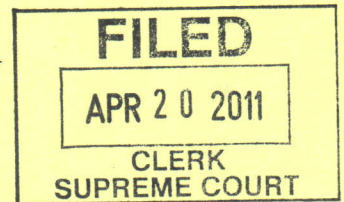


**Commonwealth of Kentucky**  
**Supreme Court**  
No. 10-SC-74-DG



**COMMONWEALTH OF KENTUCKY**

**APPELLANT**

v.

Appeal from Shelby Circuit Court  
Hon. Charles Hickman, Judge  
Indictment No. 08-T-855

**ANGELA D. PETERS**

**APPELLEE**

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**Reply Brief for Commonwealth**

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**Submitted by,**

**JACK CONWAY**

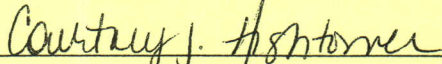
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**CERTIFICATE OF SERVICE**

I certify the record on appeal was not checked out from the Clerk of this Court and that a copy of the Reply Brief for Commonwealth has been delivered this 20th day of April, 2011 via U.S. Mail, postage prepaid, to the Hon. Charles Hickman, Judge, Shelby County Circuit Court, Shelbyville, Kentucky 40065; Hon. Alan Q. Zaring, 10 S. Main Street, P. O. Box 226, New Castle, Kentucky 40050, counsel for Appellee; and via electronic mail to the Hon. Laura Donnell, Commonwealth's Attorney.

  
Courtney J. Hightower  
Assistant Attorney General

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## ARGUMENTS

### I.

#### **THE CORRECT STANDARD OF REVIEW FOR THE APPELLATE COURT WAS ABUSE OF DISCRETION.**

The appellee and the Kentucky Court of Appeals seem to agree that the appropriate standard review for the appellate court is clear error. This is contrary to Kentucky case law.

The issuance of, or a refusal to issue a writ of prohibition is in the sound discretion of the court. Grange Mutual Ins. Co. v. Trude, 151 S.W.3d 803 (Ky.2004). Issues of law are reviewed de novo and such review will occur most often under the first class of writs, i.e. where the lower court is alleged to be acting outside its jurisdiction. Id. De novo review would also be applicable under the few second class of cases where the alleged error invokes the “certain special cases” exception. Id. A finding of great and irreparable harm is a factual finding, reviewed for clear error. Id.

In this case, the Shelby Circuit Court’s decision to grant the Commonwealth’s petition for writ of prohibition should have been reviewed for abuse of discretion. The Shelby Circuit Court’s factual finding of great and irreparable harm before exercising this discretion should have been reviewed for clear error.

## II.

### **THE SHELBY CIRCUIT COURT ACTED CORRECTLY IN GRANTING THE COMMONWEALTH'S PETITION FOR WRIT OF PROHIBITION.**

The appellant argues that the Kentucky Court of Appeals correctly overturned the writ of prohibition entered by the Shelby Circuit Court. The Kentucky Court of Appeals concluded in its opinion below and the appellee alleges in her brief that the Commonwealth has not made a sufficient showing of great and irreparable harm in support of the granting of the writ.

In this case, the appellee has conceded that the Commonwealth has no adequate remedy on appeal. In proceeding to the great and irreparable injury prong, the Shelby Circuit Court correctly concluded that the irreparable harm and the great injustice would occur in the precedential effect of the district court's order, including the district court's authority to order witnesses to appear for an unspecified discovery session. (Shelby Circuit Court Order, p. 2). In granting the writ, the Shelby Circuit Court also correctly concluded that there was great and irreparable harm because the district court order impacted the integrity of the discovery process and the structure of the discovery process as set out in the rules of procedure. (Shelby Circuit Court Order, p. 2).

There is no rule of criminal or civil procedure which provides for the taking of testimony and the mandatory appearance of a witness at a pre-trial conference. CR 16 allows for formulating of issues in a pre-trial procedure and gives the court discretion to require the attorneys appear for a conference to discuss certain matters. CR

16 makes no mention of granting the court the authority to require any witnesses to appear for the purpose of taking testimony. RCr 8.03 allows for the court, on motion of any party or on its own motion, to order counsel for all parties to appear before it for a pretrial. However, there is no mention in the rule that the court may order the complaining witness to appear. Under RCr 7.10, the court may order the appearance of a witness for the taking of deposition, but only if it appears that this witness may be prevented from attending the trial or hearing. Finally, RCr 7.24(2) provides a list of things that the trial court may order the Commonwealth to provide. Producing a witness at a pretrial conference for unspecified discovery purposes is not listed in RCr 7.24(2). Neither the appellee nor the Kentucky Court of Appeals has cited any rule of discovery which gives the district court the authority to order the production of a prosecution witness for the purpose of taking testimony. If the appellee maintains that testimony should be taken at a pre-trial conference, then the Kentucky Criminal and Civil Rules of Procedure should be amended to include such a matter in pre-trial procedure. In this case, the district court's order went beyond the scope of the rules of procedure, therefore, the Shelby Circuit Court's finding of great and irreparable harm was not clearly erroneous.

In granting the writ, the Shelby Circuit Court also correctly concluded that current Kentucky caselaw does not give the district court authority to order the production of a prosecution witness for an unspecified discovery purpose prior to trial. See Hilliard v. Commonwealth, 158 S.W.3d 758 (Ky.2005) (Rules did not authorize the Commonwealth to use the subpoena power to compel prospective witnesses to attend a pretrial interview); Riggs v. Commonwealth, 02-SC-880, WL 22975092 (Ky.2003) (Trial

court had no authority to order a witness to submit to a pre-trial interview); Gullett v. McCormick, 421 S.W.2d 352 (Ky.1967) (Attendance of witnesses and the taking of testimony at a pretrial conference not approved). Neither the appellee nor the Kentucky Court of Appeals has cited any case which authorizes the district court to order the production of a prosecution witness for the purpose of taking testimony. The district court's order is contrary to current Kentucky case law, therefore, the Shelby Circuit Court's finding of great and irreparable harm was not clearly erroneous.

Finally, the Shelby District Court's order for the complaining witness to appear for a pretrial conference to be interviewed by opposing counsel would impact the actual liberty of such witness and his/her right to refuse to submit to an interview by opposing counsel. Both sides have the right to interview witnesses before trial, but a witness also has the right to refuse to be interviewed by either the defense or the prosecution. Radford v. Lovelace, 212 S.W.3d 72 (Ky.2006) (overruled other grounds by Cardine v. Commonwealth, 283 S.W.3d 641 (Ky.2009); United States v. Medina, 992 F.2d 573 (6<sup>th</sup> Cir.1993) (overruled on other grounds in United States v. Jackson-Randolph, 282 F.3d 369 (6<sup>th</sup> Cir. 2003)) (A defendant's right to access the witnesses is tempered by the witness' equally strong right to refuse to say anything). A court order mandating that a witness appear for an interview would presuppose that the witness had no right to refuse such interview. Under Bender v. Eaton, 343 S.W.2d 799 (Ky.1961), the Shelby District Court's order requiring the Commonwealth to produce its witnesses would amount to great and irreparable harm. If not great and irreparable harm, at the very least, it amounts to a situation where the lower court is proceeding erroneously and

correction of the error is necessary and appropriate in the interest of orderly judicial administration. Id.

The appellee and the Kentucky Court of Appeals found the Commonwealth's argument in support of great and irreparable harm to be speculative. However, a district court order which is unsupported by both the Civil and Criminal Rules of Procedure and contrary to current Kentucky case law is not speculative harm; such an order usurps authority and undermines the Kentucky Civil Rules of Procedure and the Kentucky Criminal Rules of Procedure at the moment the order is entered. The appellee argues that a pre-trial conference with the arresting officer is not a novel idea. However, a pre-trial conference in which testimony is taken and the Commonwealth is **ordered** by the court to produce the complaining witness is novel. The appellee also argues that if the appellant's argument was true, police officers would not need to appear for suppression hearings, preliminary hearings or a trial. This argument is without merit as a subpoena would mandate an officer's appearance and is supported by Kentucky Civil Rule of Procedure 45 and Kentucky Criminal Rule of Procedure 7.02. The Shelby Circuit Court's determination that there was great and irreparable harm was not clearly erroneous and the Shelby Circuit Court did not abuse its discretion in granting the Commonwealth's petition for a writ of prohibition.



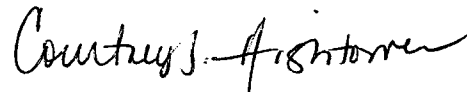
**CONCLUSION**

Wherefore, based upon all of the foregoing, the Kentucky Court of Appeals opinion should be reversed and the Shelby Circuit Court's order granting the Commonwealth's motion for a writ of prohibition should be reinstated.

Respectfully Submitted,

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