**PUBLISHED OPINIONS**
**KENTUCKY SUPREME COURT**
**SEPTEMBER 2010**

## I. CIVIL PROCEDURE

### A. Hazard Coal Corporation, et al. v. Larry J. Knight, et al

**2008-SC-000735-DG** **September 23, 2010**

Opinion of the Court by Justice Venters. All sitting. Questions Presented: (1) Once a jury trial has been demanded and the trial court announces it will instead conduct a bench trial, may waiver be implied by mere silence? Held - Pursuant to CR 38.04 and CR 39.01, waiver must be by written stipulation by all parties or by oral stipulation in open court, and mere silence does not constitute waiver; (2) coal severance deed was a broad form deed which conferred mineral owner to use the surface to transport foreign coal across surface owner's property to access tipple. Justice Noble and Justice Scott concurred in result only.

## II. CONTRACTS

### A. North Fork Collieries, LLC v. Barry Kevin Hall, et al.

**2010-SC-000269-MR** **September 23, 2010**

Opinion of the Court by Justice Abramson. Justice Scott not sitting. Parties to a coal-mining venture agreed between themselves that one was to assume the other's debt for a business loan. In a separate agreement, they both agreed with the bank to be jointly liable for the loan. The agreement between the parties contained an arbitration provision, the agreement with the bank did not. When the party that had been paying the loan defaulted and the bank threatened suit against both, the non-paying party brought suit against the defaulting party to determine which of them was responsible to the other for the loan. The defaulting party moved to have the matter stayed and referred to arbitration. Relying on the agreement with the bank, the other party resisted arbitration, and the trial court denied the motion. On review under CR 65.09, the Supreme Court held that because the pertinent agreement was the one between the two parties which contained a valid, applicable arbitration clause, the trial court abused its discretion by failing to give it effect. Justice Schroder dissented without opinion.

## III. CRIMINAL LAW

### A. Errick D. Duncan v. Commonwealth of Kentucky

**2007-SC-000925-MR** **September 23, 2010**

Opinion of the Court by Justice Abramson. All sitting; all concur. Defendant was convicted of kidnapping, sexual abuse, and stalking based in part on DNA evidence establishing a partial match between his DNA profile and the profile of a DNA sample recovered from a victim's panties. The forensic expert testified as to the partial match, but provided no testimony as to the significance of that match beyond asserting that the defendant could not be ruled out as a possible

contributor of the panty-sample DNA. Reversing, the Supreme Court held that the Commonwealth fatally overstated the strength of the mere non-exclusion DNA evidence during its cross-examination of the defendant and during closing argument when it asserted that the DNA evidence had to be "wrong" if the defendant's version of events was to be believed and that the DNA evidence pinpointed the defendant. The Court also held that the defendant was not entitled to the kidnapping exemption, that a photo identification was not unduly suggestive, and that a detective had not offered improper opinion testimony when he noted that witnesses frequently had trouble estimating another person's height.

**B. H. Drew Mayo v. Commonwealth of Kentucky**
**2009-SC-000820-MR** **September 23, 2010**

Opinion of the Court by Chief Justice Minton. All sitting. Husband convicted of raping and sodomizing his estranged wife. Issues/holdings include: One spouse may be guilty of raping/sodomizing another spouse; KRE 412 (rape shield law) applies to inter-spousal rape/sodomy; trial court did not abuse its discretion in excluding evidence of alleged past anal intercourse between victim and accused; no error in denying mistrial based upon Commonwealth's questions regarding defendant's history of alcohol-related arrests; no entitlement to relief based on prosecutorial misconduct due to Commonwealth's comments regarding a "good jury" since defendant asked for, and received, an admonition; trial court is not required to affirmatively inquire if defendant wishes to waive right to poll jury; no error in trial court correcting erroneous jury instructions during deliberations, even though jury had already completed portions of the instructions. Justice Noble concurred in result only.

**C. William Moreland v. Commonwealth of Kentucky**
**2009-SC-000310-MR** **September 23, 2010**

Opinion of the Court by Justice Cunningham. All sitting; all concur. Though affirming Appellant's convictions of rape, sodomy, burglary, and tampering with physical evidence, Appellant's convictions for tampering with a participant in the legal process were vacated. 2002 amendments to KRS 524.040 altered the requisite belief the perpetrator must hold regarding the victim. Prior to 2002, the statute only required that the defendant believe the victim "may be called as a witness". The post-2002 version requires the defendant intimidate a person "he believes to be a participant in the legal process." The use of the present tense "to be" indicates a requirement that the perpetrator believes the victim is participating in the legal process *at the time the offense is committed*. Thus, convictions could not stand where Appellant threatened victims immediately after the commission of the rape and sodomy. At the time of the commission of the offenses, it was impossible for a jury to conclude that Appellant believed the victim to be a participant in the legal process.

**D. Patrick Paul Burke v. Commonwealth of Kentucky**
**2009 SC 000431-MR** **September 23, 2010**

Opinion of the Court by Justice Venters. All sitting; all concur. Burke first argued that the trial court erred by denying his request for a jury instruction on the justification defense of "choice of evils." Burke escaped from a halfway house the day after other residents allegedly attacked him because he feared for his life. The Court held that the trial court properly denied Burke's request for a choice of evils instruction because the harm Burke feared was not imminent and Burke could have taken other steps to avoid harm. The Court distinguished the situation Burke faced from *Pittman v. Commonwealth*, 512 S.W.2d 488 (Ky. 1974), a case where the defendant was entitled to the "choice of evils" defense. Burke also argued that the trial judge gave an inappropriate admonishment to the jury. However, the Court found that the admonishment was not inappropriate because it only told the jury to closely follow the jury instructions provided and it did not violate the "bare bones" principle.

**E. Thomas Clyde Bowling v. Commonwealth of Kentucky**
**2008-SC-000901-MR** **September 23, 2010**

Opinion of the Court by Justice Noble. All sitting; all concur. The recipient of a capital sentence sought DNA testing, pursuant to the Due Process Clause and Eighth Amendment of the U.S. Constitution, as well as KRS 422.285, to prove an alternative perpetrator theory, not presented at trial. The Supreme Court declared the federal constitutional rights to DNA testing to be subsumed in the Commonwealth's statutory scheme. The Court further found that the Appellant had failed to satisfy the statutory requirements for testing because the evidence he hoped to obtain from the testing would not have exonerated him or otherwise impacted the verdict.

**F. Heather Rose v. Commonwealth of Kentucky**
**2007-SC-000123-DG** **September 23, 2010**
**2007-SC-000603-DG** **September 23, 2010**

Opinion of the Court by Justice Scott. All sitting; all concur. This case addresses whether police may search a vehicle incident to the arrest of a recent occupant after the occupant is secured and no longer able to access the vehicle. The Court of Appeals held that an officer may search the vehicle pursuant to an arrest. Applying *Gant v. Arizona*, the Kentucky Supreme Court reversed and held that a search incident to arrest may only be made where the arrestee could possibly gain access to the vehicle or where the officer is searching the vehicle for evidence of the crime of arrest.

**G. Raymond Clutter v. Commonwealth of Kentucky**
**2009-SC-000747-MR September 23, 2010**
**2009-SC-000025-MR September 23, 2010**

Opinion of the Court by Justice Abramson. All sitting; all concur. Clutter appealed as a matter of right, alleging (1) his case should have been dismissed due to prosecutorial delay in violation of the Interstate Agreement on Detainers (IAD) and (2) the trial court erred when it permitted reference to an incriminating statement attributed to Clutter, despite the Commonwealth's failure to provide notice of the statement until the evening before the trial. The trial court did not err in refusing to dismiss the charges on grounds of prosecutorial delay under the IAD because Clutter himself failed to properly invoke the IAD. Despite being repeatedly informed of the requirements of the IAD, Clutter obstinately refused to initiate the process by providing his notice and request to the federal officials having custody of him. Where there is no obstruction to strict compliance due to a public official's conduct, failure to strictly comply and notify the proper prison authority is insufficient to invoke the provisions of the IAD. The trial court did not abuse its discretion by refusing to prohibit the introduction in rebuttal of an incriminating statement made by Clutter. RCr 7.24 requires disclosure of the substance of any oral incriminating statement made by the defendant. When a disclosure is made prior to trial, the inquiry is whether the defendant was prejudiced by the tardiness of the disclosure, rather than by the statement itself. Clutter failed to identify any prejudice caused by the untimeliness of the disclosure.

## IV. JURISDICTION

**A. Interactive Media Entertainment and Gaming Association, Inc. v. Hon. Thomas D. Wingate, Judge, Franklin Circuit Court; Jack Conway, Attorney General, Commonwealth of Kentucky and Commonwealth of Kentucky, Ex Rel J. Michael Brown, Secretary, Justice and Public Safety Cabinet**
**and**
**Interactive Gaming Council, a Non-Profit Trade Association v. Hon. Thomas d. Wingate, Judge, Franklin Circuit Court and Commonwealth of Kentucky, Ex Rel J. Michael Brown, Secretary, Justice and Public Safety Cabinet**
**2010-SC-000212-TG September 23, 2010**
**2010-SC-000266-TG September 23, 2010**

Opinion of the Court. All sitting; all concur. Following the Supreme Court's earlier disposition of the case on standing grounds, Internet gambling associations filed a second writ petition to enjoin the Franklin Circuit Court from ordering the seizure of Internet gambling domain names and subsequently sought transfer to the Supreme Court. Petitioners attempted to rectify their standing by naming members of their association who allegedly owned Internet gambling domain names that the Commonwealth had attempted to seize. Due to factual issues regarding the identity of these members, as well as other concerns involving the application of associational standing to this in rem action, the Supreme Court

determined that a writ proceeding was inappropriate for the resolution of this case. Accordingly, the Court granted transfer and denied the writ petition. The Chief Justice filed a concurring opinion, in which Justice Cunningham joined, detailing the extraordinary circumstances giving rise to the Court's decision to bypass the Court of Appeals in disposing of this case.

## V. TAXATION

### A. Cromwell Louisville Associates, Limited Partnership v. Commonwealth of Kentucky, Jefferson County Property Valuation Administrator

**2008-SC-000644-DG** **September 23, 2010**

Opinion of the Court by Justice Scott. Justice Abramson not sitting; all concur. In 2002, Cromwell challenged the Jefferson County Property Valuation Administrator's 2001 tax assessment on two of its commercial properties. Appellant alleged that the PVA overvalued its property, forcing it to overpay state and local taxes (while the property was in receivership). At the administrative level, both the Jefferson County Board of Assessment Appeals and the Kentucky Board of Tax Appeals found that KRS 133.120 required Appellant to challenge the 2001 assessment during the 2001 inspection period, something Appellant failed to do. The Jefferson Circuit Court thereafter reversed, finding that KRS 133.120 did not require the conference and appeal in the same year. The Court of Appeals then reversed, construing KRS 133.120 as requiring Appellant to contest the 2001 property assessment in 2001. The Supreme Court affirmed and remanded this matter to the trial court with instructions that the court dismiss this action in accordance with the decision of the Kentucky Board of Tax Appeals. The Court construed KRS 133.120(1)(a) as requiring the taxpayer to request the assessment conference during the same tax year. Appellant failed to request the assessment conference during the same tax year, thereby failing to comply with KRS 133.120. Consequently, the Court held that Appellant cannot seek a refund under KRS 134.590, as it did not exhaust its administrative remedies.

## VI. WORKER'S COMPENSATION

### A. Quebcor Book Company v. Lou Mikletich, et. al.

**2010-SC-000122-WC** **September 23, 2010**

Opinion of the Court. All sitting; all concur. An Administrative Law Judge based income benefits for disability from hearing loss on the claimant's entire 24% permanent impairment rating although a physician had informed him that the condition was work-related more than two years before he filed his claim. The Workers' Compensation Board affirmed and the Court of Appeals affirmed the Board. The Supreme Court also affirmed, noting that the 6% permanent impairment rating attributed to hearing loss that existed more than two years before the filing date was inadequate to be compensable at that time. Although the claimant sustained additional hazardous noise exposure and additional impairment thereafter, the court distinguished *Special Fund v.* Clark, 998 S.W.2d 487 (Ky. 1999), because it did not involve a hearing loss claim or the implications of KRS 342.7305(2)'s threshold requirement. The court concluded that the 6%

impairment rating need not be excluded from the impairment rating present when the claim was heard and income benefits were calculated.

## VII. ATTORNEY DISCIPLINE

### A. Ronald R. Snyder v. Kentucky Bar Association
**2010-SC-000549-KB** **September 23, 2010**

Opinion of the Court. All sitting; all concur. Supreme Court granted attorney's motion to resign under terms of permanent disbarment, finding permanent disbarment warranted in light of attorney's conviction on federal mail fraud charge and admitted criminal misconduct resulting in pending state charges of theft by deception, identity theft and criminal possession of a forged instrument.

### B. Kentucky Bar Association v. Sandra Camille Brooks
**2010-SC-00000139-KB** **September 23, 2010**

Opinion of the Court. All sitting; all concur. Brooks operates a business, "Legal Self Help," in which she sells legal forms, assists customers in completing the forms, and gives legal advice to customers. In 1997, the KBA issued a directive to Brooks to cease and desist engaging in the unauthorized practice of law. Brooks refused to comply and in 2004 the United States Bankruptcy Court in the Eastern District of Kentucky found Brooks guilty of engaging in the unauthorized practice of law. In 2005, the Supreme Court held her in contempt, imposed a monetary sanction and again ordered her to refrain from the unauthorized practice of law. Brooks still refused to comply and in April, 2010 this Court ordered Brooks to show cause why she should not be held in contempt for violating the 2005 Order. Kentucky case law clearly establishes that Supreme Court has jurisdiction to sanction and enjoin non-lawyers from practicing law without a license. Kentucky Constitution § 116 provides for the Supreme Court to govern admission to the bar and to discipline members of the bar. This express authorization carries with it an implied corollary power to sanction those who invade the province of the profession without obtaining admission to the bar. Brooks held in contempt for violating the 2005 Order because her activities create the misleading impression that she is providing legal services in the capacity of an attorney. Sanction of $5,000 imposed for Brooks' continued contemptuous actions.

### C. Kentucky Bar Association v. Kyle David Kersey
**2010-SC-000419-KB** **September 23, 2010**

Permanent disbarment. All sitting. All concur. KBA recommended to permanently disbar Kersey due to his actions in five separate disciplinary matters. Kersey was found to have violated SCR 3.130-1.4(a), 1.8(a), 1.15(a), 1.15(b), 1.16(d), 8.1(a), and 8.4(c).

**D. Kentucky Bar Association v. Charles E. Christian**

**2010-SC-000265-KB September 23, 2010**

Permanent disbarment. All sitting; All concur. KBA recommended permanent disbarment of attorney for paying himself $13,000.00 from an estate for work not performed. Additionally, attorney delayed 10 months before probating the estate with the courts. Attorney admitted to wrongfully writing himself checks from the estate and issued a promissory note to return the money but did not make any payments to the estate.

**E. James Anthony Reskin v. Kentucky Bar Association**

**2010-SC-000510-KB September 23, 2010**

Motion of attorney for permanent disbarment granted. Attorney pled guilty to multiple charges in OK federal court. Supreme Court granted attorney's motion for permanent disbarment.