pursuant to Court order

COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2012-SC-000402
(2010-CA-000607)

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM POWELL CIRCUIT COURT
HON. FRANK A. FLETCHER, JUDGE
CIR. NO. 09-CR-00133 & 09-CR-00143

FLOYD GROVER JOHNSON — APPELLEE

BRIEF FOR APPELLEE

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief for Appellee has been mailed, postage prepaid, to Hon. Frank A. Fletcher, Judge, Powell County Justice Center, 1131 Main St., P.O. Box 946, Jackson, Kentucky 41339-0946; Hon. Darrell Herald, Commonwealth Attorney, P.O. Box 744, Jackson, Kentucky 41339-0744; Hon. Lisa N. Whisman, Assistant Public Advocate, 452 Washington St., P.O. Box 725, Stanton, Kentucky 40380-0725, Hon. Denise Garrison McElvein, Assistant Missouri Attorney General and lead counsel for *amici curiae* Attorneys General of Missouri, et al., P.O. Box 861, St. Louis, MO 63188, Hon. Ian Sonego, Assistant Commonwealth's Attorney, Eight Judicial Circuit and lead counsel for *amici curiae* Commonwealth's Attorneys Association, et al., 1001 Center Street, Suite 205, Bowling Green, Kentucky 42101-2191; and by state messenger mail to Hon. Jack Conway, Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, Hon. Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601 on June 28, 2013. I hereby further certify that the record was not checked out in preparation of this Brief for Appellee.

Emily Holt Rhorer

INTRODUCTION

Floyd Grover Johnson entered a conditional guilty plea to three counts of first degree trafficking in a controlled substance, and he received a sentence of ten years. Two panels of the Kentucky Court of Appeals[1] agreed with Mr. Johnson that investigators from the Attorney General's Office did not have authority to conduct drug investigations in Powell County, Kentucky. The Court of Appeals *sua sponte* remanded the case to the trial court for an evidentiary hearing on whether the indictments should be dismissed. The Attorney General filed a motion for discretionary review, which was granted by this Court.

NOTE AS TO CITATIONS TO THE RECORD

This case does not contain a video record, rather there are transcripts of the proceedings below. Appellee cites to the transcripts as follows: TE (date) (page), i.e. "TE 2/17/10 12."

Because there were two indictments in this case, there are two volumes of TR. Citation will be as follows: TR (case number) page, i.e. "TR 09-CR-133-02 1."

STATEMENT CONCERNING ORAL ARGUMENT

Appellee does not believe oral argument is necessary, as the issues have been adequately raised in the parties' briefs. However should this Court grant oral argument, Appellee requests that the focus be on Mr. Johnson's case, which involves controlled substances, and not on "investigations into other areas such as cyber-crimes and child pornography," as Appellant suggests.

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[1] The panel in Floyd Grover Johnson's case, 10-CA-607, and the panel in Ronnie Johnson's consolidated cases, 10-CA-1867 and 10-CA-1868.

COUNTERSTATEMENT OF POINTS AND AUTHORITES

COUNTERSTATEMENT OF THE CASE

Appellee does not accept a portion of the first paragraph of the Appellant's Statement of the Case, Appellant's Brief (hereinafter "AB") 1, specifically the last three sentences that discuss "Operation Flamingo Road," and the great success of that Operation. Appellee does not accept this because this is not part of the record in the case at bar nor does the Appellant provide citation to any kind of authority to support the statistics. This case is about Floyd Grover Johnson and an investigation into his alleged activities by UNITE officers and investigators from the Attorney General's Office.

Appellee accepts the rest of the Appellant's Statement of the Case, although Appellee would point out what would seem to be one mistake. Appellee does not believe that Jennifer Carpenter from the Attorney General's office presented testimony to the Grand Jury in both cases. According to the indictments, in 09-CR-133-002, the witness at the Grand Jury proceeding was "Detective Jennifer Carpenter, UNITE Task Force, Attorney General's Office." TR 09-CR-133-002 1-3. However, in 09-CR-143, the witness at the Grand Jury proceeding was "Detective Randy Kline, UNITE Drug Task Force, Attorney General's Office." TR 09-CR-143 1-2.

ARGUMENT

Appellant first presents an unnumbered introduction to its argument in which it asks this Court to recognize his statewide authority as Attorney General. One point must be made in reference to the Appellant's discussion of the issue in this introduction. The case at bar involves the question of jurisdiction of investigators employed by the Attorney General to investigate drug crimes. This case is not about elder abuse, internet scams, or child pornography cases. The Appellant discusses the Attorney General's

Cyber-Crime Unit and states that the holding of the Court of Appeals in Mr. Johnson's case "would hamper" said Unit's investigations. Yet KRS 500.120, cited to by the Appellant in footnote 4, and titled, "Subpoena power of Attorney General in cases involving use of an Internet service account in the exploitation of children and other cases," grants broad investigatory power to the Attorney General in child exploitation cases involving the internet. Certainly that statute does authorize jurisdiction in investigating those specific crimes of child exploitation over the internet that "do not stop at the city or county line." The focus of this case should be on the investigation of drug cases.

I. THE ATTORNEY GENERAL POSSESSES LIMITED STATUTORY AUTHORITY TO INVESTIGATE DRUG CASES IN THE COMMONWEALTH.

A. Attorney General does not have general statutory authority to investigate.

Relying on KRS 15.700, Appellant states, "the General Assembly has explicitly recognized the general authority of the Attorney General's Office to investigate potential violations of criminal law." AB 7. KRS 15.700 is the first statute in the section of KRS Chapter 15 titled, "Unified and integrated prosecutor system established." It states, in full:

> 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.

The Appellant hangs it hat on the fact that the statute refers to the Attorney General as "chief law enforcement officer of the Commonwealth." The statute also refers to the

Attorney General as the "chief prosecutor of the Commonwealth," yet it is clear that under Kentucky's statutory scheme that does not mean that the Attorney General has jurisdiction to prosecute cases in any county in the Commonwealth. In other words, the Attorney General's *role* as chief prosecutor or chief law enforcement officer or chief legal advisor, KRS 15.020, does not mean absolute power in execution of duties. Certainly, the Attorney General is the chief prosecutor in the Commonwealth, but he is still not authorized by the General Assembly to prosecute cases in individual counties unless certain conditions are met.

The entire statutory scheme of Chapter 15 of the Kentucky Revised Statutes supports Mr. Johnson's argument that there is no general authority on the part of the Attorney General to investigate criminal cases across the Commonwealth. KRS 15.010 provides the Attorney General is the head of the Department of Law. The Department of Law as set out in KRS 15.010(1) is comprised of thirteen organizational units: the criminal appellate division, consumer protection division, special investigations division,[2] special prosecutions division, prosecutors advisory council services division, Medicaid fraud and abuse control division, civil and environmental law division, victims advocacy division, child support enforcement commission, administrative hearings division, office of rate intervention, administrative services division, and financial integrity enforcement division. KRS 15.010(2). KRS 15.150, "stenographic, investigative, and clerical help," states,

> The Attorney General may employ such stenographic, investigative and other clerical help for the use and benefit of his department as he deems necessary for the proper conduct of his office, within the limits of appropriations made for that purpose. Investigative personnel as designated by the Attorney General shall have the power of peace officers.

[2] However, KRS 15.012, the Division of Special Investigations statute, has been repealed.

Notably the statute does not say that investigators shall have the power of peace officers **and statewide jurisdiction.** The statute uses limiting language—investigative **help** "for the use and benefit of his department as he deems necessary for the proper conduct of his office, within the limits of appropriations made for that purpose." This language seems to contemplate a limited role of investigators in the Office of the Attorney General; it certainly does not seem to contemplate that the investigators be peace officers with jurisdiction and power to investigate all crimes within the Commonwealth. Rather the statutory language would indicate that when investigative needs arise in the context of departmental needs, the Attorney General can so authorize personnel to act.

The Appellant takes the designation of investigative personnel as peace officers in KRS 15.150, and makes the leap that the peace officers have statewide authority because of the Attorney General's status as a state constitutional officer. AB 7. A peace officer is defined in KRS 446.010(31)—"'peace officer' includes sheriffs, constables, coroners, jailers, metropolitan and urban-county government correctional officers, marshals, policemen, and other persons with similar authority to make arrests."

The crux of the Appellant's argument is that since the Attorney General is a state constitutional officer, the investigators that he employs have statewide jurisdiction to investigate crimes across the Commonwealth. No doubt investigators in the Attorney General's Office do have the ability to investigate matters statewide—but only if the matter to be investigated is subject to the Attorney General's subject matter jurisdiction. There is no longer a "Special Investigations Division," and the investigators who are employed are not peace officers in the Kentucky State Police, which is, in reality, our

statewide investigatory body. KRS 16.060, the statute on "Powers and duties of commissioners and officers" of the Kentucky State Police, states,

> It shall be the duty of the commissioner, each officer of the department, and each individual employed as a Trooper R Class to detect and prevent crime, apprehend criminals, maintain law and order throughout the state, to collect, classify and maintain information useful for the detection of crime and the identification, apprehension and conviction of criminals and to enforce the criminal, as well as the motor vehicle and traffic laws of the Commonwealth. To this end the commissioner, each officer of the department, and each individual employed as a Trooper R Class is individually vested with the powers of a peace officer and shall have in all parts of the state the same powers with respect to criminal matters and enforcement of the laws relating thereto as sheriffs, constables and police officers in their respective jurisdictions, and shall possess all the immunities and matters of defense now available or hereafter made available to sheriffs, constables and police officers in any suit brought against them in consequence of acts done in the course of their employment. Any warrant of arrest may be executed by the commissioner, any officer of the department, and each individual employed as a Trooper R Class.

If the Legislature had intended investigators from the Attorney General's office to be charged with investigating crimes and maintaining order throughout our Commonwealth as the Attorney General maintains, the Legislature would have included language like that found in KRS 16.060 in KRS 15.150. The latter would provide, "Investigative personnel as designated by the Attorney General shall have the power of peace **officers and shall have in all parts of the state the same powers with respect to criminal matters and enforcement of the laws relating thereto as sheriffs, constables and police officers in their respective jurisdictions, and shall possess all the immunities and matters of defense now available or hereafter made available to sheriffs, constables and police officers in any suit brought against them in consequence of acts done in the course of their employment. Any warrant of arrest may be executed by the commissioner, any officer of the department, and each**

individual employed as a Trooper R Class." Notably, KRS 15.150 does not include the language in bold and makes no reference whatsoever to the extent of power investigators hold.

The jurisdiction of investigative personnel must flow from the duties assigned to them by the Appellant which in turn is determined by power delegated by the KRS. Turning to the "Criminal Prosecutions" section of KRS Chapter 15, KRS 15.190, the first statute, provides,

> County and Commonwealth attorneys may request in writing the assistance of the Attorney General in the conduct of any **criminal investigation** or proceeding. The Attorney General may take such action as he deems appropriate and practicable under the circumstances in the rendering of such assistance. (Emphasis added).

Similarly, KRS 15.200, "May intervene or direct criminal proceeding on request of Governor, court, or grand jury; subpoenas," states:

> (1) Whenever requested in writing by the Governor, or by any of the courts or grand juries of the Commonwealth, or upon receiving a communication from a sheriff, mayor, or majority of a city legislative body stating that his participation in a given case is desirable to effect the administration of justice and the proper enforcement of the laws of the Commonwealth, the Attorney General may intervene, participate in, or direct any **investigation** or criminal action, or portions thereof, within the Commonwealth of Kentucky necessary to enforce the laws of the Commonwealth.
>
> (2) He may subpoena witnesses, secure testimony under oath for use in civil or criminal trials, investigations or hearings affecting the Commonwealth, its departments or political subdivisions. (Emphasis added).

The inclusion of "investigation" in both these statutes indicates that the General Assembly is associating criminal investigation with criminal prosecution. It is limiting the Appellant's ability to investigate criminal cases. Why would criminal investigation

be referenced if the Attorney General was already vested with power to investigate crimes across the Commonwealth?

This argument is backed up by the fact that within the "Criminal prosecutions" section of KRS Chapter 15 are some statutes that confer automatic jurisdiction to investigate and/or prosecute upon the Attorney General. For example, the Attorney General has automatic jurisdiction in cases involving theft of identity or trafficking in stolen identities, KRS 15.231; cases involving purchase, sale, and dispositions of metals or objects containing metals, KRS 15.232; environmental protection, KRS 15.240; and enforcement of election laws, KRS 15.242. Thus, in those cases—like cases pursuant to KRS 15.190 and 15.200—the Attorney General can direct his investigative personnel to investigate cases across the state.

The General Assembly has limited the ability of the Attorney General to initiate criminal investigations. ". . . [T]he legislative intent as expressed in KRS 15.200 is to let the executive and not the Attorney General determine when the Attorney General may decide whether to intervene, participate in, or exclusively direct the investigation and prosecution of criminal activities." Hancock v. Schroering, 481 S.W.2d 57, 61 (Ky. 1972). In Floyd Grover Johnson's case, there was no evidence that the County or Commonwealth Attorneys requested, in writing, that the Attorney General's office investigate Powell County drug cases, nor was there evidence the Governor, a court, a Grand Jury, a sheriff, a mayor, or the majority of a city legislative body made such a request. In addition, this was a drug case, so it does not fall under any of the "automatic" jurisdiction statutes (KRS 15.231, 15.232, 15.242).

The Kentucky General Assembly defined when the Attorney General's office can automatically investigate cases and when it can investigate cases upon invitation only. Thus, the legislature clearly did not intend for the office to be able to investigate criminal cases on its own initiative. "In the construction of statutes, the primary rule is to ascertain and give effect to the intention of the Legislature." Moore v. Alsmiller, 160 S.W.2d 10, 12 (Ky. 1942). If a statute specifies exceptions to a general rule, other exceptions—not codified in statutes—are excluded. See Liberty National Bank & Trust Co. v. George, 70 B.R. 312 (W.D.Ky. 1987). Kentucky case law supports the principle of "expressio unius est exclusio alterius," or express mentioning of one thing implies the exclusion of others. George v. Commonwealth, 885 S.W.2d 938 (Ky. 1994). See also Commonwealth v. Harris, 59 S.W.3d 896, 900 (Ky. 2001), where it was held that "enumeration of particular items excludes other items that are not specifically mentioned."

In other words, since the General Assembly has seen fit to specifically authorize the Attorney General to investigate matters involving identity theft, metal sales, and election law violations, it has presumably made the decision to not allow said office to investigate other matters without a formal request for assistance from one of the entities named in KRS 15.190 and 15.200. In the case at bar, there was never evidence produced, or even a representation made, that any of those agencies made a written request to the Attorney General for assistance in investigating drug cases in Powell County, Kentucky.

B. KRS 218A.240 does not give the Attorney General a blank check to investigate drug trafficking.

The language of KRS 218A.240(1) is critical to this issue. It 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 held:
>
> [b]ased on the language used by the legislature, the intent is clear that the enumerated law enforcement officers in the Commonwealth are to enforce controlled substances laws within their jurisdictions. We do not read this statute as expanding upon the Attorney General's jurisdiction but, instead, as a general statement of legislative intent that law enforcement officers shall, within their respective jurisdictions, enforce controlled substances laws and shall cooperate with all agencies charged with the enforcement of the laws of this state. This statute merely commands the cooperation that would be necessary amongst various agencies enforcing the same or similar laws within their respective jurisdictions Thus, the jurisdiction referenced in KRS 218A.240(1) must be found elsewhere.

Slip Op. 5-6.

The Appellant argues that "the plain text of the statute requires the Attorney General to enforce the provisions of Chapter 218A." AB 9. Furthermore, the Appellant believes the Court of Appeals ignores the enforcement aspect of the statute. AB 10. Appellee disagrees—it is undisputed that the Attorney General, like County and Commonwealth Attorneys, must enforce the provisions; the distinction is that what enforcement means depends on who the party is. Enforcement of our drug laws by an agent from the Cabinet for Health and Family Services is clearly going to be different than enforcement of drug laws by a city police officer in Hazard or, for that matter, from enforcement of drug laws by a county attorney. The General Assembly would not have included the language noting "within their respective jurisdictions" if it had not realized

enforcement of drug laws means different things to different agencies and to different individuals.

The Appellant appears to be arguing that every agency listed in KRS 218A.240(1) is all powerful in enforcing drug laws and, in fact, each agency could exercise any power that another agency charged with enforcing drug laws could exercise. This interpretation renders the language "within their respective jurisdictions" meaningless. A statute should be construed in such a way that it does not become meaningless or ineffectual. Commonwealth v. Phon, 17 S.W.3d 106, 108 (Ky. 2000). And, again, such an interpretation could also lead to some ridiculous conclusions, like, for example, a deputy sheriff can perform the duty of a county attorney, or for that matter, the Attorney General.

The plain language of KRS 218A.240(1) makes clear that this is not a provision giving the Attorney General automatic prosecutorial and investigative jurisdiction over all drug cases in the Commonwealth. "Where the words used in a statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as written." Griffin v. City of Bowling Green, 458 S.W.2d 456,457 (Ky.App. 1970). "Within their respective jurisdictions" follows the listing of all the agencies which are authorized to enforce KRS Chapter 218A. Thus, the plain language of the statute provides that the agencies are charged with enforcing the drug laws in their jurisdictions, whatever jurisdiction that may be. As is detailed above, the Attorney General's jurisdiction to act in these cases is limited by KRS 15.190 and 15.200. Certainly, the office of the Attorney General should enforce the provision of KRS Chapter 218A when it is given leave to do so by the request of one of the entities listed in KRS 15.190 and 15.200. However, the Attorney General's office lacks

jurisdiction when it is not so authorized to act. Appellant's assertion that the Court of Appeals' interpretation of KRS 218A.240(1) would render the Kentucky State Police unable to act is meritless. AB 11. As noted above, KRS 16.060 grants statewide jurisdiction to officers from the Kentucky State Police. There is no statute granting unlimited jurisdiction to investigators from the Attorney General's Office. While the Attorney General may be a state constitutional officer that does not mean that his agents have authority to investigate drug crimes statewide. An Assistant Attorney General in the Criminal Appellate Division may be charged with representing the Commonwealth in statewide appeals, but that does not mean she can prosecute a case in Casey Circuit Court without an invitation from an appropriate authority.

The Appellant's reliance on Howard v. Transportation Cabinet, 878 S.W.2d 14 (Ky. 1994), is misplaced. In that case, the question was whether a vehicle enforcement officer (hereinafter "VEO") could arrest an impaired driver of a passenger vehicle, or was a VEO limited to arresting impaired drivers of motor carriers. In answering the question, this Court focused on KRS 281.765:

> Any peace officer, including sheriffs and their deputies, constables and their deputies, police officers and marshals of cities or incorporated towns, county police or patrols, and **special officers appointed by any agency of the Commonwealth of Kentucky for the enforcement of its laws relating to motor vehicles** and boats or boating, now existing or hereafter enacted, shall be authorized and it is hereby made the duty of each of them to enforce the provisions of this chapter and to make arrests for any violation or violations thereof, and for violations of any other law relating to motor vehicles and boating, ...

Howard at 15-16 (emphasis added). This Court held that the language in bold clearly contemplated the inclusion of VEOs employed by the transportation cabinet as those charged with enforcing laws related to motor vehicles and boating.

The Appellant discusses the last paragraph of this Court's opinion in Howard, wherein it was stated:

> In addition, the facts of this case draw a second statute into play which further justifies what we see as a common sense interpretation of KRS 281.765 as the operative statute. KRS 189.520(2) states, 'No peace officer or state police officer shall fail to enforce rigidly this section and KRS 189A.010 through 189A.090, [the DUI statutes].' Such a powerful imperative makes obvious the legislature's direct intention to institute a policy whereby all peace officers with varying jurisdictions, both geographical and otherwise, are mandated to arrest offenders of DUI statutes. Such policy is certainly consistent with the seriousness of the offense and the general public's attitude toward abating the needless tragedy caused by intoxicated drivers of all classes of vehicles.

Howard at 17 (footnote omitted). The Appellant compares the Court's discussion of the DUI enforcement statute to KRS 218A.240(1), the drug enforcement statue at issue in the case at bar. The difference is that the DUI statute has limited its charge to only two groups—peace officers and state police officers—and has not included the "within their respective jurisdictions" language. It makes sense for the legislature to charge peace officers and state police officers with instant enforcement of DUI laws because of the inherent, in the moment, danger involved with individuals driving our roads impaired. Not only could an accident occur immediately when an individual is driving impaired that could result in death or injury to the driver or an innocent third-party, but there is the jurisdictional question. An officer in hot pursuit of an impaired driver cannot be expected to stop at the county line; in addition, an officer might not know that he is outside of his jurisdiction when he effects an arrest of an impaired driver.

Certainly drug abuse is a scourge as the Appellant notes, and it affects many, many individuals and families across the Commonwealth. And we do want our law enforcement officers, state agencies, and state attorneys to enforce the laws of the

Commonwealth. However, there is a difference between hot pursuit of an individual driving impaired and setting up sting operations with confidential informants to purchase drugs in counties without the participation of any local police agencies.

II. ANY COMMON LAW AUTHORITY TO INVESTIGATE INDIVIDUAL CRIMINAL CASES ACROSS THE COMMONWEALTH HAS BEEN LIMITED BY THE LEGISLATURE.

Appellant devotes many pages of its brief detailing the Attorney General's authority atcommon law to investigate criminal matters in this jurisdiction and others. AB 16-23. That matters not. Whatever authority to investigate individual crimes vested in the Attorney General of Kentucky at common law has now been limited by the establishment of the Unified Prosecutorial System of County and Commonwealth Attorneys, as well as by the creation of the Kentucky State Police system. KRS 15.020 clearly contemplates that there has been a transfer of power in criminal matters at the trial level from the Attorney General to County and Commonwealth Attorneys by virtue of the language "except where it is made the duty of the Commonwealth's attorney or county attorney to represent the Commonwealth." As evidenced by the language in KRS 15.190 and 15.200, quoted above in I(A), direction, or at the very least supervision, of criminal investigations is part and parcel of the duty to prosecute. KRS 15.190 and KRS 15.200 clearly limit the Attorney General's ability to investigate only upon invitation. Appellee disagrees that these statutes are "exceptions to the Commonwealth Attorneys' authority, not a limit on the Attorney General's authority." AB 26. How is this not a limit on authority when it sets out when the Attorney General can "intervene, participate in, or direct any investigation or criminal action, or portions thereof. . .?" Without the appropriate invitation, the Attorney General can take no such action.

Appellant cites to Matthews v. Pound, 403 S.W.2d 7 (Ky. 1966). In that case, a request for intervention in a criminal case by both the Governor and the two Commonwealth Attorneys had been made pursuant to KRS 15.190 and KRS 15.200 so the Attorney General was certainly entitled to information that the Commonwealth Attorney would have had access to as well, and the circuit court was in error in denying access to the information requested. Appellee does not agree with Appellant that only "prosecutorial" duties are being referred to in the statement that "[t]he duties of the Attorney General have been enlarged by KRS 15.190, 15.200, and 15.210." Matthews at 10-11. KRS 15.190 and 15.200 contemplate invitation into a criminal investigation, not just prosecution.

This makes sense. Kentucky is made up of 120 counties. Clearly criminal investigations need to be conducted by those who know the county in which the crime has taken place. Even if state police are conducting an investigation, it would be troopers or detectives assigned to a post geographically close to the county involved. The public is best served by a model in which there are a limited number of agencies investigating a crime; in other words, the right hand knows what the left hand is doing. For example, in the instant case, there has been no representation made by the Appellant in any of the proceedings that law enforcement based in Powell County had any idea that UNITE and investigators from the Attorney General's office were investigating Floyd Johnson. What if the Powell County Sheriff's Department was in the middle of an investigation into Floyd Johnson, and the officers from outside the local jurisdiction got in the way? Furthermore, if one is worried about a situation where there might be corruption in the

county, that scenario has been envisioned, and the remedy can be found in KRS 15.190 and 15.200, which allow outside entities to invite the Attorney General in to investigate.

It should be pointed out that the office of the Commonwealth Attorney is created by the Kentucky Constitution. Ky. Const. § 97. Com. ex rel. Hancock v. Davis, 521 S.W.2d 823, 826 (Ky.App. 1975). And the only reason the Legislature can abolish that constitutional office, AB 25, is because the Kentucky Constitution allows it. Ky. Const. § 108.

The Appellant stresses that KRS 15.725(1), which sets out the Commonwealth Attorney's duties, does not reference "investigation." AB 24-25. Yet KRS 15.760(1) allows Commonwealth Attorneys to employ investigators. KRS 69.110 provides that "Commonwealth detectives shall have the power of arrest in the counties comprising their districts and the right to execute process statewide. They shall assist the Commonwealth's attorney in all matters pertaining to his office in the manner he designates and shall assist him in the preparation of all criminal cases in Circuit Court by investigating the evidence and facts connected with such cases." Investigation is part and parcel of getting the case to the point of being prosecuted. And prosecutors are not the ones doing the investigating—the local officers, including those KSP officers assigned to posts, are. The prosecutors are the ones packaging the product of the investigation up for court.

Appellee does not dispute that the Attorney General is "an investigatory body." AB 18, quoting Dennis Stilger v. Edward H. Flint, 391 S.W.3d 751, 754 (Ky. 2013). What Appellee does dispute is the proposition that now, in 2013, the Attorney General is charged with investigating criminal matters in counties throughout the Commonwealth

without an express invitation from an appropriate authority. Stilger involved a request into an investigation into the denial of access to the records of a condominium board. Likewise the other case cited by the Appellant, Strong v. Chandler, 70 S.W.3d 405 (Ky. 2002), involved the Attorney General's authority to investigate a potential contractual breach by a government cabinet. The Attorney General is charged with representing the Commonwealth's interests in such matters by KRS 15.020.

Certainly, the Attorney General should investigate and represent the people of this Commonwealth in matters of public interest. That is what this Court alluded to in Commonwealth ex rel. Conway v. Thompson, 300 S.W.3d 152 (Ky. 2009). In that case an individual Commonwealth Attorney and the Attorney General's office challenged the Department of Corrections' decision to award "street credit" against unexpired sentences for time spent on parole. In examining whether the Attorney General could bring the action, the Court stated:

> Having fully considered the law and the arguments of the parties, we now state categorically that we have no doubt that the Attorney General of the Commonwealth of Kentucky has standing to seek injunctive relief on behalf of the citizens of the Commonwealth, as was done in the Franklin Circuit Court case at hand. So, to the extent that Wilkinson[3] holds otherwise, it is overruled.
>
> KRS 15.020 provides, in the role as "chief law officer of the Commonwealth of Kentucky[,]" the Attorney General "shall exercise all common law duties and authority pertaining to the office of the Attorney General under the common law, except when modified by statutory enactment." It is unquestioned that "[a]t common law, [the Attorney General] had the power to institute, conduct[,] and maintain suits and proceedings for the enforcement of the laws of the state, the preservation of order, and the protection of public rights." Or, in other words, "[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

[3] Commonwealth ex rel. Cowan v. Wilkinson, 828 S.W.2d 610 (Ky. 1992).

> to enforce the state's statutes." So we readily conclude that the Attorney General, by virtue of that office, had the right to file an action in the Franklin Circuit Court seeking injunctive relief to prevent the DOC from, in the Attorney General's view, improperly and unconstitutionally applying HB 406 retroactively.
>
> These bedrock principles of law giving the Attorney General broad powers to initiate and defend actions on behalf of the people of the Commonwealth were overlooked by the majority in Wilkinson. Instead, Justice Leibson's dissent correctly recognized: It is the Attorney General's responsibility to file suit to vindicate public rights, as attorney for the people of the State of Kentucky. The rights of the people, as the body politic, are identical to the personal rights of a private individual, and enjoy at least the same, if not more, standing to seek a declaratory judgment, and to seek injunctive protection against injury. Under KRS 415.050, the Attorney General may proceed directly against a usurper. Under KRS 15.020, the Attorney General is the state's chief law officer and may "exercise all common law duties and authority pertaining to the office of the Attorney General under the common law." It is the personal right of the people as the body politic and not any personal right of the person holding the office of Attorney General that is being represented here. It is unreasonable to suggest that because the person with the official responsibility to seek protection on the people's behalf has no personal stake in the outcome, there is no right of redress and no right to injunctive relief against the Governor's usurpation of power, if such has occurred.

Thompson, at 172-173. (citations omitted). Clearly, what Thompson is referencing is the ability of the Attorney General to bring suit in cases where the public interest is threatened because of the action of another government agency. The Thompson case is not addressing the issue of whether the Attorney General can go piecemeal around the Commonwealth and choose people to investigate for alleged crimes.

Certainly the task given to the Attorney General and his agents under KRS 15.190 and 15.200 is an important one. Once can imagine that there are times when it is of the upmost importance to liberty and justice that an **independent** investigator look into a potential criminal matter. That is why an interpretation of the relevant statutes that would

give the Attorney General statewide jurisdiction to investigate any criminal matter he wants would weaken, or even dissipate, the separation and independence that is critical to KRS 15.190 and 15.200.

It is not disputed by the Appellee that the Attorney General can, and even should, take an active interest in the prosecution of drug offenses across the Commonwealth. What Appellee does dispute is the ability of the Attorney General to conduct investigations without KRS Chapter 15 authorization. The Attorney General, if worried about drug cases in a particular county, could certainly approach authorities and make a case for an invitation under Chapter 15. That did not occur here, however, and there was no jurisdiction for UNITE or the Attorney General's investigators to look for evidence to prosecute Floyd Johnson.

Regarding the Appellant's discussion of the Advisory Opinion of the Attorney General, OAG 70-522, Appellee would simply make a few points. First, the Opinion in Floyd Grover Johnson's case does not make mention of the advisory opinion. It was **Ronnie Johnson's panel** that discussed OAG 70-522. Ronnie Johnson's case has been held in abeyance by this Court pending the resolution of this case. Second, the point that the Court of Appeals was making by referencing the advisory opinion is that the Attorney General's authority is limited by statute. § 91 of the Kentucky Constitution states that as does OAG 70-522. Finally, the investigation the Attorney General described doing in the advisory opinion regarding coal trucks is exactly the type of investigation an ordinary citizen can do. On the other hand, ordinary citizens cannot go around setting up controlled drug buys.

III. AN EVIDENTIARY HEARING DOES NOT GIVE MR. JOHNSON A "SECOND BITE" AT THE APPLE.

After determining that investigators from the Attorney General's Office did not have jurisdiction to investigate drug crimes in Powell County as there was no invitation to investigate as required by the Kentucky Revised Statutes, the Court remanded Mr. Johnson's case for an evidentiary hearing:

> On remand, the trial court will have to assess whether the testimony presented to the grand jury by the detective(s) for the Attorney General and Operation UNITE resulted in an indictment that should be dismissed. We direct the court's attention to Commonwealth v. Bishop, 245 S.W.3d 733, 735 (Ky. 2008), wherein the Kentucky Supreme Court stated that in certain circumstances trial judges are permitted to dismiss criminal indictments in the pre-trial stage, including cases involving prosecutorial misconduct that prejudices the defendant, a defect in the grand jury proceeding, or a lack of jurisdiction by the court itself. Of importance, the Bishop court noted that "Whether an indictment premised on an arrest by a police officer who acted outside his lawful jurisdiction should be subject to pre-trial dismissal is an issue of first impression that this Court need not address at this time." Id. at 735. Additionally, we believe that the Attorney General's argument that the detective presented evidence that a private citizen could have presented to a grand jury may bear some merit.

Slip Op. 12. A footnote attached to the end of the paragraph, discussing the "private citizen" argument, stated:

> Indeed, this question *may* turn on the court's assessment of whether the evidence from the investigation and/or the testimony presented to the grand jury was collected and offered by the law enforcement officers under color of authority, i.e., under the traditional trappings of law enforcement such as badges, uniforms, use of state equipment in surveillance and, during the course of investigation, identification of the detective as an officer before the grand jury, etc. If color of authority is found, that would tend to militate against a finding that the officers and the Attorney General acted as mere individuals and not as law enforcement officers.

Slip Op. 12, n 9. (emphasis in original).

The Appellant first argues that a remand for an evidentiary hearing gives Mr. Johnson another "bite at the apple." The Appellant states Mr. Johnson "waived any right

to further hearings by pleading guilty with the state of the record as it was." AB 35. Yet, if any party is getting a second bite at the apple by a remand for an evidentiary hearing, it is the Appellant. Mr. Johnson asked throughout the briefing at the Court of Appeals for the Court to dismiss the indictments. Obviously he would prefer that the indictments against him be dismissed without the Commonwealth getting a chance to save its case through an evidentiary hearing.

Regarding "the state of the record," neither party requested an evidentiary hearing before the circuit court. While arguing case to the circuit judge, the Assistant Attorney General stated that an ordinary citizen could have investigated these cases and brought them to the Commonwealth Attorney, with a request that the cases be presented to the Powell County Grand Jury. Thus, the Assistant Attorney General was arguing that since an ordinary citizen could do this, an investigator from the Office of the Attorney General could do this as well.[4] TE 2/17/10 12. What the Court of Appeals contemplates at an evidentiary hearing is the presentation of evidence regarding the color of authority in the context of the investigation and presentation of the case to the Grand Jury, and this is simply something that was not brought up below. Again, allowing the Commonwealth an opportunity to present evidence on any show of authority, or lack thereof, inures to the benefit of the Appellant, not the Appellee. The Appellee, of course, would be open to this Court's outright dismissal of the indictments against Mr. Johnson.

The Appellant's argument that remand for an evidentiary hearing in this case undercuts judicial economy, serves as a disincentive for prosecutors to plea bargain, or

[4] Appellee does not concede that the Assistant Attorney General was correct about this. The investigator would be acting as a state actor , which means that there are legal and constitutional restraints on his or her ability to investigate. Private citizens would not have to get search warrants, or give Miranda warnings, etc. Following the Appellant's logic would open the proverbial can of worms.

"offer pleas containing wider disparities of sentence recommendations between conditional and unconditional pleas" makes little sense. AB 34. Of course, the intent behind a conditional guilty plea is not to give prosecutors an incentive to offer a plea deal, but to allow a criminal defendant to accept a plea offer instead of going to trial when the only issue in this case is a question concerning the admissibility of evidence or some other equally dispositive pretrial issue.

What if Floyd Johnson had made his motion to dismiss, and decided, after the trial court overruled his motion, to go to trial on this matter and he lost? A real waste in judicial economy would be the trial that had to occur before this matter was appealed. And why would the fact that an evidentiary hearing may occur on remand discourage prosecutors from plea bargaining cases, even in the context of a conditional guilty plea case? What if one is prosecuting Floyd Johnson's case, he has filed his motion to dismiss the indictments, and the trial court, as it did, rejected his argument. If one prosecuting the case decides not to agree to a conditional guilty plea, one is forcing Floyd to go to trial so he can eventually bring his argument to the appellate courts and, as noted, that is a waste in judicial economy. On the other hand, maybe the prosecutor decides, after Floyd Johnson loses his motion to dismiss, to accept a conditional guilty plea but attaches a surcharge to it by offering a higher sentence? How does that benefit justice? How does adding that "tax" ameliorate the hardship of having to participate in an evidentiary hearing at a later date?

Finally, as to this "second bite of the apple" argument, Appellant cites to two cases. Notably neither of these cases held that ordering an evidentiary hearing in a conditional guilty plea case is ill-advised, nor do they even involve a conditional guilty

plea direct appeal. Alvey v. Commonwealth, 648 S.W.2d 858 (Ky. 1983), involved an RCr 11.42 appeal. In 1976, Alvey entered guilty pleas to various convictions. In 1980, Alvey entered a guilty plea to PFO based on the 1976 convictions. Three bites at the apple later, Alvey filed a RCr 11.42 motion alleging the 1976 guilty pleas were not in accordance with Boykin v. Alabama, 395 U.S. 238 (1969). This Court's frustration about multiple bites at the apple is well-taken in the context of the collateral attack appeal in Alvey. "There is a substantial difference between a situation in which the record in a guilty plea proceeding does not pass constitutional muster, and one in which post-conviction proceedings are filed after a defendant has already had an opportunity to raise issues about the validity of earlier guilty pleas but has failed to do so. In the latter instance we should not afford the defendant a second bite at the apple." Alvey at 860. This case is in no way like Alvey.

The other case cited by the Appellant, Kentucky Bar Association v. Belker, 997 S.W.2d 470 (Ky. 1999), involved an appeal in an attorney disciplinary action wherein Belker gave notice that the KBA charges against him could proceed as a "default" case, and the Board of Governors ultimately recommended permanent disbarment. This Court refused to remand the case for an evidentiary hearing, noting, "The Respondent has failed to present anything resembling sufficient grounds to justify his request for a 'do over'—a remand for an evidentiary hearing." Belker at 473. That case is completely unrelated to this conditional guilty plea direct appeal. Appellant's argument that Floyd Johnson "had his hearing and had his opportunity to present whatever he wanted" is without merit when one considers that it was the Assistant Attorney General who at the hearing before the trial court who put this "private citizen" theory into play as a fallback argument, not Mr.

Johnson. And, of course, the Appellant's argument completely ignores the fact that the trial court held there was jurisdiction because of KRS 218A.240(1), not because of the "private citizen" theory.

IV. THE INVESTIGATORS WERE NOT ACTING AS PRIVATE CITIZENS.

The Appellant states "investigators from the Attorney General's Office and UNITE simply videotaped a controlled drug buy and turned this evidence over to the Commonwealth Attorney." AB 35. This implies that the videotape was turned over to the Commonwealth Attorney by the investigators on the way out of town; the Commonwealth Attorney merely showed the videotape of a controlled buy to the Grand Jury; and voila, there was an indictment. Yet the indictments in both 09-CR-133-002 and 09-CR-143 state that there were witnesses from the Attorney General's Office who appeared before the Grand Jury. In 09-CR-133-002, the witness at the Grand Jury proceeding was "Detective Jennifer Carpenter, UNITE Task Force, Attorney General's Office." TR 09-CR-133-002 1-3. In 09-CR-143, the witness at the Grand Jury proceeding was "Detective Randy Kline, UNITE Drug Task Force, Attorney General's Office." TR 09-CR-143 1-2.

It is because of the fact that investigators from the Attorney General's Office presumably **did** do more than just turn over the evidence to the Commonwealth Attorney and **did** play an active role in the presentment of the case, not just the investigation, that the Court of Appeals has ordered an evidentiary hearing. The Court of Appeals specifically urged the trial court to consider "whether the evidence from the investigation and/or the testimony presented to the grand jury was collected and offered by the law enforcement officers under color of authority, i.e., under the traditional trappings of law

enforcement such as badges, uniforms, use of state equipment in surveillance and, during the course of investigation, identification of the detective as an officer before the grand jury, etc. If color of authority is found, that would tend to militate against a finding that the officers and the Attorney General acted as mere individuals and not as law enforcement officers." Slip Op. 12, n. 9.

The Appellant states that citizens can legally participate in drug transactions if they lack criminal intent, and cites to a number of cases. AB 35-37. It may very well be the case that this is a defense that can be asserted at a defendant's trial.[5] That, however, is not the question for this Court, and the cases relied on by the Appellant are not dispositive of the issue before this Court. Kohler v. Commonwealth, 492 S.W.2d 198 (Ky. 1973), and Commonwealth v. Adkins, 331 S.W.3d 260 (Ky. 2011), cited by the Appellant, involve criminal cases where the defendants really were private citizens. Mr. Kohler alleged that he was acting with the knowledge of law enforcement, and he was denied the opportunity to have his defense considered by the jury by the court's refusal to instruct on the affirmative defense. Kohler at 200. Mr. Adkins claimed he found drugs and paraphernalia and was planning on delivering the items to the police. He, too, was entitled to an affirmative defense on his theory of the case. Adkins at 267. And Morrow v. Commonwealth, 286 S.W.3d 206 (Ky. 2009), involved the narrow question of whether one is entitled to a jury instruction on entrapment at the same time one mounts a defense that he was engaged in an independent criminal investigation. In that case, Morrow, a former sheriff currently serving as part-time jailer, was acting as an ordinary citizen although he did hope that his efforts would eventually lead to a job offer. Morrow at 211.

[5] It is questionable, however, that this private citizen drug investigation is something that should be encouraged. It is difficult to imagine that it is in the best interests of law enforcement for there to be government endorsement of private citizen investigation of drug crimes in the Commonwealth.

The case at bar involves a different kind of beast than the situations presented in the above-cited cases. Here there were no ordinary citizens but investigators acting outside their jurisdiction, and the Appellant is trying to save its case by now analogizing this to cases where criminal defendants have defended their actions by arguing they were acting at behest of law enforcement, or mistakenly possessed drugs, or were even trying to garner favor from law enforcement by performing their own investigation into drugs. Rather, this situation is like if a police officer in Winchester, Kentucky, conducted an investigation into drug trafficking in Fulton County, Kentucky, without any request made pursuant to KRS 431.007(1), and then presented the case to the Fulton County Grand Jury. Like that scenario, this case does not present the species of a private citizen arrest.

V. ULTIMATELY, THE INDICTMENTS SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

The trial court treated this as a motion to dismiss. See Appendix to Appellant's Brief, Tab 3. The Court of Appeals relied on Commonwealth v. Bishop, 245 S.W.3d 733 (Ky. 2008), in directing the trial court to conduct an evidentiary hearing to determine if the indictments should be dismissed. Slip Op. 12. Thus, careful analysis of Bishop is required.

Bishop involved the case of a Manchester city police officer arresting individuals for drug transactions in Clay County, Kentucky. KRS 95.019 clearly gave the city police officer county-wide jurisdiction, but the circuit court, relying on a municipal ordinance, dismissed the indictments. The Court of Appeals affirmed. This Court held that the municipal ordinance, while valid, did not mean that city officers could not effectuate arrests, but rather was an internal, personnel policy, not conflicting with KRS 95.019.

Thus, this Court found the arrests were proper, and reinstated the indictments. Bishop at 734-735.

In Bishop, this Court observed that "[w]hether an indictment premised on an arrest by a police officer who acted outside his lawful jurisdiction should be subject to pre-trial dismissal is an issue of first impression that this Court need not address at this time." Id., 735. This is an issue that the Court may very well need to decide in this case. As the Appellant notes, there are exceptions to the general rule that a trial court is limited in ability to dismiss an indictment. AB 38. And Mr. Johnson is not alleging that this is a case involving prosecutorial misconduct. Rather he believes that just as there is no appropriate remedy for flagrant abuse of prosecutorial misconduct, or unconstitutionality of the statute, or defects in the Grand Jury proceedings, or lack of jurisdiction of the court, short of dismissing the indictment, such action is also required when the investigating officers are without jurisdiction.

If dismissing an indictment is not the remedy when officers lack jurisdiction to investigate a crime at a particular location, what is? There must be a check. What is the point of statutes limiting an officer's jurisdictional reach, if such statutes can just be ignored? There must be a sanction imposed on the Commonwealth if it chooses to circumvent jurisdictional rules to obtain indictments. And bad faith should not be a required showing. It should be presumed that an officer knows his or her jurisdiction, and he or she should be held to it.

CONCLUSION

This Court should affirm the Court of Appeals, and either order the indictments be dismissed or remand for an evidentiary hearing.

Respectfully submitted,

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