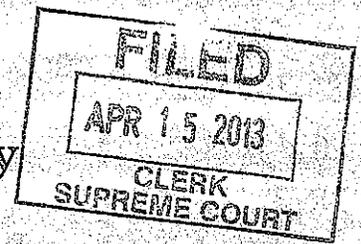


Commonwealth of Kentucky
Supreme Court
No. 2012-SC-402



COMMONWEALTH OF KENTUCKY

APPELLANT

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

FLOYD GROVER JOHNSON

APPELLEE

Brief for Commonwealth

Submitted by,

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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 the Brief for Commonwealth has been served April 15, 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 Attorney; and by delivery through Kentucky Messenger Mail to Hon. Emily Holt Rhorer, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601.

A large, stylized handwritten signature in black ink, appearing to read "Jack Conway".

Jack Conway
Attorney General of Kentucky

INTRODUCTION

Floyd Grover Johnson (“Appellee”) conditionally pled guilty to several charges including three counts of first degree trafficking in a controlled substance. He was sentenced to a total of ten (10) years pursuant to a plea agreement. The Court of Appeals reversed and this Court granted discretionary review.

Notation Concerning Citations to the Record

This appeal involves two separate indictments. The Commonwealth will refer to the transcript of record of each indictment together with the page number; *e.g.*, TR 09-CR-133-02, 1, and TR 09-CR-143, 1. There is one Transcript of Evidence of a combined hearing held on both indictments. It will be referred to as “TE” together with the date and page number.

STATEMENT REGARDING ORAL ARGUMENT

This case directly impacts upon the authority of the Attorney General to investigate matters of great public interest to the Commonwealth. It most directly affects investigations of drug trafficking but also potentially affects investigations into other areas such as cyber-crimes and child pornography. Attorney General Conway requests oral argument so that he may personally argue this case to the Court.

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STATEMENT OF THE CASE

The facts are not in dispute. A Powell County grand jury charged Appellee in two separate indictments with three counts of trafficking in a controlled substance in the first degree, second offense, in violation of KRS 218A.1412 and for delivery of drug paraphernalia, a violation of KRS 218A.500. TR 09-CR-133-2, p. 1-3; TR 09-CR-143, p.1-2. The indictments and subsequent arrest stemmed from an inter-agency investigation dubbed "Operation Flamingo Road." The investigation lasted three years and involved the FBI, the Kentucky State Police, the Drug Enforcement Administration, certain local law enforcement, and the Operation UNITE task force. It resulted in 518 warrants and over 300 arrests in 34 counties with offenders being prosecuted in both state and federal courts.

In this case, investigators with the Attorney General's Office and Operation UNITE together used a confidential informant to conduct typical controlled drug buys from the Appellee in Powell County. The Commonwealth Attorney presented the testimony of Jennifer Carpenter, a sworn officer with the Attorney General's Office, to the grand jury. TR 09-CR-143, 22-33; TR 09-CR-133-02, 13-25.

Appellee moved to suppress all the evidence collected in the two cases and to dismiss the indictments. TR 09-CR-143, 15-19.¹ He asserted that

¹ The motion does not appear in 09-CR-133-02 but it was captioned with both case numbers.

Carpenter, an investigator with the Attorney General's Department of Criminal Investigations, investigated his case along with Operation UNITE detectives Randy Cline and James Botts. Appellee argued that neither the Attorney General's Office nor UNITE had authority to conduct investigations in Powell County. *Id.* at 18.

The Attorney General, through the Office of Special Prosecutions, made a limited appearance to respond to the motions and filed a written response. TR 09-CR-143, 22-33; TR 09-CR-133-02, 13-25. The response included an explanation of the controlled drug buys and the roles of the Commonwealth Attorney and Investigator Carpenter in front of the grand jury. *Id.*

The Attorney General argued in that motion that limitations upon the Attorney General's authority mentioned in KRS 15.190 through KRS 15.210 specifically limited the *prosecutorial* authority of the office and *not the independent investigative authority* of its sworn peace officers. Moreover, KRS 218A.240(1) expressly required peace officers from the Attorney General's Office to enforce the laws on controlled substances. The General Assembly expressly authorized the Attorney General to employ sworn peace officers. KRS 15.150; *see also* KRS 446.010 ("peace officer" includes those with "authority to make arrests"). The Attorney General also argued that suppression and dismissal were not proper remedies. *Id.*

Respondent filed replies but did not contest any of the facts outlined by the Attorney General. TR 09-CR-133-02, 27-32; TR 09-CR-143, 37-42.

Respondent presented no evidence at the hearing. *See* TE, 2/17/2010. The Attorney General's Office did make one additional argument at the hearing—that the investigators “didn't do anything that any ordinary citizen couldn't have, if they wanted to.” TE 2/17/2010, 12.²

The trial court orally denied the motion, *Id.* at 20-21, and then issued a written order. TR 09-CR-133-02, 35-37; TR 09-CR-143, 45-47. Appendix 3. The Appellee conditionally pled guilty in both cases and was sentenced to a total of ten years. TR 09-CR-133-02, 49-51 (App. 1); TR 09-CR-143, 56-58 (App. 2).

The Court of Appeals reversed, holding that the sworn peace officers of the Attorney General's Office had no authority to investigate drug trafficking in Powell County, and remanded for another hearing on whether the indictment should be dismissed. *Floyd Johnson v. Commonwealth*, No. 2010-CA-000607-MR (Ky.App. Jan. 2012) *r'hg. den.* June 8, 2012; Apps. 3 and 4. On the same day the Court of Appeals issued its opinion in this case, a different panel of the Court of Appeals initially upheld the Attorney General's authority to investigate in another case in Powell County stemming from Operation Flamingo Road. *Ronnie Johnson v Commonwealth*, 2010-CA-1867

² The Commonwealth addresses this point in Argument III, *infra*.

and 2010-CA-1868, (Ky.App. Jan. 20, 2012); App. 9. The Attorney General sought a rehearing *en banc* in both cases to resolve the conflict pursuant to Supreme Court Rule 1.030(7)(d) which provides, "If ... the proposed decision of a panel is in conflict with the decision of another panel on the same question, the chief judge may reassign the case to the entire court." Ronnie Johnson also sought rehearing in his appeal.

The chief judge did not address the Commonwealth's request for an *en banc* rehearing. Instead, the panel hearing Appellant Floyd Johnson's appeal simply denied rehearing. The panel hearing Ronnie Johnson's appeal denied the Commonwealth's petition for rehearing but granted Ronnie Johnson's petition for rehearing and changed its decision. *Ronnie Johnson v Commonwealth*, 2010-CA-1867 and 2010-CA-1868 (Ky.App. June 8, 2012) *as modified on r'hg*; App. 10.³ This modified opinion in the *Ronnie Johnson* appeal considered the *Floyd Johnson* opinion and also considered, *sua sponte*, an outdated Attorney General Opinion which had long been superseded by statute. *See* Argument III-B, *infra*.

The Court granted discretionary review in this appeal and is holding the Commonwealth's motion for discretionary review in the Ronnie Johnson appeal in abeyance pending resolution of this appeal. *Commonwealth v.*

³ Judge Wine was on the panel in Ronnie Johnson's appeal and authored the original opinion. Judge Dixon was assigned to the panel on his retirement. Judge Acree authored the opinion on rehearing.

Ronnie Johnson, Order, No. 2012-SC-000404 (Ky. Feb. 13, 2012).

ARGUMENT

The Attorney General has the inherent authority to conduct investigations into matters within the public interest, such as drug trafficking. The Court of Appeals improperly stripped the office of that authority even though no statute removed that authority. In fact, the legislature specifically instructed the Attorney General's Office by name to enforce the trafficking provisions of KRS Chapter 218A. Somehow, the Court of Appeals tortured this statutory directive into a "limitation" upon the Attorney General's constitutional duty and statewide authority and to prohibit him from doing what the General Assembly directed him to do.

The office investigates drug trafficking cases that cut across political subdivisions of the Commonwealth. It investigates matters of statewide importance such as internet scams, elder abuse, and cyber-crimes against children. Since its creation in 2009, the drug task force has made numerous arrests on hundreds of counts of trafficking. The conviction rate has been 80%. This effort has not only been very successful, but has significantly contributed to battling the drug problem in Eastern Kentucky.

The Cyber-Crime Unit works statewide and has processed over 6,600 computer hard drives and other storage devices resulting in the seizure of more than 345,000 contraband images (child pornography) and over 21,000

contraband videos, contraband which would likely go unfound by regular law enforcement agencies lacking the very specialized equipment, expertise, and personnel required for such investigations.⁴ The Cyber-Crime Unit has assisted other agencies in 179 cases and has made 56 arrests. It works for the benefit of local law enforcement and Commonwealth Attorneys. Restricting the authority of these investigators would hamper child pornography investigations and almost assuredly mean fewer prosecutions. These types of crimes simply do not stop at the city or county line. The Attorney General is a state officer and the Court should recognize his statewide authority.

I.

The Attorney General has both general and specific statutory authority to investigate this matter.

Preservation statement. This issue was preserved at TR 09-CR-143, 22-33; TR 09-CR-133-02, 13-25 and at the hearing on February 17, 2010.

The Attorney General has inherent authority to investigate matters in

⁴ KRS 500.120 provides that “in any investigation” relating to certain specified offenses involving the Internet exploitation of children, the Attorney General may issue administrative subpoenas to service providers based upon “reasonable cause.” There have been numerous attempts to use the Court of Appeals’ non-final opinion in this case to challenge the Attorney General’s authority to investigate. For example, a defendant charged in federal court has challenged the authority of the Attorney General to conduct an investigation to establish reasonable cause under KRS 500.120. *James Johnathan Rogers v. United States*, Docket No. 12-6352, 2013 WL 170101 (6th Cir.) (Brief for Defendant/Appellant filed Jan. 10, 2013) (appeal pending). Other attempts have been made in the Circuit Courts for Christian, Franklin, and Greenup Counties (currently held in abeyance).

the public interest and this authority has not been limited by the legislature. See Argument II, *infra*. Instead, the General Assembly has explicitly recognized the general authority of the Attorney General's Office to investigate potential violations of criminal law and has explicitly directed its peace officers to investigate drug trafficking and other violations of KRS 218A.

A. The Attorney General has general statutory authority to investigate potential violations of law.

The legislature has emphasized the role of the Attorney General in the investigation of crimes across the Commonwealth. For example, KRS 15.010(2) recognizes this authority when it states the Office "shall" include a "Special Investigations Division." The legislature then strengthened the Attorney General's authority to pursue investigations in 1982 by providing, in part, "Investigative personnel as designated by the Attorney General shall have the power of peace officers." KRS 15.150.

The grant of statewide authority to peace officers of a state constitutional officer is clear and ambiguous. If there is any ambiguity on this matter, however, then the maxim *expressio unius est exclusio alterius* resolves it — the mention of one thing implies exclusion of the other. *See, e.g., Fox v. Grayson*, 317 S.W.3d 1, 8 (Ky. 2010). The General Assembly granted a state constitutional officer authority to employ peace officers but said nothing about limiting that authority geographically. It makes no sense to grant such

statewide authority but then impliedly take it away in another statute as the Court of Appeals has construed KRS 15.200 and KRS 218A.240 to do.

The General Assembly has also recognized the primary role the Attorney General plays in cooperative law enforcement endeavors such as Operation UNITE and Operation Flamingo Road. It has specifically declared that it is “*to be the policy of this Commonwealth to encourage cooperation among law enforcement officers*” and, to that end, has identified “the Attorney General as *chief law enforcement officer* of the Commonwealth.” KRS 15.700 (emphasis added).⁵

The Court of Appeals construed various sections of KRS Chapter 15 in an attempt to read them *in pari materia* but then failed to even mention KRS 15.700. The Court of Appeals opinion flies in the face of KRS 15.700 by holding that the chief law enforcement officer in the Commonwealth cannot use his legislatively authorized peace officers to cooperate with other law

⁵ Ky.Rev.Stat. 15.700 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.

enforcement agencies to investigate matters of statewide interest.

B. The Attorney General has specific statutory authority to investigate drug trafficking pursuant to KRS 218A.240.

In this particular case, there is *express* statutory authority directing peace officers from the Attorney General's Office to investigate drug trafficking and other drug related crimes under KRS Chapter 218A:

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.

KRS 218A.240(1) (emphasis added).

The plain text of the statute requires the Attorney General to enforce the provisions of Chapter 218A. Appellee was indicted on and pled guilty to violations of that very chapter.⁶ “[T]he cardinal rule of statutory construction is to ascertain and give effect the intent of the legislature.” *Beshear v.*

Haydon Bridge Co., Inc., 304 S.W.3d 682, 703 (Ky. 2010) quoting *Travelers*

⁶ At the time of the violation, KRS 218A.1412(1) stated in part, “A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance, that is classified in Schedules I or II which is a narcotic drug”

Indem. Co. v. Reker, 100 S.W.3d 756, 763 (Ky. 2003). It does so by giving plain meaning to the words of the statute. *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 94 (Ky. 2005); *McClure v. Augustus*, 85 S.W.3d 584, 588 (Ky. 2002).

The Court of Appeals erroneously misread this statute in two ways. It first deleted words from the statute when it said, “This statute merely commands the cooperation that would be necessary amongst various agencies enforcing the same or similar laws within their respective jurisdiction.” *Johnson*, slip op. at 5. It completely ignored the express legislative command that peace officers of the Attorney General’s office “shall enforce *all* provisions of this chapter” and gave effect only to the portion of the statute directing cooperation between agencies. This Court has construed the term *all* literally because it is “plain and unambiguous.” *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546-47 (Ky. 2000) (bill amending definition of marijuana to include “all parts of the plant cannabis sp.[species]”).

This Court has repeatedly emphasized, “We are not at liberty to add or subtract from the legislative enactment” *Department of Revenue, Finance and Admin. Cabinet v. Wyrick*, 323 S.W.3d 710, 713 (Ky. 2010) citing *Beckham v. Bd. of Educ. of Jefferson County*, 873 S.W.2d 575, 577 (Ky.1994) and *Gateway Construction Co. v. Wallbaum*, 356 S.W.2d 247 (Ky.1962).The Court of Appeals emasculated that portion of the statue demanding

enforcement of Chapter 218A and violated the rule of construction that “a statute should be construed so that no part of it is meaningless or ineffectual.” *Allen v. McClendon*, 967 S.W.2d 1, 3 (Ky. 1998) (citations omitted).

The Court of Appeals also misconstrued KRS 218A.240(1) by interpreting the phrase “within their respective jurisdictions” as a limit on peace officers’ authority to enforce the very laws the statute had just directed peace officers to enforce. It is illogical to think the General Assembly would mandate that sworn officers, including those from the Attorney General’s Office, enforce Chapter 218A and then take that power entirely away from them. This Court “presumes that the General Assembly did not intend an absurd statute”. See *Maynes v. Commonwealth*, 361 S.W.3d 922, 924 (Ky. 2012); *King Drugs, Inc. v. Commonwealth*, 250 S.W.3d 643, 645 (Ky. 2008). The Court of Appeals rendered the statute absurd by its interpretation. The statute also specifically identifies the Kentucky State Police. Applying the Court of Appeals’ same faulty logic would mean the KSP would have no authority to investigate drug offenses under Chapter 218A.

The only logical interpretation is that the term “jurisdiction” refers to the geographic jurisdiction of some of the peace officers referred to in the statute. For example, the statute refers to those full time officers employed by city, county, and urban-county or consolidated local governments. Their

authority is typically limited by geography.⁷ If the term “jurisdiction” refers to “subject matter” jurisdiction, then local police would have no authority to investigate crimes under KRS Chapter 218A. Instead, the reference to “jurisdiction” in KRS 218A.240(1) simply reaffirms that the statute does not expand the geographic boundaries in which local peace officers exercise their arrest powers. The statute also refers to various police officers employed by the state, including the Kentucky State Police. The geographic limits of their authority mirror the political boundaries of the Commonwealth. The Attorney General is the only statewide constitutional officer referred to in the statute and his peace officers have statewide jurisdiction. To hold otherwise reaches the absurd result that the Attorney General’s jurisdiction is not statewide.

In order to reach its conclusion that KRS 218A.240(1) did not authorize peace officers with the Office of Attorney General to investigate crimes under that chapter, the Court of Appeals first ignored the plain language of the statute directing the peace officers of the Attorney General’s Office to investigate violations of KRS Chapter 218A. Inexplicably, it said, “[T]he jurisdiction referenced in KRS 218A.240(1) must be found elsewhere.” *Floyd*

⁷ The authority of certain city and county police officers and deputies can be expanded to other geographic areas in limited circumstances. For example, some local police officers are granted temporary arrest powers outside their locality when their assistance is requested by another law enforcement agency. KRS 437.007(1).

Johnson, slip op. at 6. It then proceeded to discuss the interplay between KRS 15.020 and KRS 15.200. *Id.* at 6-12. It invoked the rule that statutes in *pari materia* should be construed together when possible. *Id.* at 8-9. The statute at issue, KRS 218A.240(1), is plain and unambiguous and the Court of Appeals' resort to this rule of statutory construction is improper. *See, e.g., Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002) ("This Court has repeatedly held that statutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required.") (citations omitted).

Moreover, KRS 15.020 and 15.200 are not in *pari materia* with KRS 218A.240(1) because they deal with completely different topics. Briefly stated, KRS 15.020 reaffirms the common law authority of the Attorney General and directs him or her to represent the Commonwealth in various tribunals except where statutorily modified. KRS 15.200 simply enables local officials and the governor to request assistance from the Attorney General in the context of grand jury investigations and criminal trials. In short, when these two statutes refer to limitations on the Attorney General's authority, they focus on the *prosecutorial* authority of the Office of Attorney General and not the *investigative* authority of peace officers employed by the Office. The Commonwealth discusses this at greater length in Argument II-B, *infra*.

The Court of Appeals also ignored relevant portions of statutes while

selectively emphasizing portions of less relevant statutes. The court emphasized the language in KRS 15.020 indicating the Attorney General is the “*chief law officer*” of the Commonwealth and is its “*legal adviser.*” *Floyd Johnson*, slip op. at 6 (emphasis in opinion). The court then completely ignored KRS 15.700 which designates the Attorney General as the “*chief law enforcement officer*” of the Commonwealth. The Court of Appeals could not have reached its result if it had properly analyzed KRS 15.700.

This Court has construed statutory language similar to that in KRS 218A.240(1) to uphold the authority and duty of special officers of the Transportation Cabinet to arrest those driving under the influence of intoxicants. *Howard v. Transportation Cabinet*, 878 S.W.2d 14 (Ky. 1994). The Court noted that the the Cabinet’s special officers “*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 ...*” of Chapter 281 and “*any other law relating to motor vehicles ...*” *Howard* at 15-16 *citing* KRS 281.765. The Court also noted another statute, similar to KRS 218A.240(1), which stated, “*No peace officer or state police officer shall fail to enforce rigidly this section ...* “ and the statutes on driving under the influence of intoxicants. *Howard* at 17, *citing* KRS 189.520(2).

The Court said:

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.

Id. (footnote omitted).

Here, the legislature has directed peace officers employed by the Attorney General to fight the drug scourge many areas of the Commonwealth face. Drug abuse kills people and destroys families.⁸ It is at least as serious as DUI offenses. This Court should keep in mind the General Assembly's "powerful imperative" in fighting the illegal drug problem which is prevalent in many communities. The Court should not limit the authority of the peace officers employed by the Office of Attorney General.

⁸ For example, statewide drug overdose fatalities totaled 979 in 2010. Terry Bunn, Ph.D. and Svetla Slavova, Ph.D., Kentucky Injury Prevention and Research Center, *Drug Overdose Morbidity and Mortality in Kentucky, 2000-2010*, p. 34; retrieved April 9, 2013 from <http://odcp.ky.gov>. The State Medical Examiner conducted autopsies on 558 persons who died in Kentucky in 2011 from accidental drug overdoses. *Office of the Medical Examiner, 2011 Calendar Year Annual Report*, p. 12; retrieved March 20, 2013 from <http://justice.ky.gov/departments/me>. This figure does not include drug overdoses where the Medical Examiner did not perform an autopsy. It also does not include those who died as a result of motor vehicle collisions caused by those unlawfully using drugs or others whose deaths can be attributed to drug abuse.

II.

The Attorney General has the inherent authority under common law to investigate this matter and the General Assembly has not limited that authority.

Preservation statement. This issue was preserved at TR 09-CR-143, 22-33; TR 09-CR-133-02, 13-25 and at the hearing on February 17, 2010.

The Attorney General is a constitutional officer with inherent common law duties and authority. As the chief law officer of the Crown, and now of the Commonwealth, the Attorney General has the duty and authority to investigate violations of the law when in the public interest to do so. The General Assembly has not sought to limit that authority. Instead, it has seen fit to imbue the Office of Attorney General with both general and specific statutory authority to investigate drug trafficking. *See* Argument I, *supra*.

A. The Kentucky Constitution has incorporated the common law investigative authority of the Attorney General.

The Attorney General has duties as “prescribed by law.” Ky. Const. § 91, Ky. Const. § 93. The courts of the Commonwealth have read these sections, together with Ky. Const. § 233, as authority for the legislature to *limit* the common law authority of the Attorney General and to add to it, but not as the primary *source* of the Attorney General’s authority.

Section 233 of the Kentucky Constitution adopted all laws in effect in

Virginia on June 1, 1792 and “which are of a general nature and not local to that State” and which were not contrary to Kentucky’s Constitution or to acts of the General Assembly. In turn:

By an act of the Virginia convention of 1776, the common law of England, including all statutes made in aid of it prior to the fourth year of the reign of James I (March 24, 1607), was continued in force, except as far as it was altered by the Legislature of the state. This act is in force in Kentucky by virtue of section 233 of the Constitution.

Campbell v. W.M. Ritter Lumber Co., 140 Ky. 312, 131 S.W. 20, 21 (1910)
(citations omitted).

The courts have long recognized that the Attorney General retains all of the authority, duties, and powers under common law unless modified by statute: “[I]t must be presumed that, when the office was created in Kentucky, it was contemplated that the officer should have all the powers then recognized as belonging to it, except so far as these powers were limited by statute.” *Respass v. Commonwealth*, 131 Ky. 807, 115 S.W. 1131, 1132 (Ky. 1909). The Attorney General “is clothed with all the powers incident to and traditionally belonging to his office. They are implicit in the relationship; in other words, inherently *ex officio*.” *Johnson v. Commonwealth ex rel. Meredith*, 291 Ky. 829, 165 S.W.2d 820, 826 (1942). As the court explained in that opinion, “[W]hen the office was created in Kentucky, it was

contemplated that the officer should have all the powers then recognized as belonging to it, *except so far as these powers were limited by statute.*" *Id.* at 827 (quotes and citations omitted, emphasis by court); *see also*, *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974), *Hancock v. Terry Elkhorn Mining Co., Inc.*, 503 S.W.2d 710, 715 (Ky. 1973). This view comports with the general rule in the United States. *See* 7 Am. Jur. 2d Attorney General § 6.

The court in *Johnson v. Com. ex rel Meredith* described some of the Attorney General's common law duties, "[H]e was the chief law officer of the Crown, managing all the king's legal affairs, attending to all suits, civil and criminal, in which he was interested...." *Johnson v. Com. ex rel Meredith*, 165 S.W.2d at 826. The Attorney General represented the King, and therefore the State, "in all legal matters, civil and criminal." *Hancock v. Terry Elkhorn Mining*, 503 S.W.2d at 715.

The investigative authority of the office is self-evident and has recently been recognized by this Court, "[T]he AG's office is an investigatory body." *Dennis Stilger v. Edward H. Flint*, __ S.W.3d __, No. 2010-SC-000120-DG, slip op. at 5 (Ky. Feb. 21, 2013); App. 11. This Court has recognized the Attorney General's authority to investigate and review documents in the possession of the Cabinet for Economic Development to determine whether parties had breached their incentive contracts with the state. *Strong v.*

Chandler, 70 S.W.3d 405 (Ky. 2002). The Court recognized the “common sense concept of investigating before filing” *Id.* at 410.

The obvious and inherent nature of the common law authority has meant there has been little discussion on the matter. That is not to say it has never been recognized, however. Pennsylvania's Supreme Court has noted that the common law authority included “the right to *investigate* criminal acts” as well as to prosecute criminal cases. *In re Shelley*, 332 Pa. 358, 362, 2 A.2d 809, 812 (Pa. 1938) (emphasis added) *rev'd on other grounds by Commonwealth v. Schab*, 477 Pa. 55, 61, 383 A.2d 819, 821-22 (Pa. 1978).

The authority to investigate has been recognized to be among the “most common and important functions identified with the office of Attorney General” Emily Myers and Lynne Ross, ed., National Association of Attorneys General, *State Attorneys General Powers and Responsibilities*, 2d ed., pp. 12-14 (2007).⁹ Discussing this investigative authority:

This authority is little noted but of enormous practical and theoretical potential; the power to investigate may be focused on issues of government misconduct, malfeasance, or individual criminal activities. In addition, the Attorney General may focus on issues of substantial public interest and may issue reports with recommendations as to public needs and possible solutions.

Id. at 14.

⁹ ISBN 978-0-9797381-1-1, relevant portions included as Appendix 8.

England's attorneys general often investigated matters of public interest. Sir Edward Coke's duties as Attorney General "continually involved him in criminal investigations and trials." Allen D. Boyer, *Sir Edward Coke and the Elizabethan Age*, p. 242 (2003).¹⁰ On November 17, 1596, for example, a small group of men gathered with rebellion on their mind but soon dispersed. They were arrested and then, "Coke interrogated the ringleaders and identified some more twenty 'mutinous persons.'" *Id.* at 256. In 1600 the Attorney General also investigated and personally interrogated persons connected with the publication of a seditious book, leading to imprisonment of lawyer Sir John Haywood. Coke's investigation also led him to unsuccessfully push for charges of treason to be placed against Robert Devereux, the Earl of Tyrone. *Id.* at 278-279.

Attorney General investigations were not limited to criminal matters. For example, in 1565 the Attorney General investigated and reported to the Crown when complaints arose about the application of Norman law in formerly Norman islands to non-islanders. Matthew Hale, *The History of the Common Law of England*, pp. 118-120 (Charles M. Gray ed., The Chicago Univ. Press 1971) (1739).¹¹ In another example, Attorney General Sir Francis Bacon helped investigate and report to the king on the conflict between the

¹⁰ Published by Stanford Univ. Press, ISBN 0-8047-4809-8 Relevant portions attached as Appendix 6.

¹¹ ISBN 0-226-31304-2. Relevant portions attached as Appendix 7.

courts of law and the courts of equity when Coke, as Chief Justice of the King's Bench, sought to indict the Chancellor and others when the Chancellor enjoined enforcement of a judgment obtained at law. David W. Raack, *A History of Injunctions in England Before 1700*, 61 Ind. L.J. 539, 579-80 (1986).

Modern statutes authorizing or requiring attorneys general to investigate charities and charitable trusts are simply restatements of their common law authority to do so. Martin D. Begleiter, *Son of the Trust Code — The Iowa Trust Code After Ten Years*, 59 Drake Law Rev. 265, 421 (2011). In Kentucky the common law authority of the Attorney General to investigate established charities and charitable trusts has been implicitly recognized: “[T]he Attorney General has power to supervise the administration of such established trusts, to prevent the mismanagement and waste of the trust fund, to remedy malfeasance by trustees, and to see that the purposes of the trusts are carried out.” *Commonwealth ex rel. Ferguson v. Gardner*, 327 S.W.2d 947, 948-49 (Ky. 1959) (citations omitted). The Attorney General could not do these things unless he or she has investigative authority.

The authority to investigate flows from the Attorney General's authority to act in the public interest. In Kentucky, “[T]he people are king, Ky.Const. sec. 4, so the Attorney General's duties are to that sovereign rather than to the machinery of government.” *Commonwealth. ex rel. Hancock v.*

Paxton, 516 S.W.2d at 867 (Ky. 1974). The broad authority of the Attorney General to act on behalf of the people stems from “bedrock principles of law ...” *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 173 (Ky. 2009). As another court put it, the “paramount” duty of an attorney general “is his duty to protect the interests of the general public.” *State v. Culp*, 823 So. 2d 510, 514-15 (Miss. 2002) (citations omitted). Here, the Attorney General has determined that it is the public interest to investigate drug trafficking, especially illegal trafficking of prescription drugs, in cooperation with investigators from Operation UNITE.

Since the paramount duty of the Attorney General is to protect the public interest, the legislature cannot totally circumscribe the authority of the Attorney General to investigate matters within the public interest. As noted above, the General Assembly may limit the authority and duties of the Attorney General but it may not take away that which is fundamental to the office. After recognizing that the legislature may withdraw certain duties from the Attorney General, this Court's predecessor court stated:

This, however, is subject to the limitation that the office may not be stripped of all duties and rights so as to leave it an empty shell, for, obviously, as the legislature cannot abolish the office directly, it cannot do so indirectly by depriving the incumbent of all his substantial prerogatives or by practically preventing him from discharging the substantial things appertaining to the office.

Johnson v. Commonwealth ex rel. Meredith, 291 Ky. 829, 165 S.W.2d 820, 829 (1942).

- B. The General Assembly has explicitly recognized the Attorney General's common law authority and duties and has not sought to limit his investigatory authority.**

This Court does not need to decide whether or to what extent the General Assembly can limit the Attorney General's inherent investigative authority because it has expressly recognized that authority. KRS 15.020 sets out an overview of the Attorney General's duties:

The Attorney General is the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and the legal adviser of all state officers, departments, commissions, and agencies...and *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.* ...Except as otherwise provided in KRS 48.005(8) and 2000 Ky. Acts ch. 483, sec. 8, he shall appear for the Commonwealth in all cases in the Supreme Court or Court of Appeals wherein the Commonwealth is interested, and shall also commence all actions or enter his appearance in all cases, hearings, and proceedings in and before all other courts, tribunals, or commissions in or out of the state, and attend to all litigation and legal business in or out of the state required of him by law, or in which the Commonwealth has an interest, and any litigation or legal business that any state officer, department, commission, or agency may have in connection

with, or growing out of, his or its official duties, *except where it is made the duty of the Commonwealth's attorney or county attorney to represent the Commonwealth.* When any attorney is employed for any said agency, the same shall have the approval of such agency before such employment....

KRS 15.020 (emphasis added).

KRS 15.020 recognizes and continues the Attorney General's common law authority subject to express limitations. There is no limitation on the AG's authority to investigate matters in the public interest. The statute *does* mention specific limitations on *prosecutions* when it requires the Attorney General to attend to the legal business of the state and attend to all cases and appear in all courts "except where it is made the duty of the Commonwealth's attorney or county attorney to represent the Commonwealth." *Id.* This exception applies only to *prosecutions* because the legislature has assigned the duties of prosecution to the Commonwealth and county attorneys.

This point is emphasized in KRS 15.725(1)¹² which gives the

¹² KRS 15.725(1) states:

The Commonwealth's attorney shall attend each Circuit Court held in his judicial circuit. He shall, except as provided in KRS 15.715 and KRS Chapter 131, have the duty to prosecute all violations whether by adults or by juveniles subject to the jurisdiction of the Circuit Court of the criminal and penal laws which are to be tried in the Circuit Court in his judicial circuit. In addition, he shall have the primary responsibility within his

Commonwealth Attorney the duty, generally, to prosecute criminal cases which “are to be tried” in circuit court. It separately empowers the Commonwealth Attorney “to present evidence to the grand jury.” The statute gives no express authority to the Commonwealth Attorney to investigate crime outside the context of a grand jury proceeding or the prosecution of a case in court. Unlike the office of Attorney General, the office of Commonwealth Attorney did not exist at common law and its duties are specifically established by statute; it can be completely abolished by the legislature. Ky. Const. § 97; *see also Hancock v. Schroering*, 481 S.W.2d 57, 60 (Ky. 1972) (“The office of Commonwealth's attorney does not possess the historical common law background that inheres in the office of Attorney General.”). Thus, KRS 15.020's limitation on the Attorney General is only in regard to *prosecuting* criminal cases in court or before a grand jury because that duty has been assigned to others.

The Court of Appeals confused limits on the prosecutorial authority of the Attorney General with the AG's inherent authority to investigate matters in the public interest outside of a courtroom or grand jury proceeding. The Commonwealth Attorney has general prosecutorial authority in circuit court and before the grand jury, subject to exceptions. One such exception is found in KRS 15.200 which allows the Attorney General to intervene when certain

judicial circuit to present evidence to the grand jury concerning such violations.

designated public officials or bodies request it.¹³ *This is an exception to the Commonwealth Attorneys' authority, not a limit on the Attorney General's authority.*

In *Matthews v. Pound* a Jefferson County grand jury reported that certain parole board members may have violated the law but did not indict anyone. *Matthews v. Pound*, 403 S.W.2d 7, 9 (Ky. 1966). The governor and two Commonwealth Attorneys from other circuits requested the intervention of the Attorney General pursuant to KRS 15.200. *Matthews* at 9. The circuit judge denied the Attorney General's request to see an "item" the grand jury had requested to be kept secret. *Id.* In upholding the Attorney General's right to review the full report, including the "item" kept secret, the court in *Matthews* recognized the Attorney General had both statutory and common

¹³ KRS 15.200 states, in full:

(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.

law authority, *Id.* at 10. The court did not mention what did not need to be mentioned, that the Commonwealth Attorney had general prosecutorial authority. It is in regard to the Commonwealth Attorneys' general prosecutorial authority that the *Matthews* court said, "The duties of the Attorney General have been enlarged by KRS 15.190, 15.200, and 15.210." *Id.* at 10-11. The statutes "enlarged" the AG's *prosecutorial* duties, including presentment to the grand jury, because the legislature had previously limited them. The court did not refer to the AG's investigatory powers outside the circuit court or grand jury being enlarged because there was no need to do so. The legislature had never limited that authority in the first place and still has not.

In *Hancock v. Schroering* the February term of the Jefferson County Grand Jury requested the Attorney General to intervene and take over investigation of alleged gambling and prostitution activities. *Hancock v. Schroering*, 481 S.W.2d at 58. The term ended before work was completed and, in the next term, the Commonwealth Attorney invited the Attorney General to participate on a cooperative basis. However, several officials authorized by KRS 15.200 requested the Attorney General to intervene and assume "exclusive direction of the investigation and prosecution of alleged violations of laws related to vice, gambling and prostitution in Louisville and in Jefferson County." *Id.* The Commonwealth Attorney contended he could

not be entirely displaced in the grand jury investigation. *Id.* In resolving the dispute, this Court's predecessor court referred to the *Matthews* opinion and also noted, "By legislative delegation, the Commonwealth's attorney is charged with the responsibility of *prosecuting* all violations of the criminal and penal laws of the Commonwealth." *Id.* (emphasis added).¹⁴ The court then upheld the exclusive statutory authority of the Attorney General to conduct grand jury investigations when intervening pursuant to KRS 15.200. *Id.* at 61.

Both *Matthews* and *Hancock v. Schroering, supra*, dealt with grand jury investigations and the Attorney General's role as *prosecutor*, not the inherent authority to investigate matters in the public interest nor the authority of sworn peace officers to perform their duty. In the case now before the Court, the Commonwealth Attorney presented the evidence to the grand jury and represented the Commonwealth in circuit court. He requested only that the Attorney General reply to Appellee's motion to suppress the evidence and dismiss the indictment because of the AG's alleged lack of authority to investigate.

Moreover, with respect to the Attorney General's common law duties, KRS 15.200(1) is merely a mechanism whereby other agencies in the

¹⁴ The court cited to former KRS 69.010 which now only refers to civil cases. KRS 15.725(1) is the current legislative authority for the Commonwealth Attorney to prosecute violations of criminal and penal laws within the jurisdiction of the circuit court.

Commonwealth can *request* the aid of the Attorney General to “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” when that agency desires help or assistance in a “given case” and such assistance is desirable.

KRS 15.200 is, therefore, the legislative authority through which specific agencies may approach the Attorney General for his assistance. It expands the power of those agencies in seeking help from the Attorney General. It does not contract the Attorney General’s inherent investigatory power. The Court of Appeals got it backwards.

C. A 1970 Opinion of the Attorney General recognized limits on the Attorney General’s prosecutorial authority but not on its investigative authority.

The Court of Appeals *sua sponte* raised an outdated Advisory Opinion of the Attorney General, OAG 70-522, in its opinion on rehearing in Ronnie Johnson’s appeal. The court stated:

We are somewhat perplexed by the Attorney General’s position. This argument is in direct conflict with its own articulation of its limited authority, expressed in an Opinion of the Attorney General. That Opinion states:

The Attorney General is chief law officer and legal adviser — not the chief law enforcement officer or agency — of the Commonwealth of Kentucky.

Neither the Attorney General nor any members of his staff are police officers, nor do they possess the authority thereof. The Department of Law has not

been budgeted nor staffed for investigatory activities or with field agents, nor does it maintain branch offices throughout the Commonwealth....

As the chief law officer of the state and legal adviser to its various agencies and political subdivisions, *the Attorney General does not under Kentucky law possess any authority to administer or enforce that great body of law that by legislative mandate is the responsibility of the county and Commonwealth[s] attorneys, for misdemeanors and felonies* respectively, and the executive branch of government. KRS 69.210; KRS 69.010. At present, air and water pollution, strip mining, the recovery of state funds, some consumer protection statutes and certain other limited responsibilities constitute the sum total of the Attorney General's **prosecutorial responsibility.**

Ronnie Johnson, slip op. at 8-9, quoting OAG 70-522 [pp. 8-9] (italicized portions by Court of Appeals, bolded text added). A copy of Advisory Opinion 70-522 is included as Appendix 12.

Since the Office issued that Advisory Opinion in 1970, much has changed and the Court of Appeals not only misapplied the Advisory Opinion, it ignored many subsequent statutory enactments. The General Assembly enacted KRS Chapter 218A in 1972. It enacted KRS 15.700 in 1976 and designated the Attorney General "as chief law enforcement officer of the Commonwealth" The legislature amended KRS 15.150 in 1982 to allow the Attorney General to designate investigative personnel as peace officers. The Office of Attorney General now funds sworn peace officers and

investigative activities. The Attorney General maintains branch offices in Louisville and Prestonburg.

The italicized portion of the 1970 Advisory Opinion continues to be a correct statement of the law. The Attorney General does not have general authority regarding felonies and misdemeanors because the legislature has mandated those be prosecuted by local prosecutors. The Court of Appeals, however, ignored the fact the Advisory Opinion specifically referred to “the sum total of the Attorney General’s **prosecutorial responsibility.**” Instead, the court simply lumped investigative authority in with prosecutorial authority.

The Court of Appeals also gave no context for the portion of the Advisory Opinion which it quotes. In the actual matter under discussion in the 1970 advisory opinion, the Attorney General had responded to numerous letters regarding the destruction of roads by overweight coal trucks and the non-enforcement of weight limits. The Advisory Opinion briefly explained why the Attorney General could not prosecute in court those citations issued. The Advisory Opinion later referred to the authority of the Attorney General to seek injunctive relief through a public nuisance suit, underscoring the fact the Attorney General simply recognized his lack of authority to prosecute criminally. OAG 70-522, p. 23.

The Attorney General’s Office also did something which the Court of Appeals said it had no authority to do — it investigated the matter at hand in

that case:

[M]embers of my staff and I proceeded during the first half of July, with representatives of interested departments, on fact-finding tours of the eastern and western Kentucky coalfields”

Id. at 4. The Office also reviewed records of state agencies and found that officers had issued a good number of citations with many “filed away” and only a handful of convictions. *Id.* at 5-6.

In short, the Court of Appeals’ interpretation of OAG 70-522 was based on outdated law and facts and failed to perceive the difference in the authority to investigate a matter and the authority to prosecute crimes in court. Moreover, the Court of Appeals failed to take note of subsequent statutory enactments and amendments, namely KRS Chapter 218A (enacted 1972), KRS 15.700 (enacted 1976), and KRS 15.150 (amended 1984).

This Court does not need to decide whether the legislature can constitutionally strip the Attorney General of his common law investigatory authority because the legislature has not attempted to do so. In fact, the legislature has expressly recognized both the general authority to investigate and the specific authority to investigate drug trafficking.

III.

The investigators exercised no authority of sworn peace officers in this case and it was improper for the Court of Appeals to remand for another hearing.

Preservation statement. This issue is preserved. The Attorney General argued at the evidentiary hearing that the Attorney General's investigators exercised no powers of peace officers in the investigation involving Appellee and that suppression and dismissal were improper remedies. TE 2/17/2010, 12. Appellee conditionally pled guilty pursuant to a plea agreement. The Court of Appeals then ordered a remand for a hearing to determine whether the indictment should be dismissed in light of *Commonwealth v. Bishop*, 245 S.W.3d 733 (Ky. 2008). *Floyd Johnson v. Commonwealth*, slip op. at 12-13.

If the Court determines the investigators from the Attorney General's Office acted within the Attorney General's common law or statutory authority, then this issue is moot.

A. The trial court has already conducted the hearing and Appellee is not entitled to another one.

The issue at the trial court level was whether the evidence should be suppressed and the evidence dismissed when investigators conduct an investigation “outside their jurisdiction” but without exercising any authority reserved to peace officers. The Court of Appeals improperly remanded for an evidentiary hearing because Appellant *already had his hearing* and conditionally pled guilty pursuant to a plea bargain. The “do over” undercuts the plea bargaining process and the purpose of conditional pleas.

The plea bargaining process benefits the prosecution, the defense, and the judicial system. The prosecution and the courts conserve precious resources and the defendant benefits through greater certainty in sentencing and avoiding the risk of a more severe penalty. The conditional guilty plea under RCr 8.09 often plays an important role in the plea bargaining process because:

The conditional guilty plea avoids the necessity of a full trial for a defendant who wants appellate review of a claim but who heretofore had to go to trial to preserve the issue for appeal. A defendant who prevails on appeal can withdraw the plea.

Leslie W. Abramson, *Conditional Guilty Plea*, 8 *Ky. Prac. Crim. Prac. & Proc.* § 22:17 (2012-2013 ed.).

The Court of Appeals decision to remand for a second hearing undercuts judicial economy, inserts unwarranted uncertainty into a process designed to foster certainty, and serves as a disincentive for prosecutors to plea bargain. At the very least, it would encourage prosecutors to offer pleas containing wider disparities of sentence recommendations between conditional pleas and unconditional pleas. This will disfavor many defendants because they will face longer sentence recommendations if they wish to conditionally plead guilty.

Moreover, this Court has disapproved of second bites at the apple. *See, e.g., Alvey v. Commonwealth*, 648 S.W.2d 858, 860 (Ky. 1983) (“[W]e should

not afford the defendant a second bite at the apple ...” where defendant tried to challenge his guilty plea to a felony when subsequently indicted for another offense and for being a PFO); *Kentucky Bar Ass'n v. Belker*, 997 S.W.2d 470, 473 (Ky. 1999) (Respondent was afforded due process and “has failed to present anything resembling sufficient grounds to justify his request for a ‘do over’—a remand for an evidentiary hearing.”). Here, Appellee had his hearing and had his opportunity to present whatever he wanted. He waived any right to further hearings by pleading guilty with the state of the record as it was.

B. The investigators exercised only the rights of private citizens and this does not merit the exclusion of evidence or dismissal of charges.

Turning to the merits of this issue, any citizen could have lawfully conducted the investigation done by the investigators in this case. The investigators from the Attorney General’s Office and UNITE simply video taped a controlled drug buy and turned this evidence over to the Commonwealth Attorney. Citizens act lawfully when they participate in a drug transaction as part of a private investigation into drug trafficking because they lack criminal intent.

In *Kohler v. Commonwealth*, 492 S.W.2d 198 (Ky. 1973) the court said a defendant was entitled to an affirmative jury instruction on the requirement of criminal intent when he claimed to be working with police when he bought and then attempted to sell heroin, a claim which police

denied. *Id.* at 199-200. This Court later held that one charged with trafficking (by possession with intent to traffic) was entitled to an affirmative “innocent possession” instruction if the evidence reasonably supports it. *Commonwealth v. Adkins*, 331 S.W.3d 260, 264 (Ky. 2011). In that case, the defendant claimed he found and was going to deliver to police a sock containing seventeen grams of methamphetamine and other items commonly associated with drug use or sale. *Id.* at 261-262. The Court gave several examples of “innocent possession,” including a teacher who finds drugs and gives them to the school’s principal. Without the “innocent possession” concept, both would be guilty of trafficking. *Id.* at 264. The Court concluded, “We are confident that the General Assembly did not intend to criminalize the possession or transfer of controlled substances in circumstances such as these” and then noted that the possession and trafficking statutes “all require that the possession or trafficking be ‘knowing and unlawful.’” *Id.*

The Court also noted that KRS 218A.220 created a specific “innocent possession” defense for those who have temporary incidental possession for the purpose of aiding public officials performing their duties. *Id.* at 265. This protected not only agents of police but also, “to encourage persons who find controlled substances or otherwise come innocently into their possession to turn them in and give whatever information they might have about them.” *Id.* at 266. The defendant was therefore entitled to an affirmative “innocent

possession” instruction. *Id.*

Another species of “innocent possession” is that found in *Morrow v. Commonwealth*, 286 S.W.3d 206, 211 (Ky. 2009). The defendant was a part time deputy jailer in Whitley County (formerly a special deputy sheriff in McCreary County) whose official authority ended at the county line. He was convicted of trafficking by complicity when an informant bought drugs in McCreary County from the defendant’s brother. He raised two defenses: (1) that he was conducting an independent drug investigation as a private citizen because the local police would not cooperate and (2) that he was entrapped. The trial court instructed on the first defense but refused the entrapment instruction because it seemed to conflict with the first. *Id.* at 207-209. This Court held the defendant was entitled to *both* instructions. *Id.* at 213.

The investigators here did not execute a search warrant. They did not detain or arrest Appellee pre-indictment. They did not exercise the powers of a peace officer during the investigation. They simply turned the evidence they had gathered over to the Commonwealth Attorney and testified in front of the grand jury, all of which any citizen could have done.

Neither the Appellee nor the Court of Appeals ever identified any specific constitutional right violated, assuming *arguendo* that the AG’s investigators were acting outside their jurisdiction as a peace officer. The

courts apply the exclusionary rule only upon violation of the defendant's constitutional rights. Evidence is not suppressed when there are only statutory violations. *Johnson v. Commonwealth*, 327 S.W.3d 501, 511 (Ky. 2010), *Saylor v. Commonwealth*, 144 S.W.3d 812, 817 (Ky. 2004), *Brock v. Commonwealth*, 947 S.W.2d 24, 29 (Ky. 1997).

Furthermore, dismissal of the indictment would not have been a proper remedy if the officers had operated outside their jurisdiction during the investigation. Typically, only “[t]he attorney for the Commonwealth, with the permission of the court, may dismiss the indictment” RCr 9.64. A trial court’s authority to dismiss an indictment “[i]s limited to a determination of whether the indictment was valid on its face and whether it conformed to the requirements of RCr 6.10.” *Hancock v. Commonwealth*, 998 S.W.2d 496, 498 (Ky. App. 1998); accord *Commonwealth v. Johnson*, 245 S.W.3d 821, 823 (Ky. App. 2008). There are other limited exceptions which allow a trial court to dismiss an indictment before trial, including prosecutorial misconduct for “flagrant abuse” of prosecutorial authority resulting in prejudice to the defendant. *Commonwealth v. Hill*, 228 S.W.3d 15, 17 (Ky. App. 2007).

Appellee never made any allegation of prosecutorial misconduct in this case and waived that argument when he conditionally pled guilty. The Court of Appeals improperly injected this issue *sua sponte* when it remanded the case for an evidentiary hearing to determine whether the indictment should

be dismissed in light of *Commonwealth v. Bishop, supra*. This Court expressly stated in *Bishop* that it was not deciding the issue upon which the Court of Appeals remanded for a hearing. *Bishop* at 735.

In *Bishop* this Court recited the general rule that trial judges should not dismiss indictments pre-trial but noted several exceptions including unconstitutionality of the criminal statute, certain defects in grand jury proceedings, insufficiency on the face of the indictment, and lack of jurisdiction by the court. *Id.* (citations omitted). The court also noted another exception, prosecutorial misconduct prejudicing the defendant. *Id.*, citing *Hill, supra*. The defendant in *Bishop* claimed there was a lack of jurisdiction because the police officer arrested him outside the city limits and the city had enacted an ordinance prohibiting a city police officer from leaving the city limits while on duty except in an emergency. *Bishop* at 734-735. The Court said this was not a lack of jurisdiction by the trial court itself but decided the appeal on other issues and specifically declined to address the “jurisdiction” issue: “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.

Somehow, the Court of Appeals panel interpreted this last remark as the green light to remand for a re-determination of what the trial court had

already determined. The panel then drew a roadmap for Appellee to follow in presenting the type of evidence the panel thought might warrant dismissal of the indictment.¹⁵ Even that roadmap is faulty because it did not include any type of bad faith or “flagrant abuse” as required by *Hill* at 17-18. In *Hill* the Court of Appeals actually vacated the order dismissing the indictment because there was no evidence of bad faith on behalf of the prosecutor. *Hill* at 18. In this case, there has never been any allegation or evidence that the investigators acted in bad faith or flagrantly abused their offices. They were acting on the good faith belief that were acting lawfully.

CONCLUSION

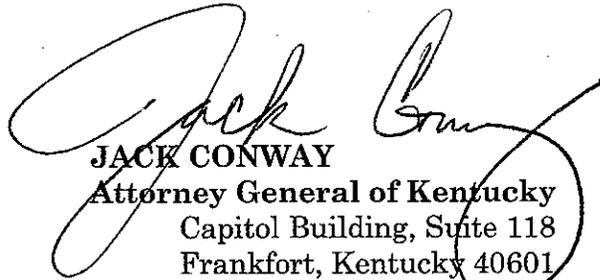
For all of the foregoing reasons, this Court should reverse the Court of Appeals and affirm the conviction of Appellee.

¹⁵ The opinion 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.

Floyd Johnson v. Commonwealth, slip op. at 12, n. 9.

Respectfully Submitted,

A large, stylized handwritten signature in black ink, appearing to read "Jack Conway". The signature is written over the typed name and title.

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APPENDIX

<u>Description</u>	<u>Appendix No.</u>
Judgement in No. 09-CR-00133-02 (TR 49-51)	1
Judgement in No. 09-CR-00143 (TR 56-58)	2
Order (TR 09-CR-143-02, 45-47) (identical order at TR 09-CR-133-2, 35-37)	3
<i>Floyd Grover Johnson v. Commonwealth</i> , No. 2010-CA-00607-MR (Ky.App. Jan. 20, 2010), <i>r'hg den.</i> June 8, 2012	4
<i>Floyd Grover Johnson v. Commonwealth</i> , No. 2010-CA-00607-MR, Order Denying Petition for Rehearing	5
Allen D. Boyer, <i>Sir Edward Coke and the Elizabethan Age</i> (2003) (selected portions).	6
Matthew Hale, <i>The History of the Common Law of England</i> (Charles M. Gray ed., The Chicago Univ. Press 1971) (1739) (selected portions).	7
Emily Myers and Lynne Ross, ed., National Association of Attorneys General, <i>State Attorneys General Powers and Responsibilities</i> , 2d ed. (2007) (selected portions):	8
<i>Ronnie Johnson v Commonwealth</i> , 2010-CA-1867 and 2010-CA-1868, (Ky.App. Jan. 20, 2012) (<i>before modification</i>).	9
<i>Ronnie Johnson v Commonwealth</i> , 2010-CA-1867 and 2010-CA-1868 (Ky.App. June 8, 2012) <i>as modified on r'hg.</i>	10
<i>Dennis Stilger v. Edward H. Flint</i> , __ S.W.3d __, No. 2010-SC-000120-DG (Ky. Feb. 21, 2013).	11
OAG 70-522.	12