

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
MAY 2012**

I. CRIMINAL LAW:

A. William Louis Rogers v. Commonwealth of Kentucky
[2010-SC-000754-MR](#) May 24, 2012

Opinion of the Court by Justice Abramson. All sitting; all concur. Following sales to a confidential informant and a search of his residence that yielded a supply of the drug, Defendant was convicted of trafficking in and possessing cocaine and was sentenced as a first-degree persistent felony offender to a maximum term of twenty years in prison. Upholding the convictions and the sentence, the Supreme Court held (1) that the search of the residence was not tainted by a faulty warrant; (2) that a joint trial of all the charges was appropriate; (3) that the defendant had been accorded an adequate opportunity to impeach a witness who had been accused of theft; and (4) that House Bill 463 (2011) did not necessitate resentencing, because judgment had been pronounced against the defendant before the Bill went into effect.

B. Thomas C. Bowling v. Commonwealth of Kentucky
[2011-SC-000056-MR](#) May 24, 2012

Opinion of the Court by Justice Venters. Minton, C.J., Abramson, Cunningham, Schroder and Scott, JJ., concur. Abramson, J., concurs by separate opinion. Noble, J. not sitting. Criminal Post-Conviction. Question Presented: Whether Appellant, who had previously procedurally defaulted on the issue of mental retardation, may bring an action seeking a declaratory judgment that he is, on grounds of mental retardation, ineligible for execution pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002) and KRS 532.130, et. seq. in light of the new guidelines issued by the American Association on Mental Retardation (AAMR) for interpreting IQ test scores? Holding – (1) Per *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005), which addressed substantially the identical issue, it is essentially the law of the case that Appellant is not mentally retarded; (2) Upon a de novo review to consider the ramifications of the new AAMR guidelines, we again concluded that Appellant has failed to make a prima facie case that he is seriously mentally retarded so as to require further inquiry into whether he is eligible for the death penalty; (3) We further declined to address on the merits the potential impact of the new AAMR guidelines in interpreting IQ scores because to do so would result in an advisory opinion.

C. Gregory Wilson v. Commonwealth of Kentucky
2010-SC-000573-MR May 24, 2012

Opinion of the Court by Chief Justice Minton. All sitting; Abramson, Noble, Scott, and Venters, JJ., concur. Cunningham, J., dissents by separate opinion, in which Schroder, J., joins. Gregory Wilson received the death sentence in 1988. In 2010, he moved the trial court to prohibit execution of the death sentence because of his mental retardation and to compel DNA testing of hairs and semen found in the victim's automobile and used by the prosecution in his 1988 trial. The trial court denied both motions in a single order without holding an evidentiary hearing on either of these motions. On appeal, the Supreme Court held: (1) the trial court erred in denying Wilson's mental retardation motion without an evidentiary hearing; (2) Kentucky's procedures for establishing whether capital offenders are mentally retarded do not violate Wilson's due process rights; (3) the trial court properly denied Wilson's motion for DNA testing of the hairs; (4) Wilson is not entitled to an evidentiary hearing to determine if the hairs are in existence or were destroyed after a preservation order; (5) the trial court erred by failing to rule on Wilson's request for DNA testing of the semen; and (6) Wilson is not entitled to DNA testing under the federal or state constitutions. Accordingly, the Supreme Court: (1) affirmed the trial court's ruling on Wilson's motion denying DNA testing of the hairs; (2) vacated the trial court's order to the extent that it failed to rule on whether Wilson is entitled to DNA testing of the semen and remanded this issue to the trial court for a ruling; and (3) vacated the trial court's ruling on the mental retardation motion and remanded this issue to the trial court to conduct an evidentiary hearing on whether Wilson is exempt from execution because he is a mentally retarded offender.

D. Daniel Keith Newman v. Commonwealth of Kentucky
2010-SC-000695-MR May 24, 2012

Opinion of the Court, affirming in part and vacating and remanding in part. All sitting; all concur. Held: (1) Introduction of Appellant's statement to victim that he had committed similar crime before did not violate KRE 404(b); (2) *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997), violations were not palpable error; (3) Appellant was improperly sentenced under Class A, rather than Class B, felony guidelines because he was convicted of first-degree sodomy under forcible compulsion theory (Class B felony) rather than victim less than twelve years old (Class A felony), KRS 510.070(2); (4) Error in probation and parole officer's testimony regarding nature of Appellant's prior offenses moot as case remanded for new penalty phase. On remand the rule enunciated in *Mullikan v. Commonwealth*, 341 S.W.3d 99 (Ky. 2011), shall apply.

E. Lloyd W. Hammond v. Commonwealth of Kentucky
[2010-SC-000639-MR](#) May 24, 2012

Opinion of the Court by Justice Venters. All sitting; all concur. Criminal Law, Evidence. Questions presented: 1) Whether the trial court erred in joinder of murder charge A for trial with murder charges B and C against same defendant, where the only connection between murder charge A and the other two murders was that all the victims were shot and the crimes occurred in the same general area of Louisville two weeks apart; 2) Whether the trial court's decision to admit hearsay evidence under the forfeiture by wrongdoing doctrine (KRE 804(b)(5)) was supported by substantial evidence when no formal evidentiary hearing was held, and the decision was based only upon unauthenticated documents prepared by police investigating the murder of a material witness. The Commonwealth charged that Appellant and victim C burglarized a home where they shot and killed victim B. Shortly thereafter, Appellant shot and killed victim C to prevent him from testifying about the murder of victim B. Two weeks later, victim A was shot and killed. Witnesses identified Appellant as the killer. Shortly before trial, an eyewitness to the murder of victim C was also killed. Held: 1) The trial of murder charge A was improperly joined with the trial of murder charges B and C. Its temporal and geographic proximity to murders B and C, and use of gun, failed to satisfy elements of RCr 6.18, which allows joinder only when crimes are either "based on the same acts or transactions connected together or constituting parts of a common scheme or plan" or are "of the same or similar character;" and 2) the trial court's findings on forfeiture by wrongdoing must be based upon substantial evidence. Documents presented without formal evidentiary foundation or authentication are not "evidence" and do not constitute substantial evidence to support a finding under the forfeiture by wrongdoing doctrine.

II. WORKERS' COMPENSATION:

A. Gaines Gentry Thoroughbreds/Fayette Farms v. Adan Mandujano; Honorable Edward Hays, Administrative Law Judge; and Workers' Compensation Board
[2011-SC-000298-WC](#) May 24, 2012

Opinion of the Court. All sitting; all concur. Mandujano worked as a groom at the Gaines Gentry horse farm near Lexington, Kentucky. He also showed horses for Eaton Sales, a business that sold horses for Gaines Gentry and others on consignment. Mandujano requested and received permission from Gaines Gentry's farm manager to take time off to work at horse sales to be held at Saratoga Springs, New York

because doing so paid considerably more per day than work as a groom. Gaines Gentry paid him to tend to farm's sales yearlings while traveling in a horse van to Saratoga. He worked a few days for Eaton Sales and then worked a few days for another consignor during the subsequent sale of lesser quality horses. He was injured in an accident while traveling back to Kentucky. Gaines Gentry argued that the accident was non-work-related because Mandujano's work for the farm ended when he reached Saratoga or when Eaton sold its yearlings. The ALJ found, however, that Gaines Gentry "instructed" him to travel to Saratoga in the van to attend to its valuable horses and paid him for doing so; that it would have sent another employee had he not made the trip; that both parties contemplated his work for others while at Saratoga; that they also contemplated his return to his duties at the farm at an unspecified date; that he was on his own to find return transportation; and that his choice was not unreasonable. Viewing the return trip as being "necessary and inevitable" to the journey that Gaines Gentry initiated, the ALJ found the accident to be work-related. The Workers' Compensation Board and the Court of Appeals affirmed under the dual purpose, positional risk, and traveling employee doctrines. The Supreme Court also affirmed, rejecting arguments that the purpose of Mandujano's travel had become entirely personal before the accident occurred.

B. UPS Airlines v. Edwin Corey West; Honorable James L. Kerr, Administrative Law Judge; and Workers' Compensation Board 2011-SC-000295-WC May 24, 2012

Opinion of the Court. All sitting. Minton, C. J. , and Abramson, Cunningham, Schroder, and Venters, JJ., concurred. Scott, J., dissented by separate opinion in which Noble, J., joined. West, a UPS pilot and union member, sustained a work-related back injury for which UPS paid TTD benefits voluntarily. Union pilots were entitled to Loss of License benefits equal to $66 \frac{2}{3}$ of the member's "pay period guarantee" for up to 20 pay periods if the member was unable to exercise the privileges of an FAA medical certificate due to medical problems and remained out of work for more than six months. UPS argued that it overpaid TTD benefits and that KRS 342.730(6) entitled it to credit Loss of License benefits against its liability for all income benefits awarded, including TTD as well as past-due and future permanent income benefits. The ALJ agreed and awarded UPS a dollar-for-dollar credit for all Loss of License benefits. The Workers' Compensation Board relied on *GAF v. Barnes*, 906 S.W.2d 353 (Ky. 1995), to reverse, convinced that KRS 342.730(6) was inapplicable because Loss of License benefits were bargained collectively and, thus, were not exclusively employer funded. The Court of Appeals affirmed. The Supreme Court affirmed in part and reversed in part. Noting that *GAF v. Barnes* was decided before KRS 342.730(6) was enacted and that the statute made no reference to collectively-bargained

benefits, the court held that the statute entitled UPS to credit its liability only to the extent that Loss of License benefits overlapped awarded income benefits and entitled West to the contractual excess. The court explained that contractual benefits overlap statutory benefits for the purposes of KRS 342.730(6) only to the extent that they are less than or equal to the workers' compensation benefit; cover the same period of time; and are not themselves offset by the receipt of benefits under KRS 342.730(1).

III. LIENS

A. Mortgage Electronic Registration Systems, Inc. v. Joseph Roberts 2010-SC-000069-DG May 24, 2012

Opinion of the Court by Justice Noble. All sitting; all concur. Trial court applied the doctrine of equitable subrogation to Appellant's mortgage lien in order to give it first priority. The Court of Appeals reversed, determining that equitable subrogation was not appropriate in this case because Appellant, holder of a subsequent mortgage lien, had constructive notice of Appellee's priority judgment lien. This Court affirmed the Court of Appeals.

The Court reaffirmed, with some clarification, its holding in *Wells Fargo Bank, Minnesota, N.A. v. Commonwealth, Finance and Administration, Department of Revenue*, 345 S.W.3d 800 (Ky. 2011), in which it held that equitable subrogation is not appropriate where the subsequent lienholder had actual or constructive knowledge of the pre-existing lien. The Court clarified its decision in *Wells Fargo* by determining that equitable subrogation applies not only to tax liens, but to mortgage liens as well. The Court also clarified that equitable subrogation applies to all lienholders, not just professional lenders.

B. Arnold W. Carter v. Jamie D. Smith and Bourbon County Board of Education 2010-SC-000295-DG May 24, 2012

Opinion of the Court by Justice Abramson. All sitting; all concur. After serving eighteen months as the superintendent of Bourbon County public schools, Arnold Carter resigned and transferred into the position of consultant to the school district. The details of Carter's resignation and consulting contract were discussed and determined in a closed session during a regular meeting of the Bourbon County Board of Education. Jamie Smith challenged the Board's actions as violative of Kentucky's Open Meetings Act and argued the Court should hold Carter's contract was void ab initio, not "voidable," and should require Carter return monies he already received under the contract. Carter argued the Board was

permitted to enter closed session under the Open Meeting Act's personnel exception, KRS 61.810(1)(f), and litigation exception, KRS 61.810(1)(c). In the alternative, Carter claimed his consulting contract was valid because, even if the Board did not strictly adhere to the letter of the law, it nevertheless ratified its actions and "substantially complied" with the OMA by taking a vote in open session pursuant to KRS 61.815(1)(c).

The Supreme Court held the closed session was not permitted under either the litigation or personnel exception. The litigation exception did not apply because there was insufficient threat or possibility of litigation. The personnel exception did not cover discussion of Carter's resignation because that exception applies only and specifically to "discussions or hearings which might lead to the appointment, discipline, or dismissal of an individual employee, member, or student." KRS 61.810(1)(f). The Court held dismissal of an employee is distinct from an employee's resignation and the statute, which must be strictly construed, explicitly does not include resignation. Nor did the personnel exception permit the Board's negotiation of Carter's consulting contract in closed session because that discussion concerned hiring Carter as an independent contractor, not as an employee, and the personnel exception explicitly applies only to discussions concerning "an individual employee, member, or student."

The Court also held the Board's vote in open session did not ratify the closed session because a public agency can never ratify actions improperly taken in closed session. If a public agency wants to effectuate such actions it must begin anew by taking up the matter in open session and handling it the same way the agency would handle any business that must be conducted before the public. Nor could the Board's action be upheld on the basis of substantial compliance because a closed session that does not comport with any of the clearly delineated and strictly construed exceptions of the Open Meetings Act cannot be said to be in substantial compliance with the law. Accordingly, the Court held the Board's actions violated the Open Meetings Act and were voidable by a court. KRS 61.848.

The Court explained that a "voidable" action is an action that is valid until it is annulled. As such, Carter's consulting contract was valid until the circuit court entered a temporary injunction, at which point the contract was nullified. Carter thus could retain any monies already paid him under the contract but he was not entitled to any additional payments.

IV. FAMILY

C. Samantha Daugherty (Now Bucher) v. John StephenTelek
[2011-SC-000043-DGE](#) May 24, 2012

Opinion of the Court by Justice Venters. Minton, C.J., Abramson, Noble, Schroder concur. Scott, J. concurs in part and dissents in part by a separate opinion in which Cunningham, J. joins. Family Law. Question presented: Whether the trial court lost subject matter jurisdiction over a petition for a domestic violence order (DVO) when it failed to conduct the full hearing within fourteen days after the issuance of the emergency protective order (EPO) as required by KRS 403.740(4), and instead re-issued an EPO at 14-day intervals until the DVO hearing. Upon filing of a petition for a DVO, the trial court issued an EPO and set a date for a full hearing. On the hearing date, respondent requested a postponement. The trial court continued the matter for a future date and reissued a new EPO to be effective for fourteen days. Thereafter, it re-issued consecutive EPOs in serial fashion every fourteen days until the DVO hearing. Held: An EPO may be reissued in serial fashion if service has not been had on the opposing party, or if the court determines that the reissuance of an EPO is “necessary for the protection of the petitioner.” The expiration of an EPO does not divest the trial court of subject matter jurisdiction.

V. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. William Eric Minamyer
[2011-SC-000744-KB](#) May 24, 2012

Opinion and Order. All sitting; all concur. Minamyer was suspended from the practice of law by the Supreme Court of Ohio for a period of one year, with the suspension to be probated for one year upon the satisfaction of certain conditions. The KBA petitioned the Supreme Court for reciprocal discipline pursuant to SCR 3.435. The petition was granted and the Court imposed reciprocal discipline retroactive to July 28, 2011.

B. Kentucky Bar Association v. Darren Burton Ellis
[2012-SC-0000053-KB](#) May 24, 2012

Opinion and Order. All sitting; all concur. The Court adopted the trial commissioner’s recommendation to suspend Ellis for thirty-seven months for misconduct addressed in six disciplinary files.

C. Kentucky Bar Association v. Donald H. Morehead
[2012-SC-000140-KB](#) May 24, 2012

Opinion and Order. All sitting; all concur. The Court suspended

Morehead from the practice of law for five years after finding him guilty of numerous ethical violations. Morehead was also ordered to reimburse several clients and pay costs related to the disciplinary proceedings.

**D. Kentucky Bar Association v. Louis Zimmerman
2012-SC-000178-KB May 24, 2012**

Opinion and Order. Minton, C.J.; Abramson, Noble, Schroder, Scott and Venters, JJ., concur. Cunningham, J., not sitting. Zimmerman was charged with several ethical violations after failing to represent one of his clients in a divorce. The trial commissioner found Zimmerman guilty of all ethical violations and recommended a thirty-day suspension. Neither Zimmerman nor the KBA filed an appeal, and the Court adopted the trial commissioner's recommendation.

**E. Kentucky Bar Association v. Ronald A. Thornsberry
2012-SC-000192-KB May 24, 2012**

Order Suspending Respondent from the Practice of Law for 61 Days. All sitting; all concur. The Supreme Court suspended an attorney from the practice of law for sixty-one days. The attorney was hired to represent a client father in a visitation matter. After the client paid a \$500.00 retainer fee, the attorney took no action beyond writing one letter. The attorney also failed to respond to the Inquiry Commission complaint.

**F. George Guy Gardner v. Kentucky Bar Association
2012-SC-000215-KB May 24, 2012**

Order Suspending Movant from the Practice of Law for 30 days, Probated for Six Months. All sitting; all concur. The Supreme Court approved a negotiated sanction suspending an attorney from the practice of law for thirty days, probated with conditions. The attorney represented a client in circuit court on a claim of property damage to his truck from a motor vehicle accident. Without his client's consent, the attorney moved to dismiss the case after issues arose with an expert witness. After filing a notice of appeal with the Court of Appeals, the attorney failed to pursue the appeal. Ultimately, the attorney filed a motion to dismiss the appeal with the Court of Appeals without his client's consent, and implied to his client that the Court of Appeals had ruled against him on the merits. The attorney admitted his conduct and moved for a 30-day probated suspension, which the Supreme Court approved on condition that he pay restitution to his former client.

G. William L. Huffman v. Kentucky Bar Association
[2012-SC-000227-KB](#) May 24, 2012

Opinion and Order. All sitting; all concur. The Court granted Huffman's motion for a public reprimand for his admitted violation of Supreme Court Rule (SCR) 3.130-8.3(c).