SUPREME COURT OF KENTUCKY

CASE NO. 2011-SC-000157-CL

COMMONWEALTH OF KENTUCKY — APPELLANT

CERTIFICATION OF LAW FROM JEFFERSON DISTRICT COURT

DIVISION 304

HON. SHEILA COLLINS, JUDGE

FILE NO. 11-M-004285

MICHAEL WILSON — RESPONDENT

BRIEF FOR THE RESPONDENT

Respectfully Submitted,

Paul Gold by PGW

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the following *Brief for the Defendant* was mailed by US Registered mail, postage prepaid, on the 22nd day of, March, 2012 to: Hon. Sheila Collins and Hon. Erica Lee Williams, Judge, Jefferson District Court, Hall of Justice, 600 W. Jefferson St., Louisville, KY 40202; Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY, 40601; Hon. David Sexton, Special Assistant Attorney General, Assistant Jefferson County Attorney, Fiscal Court Building, 531 Court Pl., Suite 900, Louisville, KY 40202, And Hon. Dorislee Gilbert, Assistant Commonwealth's Atty., 514 W. Liberty St., Louisville, KY 40202; Hon. David Hoskins, KACDL, PO Box 910369, Lexington, KY 40591-0369.

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Paul Gold

STATEMENT CONCERNING ORAL ARGUMENT

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

STATEMENT OF POINTS AND AUTHORITIES

JEFFERSON COUNTY ATTORNEY BRIEF:

THE DEFENDANT'S RESPONSE TO THE COUNTY'S EX PARTE MOTION TO THE JEFFERSON DISTRICT COURT FOR AN ARREST WARRANT WAS NOT PROHIBITED

APPELLEE'S ADDITIONAL ARGUMENT:

COUNTERSTATEMENT OF THE CASE

On February 17, 2011 a criminal complaint was submitted to the Jefferson District Court through the Jefferson County Attorney. The complaint alleged that almost three weeks earlier a person had been assaulted in Jefferson County Kentucky and had suffered scratches and bruises. The complaint resulted in a misdemeanor charge of Assault in the Fourth Degree. At the outset of this case the Jefferson County Attorney communicated in writing with the judge, urging an arrest warrant be issued for the defendant. (Appendix, page 1). After reviewing the allegations and the Commonwealth's *ex parte* recommendation for an arrest warrant, a warrant for arrest of the defendant was authorized by Jefferson District Court. The day after the County urged the court to issue an arrest warrant of the defendant, his attorney requested the court set aside the arrest warrant and issue a criminal summons.

It is uncontroverted that the County made an *ex parte* motion to issue an arrest warrant after the court had reviewed information presented to it by the County; is also uncontroverted that the defendant's attorney thereafter requested that the arrest warrant be set aside and presented further information regarding the incident to the court that indicated the offense had never occurred as alleged. (VR 2-28-11; 11:26:40-55). The arrest warrant was set aside by a Jefferson District Court judge who wrote in the court memo of the case that counsel would bring the defendant into a specific court.

Defense counsel had learned from previous experience that bringing a defendant into District Court in a situation such as this was useless, because District Court had no case file. Instead, defense counsel brought the defendant, Michael Wilson, to the Sheriff's office on the first floor of the Hall of Justice to have the summons served upon him. Since that time the procedures have been changed and now a summons or arrest warrant is served in district court.

At the initial appearance in court, the judge presiding in Division 304 recognized that there had been no improper contact or conduct, and when the County complained and argued that the defense contacting a judge after the County had contacted a judge was somehow unfair, noted that "your communication requesting a change from an arrest warrant to a summons one is within the purview of the-what-(sic) the way we deal with these warrants. I don't find anything improper about it Mr. Gold." (CD 3-1-11; 21:15).

Further facts will be provided as necessary in the arguments hereunder

ARGUMENT

The Appellee will respond to arguments by the Jefferson County Attorney and Amicus arguments from the Commonwealth Attorney serially, first answering the Jefferson County Attorney's arguments.

JEFFERSON COUNTY ATTORNEY BRIEF

THE DEFENDANT'S RESPONSE TO THE COUNTY'S EX PARTE MOTION TO THE JEFFERSON DISTRICT COURT FOR AN ARREST WARRANT WAS NOT PROHIBITED

A. Introduction

A request for certification of law is crafted by one side, often in a manner to emphasize the position that side advances. A more accurate and truthful rendition of the issue in this case would have been: *Does Kentucky law authorize a defense attorney to respond to an ex parte*

request from a County attorney regarding a warrant for arrest? This would have factually more properly framed the issue before this court. The Commonwealth admits in its *Brief for the Commonwealth* that it initially contacted the Jefferson District Court and recommended that an arrest warrant for the defendant be issued. (Brief for the Commonwealth, page 2); see also Criminal Complaint, bottom portion, wherein the County Attorney submits a written request for an arrest warrant for Assault in the Fourth Degree. (Appendix, page 1). Despite the conduct of the Assistant County Attorney, the County in its brief seems chagrined that the defense attorney contacted the court after the County had contacted the court and that defense counsel provided further information regarding the case and based upon the further information requested the court set aside the *ex parte* produced arrest warrant. (Id, page 3). Notwithstanding the County's admission that it initiated contact with the Jefferson District Court and requested an arrest warrant, Kentucky law does not prohibit a defense attorney attempting to set aside an arrest warrant prior to the initiation of the case.

B. The Government's Interest in a Fair Hearing.

The government urges this court to focus on its interest in a fair hearing. Instead, the court should focus on a defendant's constitutional right to a presumption of innocence. "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976). The presumption operates at the guilt phase of a trial to remind the trier of fact that the State has the burden of establishing every element of the offense beyond a reasonable doubt. *Taylor v. Kentucky*, 436 U.S. 478, 484, n. 12, 98 S.Ct. 1930, 1934, n. 12, 56 L.Ed.2d 468 (1978). This presumption was subverted by the County's initial contact with the court urging an arrest warrant.

There is no doubt that a judicially approved warrant of arrest is often necessary to address 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. However, the government should not be permitted "a bite at the apple" in urging a court to issue an arrest warrant without the defendant being able to also present information rebutting the government's request. Indeed, the information presented from defense counsel gives the court a well-rounded and fair perspective to counter the Commonwealth's biased initial presentation. The court can then review information from pretrial including criminal history, contacts in the community, etc. and arrive at a conclusion that comports with the due process component of the federal and state constitutions.

The County bitterly condemns the Jefferson District Court and some of its individual judges--"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 has a fundamental duty and right to be heard is a bedrock constitutional principle that cannot be ignored" (Jefferson County brief, page 10) for ruling against the County and for noting that the defense violated no rule or regulation. Incredibly, the County argues that when the Jefferson County judges permitted defense counsel to request that a warrant that had been granted by an *ex parte* be set aside, somehow this "improperly silenced" the Commonwealth. (County brief, pages 10-11). Rather than being an "idle bystander" as portrayed by its brief, the County was actually an active participant who struck the first blow in this case. Rather than some sort of conspiracy by Jefferson District Court judges against the Jefferson County Attorney, ("This latest attempt to silence the Jefferson County Attorney) (County Brief, Page 12), the ruling against the County was merely a factual assessment of current Kentucky law by the District Court judge. It is

noteworthy that this instance is hardly the only time that the Jefferson County Attorney has contacted the Jefferson District Court *ex parte* in a case. The Jefferson County Attorney's office routinely contacts Jefferson District Court Judges *ex parte* requesting an arrest warrant or requesting a high bond or asking the judge to focus on a defendant's record or on certain charges in a defendant's records. If there was a fundamental constitutional guarantee violated in this case, it was a violation by the Jefferson County Attorney of the defendant's right to a fair hearing.

C. There Was No Impermissible Restraint on County Attorney's Constitutional and Statutory Authority.

No one disputes that §81 of the Kentucky Constitution (Governor to enforce laws: He shall take care that the laws be faithfully executed) imparts responsibility for enforcement of laws of the Commonwealth to the executive branch. The flaw in the County's argument is the assertion that the "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." In the instant case, the county waived his right to make any such argument when it *ex parte* exercised its prosecutorial function by sending a written request to the District Court to issue an arrest warrant. Thus, having improperly discharged prosecutorial duties, the County can hardly complain that it had not "exercised its prosecutorial function". Indeed, in this specific instance, in light of the County's initial *ex parte* contact, it is little short of astounding that the County makes such an argument.

D. THE COMPLAINED OF PRACTICE IS NOT PROHIBITED BY COURT RULE OR STATUTE

1. RCR 4.40 and KRS 431.064.

In its brief the appellant attacks Jefferson District Court for disregarding express provisions of RCr 4.40. The primary purpose of the statutory scheme for Rule Four (Bail) is to bring a defendant before the court. The case was practiced in a manner that accomplished the purpose without endangering anyone, jail overcrowding, or loss of job by the defendant. The rule, in pertinent part, states:

RCr 4.40 Review of conditions of release

(1) The defendant or the Commonwealth may by written motion apply for a change of conditions of release any time before the defendant's trial. The motion shall state the grounds on which the change is sought. The moving party may request an adversary hearing on the motion, and is entitled to such hearing the first time the moving party requests it. Requests for adversary hearings made in subsequent motions for review of conditions of release shall lie within the discretion of the court.

"May" is discretionary. "Shall" is mandatory. This rule mandates that if a written motion is made applying for a change of conditions of release prior to the defendant's trial, the motion must state the grounds on which the changes are sought. The moving party then has the discretion to request an adversary hearing. There is no prohibition in this rule regarding oral motions. Of course, it should also be noted in any analysis of 4.40 that the Jefferson County attorney initially provided written *ex parte* communication to the District Court.

The County's brief stating that "the Jefferson District Court is not free to simply disregard the express provisions of RCR 4.40 promulgated by this court in its supervising capacity over the Court of Justice (County brief, page 15) is correct as far as it goes; however, there simply was no disregard of the express provisions of 4.40 by the Jefferson District Court. The County's complaint that the defense attorney's conduct somehow violated §116 of the Kentucky Constitution fails for the same reason. The County incorrectly asserts that the Jefferson District

Court promulgated a rule of practice not approved by the Kentucky Supreme Court. Instead, there was no prohibition to defense attorney's conduct and the District Court was recognizing this.

The County's brief somehow conflates KRS 431.064 and this case and concludes that there was a violation of the statute because of the manner in which bond was set in the case. This statute requires that " The court or agency having authority to make a decision concerning pretrial release shall review the facts of the arrest and detention of the person and determine whether the person: (a) Is a threat to the alleged victim or other family or household member; and (b) Is reasonably likely to appear in court." Indeed, the procedures engaged by the court prior to setting aside the arrest warrant in this case were perfectly congruent with the statute. The court reviewed the criminal complaint prepared by the executive branch. The court then heard from the ex parte communication of the County, and the County recommended that an arrest warrant for the appellee be issued. (Appendix, page 1). After hearing from one side (the Commonwealth) a warrant of arrest for the Mr. Wilson was authorized by Jefferson District Court. Thereafter, the court heard from the defense attorney regarding the matter, and based upon this further information and knowledge, and based in part upon the allegation that the complaint conduct occurred on January 30, 2011 but the charge was not made until February 17, 2011 the Court simply determined that the appellee was not an immediate threat to the alleged victim and was reasonably likely to appear in court. This analysis by the Jefferson County District Court comported verbatim with the statute.

The decision by the District Court to set aside the arrest warrant based on information from the County's ex parte contact and the defense information was later heard in court. After hearing arguments in court between the defense attorney and the Assistant Jefferson County

Attorney regarding the alleged conduct of Mr. Wilson, and the Assistant County Attorney's complaints about *ex parte* conduct in the matter, a second District Court judge (not the judge who had granted the defense request to set aside the bond) ruled wholly in favor of the defense. (VR 2-28-11; 11:56:55); (CD 3-1-11; 00:35; 12:14; 14:04; 16:00; 19:00).

2. SCR 4.300 and SCR 1.040

The appellant further complained that the defense attorney conduct violated various Supreme Court rules. SCR 4.300 is the Kentucky Code of Judicial Conduct. The preamble to the code states: " The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges." The County argues that somehow the Jefferson District Court engaged in conduct violative of the code. Specifically, the County cites to Cannon 3B (7) which limits communications with parties, **except** that:

(a) **Where circumstances require, ex parte communications for scheduling, initial fixing of bail, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized**; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond. (Emphasis added).

The Commentary states that: *To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.* This was precisely what the Jefferson District Court did in this instance. The court had already received communications from one party, the government; it then, properly, received communications from the defense. Section (a) of the Canon permits *ex parte* communications for scheduling, initial fixing of bail, administrative purposes or emergencies that do not deal with substantive matters or issues. Thus, there are four

specifically delineated instances wherein *ex parte* communications are explicitly authorized. At least one, "emergencies" applied in this instance. Counsel for defense noted on the record in court that the alleged victim had told him she recanted and that she went to a hospital for pre-existing back injury. (VR 2-28-11; 11:26:40). Because of the danger of an arrest and potential loss of job and livelihood based upon hearsay and untrue allegations, and because the arrest warrant was not even issued until 17 days after the incident, the defense attorney stated that he was compelled by "an emergency situation." (VR 2-28-11; 11:35:52). It is noteworthy that in this case a second District Court judge arrived at precisely the same conclusion as the original District Court Judge had ultimately arrived --"your communication requesting a change from an arrest warrant to a summons one is within the purview of the-what (sic)-the way we deal with these warrants. I don't find anything improper about it..." (CD 3-1-11; 21:15).

As an aside, Appellee notes that Appellant's brief attempts to cast aspersions upon the judge originally contacted by the defense. The County argues that somehow there was a potential violation of SCR 1.040 (4) (c) when the judge originally contacted set aside the arrest warrant. This rule provides that "in 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 preceding was originally assigned." In this instance, the case had not been assigned when the original judge was contacted by the defense. Thereafter, the case was properly assigned to division 304, and the presiding judge heard the motion. There was no violation of SCR 1.040 (4) is (c) and this could have been easily verified by the County simply by reviewing the docket sheet for that day. It is also noteworthy that the AOC re-docket form (Appendix, page 2) has an area for defense attorneys to check for arrest warrant/bench warrant set aside. Thus, the AOC anticipated in its form that such actions would regularly take place.

E. THE COMPLAINED OF CONDUCT DID NOT VIOLATE OTHER CONSTITUTIONAL PROTECTIONS.

1. Due Process of Law

The County's final assertion argues that the complained of conduct is so fundamentally unfair that it constitutes a violation of the due process of law as guaranteed by §2 of the Kentucky Constitution and the 14th Amendment of the Federal Constitution. This assertion, as all prior assertions by the County of misconduct, fails for several reasons. First, there was no case in existence. A review of the Kentucky Circuit Court Clerk's Manual, at page 218, clearly states **"Do not open a case until the warrant or summons is served on the defendant."** (Kentucky Circuit Court Clerk's Manual, page 218). (Appendix, page 3). It is critical to note, specifically for this case, that page 11 of the manual states "PURSUANT TO CR 1(2), RCr 1.02(2) AND SCR 1.050(1) THE PROVISIONS OF THIS MANUAL CONSTITUTE RULES OF THE KENTUCKY SUPREME COURT". (Appendix, page 4). Thus, when the manual states that a case is not open until the warrant or summons is served on the defendant, that statement has the imprimatur of the Kentucky Supreme Court. Therefore, if there is no case, there can be no *ex parte*. Further, as noted in arguments above, an Assistant Jefferson County Attorney originally contacted Jefferson District Court and requested an arrest warrant; defense counsel was merely providing the rest of the story to counter taint and bias already injected into the case by the County.

The term "due process" is the only constitutional command twice stated-once in the Fifth Amendment to the United States Constitution and once in the 14th Amendment to the United States Constitution. The first 10 amendments to the United States Constitution, the "Bill of Rights" apply only to individual citizens. In *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the

Supreme Court ruled that the Constitution's Bill of Rights restricts only the powers of the federal government. At no time was it ever even considered that the due process clause protected the government. The Fifth Amendment's reference to "due process" is only one of many promises of protection the Bill of Rights gives citizens against the federal government. The same 11 words that enumerate due process in the Fifth Amendment also enumerate due process in the 14th Amendment. The Fourteenth Amendment bans states from depriving **citizens** of life, liberty, or property without due process of law. Neither the Fifth nor the 14th Amendment to the United States Constitution afford the state or federal government constitutional due process rights. The Constitution is in place to grant certain powers to "the people" to protect the citizens from the government; not, as the County would indicate, to somehow protect the government from the people. Additionally, "Fundamental fairness" relied upon by the County in its final argument is a component of due process. Since due process does not apply constitutionally as a right for the government, neither does fundamental fairness apply constitutionally as a right for the government. Thus, even if the County's final argument had merit, it would not be applicable because the County's assertion of a due process right for the government is fundamentally incorrect. The United States Supreme Court recently reasserted the concept of fundamental fairness being a component of the due process clause. "Only when evidence "is so extremely unfair that its admission violates fundamental conceptions of justice,"Dowling v. United States, 493 U. S. 342, 352 (1990) (internal quotation marks omitted), have we imposed a constraint tied to the Due Process Clause. See, e.g., Napue v. Illinois, 360 U. S. 264, 269 (1959) (Due process prohibits the **State's** "knowin[g] use [of] false evidence," because such use violates "any concept of ordered liberty."). (Emphasis added). *Perry v. New Hampshire* , No. 10-8974, decided January 11, 2012.

Section 2 of the Kentucky Constitution is the Kentucky due process clause. *Pritchett v Marshall*, 375 SW. 2d 253, 258 (KY., 1963). Section 2, is commonly acknowledged as a weapon for individuals against state regulation, not as a protection of government rights. " Section 2 is a curb on the legislature as well as on any other public body or public officer in the assertion or attempted exercise of political power". *Kentucky Milk Marketing and Anti-Monopoly Commission v. Kroger Company*, 691 SW. 2d 893, 899 (KY. 1985). The County, therefore, finds no protection for its due process claim in Section 2 of the Kentucky Constitution.

2. Open Court Proceedings

The final section of the County's brief deals with the belief by the County that it has a Sixth Amendment guarantee to a public trial and open court proceedings. As noted above, the County has no Bill of Rights protections. Even so, there was no court case when the defense counsel spoke to a District Court judge after the County attorney communicated to a District Court judge. At the time of the communication, there was no "case". (See, Kentucky Circuit Court Clerk's Manual, at page 218) (supra). Not only was there no constitutional right for the County to rely upon, there was no case upon which to build a constitutional right. This court is urged to so rule.

COMMONWEALTH BRIEF

The Jefferson Commonwealth Attorney filed an Amicus brief in this matter. That brief addresses four separate allegations of impropriety. As above, each argument by the Jefferson Commonwealth Attorney shall be dealt with serially below.

A. THE PRECEDING DID NOT DENIGRATE THE ADVERSARIAL NATURE OF THE CRIMINAL JUSTICE SYSTEM.

The Jefferson Commonwealth Attorney's initial argument asserts that the adversary nature of the criminal justice system was denigrated by this proceeding. A review of the case, as noted earlier, illustrates that the Jefferson County Attorney's office initially communicated to the Jefferson District Court Judge allegations of a crime and then made an *ex parte* request to the judge to issue an arrest warrant to be served upon Michael Wilson. Thereafter, the defense attorney provided further information to the judge and requested a summons warrant in order to prevent unnecessary arrest, incarceration and loss of job. If there exists in this case a blow to the adversarial nature of our criminal justice system, that blow was struck by the Jefferson County Attorney. Indeed, "(a) basic precept of American jurisprudence is that everyone is entitled to present their side of a dispute." *Whittington v. Cunnagin*, 925 SW. 2d 455, 460 (KY. 1996) (King, dissenting). Thus, after the County Attorney presented its side of the dispute with a recommendation to the court, the defense presented to the court its side of the dispute. As noted above, it is unfortunate that this repeated conduct by the Jefferson County Attorney of *ex parte* communications with the Jefferson District Court requesting high bonds, arrest warrants, and emphasizing certain areas of a defendant's record for additional scrutiny by the court constantly occurs.

The Commonwealth Attorney is correct in its assertion that Jefferson District Court Local Rule 604 requires written notice 24 hours before a motion is on the docket. In this specific instance, there was no docket and there was not even a "case", as the Kentucky Circuit Court Clerk's Manual, page 218, makes clear. Indeed, that is the fundamental flaw in the Commonwealth's instant argument. In Jefferson District Court, there is no "case number" and no

"case" generated until, as noted above, a warrant or summons is served. Circuit Court operates in exactly the opposite manner. Once there is an indictment, a number is issued and a case is assigned. Not only is the Commonwealth's argument far-fetched, but pursuant to the Kentucky Circuit Court Clerks Manual, is impossible. Further, the defendant is in agreement that prior to making a written motion for an arrest warrant, as the Assistant Jefferson County Attorney did in requesting an arrest warrant, perhaps the better practice would have been for the Assistant Jefferson County Attorney to wait until the case was on the docket and then provide 24 hours' notice. Despite this, the County did no such thing. The flaw in the Commonwealth's first argument is its assertion, at the bottom of page 4 of its brief, of the proposition that the Commonwealth was denied "it's opportunity to present its case for the execution of a validly issued arrest warrant…" In this case, the arrest warrant was issued after a written ex parte communication from the Assistant County Attorney to the District Court.

The Commonwealth is also in error when it asserts that there would be relief from a judge who was not the judge who originally issued the arrest warrant. Generally speaking, in Jefferson County, there is a duty judge who reviews the facts of a case and determines whether to issue a warrant or set bond. This judge does not follow the case to whatever court it is assigned. The implication by the County that the contact between defense counsel and the judge that would not be presiding over the case would somehow cause mischief to be afoot overlooks the fact that this sort of situation occurs frequently in Jefferson County, such as when a judge goes on vacation and another judge sits in for that judge; when judges are in trial and another judge sits in for that judge; when courts are combined; when judges leave for appointments; when a senior status judge presides over the court of the regular judge; or, in this case when the Assistant Jefferson County Attorney made the initial *ex parte* contact. None of these situations invite impropriety or

mischief (except, perhaps, the final instance). And yet, in all these situations some judge other than the regular judge in that court makes a determination on a case. The Commonwealth also argues, on pages 6-7 of its brief, that "... If Appellee was entitled to have the warrant set aside, he would suffer no harm by notifying the Commonwealth and having them present. The converse, of course, would also be true. If the appellant was entitled to have a warrant issued, it would suffer no harm by notifying the defense attorney and having that attorney present.

B. THE ALLEGED EX PARTE PRACTICE DID NOT PREVENT THE COMMONWEALTH FROM COMPLYING WITH ITS OBLIGATIONS UNDER THE CRIME VICTIMS BILL OF RIGHTS.

KRS 421.500-421.575 places some obligations upon prosecutors. Chief among those are:

(5) Attorneys for the Commonwealth shall make a reasonable effort to insure that:

(a) All victims and witnesses who are required to attend criminal justice proceedings are notified promptly of any scheduling changes that affect their appearances;

(b) If victims so desire and if they provide the attorney for the Commonwealth with a current address and telephone number, they shall receive prompt notification, if possible, of judicial proceedings relating to their case, including, but not limited to, the defendant's release on bond and any special conditions of release;

.....

(6) The victim shall be consulted by the attorney for the Commonwealth on the disposition of the case including dismissal, release of the defendant pending judicial

proceedings, any conditions of release, a negotiated plea, and entry into a pretrial diversion program.

The County had *ex parte* contacted the Jefferson District Court and requested an arrest warrant. There was no guarantee that the judge would issue such warrant. If the County wished to comply with its statutory obligation it would be required to follow the progress of the case. No more work, no extra effort, and no further information was required of the County other than to review the case after it had made its *ex parte* request for an arrest warrant. Thus, the Commonwealth was not impeded from complying with its obligations under the Crime Victims Bill of Rights.

The Commonwealth's brief at page 9 engages in unwarranted conjecture regarding the case. For some reason the brief erroneously speculates that the victim may have recanted because she wanted the rent paid or various other reasons. In this case, the alleged victim (the wife of the defendant) had contacted the defense attorney and had subsequently signed an affidavit stating that the alleged abuse had never occurred and any papers contrary to that had been signed by her while she was under the effects of medication from the hospital, where she had gone for an injury to her back not related to the allegations of domestic violence. (Appendix, page 5). Certainly, any conveying of this information to a judge would be just as valid as information conveyed to the judge by the County attorney in the original criminal complaint.

C. The Procedure Employed by the Jefferson District Court Is Not Inconsistent with or Contrary to Other Provisions Relating to Changing Bond and Its Conditions.

The Commonwealth relies upon RCr 4.40, 2.04 and 2.06 as the rationale for the assertion in this argument. One of the flaws in the argument is the omission of facts in this argument wherein it states "On February 17, 2011 a judge of the Jefferson District Court found probable

cause for commission of a crime by Appellee and issued an arrest warrant." The argument should have noted that the warrant was only issued after a written request for an arrest warrant was communicated to Jefferson District Court by an Assistant County Attorney. Viewed in its full context, the Commonwealth's exhortation that "The people of Jefferson County are entitled to equal enforcement of the rules and equal justice" should be viewed, at a minimum, as an instruction to the Jefferson County Attorney to refrain from communicating its desire for an arrest warrant to the Jefferson District Court absent notice to the defense attorney.

Alternatively, this court may view this as an instance covered in the Circuit Court Clerk's Handbook at page 218 (see above), ruling that there was no case and thus no possibility of *ex parte* communication until summons or arrest warrants were served. Thus, the County would not be guilty of *ex parte* contact.

Finally, Cannon 3B (7) discusses judicial communications with parties, stating that:

(a) Where circumstances require, ex parte communications for scheduling, initial fixing of bail, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

Pursuant to this ethical cannon, *ex parte* communications for initial fixing of bail and/or emergencies would be authorized, particularly in this case where the judge could have reasonably believed that no party would gain a procedural or tactical advantage as a result of the defendant's communication, particularly because it was after an *ex parte* communication from the County.

D. THE PROCEDURE UTILIZED IN THE DISTRICT COURT DID NOT INTERFERE WITH THE RIGHTS OF THE PUBLIC TO AN OPEN COURT AS WELL AS THE

COMMONWEALTH'S OBLIGATIONS AS A REPRESENTATIVE OF THE PUBLIC IN CRIMINAL PROSECUTIONS.

The Commonwealth claims in its final argument that public proceedings were violated when the District Court did not admit the public into his discussion with the defense attorney regarding the arrest warrant. Certainly, on that principle, the District Court was also in violation with public proceedings when it did not admit the public to its communication from the Assistant Jefferson County Attorney urging it to issue an arrest warrant in this case. The Commonwealth claims that "bail" is somehow an enhanced procedure for conducting hearings in open court rooms. (Commonwealth brief, page 12, first full paragraph). The Commonwealth is in error when it asserts that "The District Court did not consider any of these factors prior to engaging in ex parte communications to set aside Appellee's arrest warrant". First, it is difficult to determine precisely what the District Court judge considered, but a fair analysis would include Cannon 3B (7), which permits communications of the type engaged in by the defense attorney. The Commonwealth's brief is factually in error when it claims that "The District Court could not be properly informed because only one party was represented". (Commonwealth brief, page 13). The only communication where only one party was represented was the Jefferson County Attorney communication urging an arrest warrant be issued. Thereafter, contact by the defense attorney was merely presenting the rest of the story and offsetting the initial improper claim by the Jefferson County attorney. Therefore, no public trust was initiated, nor were basic principles underlying our criminal justice system. This court is urged to so rule.

In addition to responding to the arguments of the Jefferson County Attorney and the Commonwealth, the defense further urges this court to consider the following argument.

The Government Is Prohibited from Arguing against *Ex Parte* Conduct in This Specific Case Because of Its Own Conduct

Initial contact with the Jefferson District Court in this case was made in writing by the government. Thereafter, the defense contacted the Jefferson District Court. The unclean hands doctrine as a rule forecloses relief to a party who has engaged in fraudulent, illegal, or unconscionable conduct. Dunscombe v. Amfot Oil Co., 201 Ky. 290, 256 S.W. 427, 429 (1923). Even if the court somehow finds that there was improper contact by the defense with the Jefferson District Court, it should consider that the initial contact between parties and the Jefferson District Court was made in writing by the Assistant Jefferson County Attorney. Although not applying in all instances, the maxim of unclean hands is broadly applicable. *Parris Adm'r v. John W Manning & Sons*, 284 Ky. 225 (KY, 1940). In this instance, considering the totality of the circumstances, this court is urged to recognize that the initial contact; wrongdoing, if so found, was that of the Jefferson County Attorney.

Respectfully submitted,

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