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COMMONWEALTH OF KENTUCKY

APPELLANT

v. Appeal from Powell Circuit Court
Hon. Frank Allen Fletcher, Judge
Indictment Nos. 09-CR-133-002 & 09-CR-143

FLOYD GROVER JOHNSON

APPELLEE

**Brief for Amici Curiae Commonwealth's Attorneys
Association, County Attorneys Association, Justice
and Public Safety Cabinet, Kentucky State Police,
✓Kentucky Office of Drug Control Policy,
Kentucky Narcotic Officers Association, and
Operation UNITE**

Certificate of Service

I certify that the record on appeal has not been checked out from the Clerk's office. I also certify that a copy of this brief has been served this ~~19~~¹⁷ day of April, 2013, as follows: by mailing to the trial judge, Hon. Frank Allen Fletcher, Judge, Breathitt County Judicial Center, P.O. Box 946, Jackson, KY 41339-0946; by sending electronic mail to Hon. Darrell Herald, Commonwealth's Attorney; and by delivery to Hon. Emily Holt Rhorer, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601; and by delivery to Hon. Jack Conway, Office of Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601.

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Introduction¹

The first purpose of this amici brief will be to address the authority of the Attorney General to investigate drug crimes without an invocation of his authority under KRS 15.200 but which are prosecuted by the local Commonwealth's Attorney and the functioning of the Unified Prosecutor System per KRS 15.700 et seq. The second purpose of this amici brief will be to address whether a statutory violation regarding the venue² of the investigator operates to create an exclusionary rule as to evidence of a criminal investigation and whether any exclusionary rule for a statutory violation applies to evidence presented to a grand jury.

Amici disagree with the Court of Appeals' rulings in this case and view this case as having major ramifications on the functioning of the Unified Prosecutor System in future cases. Because prosecutors and law enforcement officers often need to share resources regardless of county boundaries (sometimes on an ad hoc informal basis) and at least in some cases are required by law to do so, amici contend that they will be necessarily be affected by the Court's rulings. Any potential ruling by the Court regarding an exclusionary rule for investigators and grand juries could have a major effect on the duties for law enforcement officers and prosecutors.

1

The official name of Operation UNITE is Unlawful Narcotics Investigation, Treatment and Education, Inc., but this brief will refer to it, as did the Court of Appeals, as "UNITE."

2

The Court of Appeals and the parties at various times characterized this issue as one of "jurisdiction" for the investigators. However, amici view this as an issue of venue because of the existence of a Unified Prosecutor System per KRS 15.700 and the Court's definitions of venue and jurisdiction in Commonwealth v. Cheeks, 698 S.W.2d 832 (Ky. 1985). There was no dispute in this case about whether the investigators could investigate illegal sales of controlled substances in some counties in Kentucky or about whether they could have been authorized to do so under the Interlocal Cooperation Act; the dispute is limited to Powell County. That point will be addressed in the argument section of the amici brief.

Statement of the Case

As the result of a conditional guilty plea, Johnson was convicted per the two indictments for three counts of first-degree trafficking in a controlled substance, second or subsequent offense, and one count of delivery of drug paraphernalia. Johnson appealed the denial of his motion to dismiss the indictment on the ground that the officers (investigators employed by the Attorney General and the UNITE multi-county task force) who investigated his case exceeded their authority by investigating drug cases in Powell County. The Court of Appeals reversed and remanded. “[W]e must conclude that, without a proper invitation [under KRS 15.200] to investigate in Powell County, the Attorney General and, correspondingly, the UNITE officers, were without authority to initiate the investigation of Johnson, which ultimately led to his grand jury indictment.” Court of Appeals, slip op., p.10. This Court granted the Commonwealth’s motion for discretionary review in this case.

Although amici disagree with the Court of Appeals’ opinion regarding the law, the amici will accept the Court of Appeals’ statement of the facts as substantially correct with following exceptions and additions.

The indictment in this case was prosecuted by the Powell County Commonwealth’s Attorney, Hon. Darrell Herald. (11/4/2009 TE 2,8-11; 11/18/2009 TE 2; 12/9/2009 TE 2; 1/6/2010 TE 2; 2/17/2010 TE 2, 21; 2/3/2010 TE, entire transcript). The investigators as to the crimes charged were employed by UNITE and were under the supervision of the Office of Attorney General (OAG). (2/17/2010 TE 11; TRI 3; TRII 2)³. There was no allegation or

³

TRI refers to indictment 09-CR-133-002, and TRII refers to indictment 09-CR-143. All hearing transcripts and pleadings cited pertain to both regardless of which TR is cited.

argument that the Commonwealth's Attorney had any investigator in his employment, that the Attorney General coerced the Commonwealth's Attorney to prosecute the indictments, or that the OAG/UNITE investigation interfered with any investigative work by the Powell County law enforcement agencies. (TRII 15-19; TRII 37-41; 2/27/2010 TE 5-20). The OAG/UNITE investigators did not arrest Johnson. (TRII 23-24).

ARGUMENT

Preservation

In the circuit court, Johnson asked for both suppression of the evidence and dismissal of the indictments and argued: "The Attorney General's Office exceeded their [sic] constitutional powers by acting outside KRS 15.200. As such, this [Circuit] Court does not have subject-matter jurisdiction over this matter and the evidence obtained must be suppressed and this case must be dismissed. ****Neither the Attorney General nor Operation UNITE had any statutory or constitutional powers to be conducting investigations in Powell County." (TRII 16-17, 18). The OAG argued that its investigators had state-wide jurisdiction and that neither dismissal nor suppression would be proper remedies even assuming the alleged violation of the law. (TR II 24-30, 31). The OAG further argued that the circuit court had subject-matter jurisdiction. (TRII 32). Johnson did not reiterate the argument about lack of trial court jurisdiction in his reply and oral argument in the circuit court. (TRII 37-41; 2/27/2010 TE 5-20).

I. The Attorney General's powers as chief law officer, chief enforcement officer, and chief prosecutor authorize his office to investigate crimes and doing so does not supersede or preempt the authority of local Commonwealth's Attorneys.

As previously noted, the OAG/UNITE investigation into illegal drug sales in Powell

County did not supersede or preempt any authority of the local Commonwealth's Attorney. Under KRS 15.020 and 15.700, the Attorney General is granted the authority of chief law officer, and under KRS 15.700 (effective January 1, 1978), the Attorney General is made the chief law enforcement officer and chief prosecutor of the Commonwealth. Under KRS 15.150, the Attorney General is empowered to employ investigators with the powers of peace officers, and that statute does not limit their function or authority. KRS 15.700 was enacted at the 1976 Extraordinary Session as part of a package of statutes to create a Unified Prosecutor System to parallel the creation of the Unified Court System per the 1975 Judicial Article amending the Kentucky Constitution. Significantly, the Court of Appeals' opinion focused exclusively upon statutes and opinions predating the creation of the Unified Prosecutor System.

KRS 15.700, effective January 1, 1978, enacted by *Kentucky Acts, 1976 Extraordinary Session*, Chapter 17, Section 1, states:

It is hereby declared to be the policy of this Commonwealth to encourage cooperation among law enforcement officers and to provide for the general supervision of criminal justice by the Attorney General as **chief law enforcement officer** of the Commonwealth, in order to maintain uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the Commonwealth. To this end, a unified and integrated prosecutor system is hereby established with the Attorney General as **chief prosecutor** of the Commonwealth. [Emphasis added.]

The powers of the Attorney General were summarized by the Court in St.Clair v. Commonwealth, 140 S.W.3d 510, 530-531 (Ky. 2004), as follows:

Section 93 of the Kentucky Constitution provides that the duties and responsibilities of Constitutional State Officers, including the Attorney General, "shall be prescribed by law." Accordingly, **our statutes make the Attorney General "the chief law officer of the Commonwealth[.]"** KRS

15.020. And, “[t]o encourage cooperation among law enforcement officers [...] ... to provide for the general supervision of criminal justice [...] ... and ... to maintain uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the Commonwealth,” *Commonwealth v. Wilson*, Ky., 622 S.W.2d 912, 914 (1981), the General Assembly has enacted KRS 15.700, which establishes a unified integrated prosecutor system in Kentucky “with the Attorney General as chief prosecutor of the Commonwealth.” Given that the Attorney General “may act as prosecutor ... when so directed by statute,” *Graham v. Mills*, Ky., 694 S.W.2d 698, 701 (1985), the General Assembly has enacted a number of statutory provisions that authorize the Attorney General to prosecute criminal actions under certain circumstances. See, e.g. KRS 15.190 (when requested to do so in writing by a County or Commonwealth Attorney); KRS 15.200 (when requested to do so in writing by other identified officers); KRS 15.225 (prosecution of county financial administration); KRS 15.231 (theft of identity and trafficking in stolen identity cases); KRS 15.240 (violations by abortion facilities); KRS 15.242–15.243 (enforcement of election laws); KRS 15.715 (when authorized to do so by the Prosecutors' Advisory Council). By authorizing the Attorney general to direct the investigation and prosecution of criminal actions only in “given, limited situation[s],” *Hancock v. Schroering*, Ky., 481 S.W.2d 57, 61 (1972), “[t]he legislature has provided a check to prevent the Attorney General from usurping and pre-empting the office of Commonwealth's attorney[.]” *Id.* [Emphasis added.]

This Court has emphasized the authority of the Attorney General as chief law enforcement officer. “KRS 15.700 created a unified and integrated prosecutorial system, and the general supervision of criminal justice was placed in the office of Attorney General as chief law enforcement officer.” *Graham v. Mills*, 694 S.W.2d 698, 701 (Ky. 1985). Also see, *Commonwealth ex rel. Stumbo v. Wilson*, 622 S.W.2d 912 (Ky. 1981). “Pursuant to KRS 15.020 and 15.700, the Attorney General is the chief law officer and chief prosecutor of the Commonwealth and has a duty to see that the laws of the Commonwealth are enforced.” *Hodge v. Commonwealth*, 116 S.W.3d 463, 474 (Ky. 2003). “[U]nder the common law, the attorney general has the power to bring any action which he or she thinks necessary to protect the public interest, a broad grant of authority which includes the power to act to enforce the

state's statutes.” Commonwealth ex rel. Conway v. Thompson, 300 S.W.3d 152, 172-173 (Ky. 2009), citing, Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865, 867 (Ky.1974), and 7 Am.Jur.2d *Attorney General* § 6. The power to supervise enforcement of criminal law statutes is meaningless unless the Attorney General has the power to investigate violations of the law. As noted in Commonwealth ex rel. Breckinridge v. Nunn, 452 S.W.2d 381, 383 (Ky. 1970), “The express power [granted by statute] carries with it all powers essential to its exercise.”

7A *C.J.S.*, *Attorney General*, Sec. 26, states in part:

In some jurisdictions, the attorney general is a constitutional officer possessed of all the power and authority inherited from the common law, as well as that specially conferred upon him or her by statute. Statutory provisions imposing various duties and conferring various powers on the attorney general are **not intended to mark the limits of his or her authority**, but merely to indicate specific duties and confer definite authority in each instance. **Accordingly, a grant by statute of the same or other powers does not operate to deprive the attorney general of those belonging to the office pursuant to the common law unless the statute, either expressly or by reasonable intentment, forbids the exercise of powers not expressly conferred.** [Footnote citations omitted. Emphasis added.]

C.J.S. cites Haggerty v. Himelein, 89 N.Y.2d 431, 677 N.E.2d 276 (N.Y. 1997), which held that absence of the Governor’s executive order did not deprive Attorney General of jurisdiction to merely assist the local district attorney by furnishing Assistant Attorneys General to work with and at direction of district attorney, without exercising superseding authority. [*C.J.S.* erroneously attributed the ruling to the Appellate Division.] The silence of the local prosecutor regarding actions taken by the Attorney General in a criminal case can operate as implied consent for those actions. Saldano v. State, 70 S.W.3d 873, 883-884 (Tex. Crim. App. 2002). In Commonwealth v. Euster, 237 Ky. 162, 25 S.W.2d 1 (1931), the Court

recognized that when the local Commonwealth's Attorney objects to an action taken in a criminal case in circuit court without his approval, he is authorized to file a motion to dismiss the indictment, and the court is authorized to do so.

KRS 218A.240(1) states:

All police officers and deputy sheriffs directly employed full-time by state, county, city, urban-county, or consolidated local governments, the Department of Kentucky State Police, the Cabinet for Health and Family Services, their officers and agents, and of all city, county, and Commonwealth's attorneys, and the Attorney General, within their respective jurisdictions, shall enforce all provisions of this chapter and cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states relating to controlled substances.

The Court of Appeals correctly quotes Matthews v. Pound, 403 S.W.2d 7, 10-11 (Ky. 1966), as explaining that as of that date, "The duties of the Attorney General have been enlarged by KRS 15.190, 15.200, and 15.210." However, the Court of Appeals erred by ruling in effect that KRS 15.200 limited the powers of the Attorney General to investigate and by failing to consider the effect of the enlargement of the authority of the Attorney General by the enactment of KRS 15.700 et seq.

As noted by this Court in Hancock v. Schroering and St. Clair v. Commonwealth, *supra*, KRS 15.200 clearly prevents the Attorney General from "preempting" or subordinating the local Commonwealth's Attorney regarding the grand jury unless one of the agencies listed invoked the statute to authorize the Attorney General to do so. However, the statute is silent about investigations prior to and outside of the grand jury proceedings. No statute directs a Commonwealth's Attorney to conduct criminal investigations independently of the grand jury. See 15.725(1), noting that the Commonwealth's Attorney "shall have

primary responsibility within his judicial circuit to present evidence to the grand jury...” There is statutory authority for a Commonwealth’s Attorney to employ a Commonwealth’s Detective or investigation staff. KRS 69.110; KRS 15.760(2). However, KRS 69.110 seems to imply the investigation authority is limited to cases pending in circuit court, but the point is not clearly stated.

No argument in this case was made that the Powell County Commonwealth’s Attorney employed a Commonwealth’s Detective, and even assuming that he might have, no argument was made that the illegal drug sales investigations by the OAG/UNITE officers in any way interfered with or superseded any investigation undertaken by the Commonwealth’s Attorney or even some other Powell County law enforcement agency. As already noted, the court record in this case conclusively established that the prosecution of the indictments in this case was conducted by the Commonwealth’s Attorney. No argument was made that the Attorney General compelled or coerced the Commonwealth’s Attorney to prosecute these indictments. As noted, KRS 218A.240(1) requires the cooperation of all law enforcement officers and prosecutors regarding violations of KRS Chapter 218A.

Amici also disagree with the Court of Appeals’ ruling that alleged error in this case was one regarding the “jurisdiction” of the OAG in light of the existence of the Unified Prosecutor System. Commonwealth v. Checks, 698 S.W.2d 832 (Ky. 1985), explained the difference between subject-matter jurisdiction and venue as to courts, and that circuit courts have jurisdiction over all felony crimes committed within Kentucky. Winstead v. Commonwealth, 327 S.W.3d 386, 409-411 (Ky. 2010), explained that as the result of the 1975 Constitutional Amendment reorganizing Kentucky’s court system, all circuit court

judges have state-wide jurisdiction, but each judge's authority to act outside of his circuit is regulated by venue statutes and court rules, and that violations of these provisions may be waived.

There was no argument in this case that the OAG/UNITE officers lacked authority to investigate drug or criminal cases everywhere in Kentucky. Under KRS 65.255, part of the Interlocal Cooperation Act, the authority of law enforcement officers to conduct investigations can be extended into other counties by duly enacted and approved local ordinances, so the issue of the officers' territory is similar to the type of court rule at issue in Winstead because there is no absolute bar against working in other counties. Thus, amici views the issue as pertaining to the venue of the officers and not an immutable issue of subject-matter jurisdiction.

The Court of Appeals' ruling on the issue of OAG "jurisdiction" to investigate creates an anomaly because the Court has ruled that Commonwealth's Attorneys have state-wide jurisdiction per KRS 69.013 authorizing them to act as special prosecutors co-extensive throughout the Commonwealth as directed by the Attorney General. Commonwealth ex rel. Hancock v. Davis, 521 S.W.2d 823 (Ky.1975). Also see, KRS 15.730⁴. Therefore, under that ruling all locally elected Commonwealth's Attorneys have state-wide "jurisdiction", but according to the Court of Appeals' opinion, the Attorney General, the only state-wide elected law enforcement officer, does not have state-wide "jurisdiction" to investigate and cannot

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The bill enacting KRS 15.730 was apparently intended to replace and repeal KRS 69.013, but according to the LRC, a bill later enacted at the same session revived KRS 69.013. Both statutes authorize Commonwealth's Attorneys to act as special prosecutors state-wide.

investigate drug cases anywhere unless KRS 15.200 is invoked by another agency to supersede the local Commonwealth's Attorney in a particular county even though the Commonwealth's Attorney's power as a prosecutor will not be superseded.

The Court of Appeals' analysis also reflects an additional, but unstated error, because it in effect applied the statutory rule of construction, *Expressio unius est exclusio alterius* (expression of one is exclusion of any other), without the proper analysis as required by this Court. Fox v. Grayson, 317 S.W.3d 1, 8-11 (Ky. 2010). As noted therein, other statutes pertaining to the same subject or legislative policies may supersede that rule of statutory construction and that rule should only be applied as a last resort. "So we will use *expressio unius*, but only as an aid in arriving at legislative intention, and not to defeat it. Because the *expressio unius* maxim is only a rule of construction, and not substantive law, we must use it only when that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment." *Id* at 9. (Internal quotations omitted. Footnote citations omitted.) "[I]f a plain reading of the statute yields a reasonable legislative intent, then that reading is decisive and must be given effect regardless of the canons and regardless of our estimate of the statute's wisdom." King Drugs, Inc. v. Commonwealth, 250 S.W.3d 643, 645 (Ky. 2008). Also see, Public Service Com'n v. Commonwealth, 320 S.W.3d 660, 666-667 (Ky. 2010).

"Statutes in *pari materia* or those which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose, must be construed together and the legislative intention apparent from the whole enactment must be carried into

effect.” Commonwealth ex rel. Conway v. Thompson, 300 S.W.3d at 170, quoting from Milner v. Gibson, 249 Ky. 594, 61 S.W.2d 273, 277-278 (1933). KRS 446.080(1) states, “All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state.” Also see, Commonwealth v. Kash, 967 S.W.2d 37, 43-44 (Ky. App. 1997)(Abramson, J.).

Milner v. Gibson, 249 Ky. 594, 61 S.W.2d 273, 277-278 (1933), explained:

It is a fundamental rule of statutory construction that not only should the intention of the lawmaker be deduced from a view of the whole statute and of its every material part, but statutes in *pari materia* should be construed together. This means that, for the purpose of learning and giving effect to the legislative intention, **all statutes relating to the same subject are to be compared**, even though some of them have expired or been repealed, and, so far as still in force, **so construed in reference to each other that effect may be given to all of the provisions of each**, if that can be done by any fair and reasonable construction. [Internal quotation marks omitted. Emphasis added.]

KRS 15.020 and 15.700 grant the Attorney General state-wide authority as chief law officer, chief law enforcement officer, and chief prosecutor. KRS 15.150 grants the Attorney General to power to employ investigators. By necessary implication all of these statutes grant him the power to investigate crimes state-wide to determine whether the laws are being violated. The Powell County Commonwealth’s Attorney was not preempted, superseded, or subordinated by the OAG/UNITE drug investigations in this case. KRS 218A.240(1) requires cooperation among law enforcement agencies regarding crimes in violation of KRS Chapter 218A. Had the Commonwealth’s Attorney viewed his authority as usurped, he had amply opportunity and authority to file a motion to dismiss these indictments.

The Attorney General has state-wide jurisdiction. KRS 15.200 does not create a

limitation upon OAG investigations by negative implication because that statute is concerned with preempting Commonwealth's Attorneys in regard to grand juries and court cases, not investigations apart from the grand juries' investigations. The Court of Appeals erred in its analysis by focusing exclusively upon KRS 15.200 and in creating a limitation by negative implication in violation of the General Assembly's intent as expressed in other statutes regarding the Attorney General's authority as chief law enforcement officer. The Attorney General is not required to obtain an "invitation" under KRS 15.200 in order to carry out his lawful duty to insure that the Commonwealth's laws are not violated.

II. The exclusionary rule does not apply to grand juries and does not apply to the alleged statutory violation in this case.

As previously noted, Johnson argued that the exclusionary rule applied to the alleged statutory violation in this case and required both dismissal of the indictment and exclusionary of the evidence. Nothing in the language of KRS 15.200 creates any exclusionary rule, nor was any other statute cited for that authority.

The exclusionary rule does not apply to grand juries. United States v. Calandra, 414 U.S. 338 (1974); United States v. Mandujano, 425 U.S. 564, 571-574 (1976)(plurality opinion); United States v. R. Enterprises, Inc., 498 U.S. 292, 298 (1991); United States v. Williams, 504 U.S. 36, 50 (1992). A grand jury is entitled to "every man's evidence" in the absence of a contrary provision of law that creates a privilege against testifying. Branzburg v. Hayes, 408 U.S. 665, 668 (1972), *inter alia affirming*, 461 S.W.2d 345 (Ky. 1971). Also see, Beale, Bryson, Felman, Elston, *Grand Jury Law and Practice*, 2nd Ed., Sec. 4.22.

In Hoskins v. Maricle, 150 S.W.3d 1, 17-18 (Ky. 2004), the Court cited as authority

United States v. Williams and other U.S. Supreme Court opinions regarding the grand jury's authority and procedures. Cf. Partin v. Commonwealth, 168 S.W.3d 23, 30 (Ky. 2005). Rice v. Commonwealth, 288 S.W.2d 635 (Ky. 1956), quoted from Costello v. United States, 350 U.S. 359 (1956), and held that the indictment was not subject to dismissal because of the grand jury evidence. The Court reiterated the Rice ruling as still valid under RCr 5.10 in Jackson v. Commonwealth, 20 S.W.3d 906, 980 (Ky. 2000). King v. Venters, 595 S.W.2d 714 (Ky. 1980), held that an indictment is not subject to attack based upon evidence heard by the grand jury. In short, there is no legal authority in Kentucky for the argument that the exclusionary rule applies to a grand jury regarding a statutory violation.

As to the alleged violation of KRS 15.200, both the United States Supreme Court and this Court have held that a violation of statute does not in itself trigger the exclusionary rule because the exclusionary rule is concerned with the remedy for constitutional violations. Virginia v. Moore, 553 U.S. 164 (2008). This Court has held that the exclusionary rule will not be applied to statutory violations, which do not violate the Constitution, in the absence of statutory language requiring the exclusion of the evidence obtained from violating the statute. Beach v. Commonwealth, 927 S.W.2d 826, 828 (Ky. 1996); Brock v. Commonwealth, 947 S.W.2d 24, 29 (Ky. 1997); Saylor v. Commonwealth, 144 S.W.3d 812, 817 (Ky. 2004); Johnson v. Commonwealth, 327 S.W.3d 501, 511 (Ky. 2010).

In Commonwealth v. Adkins, 331 S.W.3d 260 (Ky. 2011), the Court held that KRS 218A.220 recognized innocent possession of controlled substances by private citizens for the purpose of providing the controlled substances to law enforcement as a defense to crimes in KRS Chapter 218A. There is no dispute in this case that the OAG/UNITE officers provided

the controlled substances for law enforcement and criminal prosecution. Hence even if the OAG/UNITE investigators took possession of the controlled substances outside of their proper venue, that was not a per se violation of the law.

The fact that these crimes were investigated by OAG/UNITE officers, even if in violation of KRS 15.200, did not deprive the circuit court or the Powell County Grand Jury of jurisdiction over the crimes. Commonwealth v. Cheeks, 698 S.W.2d 832 (Ky. 1985); Graham v. Mills, 694 S.W.2d 698, 700 (Ky. 1985); Commonwealth v. Bishop, 245 S.W.3d 733, 735 (Ky. 2008); Winstead v. Commonwealth, 327 S.W.3d 386, 409-411 (Ky. 2010); Baze v. Commonwealth, 276 S.W.3d 761, 767 (Ky. 2008); Jackson v. Commonwealth, 363 S.W.3d 11, 17-18 (Ky.2012), discussing Duncan v. O’Nan, 451 S.W.2d 626, 631 (Ky.1970), and the definition of subject-matter jurisdiction. The type of misconduct referenced in Bishop as a basis for dismissal does not depend upon the evidence presented to the grand jury as noted in the Bishop opinion itself. The Court of Appeals misinterpreted the Bishop opinion by suggesting otherwise.

As was noted previously, the OAG/UNITE officers testified about their investigations to the grand jury in this case, but they did not arrest Johnson. Thus, the only evidence to be excluded is based upon what the officers did and observed about Johnson before he was arrested. The officers had a duty to present the evidence of these crimes to the grand jury, and the grand jury had the duty to hear it. Thus, to the extent that the Court of Appeals held or implied that the exclusionary rule may apply, the Court of Appeals was in error.

Conclusion

For the forgoing reasons, amici request that the Court reverse the ruling by the Court of Appeals and uphold the judgment of the Powell Circuit Court.

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