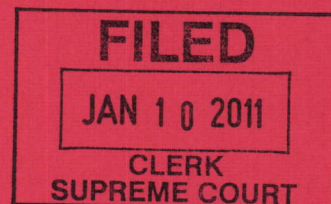


**Commonwealth of Kentucky**  
**Supreme Court**  
No. 10-SC-74-DG



**COMMONWEALTH OF KENTUCKY**

**APPELLANT**

On Discretionary Review from the Kentucky Court of Appeals  
Appeal from Shelby Circuit Court  
Hon. Charles Hickman, Judge  
Indictment No. 08-T-855

v.

**ANGELA D. PETERS**

**APPELLEE**

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**Brief for Commonwealth**

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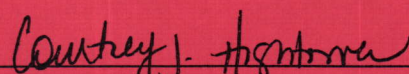
**Submitted by,**

**JACK CONWAY**  
Attorney General of Kentucky

**COURTNEY J. HIGHTOWER**  
Assistant Attorney General  
Office of Criminal Appeals  
Office of the Attorney General  
1024 Capital Center Drive  
Frankfort, Kentucky 40601  
(502) 696-5342

**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 Brief for Commonwealth has been delivered this 10<sup>th</sup> day of January 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

## **INTRODUCTION**

Angela Peters, hereinafter referred to as the appellee, was charged in Shelby District Court with Driving under the Influence in violation of KRS 189A.010. After the Shelby District Court entered an order requiring the Commonwealth to produce the complaining witness for a pretrial conference, the Shelby Circuit Court granted the Commonwealth's Petition for a Writ of Prohibition. The appellee filed an appeal as a matter of right with the Kentucky Court of Appeals. On January 8, 2010, the Kentucky Court of Appeals entered an opinion reversing the decision of the Shelby Circuit Court. The Commonwealth moved for Discretionary Review, which this court granted. This is the Commonwealth's brief on discretionary review.

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## STATEMENT OF THE CASE

On February 25, 2008, appellee was charged with Driving Under the Influence in violation of KRS 189A.010.<sup>1</sup> (Petition for Writ of Prohibition, p 1). The Appellee filed a motion for the Commonwealth to produce the complaining witness, Deputy Lauren Batts, at a pretrial conference. (Petition for Writ of Prohibition, p. 2). On July 15, 2008, the Shelby District Court entered an order requiring the Commonwealth to produce such witness prior to trial to allow the opposing counsel to conduct an interview. The Shelby District Court acknowledged that there was no rule which gave it the authority to enter such order requiring the Commonwealth to automatically produce the prosecuting witness prior to trial. The district court determined that the production of the prosecution witness, i.e. the officer, prior to trial had proven to be the most effective method in the 53<sup>rd</sup> Judicial District used to expedite cases and aid in the disposition of cases. (Shelby District Court Order, p. 2).

The Commonwealth filed a Motion to Clarify the Court's Order Dated July 15, 2008. On July 29, 2008, the Shelby District Court again ordered the Commonwealth to produce the complaining witness, the officer, for a pretrial conference. (Petition, p. 3).

The Commonwealth subsequently filed a Petition for a Writ of Prohibition in the Shelby Circuit Court. In such petition, the Commonwealth argued that the Shelby District Court's decision was unsupported by the Kentucky Rules of Criminal Procedure and would materially prejudice the Commonwealth. The Shelby Circuit Court granted the Commonwealth's petition.

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<sup>1</sup>This case is an original action in Shelby Circuit Court. Therefore, there is no record and, in drafting its Statement of the Case, the Commonwealth relies on the pleadings provided by the Shelby County Attorney. However, it is believed that there is no dispute with regard to the factual background of this case. The Commonwealth has attached the pertinent pleadings: the Shelby District Court's Order, the Shelby Circuit Court's order granting the Commonwealth's Petition for Writ of Prohibition, and the Kentucky Court of Appeals Opinion.

The Shelby Circuit Court concluded that the Shelby District Court was acting within its jurisdiction, but acting erroneously because there was no basis found in the Kentucky Rules of Criminal Procedure or in the applicable case law which would support the district court's order. (Petition, p. 3).

On appeal, the Kentucky Court of Appeals concluded that the Commonwealth had failed to establish that the Commonwealth would suffer great and irreparable harm as a result of the district court's order. Thus, the Kentucky Court of Appeals reversed the circuit court's order granting the writ of prohibition and remanded the case for entry of an order setting it aside. (Slip opinion, p. 7). This court granted the Commonwealth's Motion for Discretionary Review.

## ARGUMENTS

### I.

#### **THE KENTUCKY COURT OF APPEALS EMPLOYED THE INCORRECT STANDARD OF REVIEW.**

In reversing and remanding this case, the Kentucky Court of Appeals applied the incorrect standard of review to the Shelby Circuit Court's decision to grant the Commonwealth's writ of prohibition against the Shelby Circuit Court. The Kentucky Court of Appeals employed the clearly erroneous standard in reviewing whether the Shelby Circuit Court erred in granting the writ. (Slip opinion, p. 4). Then, the Kentucky Court of Appeals applied a *de novo* standard of review to the Shelby Circuit Court's determination of great and irreparable harm as it concluded, "that they were not persuaded that the potential results enumerated by the circuit court and the Commonwealth [qualified] as great and irreparable harm -- much less harm at all." (Slip opinion, p. 5).

#### **A. The standard for granting a writ of prohibition is twofold.**

The Kentucky Supreme Court has divided writ cases into two classes: (1) acting without jurisdiction or (2) acting erroneously within its jurisdiction. Grange Mutual Ins. Co. v. Trude, 151 S.W.3d 803 (Ky.2004). In cases where the lower court is acting within its jurisdiction but in error, the court with which the petition for a writ is filed only reaches the decision as to the issuance of the writ once it finds (1) there is no adequate remedy on appeal and (2) great and irreparable harm. If these procedural prerequisites for a writ are satisfied, "whether to grant or deny a petition for writ is within the lower court's discretion." Grange Mutual Ins. Co. v. Trude,



151 S.W.3d 803 (Ky.2004).

**B. The standard of review on appeal is abuse of discretion.**

On appellate review, however, the proper standard of review depends on the class, or category, of writ case:

De novo review will occur most often under the first class of writ cases, i.e., where the lower court is alleged to be acting outside its jurisdiction, because jurisdiction is generally only a question of law. De novo review would also be applicable under the few second class of cases where the alleged error invokes the “certain special cases” exception or where the error involves a question of law. But, in most of the cases under the second class of writ cases, i.e., where the lower court is acting within its jurisdiction but in error, the court with which the petition for a writ is filed only reaches the decision as to the issuance of the writ once it finds the existence of the “conditions precedent,” i.e. no adequate remedy on appeal, and great and irreparable harm. “If [these] procedural prerequisites for a writ are satisfied, whether to grant or deny a petition for a writ of prohibition is within the [lower] court’s discretion. But, the requirement that the court must make a factual finding of great and irreparable harm before exercising discretion as to whether to grant the writ then requires a third standard of review, i.e., clear error.

Grange Mutual Ins. Co. v. Trude, 151 S.W.3d 803 (Ky.2004). Accordingly, the proper standard of review in this case was whether the Shelby Circuit Court abused its discretion when it granted the Commonwealth’s writ of prohibition.

In this case, the trial court did not abuse its discretion in granting the Commonwealth’s writ. The Shelby Circuit Court concluded that there was no authority found in the Kentucky Rules of Criminal Procedure, Kentucky Revised Statutes or case law which allowed for the Shelby District Court to order the production of a prosecution witness for unspecified discovery

purposes prior to trial.<sup>2</sup> Further, the Shelby Circuit Court determined that Shelby District Court's order would negatively impact all prosecutions, the integrity of the discovery process and the structure of the discovery process as set out in the Kentucky Rules of Criminal Procedure. The Shelby Circuit Court's determination was not arbitrary, unreasonable, unfair or unsupported by sound legal principles. Therefore, the Shelby Circuit Court did not abuse its discretion in granting the Commonwealth's petition for writ of prohibition.

C. **The standard of review for great and irreparable harm is clear error.**

Additionally, the finding as to great and irreparable harm is a finding of fact unique to each case, not a question of law that has already been decided, and each such finding must be independently evaluated for clear error. Babbs v. Minton, 2005 WL 635047 (Ky.2005). On appeal, if the error is alleged to lie in the findings of fact, then the appellate court must review the findings of fact for clear error before reviewing the decision to grant or deny the petition. Grange, *supra* at 819. Clear error occurs only when there is no substantial evidence in the record to support the findings of the trial court. M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 116 (Ky.App. 1998). Accordingly, the Shelby Circuit Court's finding of great and irreparable harm should have been reviewed for clear error by the Kentucky Court of Appeals.

In finding great and irreparable harm, the Shelby Circuit Court correctly determined that there was no authority for the Shelby District Court to order the production of the prosecution witness for an unspecified discovery purpose at trial and such order would negatively impact the discovery process in future prosecutions. In fact, it was undisputed by all the parties that there was no rule which directly stated that the Commonwealth must automatically produce the

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<sup>2</sup>The Commonwealth will elaborate on this claim in Argument II of this brief.

prosecuting witness. The circuit court's finding of great and irreparable harm was correct.

The Kentucky Court of Appeals did not employ the correct standard of review in concluding that the Shelby Circuit Court erred in granting the Commonwealth's petition for writ of prohibition. The Kentucky Court of Appeals decision should be reversed.

## II.

### **GREAT AND IRREPARABLE HARM WILL RESULT FROM THE SHELBY DISTRICT COURT ORDER REQUIRING THE COMMONWEALTH TO PRODUCE ITS COMPLAINING WITNESS AT A PRETRIAL CONFERENCE.**

The Commonwealth and the complaining witness will suffer great and irreparable harm as a result of the Shelby District Court's Order requiring the Commonwealth to produce such witness at a pretrial conference to be interviewed by opposing counsel.

#### **A. The Shelby District Court Order impacted the liberty of the witness.**

In Powell v. Graham, 185 S.W.3d 624, 629 (Ky.,2006), the Kentucky Supreme Court described "irreparable injury" in various ways, including "something of a ruinous nature," Bender v. Eaton, 343 S.W.2d 799, 801 (Ky.1961), and "*incalculable damage* to the applicant ... either to the liberty of his person, or to his property rights, or other far-reaching and conjectural consequences." Litteral v. Woods, 223 Ky. 582, 4 S.W.2d 395, 397 (1928) (emphasis added). But this standard requires more than mere, or even great, injury:

An impression has arisen that the mere loss of valuable rights or property through an error of the court constitutes great and irreparable injury entitling the loser automatically to relief from the error. However, a careful analysis of the cases dealing with the supervisory power of the Court ... under Section 110 of the Kentucky Constitution will disclose that in addition to the element of great and irreparable injury there must be some aspect of *injustice*. There must be something in the nature of usurpation or abuse of power by the lower court, such as to

demand that the Court ... step in to maintain a proper control over the lower court. The object of the supervisory power of the Court ... is to prevent miscarriage of justice.

Schaetzley v. Wright, 271 S.W.2d 885, 886-87 (Ky.1954) (citations omitted).

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)). A defendant's right to access the witnesses is tempered by the witness' equally strong right to refuse to say anything. 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))

In this case, the appellee informed the lower court that the purpose of having the complaining witness appear at the pre-trial was to "discuss" the case. The Shelby District Court's Order framed the issue as whether or not the Commonwealth was required to produce witnesses prior to trial to allow opposing counsel to interview them. (See Order p. 1). The Shelby District Court Order mandating that the Commonwealth produce a witness for an interview suggested that the witness had no right to refuse such interview. The aforementioned case law is clear that a witness does not have to submit to an interview by the prosecution or the defense. Thus, the Shelby District Court's Order for the complaining witness to appear at a pretrial conference to be interviewed by opposing counsel impacted the actual liberty of such witness and his/her right to refuse an interview by opposing counsel. Under Bender v. Eaton, *supra*, this would amount to great and irreparable harm. This infringement on a potential witness' liberty would also amount to great and irreparable harm in the future.

The Shelby District Court concluded that the practice of police officers attending pre-trial

conferences in the 53<sup>rd</sup> Judicial District was a courtesy and convenience on the part of the Commonwealth to undertake an informal disclosure of discovery pursuant to RCr 7.24.

However, the Shelby District Court's Order mandating the witness' appearance carried a very different message than the witness voluntarily appearing at the pretrial conference. It was not justified for the district court to order the Commonwealth produce the complaining witness for an undisclosed discovery exercise. Especially, since appellant did not allege any problem with obtaining discovery in this case. Great injustice and irreparable injury occurred in this case and would occur in future prosecutions by ordering the Commonwealth produce its complaining witness for an unjustified purpose.

**B. The Shelby District Court Order created numerous potential complications for trial.**

Additionally, in granting the writ of prohibition, the Shelby Circuit Court correctly concluded that "the potential for impeachment of witnesses at the trial with unsworn statements procured at informal pretrial conferences, defense counsel who attended the pretrial hearings becoming fact witnesses, unrepresented witnesses incriminating themselves, and the encouragement of unfettered "fishing" expeditions by defense counsel [were] just a few examples of the potential problems which could occur as a result of the precedent of the Shelby District Court's Order."

**C. In the future, the Shelby District Court Order would burden the witness.**

In addition to these potential complications at trial, there is the added burden on the Commonwealth to insure the witness attends the pre-trial conference, and the burden on the complaining witness, be it a police officer or victim, to be in attendance. A police officer on duty would have to take time from his duties to appear for the pretrial conference. The rape victim

would have to be in the same room with her rapist. These are just a few of the burdens that different complaining witnesses would endure if the trial court had the authority to mandate his/her appearance at the pretrial conference. Over time the potential for great injustice and irreparable injury in these situations is plainly present. The decision of the Kentucky Court of Appeals should be reversed and the Shelby Circuit Court's decision to grant the Commonwealth's petition for writ of prohibition should be affirmed.

### III.

**IN THE ABSENCE OF GREAT AND IRREPARABLE HARM, THE SHELBY DISTRICT COURT'S ORDER FOR THE COMMONWEALTH TO PRODUCE THE COMPLAINING WITNESS FELL INTO THE SPECIAL CASES SET OUT IN BENDER V. EATON BECAUSE SUCH ORDER RESULTED IN A SUBSTANTIAL MISCARRIAGE OF JUSTICE AND CORRECTION OF THE ERROR WAS NECESSARY AND APPROPRIATE IN THE INTEREST OF ORDERLY JUDICIAL ADMINISTRATION.**

If this court does not find that great and irreparable harm is present, the Shelby District Court's Order requiring the Commonwealth to produce the complaining witness fell into the special cases set out in Bender v. Eaton, 343 S.W.2d 799, 801 (Ky.1961). Accordingly, the Shelby Circuit Court's decision to grant the Commonwealth's petition for a writ of prohibition was appropriate to cure the substantial miscarriage of justice and correction of the error was necessary and appropriate in the interest of orderly judicial administration.

A. **This case was a special case because the Shelby District Court was not authorized to order the witness' appearance at the pretrial conference.**

In special cases, the Court of Appeals will entertain a petition for writ of prohibition on a

claim that the lower court was acting erroneously within its jurisdiction in the absence of a showing of irreparable injury, provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously and correction of the error is necessary and appropriate in the interest or orderly judicial administration. Bender v. Eaton, 343 S.W.2d 799 (Ky.1961).

The Shelby District Court's order requiring the complaining witness appear at the pretrial conference would, in effect, mandate that the Commonwealth provide the defendant with a medium of discovery that is entirely unfounded under Kentucky Rules of Criminal Procedure. 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).

The Shelby District Court's decision to order a witness appear at a pretrial conference was an abuse of power because it was completely unsupported in the Kentucky Criminal Rules, the Kentucky Revised Statutes or the Kentucky case law. This resulted in a substantial miscarriage of justice for the Commonwealth. The Kentucky Court of Appeals' conclusion that this case did not fall into the category of special cases set out in Bender v. Eaton, *supra*, was incorrect. The decision of the Kentucky Court of Appeals should be reversed and the Shelby Circuit Court's decision to grant the Commonwealth's petition for writ of prohibition should be affirmed.

**B. The case law establishes that the Shelby District Court was not authorized to order the appearance of the witness at the pretrial conference.**

The case law also indicates that the district court was not authorized in ordering the Commonwealth to produce the complaining witness. In Hilliard v. Commonwealth, 158 S.W.3d 758 (Ky.2005), the Kentucky Supreme Court held that the rules did not authorize the Commonwealth to use the subpoena power to compel prospective witnesses to attend a pretrial interview. Certainly, the appellant was not entitled use his subpoena power in the same manner.

In Riggs v. Commonwealth, 2003 WL 22975092 (Ky.2003), the Kentucky Supreme Court found no merit in the appellant's argument that the trial court had the inherent authority to order a witness to submit to a pre-trial interview. In an instance where there was no concern that the witness would not be able to testify in person, the court concluded that RCr 7.10 did not afford the appellant the right to depose/interview the witnesses. Id.

Finally, in Gullett v. McCormick, 421 S.W.2d 352 (Ky.1967) the Kentucky Court of Appeals held that the attendance of witnesses and the taking of testimony at a pretrial conference was generally not approved. The court concluded that the function of the pretrial conference under CR 16 was not to compel litigants to try their cases ... the pretrial conference was a useful procedural device important in many cases to accomplish the refinement of issues, the elimination of nonessential proof, and to expedite the actual trial of the action. Id. at 354.

Therefore, the district court was not authorized by any rule, statute or case in ordering the Commonwealth's complaining witness to appear at the pretrial conference. Therefore, as the Shelby District Court was acting outside the scope of the Kentucky Civil and Criminal Rules of Procedure, the writ of mandamus was necessary because a substantial miscarriage of justice



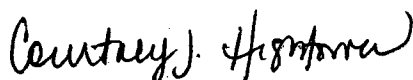
resulted and correction of the error was necessary and appropriate in the interest or orderly judicial administration. Bender v. Eaton, 343 S.W.2d 799, 801 (Ky.1961). Accordingly, the Shelby Circuit Court acted correctly in granting the Commonwealth's Motion for a Writ of Prohibition. The Kentucky Court of Appeals erred in determining that there was no substantial miscarriage of justice and correction of the error was not necessary and appropriate in the interest of orderly judicial administration. The decision of the Kentucky Court of Appeals should be reversed and the Shelby Circuit Court's decision to grant the Commonwealth's petition for writ of prohibition should be affirmed.

### **CONCLUSION**

Wherefore, based upon all of the foregoing, the Commonwealth respectfully requests this court grant its Motion for Discretionary Review in this case.

Respectfully Submitted,

**JACK CONWAY**  
Attorney General of Kentucky



**COURTNEY J. HIGHTOWER**  
Assistant Attorney General  
Office of Criminal Appeals  
Office of the Attorney General  
1024 Capital Center Drive  
Frankfort, Kentucky 40601-8204  
Commonwealth of Kentucky

Counsel for Appellant