Commonwealth of Kentucky
Supreme Court of Kentucky
2013-SC-000684-CL

Commonwealth of Kentucky — Movant

v.

Request for Certification of the Law
by Commonwealth of Kentucky
Jefferson District Court
Action Nos. 13-F-008009 and 13-F-008010

Shannondoah Carman and
Kenneth Westbay — Respondents

Joint Brief for Respondents

Submitted by:

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Certificate

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by United States mail on May 16 2014: Hon. Donald E. Armstrong, Judge, Jefferson District Court, Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky, 40202; Hon. Stephanie Pearce Burke, Judge, Jefferson District Court, Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky, 40202; Hon. David Sexton and Hon. Michael J. O'Connell, Office of the Jefferson County Attorney, Second Floor, Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky, 40202; and the Clerk of Jefferson District Court, Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky, 40202. The undersigned does also certify that he has not withdrawn the record from the Clerk of this Court or the Jefferson District Court.

Michael R. Mazzoli

STATEMENT OF POINTS AND AUTHORITIES

Statement of Points and Authorities (continued)

INTRODUCTION

The Court has agreed to certify the law with respect to the following question posed by the Jefferson County Attorney:

> In light of this Court's decision in *Commonwealth v. Wilson*, 384 S.W.3d 113 (Ky. 2012), does Kentucky law authorize ex parte communications to change the conditions of release after the initial fixing of bail with no notice for the Commonwealth to be heard.

(Order of April 17, 2014 at pg. 1.) The following brief explains that (1) the question of law has already been clearly and unequivocally answered by this Court; (2) the answer has little or no relevance to the legal and factual issues that crowd the County Attorney's pleadings; and (3) as a fundamental jurisdictional matter, the certification of law procedure under CR 76.37 is not the proper mechanism for the County Attorney to litigate this case.

ARGUMENT

I. Recommendation for certifying the law: *Commonwealth v. Wilson* states that ex parte communications after the initial fixing of bail are improper.

It is well settled that "Kentucky's Judicial Canons forbid one-sided contacts relating to all judicial proceedings, except in regards to scheduling, initial fixing of bail, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits." *Wilson*, 384 S.W.3d at 116 (citing SCR 4.300, Canon 3(B)(7)(a)). The *Wilson* opinion leaves no doubt that, *after* the initial fixing of bail, Kentucky law prohibits ex parte communications regarding an accused person's conditions of release. The answer to the County Attorney's

question is "no." *Wilson* states the point so clearly that this Court hardly needs to certify it again.

* * * * *

Wilson states what the law *is*; it is for this Court to decide what the law *should* be. If the Court sees fit to abolish the exception for the "initial fixing of bail" and ban all ex parte communications about bail at any time, it may do so. If the Court wishes, it can use the present case as its vehicle for reshaping the rules of procedure and the ethics of ex parte communications. There is certainly no *imperative* in this specific litigation for the Court to propound any such reforms, however; the Court can simply certify (or more accurately, *re*-certify) *Wilson*'s statement of the law and dispose of this particular case, and then wait for some better occasion to announce new rules for the Commonwealth.

The Respondents do not urge the Court to take any particular action. Mr. Carman and Mr. Westbay have no personal interests at stake in this matter. The adversarial proceedings with the Commonwealth are over: the Jefferson District Court cases were dismissed after the men were indicted in September 2013; the Commonwealth asked the Circuit Court to dismiss all charges against Mr. Carman in February 2014, and simultaneously entered a settlement with Mr. Westbay that called for dismissal of his handgun-possession charge and a total jail sentence of one year for the remaining charges. *See Commonwealth v. Carman*, 13-CR-002581-001 (Jeff. Circ.) *and Commonwealth v. Westbay*, 13-CR-002581-003 (Jeff. Circ.).

The Respondents and their attorneys cannot properly speak for any of the Jefferson District Court judges or act as advocates for the

District Court's institutional interests, and nothing in this brief or any earlier submission has been approved by Jefferson District Court or any member of its bench. Respondents should not be seen as taking any particular side in their discussion of the Jefferson District Court's bail-determination procedures. And lastly, counsel are limited to the public record when commenting about the occurrence of any ex parte communications in this matter.

Notwithstanding these limits, it is possible for Respondents' counsel to outline the larger issue of ex parte communications relating to the initial fixing of bail, and to the extent the Court wants to explore this larger issue, the following discussion is offered in the hope that it will be of some benefit.

II. Ex parte communications relating to the "initial fixing of bail."

A. Introduction.

As the law presently exists, ex parte communications may properly take place when they relate to "the initial fixing of bail." *Wilson*, 384 S.W.3d at 116. That term, "the initial fixing of bail," might be seen as a safe harbor for ex parte conversations about bail conditions: if "the initial fixing of bail" is still in progress or has not yet been accomplished, the judge may engage in ex parte communications ethically; if "the initial fixing of bail" has been done, then ex parte communications should be shunned.

"Initial fixing of bail" does not appear to be defined by statute, rule, or common law. In fact, a search for the term indicates that it appears *only* in SCR 4.300 Canon 3B(7) and the two opinions that quote the rule, *Wilson* and an unpublished Court of Appeals case, *Mitchell v.*

Mitchell, No. 2009-CA-001856-MR, 2012 WL 2160119 at *3 (Ky. App. June 15, 2012). To the extent the Court wishes to craft a definition now, the discussion below contends that the best formulation for "initial fixing of bail" would be a bright line rule keying on the initial appearance, defining "initial fixing of bail" as judicial actions concerning bail taken at or before the initial appearance. This at least would have the merit of simplicity: ex parte communications regarding bail would be *allowed* if the accused's initial appearance has not yet taken place, and *prohibited* any time thereafter.

B. Because limitations in the record preclude meaningful inquiry into factual events in this case, hypothetical assumptions must be entertained.

It is tempting to use the current proceedings to debate precisely what happened in the Respondents' District Court cases, and determine whether the events were "proper" or not. But this is not an appeal, and there were no evidentiary proceedings below – not solely because District Judge Stephanie Pearce Burke rebuffed the County Attorney's effort to subpoena Judge Donald Armstrong, but also because the County Attorney did not try to invoke the supervisory authority of Jefferson Circuit Court by filing a mandamus petition. (This omission points to a jurisdictional defect in the proceedings before this Court, as explained later.) There is, in short, no real record for this Court to consult.

What little there is of reliable information appears in a few judicial documents appended to the County Attorney's original motion. (*See* Commonwealth's Mot. for Certification, App. pp. 1-23.) These documents appear to establish a few facts beyond dispute:

- The Respondents were arrested at about 1:00 p.m. on Wednesday, July 24, 2013. (*Id.* at pp. 1, 2.) Assuming standard procedures were followed, initial appearances for both men were set for the following morning at 9:00 a.m.

- Pretrial Services personnel met with and interviewed both Mr. Westbay and Mr. Carman in jail later on Wednesday. (*Id.* at pp. 6, 11.) The Pretrial Services office recommended that both men be released on their own recognizance. (*Ibid.*; *see* RCr 4.10: when deciding a defendant's status, "the court shall give due consideration to recommendations of the local pretrial services agency....")

- Some time before 8:00 a.m. on Thursday, July 25, District Judge Armstrong contacted the Pretrial Services office and ordered Mr. Westbay and Mr. Carman released on their own recognizance. (*Ibid.*) The pending initial appearances for both men were automatically postponed – again, assuming standard procedure was followed – until Monday, July 29.

- There are no references to other bond orders in the Pretrial Services documentation. No bond order signed by any other District Judge can be found in the County Attorney's appendix.

There is much that the County Attorney's brief alleges about an ex parte communication that Judge Armstrong purportedly had in the early morning hours preceding his call to the Pretrial Services office on July 25; the only evidence of this is a newspaper report, though, and its quotations of Judge Armstrong are double-hearsay. The County Attorney also claims that District Judge Jerry Bowles, one of the two "duty judges"

on call the night of July 24-25, entered bond orders for Mr. Carman and Mr. Westbay, but as observed above, no such orders can be found in the County Attorney's appendix. The only contemporaneous reference to an order by Judge Bowles appears in a handwritten note (author unknown) dated *July 25*, several hours *after* Pretrial Services recorded Judge Armstrong's order.

Given the deficient quality of the record, it would be more fair to all concerned to use hypothetical examples of the "initial fixing of bail" process, rather than try to make an example out of "what actually happened" in our case. For purposes of further discussion, then, it may help to suppose the existence of two judicial authorities: the on-call *duty* judge ("Judge D") and one who is *not* the duty judge ("Judge N").

C. A bright-line definition would favor using the first adversarial proceeding when bail must be decided, such as the initial appearance, as the end-point for the "initial fixing of bail."

The earliest *adversarial* proceeding in which bail conditions can (indeed, must) be formally set is when the accused makes his or her initial appearance. *See* RCr 3.02 and 3.05 *and Bolton v. Irvin*, 373 S.W.3d 432, 435 (Ky. 2012). As the rules lay out the sequence, any citizen who is arrested must be taken "without unnecessary delay before a judge," RCr 3.02(1), and "at the time of the defendant's appearance the judge shall ... release the defendant on personal recognizance or admit the defendant to bail if the offense is bailable." RCr 3.05(1).

Logic suggests that if the initial appearance is the moment when bail *must* be set, then the "initial fixing of bail" period cannot continue past the initial appearance. (Once bail is first set, later actions cannot be

classified "initial fixing of bail.") The public and adversarial character of the initial appearance recommends it for the role of bright line terminating the "initial fixing of bail" stage: its occurrence can be verified quickly, allowing a judge to know almost instantly whether ex parte communications can or cannot proceed.

Relying on the initial appearance as the line of demarcation makes sense procedurally, too. Before the initial appearance occurs, there are no "adversarial proceedings" to speak of, at least in any practical sense. In most instances, there are no formal charges pending against a person at the moment of arrest; charges ordinarily follow the arrest. Until an arrest is made and charges are filed, there is usually no prosecutor familiar with the case, probably no defense attorney involved, and almost certainly no judge assigned to the matter. Following the initial appearance, though, all these participants are in place: there's an accused, a judge, a prosecutor, and a defense attorney; one-sided communications between the judge and any of these other people would be "ex parte" by definition.

This fact makes the initial appearance particularly useful in the context of the *Wilson* rule. *Wilson* is strongly opposed to ex parte communications; the initial appearance fits this framework well, because it signifies the first point at which there are "two sides" who, from that moment forward, should both be present for substantive communications. Given that nearly *all* one-sided contacts *after* the initial appearance are presumptively improper, about the only time an ex parte communication about *anything* might be permissible would be *before* the initial appearance. *Wilson* describes a limited exception, the

"initial fixing of bail," for which ex parte communications can be tolerated; communications about bail *before the initial appearance* would seem to be the only ex parte contacts that could comply with *Wilson*'s strict standards.

If the bright-line approach were applied to our hypothetical circumstances, both the duty judge (Judge D) and the non-duty judge (Judge N) could ethically engage in ex parte communications about an accused person's bail until the initial appearance takes place. This, of course, countenances the prospect of two judges simultaneously having conversations with different people (defense attorney and prosecutor, say) and thereupon entering different bail orders. This potential for discord is inherent in a system with coequal judges, though, and the Commonwealth's judiciary has functioned in this environment for many years without suffering frequent breakdowns. In the real world, experience teaches that Kentucky's judges act with respect and comity toward one another, and one judge does not knowingly vacate another judge's orders without a compelling reason. There are also dedicated judicial assistants, like the Pretrial Services workers, who can be counted on to do their best to alert a "later" judge that an "earlier" judge has already made a ruling on a particular person's bond, thereby heading off contradictory rulings. These realities are at least part of the reason why our judicial system is not the "bizarre legal free for all" derided in the County Attorney's pleadings (*see* Commonwealth's Mot. at pg. 14); contradictory orders are always possible, but they are rare because the people in the system strive to avoid them.

Applying the bright line, initial appearance rule in our case would lay to rest the County Attorney's complaints. Although his pleading criticizes the merits of the *bond orders* releasing the Respondents on their own recognizance, the County Attorney does not contend that there was an abuse of discretion requiring reversal; his question of law concerns only the propriety of ex parte *communications* that may have preceded those orders. Despite the impaired nature of the record in our case, it is clear that all ex parte communications involving either of the judges occurred *before* the Respondents' initial appearance. By the proposed bright-line rule, all such communications were ethical.

D. Alternative definitions of "initial fixing of bail" suggested by the County Attorney's motion are unsupported by the law and unworkable in practice.

The County Attorney seems to recognize that any communications involving Judge Armstrong must have preceded the Respondents' initial appearance. He nevertheless attacks the communications as improper under *Wilson*, forcing the conclusion that the County Attorney has a different definition of "initial fixing of bail" in mind than the one discussed above. His motion suggests in some passages that Judge Armstrong's communications were wrong because a different person was "duty judge" at the time (*see* Commonwealth's Mot. at pg. 14); in other places, the County Attorney assumes that Judge Armstrong "set aside" an existing order (*id.* at 18), suggesting a belief that any ex parte communications were wrong because the "initial fixing of bail" had already occurred. Upon closer consideration, though, neither of these alternate definitions of "initial fixing of bail" are legally proper or workable in a practical sense.

1. "Duty-judge-only" proposal:

The County Attorney's repeated emphasis on the fact that Judge Armstrong was not the "duty judge" on July 24-25 suggests this definition of "initial fixing of bail": When the on-call duty judge is working, only he or she may make initial orders fixing bail. As Judge D alone may make such orders, Judge D may have ex parte communications about the initial fixing of bail, but no other judge may. Any bail order by Judge N – whether entered *before or after* Judge D's order – is therefore improper; thus any ex parte communication about bail involving Judge N is improper, because Judge N cannot participate in the initial fixing of bail during Judge D's shift.

The "duty-judge-only" rule supposes an arrangement in which, for a certain number of hours, that judge has exclusive authority, superior to that of any other fellow judge. (If there are two duty judges on call, as happens sometimes in Jefferson County, presumably they would share concurrent supreme authority.) This idea of exclusive jurisdiction cannot be reconciled with Kentucky's Constitution, which provides that there is "one Court of Justice" constituting "a unified judicial system" in the Commonwealth. Ky. Const. § 109. "It is clear from Const. Sec. 109 that there is but one District Court for the entire state," wrote this Court three decades ago, and all district judges "are members of the same court." *Richmond v. Commonwealth*, 637 S.W.2d 642, 646 (Ky. 1982). Indeed, subject to this Court's rules and matters within the chief judges' purview, district judges "have equal capacity to act throughout the Commonwealth...." *Ibid.* A constitution that confers judicial equality statewide would not easily tolerate rigid hierarchies within individual

districts: if a Jefferson District judge has "equal capacity to act" in other counties, it would be strange that he or she would not have "equal capacity" with other Jefferson District judges.

The fact that "duty judges" are on-call only for certain hours does not suggest that they can assume superior or exclusive authority during those hours. The courts are not "down" during the overnight hours, *see* CR 77.01, and district judges do not go "off-duty" after their regular shifts. Larger districts in the Commonwealth might designate one or two judges for overnight duty, both to guarantee a ready point of contact at all hours and to let the other judges get a night's sleep, but the other judges are not officially relieved of their responsibilities during the overnight period. When the phone rings in the middle of the night, the responsible judge answers, whether or not someone else happens to be the "duty judge" at that hour. If the caller asks the judge to do something that the law puts within the judge's authority, he or she is allowed (and possibly obliged) to act, even if the "duty judge" might also be available for the task.

There are also a multitude of practical problems with a rule saying "only the duty judge can initially fix bail." The rule obviously would give no guidance to judges in small districts without the luxury of a "duty judge," nor would it help larger districts during the hours when no "duty judge" is in place. Jefferson District Court's rules envision that duty judges will be available from 11:00 p.m. to 7:00 a.m. on weeknights (though Trial Commissioners are also directed to "review and set bail" at certain times); there are no "duty judges" outside these hours. JDR 207. (According to Pretrial Services records, the orders releasing the

Respondents on their own recognizance were entered at 8:00 a.m. on July 25, which, if accurate, would have been after the duty judge's shift had ended.) Even in larger districts, a "duty-judge-only" approach ignores the likelihood that the duty judge might be preoccupied with one matter, like a search warrant, and be unable to take other calls; in such instances, a non-duty judge must take up the slack. It is accordingly unrealistic even in bigger districts to confine decisions about the "initial fixing of bail" to one judge only.

2. "First-in-time" proposal:

When the County Attorney protests that Judge Armstrong "summarily set[] aside [a] prior judicial determination concerning bail" (*see* Commonwealth's Mot. at pg. 19), he is doing two things: engaging in rank speculation; and suggesting a belief that the "initial fixing of bail" is done by whichever judge takes action first. By this approach, whichever judge is first in time can enter the order initially fixing bail; the first-in-time judge may have ex parte communications about bail without contravening *Wilson*, because this judge is the one who performs the "initial fixing of bail." Extrapolating further, the County Attorney's definition would provide that once the first-in-time judge enters the order, the "initial fixing of bail" is done, and any subsequent orders are void. By this logic, any other judge's ex parte communications about bail – whether the communication happened before the first-in-time judge entered the bail order, or after – would violate the *Wilson* rule: because the other judges are not first-in-time, their conversations cannot relate to the "initial fixing of bail."

The "first-in-time" idea does not offer a workable alternative, either. As noted above, in the real world, the first judge to rule almost always commands the deference of other judges; in most cases, when Judge N is awakened in the middle of the night to discuss an arrestee's bond conditions, the first question asked will be, "has Judge D already entered an order?" It is probably exceedingly rare in Kentucky for one judge knowingly to countermand a prior judge of equal authority. In rare cases when conflicting orders occur, the two judges are almost always unaware of one another's involvement.

In those rare cases when two judges act, it may be impossible to say which judge was "first-in-time." Suppose Judge D receives a phone call in the middle of the night from a police officer about an arrestee's bail; the defense attorney gets a busy signal when she calls Judge D, and thus calls Judge N. Both judges call the Pretrial Services office and talk to different workers, and so the judges know nothing about the other's involvement. Deciding which judge was "first-in-time" seems a futile exercise. Worse, it would be acutely unfair to condemn either judge's ex parte communications as unethical, when neither judge was aware of the other, and thus could not possibly have realized that his or her ex parte communications would not qualify as relating to the "initial fixing of bail."

* * * * *

As stated at the outset, the Court has a free hand to adjust the rules about ex parte communications relating to the "initial fixing of bail." The Court can prohibit all ex parte communications about bail; the Court can announce a restrictive definition for "initial fixing of bail";

or the Court can take any other steps it desires. If the Court prohibits all ex parte communications about bail, the warmest applause might come from the judge who wakes up in the middle of the night to take phone calls about an arrestee's bail conditions, even though someone else is the assigned "duty judge." If the Court prefers an intermediate course, it might consider using the initial appearance as the bright-line cutoff for the "initial fixing of bail," so the judge who wakes up in the middle of the night can have some assurance that his or her ex parte communications about an arrestee's bail conditions won't later be castigated as improper.

III. Jurisdiction under Ky. Const. § 115 and CR 76.37 for motions by the Commonwealth to certify a question of law.

The Respondents have previously argued that the County Attorney's motion for certification of the law is procedurally improper. As the Court has accepted the County Attorney's motion, the jurisdictional question is probably moot; nevertheless, the Respondents will reiterate their position in the event it is of any interest to the Court.

With just one exception, only courts and litigants from *outside* Kentucky's judicial system can ask this Court to certify the law about a particular matter. CR 76.37(1). The one exception allows the Commonwealth to request certification of the law "pursuant to Section 115 of the Constitution of Kentucky," after the entry of a "final order adverse to the Commonwealth." CR 76.37(10). Section 115 of the Constitution provides that "the Commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of securing a certification of law...." Ky. Const. § 115. As this Court has explained, Rule 76.37 allows "the Commonwealth, pursuant to Section

115 of the Kentucky Constitution, to initiate a request for a certification of the law in the Supreme Court, but only after a judgment of acquittal." *Commonwealth v. Bailey*, 71 S.W.3d 73, 83 (Ky. 2002) (punctuation and footnotes omitted). This "special privilege" for the Commonwealth after an acquittal reflects the fact that, alone among all litigants in all cases, criminal and civil, only the Commonwealth after an acquittal has no right to an appeal.

There has been no "judgment of acquittal" in this case, however. The County Attorney has instead used the certification process to complain about conditions of release that were accorded to Mr. Carman and Mr. Westbay at the very outset of criminal proceedings in Jefferson District Court. The correct procedure for mounting such a challenge was not a motion to certify the law, but a petition in Circuit Court for mandamus or prohibition, the appropriate method for securing interlocutory review of a District Court order. *Commonwealth v. Williams*, 995 S.W.2d 400, 402-403 (Ky. App. 1999). This type of action would certainly have been adequate for the County Attorney's purposes: Jefferson Circuit Court would have been an ideal forum for conducting the substantial additional fact-finding necessary to produce a full record in this case, and to the extent corrective action had been deemed appropriate, the Circuit Court would have had all the authority it needed for such purposes.

The Court originally denied the County Attorney's petition on jurisdictional grounds, observing that "a final disposition is a prerequisite for a certification of the law." (Order of Nov. 21, 2013.) The Court's Order cited subsection (1) of CR 76.37 as authority for this (*ibid.*),

but subsection (1) contains no "final order" requirement. CR 76.37(1). Subsection (1), moreover, expressly limits its scope to petitions filed by *courts* – any federal court, and the highest appellate court of any state outside Kentucky – and does not extend the privilege to Kentucky prosecutors. *Id.*

The County Attorney asked the Court to reconsider its position, citing five instances in which the Court accepted petitions for certification in criminal cases where no judgment of acquittal was apparently entered. (Commonwealth Mot. to Reconsider) (citing *Wilson*, 384 S.W.3d 113, *Commonwealth v. Ingram*, 46 S.W.3d 569, 570 (Ky. 2001), *Commonwealth v. Davis*, 25 S.W.3d 106, 107-108 (Ky. 2000), *Commonwealth v. Lopez*, 3 S.W.3d 351, 352 (Ky. 1999), *and Commonwealth v. Raines*, 847 S.W.2d 724, 726 (Ky. 1993) (*overruled in non-relevant part by Commonwealth v. Howard*, 969 S.W.2d 700, 704 (Ky. 1998))). The Court granted the motion, directing that briefs should be filed in accordance with CR 76.37(6), a subsection associated with petitions filed under CR 76.37(1) by courts outside Kentucky. (Order of April 17, 2014.)

The mere existence of a jurisdictional anomaly in a case does not authorize the practice in all cases; for anything to rise to the level of judicial precedent, "there must have been an application of the judicial mind to the precise question necessary to be determined...." *Carroll v. Carroll's Lessee*, 57 U.S. 275, 287 (1853). The five cases cited by the County Attorney have a critical common denominator: the Court did not discuss the issue of jurisdiction under CR 76.37(10) in any of them. *See Wilson*, 384 S.W.3d at 114; *Ingram*, 46 S.W.3d at 570; *Davis*, 25 S.W.3d

at107-108; *Lopez*, 3 S.W.3d at 352; *Raines*, 847 S.W.2d at 726. Indeed, nothing in the opinions suggests that jurisdiction was ever a subject discussed in oral argument or mentioned in any of the parties' briefs.

This silence about jurisdiction robs these cases of any precedential value on the issue of jurisdiction. As the United States Supreme Court explained: "When questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984) (internal quotation marks and citation omitted). When judicial opinions assume or overlook a particular jurisdictional criterion without comment, "[t]he most that can be said is that the point was in the cases if anyone had seen fit to raise it." *Webster v. Fall*, 266 U.S. 507, 511 (1925). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Ibid.* (citations omitted); *see also Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) (same).

There is accordingly no authoritative case law that allows a Kentucky prosecutor to request certification of the law outside the bounds of the Kentucky Constitution and CR 76.37(10). The Court presumably may amend CR 76.37 to allow such requests (if not otherwise inconsistent with the Constitution), but it will have to take such action outside the ambit of this case. For present purposes, the County Attorney has not established proper jurisdiction for the current certification of law proceedings, and nothing prevents the Court from dismissing this case for that reason.

CONCLUSION

Respondents ask this Court to dismiss the Commonwealth's request for certification of the law or, in the alternative, certify that the law is as the Court specified in *Wilson*, namely, that ex parte communications after the initial fixing of bail are improper.

Respectfully submitted,

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