COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2007-SC-0922
(CASE NO. 2006-CA-000897 AND 2006-CA-001792)

LARRY THOMAS JONES, ET AL. **APPELLANTS**

v.

Appeal from Hickman Circuit Court
Hon. William L. Shadoan, Judge
Indictment No. 00-CR-00001
And
Appeal from Calloway Circuit Court
Hon. Dennis R. Foust, Judge
Indictment No. 01-CR-00128

COMMONWEALTH OF KENTUCKY **APPELLEE**

REPLY BRIEF FOR APPELLANTS, LARRY THOMAS JONES, ET AL.

Submitted by:

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Certificate Required by CR 76.12 (b)

The undersigned certifies that this brief was served by U.S. mail, postage prepaid, on the Hon. William L. Shadoan, Judge, Hickman Circuit Court, 132 N. 4th Street, Wickliffe, KY 42087; Hon. Timothy Langford, Commonwealth Attorney, P.O. Box 167, Hickman, KY 42050; Hon. Margot Merrill, Assistant Public Advocate, Suite B, 400 Park Avenue, Paducah, KY 42001; Hon. Dennis R. Foust, Judge, Calloway Circuit Court, Judicial Building, 12 N. 4th Street, Murray, KY 42071; Hon. Cynthia Gale Cook, Commonwealth's Attorney, 304 N. 5th Street, Murray, KY 42071; Hon. Scott West, Assistant Public Advocate, 503 N. 16th Street, Murray, KY 42071 and by messenger mail to: the Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204 on June 8, 2009.

JAMESA J. DRAKE

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

Subsection five (5) of the sexual offender conditional discharge statute, KRS 532.043, unconstitutionally assigns to the judicial branch a power properly belonging to the executive branch in violation of the separation of powers principles embodied in Sections 27 and 28 of the Kentucky Constitution.

I.

APPELLANTS TIMELY CHALLENGED THE CONSTITUTIONALITY OF SUBSECTION (5) OF THE SEXUAL OFFENDER CONDITIONAL DISCHARGE STATUTE.

Both Appellants have finished serving their sexual offender conditional discharge sentences; the issues presented on appeal are now moot. However, this Court should decide whether KRS 532.043(5) passes constitutional muster because the issue is "one capable of repetition, yet evading review." App. Brief at 2-3.

The Commonwealth responds that "appellants could have challenged the constitutionality of KRS 532.043 on direct appeal immediately after they were finally sentenced. Yet, both of the appellants conveniently waited until they had violated the terms of their conditional discharge, and were facing revocation, before challenging the constitutionality of KRS 532.043." CW Brief at 4.

Appellants' challenged the constitutionality of their sexual offender conditional discharge revocation sentences at the first available opportunity, *i.e.* when the respective circuit courts revoked their conditional discharge and sent them back to prison. At that point, Appellants timely filed a notice of appeal, and the Commonwealth made no argument otherwise.

Had the Appellants challenged the constitutionality of KRS 532.043(5) "immediately after they were finally sentenced," the Commonwealth would no doubt have argued – correctly – that their challenge was premature. "Immediately after they were finally sentenced," it was unknown whether a court would – years later – revoke the Appellants' conditional discharge. Speculative claims of error are not reviewable. *See Harris v. Jackson,* 192 S.W.3d 297, 309 (Ky. 2006) ("If no case or controversy exists, we have no jurisdiction); *Commonwealth v. Maricle*, 15 S.W.3d 376, 380-31 (Ky. 2000) ("the issue is not an actual case or controversy before this Court; the issue is not ripe for review. To grant [the relief sought] would require the rendition of an advisory opinion, which is beyond the constitutional powers of this Court.")

II.

THE COMMONWEALTH'S 418.075-NOTICE ARGUMENT IS ITSELF NOT PROPERLY BEFORE THIS COURT.

The Commonwealth argues that KRS 418.075 "specifically requires that notice be given to the Attorney General before the judgment is entered. The fact that appellants failed to do this provides this court with sufficient basis to reject the challenge in this case." CW Brief at 5.

This Court had occasion to interpret KRS 418.075 in *Brashars v. Commonwealth*, 25 S.W.3d 58 (Ky. 2000). The *Brashars* Court construed KRS 418.075 to: (a) apply outside the context of claims for declaratory relief; (b) apply *whenever* a party is challenging the constitutionality of *any* statute; (b) require that the *party challenging* the statute notify the Attorney General; (c) require that the

notification be *in writing*, and, remarkably; (d) to provide that failure to comply with the statute *divests a court with authority to decide an issue* (or affords a court discretion to avoid doing so; the *Brashars* opinion is not clear on this point). *Id.* at 65-66.

Respectfully, *nothing* in the plain text of the statute supports that interpretation, and the *Brashars* opinion makes no mention of the statute's legislative history. Ironically, this Court recently reaffirmed the construction given KRS 418.075 by the *Brashars* Court, remarking that "a reviewing court must interpret a statute as written, without adding or subtracting from the legislative enactment." *Benet v. Commonwealth*, 253 S.W.3d 528, 533 (Ky. 2008) (under *Benet*, failure to comply with KRS 418.075 simply renders an issue unpreserved).[1]

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[1] KRS 418.075 provides, in part:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.
>
> (1) In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.
>
> (2) In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

At any rate, the construction given KRS 418.075 by the *Brashars* Court, and reaffirmed by this Court in *Benet*, inexplicably elevates form over substance. Giving notice to the Attorney General would not have affected the course of *this* litigation in *any* way. The local prosecutors *prevailed* at the trial level, and the *same* arguments they advanced below are now advanced by the Attorney General on appeal.

As the Commonwealth acknowledges, "appellants did present the issue regarding the constitutionality of KRS 532.043 to the trial court at the appellants' revocation hearings." CW Brief at 5. And, of course, now the Attorney General is fully apprised of the issue and has an "opportunity to participate [and]...to argue for or against the validity of [the] statute." *See Brashars*, 253 S.W.3d at 65 (explaining "public policy" reasons for its construction of KRS 418.075). The Court of Appeals has decided the issue on the merits, and the issue is before this Court on *de novo* review. *See e.g. Moore v. Ward*, 377 S.W.2d 881, 883 (Ky. 1964) (stating the standard of review).

If despite all that, this Court concludes that Appellants' argument is unpreserved, then Appellants respectfully request palpable error review under R.Cr. 10.26. The issue here involves the claimed aggrandizement of *judicial* powers. The discretion to avoid correcting judicial error implicit in palpable error review should be exercised sparingly – if at all – in such a case. *See Bloemer v. Turner*, 137 S.W.2d 387, 390 (Ky. 1940) (separation of powers is the "cardinal principle of our republican form of government"); *Arnett v. Meredith*, 121 S.W.2d 36, 38 (Ky. 1938) (separation

of powers are one of the most "emphatically cherished and guarded" principles in the Kentucky Constitution).

Lastly, this Court can avoid the Commonwealth's "preservation" argument altogether. As Appellants argued in the footnote on page 3 of their brief, the Court of Appeals implicitly rejected the Commonwealth's preservation argument when it decided the cases on the merits. The Commonwealth has forfeited any opportunity to raise those arguments in this Court by failing to file its own motion for discretionary review. *See Wells v. Commonwealth*, 206 S.W.3d 332, 335 (Ky. 2006) ("Issues not raised in [a] motion for Discretionary Review will not be addressed by this Court despite being briefed before us and addressed at oral argument.")[2]

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[2] The Commonwealth cites to *Noel v. Commonwealth*, 76 S.W.3d 923 (Ky. 2002), and declares that: "The Commonwealth is entitled to argue any theory which supports the decision of the Kentucky Court of Appeals." CW Brief at 6. Inexplicably, the Commonwealth makes no attempt to reconcile its understanding of *Noel* with the long line of cases, including *Wells*, which hold that this Court will consider only those issues raised in a motion for discretionary review. Regardless, *Noel* plainly does *not* hold that "the Commonwealth is entitled to argue any theory which supports the decision of the Kentucky Court of Appeals." In *Noel*, this Court articulated the so-called "right-for-the-wrong-reason" rationale. *Id.* at 929 ("the trial judge's decision to admit...evidence was correct even though for the wrong reason.") Application of the "right-for-the-wrong-reason" rational *presumes* that an issue is properly preserved for appellate review. For example, in *Noel*, whether the trial court erred by admitting evidence was an issue squarely before both the Court of Appeals and this Court. In the instant case, the Commonwealth failed to file its own motion for discretionary review contesting the Court of Appeals' implicit conclusion that Appellants properly preserved their challenge to the constitutionality of KRS 532.043(5). Thus, as *Wells* instructs, the preservation issue is *not* properly before this Court. The "right-for-the-wrong-reason" rationale does not – as the Commonwealth insinuates – *excuse* either the Commonwealth or a defendant's failure to properly preserve an issue for appellate review.

III.

THE COMMONWEALTH FAILS TO DISTINGUISH BETWEEN CONDITIONAL DISCHARGE UNDER KRS 533.020 AND SEXUAL OFFENDER CONDITIONAL DISCHARGE UNDER KRS 532.043.

The Commonwealth argues that the run-of-the-mill "conditional discharge" contemplated in KRS Chapter 533 "is more akin to probation than parole," and it cites to numerous cases in support of that view. CW Brief at 6-7. Appellants agree. If this case were about the constitutionality of KRS 533.010 et seq., Appellants would lose.

But, this case is *not* about the run-of-the-mill conditional discharge statute. This case concerns the sexual offender conditional discharge statute, KRS 532.043. As explained in pages 15 through 17 of the Appellants' Brief, run-of-the-mill conditional discharge under KRS 533.020 and sexual offender conditional discharge under KRS 532.043 are similar in name only. The fact that conditional discharge under KRS 533.020 is similar to probation is of no consequence to this appeal.

IV.

HYATT NEITHER CONTROLS NOR INFORMS THE ANALYSIS HERE.

As the Commonwealth notes on page 8 of its brief, in *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2000), this Court considered the constitutionality of the Sexual Offender Registration Act, KRS 17.500 et seq., commonly known as "Megan's Law." The Appellants challenged their classification as "high-risk sex offenders" on separation of powers grounds, although the specific arguments they made are not relayed in the opinion. This Court rejected the Appellants' arguments – whatever they were – simply by noting that "the legislature, pursuant to the constitution, has

express power to determine the original jurisdiction of circuit and district courts. ... This Court has recognized the authority of the legislature to enact statutes regarding the jurisdiction of the court. Here, the legislature assigned to the circuit courts the duty of conducting classification hearings in connection with a legislative act requiring assessment for the purpose of community notice." *Id.* at 577.

Hyatt does not control the outcome here. *Hyatt* concerned the constitutionality of KRS 17.500 et seq. This appeal concerns the constitutionality of KRS 532.043(5). *Hyatt* does not inform the analysis here, either. Respectfully, whether the legislature has the power to determine the original jurisdiction of the circuit courts and whether the legislature, in assigning that power, has violated the separation-of-powers mandate are two entirely different questions. For example, pursuant to its power to determine the original jurisdiction of the circuit courts, the legislature *could* assign clemency powers to the judicial branch believing, for example, that public policy is best served by that distribution of authority. But, such an assignment would violate separation-of-powers principles because the clemency powers are expressly reserved to the executive branch. Or, the legislature *could* assign to the judicial branch the duty to administer executed sentences, believing that because courts are familiar with an offender's specific rehabilitative potential, public policy is best served by that distribution of authority. But again, such an assignment would violate separation-of-powers principles because that duty belongs to the executive. In other words, simply because the legislature *can* determine the original jurisdiction of the court does not

mean that whatever jurisdiction it assigns a court, *ipso facto*, passes state constitutional muster.

The Commonwealth is correct when it states that "[i]t is within the power of the legislature to determine what unit of government [is] best suited to perform certain civil responsibilities." CW Br. at 8. But, the legislature's ability to determine the jurisdiction of the courts is not the standard by which separation-of-powers claims are determined. If it were, then, by definition, no separation-of-powers problem would *ever* arise. *But see* App. Br. at 7-9, 12-13 (collecting cases where Kentucky Courts have held that a legislative grant of sentencing authority offends the separation-of-powers guarantee).

V.

WILFONG DOES NOT CONTROL THE OUTCOME HERE, EITHER.

As a preliminary matter, defendant notes that this Court denied review of *Wilfong v. Commonwealth*, 175 S.W.3d 84 (Ky. App. 2005). *See* 2005-SC-020 (review denied November 16, 2005). It is unclear whether the Commonwealth's repeated references to *Wilfong* as a decision of this Court is a slip of the pen or is based on the Commonwealth's belief that this Court, by denying review, adopted the decision of the Court of Appeals. *See* CW Br. at 9; *but see* 76.20(9) ("The denial of a motion for discretionary review does not indicate approval of the opinion or order sought to be reviewed and shall not be cited as connoting such approval.")

At any rate, the Appellant in *Wilfong* challenged the constitutionality of KRS 532.043(1) and (2). He argued that the mandatory nature of the sexual offender

conditional discharge violated the separation of powers provisions of the Kentucky Constitution. *Wilfong*, 175 S.W.3d at 91-92. The Court of Appeals rejected that argument on the ground that the legislature has plenary power to fix criminal punishments. *Id.* at 92.

The Appellants in the instant case challenge the constitutionality of KRS 532.043(5). They argue that for nearly one hundred (100) years, Kentucky courts have identified the entry of a final sentencing order as the fulcrum point when the sentencing power of the judicial branch gives way to the sentencing power of the executive branch. Subsection (5) of the sexual offender conditional discharge statute violates the separation of powers because it authorizes a court to make sentence modifications decades after the judgment entry date and years after an offender's release from prison and parole. At that point, any residual sentencing power properly belongs to the executive branch. No decision by this Court addresses whether KRS 532.043(5) violates Sections 27 and 28 of the Kentucky Constitution.

CONCLUSION

For all of the reasons set forth herein and in the Appellants' Brief, Appellants respectfully request that this Court declare KRS 532.043(5) to be unconstitutional.

Respectfully submitted,

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