

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
OCTOBER 2010**

I. CHILD CUSTODY

- A. L.D. Harrison & Debra Harrison v. Christopher Leach**
[2010-SC-000018](#) October 21, 2010

Opinion of the Court by Chief Justice Minton. All sitting. Court of Appeals *sua sponte* held that Appellants in child custody case, who were grandparents of the children in question, lacked standing to contest trial court's decision to award custody of children to children's father. Court of Appeals then concluded that grandparents' lack of standing deprived trial court of subject matter jurisdiction to hear grandparents' petition for custody of their grandchildren. Supreme Court reversed, holding that lack of standing is distinct from lack of subject matter jurisdiction. Thus, Supreme Court held that a lack of standing is waived if not asserted timely before the trial court. Since the father did not contest the grandparents' purported lack of standing before the trial court, the Court of Appeals erred by resolving the case on standing grounds on its own motion. Because the merits of the custody dispute were not properly before it, Supreme Court reversed the decision of the Court of Appeals and remanded to that court for a determination on the merits of the grandparents' appeal. Justice Cunningham dissented by separate opinion, in which Justice Scott joined.

II. CRIMINAL LAW

- A. Gary Lloyd v. Commonwealth of Kentucky**
[2008-SC-000206](#) October 21, 2010

Opinion of the Court by Chief Justice Minton. All sitting. Defendant was convicted of both robbery in the first degree and felony version of theft by unlawful taking, based upon the theft of the same item(s). Court held that both robbery in the first degree and felony theft by unlawful taking each contained different elements, thereby satisfying the *Blockburger* "same elements" double jeopardy test. In reliance upon *Terry v. Commonwealth*, 253 S.W.3d 466 (Ky. 2008), Court held that the threshold monetary requirement in the felony version of theft by unlawful taking statute distinguished that offense from robbery in the first degree, because robbery has no threshold monetary requirement. Likewise, Court held that robbery in the first degree contained requirement of use or threatened use of force, unlike theft by unlawful taking. However, Court noted that *Blockburger* test is a tool of statutory construction which could not be used to contravene legislative intent. Court held that usage of the word

“theft” in both felony version of theft by unlawful taking and robbery statutes, as well as recitation in official commentary to robbery statute that robbery contained all the elements of theft by unlawful taking, showed that General Assembly did not intend to permit convictions for both robbery and felony theft by unlawful taking based upon one theft of the same item(s). Thus, Court reversed the lesser offense, felony theft by unlawful taking, on double jeopardy grounds. Court also rejected argument that trial court erred by denying motion to suppress, holding that hearsay testimony of an officer that another officer had radioed that a vehicle was traveling above the speed limit was a sufficient basis for the trial court to conclude that a traffic stop of the speeding vehicle was proper. Justice Cunningham concurred by separate opinion.

- B. Steven Paulley v. Commonwealth of Kentucky**
Henny L. Gunn (aka Henry L. Gunn) v. Commonwealth of Kentucky
[2009-SC-000024-MR](#) October 21, 2010
[2009-SC-000033-MR](#) October 21, 2010

Opinion of the Court by Chief Justice Minton. All sitting. Issues include: (1) trial court committed reversible error by failing to excuse juror for cause when juror could not deem herself impartial due to her son being the victim of a robbery involving a firearm; (2) holding in *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky. 2009) that defendant must identify on peremptory challenge strike sheet any additional jurors he would have struck in order to raise properly on appeal trial court’s failure to strike juror for cause will apply only to cases tried after its rendition; (3) defendant’s foot briefly crossing threshold of dwelling is sufficient entry for commission of burglary; (4) no error in conviction for nine counts of wanton endangerment when defendant fired nine shots into occupied dwelling; (5) combination murder instruction not inherently improper since evidence supported intentional and wanton murder theories; (6) jury need not unanimously agree on specific theory of guilt if all theories embodied in instructions are supported by sufficient evidence; (7) no entitlement to mistrial/conviction only on lesser-included offenses when jury initially found defendants guilty of all principal and lesser-included offenses; (8) no inherent, undue prejudice for joint trial of defendants with antagonistic defenses; (9) no error in excluding hearsay statement purportedly made by co-defendant that another person fired fatal shot since insufficient indicia for reliability of statement and statement of co-defendant not deemed statement of party-opponent for purposes of KRE 801A. Justice Venters concurred in part and dissented in part by separate opinion, in which Justice Cunningham and Justice Schroder joined.

- C. Commonwealth of Kentucky v. Angella Prater**
[2009-SC-000352](#) October 21, 2010

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Supreme Court reversed Court of Appeals decision vacating Prater's reckless homicide conviction and reinstated trial court judgment. Issues/holdings include: 1) assuming for sake of argument that defendant Prater adequately preserved issue of collateral impeachment through objection on relevancy, trial court had discretion to permit or deny impeachment by extrinsic evidence on collateral issue raised by party upon direct examination and 2) under facts of case, trial court did not abuse its discretion in permitting admission of extrinsic evidence (medical records and testimony by medical records custodian) by Commonwealth to rebut Prater's assertion on direct examination that she had been taking two prescription painkillers as a result of surgery a few days before the single-vehicle automobile collision resulting in the death of her passenger, her son—especially as this testimony appeared likely to appeal to jury's sympathy. Supreme Court held that to extent prior precedent suggested that a trial court invariably lacked discretion to permit impeachment on collateral matters by extrinsic evidence on issue raised by party on direct examination, any such cases were overruled in favor of recognizing trial court's discretion to permit or deny impeachment by extrinsic evidence of a collateral matter raised by a party on direct examination.

D. John Marrion Terry v. Commonwealth of Kentucky
[2009-SC-000497-DG](#) October 21, 2010

Opinion of the Court by Justice Scott. All sitting. This case addresses whether a defendant is required to provide the Commonwealth with twenty days' notice pursuant to RCr 7.24(3)(b)(i) before calling an expert witness to testify to general scientific principles regarding false confessions. The Court of Appeals held RCr 7.24(3)(b)(i) applicable in this case because the testimony addressed the mental status of the defendant and because the testimony related the issue of guilt. The Supreme Court reversed on both grounds and held that because this expert could not and did not apply his scientific knowledge to the defendant, the expert's testimony did not address the defendant's mental status. The Court further held, applying *Powell v. Graham*, that the expert testimony in this case did not directly address the ultimate issue of guilt. Justice Abramson and Justice Noble concurred in result only.

E. Allen Wiley III v. Commonwealth of Kentucky
[2009-SC-000702-MR](#) October 21, 2010

Opinion of the Court by Justice Scott. All sitting; all concur. Appellant was convicted of two counts of first-degree robbery, one count of second-degree robbery, and sentenced to forty-five years imprisonment. The Supreme Court affirmed Appellant's first-degree robbery convictions, reversed his second-degree robbery conviction, and vacated both the court

costs assessed against the Appellant as well as the ordered payment of restitution. The Court found palpable error in both the imposition of court costs on an indigent defendant and the lack of due process in connection with the restitution order. The Court affirmed the first-degree robbery conviction, again noting that a victim's description of the weapon ordinarily provides sufficient evidence to permit the jury to decide whether the item was a "deadly weapon." However, the Court reversed the second-degree robbery conviction, holding that that the trial court erroneously admitted hearsay when it allowed a police officer to assert that he consulted unnamed sources and traced the Social Security number, given during the bank robbery, to Appellant. The Court also held that the trial court erroneously admitted hearsay when it allowed a police officer to testify to what another officer told him; however, the Court found it harmless due to eyewitness testimony. Lastly, the Court found a police detective's suggestive testimony—regarding Appellant's prior contacts with police—was harmless also due to the eyewitness testimony.

F. Robert Ladriere v. Commonwealth of Kentucky
[2009-SC-000758-MR](#) October 21, 2010

Opinion of the Court by Justice Abramson. Justice Schroder not sitting. Ladriere pled guilty to one count of kidnapping of a ten-year old girl whom he confronted in a bathroom stall. In addition to the agreed-upon twenty year sentence, the judgment imposed a five-year conditional discharge period and several accompanying conditions relative to his duty to register pursuant to KRS 17.510. On appeal, Ladriere challenged these restrictions and requirements as well as the imposition of court costs.

The Court vacated the portion of the judgment imposing a five-year conditional discharge period and accompanying conditions, as well as the provisions ordering Ladriere to complete a Sex Offender Treatment Program (SOTP) and to submit to HIV testing because they are not authorized by statute. KRS 532.043 does mandate a five-year conditional discharge period for certain offenders, but Ladriere's offense is not referenced in the statute. The non-statutory conditions imposed as part of the conditional discharge are therefore also invalid. Further, the SOTP was not appropriate because Ladriere did not commit an offense within the purview of the statute's definition of "sex crime." KRS 17.500, 197.010(4), 197.410(1). It was also improper for the trial court to order Ladriere be tested for HIV pursuant to KRS 510.320 because his offense is not among those enumerated therein. Finally, Ladriere could not be required to pay court costs because of his indigent status. KRS 31.110(1)(b).

III. CONSTITUTIONAL LAW

A. **H.C. “Blue” Hill v. Petrotech Resources Corporation AND John Burness**

[2010-SC-000182-I](#)

October 21, 2010

Opinion of the Court by Justice Venters. All sitting Justice Cunningham concurs in result only by separate opinion. Question Presented: May a trial court issue a temporary injunction restraining libelous speech prior to a final determination of the falsity of the speech. Held - Pursuant to the First Amendment of the United States Constitution and Section Eight of the Kentucky Constitution a trial court may not issue such an injunction; it may, however, following a final adjudication of the falsity of the speech issue a permanent injunction restraining the false speech.

IV. MEDICAL MALPRACTICE

A. **Jerry Woolum, M.D. v. Lisa Ann Hillman**

[2008-SC-000396-DG](#)

October 21, 2010

Opinion of the Court by Justice Noble. All sitting. In a medical malpractice case over the alleged wrongful death of a stillborn fetus, Dr. Woolum appealed a judgment against him, affirmed by the Court of Appeals, on four grounds. (1) In permitting the plaintiffs to demonstrate the bias of a medical expert witness for the defense, the trial court allowed evidence of the commonality of insurance between the witness and the defendant. Due to the bias exception to KRE 411, such evidence was not per se inadmissible, but instead subject to a balancing test under KRE 403. The trial court exercised proper discretion in weighing the evidence in favor of admissibility due to several factors specific to the case adding probative value to the evidence’s imputation of bias. (2) A video of an ultrasound of the then-alive fetus was played for the jury. Although the ultrasound had minimal probative value, its admission did not violate KRE 403 due to its equally minimal prejudicial effect. (3) The trial court denied a directed verdict requested on the basis that plaintiffs had allegedly failed to prove viability of the fetus. This ruling was correct because expert testimony provided that a fetus at its stage before the alleged malpractice occurred was viable. (4) A six-day delay occurred during jury deliberations, resulting from the illnesses of two jurors. This delay did not mandate a mistrial because, amongst other reasons, the cause for delay was legitimate, it was unavoidable, and it did not result in any apparent prejudice. The Chief Justice issued a concurring opinion, in which Justice Abramson joined, emphasizing that this case represents a narrow exception to the bar against evidence of insurance, and also stating that, while perhaps the better practice would have been to exclude the ultrasound video, its minimal value rendered any error in that regard

harmless. Justice Cunningham issued a dissenting opinion, stating that the six-day delay in deliberations, combined with the concurrent illnesses of two jurors assigned to the case, deprived both parties of their entitlement to uninterrupted deliberation by able-minded jurors.

V. OPEN RECORDS

- A. Department of Revenue, Finance and Administration Cabinet, Commonwealth of Kentucky, et al. v. Mitzi D. Wyrick**
[2008-SC-000468-DG](#) October 21, 2010
[2009-SC-000543-DG](#) October 21, 2010

Opinion of the Court by Justice Schroder. All sitting; all concur. The Supreme Court interpreted the “civil litigation limitation” to the Open Records Law, found in KRS 61.878(1). The Court held that a request for open records should be evaluated independently of whether the requester is a party or potential party to litigation. The civil litigation limitation applies only to documents otherwise excluded from disclosure by KRS 61.878(1)(a)-(n). It is not an exception to an agency’s duty to disclose nonexempted records. A court of competent jurisdiction, upon request, may grant disclosure of documents excluded from disclosure under KRS 61.878(1)(a)-(n) with one qualification: if the document pertains to civil litigation, the court cannot order disclosure beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery.

VI. PUBLIC UTILITIES/ADMINISTRATIVE LAW

- A. Kentucky Public Service Commission v. Commonwealth ex rel Conway, Attorney General, & Duke Energy, Kentucky Inc. v. Commonwealth, ex rel Conway, Attorney General**
[2009-SC-000150-DG](#) October 21, 2010
[2009-SC-000134-DG](#) October 21, 2010

Opinion of the Court by Chief Justice Minton. Justice Schroder not sitting. Kentucky Supreme Court affirmed in part and reversed in part a Court of Appeals opinion, remanding to the trial court to reinstate PSC orders. Court of Appeals had reversed trial court’s invalidation of Public Service Commission (PSC) orders allowing an Accelerated Main Replacement Program (AMRP) rider following the enactment of KRS 278.509 in 2005 and affirmed trial court’s invalidation of PSC orders allowing the AMRP rider prior to the enactment of KRS 278.509. Issues/ Holdings include: that PSC had the plenary ratemaking authority under KRS 278.030 and KRS 278.040 to allow the AMRP rider even without specific statutory authorization; that the validity of orders allowing for the AMRP rider did not depend upon the enactment of KRS 278.509; that a general rate case was not required to allow or modify the AMRP rider and/

or surcharge; that relevant inquiry was whether rate was fair, just and reasonable; that there is no statutory prohibition against “single-issue” ratemaking; that nothing requires that only costs for the prior year may be recovered; and that the “Hope” doctrine applied, meaning that the method used did not matter so long as the result reached was proper. Justice Venters dissented by separate opinion.

VI. WORKERS’ COMPENSATION

A. Zurich American Insurance Co. v. Journey Operating, LLC [2009-SC-000796-WC](#) October 21, 2010

Opinion of the Court. All sitting; all concur. The widows of Tennessee residents who were employed by a Tennessee corporation but killed in Kentucky while performing work for a Kentucky contractor sought workers’ compensation benefits in Kentucky. Having found that the policy Zurich American Insurance Co. issued the Tennessee employer covered benefits provided by Tennessee law but did not cover Kentucky claims, the Administrative Law Judge (ALJ) ordered the Kentucky contractor to pay income benefits but granted credit for benefits that Zurich admitted were due and owing under Tennessee law and was paying voluntarily. The Kentucky employer moved to reopen the final awards based on mistake or fraud after Zurich ceased paying Tennessee benefits and denied liability based on Tennessee’s election of remedies doctrine. Having found that KRS 342.125(1) permits reopening to be based on fraud and that Zurich committed a constructive fraud by failing to reveal its intention to terminate Tennessee benefits throughout the initial litigation, the ALJ ordered Zurich to continue paying the Tennessee benefits for which it admitted liability. Although the Workers’ Compensation Board reversed, the Court of Appeals reinstated the ALJ’s decision. Affirming, the Supreme Court held that KRS 342.325 and KRS 342.125(1) grant an ALJ jurisdiction to reopen a final award when its accuracy and integrity are affected by fraud or constructive fraud. The court also held that the record supported the ALJ’s finding that Zurich committed constructive fraud and warranted an estoppel in order to prevent it from benefiting from its conduct.

VII. ATTORNEY DISCIPLINE

A. Kentucky Bar Association v. William J. Grider [2010-SC-000522-KB](#) October 21, 2010

Opinion of the Court. All sitting; all concur. Supreme Court adopted KBA’s recommendation to suspend Grider for one year and recover administrative costs totaling \$459.80, for his practice of law under a suspended license and in direct disobedience of the Court’s order of suspension, and for his failure to respond to the Office of Bar Counsel.

B. Kentucky Bar Association v. D. Anthony Brinker
[2010-SC-000004-KB](#) October 21, 2010

Opinion of the Court. All sitting; all concur. Supreme Court found Brinker guilty of failing to comply with an Order requiring him to pay a fee in the amount of \$750 and adopted the CLE Commission's recommendation to suspend Brinker for failure to comply with minimum CLE requirements.

C. Inquiry Commission v. Barbara A. Yeager
[2010-SC-000514-KB](#) October 21, 2010

Opinion of the Court. All sitting; all concur. Supreme Court temporarily suspended Yeager based on probable cause that Yeager misappropriated funds held for others and allegations that Yeager lacks the physical or mental fitness necessary to continue practicing law.

D. Heather Clark Reynolds v. Kentucky Bar Association
[2010-SC-000617-KB](#) October 21, 2010

Opinion of the Court. All sitting; all concur. Supreme Court permanently disbarred Reynolds from the practice of law.