

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
JUNE 2016**

I. CRIMINAL LAW:

**A. David A. Calhoun v. Commonwealth of Kentucky
2014-SC-000488-MR June 16, 2016**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Calhoun was convicted of first-degree sodomy and first-degree sexual abuse and sentenced to thirty years' imprisonment. He raised two issues on appeal. First, relying on *Whitaker v. Commonwealth*, 895 S.W.2d 953 (Ky. 1995). Calhoun claimed he was denied his right to conflict-free counsel when the trial court denied his motion to disqualify the entire Commonwealth's Attorney's office from prosecuting the charges against him after his former attorney withdrew from his representation before trial and took a job as an assistant prosecutor in the same Commonwealth's Attorney's office. The Supreme Court admitted that *Whitaker* involved facts similar to Calhoun's case. But the Court noted that *Whitaker* misinterpreted SCR 3.130-1.11 and that the confusion spawned by *Whitaker* regarding wholesale imputation of disqualification to entire government offices had been eliminated by a 2009 amendment to the rule. Specifically, the Court held that under SCR 3.130-1.11, a former government attorney must be disqualified from matters involving a prior representation but the entire office in which that attorney works is *not* disqualified as long as the disqualified attorney is appropriately screened. Accordingly, the Court overruled *Whitaker* and held that the trial court did not act erroneously by denying Calhoun's motion to disqualify the entire Commonwealth's Attorney's office.

Second, Calhoun argued that the trial court erred when it declined to admonish the jury to disregard certain questions posed by the Commonwealth in cross examination of a defense witness. The trial court sustained Calhoun's objection to a line of questioning and told the Commonwealth to refrain from questioning the witness about an alleged incident. The trial court also agreed to Calhoun's request for an admonition but, for reasons unknown, failed to admonish the jury. The Court held that the Commonwealth's line of questioning was proper and that while the trial court's agreement to admonish the jury was prudent, Calhoun never reminded the trial court of the admonition. The Court also noted that the witness never answered the question posed by the Commonwealth so there was no evidence on which an admonition could be based. To the extent there was any error, it was harmless. Finding no error, the Court affirmed the judgment of the trial court.

B. Shannon Geary v. Commonwealth of Kentucky
[2015-SC-000218-MR](#) June 16, 2016

Opinion of the Court by Justice Wright. All sitting. Minton, C.J.; Hughes, Keller, Venters, Wright, JJ., concur. Cunningham, J., concurs in result only by separate opinion. Noble, J., concurs in result only by separate opinion. Appellant, Shannon Geary, was sentenced to thirty years' imprisonment after a Muhlenberg Circuit Court jury convicted him of first-degree robbery and of being a persistent felony offender. Geary raised the following issues on appeal: 1) whether the trial court erred by denying his request for the Kentucky State Police laboratory to test two bandanas for his DNA; 2) whether the trial court erred by excluding his proffered alternate perpetrator testimony, and if so, whether that exclusion deprived him of his right to present a defense; 3) whether the trial court erred by denying him the opportunity to impeach a witness for an alleged inconsistent statement; and 4) whether the testimony of a parole officer regarding good-time credit rose to the level of palpable error. First, the Supreme Court held that the trial court did not err in denying Geary's request for DNA testing of the bandanas, as it would have neither been admissible, nor did it appear reasonably calculated to lead to the discovery of admissible evidence. The Court also held the trial court did not err in excluding Geary's alternative perpetrator evidence, as that evidence failed to meet the KRE 403 balancing test. Next, the Court held the trial court did not err in denying Geary the opportunity to impeach a witness for an alleged inconsistent statement because that statement was not inconsistent with testimony at trial. Finally, the Court held that any error related to the parole officer's testimony was unpreserved and did not rise to the level of palpable error.

C. Commonwealth of Kentucky v. Iris Jennings
AND
Iris Jennings v. Commonwealth of Kentucky
[2014-SC-000419-DG](#)
[2015-SC-000171-DG](#) June 16, 2016

Opinion of the Court by Justice Venters. All sitting; all concur. Criminal Appeal, Discretionary Review Granted. Questions presented: Whether the trial court erred by (1) not including a jury instruction based upon KRS 506.100(1); (2) not granting a directed verdict on the criminal facilitation to first degree assault charge; and (3) not suppressing evidence. Held: (1) The jury instructions were not erroneous by omitting a KRS 506.100(1) instruction on Jennings' criminal facilitation to first degree assault charge. KRS 506.100(1) provides that one cannot be guilty of criminal facilitation for participation in a crime that by its very definition requires the mutual participation of two or more persons. As a matter of law, KRS 506.100(1) is inapplicable to the crime of first degree assault, KRS 508.010(1), as it does not require the participation of two or more persons. (2) Jennings was not entitled to a directed verdict on the criminal facilitation to first degree assault charge. It was reasonable for a jury to find her identification of Boysie provided co-defendant McDaniel with a means to shoot Boysie and that she knew McDaniel intended to shoot the Boysie when she called out Boysie's

name. (3) The trial court did not err by not suppressing evidence found on Jennings' cell phone. Text messages introduced into evidence were not subject to exclusion based upon the premise that the search exceeded the scope of consent. As Jennings' consent did not expressly limit the search to the phone's "contact" directory listing, it was objectively reasonable for the detective to look for McDaniel's phone number in text messages, another source in which contact information such as phone numbers is routinely exchanged.

D. Kevin B. Herp v. Commonwealth of Kentucky
[2014-SC-000447-MR](#) June 16, 2016

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Herp was accused of first-degree sexual abuse for actions that allegedly took place with his nephew decades before. On the first day of trial, the Commonwealth moved to amend the indictment against Herp to add an additional year to the timeline of criminal events. Herp objected to the amendment and alternatively sought a continuance. The trial court denied both motions.

A unanimous court determined that the trial court did not abuse its discretion in allowing the amendment, but did abuse its discretion in denying the continuance. The amendment was proper because it did not substantively alter the claims against Herp and did not result in additional charges. But the Court reversed the denial of a continuance because it unfairly prejudiced Herp's ability to present a defense.

E. Ernest Lee Manery v. Commonwealth of Kentucky
[2014-SC-000666-MR](#) June 16, 2016

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Manery was charged with first-degree rape and first-degree sexual abuse against a minor. He was sentenced to a life imprisonment without the possibility of parole for twenty-five years. His primary issue on appeal dealt with testimony regarding a presumptive-positive DNA test at trial.

A unanimous court reversed and remanded his case for a new trial. The Court held that the Confrontation Clause of the Sixth Amendment requires live testimony from the lab technician who conducted the DNA penile swab. The test was testimonial in nature because it was obtained through execution of a search warrant and its results only served to incriminate Manery. The Court did hold, however, that the presumptive-positive nature of the results did not bar this evidence altogether. The Court was satisfied that the relevance, probativeness, and reliability of the forensic analysis greatly outweighed the risk of harm against the defendant.

**F. Jesse Rice v. Commonwealth of Kentucky
2014-SC-000733-DG **June 16, 2016****

Opinion of the Court by Justice Wright. All sitting; all concur. Appellant, Jesse Rice, pled guilty to driving under the influence (fourth offense) and driving on a DUI suspended license. The DUI charge carried a mandatory minimum sentence of 240 days. Rice moved the trial court to allow him to serve his sentence via home incarceration. The trial court expressed doubts as to whether it could allow Rice to serve the sentence by means of home incarceration, but stayed the imposition of Rice’s sentence pending appeal. Rice appealed to the Court of Appeals, which affirmed the trial court’s ruling that Rice was ineligible for home incarceration. The Supreme Court granted discretionary review and reversed the Court of Appeals. The Court held Rice was eligible to petition the trial court for home incarceration, and explained that holding otherwise would negate a statutory amendment of the General Assembly

II. INTERLOCUTORY RELIEF:

**A. The Kentucky Shakespeare Festival, Inc. v. Brantley Dunaway
2016-SC-000002-I **June 16, 2016****

Opinion of the Court by Justice Venters. All sitting; all concur. Civil; Arbitration Agreement; Arbitration Award; Question presented: Whether the trial court erred by failing to construe a provision in an employment contractual for resolving dispute over bonus pay as an agreement to arbitrate. facts: Plaintiff Dunaway entered into an employment agreement with The Kentucky Shakespeare Festival (KSF) which included a provision for bonuses, with a financial statement to be prepared by an accounting firm in the event of a dispute about the bonus amount. Dunaway was terminated and sought collection of his 2013 bonus; KSF alleged that a financial statement prepared by the accounting firm was an “arbitration award,” and unsuccessfully sought “confirmation” of the award before the circuit court and the Court of Appeals. Held: Upon review under CR 65.09, the Court declined to grant relief because, based upon the application of well-established contract interpretation principles, the purported “arbitration clause” was manifestly not a valid arbitration clause, and nor was the financial statement prepared by the accounting firm an “arbitration award,” and thus the dispute was not subject to an arbitration agreement and no “arbitration award” existed to be confirmed by the circuit court.

**B. Stanley M. Chesley v. Mildred Abbott, et al.
2015-SC-000599-I **June 16, 2016****

Opinion and Order of the Court. All sitting; all concur. Chesley moved under CR 65.09 for the Supreme Court to vacate or modify an order entered by the Court of Appeals, which denied his motion for interlocutory relief under CR 65.07. Because the order entered by the circuit court was not an injunction, temporary or

otherwise, the Court held it was not properly the subject of an interlocutory relief motion. Accordingly, the judgment of the Court of Appeals was affirmed.

III. WORKERS' COMPENSATION:

A. **Toyota Motor Manufacturing Kentucky, Inc. v. Jason Tudor, et al.** **2015-SC-000381-WC June 16, 2016**

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, and Venters, JJ., concur. Wright, J., concurs in part and dissents in part by separate opinion in which Noble, J., joins. The ALJ found that Toyota failed to pay TTD benefits when due and that Toyota's in-house physician misled Tudor about the true nature of his injury thus tolling Tudor's statute of limitations. The Board and the Court of Appeals affirmed.

The Supreme Court vacated and remanded. As to the TTD issue, the Court noted that Tudor had not missed any time from work and that he had been paid at his usual rate. Because the Court recently rendered an opinion clarifying entitlement to TTD in such situations (*Trane Commercial Systems v. Tipton*, 481 S.W.3d 800 (Ky. 2016)), it remanded to the ALJ for further review consistent with that opinion.

As to whether Toyota misled Tudor, the Court noted the ALJ found that the in-house physician told Tudor he only had bulging discs when a radiologist's report stated the discs were herniated. According to the ALJ, this amounted to misleading Tudor about his "true condition." However, as the Court noted, a neurosurgeon agreed with the in-house physician's assessment that the discs were only bulging. In that circumstance, the Court held the ALJ's finding that Tudor "possibly" had herniated discs was not sufficient to support his finding that Toyota had misled Tudor about his true condition. In order to make a finding that Toyota misled Tudor about his true condition, the ALJ was required to definitively find what the condition was, not what it possibly was. The Court also noted that the ALJ made several other factual findings which were not supported by the record. Therefore, the Court remanded to the ALJ with instructions to review the evidence and make a determination as to Tudor's true condition, to correct any factual misstatements, and to make findings accordingly. The Court did not foreclose the ALJ from ultimately reaching the same conclusion, as long as that conclusion was based on a correct reading of the record.

IV. WRIT:

- A. Keith Spears v. Honorable Pamela R. Goodwine, Judge, Fayette Circuit Court, et al.**
2015-SC-000365-MR June 16, 2016

Opinion of the Court by Justice Venters. All sitting; all concur. Civil; Extraordinary writ relief. Question presented: Whether the defects in a petition for judicial review of an administration agency decision left the circuit court without subject matter jurisdiction of the matter, thus entitling the respondent to a writ of prohibition to stop the proceeding. Facts: After the denial of his claim for disability retirement benefits, Spears filed a petition for judicial review in the circuit court. The applicable statute requires that such filings be “verified by the petitioner”, and Spears’ petition was not verified. Based upon that deficiency, the Trustees of the retirement fund moved to dismiss Spears’ petition. The circuit court overruled a motion to dismiss, saving the petition by applying the doctrine of substantial compliance. The Trustees filed an original action for a writ of prohibition in the Court of Appeals prohibit the circuit court from proceeding. The Trustees argued that, because the petition was not verified when it was filed, the circuit court lacked jurisdiction to adjudicate the action. The Trustees sought a writ of the first class, claiming that the circuit court “is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court.” The Court of Appeal granted the writ. Upon direct appeal, the Supreme Court reversed and vacated the writ. Held: The Supreme Court declined to address the issue of whether the circuit court erred by applying the doctrine of substantial compliance. Instead, the Court determined: 1) writ relief of the first class was not available even if the circuit court erred because the defective pleading did not deprive the circuit court of jurisdiction over the subject matter of Spears’ action; 2) a writ of the second class was available because the Trustees had not alleged or shown that “great injustice and irreparable injury will result if the [writ] petition is not granted;” 3) a “special case” writ was not available because there was no reason to believe that “the administration of justice generally will suffer the great and irreparable injury” if the case was litigated to its normal conclusion in the circuit court and then followed the traditional route of ordinary appellate review.

V. ATTORNEY DISCIPLINE:

- A. Kentucky Bar Association v. Thomas Margolis**
2015-SC-000660-KB June 16, 2016

Opinion and Order of the Court. All sitting; all concur. The Supreme Court of Illinois found Margolis guilty of eleven violations of the Illinois Rules of Professional Conduct and imposed a thirty-day suspension. The KBA petitioned the Supreme Court of Kentucky for reciprocal discipline under SCR 3.435. The Court ordered Margolis to show cause why he should not be suspended. Margolis

did not respond to the order. Accordingly, he was suspended from the practice of law in the Commonwealth for a period of thirty days.

**B. Kentucky Bar Association v. Justin Ross Morgan
2016-SC-000100-KB June 16, 2016**

Opinion and Order of the Court. All sitting; all concur. Morgan was charged with six counts of violating the Kentucky Rules of Professional Conduct. Morgan did not respond and the matter came before the Board of Governors as a default matter under SCR 3.210. The Board voted to find Morgan guilty of violating SCR 3.130(1.4)(a)(4) and SCR 3.130(1.4)(b). In determining the appropriate penalty for these violations, the Board considered Morgan's prior disciplinary history, including a private reprimand, a ninety-day suspension, and a suspension for failure to pay bar dues and non-compliance with continuing legal education requirements.

Neither Morgan nor Bar Counsel filed a notice of review under SCR 3.370(8) and the Court declined to independently review the decision of the Board, meaning the decision of the Board was adopted. Accordingly, the Court suspended Morgan from the practice of law for 180 days, ordered him to attend the Ethics and Professionalism Enhancement Program, and referred him to the Kentucky Lawyers Assistance Program.

**C. Kentucky Bar Association v. James Walker Bryant
2016-SC-000101-KB June 16, 2016**

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission issued a two-count charge against Bryant but he did not respond. The charge eventually reached the Board of Governors as a default case under SCR 3.210. The Board found Bryant guilty of both counts and recommended that the Supreme Court suspend him from the practice of law for sixty days.

Neither Bryant nor Bar Counsel filed a notice of review under SCR 3.370(8) and the Court declined to independently review the decision of the Board, meaning the decision of the Board was adopted. Accordingly, the Court suspended Bryant from the practice of law in the Commonwealth for sixty days.

**D. Kentucky Bar Association v. Daniel Edward Pridemore
2016-SC-000104-KB June 16, 2016**

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission issued a four-count charge against Pridemore but he did not respond. The charge eventually reached the Board of Governors as a default case under SCR 3.210. The Board found Pridemore guilty of all four disciplinary infractions and recommended a suspension from the practice of law for a period of one year to run consecutively with his prior suspensions and restrictions.

Neither Pridemore nor Bar Counsel filed a notice of review under SCR 3.370(8) and the Court declined to independently review the decision of the Board, meaning the decision of the Board was adopted. Accordingly, the Court suspended Pridemore from the practice of law in the Commonwealth for a period of one year to run consecutively to any prior suspensions or restrictions.

**E. Gregory Alan Gabbard v. Kentucky Bar Association
2016-SC-000184-KB June 16, 2016**

Opinion and Order of the Court. All sitting; all concur. During his tenure as administrator of an estate, Gabbard unlawfully removed over \$50,000 from the estate account. He eventually entered a guilty plea to theft by failure to make required disposition of property with a value of \$10,000 or more, a class C felony, and was sentenced to five years' imprisonment. Following his sentencing, a bar complaint was filed against Gabbard. He answered the complaint and admitted to serving as administrator of the estate; diverting funds; and pleading guilty to a felony. Gabbard admitted that he engaged in professional misconduct and violated SCR 3.130(8.4)(b) and (c) by committing a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Based on these admissions, Gabbard moved to resign under terms of permanent disbarment. The KBA did not object and moved the Supreme Court to enter an order sustaining Gabbard's motion. After reviewing the current action and Gabbard's disciplinary history, the Court concluded that permanent disbarment was the appropriate action and granted Gabbard's motion.