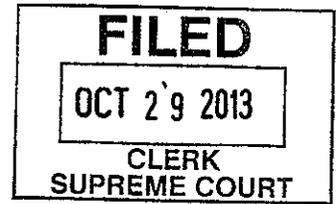


SUPREME COURT OF KENTUCKY
FILE NO. 2012-SC-550



COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM NICHOLAS CIRCUIT COURT
HON. JAY DELANEY, JUDGE

SAMUEL TERRELL

APPELLEE

BRIEF FOR APPELLEE, SAMUEL TERRELL

SUBMITTED BY:

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CERTIFICATE REQUIRED BY CR 76.12(6):

The Undersigned does hereby certify that copies of this brief was served upon the following named individuals by mail delivery on October 29, 2013: Hon. Jay Delaney, Chief Circuit Judge, Harrison County Justice Center, 115 Court St., Suite 5, Cynthiana, Kentucky 41031; Hon. E. Douglas Miller, Commonwealth's Attorney, 130 South Main St., Suite A, Cynthiana, Kentucky 41031; and Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601. The undersigned does also certify that the record on appeal was not checked out for the purpose of this Brief.



KATIE L. BENWARD

INTRODUCTION

The Commonwealth appeals from a trial court order appointing counsel.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee believes oral argument is unwarranted since the lack of an adequate record on appeal precludes any meaningful review by this Court. Nonetheless, Appellee is happy to comply should the court believe oral argument would assist in rendering a just determination of the case.

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COUNTERSTATEMENT OF THE CASE

The record on appeal consists of 1) an order from the Nicholas Circuit Court appointing counsel, 2) an affidavit for a search warrant, 3) a search warrant signed by the Nicholas County District Court Judge, 4) a district court docket page from the arraignment on 5/18/11, 5) a deputy clerk's memorandum concerning bond and a preliminary hearing following the district court's arraignment, 5) a notice of appeal, and 6) a designation of the record on appeal.

From the record filed, it appears that at 6:19 a.m. on May 13, 2011, Sergeant Ben Buckler of the Carlisle Police Department obtained a search warrant from the Nicholas District Court for 118 Locust Street, Apartment 6, Carlisle, Kentucky, for the person of Samuel Jay Terrell and for all clothing worn by Samuel Jay Terrell "at the time he was taken into custody." TR 4-5. From this use of the past tense, it can be adduced that Samuel Jay Terrell was already in custody at 6:19 a.m. when Sergeant Buckler obtained the search warrant.

The order appointing counsel by the Nicholas Circuit Court indicates that it was signed at 12:35 p.m. on May 13, 2011, over six hours after Samuel Terrell's apparent arrest. TR 1. The order appointed counsel for Samuel Terrell pursuant to RCr 2.14(2), and directed the police to cease questioning Samuel Terrell until he had been allowed access to an attorney from the Public Defender's Office. TR 1. The order states that Samuel Terrell's father, Mark Terrell, requested that he be appointed counsel "before any further questioning by law enforcement officers regarding allegations of his being involved in a homicide." TR 1.

No complaint appears in the record, but the district court arraigned Samuel Terrell on May 18, 2011. TR 9. The district court docket sheet indicates the charged offense was murder. TR 9. The district court set a preliminary hearing for May 25, 2011.

Prior to the preliminary hearing, on May 20, 2011, the Commonwealth filed notice of appeal alleging the illegality of the trial court order on various constitutional grounds. TR 11. The Court of Appeals affirmed the trial court's order¹ and the Commonwealth then filed for discretionary review, which this Court granted.

ARGUMENT

I.

THE COMMONWEALTH'S APPEAL IS MOOT.

In its appeal, Appellant puts forth several different arguments as to why the May 13, 2011 order of the Nicholas Circuit Court was erroneous. However, even if this order was erroneous, which it was not, the outcome of the appeal makes no difference to either party. The order directed the police to cease interrogations until the detainee, Samuel Terrell, had been given access to an attorney. TR 1. Unquestionably Mr. Terrell later had access to an attorney, since he was arraigned on May 18, 2011, and Gatewood Galbraith was noted as appearing for the defendant at the arraignment. TR 9. Therefore, this order did not prevent the Commonwealth from doing anything it would want to do and that it should be allowed to do in this case.

The Commonwealth requests relief at the close of its brief: "[T]he Commonwealth respectfully requests that this Court vacate the erroneous Order of the Nicholas Circuit Court." (Appellant Br. at 16). If this Court were to grant the relief the

¹ *Commonwealth of Kentucky v. Samuel Terrell*, 2011-CA-000890-MR, 2012 WL 3137030 (Ky. Ct. App. Aug. 3, 2012).

Appellant is requesting, nothing would change. There is no allegation that any evidence would become admissible that was previously inadmissible. There is no allegation that the status quo between these two parties would be altered in the slightest. Indeed, there is not even an allegation that the police ever ceased questioning Samuel Terrell because of the Circuit Court's order. There is no allegation that the prosecution was ever harmed by this order in any way. Appellant concedes there would be no relief because Mr. Terrell retained the services of a private attorney and the record does not show that he even utilized the services of the Department of Public Advocacy. (Appellant Br. at 1). In short, there is no evidentiary relief requested and there is no case-related relief that can be granted by this Court.

A case becomes moot between parties when either of the two conditions of justiciability relevant on appeal are no longer met -- an adverse interest between the parties and an effective remedy by way of appeal. *Schiaffo v. Helstoski*, 492 F.2d 413, 416-417 (3rd Cir. 1974); Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, 1674 (1970). An appellate court is required to dismiss an appeal when a change in circumstance renders that court unable to grant meaningful relief to either party. *Brown v. Baumer*, 301 Ky. 315, 191 S.W.2d 235, 238 (Ky. 1945). Clearly in the present case, this Court is not able to grant meaningful relief to either party. There is no evidence that the Nicholas Circuit Court's order on May 13, 2011 had any effect on the police investigation or the trial proceedings. The Commonwealth has not requested any relief in its appeal that will affect future proceedings in this case. The issue the Commonwealth has appealed is therefore moot and its appeal should be dismissed.

The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. In reality, Appellant is asking this Court to render an advisory opinion, which this Court is not allowed to provide. See *Commonwealth v. Hughes*, 873 S.W.2d 828 (Ky. 1994); Ky. Const. § 110. Under § 110 of the Kentucky Constitution, this Court is limited to “appellate jurisdiction,” with the exception of certain original writs which have not been utilized in the present case.

This Court cannot render an advisory opinion or an opinion in a case that is abstract and does not rest on existing facts or rights. This limitation on the Court’s jurisdiction was explained in *In re Constitutionality of House Bill No. 222*, 262 Ky. 437, 90 S.W.2d 692 (1936):

[W]ith the exception of the power to issue certain writs, a matter not here involved, the Court of Appeals has ‘appellate jurisdiction only.’ The word ‘appellate’ is used in contradistinction to the word ‘original.’ Original jurisdiction is jurisdiction conferred upon or inherent in a court in the first instance. ‘Appellate jurisdiction *** means the review by a superior court of the final judgment order, or decree of an inferior court.’ *Ex parte Batesville, etc., R. Co.*, 39 Ark. 82. ‘It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.’ *Marbury v. Madison*, 1 Cranch, 137, 172, 175, 2 L.Ed. 60

... [T]he rendition of advisory opinions is in no sense a review or rehearing of a cause that has been tried in a court below. *Id.*, 90 S.W.2d at 693.

Unless there is “an actual case or controversy,” this Court has no jurisdiction to hear an issue and is prohibited from producing mere advisory opinions. *See Hughes, supra* at 829, and *Pursley v. Pursley*, 144 S.W.3d 820, 827 (Ky. 2004). This Court should refuse to render the advisory opinion that Appellant seeks, and dismiss this appeal.

In order to avoid having its case dismissed for mootness, Appellant claims that “undersigned counsel has received numerous calls from prosecutors seeking guidance due to similar incidents” to show how this issue is capable of repetition while evading review. (Appellant Br. at 3). In *Spencer v. Kemna*, 523 U.S. 1 (1998), the U.S. Supreme Court held:

[T]he capable-of-repetition doctrine applies *only in exceptional situations*,” [*City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again. *Lewis [v. Continental Bank Corp.]*, 494 U.S. 472, 481 (1990) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (*per curiam*), in turn quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (*per curiam*)); see also *Norman v. Reed*, 502 U.S. 279, 288 (1992).

Id. at 17-18 (emphasis added). *See also, A.C. v. Commonwealth*, 314 S.W.3d 319, 327 (Ky. App. 2010); *In re Commerce Oil Co.*, 847 F.2d 291, 293 (6th Cir. 1988).

This Court cannot render an advisory opinion or an opinion in a case that is abstract and does not rest on existing facts or rights, even if it is an issue of general concern: “[o]ur courts do not function to give advisory opinions, even on important

public issues, unless there is an actual case or controversy.” *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992).

Appellant claims, “[T]he 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.” (Appellant Br. at 2). There is nothing in the record indicating that the Commonwealth was not permitted to make an argument when the trial court’s order was entered on May 13, 2011 or that the Commonwealth was in any way prohibited from affirmatively making a record. To the contrary, the order of the court says, “The Court, being sufficiently advised ...” TR 1. The order does not say what investigation the Nicholas Circuit Court undertook, but it does say the court was sufficiently advised. It is an unsupported assumption by Appellant that the Commonwealth had no input at that time.

It should be noted that a case presenting a very similar issue was found by this Court to meet the exception in *West v. Commonwealth*, 887 S.W.2d 338, 343 (Ky. 1994). However, unlike the mere hypothetical presented to this Court in the case *sub judice*, the Appellant in *West* established a record that was able to be reviewed. The Commonwealth Attorney in *West*, when it learned of a nearly identical order to the one issued in Mr. Terrell’s case, “immediately sought to have the order set aside, which the circuit court declined to do. A hearing on the matter was set for the next day.” *West, supra*, at 340. At this hearing, the Commonwealth Attorney established that West had waived his rights under *Miranda*.² *Id.*

There is no reason the Commonwealth in Mr. Terrell’s case could not have acted as the Commonwealth Attorney in *West* did to create a record for review. Like any party

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

wishing to appeal an issue, it is an Appellant's duty to see that the record is complete on appeal. *Commonwealth, Dept. of Highways v. Richardson*, 424 S.W.2d 601, 603 (Ky. 1968). There are various procedural options for supplementing the record with a missing portion of the record, such as narrative statement,³ a bystander's bill,⁴ an agreed statement,⁵ or a motion to supplement the record with a transcript of a hearing that was not part of the original record on appeal. Or the Commonwealth could have filed a motion with the Nicholas Circuit Court to reconsider its appointment of counsel for the defendant. The Commonwealth could have also requested an evidentiary hearing to make a record of the facts it now wants this Court to assume as truth or filed this allegedly "valid waiver" by its suspect, Samuel Terrell, in the record. It did none of these things. The Commonwealth did not even establish that the police were attempting to interrogate Samuel Terrell when the order was entered. In *West* the Commonwealth affirmatively created a record and was able to establish the key facts as reviewed by this Court. The Commonwealth made no such effort in Mr. Terrell's case, which should preclude Appellant from seeking review by this Court.

Next, Appellant makes a ridiculous claim that it is prejudiced by the appearance of impropriety in the Nicholas Circuit Court's actions. (Appellant Br. at 2-3). There is nothing improper in appointing counsel to represent a person who is in custody. Appointment of counsel is required by both the United States and the Kentucky Constitutions. §11, Ky. Const.; 6th Amend., U.S. Const. Appointment of counsel is not only permitted, but it is required by numerous statutes and court rules. E.g., KRS 31.120;

³ CR 75.13

⁴ CR 75.14

⁵ CR 75.15

RCr 3.05. What is improper is Appellant's assertion of facts that have no basis in the record on appeal.

II.

THERE IS NOTHING IN THE RECORD INDICATING THAT SAMUEL TERRELL EVER WAIVED HIS RIGHT TO COUNSEL.

Appellant has not preserved this issue for appeal. Appellant's brief is deficient because it does not contain a statement, with reference to the record, showing the issue was properly preserved for review, and in what manner. CR 76.12(4)(c)(iv). In addition, Appellant's entire argument is premised upon "facts" that are assumed and not supported by the paltry record on appeal.

Appellant creates a fictitious scenario wherein Samuel Terrell was read his *Miranda* rights, refused counsel, and even apparently asserted his right to represent himself at trial, but nevertheless had counsel "thrust" upon him. (Appellant Br. at 3-4). None of these allegations have any support in the record, and in fact are contradicted by the meager record that does exist.

The record does not show that Mr. Terrell made a statement to the police, much less that any statement was voluntary or that he waived his right to counsel. There is no *Miranda* waiver filed in the record. Nor is there a transcript of any alleged statement by Terrell to the police. The search warrant affidavit admits that Samuel Terrell was already in custody by 6:00 a.m., when the affidavit was signed. TR 2, 4. Presumably Mr. Terrell was in custody significantly before 6:00 a.m. because the typed affidavit had to be prepared before Officer Buckler could swear to it. Judge Delaney's order was not signed until 12:35 p.m. TR 1. So, Mr. Terrell had been in police custody at least six and half

hours, and probably much longer, before Judge Delaney's order was signed. That was long enough for the police to interview him if he was willing to make a statement. The order of the Nicholas Circuit Court says that Mr. Terrell's father, Mark Terrell, "requested on his behalf that he be provided an attorney before any further questioning by law enforcement officers." TR 1. The use of the term "further questioning" implies that there had been some previous questioning by the police, but it does not imply that Samuel Terrell had ever given a statement to the police or that he had made any waiver of his right to counsel. Appellant's brief improperly assumes there was a waiver of counsel without any evidence in the record to that effect.

Appellant's citation of *Faretta v. California*, 422 U.S. 806 (1975), as a justification for denying the appointment of counsel to an unrepresented defendant is completely misplaced. *Faretta* gives a defendant a right to represent himself after the trial court has thoroughly canvassed the pitfalls of self-representation with the defendant. Judge Delaney could not canvass the pitfalls of self-representation with Mr. Terrell because the police never brought Mr. Terrell before the judge as should have been done under RCr 3.02. In fact, it is precisely because of the police's failure to bring Mr. Terrell before a judge as required by law and instead holding him incommunicado for over six hours that the judicial order appointing counsel was necessary.

There is nothing in the record to establish that Mr. Terrell ever waived his right to counsel or that he asserted his right to represent himself, and this Court should not speculate about facts that Appellant has not seen fit to include in the record for this appeal. Again, this Court is not permitted to give an advisory opinion based on an abstract principle of law. *Commonwealth v. Hughes*, 873 S.W.2d 828 (Ky. 1994); *In re*

Constitutionality of House Bill No. 222, 262 Ky. 437, 90 S.W.2d 692 (1936). It must decide the case based on the facts contained in the record on appeal. Facts that should be in the record on appeal, but are missing, are presumed to support the ruling of the trial court. *Combs v. Risner*, 282 Ky. 588, 139 S.W.2d 375, 376 (1940). There is nothing in the record showing that Samuel Terrell voluntarily waived his right to counsel for any purpose. Since the Nicholas Circuit Court appointed counsel after being sufficiently advised, this Court must presume that the information given to the Nicholas Circuit Court was that there was no voluntary waiver of Samuel Terrell's right to counsel.

III.

WHETHER SAMUEL TERRELL COULD FILE A MOTION TO SUPPRESS IS AN IMPROPER CONSIDERATION WHEN ASSESSING WHETHER HE SHOULD BE APPOINTED COUNSEL.

Once again, this issue is not preserved. Appellant has given no citation to the record where this issue has allegedly been preserved, violating CR 76.12(4)(c)(iv). Appellant asks this Court to base its opinion on factual assumptions that are not supported by the record on appeal; i.e., the defendant did not ask for counsel, the order was *ex parte*, the defendant wanted to give a statement, but the order stripped him of that right. There is nothing in the record to support those factual allegations.

Appellant argues, apparently, that counsel should be denied to defendants accused of crimes "until charges were actually brought, and a case was initiated." (Appellant Br. at 6). Appellant justifies this limited view of the right to counsel because a defendant can "[bring] a motion to suppress based upon the allegation of wrongdoing." The same logic could be used to justify the use of "truth serums" during interrogations, extracting confessions by torture, and even a denial of counsel over an objection at trial. The

defendant can always file a motion to suppress or an appeal. Appellant's argument shows a lack of understanding of the laws and constitutions of Kentucky and the United States. The Kentucky and United States Constitutions do not guarantee a defendant a right to file a motion to suppress. They guarantee a defendant the right to counsel at every critical stage of the proceedings, including a Fifth Amendment right to counsel during interrogations by the police prior to the bringing of any formal charges. *Miranda v. Arizona*, 384 U.S. 436 (1966). Judges and lawyers are required to protect the legal rights of individuals from being violated, not simply to pick up the pieces after those rights have been violated.

Appellant then suggests that denying a defendant counsel would allow the defendant to file a motion to suppress, thus enabling the creation of a trial record like the one the Commonwealth should have created in order to properly present its argument in this appeal. Appellant thereby tacitly admits it has failed to present this Court with an adequate record. However, as *West v. Commonwealth, supra*, illustrates, it is just as easy for the Commonwealth to make a record adequate for an appeal as it is for the defendant, and the Commonwealth alone was responsible for making this record.

IV.

THERE ARE NO FACTS IN THE RECORD OF APPEAL SHOWING THE TRIAL COURT'S ORDER WAS ERRONEOUS.

Once again, this issue is not preserved. Appellant has given no citation to the record where this issue has allegedly been preserved, violating CR 76.12(4)(c)(iv). Moreover, appellant has not requested palpable error review.

There is no evidence that Mr. Terrell was advised of his right to counsel or that he waived this right. Nor does the record reflect that police ceased questioning of Mr. Terrell in order to allow him to confer with counsel as ordered by the trial court judge. Nonetheless, Appellant appears to argue that the trial court lacked the authority to issue an order pursuant to the Kentucky Rules of Criminal Procedure.

Our system of criminal justice is accusatorial, not inquisitorial. *Rogers v. Richmond*, 365 U.S. 534, 541 (1961). If, as Appellant claims, the circuit court did not have jurisdiction, this would mean that there would be nobody to review the actions of police prior to the time that a person has been charged. Appellant cites to the Sixth Amendment in support of the apparent argument that a person has no right to counsel before an indictment is filed. Such a position shows a misunderstanding the application of the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination, which requires that "custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney." *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

In *West*, this Court upheld an order that was essentially the same as the trial court's order in the present case. This Court noted the necessity for RCr 2.14, which was intended to "address the hazards faced by any unrepresented accused person, who if unaided by competent legal advice...may lose any legitimate defense he may have long before he is arraigned and put on trial." 887 S.W. 2d. at 343. Thus, RCr 2.14 ensures that there is recourse for a person who is held incommunicado by police and denied the assistance of counsel, which is the situation the trial judge responded to when Mr.

Terrell's father sought an order from the judge in Mr. Terrell's case. A court order enforcing this rule in no way runs afoul of *Moran v. Burbine*, see infra. secs. V and VI.

V.

WEST'S INTERPRETATION OF RCr 2.14 IS CONSISTENT WITH THE U.S. CONSTITUTION

Once again, this issue is not preserved. Appellant has given no citation to the record where this issue has allegedly been preserved, violating CR 76.12(4)(c)(iv). Moreover, Appellant has not requested palpable error review.

The *West* decision does not purport to expand the Fifth or Sixth Amendment, it simply allows state court rules to govern police conduct under state law, just as *Moran v. Burbine*, 475 U.S. 412, 424 (1986), invites state courts to do.

Moran v. Burbine was a departure from prior U.S. Supreme Court precedent interpreting *Miranda's* protections under the Fifth Amendment.⁶ Indeed, the U.S. Supreme Court in *Moran* was cognizant of how this abandonment of its own precedent was contrary to both the norms that had been established by state courts and the standards of the legal community as a whole:

[W]e acknowledge that a number of state courts have reached a contrary conclusion...[W]e recognize also that our interpretation of the Federal Constitution, if given the dissent's expansive gloss, is at odds with the policy recommendations embodied in the American Bar Association Standard of Criminal Justice... *Id.* at 427-428.

⁶ See John L. Terzano, "Maintaining an Accusatorial System of Justice: The States' Refusal to Follow the Supreme Court's Sanctioning of Official Police Deception in *Moran v. Burbine*, 4 U.D.C.L. Rev. 43, 45 (Spring, 1998) ("The U.S. Supreme Court in *Moran v. Burbine* effectively eroded the basic foundation of one's right against self-incrimination by sanctioning the practice of incommunicado interrogation and endorsing deliberate police deception of an officer of the court.")

The *Moran* Court plainly states that this is a narrow holding that applies to the facts of this case, and the Court invites states to adopt different standards to regulate the type of conduct that the Court so begrudgingly condoned in *Moran*:

At the outset, while we share respondent's distaste for the deliberate misleading of an officer of the court... Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege. *Moran v. Burbine*, 475 U.S. 412, 424-25 (1986).

Thus, the Court invites states to regulate the conduct of its police officers and state officials on state law grounds because the Court simply lacks the ability to regulate this sort of police conduct under the Fifth Amendment of the Constitution:

Nothing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law. We hold only that the Court of Appeals erred in construing the Fifth Amendment to the Federal Constitution to require the exclusion of respondent's three confessions. *Id.* at 428.

The Kentucky Rules of Criminal Procedure provide precisely the source of authority for regulating state actors that *Moran v. Burbine* lamented it could not provide under the Fifth Amendment. Accordingly, *West's* interpretation of RCr 2.14 in no way conflicts with *Moran's* interpretation of a defendant's rights under the Fifth Amendment as claimed by Appellant.

In Mr. Terrell's case, police failed to follow Kentucky state law as set out in the Kentucky Rules of Criminal Procedure by holding Samuel Terrell incommunicado for over six hours. In so doing, police violated RCr 3.02(2), which provides:

Any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a judge ...

The purpose of RCr 3.02 is to remove a police officer's discretion as to when to question an accused. *Savage v. Commonwealth*, 939 S.W.2d 325, 329 (Ky. 1996). The Attorney General's Opinion interpreting "unnecessary delay" under RCr 3.02 allows that "a court may countenance reasonable delays. But a delay based merely upon the officer's lengthy interrogation of the defendant is not a reasonable or necessary delay." Ky. Op. Att'y Gen. 2-465 (1979) citing *United States v. Hensley*, 374 F.2d 341, 350(6th Cir. 1967).

RCr 2.14 sets forth a procedure that may be followed when government agents do not voluntarily bring a person before the judge as instructed in RCr 3.02(2). That procedure, which was previously reviewed by this Court in *West v. Commonwealth*, 887 S.W.2d 338 (Ky. 1994), was scrupulously followed by the trial court judge in this case by his issuance of an order that intended to end police's violation of RCr 3.02 via RCr 2.14, which would ensure that Mr. Terrell was not being held incommunicado by police, unapprised of his right to an attorney.

Thus, the order worked no injustice on the Commonwealth in this case. The issue Appellant seeks to raise is strictly an issue of state procedural law. It is an issue that only arises *after* an arresting officer has violated the mandate of RCr 3.02 that he take a person arrested without a warrant before a judge without unnecessary delay. If a representative of the accused is able to go before a judge and obtain a written order that the accused be allowed to confer with counsel, then, *ipso facto*, the police had the same opportunity to take the accused himself before the judge as required by RCr 3.02.

RCr 3.02 was blatantly violated by the police in this case. The police could have clearly taken Samuel Terrell before the circuit judge just as easily as, if not easier than, Mr. Terrell's father who was able to go before the judge and obtain the complained of

order appointing counsel. The delay in taking Mr. Terrell before the judge was utterly unnecessary, and a judge certainly must have the ability to constrain the actions of police who disregard the procedural safeguards that are in place to discourage the sort of distasteful police conduct that the *Moran* Court ultimately leaves to the states to regulate. *See Moran v. Burbine, supra*, 475 U.S. at 424-25; 428.

As Appellant concedes “the record in this matter is not clear to establish [sic] whether the Appellee was, in fact, in custody at the time he was being questioned...” (Appellant Br. at 11). Thus, there is no basis upon which to conclude that Mr. Terrell was even read his *Miranda* rights by police,⁷ and then waived them, and much less for this Court to proceed under Appellant’s baseless conclusion of “fact” that Mr. Terrell waived his right to counsel yet nevertheless had a third party “thrust” counsel upon him. (Appellant’s Br. at 12). Further, even if Mr. Terrell in fact did not wish to speak with the DPA Attorney appointed to represent him while he was being held by police, nothing would prevent Mr. Terrell from simply declining representation or firing this attorney at any point should he wish proceed without the assistance of counsel.

No constitutional violation has been alleged, and therefore the trial court order issued pursuant to RCr 2.14 conflicts with no provision of the U.S. Constitution or United States Supreme Court decisions interpreting the Constitution. Neither the United States Constitution nor the Kentucky Constitution bestow on the prosecution any right to deny counsel to an accused person for any period of time. The only “rights” conferred by the U.S. Constitution that are remotely pertinent in this case are the Sixth Amendment right

⁷ “It has been held by the United States Supreme Court that *Miranda* warnings are only required when the suspect being questioned is ‘in custody.’” *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006) citing *Thompson v. Keohane*, 516 U.S. 99 (1995).

of the accused to assistance of counsel and a person's Fifth Amendment right against self-incrimination. The trial court's action under RCr 2.14 implicated neither of these constitutional protections belonging to the defendant. The action taken by police in holding Mr. Terrell incommunicado, where there is simply no record revealing what transpired during that time except that police failed to bring Mr. Terrell before the magistrate as required by RCr 3.02, was remedied by the trial court strictly on the basis of state procedural law, not federal constitutional law. Ordering police to comply with the Kentucky Rules of Criminal Procedure is the proper means of "mandat[ing] a code of behavior for state officials wholly unconnected to any federal right or privilege" as the *Moran* Court invites states to do. *Moran, supra*, 475 U.S. at 424-25.

Appellant once again suggests that a motion to suppress on the part of the defendant is the proper remedy, but this suggestion again highlights the fatal flaw of Appellant's argument—there was no allegation of a constitutional violation here; thus there are no grounds for a motion to suppress. A court order requiring police to comply with the rules of criminal procedure that have been adopted to regulate the conduct of its officials is the proper mechanism of ensuring that a person's rights are not violated prior to the initiation of court proceedings. Thus RCr 2.14 as interpreted by the *West* Court is entirely consistent with the U.S. Constitution.

VI.

THE WEST COURT CORRECTLY INTERPRETED RCr 2.14 ON STATE LAW GROUNDS.

Again, this issue is not preserved, Appellant has given no citation to the record where this issue has allegedly been preserved, violating CR 76.12(4)(c)(iv). There is nothing in the record to reflect that Mr. Terrell waived his rights under *Miranda*, that he

either requested or did not personally request the services of an attorney, or that he made any statements to police.

Kentucky RCr 2.14, as relied on by the trial court in Mr. Terrell's case, does not infringe on any constitutional right and thus cannot be found to run afoul of any of constitutional protections afforded to either the Commonwealth or Mr. Terrell. But if this Court nonetheless wishes to address Appellant's contention that the Court in *West* "attempts to defy *Burbine* by arguing that RCr 2.14 expands the rights of the criminal defendant above and beyond those explained [sic] by the U.S. Supreme Court in *Moran v. Burbine*," (Appellant's Br. at 9), this Court should find that the *West* Court correctly relied on state law grounds in upholding the validity of RCr 2.14.

The West Court provided ample state grounds for departing from *Moran v. Burbine*'s interpretation of the Fifth Amendment. In *West*, this Court relies on Kentucky's own precedent, history, and tradition in interpreting the rights of its citizens, just as *Moran v. Burbine* explicitly invites state courts to do, and which many state courts have done, since the Supreme Court announced the narrow holding of *Moran v. Burbine*.

Appellant cites to *Commonwealth v. Cooper*, 899 S.W.2d 75, 77-78 (Ky. 1995), in asserting that "Section Eleven of the Constitution of Kentucky and the Fifth Amendment are coextensive and provide identical protections against self-incrimination." (Appellant's Br. at 11) However, *Cooper* also states that, "from time to time in recent years this Court has interpreted the Constitution of Kentucky in a manner which differs from the interpretation of parallel federal constitutional rights by the Supreme Court of the United States." *Id.* at 78. This Court describes that when Kentucky departs from Supreme Court interpretations of the Fifth Amendment, "it has been because of Kentucky

constitutional text, the Debates of the Constitutional Convention, history, tradition, and relevant precedent.” *Id.* at 77-78 citing *Holbrook v. Knopf*, 847 S.W.2d 52, 55 (Ky. 1992).

This Court in *West* engaged in precisely such an analysis of Kentucky’s unique history, tradition, and relevant precedent when it declined to follow *Moran v. Burbine*. This Court in *West* looked to the history of RCr 2.14, which predates *Moran* by twenty-four years. *West*, 887 S.W.2d at 342. *West* then goes on to examine the rationale for the protections afforded by RCr 2.14: “This rule was adopted to address the hazards faced by any unrepresented accused person,” who “[i]f unaided by competent legal advice...may lose any legitimate defense he may have long before is arraigned and put to trial.” *Id.* at 343. The Court notes that *Miranda*’s “prophylactic safeguards...echo the protections provided by only part of RCr 2.14, and thus, do not represent the ‘rich and compelling tradition of recognizing and protecting individual rights’ that exists in Kentucky.” *Id.* citing *Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1993). Here the Court recognizes that *Miranda*’s protections do not sufficiently address the rights of a suspect prior to indictment as Kentucky has historically protected, thus justifying the need for more protections than those afforded by *Moran*.

Despite *West*’s explicit reliance on state court tradition, history and precedent, Appellant faults the *West* decision for failing to provide specific wording in the state constitutional provision that justifies the more expansive protections afforded to persons detained by police prior to formal filing of a criminal charge, complaining that 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.” (Appellant Br. at 10). In support of

this unfounded proposition that a state court must analyze the wording of its state constitution in order to justify its departure from a Supreme Court decision, Appellant curiously cites to an Oklahoma Court of Appeals case, *Dennis v. State*, which supports no such requirement. 990 P.2d 277 (Okla. Crim. App. 1999). In *Dennis*, the Oklahoma Court of Appeals declined to follow *Moran v. Burbine* on state constitutional grounds. See *infra* p.26 and note 12. Nonetheless, the Oklahoma Court of Appeals recognized that *Moran* does not require that states ground their holdings in the state constitution in order to grant broader protections to its citizens: “the *Burbine* Court notes that some states chose to interpret their own *statutes* (emphasis added) or constitutions more broadly and limited its holding to the Fifth Amendment of the United States Constitution...” *Dennis*, 990 P.2d 277 at 281. This Court of Appeals decision thus in no way supports Appellant’s contention that a state court’s departure from *Moran*’s holding “would necessarily have to be rooted in the state constitution—not a state court rule.” (Appellant’s Br. at 9).

Indeed, state courts have departed from *Moran*’s narrow holding on various state law grounds. Some state courts view deceptive police tactics as a violation of a person’s rights under the state constitution; others look to their own state histories and traditions as the basis for departing from the *Moran* holding. Should this Court wish to further develop the *West* decision on the basis of Kentucky’s state constitution, the Court is fully entitled to do so, just as many states have done.

In *Haliburton v. State* the Florida Supreme Court relied on the due process clause of its state constitution in declining to follow *Moran v. Burbine*, even where the Court noted that police did not openly deceive the attorney as was the case of *Moran*. 514 So. 2d 1088 (Fl. 1987). Nonetheless, the court would not tolerate a lie by omission any more than it

would condone outright lying by police. Quoting from the *Moran* dissent the Florida Supreme Court found:

[T]here can be no constitutional distinction ... between a deceptive misstatement and the concealment by the police of the critical fact that an attorney retained by the accused or his family has offered assistance, either by telephone or in person.” *Haliburton v. State*, 514 So. 2d 1088, 1090 (Fla. 1987) citing *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 1158, 89 L.Ed.2d. 410 (1986)(Stevens, J., dissenting).

In *Haliburton*, the court was even more disturbed by the fact that the police did not readily comply with a court order allowing Mr. Haliburton to speak to his attorney:

Haliburton was not told of the attorney's presence or request. The police refused access even in the face of a circuit court judge's telephonic order that the attorney be allowed to see the suspect. Only after a second telephone call from the judge was the attorney allowed to see his client. We find that this conduct violates the due process provision of article I, section 9 of the Florida Constitution.⁸ *Haliburton v. State*, 514 So. 2d at 1090.

The Florida State Supreme Court refused to condone deceptive police behavior and agreed with Justice Stevens' dissent that “[Police] interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration of justice that the Due Process Clause prohibits...” *Id. citing Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 1158; 89 L.Ed.2d. 410 (1986)(Stevens, J., dissenting). Likewise, the Connecticut Supreme Court departed from *Moran's* holding on

⁸This provision of the Florida State Constitution reads: “No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.” Fla. Const. art. I, § 9.

the basis of its state due process clause, which it analyzed in light of the state's long history of recognizing the significance of the right to counsel.⁹

Other states have relied on their state constitutional due process clauses as well as state constitutional protections against self-incrimination as the rationale for departing from *Moran v. Burbine* on state law grounds. The Illinois Supreme Court declined to follow what it deemed to be *Moran v. Burbine*'s "regressive interpretation of Fifth Amendment protections." *People v. McCauley*, 163 Ill. 2d 414, 421 (Ill. 1995). The Court in *McCauley* clarified its previous departure from *Moran* and ultimately condemned *Moran v. Burbine*'s tacit acceptance of deceptive police practices, stating:

The day is long past in Illinois, however, where attorneys must shout legal advice to their clients, held in custody, through the jailhouse door...Our State constitutional guarantees simply do not permit police to delude custodial suspects, exposed to interrogation, into falsely believing they are without immediately available legal counsel and to also prevent that counsel from accessing and assisting their clients during the interrogation. *McCauley*, 163 Ill. 2d at 423-24.

The Illinois Supreme Court cited its state constitution¹⁰ as the basis for its holding, as well as prior Illinois court decisions, the history of the 1970 Constitutional Convention proceedings, and the state's code of criminal procedure and statutory provisions that are all "designed to ensure fundamental fairness to persons in custody." *Id.* On these various grounds, and in line with other state court rulings, the Illinois Supreme Court held that when police did not inform the defendant that his attorney was present at the station and

⁹ *State v. Stoddard*, 206 Conn.157, 164-67 (Conn. 1988)(Holding, "in light of both the historical record and our due process tradition, we conclude that a suspect must be informed promptly of timely efforts by counsel to render pertinent legal assistance.")

¹⁰ The Illinois constitutional provisions are nearly analogous to the United States Constitutional provisions: No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws. Ill. Const. art. I, § 2; No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy for the same offense. Ill. Const. art. I, § 10.

refused the attorney access to his client while he was being questioned, that the police conduct violated the defendant's privilege against compelled self-incrimination as well as his right to due process. *Id.* at 446.

Even states that historically march in lockstep with the rulings of the United States Supreme Court in regards to their nearly identical state provisions decline to do so when it comes to the *Moran v. Burbine* decision. The Michigan Supreme Court in *People v. Wright*, 441 Mich. 140, 153 (1992), acknowledged that "this Court has held that the interpretation of our constitutional privilege against self-incrimination and that of the Fifth Amendment are the same."¹¹ However, *Wright* took *Moran's* invitation to "adopt different requirements for the conduct of its employees and officials as a matter of state law." *Moran, supra*, at 427. Accordingly, the Michigan Supreme Court held:

Because we believe that it was necessary, in order to allow Mr. Wright to make a knowing and fully voluntary waiver of his Fifth Amendment rights, we extend the rights afforded under Const. 1963, art. 1, § 17, to include information of retained counsel's in-person efforts to contact a suspect.

To hold otherwise would suggest 'that a State has a compelling interest, not simply in custodial interrogation, but in lawyer-free, incommunicado custodial interrogation.' *Id.* at 154, citing *Moran* 475 U.S. at 437, (Stevens, J., dissenting).

It should be noted that the reasoning of this decision does not examine textual differences in the state and federal constitutions, or even examine the state's history or precedent. Rather, the Michigan Supreme Court ruled based on the state's interest in ensuring that individuals are not subject to improper investigative practices.

¹¹ Sec. 17 of the Michigan State Constitution reads in relevant part: "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

Other states that have declined to follow *Moran v. Burbine* on the basis of state self-incrimination or due process grounds include Oregon,¹² Massachusetts,¹³ Delaware,¹⁴ Texas,¹⁵ and Oklahoma.¹⁶ New Jersey doesn't even have a state constitutional privilege against self-incrimination, yet the state nonetheless relied on its state common law tradition to grant more protections to its citizens under the Fifth Amendment.¹⁷ Louisiana combines both constitutional and statutory law in refusing to follow *Moran*. See also Terzano, *supra*, at 52-53.

The *West* Court was amply justified in departing from *Moran v. Burbine* based on its own history and traditions that are expressed in RCr 2.14. In no way is this Court required to cite to specific provisions within its state constitution as Appellant argues. But even if this Court should wish to revisit the *West* decision in order to further justify not

¹² *State v. Simonson*, 319 Or. 510, 518 (Or. 1994)(Holding under the self-incrimination grounds of the state constitution, that in case where officer was not made aware of attorney's attempts to contact suspect in obtaining confession to capital murder and so did not let suspect know of his attorney's attempts to contact him made defendant's waiver not sufficiently intelligent.).

¹³ *Commonwealth v. Mavredakis*, 430 Mass. 848, (Mass. 2000)(Declining to follow the holding of *Moran v. Burbine* based on the states' constitutional protections against self-incrimination).

¹⁴ *Bryan v. State*, 571 A.2d 170, 176 (Del. 1990)("Our holding simply recognizes that to knowingly, voluntarily and intelligently waive this right a defendant must be informed that his counsel has attempted or is attempting to render legal advice or perform legal services on his behalf. To hold otherwise would be to condone "affirmative police interference in a communication between an attorney and suspect.") *Citing Moran*, 475 U.S. at 456; n. 42, 106 S.Ct. at 1159, n. 42 (Stevens, J. dissenting)).

¹⁵ *Roeder v. State*, 768 S.W. 2d 745, 754-55 (Tex. Ct. App. 1988)(reaffirming pre-*Moran* state court decisions that rely on state constitutional grounds to find that waiver not knowing and intelligent based on totality of circumstances analysis in case where defendant not told that a public defender was there was at jail to speak to him while being subjected to police interrogation).

¹⁶ *Dennis v. State*, *supra*, at 284 (Upon reconsideration of prior court rulings, the court declined to follow *Moran v. Burbine* and instead adopted a case-by-case analysis to determine whether a defendant's right against self-incrimination under the Texas constitution was violated when he was not informed an attorney was present.).

¹⁷ *State v. Reed*, 133 N.J. 237, 261-62 (NJ 1993)("We are satisfied that an attorney-client relationship should be deemed to exist under such circumstances between the suspect and an attorney when the suspect's family or friends have retained the attorney or where the attorney has represented or is representing the suspect on another matter. When, to the knowledge of the police, such an attorney is present or available, and the attorney has communicated a desire to confer with the suspect, the police must make that information known to the suspect before custodial interrogation can proceed or continue. Further, we hold that the failure of the police to give the suspect that information renders the suspect's subsequent waiver of the privilege against self-incrimination invalid *per se*. Our holding is essential to give effect to the right to counsel that, in turn effectuates the privilege against self-incrimination").

following the *Moran* decision, this Court would find company among a number of states which have done precisely this.

Indeed, Kentucky is one of a number of states that has a rich independent state law tradition. See Jennifer DiGiovanni, *Justice Charles M. Leibson and the Revival of State Constitutional Law: A Microcosm of A Movement*, 86 Ky. L.J. 1009, 1018 (1998).

Development of an independent constitutional analysis is desirable because it can “provide the people of Kentucky with an individually tailored, fruitful, and workable body of jurisprudence” *Id.* The Kentucky Supreme Court has embraced this role as protector of its citizens’ rights on state constitutional grounds:

[U]nder our system of dual sovereignty, it is our responsibility to interpret and apply our state constitution independently. We are not bound by decisions of the United States Supreme Court when deciding whether a state statute impermissibly infringes upon individual rights guaranteed in the State Constitution so long as the state constitutional protection does not fall below the federal *floor*, meaning the minimum guarantee of individual rights under the United States Constitution as interpreted by the United States Supreme Court. *Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992).

Kentucky has specifically recognized the strength of its privilege against self-incrimination, classifying it as “sacred and important as the privilege of the writ of habeas corpus or any of the other fundamental guaranties for the protection of personal rights...” *Kindt v. Murphy*, 312 Ky. 395, 400-01 (Ky. 1950).

This Court is enshrined with the duty to ensure that its citizens’ rights are protected against the sort of investigative tactics that were disparaged by the *Moran* Court, but which the U.S. Supreme Court determined must be regulated as a matter of state law. This Court has done so in *West v. Commonwealth*, and would find good company among other states were it to cite further justification for so holding based on the principles of the right to due process and privilege against self-incrimination

contained in the Kentucky State Constitution, in addition to Kentucky's precedent, history, and traditions that further justify departure from the narrow holding of *Moran v. Burbine*.

VII.

THE ORDER IS NOT A VIOLATION OF SEPARATION OF POWERS

Once again, this issue is not preserved. Appellant has given no citation to the record where this issue has allegedly been preserved, violating CR 76.12(4)(c)(iv). Nor has Appellant requested palpable error review.

Notwithstanding the lack of preservation, Appellant claims that *West* violates the separation of powers doctrine because it potentially interrupts the police interrogation of a suspect so that the suspect can meet with a lawyer before deciding whether to continue with the interrogation. The argument is fallacious. An order requiring the police to allow a suspect to meet with a lawyer if he desires does not violate the separation of powers doctrine any more than *Miranda v. Arizona, supra*, violates the separation of powers doctrine. In *Miranda*, the U.S. Supreme Court required police interrogators to interrupt their interrogations and give suspects a prophylactic warning concerning their constitutional rights. The constitutionality of *Miranda* was upheld by the United States Supreme Court as recently as *Dickerson v. United States*, 530 U.S. 428 (2000). Clearly, there are all kinds of restrictions on the way that the police conduct their investigations in criminal cases -- there are wiretapping restrictions, there are anti-sweating laws, there are all kinds of constitutional restrictions on police investigations. It is frivolous to argue that the police have a right to completely unfettered investigatory powers. The police

must obey the law in conducting their investigations just as surely as everyone else must obey the law.

RCr 2.14 does not tell the police how to conduct their criminal investigations. It merely says that an attorney shall be permitted to meet with a person in custody at the request of the person in custody or someone acting in that person's behalf.

VIII.

WHETHER A DEFENDANT IS INDIGENT IS TO BE DETERMINED BY THE TRIAL JUDGE.

Once again, this issue is not preserved. Appellant has given no citation to the record where this issue has allegedly been preserved, violating CR 76.12(4)(c)(iv). Furthermore, the question of whether the circuit court abused its discretion in finding Mr. Terrell indigent at the time counsel was appointed is now moot, since the prosecution suffered no injury from that decision and there can be no effective remedy other than reimbursement, which Appellant has not sought.

To the extent that Appellant is arguing *West v. Commonwealth, supra*, should be overruled because of the possibility that a third-party request for counsel might result in a non-indigent person receiving the appointment of counsel, the Kentucky Supreme Court determined in *West v. Commonwealth, supra*, that Chapter 31 allows for the exact procedure that the trial court followed in the present case in appointing counsel.

KRS 31.110, by its plain language, allows for representation by a DPA attorney upon a finding of indigency by the trial court. Whether a person later hires private has no bearing on that initial determination as the statute for recoupment of funds by those who are later found to not be indigent. KRS 31.110(1) provides that a needy person who is being detained by a law enforcement officer on suspicion of having committed ... a

serious crime ... is entitled ... [t]o be represented by an attorney to the same extent as a person having his or her own counsel is so entitled.” KRS 31.110(2) provides, “A needy person ... is entitled ... [t]o be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney.” The only consideration in deciding whether to appoint counsel are factors relevant to the defendant’s ability to pay for private counsel. KRS 31.120(2). The suggestion that a court should deny counsel to a deserving defendant for something unrelated to his or her financial need is an improper judicial consideration, and would be completely arbitrary and unconstitutional. §§2, 7, and 11, Ky. Const.; 6th and 14th Amends., U.S. Const.

Despite the glaring lack of a record to support nearly all of the Commonwealth’s claims throughout this brief, and despite the fact that the Commonwealth here has the burden of establishing the record in this case, Appellant here faults Mr. Terrell for there not being a finding of his indigency in the record. (Appellant’s Br. at 15.) However, contrary to Appellant’s assertion, one of the few things established by the sparse record presented by Appellant does in fact show that the trial judge, “being sufficiently advised,” appointed the Department of Public Advocacy, which is a finding on the record that the trial court had a basis for appointing the Department of Public Advocacy in Mr. Terrell’s case. Evidence that Mr. Terrell later hired private counsel does nothing to undo the trial court judge’s appointment at that time of the Department of Public Advocacy to represent Mr. Terrell.

Lastly, Appellant has no standing to complain about the possibility of DPA being involved in this case prior to formal appointment, since there is no evidence in the record

on appeal that DPA was involved at all at the trial level, despite having been appointed. However, even if this Court were to envision a party with standing and who was actually aggrieved by the court's appointment of counsel to one who is later found not to be indigent, the remedy, as noted in *West v. Commonwealth, supra*, can be found in KRS 31.120, which allows for reimbursement to the agency should the defendant later be determined not to be "needy." Chapter 31 allows for easy and liberal appointment of counsel, with reimbursement permitted in cases where the defendant proves to not be indigent. The remedy is not, as the Commonwealth would have this Court believe, arbitrarily abridging a suspect's right to counsel in a way that is contrary to state and federal constitution law.

CONCLUSION

This Court should dismiss the Commonwealth's appeal because it is moot and impermissibly requests an advisory opinion. If this Court decides to address the case based on the capable-of-repetition-but-excluding-review exception, it must find that RCr 2.14 does not run afoul of the U.S. Constitution and that *West v. Commonwealth* was correctly decided. Should this Court wish to clarify its holding in *West*, there are ample grounds upon which to elaborate the basis of its ruling on state law grounds which neither impermissibly expands the protections of the Fifth or Sixth Amendments nor violates the doctrine of separation of powers. Finally Appellant has no standing to challenge the appointment of the DPA in this instance, and even if did, the trial court was fully entitled to appoint counsel to Mr. Terrell pursuant to KRS 31.110.

Respectfully submitted.



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