COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2011-SC-000227-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

VS.

Court of Appeals Nos. 2009-CA-0949 and 2009-CA-00950
Knox Circuit Court Nos. 08-CR-00141 and 08-CR-00155
Hon. Gregory A. Lay, Circuit Judge

FRANK D. HAMILTON
and HEATHER R. COLE — APPELLEES

BRIEF FOR THE APPELLEES

Respectfully submitted,

D. RANDALL JEWELL
JEWELL LAW OFFICE, PLLC
P. O. Drawer 670
Barbourville, Kentucky 40906
Telephone: (606) 546-9714
ATTORNEY FOR APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that I did not check out the record on appeal and a true copy of this Brief for Appellees has been mailed, postage prepaid, to Hon. Gregory A. Lay, Judge, Knox Circuit Court, Div. I, P. O. Box 1209, London, Kentucky 40743-1209; Hon. Jackie L. Steele, Commonwealth Attorney, 128 N. Main Street, London, Kentucky 40741; Office of the Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601; Clerk, Knox Circuit Court, P. O. Box 760, Barbourville, Kentucky 40906; and the original and nine (9) copies to the Clerk of the Supreme Court, 209 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601-3488, on this 29th day of June, 2012.

ATTORNEY FOR APPELLEES

INTRODUCTION

The Appellees, Frank D. Hamilton (Frankie) and Heather R. Cole (Heather), both entered conditional pleas on April 13, 2009 pursuant to a written motion to enter guilty pleas reserving the right to appeal the March 26, 2009 order overruling their motions to dismiss the indictments. Heather and Frankie both received two year sentences, probated for three years on conditions including completion of the drug court program. Heather and Frankie's cases were combined by the trial court as they present the same issue. These cases have been consolidated. See order entered on June 29, 2009.

STATEMENT REGARDING ORAL ARGUMENT

Appellees request oral agreement as this case involves novel and complex issues of law.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

A. Facts and Procedural History in the Trial Court

Appellees, Frank D. (Frankie) Hamilton and Heather R. (Heather) Cole, were indicted by a Knox County Grand Jury in 2008 for Trafficking in a Controlled Substance, 2nd Degree, 1st Offense in violation of KRS § 218A.1413. Specifically, Heather and Frankie were accused of trafficking in Suboxone, the trade name of a drug containing buprenorphine, a Schedule III controlled substance. This alleged crime is a Class D Felony. Their cases were assigned for trial in December 2008 but motions to continue were sustained to allow additional time for them to obtain information from the Cabinet for Health and Family Services (the "Cabinet") regarding its decision in 2002 to reclassify buprenorphine from a Schedule V controlled substance to a Schedule III controlled substance.

The Commonwealth agreed to find out what findings the Cabinet made and what actions it took prior to reclassifying buprenorphine. The Commonwealth's Attorney asked the Cabinet for "any and all records related to the classification of Buprenorphine as a Schedule III [controlled substance]." The Cabinet stated "we have no responsive records to this request." The Cabinet also furnished a witness, Steven Christopher Johnson, to appear before the trial court to defend the Cabinet's actions. [RA 62].

As a result of the Cabinet's failure to produce any records to support its reclassification of buprenorphine, Heather and Frankie filed a Motion to Dismiss the Indictment or in the Alternative Assign for an Evidentiary Hearing and a Notice of Intent to Challenge the Classification by Administrative Regulation of Suboxone as a Schedule III Controlled Substance. Kentucky law provides that the General Assembly may delegate authority to the Cabinet to classify controlled substances consistent with separation of powers doctrine and KRS § 218A.080 only if the Cabinet follows established adequate standards in

making reclassification decisions. The motion and notice argued that the Cabinet failed to follow established adequate standards when it reclassified buprenorphine and the reclassification by regulation was unconstitutional and violated KRS § 218A.080. Critically, as the Commonwealth repeatedly concedes in its brief, Heather and Frankie never challenged the constitutionality of any statute. Instead, they challenged the Cabinet's decision to reclassify buprenorphine from a Schedule V controlled substance to a Schedule III controlled substance without following established adequate standards or making any findings whatsoever in violation of KRS § 218A.080 and § 28 of the Kentucky Constitution as set forth in *Commonwealth v. Hollingsworth*, 685 S.W.2d 546 (Ky. 1984).

Heather and Frankie also filed a Motion to Exclude Scientific Evidence Which Does Not Meet the Daubert Standard and to Exclude Unqualified Opinion Testimonies. This motion challenged the qualifications of the Commonwealth's listed expert witnesses to testify regarding certain aspects of the reclassification of buprenorphine as a Schedule III controlled substance.

In its response to the motions, the Commonwealth's key argument to support the reclassification of buprenorphine was that the Federal government had classified buprenorphine as a Schedule III controlled substance and the Cabinet could adopt this classification pursuant to KRS § 218A.020(3) without making any findings or following any procedures at all. The Commonwealth did not serve its responses on the Attorney General even though it argued that KRS § 218A.020(3) constitutionally delegated authority to the Cabinet to schedule controlled substances. The trial court set the motions for an evidentiary hearing on February 25, 2009. Before the evidentiary hearing, the trial court compelled notification of the motion hearing to the Attorney General but did not require the Attorney

General to be added as a party. Accordingly, Heather and Frankie sent a notice but the Attorney General did not participate in the hearing.

The key witness at the evidentiary hearing was Harry Plotnick, a licensed attorney in Ohio who has a Ph.D. in toxicology. He testified that the Drug Enforcement Administration ("DEA") did not follow the proper procedures in rescheduling buprenorphine on the Federal list of controlled substances and instead relied on obscure European studies. He also testified that the reclassification was wrong in light of the criteria for classifying controlled substances.

After taking testimony from Plotnick and other witnesses, the trial court did not make findings of fact but, nevertheless, overruled the motions. The trial court concluded that (1) KRS § 218A.020(3) was a constitutional delegation of authority from the Kentucky Legislature to the Cabinet and (2) the trial court lacked subject matter jurisdiction to review the reclassification of buprenorphine because the reclassification was an act of the Federal government, not the Cabinet, and any such challenge must be heard in Federal court. In essence, the trial court ruled that the reclassification of buprenorphine under Kentucky law was an action of the Federal government and, as a result, it lacked subject matter jurisdiction to adjudicate Appellees' *Hollingsworth* challenge to the reclassification. Critically, while the trial court heard testimony, it never made findings of fact or conclusions of law on the merits of Heather and Frankie's *Hollingsworth* challenge.

Heather and Frankie then filed a Motion for Reconsideration and Clarification. The trial court clarified its previous ruling but refused to reconsider it. The trial court clarified its ruling and held that any challenge to the classification of buprenorphine as a Schedule III controlled substance must be made in Federal court as a collateral attack to any adverse judgment that may occur if Heather and Frankie were convicted.

The Commonwealth never argued and the trial court never found that the Attorney General was a necessary or indispensable party. Heather and Frankie provided the Attorney General with notice of the proceedings challenging the reclassification of buprenorphine but the Attorney General chose not to move to intervene or otherwise participate. Similarly, the Commonwealth never argued and the trial court never found that the Cabinet was a necessary or indispensable party. The Cabinet participated in the proceedings by sending a witness and responding to a subpoena but it chose not to move to intervene.

After the trial court denied their motions, Heather and Frankie entered conditional guilty pleas to one count of trafficking in a controlled substance, second degree, first offense, and were sentenced to two years of imprisonment probated for three years. The plea agreement preserved the right to appeal the trial court's refusal to consider the *Hollingsworth* challenge. Heather and Frankie timely appealed.

B. Procedural History in the Court of Appeals

On appeal, Heather and Frankie argued the trial court reversibly erred because (1) the trial court had subject matter jurisdiction to determine whether established adequate standards were followed because the issue before the trial court was whether buprenorphine was properly reclassified under *Kentucky* law, not Federal law, as a Schedule III controlled substance, (2) while the classification may have been statutorily sound under KRS § 218A.020(3), it was constitutionally infirm because the Cabinet failed to follow established adequate standards in violation of dictates set forth by this Court in *Commonwealth v. Hollingsworth*, 685 S.W.2d 546 (Ky. 1984), and (3) relying solely on the Federal classification violated clearly established Kentucky law as set forth in *Hamilton v. City of Louisville*, 332 S.W.2d 539 (Ky. 1960), and *Dawson v. Hamilton*, 314 S.W.2d 532 (Ky. 1958). The Commonwealth argued Kentucky law utilizes the same factors considered under

Federal law when classifying controlled substances, the classification of buprenorphine was proper because following the Federal classification met the "established adequate standards" requirement for constitutional delegation, and the trial court properly concluded that it lacked subject matter jurisdiction to answer this question in the first place. The Commonwealth did not argue that the appeal should be dismissed for failure to name the Attorney General or the Cabinet as parties.

On September 24, 2010, the Kentucky Court of Appeals decided 2-1 to dismiss the appeal, with Judge Clayton dissenting. The majority decided, *sua sponte*, that the appeal must be dismissed because the Cabinet was an indispensable party and it was not named as a party to the appeal. The majority relied on KRS § 13A.090 to reach its conclusion. This statute reads:

> (1) The Commissioner's authenticated file stamp upon an administrative regulation or publication of an administrative regulation in the Kentucky Administrative Regulations Service or other publication shall raise a rebuttable presumption that the contents of the regulation are correct.
>
> (2) The courts shall take judicial notice of any administrative regulation duly filed under the provisions of this chapter after the administrative regulation has been adopted.

The court continued its analysis: "If Appellants want to challenge this rebuttable presumption of correctness, they must do so pursuant to KRS 13A.140, which sets forth the proper procedure for such a challenge." KRS § 13A.140 states that an administrative regulation is presumed to be valid unless otherwise declared invalid by a court and that the promulgating administrative body bears the burden to show that it had the authority to promulgate the regulation and that the regulation is statutorily permissible. The dissent stated that the court could review the constitutional question without the Cabinet as a party.

Heather and Frankie then timely filed a Petition for Rehearing in the Court of Appeals. In the Petition for Rehearing, they requested reconsideration of the issue of whether the Cabinet was an indispensable party because the Commonwealth never raised it, the issue was not briefed, and the issue was a novel question involving a matter of first impression. They also pointed out that the ruling conflicted with this Court's holding in *Hollingsworth*, where this Court adjudicated a constitutional challenge to a drug classification on the merits even though the Cabinet was not a party. Similar cases from other jurisdictions did not require that the equivalent of the Cabinet be named as a party. Further, Appellees argued that the Court of Appeals misconstrued the statute, the purpose of which is to provide statutory authority to the Cabinet and other agencies to promulgate regulations instead of providing a procedural framework for constitutional challenges. The Court of Appeals' ruling would have foreclosed the constitutional challenge to the reclassification based on the statutory presumption of correctness found in KRS § 13A.140.

On March 25, 2011, the Court of Appeals agreed, withdrew its superseded Opinion of September 24, 2010, and issued a new, final Opinion. The Court stated that Heather and Frankie must still follow the procedures set forth in KRS § 13A.140 but the case would be remanded to the trial court to add the Attorney General and the Cabinet as parties.

The Commonwealth moved for discretionary review, which this Court granted.

ARGUMENT

I. APPELLEES DID NOT FAIL TO COMPLY WITH STATUTORY REQUIREMENTS TO GIVE NOTICE OF THEIR *HOLLINGSWORTH* CHALLENGE TO THE ATTORNEY GENERAL AND THE COURT OF APPEALS DID NOT REVERSIBLY ERR BY REQUIRING THE ATTORNEY GENERAL TO BE NAMED AS A PARTY

A. Statutory Notice

While the Commonwealth first argues that the appeal should be dismissed for Appellees' alleged failure to give notice of their *Hollingsworth* challenge to the Attorney General, the Commonwealth failed to raise this argument before the trial court. It is axiomatic that any argument not raised in the trial court is waived on appeal. *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011) ("[a] new theory of error cannot be raised for the first time on appeal.") The Commonwealth also failed to raise this argument in its opening brief to the Court of Appeals and thereby waived it. Further, the Court of Appeals' rulings did not turn on and did not even discuss statutory notice requirements. The Court of Appeals held that this case should be remanded to the trial court so the Cabinet and the Attorney General could be added as parties; it did not hold that Appellees failed to provide statutorily required notice to the Attorney General. If the Court of Appeals had ruled that the Appellees failed to comply with statutory notice requirements, it would have dismissed the appeal. It did not. Because the Commonwealth failed to preserve this issue and the Court of Appeals never addressed it or relied on it in reaching its decision, this Court should not address it in the first instance. This issue simply is not properly before this Court.

Even if this Court excuses the Commonwealth's failure to raise this argument and addresses the issue, the Commonwealth's argument lacks merit. Most importantly, the Commonwealth's allegation that Appellees failed to provide notice to the Attorney General lacks a factual basis. As the Commonwealth concedes in its Opening Brief, "Appellees []

notified the Attorney General of their intent to challenge the classification of Suboxone as a Schedule III controlled substance. . . ." (Commonwealth's Br. at 13) "Appellees filed a 'Notice of Intent to Challenge the Classification of Suboxone as a Schedule III Narcotic' and sent a copy to the Attorney General." (Commonwealth's Br. at 2). The Appellees sent the notice to the Attorney General because the trial court compelled them to do so.

The Commonwealth contends that, despite the Appellees' notice to the Attorney General, the Attorney General still somehow lacked "fair notice that they would claim the General Assembly unconstitutionally delegated its authority." (Commonwealth's Br. at 13) The Commonwealth claims that Appellees' defense theory evolved during the course of litigation and they could have notified the Attorney General of their *Hollingsworth* challenge after the evidentiary hearing but before judgment was entered. However, this argument also lacks a factual basis. As the Commonwealth admits in its brief, "[the notice sent to the Attorney General] alleged the drug Suboxone had no euphoric effect and challenged the Commonwealth's classification of the drug as a Schedule III controlled substance. . . ." (Commonwealth's Br. at 2) The Attorney General had notice and actual knowledge of Appellees' *Hollingsworth* challenge and chose not to move to intervene or otherwise participate in the trial court proceedings.

The Commonwealth further complains that "[t]he notice did not . . . refer to the constitutionality of any statute." (Commonwealth Br. at 12). However, a *Hollingsworth* challenge is primarily a constitutional challenge to a *regulation*, not a constitutional challenge to a *statute*. As the Commonwealth repeatedly concedes in its brief, the Appellees "did **not** claim that any statute was unconstitutional." (Commonwealth Br. at 2) (emphasis in original) Therefore, the notice did not have to refer to the constitutionality of any statute.

Even if the Commonwealth's allegations of insufficient notice had a factual basis—which they do not—the Commonwealth has pointed to no statute or other authority that requires the Appellees to provide notice of a *Hollingsworth* challenge to the Attorney General. The only authority the Commonwealth cites in favor of its position that Appellees failed to comply with a statutory notice requirement is KRS § 418.075. In relevant part, KRS § 418.075 states:

> In any proceeding which involves the **validity of a statute**, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard. . . .

(emphasis added) Yet KRS § 418.075 is inapplicable because the Commonwealth acknowledges that the Appellees "did **not** claim that any statute was unconstitutional." (Commonwealth Br. at 2) (emphasis in original) Instead, Heather and Frankie challenged the reclassification of buprenorphine from a Schedule V controlled substance to a Schedule III controlled substance on the grounds that established adequate standards were not followed in violation of KRS § 218A.080 and § 28 of the Kentucky Constitution as set forth in *Commonwealth v. Hollingsworth*, 685 S.W.2d 546 (Ky. 1984). A *Hollingsworth* challenge is a constitutional challenge based on separation of powers doctrine to a regulation issued by the Cabinet classifying a controlled substance, not a constitutional challenge to a statute. *See id.* at 548. Therefore, the notice requirement of KRS § 418.075 for constitutional challenges to the validity of a statute simply did not apply to Appellees' *Hollingsworth* challenge.

Instead of requiring that the Attorney General be given special notice or be named as a party to a *Hollingsworth* challenge, KRS § 418.075 shows that the Attorney General is not entitled to special notice procedures. The General Assembly knows how to create a requirement that parties follow certain procedures to notify executive branch agencies of a constitutional challenge, as it did with KRS § 418.075 for constitutional challenges to

statutes. Yet no such statutory requirement exists for a party raising a *Hollingsworth* challenge to the constitutional validity of the classification by regulation of a controlled substance. If the General Assembly intended such a requirement to apply, it would have stated so clearly.

The Commonwealth has failed to point to any authority from this Court or any other court that would require Appellees to give the Attorney General special notice of a *Hollingsworth* challenge. Research reveals no such authority. The Commonwealth has offered absolutely no explanation whatsoever for its contention that the Attorney General *must* be given special notice of a *Hollingsworth* challenge when the Attorney General was not given special notice in the *Hollingsworth* case itself. Even though no statutory notice requirement applied to Appellees' *Hollingsworth* challenge, they provided a notice to the Attorney General because the trial court compelled them to do so. The Attorney General had notice and chose not to participate.

Furthermore, the Commonwealth's argument is simply misplaced and this Court should not reach it because the Court of Appeals never addressed the issue of notice to the Attorney General. The Commonwealth contends that the Court of Appeals raised statutory notice requirements *sua sponte* and "correctly determined the Appellees did not comply with the notice statute." (Commonwealth's Br. at 13) This statement simply is not true. The Court of Appeals' initial, superseded Opinion dismissed the appeal for failure to add the Cabinet as a party, not the failure to provide *notice* to the Attorney General. Similarly, the Court of Appeals' final Opinion that vacated and replaced the initial, superseded Opinion ruled that the Attorney General had become a party on appeal and, on remand, the Attorney General and the Cabinet must be added as parties for further proceedings at the trial court level. Neither Court of Appeals Opinion held that Appellees failed to comply with a

statutory notice requirement to the Attorney General. Neither Court of Appeals Opinion even so much as referenced a statutory requirement of notice to the Attorney General. Neither Court of Appeals Opinion discussed or cited KRS § 418.075, the only authority the Commonwealth attempts to cite in support of its argument.

B. Attorney General as a Party

Whether the Court of Appeals reversibly erred by Ordering that the Attorney General be named as a party on remand is a question of law that this Court reviews de novo. *Moffitt v. Commonwealth*, 360 S.W.3d 247, 250 (Ky. App. 2012).

After faulting the Appellees for allegedly failing to give the Attorney General notice of their *Hollingsworth* challenge, the Commonwealth argues that the Court of Appeals reversibly erred by ordering that the Attorney General be named as a party on remand. The issue of whether the Attorney General is a necessary or indispensable party was never raised or addressed at the trial court level. Instead, in its final Opinion, the Court of Appeals ruled *sua sponte* that the Attorney General had become a party on appeal. It then remanded the case to the trial court so the Attorney General could be a party to the trial court's determination of the Appellees' *Hollingsworth* challenge on the merits in the first instance. Appellees contend that the Attorney General is not a necessary or indispensable party but any error in ordering that the Attorney General be named as a party on remand is harmless.

First, Appellees and the Commonwealth agree that the Attorney General is not a necessary or indispensable party to this action. The Commonwealth states in its brief that "[t]here is simply no authority for naming the Attorney General as a party to the litigation. . . ." (Commonwealth Br. at 15) This statement is correct. However, the Court of Appeals concluded that the Attorney General should be added as a party because the constitutionality of a statute was called into question. "While the Attorney General's office was not a party at

the trial court level, it has become a party at the appellate level." (Op. at 8) Appellees disagree with this reasoning because, as the Commonwealth concedes, the Appellees have never challenged the constitutionality of any statute. Further, the Attorney General was not named as a party in *Hollingsworth*. Therefore, there is no basis for requiring the Attorney General to be named as a party to Appellees' *Hollingsworth* challenge.

Second, any error in the Court of Appeals' ruling that the Attorney General must be added as a party on remand is harmless. If this Court affirms this aspect of the Court of Appeals' ruling and remands to the trial court so the Attorney General can be added as a party, then the Attorney General would have even more notice of Appellees' *Hollingsworth* challenge before the trial court decides it on the merits. The Attorney General would not suffer any prejudice by virtue of becoming a party because it can choose not to participate actively in the trial court proceedings on remand, just as it chose not to participate in the initial trial court proceedings after receiving Appellees' notice. Further, the appropriate remedy for the Court of Appeals' harmless error is not to affirm Appellees' convictions. Instead, if the Court of Appeals' ruling is not affirmed in full, the remedy is to reverse in part the Court of Appeals' holding that the Attorney General must be added as a party but affirm the general remand to the trial court for a ruling in the first instance on the merits of Appellees' *Hollingsworth* challenge. In either case, the result is proper and substantively the same—this case should be remanded to the trial court for a ruling on the merits of the *Hollingsworth* challenge in the first instance.

Because the Court of Appeals erroneously ordered that the Attorney General be named a party, the Commonwealth contends that this Court "should reverse the Court of Appeals and affirm the trial court without reviewing the constitutional issue at all." (Commonwealth Br. at 15). However, the Commonwealth has provided no explanation or

authority to support its harsh contention that Appellees should be prejudiced by having their convictions affirmed without the merits of their *Hollingsworth* challenge ever being decided by the trial court simply because the Court of Appeals, *sua sponte*, erroneously ordered that the Attorney General be made a party. The Attorney General was not a party in *Hollingsworth* and, other than the final Opinion of the Court of Appeals in this case, no authority whatsoever exists to suggest that the Attorney General is a necessary or indispensable party to a *Hollingsworth* challenge. Therefore, Appellees lacked notice of any such requirement when Appellees initiated the *Hollingsworth* challenge. The Attorney General had notice of the proceedings but chose not to move to intervene or otherwise participate. Dismissing this appeal simply because the Court of Appeals reached the right result but got an immaterial detail wrong would be manifestly unjust. The party status of the Attorney General is not dispositive and this case should be remanded to the trial court for a ruling on the merits of the *Hollingsworth* challenge in the first instance with or without the Attorney General as a party.

II. THE CABINET IS NOT A NECESSARY OR INDISPENSABLE PARTY

Whether the Court of Appeals reversibly erred by ordering that the Cabinet be named as a party is a question of law that this Court reviews de novo. *Moffitt,* 360 S.W.3d at 250. In its initial, superseded Opinion, the Kentucky Court of Appeals decided, *sua sponte*, that the appeal must be dismissed because the Cabinet was an indispensable party and it was not named as a party to the appeal. The majority relied on KRS § 13A.090 to reach its conclusion. This statute reads:

> (1) The Commissioner's authenticated file stamp upon an administrative regulation or publication of an administrative regulation in the Kentucky Administrative Regulations Service or other publication shall raise a rebuttable presumption that the contents of the regulation are correct.

(2) The courts shall take judicial notice of any administrative regulation duly filed under the provisions of this chapter after the administrative regulation has been adopted.

The court continued its analysis: "If Appellants want to challenge this rebuttable presumption of correctness, they must do so pursuant to KRS § 13A.140, which sets forth the proper procedure for such a challenge." KRS § 13A.140 states that an administrative regulation is presumed to be valid unless otherwise declared invalid by a court and that the promulgating administrative body bears the burden to show that it had the authority to promulgate the regulation and that the regulation is statutorily permissible. Appellees contended in their Petition for Rehearing that the Court of Appeals' reasoning was wrong and conflicted with this Court's Opinion in *Hollingsworth* because *Hollingsworth* was decided on the merits and the Cabinet was not a party. After the Court of Appeals granted Appellees' Petition for Rehearing, it withdrew its initial, superseded Opinion and issued a final Opinion holding that Heather and Frankie must still follow the procedures set forth in KRS § 13A.140 but the case must be remanded to the trial court to add the Cabinet as a party.

The Commonwealth concedes in its brief to this Court that the Court of Appeals' reasoning is incorrect:

> With the exception of the provision on proving proper promulgation of the regulations, all the enumerated duties in KRS 13A.140 relate to the *statutory* authority of the *administrative agency* to adopt the regulation questioned. The issue actually raised and addressed at the trial court level deal [sic] with the *constitutional* authority of the *General Assembly* to delegate authority. As such, it is not clear that KRS 13A.140 provides authority for requiring the Cabinet be made a party.

(Commonwealth's Br. at 17) (emphasis in original) Appellees' agree with the Commonwealth's analysis of KRS § 13A.140. Research reveals no Kentucky decision interpreting KRS § 13A.140 in the manner the Court of Appeals applied it. KRS § 13A.140

applies to statutory challenges to administrative regulations, not constitutional challenges based on separation of powers doctrine.

However, Appellees part ways with the Commonwealth when it contends that the Cabinet should have been named as a party for other reasons. The Commonwealth contends that the Cabinet is an indispensable party because Appellees challenged its scheduling of drugs and other substances. Any decision adverse to the Cabinet "would effectively force the Cabinet to modify its regulations and independently assess the classification of each controlled substance. . . ." (Commonwealth Br. at 17) This argument simply rehashes the KRS § 13A.140 argument that the Commonwealth concedes is wrong. Regardless, contrary to the Commonwealth's contention, any adverse decision to the Cabinet's actions would not compel it to reclassify any controlled substance. Instead, it would compel the Cabinet to comply with KRS § 218A.080 and § 28 the Kentucky Constitution by following established adequate standards before classifying a controlled substance. *See Hollingsworth*, 685 S.W.2d at 548. The Cabinet could still choose to reclassify or not to reclassify buprenorphine or any other controlled substance so long as it followed established adequate standards. The Cabinet must follow these constitutionally-mandated standards regardless of whether it is a party to Appellees' *Hollingsworth* challenge. Whether the Cabinet followed the standards in this case is a question that should be presented to the trial court for a determination in the first instance and the Cabinet need not be a party.

Further, the Commonwealth's argument overlooks the fact that the Cabinet actually participated in the trial court proceedings by sending an employee to testify but it never moved to intervene. The Commonwealth argues that this testimony was insufficient but does not support or develop this argument with facts or authority. Curiously, the Commonwealth contends that the Cabinet's lawyers "potentially have greater expertise in this specific area

and better access to helpful records." (Commonwealth Br. at 17) However, when the Commonwealth's Attorney asked the Cabinet for "any and all records related to the classification of Buprenorphine as a Schedule III [controlled substance]," the Cabinet responded "we have no responsive records to this request." Expertise and access to records are simply not the issue. The Cabinet had notice and actual knowledge of Appellees' *Hollingsworth* challenge, chose not to move to intervene, actually participated by sending a witness and responding to a subpoena, and provided testimony in support of the regulation.

The Cabinet is not a necessary or indispensable party because there is no statute, case law, or other authority that requires the Cabinet be added as a party to a *Hollingsworth* challenge. Critically, the Commonwealth has offered no authority or explanation to support its contention that the Cabinet must be a party to a *Hollingsworth* challenge when the Cabinet was not a party in *Hollingsworth*. In *Hollingsworth*, this Court held that the Cabinet had the power to classify pentazocine in pill form as a Schedule III drug and upheld the regulatory scheme for drug classification against a constitutional challenge. The Cabinet was not a party. Here, like *Hollingsworth*, Appellees raised a constitutional challenge to the administrative decision to classify a controlled substance without naming the Cabinet as a party. Here, like *Hollingsworth*, the case should be decided on the merits. KRS § 13A.140, the statute relied upon by the Court of Appeals for its holding that the Cabinet is an indispensable party, became effective on April 13, 1984, before the *Hollingsworth* decision was rendered, but this Court did not address the statute or the absence of the Cabinet as a party to the appeal. The Commonwealth's argument that the Cabinet is an indispensable party invites this Court to overturn its decision in *Hollingsworth* but the Commonwealth provides no authority or compelling reason to disturb clearly established law. *Hollingsworth*

was correctly decided, it is directly on point, it controls, and this Court should decline the Commonwealth's invitation to revisit it.

Similar cases from other states have not required the Defendant to join that state's equivalent of the Cabinet to the appeal. *See, e.g., People v. Turmon*, 340 N.W. 2d 620 (Mich. 1983) (resolving on the merits a constitutional attack on the Board of Pharmacy's statutorily delegated power to classify controlled substances even though the Board of Pharmacy was not named as a party to the appeal); *McCurley v. Alabama*, 390 So.2d 25 (Ala. 1980) (resolving on the merits a constitutional challenge to the delegation of classification of controlled substances to the State Board of Health where the State Board of Health was not a party to the appeal); *West Virginia v. Grinstead*, 206 S.E. 2d 912 (W. Va. 1974) (holding that the Board of Pharmacy cannot adopt a prospective Federal law not approved by the state legislature even though the Board of Pharmacy was not named as a party to the appeal). The Commonwealth has provided no compelling reason to depart from the clear trend. The Commonwealth has never cited any authority for the proposition that the Cabinet can be an indispensable party to a criminal case. Appellees have not been able to find any such authority in Kentucky or any other state. If the Commonwealth finds any such authority, Appellees would request leave to file a sur-reply to address this issue.

If this Court affirms the decision of the Court of Appeals to remand with the Cabinet to be named as a party, then the Cabinet will have an opportunity to defend its classification of buprenorphine as a party to this case before the trial court as the Commonwealth so ardently desires. The Cabinet would not prejudiced by this decision because it can choose not to participate actively as a party on remand, just as it chose not to move to intervene in the initial proceedings before the trial court.

If this Court determines that the Court of Appeals erred by ordering that the Cabinet be added as a party, then the proper remedy is to affirm the general remand but reverse in part the Court of Appeals' ruling to the extent that it required the Cabinet to be added as a party. The Appellees lacked notice of any requirement that the Cabinet be named as a party to a *Hollingsworth* challenge because it was not named as a party in *Hollingsworth* itself and no authority indicated that the Cabinet was an indispensable party. Therefore, Appellees' convictions should not be affirmed for failure to add an indispensable party when Appellees had no notice that the Cabinet was indispensable. This Court should affirm the Court of Appeals' decision to remand this case to the trial court for a determination of the *Hollingsworth* challenge on the merits with or without the Cabinet as a party.

III. THE TRIAL COURT HAS SUBJECT MATTER JURISDICTION TO RULE ON APPELLEES' *HOLLINGSWORTH* CHALLENGE

Whether a court has subject matter jurisdiction is a question of law that this Court review de novo. *Moffitt,* 360 S.W.3d at 250.

The key issue in this case is whether buprenorphine was properly reclassified from a Schedule V controlled substance to a Schedule III controlled substance under Kentucky law consistent with the established adequate standards required by KRS § 218A.080 and the Kentucky Constitution as set forth in *Hollingsworth.* The trial court ruled that it did not have subject matter jurisdiction to consider this issue because Kentucky followed the Federal government's classification of buprenorphine and any challenge to Kentucky's law was essentially a challenge to Federal law. Heather and Frankie argued to the Kentucky Court of Appeals that the trial court has subject matter jurisdiction because they challenged the decision of the *Kentucky* Cabinet to classify buprenorphine as a Schedule III controlled substance under *Kentucky* law without following established adequate standards as required by KRS § 218A.080 and § 28 of the *Kentucky* constitution. The Court of Appeals never

expressly addressed this issue but implicitly held that the trial court has subject matter jurisdiction because it remanded the case to the trial court for a determination of the *Hollingsworth* challenge in the first instance. This Court should affirm the Court of Appeals' implicit holding that the Knox Circuit Court has subject matter jurisdiction to determine Appellees' *Hollingsworth* challenge.

Section 109 of the Kentucky Constitution vests the circuit courts with general jurisdiction. Section 112(5) vests circuit courts "original jurisdiction of all justiciable causes not vested in some other court." It is "clear that a court is deprived of subject matter jurisdiction only in cases 'where the court has not been given the power to do anything at all.'" *Gordon v. NKC Hospitals, Inc.*, 887 S.W.2d 360, 362 (Ky. 1994) (quoting *Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky. 1970)). Subject matter jurisdiction exists in the circuit court so long as the "kind of case" identified is within the court's jurisdiction. *Gordon*, 887 S.W.2d at 362.

The "kind of case" presented here is a *Hollingsworth* challenge to the reclassification of buprenorphine under Kentucky law. The circuit courts have the power to do something because they can declare the regulation promulgated by the Cabinet reclassifying buprenorphine to be unconstitutional under Kentucky law and/or in violation of KRS § 218A.080. Therefore, as in *Hollingsworth*, the circuit courts have subject matter jurisdiction. While the Cabinet may have relied heavily on the Federal reclassification when it reclassified buprenorphine, this reliance does not divest Kentucky courts of subject matter jurisdiction to review the Cabinet's compliance with the separation of powers doctrine embedded in § 28 of the Kentucky Constitution. It is the decision of the Kentucky Cabinet, apparently without any independent assessment whatsoever, to follow the Federal classification—not the Federal classification itself—that is at issue in this case. The Federal classification could be

sufficient under Federal law but the Cabinet nevertheless may have failed to follow the established adequate standards required by the Kentucky Constitution when it reclassified buprenorphine. This question has never been answered and this case should be remanded to the trial court for a ruling in the first instance.

While the classification of buprenorphine under Federal law may be relevant to the merits of Appellees' *Hollingsworth* challenge, the fact that buprenorphine is scheduled under Federal law the same as it is under Kentucky law does not divest Kentucky courts of subject matter jurisdiction to determine a *Hollingsworth* challenge because there is no requirement that the Cabinet follow Federal law. To the contrary, the Cabinet must follow established adequate standards regardless of Federal law and the Kentucky General Assembly may not delegate authority to define crimes to the Federal government. *Dawson v. Hamilton*, 314 S.W.2d 532, 536 (Ky. 1958) (holding that a Kentucky penal statute that incorporated federal regulations was unconstitutional because the Kentucky General Assembly must define what constitutes a criminal offense and may not delegate that authority to the Interstate Commerce Commission or other agency of the Federal government).

The Commonwealth contends that "[t]he state trial court correctly concluded it had no authority to strike down a federal regulation." (Commonwealth Br. at 28) However, Appellees never asked the trial court to strike down the Federal classification of buprenorphine or any other Federal regulation. Appellees were never charged with a Federal crime or indicted in Federal court. Appellees briefly considered filing a challenge to the classification of buprenorphine in Federal court but chose not to do so because a Federal court would lack subject matter jurisdiction to review the actions of the Kentucky Cabinet for compliance with Kentucky law. A Kentucky court undoubtedly lacks subject matter

jurisdiction to strike down a Federal law in circumstances such as these but Appellees never asked the trial court to strike down a Federal law.

Under the Commonwealth's position, the Kentucky Cabinet would essentially be exempt from following the established adequate standards required by the Kentucky Constitution and KRS § 218A.080 when it reclassifies a controlled substance so long as it incorporates the Federal classification. The actions of the Kentucky Cabinet would then be placed beyond judicial review by Kentucky courts. Such a result would be at odds with numerous decisions where Kentucky courts have ruled on the merits of challenges to Kentucky laws or regulations that are identical to Federal laws or regulations. *See, e.g.*, *Hamilton v. City of Louisville*, 332 S.W.2d 539, 543 (Ky. 1960) (holding that Kentucky law turning on Federal regulations was too indefinite to be given effect); *Dawson*, 314 S.W.2d at 536 (holding that a Kentucky penal statute that incorporated federal regulations was unconstitutional because the Kentucky General Assembly must define what constitutes a criminal offense and may not delegate that authority to the Interstate Commerce Commission). None of these cases dismissed the challenge for lack of subject matter jurisdiction. The Commonwealth has not developed any argument that these cases are no longer good law and should not be followed or that Appellee's *Hollingsworth* challenge is somehow different from these cases. The trial court has subject matter jurisdiction to decide the *Hollingsworth* challenge and this case should be remanded for a determination of that challenge in the first instance.

IV. THIS COURT SHOULD DECLINE THE COMMONWEALTH'S INVITATION TO RULE IN THE FIRST INSTANCE THAT ESTABLISHED ADEQUATE STANDARDS WERE FOLLOWED IN THE RECLASSIFICATION OF BUPRENORPHINE AND SHOULD REMAND TO THE TRIAL COURT FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Were the established adequate standards required by KRS § 218A.080 and the Kentucky Constitution for a delegation of power followed when buprenorphine was reclassified from a Schedule V controlled substance to a Schedule III controlled substance? This question has yet to be answered in this case. The trial court ruled that it did not have subject matter jurisdiction to answer this question and declined to make findings of fact and conclusions of law. The Court of Appeals implicitly found that the trial court has subject matter jurisdiction and remanded for a determination on the merits in the first instance. The Commonwealth now argues vigorously that this Court should answer the question in the first instance and affirm Appellees' convictions. However, the Commonwealth has offered no authority to support its request to this Court to make findings of fact and rule on an issue in the first instance. It is axiomatic that the trial court should make findings of fact and conclusions of law in the first instance before an appellate court rules on an issue. This case should be remanded to the trial court with instructions to make findings of fact and conclusions of law on the merits of Appellees' *Hollingsworth* challenge. The Commonwealth can then appeal any adverse ruling.

KRS § 218A.020(3) provides that if any substance is classified as a controlled substance under Federal law, the Cabinet "*may* similarly control the substance under this chapter by regulation." (emphasis added) Nevertheless, where, as here, the Cabinet classifies a controlled substance pursuant to a delegation of authority from the Kentucky Legislature, § 28 of the Kentucky Constitution *requires* the Cabinet to follow "established adequate standards" in making the classification. *Hollingsworth*, 685 S.W. 2d at 548. Here, Respondents contend the Cabinet failed to follow the "established adequate standards" as required by the Kentucky Constitution when (1) it reclassified Buprenorphine, apparently without making any findings whatsoever, let alone making findings pursuant to "established

adequate standards," and (2) the Cabinet apparently blindly relied on the Federal classification, effectively delegating Kentucky's sovereign power to define crimes under the Kentucky law to the Federal government. Accordingly, Respondents contend the Cabinet's decision to reclassify Buprenorphine as a Schedule III controlled substance violates § 28 of the Kentucky Constitution. The trial court never addressed the merits of these issues. Instead, it ruled that (1) the statute is constitutional—a point that Appellees never argued, as the Commonwealth concedes—and (2) dismissed the *Hollingsworth* challenge for lack of subject matter jurisdiction. The Court of Appeals did not pass on the merits of the *Hollingsworth* challenge because it could not—there simply were no findings of fact or conclusions of law to review.

The Commonwealth argues that this Court should affirm the ruling of the trial court dismissing Appellees' *Hollingsworth* challenge for lack of subject matter jurisdiction because the General Assembly has established a framework for scheduling of controlled substances that utilizes the same factors as those considered under Federal law. However, the Commonwealth has confused the issue of subject matter jurisdiction with the merits of Appellees' *Hollingsworth* challenge. Whether the trial court has subject matter jurisdiction does not turn on the merits of Appellees' *Hollingsworth* challenge. If, as Appellees contend, the trial court has subject matter jurisdiction, there is no reason to depart from the normal procedure of a trial court ruling on a matter in the first instance and appellate courts then conducting appellate review. The Commonwealth has offered absolutely no authority whatsoever for the proposition that this Court should make findings of fact and conclusions of law in the first instance for a *Hollingsworth* challenge. Appellees can find no instance in which this Court ruled on the merits of a *Hollingsworth* challenge in the first instance. The trial court is in the best position to evaluate the credibility of witnesses and make findings of

fact. This Court should decline the Commonwealth's invitation to usurp the normal duties of the trial court and this case should be remanded.

Contrary to the Commonwealth's contention that Appellees' position lacks merit, whether the Cabinet complied with the Kentucky Constitution is highly in doubt. While KRS § 218A.020(3) provides the Cabinet *may* adopt the Federal classification, the statute does not relieve the Cabinet from following the constitutionally mandated "established adequate standards." Adopting the Federal classification may be sufficient to classify a controlled substance under the plain language of the statute, but doing so is not sufficient to satisfy the requirement of the Kentucky Constitution, as interpreted in *Hollingsworth*, that the Cabinet follow "established adequate standards." This distinction is critical. If the Cabinet classified buprenorphine in compliance with the statute but without following established adequate standards as required by the Kentucky Constitution, then it has, in effect, delegated authority to the Federal government to define what constitutes a crime under Kentucky law. The General Assembly may not delegate authority to the Federal government to define crimes under Kentucky law. *Dawson*, 314 S.W.2d at 536. Therefore, the issue of whether the Cabinet followed established adequate standards as required by the Kentucky Constitution is highly in doubt, fact sensitive, and not presently ripe for decision based on the record, which does not feature findings of fact and conclusions of law on the issue.

Directly contradicting its position that Kentucky may delegate its sovereignty to the Federal government to define crimes under Kentucky law, the Commonwealth concedes in its Motion for Discretionary Review that *Hollingsworth* requires the Cabinet "to *independently* assess the potential of drugs for abuse and schedule them accordingly." *See* Commonwealth's Motion for Discretionary Review at p. 13 (emphasis added). The trial court never made factual findings as to what the Cabinet did and did not do in its assessment.

The trial court also never made a conclusion regarding whether the Cabinet properly discharged its duty to assess buprenorphine independently under *Hollingsworth*. This Court should not sit as a trial court and make these findings of fact in the first instance. Therefore this matter should be remanded to the trial court for determination of the *Hollingsworth* challenge on the merits in the first instance.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the final Opinion of the Court of Appeals and remand this matter to the trial court for a ruling on the merits of Appellees' *Hollingsworth* challenge in the first instance.

Respectfully submitted,

D. RANDALL JEWELL
JEWELL LAW OFFICE, PLLC
P. O. Drawer 670
Barbourville, Kentucky 40906
Telephone: (606) 546-9714
Attorney for Appellees

APPENDIX