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Commonwealth of Kentucky
Supreme Court

File No. 2012-SC-000550
(On Review from Ky. Court of Appeals No. 11-CA-890)

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

Appeal from Nicholas Circuit Court
Hon. Jay Delaney, Judge
Unnumbered Order Entered Prior to Indictment

SAMUEL TERRELL — APPELLEE

Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify that the record on appeal was not checked out from the Court and that a copy of the Brief for the Commonwealth has been served June 28, 2013, via United States Mail, postage pre-paid to: Hon. Jay Delaney, Chief Circuit Judge, Harrison Co. Justice Center, 115 Court St., Suite 5, Cynthiana, KY 41031; and via messenger mail to Hon. Kathleen Schmidt, Dept. of Public Advocacy, real party in interest; and sent via electronic mail to: Hon. Douglas Miller, Nicholas County Commonwealth's Attorney.

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INTRODUCTION

The Commonwealth appeals an order, entered *ex parte*, which required the police to stop all questioning of an adult suspect and to allow the Department of Public Advocacy to meet with the suspect - even though the suspect did not request counsel. No video record was made before the trial court, and the Commonwealth was not allowed to participate in the proceeding that occurred.

STATEMENT CONCERNING ORAL ARGUMENT

Given the unique procedural posture and subject matter of this case, the Commonwealth requests oral argument to address questions and concerns that the Court may have.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On May 13, 2011, the Nicholas Circuit Court, acting *ex parte*, ordered police to stop questioning a suspect, Samuel Terrell, about the murder of his mother. TR 1. Samuel Terrell, an adult son of the victim (TR 2), did not request counsel. Instead, the Court's Order reflects that Terrell's father felt that he should have counsel and sought the intervention of the Court to allow the Department of Public Advocacy to interrupt and confer with his son. TR1. At the time of the Order, Terrell had not requested an attorney and he was not represented by the Department of Public Advocacy for the charge under investigation. The Court did not allow the Commonwealth to appear and, in fact, did not allow the Commonwealth's Attorney time to travel to Nicholas County to make any argument. In fact, at the time of the Order, the matter had not reached the jurisdiction of the circuit court as Terrell had not been indicted and had not made any appearance before the District Court. The victim's body had only just been discovered that morning and police were beginning their investigation. TR 2 - 4. The Order does not even have a case number as no case had been opened. TR 1. Most notably, the Appellee did not immediately require the services of the Department of Public Advocacy because he retained the services of a private attorney, the late Gatewood Galbraith. TR 9. On its face, this Order was improperly entered. This Court should explicitly hold that such action is improper, that such Orders violate the separation of powers doctrine, and that the Department of Public Advocacy does not have the statutory authority to effectively disrupt investigations before any right to an attorney has been asserted by the individual being questioned. The proper course of action would have been to raise any alleged improper action in the form of a motion to suppress, and to allow both parties to be heard while establishing a record for review.

ARGUMENT

The Nicholas Circuit Court's Order exceeded the bounds of long established precedent set out by the U.S. Supreme Court. In addition, the trial court violated the separation of powers doctrine. The Department of Public Advocacy, which appears to have initiated this action at the behest of the Appellee's father, also lacked any statutory authority to act as it did because the Appellee had not asked for counsel and evidently had the ability to hire a private attorney. This Court should overrule the lone Kentucky case that suggests that such action is appropriate as it is contrary to the law as established by the U.S. Supreme Court and the federal and state constitutions.

I.

REVIEW OF THE EX PARTE ORDER IS PROPER

Before considering the merits of this case it is necessary to note the unusual procedural posture of this matter. Because this *ex parte* order was issued before the criminal proceedings against the Appellee ever began, the Commonwealth believes that this order is a free standing matter separate from the later initiated criminal proceeding, and that this un-numbered proceeding has become final and appealable. This is evidenced by the fact that the order does not have any case number and appears to have only later been associated with the Appellee's criminal proceeding. However, even if the *ex parte* order is a part of the criminal proceeding, the Commonwealth has the right to seek interlocutory appeal under KRS § 22A.020, and the confusion associated with the procedural posture of the case only evidences the inappropriateness of this type of proceeding.

The Appellee is also likely to suggest that this matter is moot. However, the Commonwealth was never permitted to make any argument and will continue to be prejudiced by its inability to speak to the suspects of crime even with a valid waiver by the suspect. The Commonwealth is also

prejudiced by the appearance of impropriety that exists when the Court enters this type of order, even absent any actual allegation of wrongdoing by the police. Even if the Court were to consider this matter moot, it should be reviewed by the Court as it is capable of repetition while evading review. See e.g. Nebraska Press Assn. v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); Lexington Herald-Leader Co., Inc. v. Meigs, 660 S.W.2d 658, 661 (Ky. 1983). Such matters continue to arise across the Commonwealth, and undersigned counsel has received numerous calls from prosecutors seeking guidance due to similar incidents.

II.

NEITHER THE COURT NOR THIRD PARTIES HAVE THE ABILITY TO FORCE COUNSEL UPON AN ADULT SUSPECT

It should also be noted that the trial court's *ex parte* order effectively stripped the defendant of his right to reject counsel. The defendant never requested counsel and was speaking to police, as was his right. The trial court's Order allowed a third party and the trial court to force the defendant to stop his voluntary action and thrust an otherwise unrequested lawyer upon him. Such actions have been reviewed by the U.S. Supreme Court in the past and have been held to violate the constitution.

The Sixth Amendment guarantees the criminal defendant the right to counsel at all critical stages of the adversary proceeding. United States v. Wade, 388 U.S. 218, 227–228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); Powell v. Alabama, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "Interrogation by the State is such a stage." Montejo v. Louisiana, 129 S. Ct. 2079, 2085, 173 L. Ed. 2d 955 (2009) *reh'g denied*, 130 S. Ct. 23, 174 L. Ed. 2d 606 (U.S. 2009); citing Massiah v. United States, 377 U.S. 201, 204-205, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Conversely, the criminal defendant does not have to accept counsel when counsel is not desired. "The defendant may waive

the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled." Montejo v. Louisiana, 129 S. Ct. 2079, 2085, 173 L. Ed. 2d 955 (2009) *reh'g denied*, 130 S. Ct. 23, 174 L. Ed. 2d 606 (U.S. 2009) citing Michigan v. Harvey, 494 U.S. 344, 352- 353, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990). "And when a defendant is read his Miranda rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the Miranda rights purportedly have their source in the Fifth Amendment[.]" Montejo v. Louisiana, 129 S. Ct. 2079, 2085, 173 L. Ed. 2d 955 (2009) *reh'g denied*, 130 S. Ct. 23, 174 L. Ed. 2d 606 (2009).

Even when a court may feel that a criminal defendant is not acting in his best interest, it violates that defendant's constitutional right to have unwanted and unrequested counsel thrust upon the defendant against his will. The right to have counsel and waive counsel necessarily includes the right to refuse counsel. "Although not stated in the Amendment in so many words, the right to self-representation-to make one's own defense personally-is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." Faretta v. California, 422 U.S. 806, 819-20, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975). The right is a personal right, neither the courts nor any interested third party has the authority to interfere in the defendant's free exercise or the waiver thereof. Id.

Although there is little record of what occurred, the Commonwealth can only assume that this Circuit Court thought that it was acting in the best interest of the defendant to "protect" him. However, when faced with a similar situation the U.S. Supreme Court held that such actions strip the defendant of the ability to exercise his personal right and waive counsel. Writing for the Court, Justice Scalia rhetorically asked, "To safeguard the right to assistance of counsel from what ? From

a knowing and voluntary waiver by the defendant himself?" Montejo v. Louisiana, 129 S. Ct. 2079, 2086, 173 L. Ed. 2d 955 (2009) *reh'g denied*, 130 S. Ct. 23, 174 L. Ed. 2d 606 (U.S. 2009). The same question must be asked in this situation. The defendant was an adult that had been given a Miranda warning and had voluntarily waived his right to counsel in order to speak to the police officers that were investigating his mother's death. Obviously, his father and the Court felt that he needed to be protected - but from what? The only answer is that the father and the Court felt that they knew what was best for the adult defendant and they actively stopped him from exercising his own personal right. Justice Scalia noted that such actions "prevent a defendant altogether from waiving his Sixth Amendment rights, i.e., to 'imprison a man in his privileges and call it the Constitution.'" Montejo at 2086 quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 280, 63 S.Ct. 236, 87 L.Ed. 268 (1942). The Court's Opinion also noted that such a view has "zero support in reason, history or case law." Montejo at 2086.

By way of illustration the Court should consider the following example based upon another incident similar to the one currently at bar. A mother and adult son were both being questioned by police about a violent murder. The adult son knew that his mother was involved in the murder and he wanted to talk to investigators so that he could clear his own name - even though his mother had asked him to hide the truth. The mother told her own lawyer that her son needed to be represented and protected from questioning. The lawyer arranged to send another lawyer to talk to the son, but the son asked investigators to turn the lawyer away. The investigators relayed the message that the son had waived his right to an attorney. By obtaining the same type of *ex parte* order now at issue, the mother's lawyer effectively prevented the son from talking to the police and implicating his client, even though the son desired to talk to the police and had never indicated a desire to speak with a

lawyer. This action had nothing to do with the well being of the son, it was designed to prevent the son from giving a statement to implicate his mother and clear his own name. The situation could have been prevented by the trial court if the trial court had denied the order and proceeded to address any allegations of wrong-doing through a traditional suppression hearing. The use of a suppression hearing would have corrected any wrong doing had the police infringed upon the defendant's constitutional rights. Instead, the court actually became the wrong-doer and effectively stripped the son of his constitutional right to refuse the presence of counsel.

III.

AN ADEQUATE REMEDY FOR ALLEGED POLICE MISCONDUCT EXISTS IN THE FORM OF A MOTION TO SUPPRESS

The Appellee is likely to argue that the Court should have the ability to enter such orders because of the need to protect defendants against "badgering" or other police pressures. However, the Supreme Court's opinion in Montejo also addressed this question. A defendant cannot be badgered into changing his mind when "a defendant who never asked for counsel has not yet made up his mind in the first instance." Montejo at 2087. In so stating the Commonwealth is not turning a willfully blind eye to the potential for police to violate the Constitution, but that is not the case in this matter. There has not been any allegation of wrongdoing in this case. A Court that is faced with allegations of wrongdoing by police has an available recourse without turning to *ex parte* orders that strip defendants of rights in order to protect them from unseen threats. The proper course of action would have been to wait until charges were actually brought, and a case was initiated. The defense could have then have brought a motion to suppress based upon the allegation of wrongdoing. The Commonwealth would have then been given a chance to respond to the allegations, witnesses could

have been called, and a record could have been made for further review. A motion to suppress is a powerful remedy that both corrects the wrongdoing and discourages future bad acts by police.

IV.

EVENTS THAT OCCUR OUTSIDE OF THE KNOWLEDGE OF A SUSPECT HAVE NO BEARING ON THE VALIDITY OF A WAIVER OF KNOWN RIGHTS AND CANNOT JUSTIFY SUCH AN ALL-ENCOMPASSING ORDER

The Appellee is also likely to argue that the police had a duty to stop the interrogation and inform Terrell that an attorney wanted to visit him. This Court has previously stated that, under RCr 2.14, an attorney has the right to visit a person that is in custody. West v. Commonwealth, 887 S.W.2d 338 (Ky. 1994). However, although an attorney retained by a third party must be allowed to visit a person in custody - the Court does not have the authority to order that all previously initiated interrogations stop until that visit has occurred. To the extent that the West decision suggests otherwise - it is contrary to established U.S. Supreme Court precedent and it should be overruled. The rule does not require that all police contact stop - only that the attorney be allowed to visit at some point in time when the visit is feasible. To require that all questioning stop in order to thrust the unrequested attorney upon the suspect is contrary to the authority set out in Section I herein, such as Montejo v. Louisiana, supra.

West v. Commonwealth, 887 S.W.2d 338 (Ky. 1994) was a fractured decision that contains severe logical flaws. That decision was a four-three decision authored by Justice Stumbo. That case upheld the validity of a similar pre-emptive court order issued by then Jefferson Circuit Court Judge Wine. That order appointed the Louisville Public Defender as counsel for a suspect before any counsel had been requested on the basis of the suspect's family members' request, and information

that the public defender was already representing the suspect on another matter. Notably, there is no information in this record that would have allowed the court to make any such finding of indigency.

The West decision stated that RCr 2.14 created a justiciable cause or controversy sufficient to allow the circuit court to have jurisdiction over a case. However, this reasoning is largely circular. Although it is true that the circuit courts are courts of general jurisdiction pursuant to KRS 23A.010(1), no issue is ripe for adjudication until two parties actually exist. A suspect that has not yet been charged with a crime is not a criminal defendant. There is no "accused" and no defendant until there is an indictment. U. S. v. Marion, 404 U.S. 307, 313, 92 S.Ct. 455 (1971). The Sixth Amendment does not "require the Government to discover, investigate, and accuse any person within any particular period of time." U. S. v. Marion, 404 U.S. 307, 313, 92 S. Ct. 455, 459, 30 L. Ed. 2d 468 (1971). Although it is evident that the trial judge here disagreed with the police and prosecution decision to investigate before seeking charges, the U.S. Supreme Court has stated that "the Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining due process, to impose on law enforcement officials our personal and private notions of fairness and to disregard the limits that bind judges in their judicial function." U. S. v. Lovasco, 431 U.S. 783, 790, 97 S. Ct. 2044, 2049, 52 L. Ed. 2d 752 (1977) (internal quotations omitted).

The West decision is also contrary to the U.S. Supreme Court's decision in Moran v. Burine, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). That case addressed a similar situation, in which an attorney attempted to see a person in custody, before that person was charged with a crime. That attorney was denied access to the suspect, and was also misled by the police. The issue presented to the Court was wether the suspect's confession should have been suppressed. The Court

held that suppression was not proper. The Court stated:

> Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.... No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.

Burbine at 422, 106 S.Ct. 1135. The Court further explained that "the privilege against compulsory self-incrimination is ... a personal one that can only be invoked by the individual whose testimony is being compelled." Id. at 433 n. 4, 106 S.Ct. 1135. In applying Burbine, the Supreme Court of Wisconsin described the rule by stating, "[i]n other words, in pre-charge circumstances, a third-party such as an attorney, a family member, or a friend may not invoke, on behalf of the suspect, the suspect's constitutional right to request the presence of an attorney. Only the suspect may invoke that right." State v. Stevens, 822 N.W.2d 79, 93 (Sup. Ct. Wis. 2012).

V.

THE KENTUCKY CONSTITUTION DOES NOT EXPAND THE FIFTH OR SIXTH AMENDMENT

The West decision attempts to defy Burbine by arguing that RCr 2.14 expands the rights of the criminal defendant above and beyond those explained by the U.S. Supreme Court in Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). However, this statement is flawed due to the separation of powers doctrine. Such an expansion of a constitutional right based upon state law would necessarily have to be rooted in the state constitution - not a state court rule. Even West itself acknowledges that the expansion of a right must be rooted in the state constitution - not a state court rule. The West opinion states: "It is well-established that the United States Supreme Court's

interpretation of what the federal constitution demands establishes only minimum federal constitutional guarantees, and that 'this Court and other state courts are at liberty to interpret state constitutions to provide greater protection of individual rights than are mandated by the United States Constitution.'" West at 342 citing Crayton v. Commonwealth,846 S.W.2d 684 (Ky.1993); Oregon v. Hass, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570, 575 (1975). However, the West decision then skips any analysis of the wording of the state constitution and simply concludes that the court rule serves as the expansion.

Other state courts have recognized that any expansion of a right over and above what is recognized by the federal Constitution must be rooted in the state's own constitution. See e.g. Traylor v. State, 596 So.2d 957, 962 (Fla. 1992); State v. Granville, 142 P.3d 933, 939 (N.M. 2006); State v. DeFusco, 620 A.2d 746, 749 (Conn. 1993); State v. Grant-Chase, 665 A.2d 380, 382 (N.H. 1995). Absent authority rooted in the state's constitution, the court infringes on the power of the legislature in attempting to expand a constitutional right through the rule making process[1]. Further, the language of our own constitution does not allow for an expansion of the right.

This Court has consistently interpreted our state Constitution consistently with the federal Constitution. This Court has stated that the right of counsel guaranteed by Section 11 of the Kentucky Constitution is not broader than the right of counsel guaranteed by the Sixth Amendment. See e.g. Cain v. Abramson, 220 S.W.3d 276 (Ky. 2007). The Court has even stated that the right to decline representation is "implicit under the Sixth Amendment of the United States Constitution and explicit under Section 11 of the Constitution of Kentucky[.]" Partin v. Com., 168 S.W.3d 23, 27 (Ky. 2005). To the extent that the Fifth Amendment is implicated by the issues herein, this Court has also held

[1] See §VII herein for a discussion of the separation of powers doctrine.

that "Section Eleven of the Constitution of Kentucky and the Fifth Amendment to the Constitution of the United States are coextensive and provide identical protections against self-incrimination." Commonwealth v. Cooper, 899 S.W.2d 75, 78 (Ky. 1995).

Other jurisdictions recognize the flaws of the serious constitutional and separation of powers issue raised by the West decision- and have refused to follow its reasoning. See e.g. Dennis v. State, 990 P.2d 277 (Okla. 1999). Notably, the Oklahoma case of Dennis v. State assumed that the Court had interpreted the state constitution when creating the court rule. However, as set out above, the rule is not a constitutional interpretation.

VI.

RCr 2.14 MUST BE INTERPRETED IN MANNER THAT IS CONSISTENT WITH THE CONSTITUTION

The record in this matter is not clear to establish whether the Appellee was, in fact, in custody at the time that he was being questioned, and whether he was aware of any of his father's actions. However, it is clear that the trial court's order was sought out by the Appellee's father without any participation by Terrell, and there is no indication that police were acting outside of their proper powers. In other words, the Appellee had not requested an attorney. Thus, the issue becomes, does RCr 2.14 grant a suspect's family the right to obtain an attorney and then force the police to immediately stop all activity until such time as the suspect has visited with the attorney? The answer must be no. The rule gives a third party the right to hire an attorney and have that attorney visit a person in custody. The rule does not require the police to immediately stop all investigation and questioning that is already in progress. The rule cannot require such action because the right to an attorney is personal (as set out above). The person in custody may refuse an attorney and may refuse

to speak to an attorney that is retained by a third party for his or her benefit. The Court's Order herein effectively stripped the Appellee of his right to refuse the counsel that was thrust upon him and stripped him of the right to choose. The construction of the Order requires the police to force the Appellee to meet with the attorney or to forever forego further questioning.

Of course, there is no constitutional right to counsel prior to the time that the suspect was taken into police custody as defined by Miranda. See e.g. Callahan v. Commonwealth, 142 S.W.3d 123 (Ky. 2004); Texas v. Cobb, 532 U.S. 162 (2001). Even where the Sixth Amendment right to counsel has firmly and unquestionably attached, a defendant may waive that right in order to voluntarily speak to police. Patterson v. Illinois, 487 U.S. 285 (1998). This is not a case in which the defendant, while in custody, notifies police that he desires to have counsel. Rather, this case presents quite the opposite situation. Where the defendant does not request any counsel but third parties seek to foist counsel upon the defendant without such a request being personally made.

Although, once again, there is no record to establish what occurred, such an order is also contrary to long established precedent that established that police do not have to interrupt their investigation to inform a suspect that an unrequested attorney has asked for a visit. There can be no Fifth Amendment violation because events that occur outside of the knowledge of the suspect cannot affect an otherwise valid Miranda waiver. "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." Moran v. Burbine, 475 U.S. 412, 422, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986). Thus, there can be no constitutional violation justifying an Order such as the one entered here, under either the Fifth or Sixth Amendments.

Thus, the state rule should be interpreted as allowing attorneys hired by third parties access to a person being held in custody, but not at any time and not under any conditions. It should not give the circuit courts the authority to enter a constitutionally unsound order. Instead, the proper remedy would be a motion to suppress in the event that there is an allegation that a statement was obtained in a manner that was not constitutionally sound. Such motions allow the party to raise any alleged abuse of the police power while giving the Commonwealth an opportunity to be heard and giving the individual the chance to preserve his right to make statements.

VII.

THE *EX PARTE* ORDER VIOLATED THE SEPARATION OF POWERS DOCTRINE UNDER BOTH THE FEDERAL AND KENTUCKY CONSTITUTIONS

As was noted above, this Court should hold that the West decision violates the separation of powers doctrine. Although the West case purports to be based upon RCr 2.14(2), the broad interpretation of that rule adopted in West violates both the federal and state constitutional bar against the usurping of power by one branch of government at the expense of another. RCr 2.14(2) should be interpreted to give reasonable access to an attorney rather than access at any time that any attorney demands under any set of factual circumstances. Any other interpretation encourages the court to enter *ex parte* orders that violate the separation of powers doctrine and an individual's rights in the name of protecting an individual from an unnamed evil.

The West decision and the trial court Order at issue violate the federal and state constitutional doctrine of separation of powers. The investigation of crimes and the exercise of law enforcement is an executive function. Morrison v. Olsen, 487 U.S. 654 (1988). The courts may not constitutionally attempt to increase the scope of their own judicial powers at the expense of another

branch. Id. at 694. When a court action effectively prevents an executive agency from accomplishing its constitutionally assigned functions, it violates the separation of powers doctrine. Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777 (1977).

The separation of powers doctrine is firmly rooted in the Kentucky Constitution. Sections 27 and 28 of the Kentucky Constitution expressly adopt the doctrine - and the courts of the Commonwealth require a strict construction when applying these provisions. Legislative Research Commission v. Brown, 664 S.W.2d 907 (Ky. 1984). The test for a violation of the separation of powers doctrine is "when, and only when, one branch of government exercises power properly belonging to another branch." Prater v. Commonwealth, 82 S.W.3d 898, 907-908 (Ky. 2002). Here, the court is acting outside of its constitutional authority to take a position in a matter that is not yet before it, before any charges have been filed, without any assertion of indigency or need, and without any allegation of any wrongdoing. Such an overbearing and all encompassing power has never been conferred upon the circuit courts. Indeed, a basic principle of jurisdiction requires that there be an actual controversy before the court may take any action. Here, based upon nothing more than a third party assertion that another adult might benefit from an attorney, the court took affirmative steps to strip the police of their power to investigate a crime by collecting a voluntary statement from a suspect.

VIII.

THE DPA LACKS ANY STATUTORY AUTHORITY TO ACT BEFORE APPOINTMENT OR ASSERTION OF INDIGENCY

Further, this case is ultimately distinguished from the West decision because in West the defendant actually qualified for assistance from the Department of Public Advocacy. Here, the DPA

intervened upon the father's request when the adult son had the ability to hire a private attorney (as evidenced by his retention of private counsel). This case demonstrates how problematic and premature the trial court's action ultimately proved to be since KRS chapter 31 does not include any provision that allows the DPA to take the action that it did in undertaking any representation of Mr. Terrell without a Court's appointment, without any finding of indigency by the court, or without any declaration of indigency by the defendant himself. See KRS 31.110 - KRS 31.120. At the very least, KRS Chapter 31 requires that an indigent person declare that he is indigent and request the services of a public defender. Nothing in the chapter allows for a third party to make such declarations or determination on behalf of another adult, and there is no record for this Court to review evidence of any valid assertion of indigency by the defendant. The fact that the Appellee ultimately made the declaration of indigency after the unfortunate death of Mr. Galbraith does little to correct the error that occurred. Affidavits of indigency are not retroactively effective.

The Court, in considering this question, should also consider SCR 3.130. In West, as is the case here, the person seeking the assistance of the public defender was a member of the suspect's family. In other situations, the issue is more attenuated. SCR 3.130 severely limits in-person solicitation of clients by an attorney, and there is no exemption for public defenders. Public defenders are not given leave to troll police investigations for potential high profile clients. Indeed, in Talbott v. Commonwealth, this Court explained West by stating that "such appointment can only be made by a judge or trial commissioner and only upon at least a claim of indigency." Talbott v. Commonwealth, 968 S.W.2d 76, 83 (Ky. 1998). Where the suspect has not been charged, and there is no assertion of any indigency in the record, and no personal request for an attorney the trial court lacks the authority to appoint the DPA to representation.

CONCLUSION

Wherefore, for the foregoing reasons, the Commonwealth respectfully requests that this Court vacate the erroneous Order of the Nicholas Circuit Court.

Respectfully Submitted,

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APPENDIX