pursuant to Court order

COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2012-SC-000771-DG

COMMONWEALTH OF KENTUCKY
APPELLANT

On Discretionary Review from Court of Appeals
VS. File No. 2011-CA-001235-DG

JAMES BEDWAY
APPELLEE

* *

BRIEF FOR THE COMMONWEALTH

* *

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief For The Commonwealth* was mailed by U.S. First-Class mail, postage prepaid, to: Honorable Charles L. Cunningham, Jr., Judge, Jefferson Circuit Court, Division Four (4), Jefferson Judicial Center, 700 West Jefferson Street, Louisville Kentucky 40202; Honorable Paul Gold, Suite 320, Republic Plaza, 200 South Seventh Street, Louisville, Kentucky 40202; Clerk of Court of Appeals, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601; and Honorable Jack Conway, Attorney General, 1024 Capital Center Drive, Suite 200, Frankfort, Kentucky 40601; on this Tuesday, the Twelfth (12th) day of November, 2013. I hereby further certify that the record on appeal was not withdrawn from the Clerk of the Supreme Court.

David A. Sexton

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INTRODUCTION

This appeal is a discretionary review of an *Opinion* of a To Be published *Opinion* of the Court of Appeals. The Court of Appeals held that the Appellee had been deprived of his statutory right "to attempt to contact and communicate with an attorney" when he was deprived of an opportunity to call his daughter. The Court of Appeals also approved the application of the exclusionary rule to the purported violation of the statute.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth respectfully requests oral argument. Oral argument is requested since this appeal concerns the application and construction of a provision of Kentucky's implied consent law which affects the enforcement of this state's drunk driving laws and the application of the exclusionary rule.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

STATEMENT OF THE CASE

This case was initiated on March 15, 2009 with the arrest of the Appellee on several charges. (Appendix, p. 26). Specifically, the Appellee was charged with driving under the influence, reckless driving, expired registration and no insurance. *Id.* Jefferson County Deputy Sheriff Sean Hayden had observed the Appellee driving erratically on I-64 before ultimately stopping and finally arresting the Appellee on the charged offenses. *Id.* Subsequent breath testing of the Appellee the night of his arrest indicated that the Appellee had a blood alcohol level of .161 - more than twice the legal limit. (Appendix, pp. 27-28).

Prior to trial in the Jefferson District Court the Appellee moved to dismiss the criminal prosecution against him on the grounds that the arresting officer had no reasonable and articulable suspicion to stop the Appellee's vehicle on March 15, 2009 and that the officer did not have probable cause to subsequently arrest him. At the conclusion of a suppression hearing in the Jefferson District Court, the trial court granted the Appellee's motion and dismissed the Commonwealth's criminal case against him. Thereafter, the Commonwealth took a timely appeal to the Jefferson Circuit Court, and the Jefferson Circuit Court ultimately reversed the complained about dismissal by the Jefferson District Court.[1]

Following the reversal in that initial appeal, this case ultimately proceeded to trial in the Jefferson District Court commencing on December 7, 2010.[2] (Audio CD 1, 12-7-10, 7:20). At trial, Jefferson County Deputy Sheriff Sean Hayden confirmed that he was on duty on March 15, 2009. (Audio CD 1, 12-7-10, 7:25). He explained at trial that he was working the midnight to 8:00 a.m. shift that day. (Audio CD 1, 12-7-10, 7:28). He recounted that he was proceeding in his cruiser on I-64 westbound at about 5:30 a.m. (Audio CD 1, 12-7-10, 7:44).

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[1] *Commonwealth of Kentucky v. James Bedway,* Jefferson Circuit Court No. 10-XX-00022.

[2] The untranscribed audio recordings of the trial proceedings in the Jefferson District Court are contained on two (2) audio compact discs found in the record on appeal.

As he was driving on I-64 he noticed the Appellee's vehicle in front of him "with expired tags." (Audio CD 1, 12-7-10, 8:09). He also observed that the Appellee's vehicle was "weaving", (Audio CD 1, 12-7-10, 8:15), and that the Appellee's vehicle was going over the lane lines in the road. (Audio CD 1, 12-7-10, 8:23). He explained at trial that he saw the Appellee's vehicle cross over the lines marking the lanes in the highway several times. (Audio CD 1, 12-7-10, 8:29). The deputy finally activated his lights to stop the Appellee's vehicle after he observed the Appellee almost drive his vehicle into a concrete barrier as the Appellee attempted to make his way onto nearby I-264. (Audio CD 1, 12-7-10, 9:25).

Deputy Hayden could smell alcoholic beverages upon the Appellee at the traffic stop. (Audio CD 1, 12-7-10, 9:55). The Appellee admitted to having been drinking before being stopped that morning. (Audio CD 1, 12-7-10, 10:02). The deputy noticed that the Appellee's speech was slurred, (Audio CD 1, 12-7-10, 10:45), and that he was not able to "get full sentences out." (Audio CD 1, 12-7-10, 11:12). Additionally, the Appellee's eyes were "glazed over" and appeared to be "bloodshot." (Audio CD 1, 12-7-10, 11:23).

Deputy Sheriff Hayden also recounted at the trial in the Jefferson District Court that the Appellee was unable to recite the alphabet from the letter "d' to the letter "q" when requested to do so. (Audio CD 1, 12-7-10, 11:56-12:54). Further, the Appellee was unable to adequately perform a one-leg stand as the Appellee was unable to hold his foot up. (Audio CD 1, 12-7-10, 13:05-14:04). Finally, the Appellee also showed indications of intoxication based upon his performance when a horizontal gaze nystagmus test was performed at the roadside stop. (Audio CD 1, 12-7-10, 14:13-14:40). Not surprisingly, Deputy Sheriff Hayden arrested the Appellee that morning for driving under the influence. (Audio CD 1, 12-7-10, 15:47).

The next witness called at trial by the Commonwealth was Samuel Broome of the Louisville Metro Department of Corrections. (Audio CD 2, 12-7-10, 6:22). Before Officer Broome could commence his testimony after being sworn the defense made a motion to suppress. (Audio CD 2, 12-7-10, 6:40). Specifically, the defense made a motion to suppress on the basis that the Appellee was not afforded his statutory right to attempt to contact an attorney as set out at KRS 189A.105. (Audio CD 2, 12-7-10, 6:40-7:25). The defense readily acknowledged that the basis of its suppression motion was a "statutory directive." (Audio CD 2, 12-7-10, 7:57). The defense argued that the trial court was required to "suppress statements and everything else that is fruit of the poisonous tree." (Audio CD 2, 12-7-10, 7:36).

The Jefferson District Court overruled the Commonwealth's objection to the timing of the suppression motion and permitted the motion to go forward for a ruling. (Audio CD 2, 12-7-10, 13:15). Officer Broome testified that he was on duty at Metro Corrections on March 15, 2009. (Audio CD 2, 12-7-10, 16:03). After asking the Appellee if he had anything in his mouth, (CD 2, 12-7-10, 19:19), he read the implied consent warning to the Appellee. (Audio CD 2, 12-7-10, 19:40). As part of that warning, the officer explained that drunk drivers are told that they have ten minutes and no more than fifteen minutes to attempt to contact an attorney. (Audio CD 2, 12-7-10, 23:40).

The officer explained that his records from that morning at Metro Corrections reflected that the Appellee chose not to attempt to contact an attorney. (Audio CD 2, 12-7-10, 25:20). On cross-examination, Officer Broome explained that he did not recall the Appellee saying to him that he wanted to call his daughter to try to obtain an attorney's name and telephone number. (Audio CD 2, 12-7-10, 29:10). In any event, he further explained that even if the

Appellee had asked for permission to call his daughter the answer from him would have been "no". (Audio CD 2, 12-7-10, 29:20).

During the suppression proceedings in the Jefferson District Court the Appellee readily acknowledged that he was told by Officer Broome that he had a right to attempt to contact a lawyer the morning of his arrest. (Audio CD 2, 12-7-10, 34:45). He claimed that he told Officer Broome that he wanted to contact his daughter to get a telephone number of a "family attorney."[3] (Audio CD 2, 12-7-10, 34:55). According to the Appellee, he was told by Officer Broome he was not permitted to attempt to call his daughter but that he could attempt to contact an attorney that morning. (Audio CD 2, 12-7-10, 35:00).

The Appellee further acknowledged that he was told that he could use the phones that were located in the testing area. (Audio CD 2, 12-7-10, 36:30). He also freely admitted that phone books were provided for his use to obtain a lawyer's telephone number. *Id.* The Appellee also frankly acknowledged that there were also some attorney phone numbers posted on the wall in the area. (Audio CD 2, 12-7-10, 36:40-37:00).

At the conclusion of proof and the arguments of counsel, the Jefferson District Court declined the Appellee's invitation to grant his suppression motion. Specifically, the Jefferson District Court explained that even if Appellee had requested to be permitted to call his daughter such a request does not trigger KRS 189A.105 explaining "that doesn't meet the test here." (Audio CD 2, 12-7-10, 52:50). Thereafter, the Appellee entered a conditional plea of guilty to the offense of driving under the influence (Audio CD 2, 12-7-10, 1:07:10), and a timely appeal to the Jefferson Circuit Court then followed.

[3] Even the Jefferson Circuit Court, in its *Opinion*, acknowledged that the Appellee did not "personally know" the lawyer referred to as the "family attorney" and that the so called "family attorney" had merely "represented Mr. Bedway's daughter in a previous matter." (Appendix, p. 14).

The Jefferson Circuit Court, sitting in its appellate capacity, rendered its complained about *Opinion* in this case on June 8, 2011. (Appendix, pp. 12-25). The Jefferson Circuit Court concluded that the Appellee's statutory right to attempt to contact and communicate with an attorney was denied by the failure to allow the Appellee to attempt to contact his daughter following his arrest. (Appendix, p. 22). The Jefferson Circuit Court then went on to hold that the evidence of the Appellee's .161 alcohol level the night of his arrest for driving while drunk had to be excluded. (Appendix, pp. 24-25). Despite the absence of a statutory remedy for any claimed violation of the statute, the Jefferson Circuit Court concluded that it was required to impose the drastic remedy of the exclusion of the breath test result as "the absence of a remedy when a right is violated is an untenable result...". (Appendix, p. 23).

Thereafter, the Commonwealth obtained discretionary review of the *Opinion* of the Jefferson Circuit Court which held that the Appellee was deprived of the statutory right under KRS 189A.105(3) "to attempt to contact and communicate with an attorney" and that application of the exclusionary rule was the appropriate remedy. The Court of Appeals, in a To Be Published *Opinion* rendered on October 26, 2012 affirmed the decision of the Jefferson Circuit Court. (Appendix, pp. 1-11). Writing that it was merely adhering to its decision in Ferguson v. Commonwealth, 362 S.W.3d 341 (Ky. App. 2011), which mandated the retrieval of a drunk driver's confiscated cell phone to obtain an attorney's phone number, the Court of Appeals concluded that the Respondent's request to call his daughter fell within the scope of the statute. (Appendix, pp. 10-11). Additionally, the Court of Appeals approved the application of the exclusionary rule to the purported violation of the state statute. (Appendix, p.11).

ARGUMENT

1. Introduction.

Kentucky's implied consent law was initially enacted by the General Assembly in 1968 and was codified at KRS 186.565. *See,* Washburn v. Commonwealth, 433 S.W.2d 859, 861 (Ky. 1968). In 1991 the original implied consent statute codified at KRS 186.565 was repealed and replaced by KRS 189A.103. Litteral v. Commonwealth, 282 S.W.3d 331, 333 (Ky.App. 2008). Additionally, "[t]he consequences of refusing to submit to testing were addressed in KRS 189A.105(2)." *Id.* As the Court of Appeals recognized in Litteral, "[i]n 2000, the legislature added a **very limited right** to attempt contact with an attorney.[emphasis added]" *Id.* That "**very limited right**" is set out at KRS 189A.105(3):

> During the period immediately preceding the administration of any test, **the person shall be afforded an opportunity** of at least ten (10) minutes but not more than fifteen (15) minutes to **attempt to contact and communicate with an attorney** and shall be informed of this right. **Inability to communicate with an attorney during this period shall not be deemed to relieve the person of his obligation to submit to the tests** and the penalties specified by KRS 189A.010 and 189A.107 shall remain applicable to the person upon refusal. Nothing in this section shall be deemed to create a right to have an attorney present during the administration of the tests, but the person's attorney may be present if the attorney can physically appear at the location where the test is to be administered within the time period established in this section. [emphasis added].

The Court of Appeals in Litteral explained that the statutory provision regarding the attempt to contact an attorney is "**a very limited right**" and that the "right" set out in the statutory provision is "**very circumscribed.**" Litteral, at 333. In this *Brief*, the Commonwealth shall demonstrate that the action taken by the Jefferson Circuit Court and subsequently affirmed by the Court of Appeals in its To Be Published *Opinion* should be reversed. The Jefferson Circuit Court, in its *Opinion,* directed that "[a]ny evidence obtained after Mr. Bedway was not an

opportunity to call his daughter must be suppressed, ..." (Appendix, p. 25). Of course, "any evidence" includes the most critical piece of evidence the Commonwealth possesses to demonstrate the Appellee's guilt beyond a reasonable doubt – the breath test results showing that subsequently the Appellee's alcohol level was more than twice the .08 limit imposed by statute. The Court of Appeals subsequently gave its imprimatur to the application of the exclusionary rule to the facts and circumstances of this case (Appendix p. 11).

It is manifest that timely and accurate alcohol concentration test results of drunk drivers is the most critical piece of evidence to successfully prosecute drunk drivers. As the panel of the Court of Appeals in Litteral recognized, the General Assembly necessarily limited the scope of the statutory right to attempt to contact an attorney. If the General Assembly wanted to create a statutory right to contact third persons such as family members, drinking buddies, or friends and acquaintances, it could have easily said so. By the statute's express language nothing more than an opportunity to attempt to contact and communicate with **an attorney** is required. When read with the requirements now imposed by the Court of Appeals' earlier decision in Ferguson, law enforcement officials will now be required to retrieve confiscated cell phones or other personal items so that drunk drivers can retrieve the calling information of third parties. Simply put, the courts below have incorrectly expanded the limited statutory right to attempt to contact an attorney well beyond the scope of that contemplated by the General Assembly.

Further, the Court of Appeals erroneously approved the drastic remedy of the exclusion of the Commonwealth's most pivotal piece of evidence in a drunken driving-case the results of the test administered following arrest to determine alcohol concentration. *See*, KRS 189A.103(1). The Commonwealth shall demonstrate that the drastic remedy imposed by the Jefferson Circuit Court and subsequently approved by the Court of Appeals is reserved **only** for

violations of fundamental constitutional rights. Even if the courts below were somehow correct in construing the statute as somehow creating a right to attempt to contact third persons, the drastic remedy of the exclusionary rule is simply not authorized by law. Any remedy for a purported violation of the statute is properly the province of the General Assembly which created the statutory right in the first place. Any remedy for a violation of the statute is an issue which ultimately rests with the legislative branch regarding the scope of Kentucky's implied consent statutory framework.

2. Impermissible Expansion of the Scope of the Statute.

KRS 189A.105(3) simply provides, in relevant part, that once a drunk driver has been asked to submit to a breath, blood, or urine test, "the person shall be afforded an opportunity of at least ten (10) minutes but not more than fifteen (15) minutes to attempt to contact and communicate with an attorney and shall be informed of this right." There is no dispute that the officer at Metro Corrections the night of the Appellee's arrest properly advised the Appellee of that statutory right. "The 'right' described is **very circumscribed**. It is merely the right to an opportunity... to contact and communicate with an attorney. [emphasis added]". Litteral, at 333. The very limited right provided by the statute was satisfied by Metro Corrections providing a telephone, attorney phone number information, and the statutory period of time to attempt to contact a lawyer. Simply put, the law did not require that the Appellee be given an opportunity to contact third persons – in this instance, a family member. The Jefferson District Court got it right when it concluded that a request to call a family member does not trigger the stratute.

The statutory provision which the courts below invoked to ultimately exclude the breath test results and other inculpatory evidence-KRS 189A.105(3)-is part of Kentucky's statutory scheme prohibiting persons from driving motor vehicles while intoxicated. As this Court has

observed, "a law prohibiting a person from driving a motor vehicle while intoxicated is a remedial statute." Lynch v. Commonwealth, 902 S.W.2d 813, 815 (Ky. 1995). Statutes which attempt to protect the public from persons driving a motor vehicle while intoxicated, this Court has explained, "may be liberally interpreted in favor of the public interest and against the private interest of the driver involved." *Id.* What the Court of Appeals said about the limited statutory right in Literral is certainly consistent with this Court's admonition to construe the statutory scheme in favor of the compelling public interest involved. As the Court of Appeals observed in Litteral, "the legislature intended to only allow such right as would not infringe upon the Commonwealth's need to obtain accurate evidence regarding a violation of KRS 189A.010." Litteral, at 333. The decision of the panel of the Court of Appeals is this case simply ignores the admonition of this Court that the implied consent scheme must be construed in favor of the public interest in the enforcement of the laws prohibiting impaired driving. Instead, the Court of Appeals has expanded the scope of the limited right to attempt to contact an attorney to now include attempts to contact third persons. The result in this case – the suppression of the results of the alcohol concentration test – reflects the obvious mischief that flows from the unwarranted judicial expansion of the statute.

Recognizing that the timely and accurate breath test results of a drunk driver is the most critical piece of evidence to successfully prosecute drunk drivers, the General Assembly necessarily limited the scope of the statutory right created by it. If the General Assembly wanted to create a statutory right to contact third persons such as family members, drinking buddies, or friends and acquaintances, it could have easily said so. By the statute's express language, nothing more than an opportunity to attempt to communicate with **an attorney** is required. As noted earlier herein, the Appellee frankly conceded at trial that he was advised of the right and

given access to telephones to attempt to make contact with a lawyer the morning of his arrest. Further, he also readily admitted that he was provided access to telephone books as well as posted attorney contact information at Metro Corrections.

When persons accused of drunken driving are taken into custody, items such as cell phones, wallets and purses are confiscated for obvious security reasons. Furthermore, it is hardly a secret that many if not most drunk driving arrests occur in the wee hours of the morning when staffing levels at law enforcement facilities are necessarily less. However, the Court of Appeals now seemingly takes the position in its expansion of the right which just five years ago it said was "very circumscribed" to require officials to retrieve cell phones or other confiscated items as set out in its decision in Ferguson so that accused drunk drivers can attempt to contact third persons and not just lawyers. Needless to say, those kinds of expanded requirements imposed upon law enforcement officials will unduly complicate the requirement of personal observation for a minimum of twenty minutes as required by KRS 189A.103(3)(a) for purposes of observation to insure that a "subject shall not have oral or nasal intake of substances which will affect the test." 500 KAR 8:030 Section 1(1).

As the Commonwealth noted earlier herein, the decision in this case was bootstrapped on to the Court of Appeals' earlier decision in Ferguson. A reading of the decision in Ferguson reflects that the panel of the Court of Appeals in that case relied upon the Court of Appeals' earlier decision in Commonwealth v. Long, 118 S.W.3d 178 (Ky.App. 2003) requiring government actors to make reasonable efforts to assist a drunk driver in obtaining an independent alcohol test **after** the Commonwealth has obtained its initial test. However, the application of the Long rationale to cases where the initial breath test has yet to be obtained simply fails to recognize a critical distinction. The Court of Appeals itself in Litteral

recognized that the Commonwealth has an obvious need for an accurate and timely initial test to successfully prosecute drunk drivers which necessarily limits the scope of the "right" to attempt to communicate and consult with an attorney. Once a drunk driver has cooperated and given the Commonwealth that what which it rightly requests - the initial test for alcohol concentration – the equation changes and pursuant to Long the Commonwealth is required to provide reasonable accommodations to effectuate the right to an independent alcohol concentration test.

The Court of Appeals' expansion of the scope of the right to attempt to communicate with an attorney set out in the implied consent statute to now include communications with third persons will unnecessarily frustrate the vigorous enforcement of this Commonwealth's drunken driving laws. What bears repeating is that this Court has expressly recognized that the whole purpose of Kentucky's implied consent statutory scheme is to "**facilitate obtaining evidence** of driving under the influence.[emphasis added]" Beach v. Commonwealth, 927 S.W.2d 826, 828 (Ky. 1996). The Court of Appeals decision in this case now mandates that law enforcement officials permit communication with third persons – an ill advised expansion of the scope of what heretofore has been construed as a very limited and circumscribed statutory right.

Read in conjunction with Ferguson, drunk drivers will undoubtedly now claim that their freshly expanded right to contact not just lawyers but third persons the night of their arrest means that they are entitled access to cell phones, wallets, or purses in order to retrieve the phone numbers of third persons so that they may meaningfully effectuate their expanded statutory right. Of course, these demands for access to cell phones, wallets or purses to retrieve contact information for third persons will be made most typically at a time when staffing at testing facilities will be minimal and while the breath test operator is required to keep the

offender under personal observation. The decision of the Court of Appeals simply ignores these very practical and real concerns demonstrating why any expansion of the statute is best left to judgment of the General Assembly.

The Court of Appeals has strayed well off the path by expanding the scope of what another panel of the Court of Appeals just five years ago said was a very limited and circumscribed statutory right. The expansion of the scope of the statutory right to contact an attorney to know include attempts to communicate with third persons is contrary to the remedial purpose of this Commonwealth's drunken driving statutory scheme. The expansion of the scope of the statutory right to contact an attorney to now include third persons is contrary to the remedial purpose of this Commonwealth's drunken driving laws. As this Court has observed, "a law prohibiting a person from driving a motor vehicle while intoxicated is a remedial statute." Lynch v. Commonwealth, 902 S.W.2d 813, 815 (Ky. 1995). The statute which the General Assembly in this Commonwealth has enacted prohibiting driving while drunk, "may be liberally interpreted in favor of the public interest and against the private interests of the driver involved." *Id.* The expansion of the scope of the statutory right in this case is wholly inconsistent with this Court's admonition to construe the statutory scheme against drunk driving in favor of the compelling public interest involved. Any expansion of the scope of the statute is properly vested in that branch of government which created the limited right in the first place – the General Assembly.

3. Improper Application Of The Exclusionary Rule.

The expansion of the scope of the statutory right created by the Court of Appeals would be less troublesome to the Commonwealth's driving under the influence enforcement efforts if it did not go on to apply the exclusionary rule to the purported violation of the statutory right.

The Court of Appeals simply ignored what this Court has repeatedly said concerning the application of the exclusionary rule for the violation of provisions of a state statute where no constitutional right is involved.

The strong medicine of excluding at trial the results of the alcohol concentration test result is contrary to what this Court said in Beach v. Commonwealth, 927 S.W.2d 826, 828 (Ky. 1996) and bears repeating verbatim:

> **Exclusion of evidence for violating the provisions of the informed consent statute is not required. It has been held in Kentucky and elsewhere that in the absence of an explicit statutory directive, evidence should not be excluded for the violation of provisions of a statute where no constitutional right is involved.** *See* Little v. Commonwealth, Ky., 438 S.W.2d 527 (1968). The Commonwealth cites a number of authorities from other state and federal courts. We find the language of the Wisconsin Supreme Court to be persuasive. It held in State v. Zielke, 137 Wis.2d 39, 403 N.W.2d 427 (1987), that the exclusion of evidence was not required for violation of the implied consent statute of the state noting that the overall purpose of the legislation was to facilitate obtaining evidence of driving while under the influence. KRS 446.080(1) provides that all statutes of this state shall be liberally construed with a view to promote their objects and to carry out the intent of the legislature.
>
> **Even under the interpretation urged by Beach, the statute contains no explicit or implicit directive from the General Assembly that required exclusion of evidence obtained.** The United States Supreme Court has held that a blood test does not violate the Federal Due Process Clause, the Fifth Amendment against self-incrimination, the Sixth Amendment right to counsel or the Fourth Amendment right to unlawful search and seizure. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). [emphasis added].

Just a year after the decision in Beach, this Court considered the suppression of evidence which was arguably illegally obtained in violation of Kentucky's eavesdropping statute, KRS 526.020. Once again, this Court reaffirmed the fundamental principle that exclusion of evidence "applies only to evidence obtained in violation of a **constitutional right**, ... [emphasis added] ."

Brock v. Commonwealth, 947 S.W.2d 24, 29 (Ky. 1997). Likewise, in Saylor v. Commonwealth, 44 S.W.3d 812, 816-817 (Ky. 2004) this Court noted that even if evidence admitted at trial was obtained by police in violation of KRS 72.020(2), any violation as that statutory provision "would **not** require its exclusion. [emphasis added]" *Id.* More recently, this Court revisited this principle and concluded that a violation of the state statutes regarding the Combined DNA Index System database would **not** entitle an offender to suppression of the evidence. Johnson v. Commonwealth, 327 S.W.3d 501, 511 (Ky. 2010).

This Court has repeatedly spoken clearly and unequivocally on the subject. Furthermore, what the Court of Appeals said in this case is seemingly at odds with what another panel of the Court of Appeals said just five years ago in Litteral. The panel of the Court of Appeals in the Litteral case flatly rejected the notion that suppression is required as a result of a claimed violation of the statutory right to an opportunity to contact and communicate with an attorney. The panel of the Court of Appeals in Litteral observed in no uncertain terms that Kentucky law provides that "[e]xclusion of evidence for violating the provisions of the implied consent statute is not mandated absent an explicit statutory directive. [emphasis added]." Litteral, at 335 *quoting* Beach v. Commonwealth, 927 S.W.2d 826, 828 (Ky. 1996).

In this case, the Court of Appeals looked to what it had previously said in Ferguson to justify its application of the exclusionary rule. In so doing, it quoted from the language in Ferguson that where the right to contact and communicate with an attorney "was frustrated by state action" suppression is somehow mandated. (Appendix, p. 9). As best the Commonwealth can glean, the Court of Appeals concluded that application of the exclusionary rule is required because so as not to make the right created by the statute "meaningless". (Appendix, p. 9). Needless to say, the strained reading by the Court of Appeals simply ignores the clear and

unequivocal language of the statute that "[i]nability to communicate with an attorney during this period shall not be deemed to relieve the person of his obligation to submit to the test..." The application of the exclusionary rule by the Court of Appeals to the very limited right to attempt to communicate with an attorney is contrary to the decisions of this Court concerning the proper application of the exclusionary rule **and** the express language of the statute itself.

As noted above, the Court of Appeals relied upon the language of its earlier Ferguson decision to support application of the exclusionary rule. According to the Court of Appeals, failure to apply the harsh medicine of the exclusionary rule would render the statutory right "meaningless". (Appendix, p. 9). Of course, that sort of analysis effectively eviscerates the fundamental principle repeatedly affirmed by this Court that violations of state statutes do **not** require exclusion of evidence. If application of the exclusionary rule is required to prevent the statutory right from somehow being rendered "meaningless" then there is seemingly no statutory right which does not compel the exclusion of evidence. Of course, the analysis of the Court of Appeals ends up with a result completely at odds with what this Court has previously said that the exclusionary rule applies **only** to fundamental constitutional violations.

Exclusion of evidence is reserved for fundamental constitutional violations since such a harsh remedy "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence" and "its bottom line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." Davis v. United States, 564 U.S. – ,131 S.Ct. 2419, 2427, 18 L.Ed.2d 285 (2011). The whole purpose of suppression is to deter constitutional violations. Without a constitutional violation, there is no deterrent benefit to suppression based on a mere statutory violation. *See*, United States v. Ware, 161 F.3d 414, 424 (6th Cir. 1998). As the Commonwealth noted earlier, the whole purpose of Kentucky's statutory

drunken driving scheme is remedial in nature and is to be construed in favor of the public's interest. Further, Kentucky's implied consent statutory scheme exists to facilitate the collection of evidence for the successful prosecution of driving under the influence cases. The application of the exclusionary rule for purported violations of the statutory right in this case is wholly inimical to the remedial nature of the statutory scheme and the very purpose of the implied consent law of this Commonwealth. The decision of the Court of Appeals has impermissibly applied the exclusionary rule to frustrate the Commonwealth's obvious interest in the vigorous enforcement of its drunk driving laws. The decision of the Court of Appeals should be reversed.

CONCLUSION

For the reasons set out above, the Commonwealth of Kentucky respectfully requests that the To be Published *Opinion* of the Court of Appeals in the above-styled case be **reversed**, and this case remanded to the Jefferson District Court for further proceedings .

Respectfully submitted,

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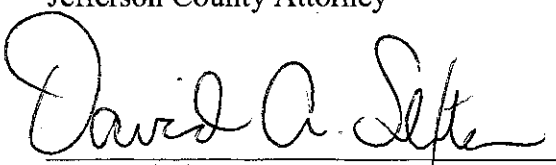

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APPENDIX