COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2011-SC-000157-CL

COMMONWEALTH OF KENTUCKY — APPELLANT

VS. **Certification of Law from Jefferson District Court**
Division 304
Honorable Sheila Collins, Judge
File No. 11-M-004285

MICHAEL. L. WILSON — APPELLEE

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BRIEF FOR THE COMMONWEALTH

* *

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief For The Commonwealth* was mailed by U.S. First Class mail, postage prepaid, to: Honorable Sheila Collins, Judge, Jefferson District Court, Hall of Justice, 600 West Jefferson Street, Louisville Kentucky 40202; Honorable Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601; Honorable Paul Gold, Suite 320, Republic Plaza, 200 South Seventh Street, Louisville, Kentucky 40202; and Honorable Erica Lee Williams, Judge, Jefferson District Court, Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202; on this Wednesday, the Twenty-First (21st) day of December, 2011. I hereby further certify that the record on appeal was not withdrawn from the Clerk of the Supreme Court of Kentucky or the Jefferson District Court.

DAVID A. SEXTON

INTRODUCTION

This case is before this Court on a certification of the law as authorized by Section 115 of the Constitution of Kentucky and CR 76.37(10). The question of law presented in this certification proceeding is as follows:

Does Kentucky law authorize an ex parte motion by a criminal defendant to vacate or set aside a warrant for his or her arrest with no notice or opportunity for the Commonwealth to be heard?

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to CR 76.12(4)(c)(ii), the Commonwealth of Kentucky respectfully requests that this Honorable Court conduct oral argument in this certification of the law proceeding since the question of law presented affects the fair and efficient administration of justice.

STATEMENT OF POINTS AND AUTHORITIES

E. The *Ex Parte Practice Is Prohibited* By Court Rule And Statute.

1. RCr 4.40 and KRS 432.064.

2. SCR 4.300 and SCR 1.040.

F. The *Ex Parte Practice Violates Other* Constitutional Protections.

1. Due Process of Law.

STATEMENT OF THE CASE

On January 30, 2011 a nurse at Baptist East Hospital contacted the Louisville Metro Police Department to report suspected domestic violence involving an emergency room patient. (Appendix, p. 1). The victim in this case, Cynthia Wilson, the Appellee's wife, reported to the police that when she and her husband were out with friends socializing he became upset with her and ultimately left her company. *Id.* After the Appellee had left, she received a text message from him over her telephone which threatened that "I'll be waiting!!! You're a dead mother fucker if you come home." *Id.* After receiving the threatening text message, the victim was taken home by her friends. *Id.*

The victim entered the home, causing the burglar alarm system to go off. *Id.* At that point, the Appellee got up out of bed and began arguing with the victim. *Id.* In response to the triggered burglar alarm, the police came to check the couple's home. *Id.* As the police pulled away from the home, the victim told the Appellee to go back to bed. *Id.* The victim also attempted to go to bed. *Id.* However, the Appellee pulled his spouse from her bed and threw her to the floor. *Id.*

The Appellee then proceeded to pull the victim down the hallway of their home by her feet. *Id.* In an apparent effort to escape the Appellee's grasp of her, she grabbed onto a door frame. *Id.* However, she was unsuccessful and the Appellee proceeded to get on top of her and began to strangle her. *Id.* At that point in the physical attack, the victim screamed for her young son in the family home. *Id.* The police report noted that police observed that the victim's neck and throat area had scratches and bruising present. *Id.* Further, the police also noted that the victim also complained of pain to her lower back. *Id.* Additionally, the police report noted that

the victim exhibited bruising to the left side of her body and her arms and complained of pain. *Id.*

A criminal complaint was submitted to the Jefferson District Court, through the Jefferson County Attorney , on February 17, 2011. (Appendix, p. 2). The criminal complaint alleged that the victim received a text message on January 30, 2011 from the Appellee threatening her with death if she came home. *Id.* The criminal complaint further set out the facts and circumstances of the physical attack of January 30, 2011. *Id.* The criminal complaint alleged that the Appellee pulled the victim down the hall of their home by her feet, got on top of the victim and began to strangle her. *Id.* The criminal complaint also set out that after being taken to Baptist East Hospital the police were summoned by hospital personnel and took photographs of the victim's injuries. *Id.* The criminal complaint further alleged that the victim suffered scratches and bruising to her neck area, was experiencing pain to her lower back and left side, and exhibited bruising to her arms. *Id.* The Appellee was charged with the criminal offense of Assault in the Fourth Degree in contravention of KRS 508.030 as a result of his attack on his wife. *Id.*

The record of the proceedings in the Jefferson District Court reflects that the Commonwealth initiated a charge of Assault in the Fourth Degree and recommended that an arrest warrant for the Appellee be issued (Appendix, pp.2-3). A warrant of arrest for the Appellee was subsequently authorized by the Jefferson District Court on February 17, 2011 at 2:21 P.M.. (Appendix, p. 3). On the following day, February 18, 2011 at 12:30 in the afternoon counsel for the Appellee made an *ex parte* request to the Jefferson District Court to set aside the

arrest warrant and issue a criminal summons in place of the initial arrest warrant.[1] *Id.* The *ex parte* request to set aside the previously approved warrant of arrest was granted by the Jefferson District Court with the notation that counsel would "BRING APPELLEE TO COURT ON TUESDAY 2/22/2011." (Appendix, pp. 3-4).

As shall be discussed in further detail below, it is uncontroverted that despite the fact that the *ex parte* motion to set aside the arrest warrant was made at the Jefferson County Hall of Justice at 12:30 in the afternoon on a weekday the Commonwealth was never given notice of the defense effort to vacate or set aside the arrest warrant. Additionally, it is also uncontroverted that the Appellee did not appear in court on February 22, 2011 to answer the criminal summons which had been issued at his request. Having subsequently learned that the initial arrest warrant in this domestic violence case had been set aside without any notice to the Commonwealth, the Commonwealth thereafter filed its *Motion To Reinstate Arrest Warrant, Review Bond, And Order The Defendant To Have No Contact With The Victim* which was heard before the Jefferson District Court on February 28, 2011.[2] (Appendix, p. 5).

At the hearing on the Commonwealth's motion on February 28, 2011 counsel for the Appellee frankly stated to the court that "I came to you last week and told you there was an arrest warrant and asked you to set the arrest warrant aside and make it a summons." (VR 2-28-11; 11:23:18). In support of its motion, the Commonwealth explained that it believed it "should have an opportunity, we think, once there is an arrest warrant and there is a case, we think it is

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[1] The initial arrest warrant was authorized by Judge Deana McDonald of the Jefferson District Court. The *ex parte* motion to set aside the arrest warrant made to and granted by Judge Erica Lee Williams of the Jefferson District Court.

[2] The Commonwealth explained on the record that it brought its motion before Judge Williams as she was the judge of the Jefferson District Court who had entertained and ultimately granted the *ex parte* request to set aside the arrest warrant. (VR 2-28-11; 11:58:15).

now an adversarial proceeding and the Commonwealth should be entitled to be present and note its objections to the arrest warrant being changed to a criminal summons." (VR 2-28-11; 11:24:19). The Commonwealth informed the Jefferson District Court that the prosecution was a domestic violence case involving the allegation that the Appellee had attempted to strangle his wife and that the Commonwealth "would have liked to have told the court about that." (VR 2-28-11; 11:25:16). Accordingly, the Commonwealth explained that it was requesting that the court: reconsider its prior action of setting aside the arrest warrant, set aside the criminal summons and reissue the arrest warrant, set an appropriate bond, and enter a no contact order with the victim. (VR 2-28-11; 11:25:33).

In defense of its *ex parte* application to set aside the arrest warrant, counsel for the Appellee explained that the victim had contacted him, allegedly recanted her initial report of attempted strangulation to the police, and instead told defense counsel that she merely sought medical attention at the hospital for a pre-existing back injury. (VR 2-28-11; 11:26:40). Defense counsel reminded the court that he relayed that information to the court when he sought to set aside the arrest warrant and that "based on that you set aside the warrant." (VR 2-28-11; 11:26:55). In explanation of why the Appellee did not appear in court on February 22, the defense explained that he and the Appellee "were here" although "not in 304". (VR 2-28-11; 11:30:44). Instead, defense counsel explained that instead of reporting to Division 304 of the Jefferson District Court with the Appellee he sought out a deputy sheriff in the Hall of Justice to serve the Appellee with the criminal summons that day. (VR 2-28-11; 11:28:45).

The defense asserted that the Commonwealth "has rigged up a system whereby they can talk to the judges through the computer." (VR 2-28-11; 11:32:25). The Appellee's *ex parte*

application to set aside the outstanding warrant for his arrest was entirely appropriate because, according to defense counsel, "everybody gets arrested, everybody goes to jail, maybe they lose their jobs, maybe they lose their livelihood based on assertions that are nothing more than hearsay and are untrue and the whole thing goes down like that. And that's why I asked the court to set it aside. And I did bring him in in all good faith to this building." According to the Appellee's attorney, his *ex parte* motion to a judge of the Jefferson District Court to set aside the previously approved arrest warrant was compelled by nothing less than "an emergency situation."[3] (VR 2-28-11; 11:35:52).

The Jefferson District Court judge who had granted the *ex parte* motion to set aside the arrest warrant declined to rule on the Commonwealth's motion on February 28, 2011 and passed the matter to the judge in Division 304 of the Jefferson District Court to whom the case had been assigned to take the motion up the following day at arraignment. (VR 2-28-11; 11:56:55). The next day, the Appellee was arraigned in Division 304 of the Jefferson District Court and entered a plea of not guilty to the assault charge he was facing.[4] (CD 3-1-11; 00:35). The defense once again returned to its assertion that it was the County Attorney's actions which were somehow "*ex parte*" when it submitted the information initially requesting judicial approval of an arrest warrant. (CD 3-1-11; 12:14). The Assistant County Attorney noted the ongoing problem with the complained about practice of intentionally excluding the Commonwealth's representative as "these things are set aside *ex parte* all the time." (CD 3-1-11; 14:04). The Commonwealth explained that it simply sought an opportunity to be heard when criminal defendants attempted to vacate or set aside a previously issued arrest warrant. (CD 3-1-11; 16:00). The defense further

[3] No facts were offered to establish *why* an "*emergency situation*" existed or why one of the many Assistant County Attorneys present at the Hall of Justice in the middle of the day could not have been informed of the motion.
[4] This case was heard before Judge Sheila Collins of the Jefferson District Court on March 1, 2011.

declared that "there's no strangulation", (CD 3-1-11; 16:53), and insisted that "it's my job to see he's not arrested and go to jail." (CD 3-1-11; 17:10).

The Jefferson District Court unequivocally rejected the Commonwealth's motion to reinstate the arrest warrant. (CD 3-1-11; 19:00; Appendix, p. 6). Addressing defense counsel, the presiding judge in Division 304 flatly declared that, "I consider it a legitimate ex parte communication, you coming to me and asking me to set aside an arrest warrant." (CD 3-1-11; 20:34). Leaving no doubt that this case was **not** some sort of lone aberration, the court went on to unambiguously announce that "**we do it every single day**." (CD 3-1-11; 21:04). According to the Jefferson District Court, the complained about action which intentionally excluded the County Attorney and deprived the Commonwealth of an opportunity to be heard on the motion to vacate or set aside the outstanding arrest warrant was nothing short of "**absolutely acceptable**." (CD 3-1-11; 21:05). According to the Jefferson District Court, "[y]our communication requesting a change from an arrest warrant to a summons warrant is within the purview of the – what – the way we deal with these warrants. **I don't find anything improper about it Mr. Gold.**" (CD 3-1-11; 21:15).

As noted earlier herein, the Appellee vigorously asserted his actual innocence, claiming that "there's no strangulation", (CD 3-1-11; 16:53), when the Commonwealth subsequently complained of the *ex parte* proceeding. In defense of the complained about *ex parte* proceeding the Appellee's attorney explained the victim had told him she recanted and that she went to the hospital for a pre-existing back injury, (VR 2-28-11; 11:26:40). Defense counsel reminded the judge who had summarily set aside the arrest warrant that he had relayed his version of events to her when he sought to set aside the warrant and acknowledged that "based on that you set aside

the warrant." (VR 2-28-11; 11:26:55). However, the Appellee ultimately abandoned his claim of innocence and entered a plea of guilty to the charged offense in the Jefferson District Court. (Appendix, p. 7).

This Brief on behalf of the Commonwealth now follows:

ARGUMENT

Kentucky Law Does Not Authorize the Intentional Exclusion Of The Commonwealth From Motions To Set Aside An Arrest Warrant

A. Introduction.

The law of this Commonwealth does **not** authorize the intention exclusional of the Commonwealth's representative when a criminal defendant attempts to set aside an arrest warrant. The law, as it should, mandates that the Commonwealth be provided fair notice and an opportunity to be heard when a criminal defendant attempts to set aside an arrest warrant. The Jefferson County Attorney simply asks that he, as the Commonwealth's representative in the Jefferson District Court, receive that to which every litigant before the Court of Justice is entitled – fair notice and an opportunity to be heard.

B. The Commonwealth's Interest In A Fair Hearing.

The prosecutorial arm of the Commonwealth's executive branch has a strong and legitimate interest in seeing that it is not intentionally excluded from proceedings seeking to set aside a previously approved arrest warrant. The decision concerning whether to set aside an arrest warrant, which the initial reviewing judge has previously approved, is not some rote exercise which somehow excuses the Commonwealth's participation. It is a decision which

carries with it real world implications for the victims of crime and their families, potential witnesses, and the ability of the Commonwealth to effectively prosecute criminal offenses.

The Commonwealth should be afforded the opportunity to weigh in when a criminal defendant attacks an arrest warrant requiring his or her initial detention following the commencement of criminal charges. Even in the pre-trial context, the law recognizes that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." United States v. Salerno, 481 U.S. at 739, 748, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). While the Jefferson District Court thought intentionally excluding the Commonwealth from efforts to set aside an arrest warrant was "**absolutely acceptable**", (CD 3-1-11; 21:05), surely justice demands that the court afford the Commonwealth an opportunity to be heard, especially in view of the important interests advanced by arrest warrants. Simply put, arrest warrants are a critical tool for the fair and efficient functioning of the criminal justice system.

A judicially approved warrant of arrest is often necessary to address several legitimate concerns not adequately protected by a mere summons commanding one charged with a crime to appear in court at a later date of his or her own accord. First, and perhaps most importantly, a warrant of arrest is an attempt to make sure the offender actually appears in court to answer to the charged criminal offense. Additionally, a warrant of arrest can serve the interest of preventing a repetition of the charged offense or the commission or further offenses against other victims. A judicially approved warrant of arrest can also advance the purpose of stopping the harassment of witnesses or the victim and help safeguard the safety and welfare of any victims. Further, as is especially true in domestic violence cases, a warrant of arrest can help prevent

manipulation, coercion, or exploitation of the victim of the sort the record suggests may very well have happened in this case given the claimed recantation. As the Supreme Court of the United States has observed, domestic violence cases are "notoriously susceptible to intimidation or coercion of the victim to insure she does not testify at trial." Davis v. Washington, 547 U.S. 813, 832-833, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

This case well illustrates the mischief inherent in the sort of one-sided proceeding approved by the Jefferson District Court. As related in the *Statement of the Case,* counsel for the Appellee frankly acknowledged that in the *ex parte* hearing he gave the judge who set aside the arrest warrant his obviously one-sided version of events. The judge who set aside the arrest warrant heard only that the victim had recanted her version of events and that her visit to the hospital was merely for treatment of a pre-existing back condition. Needless to say, the Commonwealth would have liked to have been afforded an opportunity to be heard to point out that the case was about an apparent attempted strangulation, refer the court to what the victim had told the police at the hospital, and provide the court with multiple photographs reflecting the victim's obvious physical injuries. Of course, given the Appellee's later admission of guilt to the charged crime we now know that the protestation of actual innocence relied upon by the Jefferson District Court to set aside the arrest warrant was false.

The intentional exclusion of the Commonwealth's representative when an arrest warrant is attacked advances no valid interest. Those who attack a warrant for their arrest will flatly refute or minimize their criminal culpability, decline to present their criminal history or discuss the other factors which support their initial detention. The Commonwealth, if simply afforded the opportunity to be heard, can bring to the reviewing court's attention the nature and

circumstances of the charges, the weight of the evidence, the history and characteristics of the offender, and any other facts which may reflect danger to the community or the victim. While the Jefferson District Court gave its vigorous endorsement to a procedure which intentionally excluded the Commonwealth from being heard, this Court should exercise its inherent supervisory authority over the Court of Justice to declare otherwise.

C. Summary of Argument.

The intentional exclusion of the Commonwealth when an arrest warrant is attacked is but the latest variation of a recurring theme – that somehow the Jefferson County Attorney does not have the right to be heard on behalf of the Commonwealth in criminal prosecutions before the Jefferson District Court. While certain divisions of the Jefferson District Court may find it unnecessary, inconvenient or even ill-advised to permit the Commonwealth to be heard, that the County Attorney has a fundamental duty and right to be heard is a bedrock constitutional principle that cannot be ignored.

Some four years ago, the Court of Appeals rejected the notion that the Jefferson District Court could summarily preclude the Commonwealth from being heard at a trial on the merits simply because a witness failed to appear at a pre-trial conference. Commonwealth v. Gonzalez, 237 S.W.3d 575 (Ky.App. 2007). In holding that the Commonwealth had been improperly silenced prior to trial, the Court of Appeals explained that "[b]y evaluating and dismissing the case before trial, the district court improperly assumed the function of the executive branch in violation of the separation of powers act." Gonzalez, at 579. Likewise, the complained about procedure in this case improperly silences the Commonwealth's representative from being heard

in the Jefferson District Court in contravention of the executive branch's "job to prosecute the case..." *Id.*

More recently, the Court of Appeals revisited yet another instance where the Jefferson District Court silenced the County Attorney from voicing objections during preliminary hearings. Delahanty v. Commonwealth, 295 S.W.3d 136 (Ky.App. 2009). In that case, a division of the Jefferson District Court issued "a verbal and written prohibition, ... that prohibits the County Attorney and his assistants from making objections to defense counsel's questions during preliminary hearings to establish probable cause to detain a defendant pending indictment." *Id.*, at 138. In approving the Jefferson Circuit Court's issuance of the extraordinary remedy of a writ of prohibition, the Court of Appeals explained "that without the right to object to questions asked during an adversarial proceeding, the county attorney cannot be an effective advocate for the citizens... the county attorney is reduced to that of an idle bystander and his voice as an advocate muted." *Id.*, at 143. The same is true in this case – the intentional exclusion of the Jefferson County Attorney from proceedings to set aside an arrest warrant mutes his voice as an advocate. Indeed, the complained about procedure in this case is even more offensive than the one in Delahanty since the lack of even notice that the motion is being made means the Commonwealth is not even permitted to be an idle bystander.

In response to an inquiry from the Jefferson County Attorney, the Attorney General of the Commonwealth has opined that "to refuse to allow the County Attorney to participate in the criminal prosecution in open court is an affront to the Office of the County Attorney as well as to the citizens of the Commonwealth with whose voice he speaks."[5] Ky. OAG 07-003, p. 3. The

[5] The Kentucky Attorney General Opinion referenced above was the result of an inquiry from then Jefferson County Attorney Irv Maze explaining that he believed "he is entitled to participate in the proceedings whenever a pending

same principles that drove the decisions in Gonzalez and Delahanty apply with equal force in this case. Kentucky law does not permit the sort of *ex parte* proceeding so enthusiastically approved by the Jefferson District Court. This latest attempt to silence the Jefferson County Attorney violates the County Attorney's constitutional and statutory obligations, is contrary to rules promulgated by this Court as well as state statute, is fundamentally unfair in violation of the Kentucky and federal Constitutions, and violates fundamental constitutional guarantees ensuring open criminal proceedings.

D. Impermissible Restraint On County Attorney's Constitutional And Statutory Authority.

The complained of "**every single day**" practice of the Jefferson District Court constitutes an impermissible restraint on the constitutional and statutory duties and obligations of the County Attorney. Intentionally excluding the County Attorney when *ex parte* motions to set aside an arrest warrant are made infringes upon the County Attorney's duties delegated exclusively to the County Attorney to defend the Commonwealth's interests in criminal cases. Having presented factual allegations sufficient to obtain prior judicial approval for an arrest warrant, the Commonwealth has the right to fair notice and opportunity to be heard when a defendant seeks to set aside that initial judicial determination.

It is fundamental that the Executive Branch is responsible for the enforcement of the laws of the Commonwealth. *See,* Kentucky Constitution Section 81. It is "the duty of the executive department to enforce criminal laws." Bradshaw v. Bell, 487 S.W.2d 294, 299 (Ky. 1972). Section 27 of the Kentucky Constitution specifically provides for three branches of state

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criminal is called in open court and taken up by the presiding District Court Judge after the case has been conferenced with the County Attorney. Mr. Maze relayed that it was common practice for criminal cases to proceed in the District Court with only the judge and defense attorney present." Ky. OAG 07-003, p. 1.

government: legislative, executive and judicial branches. Kentucky has strictly adhered to the separation of powers doctrine. Legislative Research Commission v. Brown, 664 S.W.2d 907, 912 (Ky. 1984). "Perhaps no state forming a part of the national government of the United States has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government more than does our Constitution... ." Silbert v. Garrett, 197 Ky. 17, 246 S.W. 455, 457 (1972). Its purpose is to retain the balance of powers contemplated in the Kentucky Constitution. Dannheiser v. Commonwealth, 4 S.W.3d 542, 547 (Ky. 1999) ("Section 27 and 28 of the Kentucky Constitution have separate duties and powers in order to maintain a balance of government.").

As the prosecution of crime is exclusively an executive function, Flynt v. Commonwealth, 105 S.W.3d 415 (Ky. 2003), it is no answer that somehow the presiding judge of the Jefferson District Court will some adequately protect the Commonwealth's interests as [t]he judge does not represent the state any more than he does the defendant in the prosecution." Hoskins v. Mericle, 150 S.W.3d 1, 14 (Ky. 2004). Simply put, the judge cannot substitute for the County Attorney or one of his assistants since it is patently improper for a trial court to assume the role of the prosecutor in a criminal action. LeGrand v. Commonwealth, 454 S.W.2d 726 (Ky. 1973). The facts and circumstances of this case well illustrate the inherent flaw in the Jefferson District Court's *ex parte* procedure – no one was present before the Court whose job it was to point out the compelling evidence of the Appellee's guilt of the charged offense.

Given Kentucky's unequivocal recognition of each branch's sphere of proper authority, the "**every single day**" practice of the Jefferson District Court which intentionally excludes the County Attorney impermissibly prohibits the fundamental role of the County Attorney in

exercising his prosecutorial function. The obvious harm of the complained about practice is that it excludes from participation those attorneys who represent the prosecutorial arm of the executive branch from doing that which lawyers do in our adversarial system. Without notice and an opportunity to be heard no one is present who can present evidence and make objections in opposition to the defendant's assertion that his detention is not required. As attorney Brendan Sullivan succinctly put it when criticized for advocating for his client, "I'm not a potted plant. I'm here as lawyer. That's my job." *See*, Commonwealth v. Ramos, 936A. 2d 1097, 1105 (Pa. Super. 2007).

Not only does the *ex parte* practice infringe upon fundamental separation of powers principles set out in the Kentucky Constitution, but also the statutory authority expressly granted the Jefferson County Attorney by the General Assembly. Indeed, it is a statutory obligation that commands the Jefferson County Attorney to appear in the Jefferson District Court and defend the Commonwealth's interest in enforcing the criminal and penal laws, KRS 15.725(2):

> (2) The county attorney shall attend the District Court in his county and prosecute all violations whether by adults or by juveniles subject to the jurisdiction of the regular or juvenile session of the District Court of criminal and penal laws, except as provided in KRS Chapter 131, within the jurisdiction of said District Court.

By state statute, the County Attorney is required to attend and prosecute all criminal cases in the District Court. In addition to violating fundamental constitutional separation of powers, the *ex parte* practice violates the General Assembly's command that the County Attorney attend the District Court for purposes of enforcing the Commonwealth's criminal and penal laws. The *ex parte* practice violates both the Jefferson County Attorney's constitutional

and statutory duties to act as an advocate on behalf of the Commonwealth in the Jefferson District Court.

E. The *Ex Parte* Practice Is Prohibited By Court Rule And Statute.

1. RCr 4.40 and KRS 431.064.

In addition to contravening fundamental separation of powers principles and the express statutory duties of the County Attorney, the complained of practice also is contrary to the rules promulgated by this Court and state statute. Pursuant to Rule 4.40 of the Kentucky Rules of Criminal Procedure, a "defendant or the Commonwealth may by written motion apply for a change of conditions of release at any time before the defendant's trial." RCr 4.40(1). Further, a defendant "shall state the grounds on which the change is sought." *Id.* A hearing before the court is expressly authorized as the rule provides that "[t]he moving party may request an adversary hearing on the motion, and is entitled to such hearing for the first time the moving party requests it." *Id.* Further, the summary action taken in this case is contrary to the requirement of RCr 4.40(2) which directs that "[w]henever the court denies the specific relief requested, the judge shall record in writing the reasons for so doing." RCr 4.40(2).

The Jefferson District Court is not free to simply disregard the express provisions of RCr 4.40 promulgated by this Court in its supervisory capacity over the Court of Justice. It ought to go without saying that the various judges of the Court of Justice exercise their judicial authority "subject to the administrative authority of the respective chief judges and the Chief Justice **and subject to the rule-making power of the Supreme Court**.[emphasis added]." Richmond v.

Commonwealth, 637 S.W.2d 642, 646 (Ky. 1982). *See also,* Brutley v. Commonwealth, 967 S.W.2d 20 (Ky. 1998).

The complained of *ex parte* practice also is contrary to Section 116 of the Kentucky Constitution. Pursuant to Section 116 of the Kentucky Constitution, the power to prescribe rules of procedure and practice is "vested exclusively in the Supreme Court and should not be undertaken by other courts." Abernathy v. Nicholson, 899 S.W.2d 85, 87 (Ky. 1995). Abernathy involved one division of the Jefferson District Court where a judge had entered an "administrative order". As this Court observed in Abernathy, "[w]hatever its appellation, the "order" is a rule. It is not limited to a particular case, but applies to all cases which fall within its confines." Abernathy, at 87.

What the Court of Appeals in Delahanty said about the policy preventing the Jefferson County Attorney from making objections in preliminary hearings applies with equal force in this case – "regardless of the label given, the appellant promulgated a rule: It is not limited to a particular case; it is prospective by its terms; and it is indefinite in nature." Delahanty, at 143. The Jefferson District Court's pronouncement that the *ex parte* practice occurs "every single day" and is "absolutely acceptable" leaves no doubt that whatever label is attached, it is an ongoing rule of practice of the Jefferson District Court.

While the Jefferson District Court is certainly free to adopt local rules of practice, such rules are effective "only when approved by the Supreme Court" and "cannot contradict... any rule of practice and procedure promulgated by the Supreme Court... ." *Id.* Because the Jefferson District Court lacks the authority to contradict the Kentucky Rules of Criminal

Procedure promulgated by this Court, the *ex parte* practice is invalid as a matter of law on that basis alone.

In addition to being contrary to the rule of court promulgated by this Court in RCr 4.40, the complained of practice also offends the provisions of KRS 431.064. Appellee was, of course, charged with a violation of KRS Chapter 508. KRS 431.064 requires a review of the pre-trial release of defendants charged with violating Chapter 508 to determine, among other things, if a defendant "[i]s a threat to the alleged victim or other household member, …". *See,* KRS 431.064(1). Additionally, before defendants charged with a crime in KRS Chapter 508 are released the statute authorizes conditions "to protect the alleged victim of domestic violence or abuse and to insure the appearance of the person in a subsequent court proceeding." *See,* KRS 431.064(2).

The legislative intent of the General Assembly is manifest – victims of domestic violence and abuse are particularly vulnerable and special care must be taken "[i]n making a decision concerning pre-trial release" of offenders in those cases charging assault or sexual offenses. *See,* KRS 431.064(1). The *ex parte* proceedings about which the Commonwealth complains conveniently side step these legislative efforts to protect the victims of domestic violence or abuse before a defendant is released. The practice is invalid as it ignores the controlling authority of RCr 4.40 and KRS 431.064.

2. SCR 4.300 and SCR 1.040.

Further, the complained about *ex parte* practice violates this Court's SCR 4.300, the Kentucky Code of Judicial Conduct. Canon 3B.(7) provides in no uncertain terms that "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the

right to be heard according to law." In this case, the Commonwealth had set the wheels of formal criminal prosecution in motion and the Jefferson District Court had previously given its approval to issue a warrant for the Appellee's arrest. Given these facts and circumstances, and the important governmental interests served by an arrest warrant, the Commonwealth had a fundamental right to receive fair notice of the motion and to be heard before the judicially approved arrest warrant was summarily set aside at the Appellee's secret request.

Nor do the facts and circumstances of this case fall within the narrow circumstances under which *ex parte* communications may sometimes be permitted. The complained of *ex parte* proceeding did not involve the initial fixing a bond, but went to the complete setting aside of the previously approved warrant of arrest. *See,* Canon 3B.(7)(a). The exception to the rule concerning *ex parte* communications for the initial fixing of bail provides no justification for the complained about *ex parte* action given the facts and circumstances of the relief the Appellee sought and obtained by way of *ex parte* motion.

Further, the narrow exception set out in Cannon 3B.(7)(a) applies **only** if the judge reasonably believes that no party will gain a procedural or tactical advantage **and** the other party is notified and allowed an opportunity to respond. *See,* Canon 3B.(7)(a)(i)(ii). As the Commentary further explains, "a judge must discourage ex parte communication and allow it **only** if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all the parties all ex parte communications described in Sections 3B(7)(a) regarding a proceeding pending or impending before the judge. [emphasis added]"

In this case, the conditions permitting *ex parte* contact in certain very limited situations were clearly not satisfied. The complained about *ex parte* proceeding gave the Appellee a clear

advantage in that without the Commonwealth present there was no party present to demand that the requirements of RCr 4.30 and KRS 431.064 be enforced. Needless to say, that made his efforts to set aside the warrant for his arrest much easier and a clear advantage. Further, there is absolutely no indication in the record that the Commonwealth was "promptly" notified of the *ex parte* action taken by the Jefferson District Court and given an opportunity to respond.

As also explained in this Brief, the *ex parte* request was made to a Jefferson District Court judge who was not the judge who initially approved the arrest warrant or to whom the underlying criminal case had been assigned. Judge Williams declined to rule on the Commonwealth's motion attacking the *ex parte* action setting aside the arrest warrant, explaining that "I went and spoke with Judge Collins since it's her case", (VR 2-28-11; 11:55:55), and therefore the motion would be taken up the following day before Judge Collins. (VR 2-28-11; 11:56:55). These uncontroverted facts suggest a potential violation of SCr 1.040(4)(c) which provides that "[i]n the absence of good cause to the contrary, all matters connected with a pending or supplemental proceeding shall be heard by the judge to whom the proceeding was originally assigned."

This Court has explained that the rule has the "primary purpose of requiring 'all matters connected with a pending or supplemental proceeding' and to be heard by the judge to whom the proceeding was originally assigned to prevent... forum shopping." Cox v. Braden, 266 S.W.3d 792, 798 (Ky. 2008). Significantly, the record is completely silent as to why the *ex parte* motion was presented to Judge Williams rather than the judge to whom the underlying criminal case had been assigned. Taking up the issue of the pre-trial release of a defendant without a prosecutor present inexplicably places the narrow interests of a defendant and his attorney "ahead of all

interests, including the protection of the public." In re Honorable Cynthia Gray Hathaway, 464 Mich. 672, 630 N.W.2d 850, 860 (Mich. 2001).

Finally, the complained about *ex parte* practice cannot find safe harbor in the notion that it is simply the common and accepted practice in the Jefferson District Court. It bears repeating that the Jefferson District Court flatly stated, in its approval of the complained about *ex parte* practice, that **"we do it every single day."** In Thomas v. Judicial Conduct Commission, 77 S.W.3d 578 (Ky. 2002), this Court addressed the issue of *ex parte* proceedings when it held that a judge's suspension of a defendant's jail sentence without the County Attorney present to be a violation of the Kentucky Code of Judicial Conduct. The Court went on to note that any "defense by Judge Thomas that his actions should be permitted because of a 'long-standing judicial policy in Marshall County' which permits such *ex parte* communications is without merit." *Id.* at 580. The same is absolutely true in this case. The law of this Commonwealth applies with equal force in the largest county of the state just as much as it applies in the other 119 counties. The various divisions of the Jefferson District Court are simply not free to somehow suspend as inconvenient or unnecessary the requirements imposed by this Court in its supervisory capacity over the Court of Justice.

F. The *Ex Parte* Practice Violates Other Constitutional Protections.

1. Due Process of Law.

The complained of *ex parte* practice is so fundamentally unfair that it constitutes a violation of due process of law as guaranteed by the Kentucky and federal Constitutions. "Section 2 of the Kentucky Constitution provides the Commonwealth shall be free of arbitrary action. With respect to adjudications, whether judicial or administrative, this guarantee is

generally understood as a due process provision whereby Kentucky citizens may be assured of fundamentally fair and unbiased procedures." Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc., 177 S.W.3d 718, 724 (Ky. 2005). The protections of Section 2 of the Kentucky Constitution are "a concept we consider broad enough to embrace both due process and equal protection of the laws, both fundamental fairness and impartiality." Pritchett v. Marshall, 375 S.W.2d 253 (Ky. 1963).

In the criminal context, a criminal procedure will be held to violate due process if the procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Madina v. California, 505 U.S. 437, 445, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). There is a "strong presumption against *ex parte* submissions." United States v. Abuhamra, 389 F.3d 309, 328 (2nd Cir. 2004) "[F]airness can rarely be obtained by secret, one-sided determinations of facts decisive of rights." Abuhamra, at 332.

Arrest warrants serve important interests critical to the right of victims and witnesses as well as the Commonwealth's interest in the effective enforcement in its criminal and penal laws. The notion that previously issued warrants of arrest can be summarily disposed of in *ex parte* proceedings based on one-sided determinations of facts is contrary to basic notions of fairness which must govern proceedings in our criminal justice system. The County Attorney seeks only the opportunity to receive notice and an opportunity to be heard. The complained about *ex parte* practice of the Jefferson District Court is contrary to the fundamental idea that litigants be provided notice and an opportunity to be heard. Storm v. Mullins, 199 S.W.3d 156, 162 (Ky. 2006).

2. Open Court Proceedings.

Both the parties to a criminal prosecution and the public in general share an interest in seeing that the conduct of criminal proceedings be open and transparent. The complained of practice approved by the Jefferson District Court is at odds with this fundamental principle. This fundamental interest in open criminal proceedings enjoys constitutional protection, explicitly through the Sixth Amendment's guarantee of public trials and implicitly through the First Amendment's guarantee of free speech and a free press. Press-Enterprises Co. v. Superior Court of California, 478 U.S. 1, 7, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986); Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). The American legal tradition has long taken the position that "contemporaneous review" of criminal prosecutions "in the form of public opinion" serves as an important restraint on the abuse of government power. In Re Oliver, 333 U.S. 257, 270, 68 S.Ct. 499, 92 L.Ed.2d 682 (1948).

As this Court has recently acknowledged, the value "of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known" Riley v. Gibson, 338 S.W.3d 230, 235 *quoting* Press-Enterprise v. Superior Court, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). Needless to say, the sort of *ex parte* approved by the Jefferson District Court in this case excluding the elected official who is duty bound by law to protect the Commonwealth's interests frustrates the reasons why we have open court proceedings. *See also,* Estes v. Texas, 381 U.S. 532, 588, 85 S.Ct. 1628, 1662, 14 L.Ed.2d 543 (1965) (Harlan, J., concurring) ("Essentially, the public-trial guarantee embodies a view of human nature, true as a

general rule that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings"); In re Oliver, 333 U.S., at 270, 68 S.Ct., at 506 ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power").

The complained of *ex parte* practice of the Jefferson District Court setting aside warrants of arrest with no notice of the Commonwealth and no opportunity to be heard violates the fundamental principle that criminal prosecutions are two-party proceedings which are to be open to the public. Sections Eight and Eleven of the Kentucky Constitution "when viewed in the context of their history and of the history and traditions of our people can only be taken as an expression of the principle that justice cannot survive behind walls of silence and of an intent and spirit there be a 'presumption of openness' to criminal proceedings in the court." Ashland Publishing Co. v. Asbury, 612 S.W.2d 759, 751 (Ky.App. 1980). "The public has a legitimate interest in criminal proceedings, and this is thwarted by *ex parte* proceedings." Storer Communications, Inc. v. Presser, 818 F.2d 330, 335 (6th Cir. 1987). "Ex parte proceedings, particularly in criminal cases, are contrary to the most basic concepts of American justice ... ." *Id.* The one-sided practice complained about in this proceeding is contrary to our state and federal constitutions. Attacks on arrest warrants made in secret offend the fundamental constitutional principle of openness in criminal proceedings. The Kentucky and federal Constitutions demand that attacks on arrest warrants be heard only upon fair notice to the Commonwealth's representative and in open court – not in secret.

CONCLUSION

For the reasons set out above, the Commonwealth of Kentucky respectfully requests that this Court certify the law and hold that the complained about *ex parte* practice of the Jefferson District Court which permits *ex parte* motions by a criminal defendant to vacate or set aside a warrant for his or her arrest with no notice or opportunity for the Commonwealth to be heard as violative of the Kentucky and federal Constitutions, the rules promulgated by this Court in its supervisory capacity over the Court of Justice, and contrary to state statute.

Respectfully submitted,

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