

Commonwealth of Kentucky  
Supreme Court of Kentucky  
2010-SC-0076-D

K.R. a/k/a J.W., A Child

Appellant

On Discretionary Review from the Kentucky Court of Appeals  
No. 2008-CA-001980-MR

Appeal from the Jefferson Circuit Court  
Action No. 2008-CA-7535

Commonwealth of Kentucky

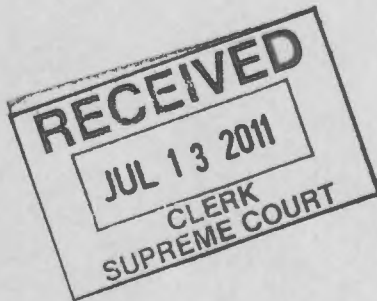
Appellee

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Commonwealth of Kentucky

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of this Brief for Appellee, Commonwealth of Kentucky, were mailed/delivered this 12<sup>th</sup> day of July, 2011, to Hon. Olu Stevens, Judge, Jefferson Circuit Court, Division Six, 700 West Jefferson Street, Louisville, Kentucky 40202; Hon. Deborah Deweese, Jefferson District Court, Division Ninety-Nine, 600 West Jefferson St., Louisville, Kentucky 40202; and to Daniel Goyette, Public Defender, Hon. Emily Farrar-Crocket, Hon. Elizabeth B. McMahon, Assistant Public Defenders, Office of the Louisville Metro Public Defender, 717-719 West Jefferson Street, Louisville, Kentucky 40202; and Hon. Jack Conway, Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky 40601. I further certify that the record on review has not been withdrawn.

  
Dorislee Gilbert

**STATEMENT CONCERNING OAL ARGUMENT**

The Commonwealth believes oral argument is not necessary as it has thoroughly addressed the issues before the Court in this brief. However, should the Court determine that oral argument would be beneficial to it, the Commonwealth will zealously participate.

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## COUNTERSTATEMENT OF THE CASE

Although Appellant's statement of the case reasonably summarizes the factual and procedural history of this case, the Commonwealth believes the more appropriate recitation of facts to guide this Court's inquiry is the one spelled out by the Court of Appeals in its opinion affirming the Jefferson Circuit Court's issuance of a writ of mandamus. K.R. v. Commonwealth, 2008-CA-001980-MR, slip op. pps. 2-3 (Ky. App. Jan. 8, 2010)(Attached to Appellant's Brief as Appendix A). The Court summarized:

K.R. was a juvenile runaway from Tennessee. While in Louisville, she supported herself by working as a prostitute. Although the parties present different versions of the details, they agree that in June 2008, some sort of disagreement occurred between K.R. and one of her clients, Juan Velasquez. As a result, Velasquez kept K.R.'s bracelet. K.R. was sixteen years of age at the time.

When the altercation occurred, K.R. was living with members of the MS-13 street gang. She asked two of them to do "whatever they had to" in order to retrieve her bracelet. The two gang members were an adult, Jose Lopez, and J.G., another juvenile. Since Lopez and J.G. had never met Velasquez, K.R. showed them the apartment building in which he lived. As they drove past the building, one of the men shot into an apartment. Realizing that it was not Velasquez's apartment, K.R. directed them to the correct one.

K.R., J.G., and Lopez then unsuccessfully attempted to break into Velasquez's apartment. The occupants of the apartment held the door shut, and so K.R. tried to break through a window. Failing to gain entry through the window, the three went to the back of the building. They spotted Velasquez looking through a closed window. Lopez then shot at the window, striking Velasquez in the face. Velasquez underwent surgery to remove a bullet from his jaw. In the days following the incident, K.R. disposed of Lopez's gun.

K.R. was charged with complicity to assault in the first degree, attempted burglary, and tampering with evidence. The district court held a probable cause hearing and found that there was probable cause to believe that K.R. was guilty of all the charges. The Commonwealth then asked the court to apply Kentucky Revised Statute[s] (KRS) 635.020(4) and to transfer K.R.'s case to Jefferson Circuit Court.

The district court held another hearing and determined that K.R. did not meet the criteria of the statute because she had not handled the gun when Velasquez was shot. The Commonwealth then petitioned the circuit

court for a writ of mandamus to order the district court to apply KRS 635.010(4). The circuit court granted the petition . . . .”

K.R., 2008-CA-001980-MR, Slip Op. Pps. 2-3.

The only additional note the Commonwealth would add to this recitation of facts is that K.R. may sometimes be referenced in the record as J.W. because that is how K.R. was originally identified in these proceedings based upon her false representations to police regarding her identity.

### ARGUMENT

**I. The Commonwealth’s petition for writ of mandamus was properly considered and granted by the Circuit Court and affirmed by the Court of Appeals.**

**A. Nature of writs.**

Writs of mandamus or prohibition are extraordinary remedies and courts should be cautious and conservative in granting them. Cox v. Braden, 266 S.W.3d 792, 795 (Ky. 2008); Independent Order of Foresters v. Chauvin, 175 S.W.3d 610, 613 (Ky. 2005). “This careful approach is necessary to prevent short-circuiting normal appeal procedure and to limit so far as possible interference with the proper and efficient operation of [ ] circuit and other courts.” Bender v. Eaton, 343 S.W.2d 799, 800 (Ky. App. 1961). While courts always have discretion in deciding whether to issue a writ (Cox, 266 S.W.3d at 797), there are certain “‘conditions precedent’ for the mere availability of a writ as a possible remedy” (Foresters, 175 S.W.3d at 615). In other words, there are certain requirements that must be met in order for a higher court to even reach the issue of whether a lower court has committed error that should be remedied by issuance of a writ. Id.; Hoskins v. Maricle, 150 S.W.3d 1, 18 (Ky. 2004). These requirements depend on the class of writ sought.

There are two classes of writs: (1) where the lower court is acting or about to act without jurisdiction and (2) where the lower court is acting or about to act erroneously within its jurisdiction. Hoskins, 150 S.W.3d at 10. With the first class of writ, the party seeking the writ must show that “there is no remedy through an application to an intermediate court” in order for the court to even consider granting the writ. Id. With the second class of writ, the party seeking the writ must generally show that “there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.” Id.

Great injustice and irreparable injury means “incalculable damage to the applicant . . . either to the liberty of his person, or to his property rights, or other far-reaching and conjectural consequences” (Id. at 19 quoting Litteral v. Woods, 223 Ky. 582, 4 S.W.2d 395, 396-397 (Ky. 1928)(emphasis omitted)) and “something of a ruinous nature” (Bender, 343 S.W.2d at 801). While great injustice and irreparable injury is generally a required showing for availability of the second class of writ, “a finding of ‘great injustice and irreparable injury’ is not an absolute prerequisite to considering the merits of a claim of error.” Hoskins, 150 S.W.3d at 20. In fact, this requirement is “put aside in certain special cases . . . [where] a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration.” Cox, 266 S.W.3d at 797 (citations omitted). These certain special cases are rare and exist only where invocation of a writ would serve as “a shield from injustice . . . to preserve the orderly administration of the laws.” Id. (citations omitted).



In this case, there is no claim that the District Court was acting outside its jurisdiction when it refused to transfer Appellant to circuit court. Instead the type of writ at issue is one of the second class, wherein the District Court acted erroneously within its jurisdiction. In issuing the writ, the Circuit Court found that the Commonwealth met both the inadequate remedy by appeal and great injustice and irreparable injury prerequisites to relief. Commonwealth v. Deweese, 08CI007535, Findings of Fact and Conclusions of Law, pps. 3-4 (Jeff. Cir. Ct., Oct. 8, 2008)(Attached to Appellant's Brief as Appendix B). In affirming the Circuit Court, the Court of Appeals found that this was one of the certain special cases in which the only requirement for availability of a writ is inadequate remedy by appeal and that the Commonwealth had met this requirement. K.R., 2008-CA-001980-MR, Slip Op. Pps. 4-5.

**B. Standard of appellate review.**

Issuance of a writ is in the sound discretion of the court. Grange Mutual Insurance Company v. Trude, 151 S.W.3d 803, 810 (Ky. 2005). However, the standard of appellate review "depends on the class, or category, of writ case." Id.

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

But the requirement that the court must make a factual finding of great and irreparable harm before exercising discretion as to whether to grant the writ then requires a third standard of review, i.e., clear error, in

some cases. This is supported by the fact that the petition for a writ is an original action in which the court that hears the petition, in this case the Court of Appeals, acts as a trial court. And findings of fact by a trial court are reviewed for clear error. Therefore, if on appeal the error is alleged to lie in the findings of fact, then the appellate court must review the findings of fact for clear error before reviewing the decision to grant or deny the petition.

Id. at 811 (citations and internal quotations omitted).

Because this case primarily concerns a question of law and because the Court of Appeals found that this is one of the certain special cases in which it is unnecessary to show great injustice and irreparable injury, this Court's review is de novo. However, to the extent the Court reviews the Circuit Court's factual findings that the Commonwealth established great injustice and irreparable injury, this Court should consider whether that court committed clear error.

**C. The Commonwealth lacked an adequate remedy by appeal or otherwise.**

As noted above, whether or not this case falls into the category of certain special cases that are exempt from a showing of great and irreparable injury, a writ of mandamus is an appropriate remedy only if the Commonwealth lacked an adequate remedy by appeal or otherwise. Both the Circuit Court and the Court of Appeals properly found that it did.

KRS 23A.080 governs appeals from district courts and provides: "A direct appeal may be taken from District Court to Circuit Court from any *final action* of the District Court." KRS 23A.080(1) (emphasis added). This provision has been interpreted to mean that there is no appeal to the circuit court of interlocutory orders of the district court. Commonwealth v. Williams, 995 S.W.2d 400, 402-403 (Ky. App. 1999); Tipton v. Commonwealth, 770 S.W.2d 239, 241 (Ky. App. 1989). Instead, appeals are only

permitted for final judgments. With regard to juvenile court, KRS 610.130 similarly provides:

Unless otherwise exempted, an appeal to the Circuit Court may be taken as a matter of right from the juvenile session of the District Court from dispositional orders under KRS 610.110. The appeal shall be taken in the manner provided in the Rules of Criminal Procedure, and the Circuit Court shall, in the best interest of the child, hear such cases expeditiously.

To appeal under either of these provisions, the Commonwealth would be required to await the final disposition of Appellant's case by the District Court. However, "the Commonwealth's right to appeal is limited by double jeopardy principles." Collins v. Commonwealth, 973 S.W.2d 50, 53 (Ky. 1998). And because the double jeopardy clause of the Fifth Amendment of the United States Constitution applies to juvenile proceedings that are adjudicatory in nature (Breed v. Jones, 421 U.S. 519, 44 L.Ed.2d 346, 95 S.Ct. 1779 (1975)), the Commonwealth would be prohibited from appealing if it chose to await final disposition of Appellant's case by the District Court.

Thus, the law allows for appeal of interlocutory orders of the district court by way of "an original proceeding for relief in the nature of mandamus or prohibition" in the circuit court. Tipton, 770 S.W.2d at 241. In other words, "the circuit court is without jurisdiction to take an interlocutory 'appeal' from the district court as the proper method of procedure is through an original action seeking a writ of mandamus or prohibition." Williams, 995 S.W.2d at 403. See also Commonwealth v. Eckert, 2002-CA-002416-MR, 2003 WL 1344875 (Ky. App. Feb. 21, 2003)(Attached as Appendix 1)(Court of Appeals reversed the circuit court's denial of a writ of mandamus based upon finding that the Commonwealth did not show inadequate remedy by appeal so as to qualify for writ because Commonwealth had no right to appeal the juvenile court order denying transfer

of the juvenile to circuit court). Appellant does not assert that the Commonwealth lacked an adequate remedy by appeal. And under the law there can be no question that the Commonwealth lacked an adequate remedy to appeal the District Court's order denying transfer.

Appellant claims that the Commonwealth's petition for writ of mandamus should have been denied because the Commonwealth had another adequate remedy in that it could have sought transfer of Appellant under KRS 640.010. That statute grants the district court discretion to transfer juvenile offenders to circuit court as youthful offenders after evaluating a number of listed factors and determining that at least two of those factors "favor transfer." KRS 640.010(2). By its very terms, this type of discretionary transfer is not applicable to juveniles qualifying for transfer under the use of a firearm provisions of KRS 635.020(4). KRS 640.010(2). Instead, as will be discussed in more detail below, KRS 635.020(4) requires mandatory transfer of a juvenile who is at least 14 years of age at the time of the crime when a firearm is used in commission of the felony. KRS 635.020(4).

Nevertheless, Appellant claims the availability of a request for discretionary waiver based upon factors other than the use of the firearm is an adequate remedy for the District Court's failure to transfer Appellant to circuit court. Yet, this possible alternative method for transfer does nothing to address the error sought to be corrected by the Commonwealth's petition for a writ of mandamus—namely, that the District Court acted in contradiction of the statutory mandate requiring transfer of Appellant to circuit court. Appellant's position neglects that the District Court's error was not simply failing to transfer Appellant but failing to abide by the law requiring transfer. Even if the

Commonwealth were to petition for discretionary transfer under KRS 640.010(2) and even if the District Court granted it (which is in no way guaranteed as it is under KRS 635.020(4)), the District Court's error would still not be fully redressed. Accordingly, that uncertain remedy cannot be said to be "adequate" so as to defeat entitlement to a writ of mandamus.

Moreover, if the Commonwealth petitioned for discretionary transfer under KRS 650.010(2), and the District Court denied transfer, the Commonwealth could be foreclosed or at least severely hampered in seeking relief. The Commonwealth would still lack the ability to appeal the denial of transfer because it would be an interlocutory order. And if the Commonwealth filed an original action seeking a writ of mandamus requiring transfer, the issue would then be whether the District Court abused its discretion in denying transfer under KRS 640.010(2), not whether the District Court erroneously denied transfer under the non-discretionary mandate of KRS 635.020(4). The Commonwealth's actions in seeking transfer under KRS 640.010(2) would arguably be considered waiver of any error by the District Court in not transferring Appellant under the requirements of KRS 635.020(4). Appellant's proposed remedy would leave the Commonwealth not only with no remedy by appeal but no chance at remedy by original action. The Circuit Court and Court of Appeals properly found that the Commonwealth lacked an adequate remedy by appeal or otherwise, and this Court should affirm those findings.

**D. The Court of Appeals properly found that this is one of the "certain special cases" eligible for relief by writ.**

A court may consider a petition for a writ without a showing of specific great and irreparable injury:

“provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration. It may be observed that in such a situation the court is recognizing that if it fails to act the administration of justice generally will suffer the great and irreparable injury.”

Bender, 353 S.W.2d at 801. These certain special cases are rare exceptions where a writ can operate as a shield from injustice and to preserve the orderly administration of justice. Cox, 266 S.W.3d at 797; Bender, 353 S.W.2d at 801.

In Bender, the Court considered a writ petition absent a showing of great and irreparable injury where the writ was sought in response to an order compelling pretrial production of evidence that the petitioner claimed the opposing party was not entitled to. Id. at 802. The Court found that if this order was erroneous there would be “a substantial miscarriage of justice, particularly since the Rule involved was expressly adopted for the protection of those in petitioner’s position.” Id. The Court further explained its choice to consider the writ petition:

In addition, and perhaps this is the most compelling consideration, the proper construction and application of the Rule in question (CR 37.32) is important to the orderly administration of our Civil Rules. This Rule is relatively new and had no predecessor in our Civil Code or the Federal Rules of Civil Procedure. We have not heretofore had occasion to pass upon its meaning or effect. Under these circumstances, a decision would be of value to the Bench and Bar of Kentucky.

Id.

More recently in Commonwealth, Dep’t of Corrections v. Engle, 302 S.W.3d 60 (Ky. 2010), the Court found that a writ application fell into the special class of cases making it unnecessary to show great and irreparable harm. In that case, the trial court erroneously ordered the Department of Corrections, rather than the local sheriff’s department, to transport a state prisoner for pretrial and trial proceedings. Id. at 64. The

Court of Appeals denied the Department of Corrections' petition for a writ of prohibition Id. at 62. In ultimately vacating the order denying the writ, the Supreme Court discussed the qualifications necessary for consideration of a writ petition and found that although the transport of a single inmate would not constitute great injustice and irreparable injury, the case qualified as one of the certain special cases in which such showing was not required. Id. at 65. The Court explained its decision:

Since erroneous orders, such as this one, may occur multiple times across the expanse of Kentucky's 120 trial court venues, over time the potential for "great injustice and irreparable injury" is plainly present. Forcing the DOC to transport prisoners across the state certainly would ultimately have a substantial impact on its resources, and distort the legislature's budgetary considerations implicit in its statutes designating the county sheriffs to transport inmates such as Hurt. Such injuries could not be remedied. Additionally, the resolution of this controversy is important to the orderly transportation of DOC inmates housed in county detention centers, and thus the decision will be of value to the Bench and Bar of Kentucky. So, while no great injustice or irreparable injury may result because of Hurt's transport, and that particular issue is moot, we determine that a writ would have been appropriate to correct the error of the lower courts in the interest of orderly judicial administration.

Id., 302 S.W.3d at 65-66.

This case too is one in which issuing a writ of mandamus is the appropriate action to correct the lower court's error and to affect the orderly administration of justice.

Juvenile transfer provisions "represent an attempt to impart to the juvenile court system the flexibility needed to deal with youthful offenders who cannot benefit from the specialized guidance and treatment contemplated by the [juvenile court] system." Breed, 421 U.S. at 535, 95 S.Ct. at 1789, 44 L.Ed.2d 346. There can be no question that the possibility of transfer "is a matter of great significance to the juvenile." Id., 95 S.Ct. at 1788, 95 S.Ct. 1779. Nor can it be questioned that in states enacting statutory transfer procedures, the state and its citizens have a great interest in juvenile transfer proceedings

because “there appears to be widely shared agreement that not all juveniles can benefit from the special features and programs of the juvenile-court system and that a procedure for transfer to an adult court should be available.” Id. “[T]he state has a compelling interest in protecting the public from a juvenile who will not be helped by the juvenile justice system . . . .” Stout v. Commonwealth, 44 S.W.3d 781, 788 (Ky. App. 2001). The Kentucky legislature “has recognized that not all juvenile offenders should be proceeded against in juvenile court and, accordingly the scheme it enacted provides for both automatic and discretionary transfer of certain juvenile offenders.” Id. at 786.

In this case, the District Court erred by not ordering the statutorily mandated automatic transfer. As noted above, this provision was created in response to the state’s compelling interests in protecting the public and in recognition that all juvenile offenders should not be proceeded against in juvenile court. The provision is in place to secure justice for juvenile offenders and the citizens of this state. It is part of the orderly administration of the juvenile justice system. When this provision is disregarded, a substantial miscarriage of justice is committed because neither the interests of this particular juvenile nor other juveniles for whom transfer will be sought and obtained as required under the statute are appropriately shielded. Nor is the state’s interest in protecting its citizens appropriately administered when the statutory mandate is ignored. As in Bender, the “proper construction and application” of this statute “is important to the orderly administration of” justice. Bender, 353 S.W.2d at 802. Like the issues addressed in both Bender and Engle, consideration of the writ petition will be beneficial to both the Bench and Bar who have an interest in ensuring the proper and just application of the law. Accordingly, this case is one of the special class of cases in which granting of the



writ was appropriate even without a finding of great and irreparable injury. The Court of Appeals was correct in so classifying this case, and that decision should be affirmed.

Appellant implies impropriety in the Court of Appeals' finding that this is one of the special class of cases in which great or irreparable injury is not required because the Commonwealth never made that argument in the Circuit Court or in the Court of Appeals. App. Br. Pps. 6, 9. "However, . . . an appellate court[ ] may affirm the trial court for any reason sustainable by the record." Kentucky Farm Bureau Mut. Ins. Co. v. Gray, 814 S.W.2d 928, 930 (Ky. App. 1991); see also McCloud v. Commonwealth, 286 S.W.3d 780, 786 fn. 19 (Ky. 2009)("[I]t is well-settled that an appellate court may affirm a lower court for any reason supported by the record."). The record supports the Court of Appeals' opinion regarding the nature of this case, and Appellant's argument is unavailing.

Appellant also contends that by affirming the Court of Appeals' finding that this is one of the "certain special cases" in which it is unnecessary to show great and irreparable injury, "the door could be opened for the Commonwealth to challenge every probable cause determination that it did not agree with by way of seeking a writ of mandamus." App. Br. P. 26. This assertion shows Appellant's misunderstanding of the reason the Commonwealth sought a writ of mandamus in the first place. It is not the District Court's factual determinations related to deciding whether probable cause existed either to charge Appellant or transfer her to circuit court that is under attack. Instead, it is the District Court's misinterpretation and improper application of the law regarding transfer that the Commonwealth challenges. Affirming the writ of mandamus on grounds

including that the administration of justice requires it would not open the door to a barrage of ill-founded petitions for relief.

**E. Even if this was not one of the “certain special cases,” the Commonwealth has established great and irreparable harm entitling it to relief.**

Great and irreparable injury is something of a ruinous nature and includes incalculable damage to liberty, property rights or other far-reaching consequences. Bender, 343 S.W.2d at 801; Hoskins, 150 S.W.3d at 19. It is “not such an injury as is usually suffered and sustained by a losing litigant upon a trial of his cause in a court having jurisdiction thereof, i.e., a mere failure to succeed in that litigation, followed by the loss of that which success might have brought him; but [ ] in order to constitute the requisite ‘great and irreparable injury’ to confer original jurisdiction . . . , the failure to succeed in the particular case should inevitably be followed by consequences of great and ruinous loss for which there was no remedy.” Osborn v. Wolfford, 239 Ky. 470, 39 S.W.2d 672, 673 (Ky. App. 1931). “Inconvenience, expense, annoyance, and other undesirable aspects of litigation” do not constitute irreparable injury. Fritsch v. Caudill, 146 S.W.3d 926, 930 (Ky. 2004).

Great and irreparable injury justifying consideration of a writ petition has been found to exist where disclosure of work product privileged information is ordered (O’Connell v. Cowan, 332 S.W.3d 34, 39 (Ky. 2010)); where an erroneous permanent injunction “would result in the continued incarceration or supervision of prisoners or parolees, which would, in turn, cause the expenditure of scarce state funds to house or supervise those prisoners or parolees” (Commonwealth ex rel. Conway v. Thompson, 300 S.W.3d 152, 171 (Ky. 2009)); and where a court order prevented “county attorneys from advocating on behalf of the Commonwealth without being subject to the penalty of

contempt” (Delahanty v. Commonwealth ex rel. Maze, 295 S.W.3d 136, 141 (Ky. App. 2009)).

Likewise, the circuit court properly found the prerequisite great injustice and irreparable injury to consider the Commonwealth’s petition for writ of mandamus. The difference between a juvenile adjudication and a criminal conviction is significant, both for an offender and for the Commonwealth. Waiver “can make the difference between a brief period of regenerative treatment and life imprisonment.” Buchanan v. Commonwealth, 652 S.W.2d 87, 88 (Ky. 1983). Waiver under KRS 635.020(4) would permit Appellant to be subjected to the same penalties as an adult offender. The Commonwealth (that is, both the entire state of the Commonwealth and the Commonwealth’s Attorney) has a compelling interest in “protecting the public from a juvenile who will not be helped by the juvenile justice system.” Stout, 44 S.W.3d at 788. An erroneous denial of mandatory transfer creates incalculable damage and far-reaching consequences because it prevents the legally required, appropriate resolution of criminal acts committed against the Commonwealth. The order is ruinous to the Commonwealth Attorney’s obligation “to see that every defendant receives a fair trial, a trial in accordance with the law, which means the law as laid down by the duly constituted authorities, and not as the prosecuting attorney may think it ought to be.” Niemeyer v. Commonwealth, 533 S.W.2d 218, 222 (Ky. 1976).

[I]t is the obligation of the prosecuting attorney to conduct himself with due regard to the properties of his office and to see that the legal rights of the accused, as well as those of the Commonwealth, are protected. It is his duty to prosecute but not persecute. He should endeavor to see that justice is meted out and that the accused is dealt with fairly. Above all, there is an obligation that truth and right shall prevail.

Bowling v. Commonwealth, 279 S.W.2d 23, 24 (Ky. 1955).

The legislature laid down the law governing automatic transfer and determined what is just and fair for juvenile offenders whose felony crimes involve the use of a firearm when it adopted KRS 635.020(4). The District Court's erroneous order denying transfer is ruinous and prevents execution of the Commonwealth Attorney's duties to seek justice through proper application and enforcement of this duly enacted law. The circuit court did not clearly err in concluding that the Commonwealth would suffer great injustice and irreparable injury by the District Court's order, and this Court should affirm that finding.

**II. Issuance of the writ of mandamus was proper because the District Court erred as a matter of law in not transferring Appellant to circuit court.**

KRS 635.020(4) governs what is sometimes termed automatic transfer, but what might be more appropriately called mandatory transfer,<sup>1</sup> of juvenile offenders to circuit court. That statute provides, in part:

Any other provision of KRS Chapters 610 to 645 to the contrary notwithstanding, if a child charged with a felony in which a firearm, whether functional or not, was used in the commission of the offense had attained the age of fourteen (14) years at the time of the commission of the alleged offense, he shall be transferred to the Circuit Court for trial as an adult if, following a preliminary hearing, the District Court finds probable cause to believe that the child committed a felony, that a firearm was used in the commission of that felony, and that the child was fourteen (14) years of age or older at the time of the commission of the alleged felony.

KRS 635.020(4).

There is no question that Appellant was more than fourteen years old at the time the crime was committed. And the District Court properly found probable cause that Appellant was complicit in a first-degree assault in which a gun was used to shoot the

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<sup>1</sup> See Caldwell v. Commonwealth, 133 S.W.3d 445, 452-453 (Ky. 2004)(pointing out that it is misleading to call transfer under this statute automatic because there are certain findings that must be made before transfer can occur).

victim in the face. Nonetheless, the District Court refused to transfer Appellant because it imposed an additional requirement that the juvenile offender use the firearm. This requirement is not present and cannot be imputed into the statute.

Where a statute's language is plain and unambiguous, "statutory construction is not necessary." Hood v. Commonwealth, 230 S.W.3d 596, 599 (Ky. App. 2007). In other words, when the statute is plain and unambiguous, the statute should be given its literal interpretation. Id. "Further, a court must refer to the words used in a statute, and not speculate on what the legislature might have intended, but did not express." Id.

"The primary purpose of judicial construction is to carry out the intent of the legislature. In construing a statute, the courts must consider the intended purpose of the statute-and the mischief intended to be remedied. A court may not interpret a statute at variance with its stated language. The first principle of statutory construction is to use the plain meaning of the words used in the statute. Statutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required. We lend words of a statute their normal, ordinary, everyday meaning. We are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used. The courts should reject a construction that is unreasonable and absurd, in preference for one that is reasonable, rational, sensible, and intelligent."

Harrison v. Park Hills Board of Adjustment, 330 S.W.3d 89, 94-95 (Ky. App. 2011), quoting Monumental Life Ins. Co. v. Dep't of Revenue, 294 S.W.3d 10, 19 (Ky. App. 2008).

The plain, literal, and unambiguous terms of KRS 635.020(4) provide for mandatory transfer when a child 14 years of age or older is "charged with a felony in which a firearm, whether functional or not, was used in the commission of the offense" and probable cause is found that "the child committed a felony, that a firearm was used in the commission of that felony, and that the child was fourteen (14) years of age or older

at the time of the commission of the alleged felony.” KRS 635.020(4). Notably, the statute does not say there must be probable cause to believe *that the child committed a felony, that the child used a firearm in the commission of that felony, and that the child was fourteen (14) years of age or older at the time of the commission of the alleged felony*. Reading such a requirement into this statute improperly invades the province of the legislature who could have easily included language requiring that the child use the firearm but chose not to do so.

This Court recently considered the language of this statute in deciding whether a juvenile offender’s conviction qualified her to be sentenced as a youthful offender. In Chipman v. Commonwealth, 313 S.W.3d 95, 98 (Ky. 2010), this Court explained that the determination depended “on whether she was actually convicted of a felony in which ‘a firearm was used’” under KRS 635.020(4), noting that this particular transfer provision is “fact-specific and requires the court to conduct deeper inquiry” than simply looking at the type of crime because “KRS 635.020(4) covers crimes for which the use of a firearm is not an element but where a firearm was nevertheless used in a particular case.” Id. at 99. As the Court noted, “the crimes potentially covered by the provision are quite broad: it requires that the ‘child committed a felony[ and] that a firearm was used in the commission of that felony.’” Id. The Court further explained that the “firearm must be tied to the child” in that “the child must use the firearm while committing a felony, or at least be complicit in another person’s use of a firearm.” Id. The use contemplated in KRS 635.020(4) “requires something more than mere ‘possession’ or being ‘armed.’” Id. at 100. It requires that the child *use the firearm or be complicit in its use*. Id.

In this case, the District Court found probable cause that Appellant was complicit in a first-degree assault. The undisputed evidence before the court established that the assault involved her co-defendant shooting the victim in the face. The undisputed evidence further revealed that the shooting resulting in the assault was the second shooting committed by the co-defendants that day in the presence of Appellant and that after the first shooting, Appellant redirected the co-defendants to the victim's apartment in order to do whatever they had to do to get her bracelet. Because there was probable cause that Appellant was complicit in the assault, there was probable cause that she was complicit in the use of the firearm, which was the only means of assault. This is not a case where Appellant's co-defendants merely possessed the gun. Nor is this a case where Appellant can reasonably contend that the use of the firearm was completely unexpected or unanticipated by her. She was present with her co-defendants earlier in the day when they shot into an apartment. She then redirected them to the correct apartment when their first efforts to reacquire her bracelet were unsuccessful.

Appellant recognizes that Chipman contemplates that the use of a firearm required for transfer under KRS 635.020(4) is satisfied if the juvenile is complicit in the use of the firearm but contends that "the extension of KRS 635.020(4) to include complicity is an overly broad interpretation." Appellant then makes a poor attempt to distinguish the degree of use required in KRS 635.020(4), which requires "that a firearm was used in the commission of that felony" from the degree of use required in KRS 533.060(1), which requires "the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury." App. Br. Pps. 17-18. Appellant asserts "involved

the use of a weapon” is “broad, inclusive language” that “does not draw a distinction as to who fired the weapon for probation purposes as long as a weapon was ‘involved.’” App. Br. P. 18. Appellant futilely attempts to contrast KRS 635.020(4)’s “use of a firearm” language as “ambiguous as to whether or not the defendant has to be the one who actually ‘used’ the firearm.” App. Br. P. 18. Appellant fails to consider that rather than being ambiguous, the language of KRS 635.020(4) is literal. It means that when a juvenile more than 14 years old commits a felony wherein a firearm is used, that juvenile must be transferred to circuit court. Twice in the statute, the legislature describes that the child is charged with a felony in which a firearm was used. The legislature’s emphasis is on a felony committed by a child in which a firearm was used not on a child who used a firearm in the commission of a felony.

Appellant persists in the non-existent distinction between the language of KRS 635.020(4) and KRS 533.060(1) despite the lack of any case law to support this distinction because without it Pruitt v. Commonwealth, 700 S.W.2d 68 (Ky. 1985) forecloses her claim. In Pruitt, the appellant was charged and convicted of complicity to the murder of her husband, who was actually shot and killed by another person. Id. The trial court denied her motion for probation citing KRS 533.060(1). Id. The appellant claimed the statute was ambiguous and “should be construed to prohibit probation only when the defendant actually used the weapon and should not prohibit probation in cases in which the commission of the offense involved the use of a weapon by someone other than the defendant seeking probation.” Id. The court rejected this claim.

We do not see any ambiguity in the statute in this respect. While the statute does pertain to “the use of a weapon” and there is a legitimate question as to the type of use contemplated, it does not concern itself at all with what person actually used the weapon. The statute prohibits



probation if the commission of the offense “involved the use of a weapon”, and the plain reading of the statute does not indicate any basis for a distinction based upon the identity of the person who uses the weapon.

Id. The same is true of KRS 635.020(4). It does not concern itself at all with what person actually used the weapon and the plain reading of the statute does not indicate any basis for a distinction based upon the identity of the person who uses the weapon. Appellant’s claims to the contrary should be rejected by this Court as they were rejected by the Circuit Court and the Court of Appeals.

Appellant’s citation to Darden v. Commonwealth, 52 S.W.3d 574 (Ky. 2001), is unconvincing. In that case, the court held that unlawful possession of a firearm is not actual use of a firearm and does not satisfy the requirements of KRS 635.020(4) for mandatory transfer. Id. at 577. The court relied on Haymon v. Commonwealth, 657 S.W.2d 239, 240 (Ky. 1983), in which the court held that “use of a weapon” as used in KRS 533.060(1) was ambiguous as to whether it included mere possession of a weapon or actual employment of the weapon in commission of the offense and gave the movant the benefit of the ambiguity. Following Haymon, the Darden court found that possession and use of a weapon were entirely different concepts and that “doubts in the construction of a penal statute are to be resolved not only in favor of lenity, but also against a construction that would produce extremely harsh or incongruous results.” Id.

Darden, however, does not alter Pruitt’s application to this case. The Pruitt court considered Haymon and found that the ambiguity pointed out in Haymon was not relevant to the question of whether KRS 533.060(1) applied to prohibit probation for one who was convicted of complicity to murder when the shooting that resulted in the murder was actually committed by another because the ambiguity found in Haymon did not

concern itself with what person used the weapon. Similarly, the ambiguity identified in Darden is irrelevant to who used the weapon and in this case there is no doubt that a weapon was used. Darden does not support Appellant's interpretation of KRS 635.020(4).

Appellant proposes a hypothetical that she has substantially modified from a hypothetical provided in Darden in an attempt to drive home her point. She writes: "It is hard to imagine that the General Assembly would create a statutory scheme whereby a juvenile who commits a murder with a knife would be entitled to a waiver hearing pursuant to KRS 635.020(2), but a sixteen-year-old female prostitute, in the company of violent males who are in control and assaultive toward her, should be automatically transferred to circuit court pursuant to KRS 635.020(4) simply because she was with them as one of them decided, of his own volition, to shoot a person."<sup>2</sup> App. Br. P. 19. It might seem enticing to accept this hypothetical at face value; however, a closer examination reveals that it is misleading. The legislature has not provided for automatic transfer where a juvenile defendant was simply present when someone else decided to shoot someone. Transfer is *mandatory* only upon a finding of probable cause that the juvenile, who is 14 or older, committed a felony and that a firearm was used in commission of the felony. See Caldwell v. Commonwealth, 133 S.W.3d 445, 452-453 (Ky. 2004)(pointing out that it is misleading to call transfer under KRS 635.020(4) automatic because there are certain findings that must be made before transfer can occur). If Appellant was innocently present when a violent male shot another person, there would not be probable cause that she committed a felony. There was ample evidence to support

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<sup>2</sup> In Darden, the court wrote: "It is inconceivable that the Legislature would provide that waiver is discretionary if a child murders someone with a knife, but provide that waiver is mandatory for a minor who merely brings his hunting rifle to school in the gun rack of his pickup truck. 52 S.W.3d at 577.

the District Court's determination that probable cause existed that Appellant committed the felony of complicity to first-degree assault. Appellant has not contested this finding and doing so in a misleading hypothetical should not benefit her cause.

Besides, it is entirely conceivable that the General Assembly would view the inherent danger and deadliness of the use of firearms as such a significant risk to citizens of this Commonwealth that it would provide different standards for transfer of juveniles committing felonies in which firearms are used than for juveniles whose felony crimes did not involve the use of firearms. In fact, this is consistent with the General Assembly's treatment of firearms in other statutes. See *e.g.*, KRS 533.060(1)(generally prohibiting probation for persons convicted of or pleading guilty to certain felonies involving "the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury"); KRS 218A.992 (providing for enhancement of penalties for certain drug offenses when a firearm was possessed in furtherance of the offense); KRS 527.100 (criminalizing possession of a handgun (but not a knife) by a minor); KRS 527.110 (criminalizing providing a handgun (but not a knife) to a minor).

In the lower courts and now in this Court, Appellant relied upon the unpublished opinion in W.L. v. Commonwealth, 2003-CA-000486-MR, 2004 WL 406537 (Ky. App. Mar. 5, 2004)(Attached to Appellant's Brief as Appendix E). In a footnote, Appellant recognizes that CR 76.28(4)(c) permits citation to unpublished opinions "if there is no published opinion that would adequately address the issue before the court." App. Br. P. 13, Fn. 5. While it was permissible for Appellant to cite this case to the Circuit Court and the Court of Appeals because there was no published opinion that would adequately

address the issue for which Appellant relied upon W.L., that is no longer the case. By Appellant's own admission, the "two-step probable cause analysis" that Appellant takes from W.L. "now seems to be supported" by Chipman. App. Br. P. 14. Thus, this Court should not consider W.L. as persuasive on the issues for which it is cited by Appellant. In any event, the court in W.L. was not asked to consider a case involving co-defendants in which one actually used the firearm and the other was complicit in the felony crime in which the firearm was used, and that court's assertion that "the district court must find that the juvenile used a firearm in the commission of the offense," should be limited to the specific facts of that case (Id. at \*2) and considered superseded by Chipman's explanation of KRS 635.020(4) as requiring that the child use the firearm or be complicit in its use. 313 S.W.3d at 99.

Appellant refers this Court to the Ohio case of State v. Hanning, 89 Ohio St.3d 86, 94, 728 N.E.2d 1059, 1065 (Ohio 2000), wherein the court held that a statutory provision requiring the transfer of a juvenile who was alleged to have used a gun in the commission of certain crimes did not "provide for imposing an accomplice's liability onto the juvenile." App. Br. Pps. 19-20. That case, however, does not support Appellant's interpretation of KRS 635.020(4) because the statute at issue there was substantially and significantly distinct from KRS 635.020(4). Along with other facts, the statute required that the child be "alleged to have had a firearm *on or about the child's person or under the child's control* while committing the act charged *and* to have displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the act charged." Hanning, 89 Ohio St.3d at 91, 728 N.E.2d at 1063 quoting R.C. 2151.26(B)(4)(b)(emphasis in original). KRS

635.020(4) does not restrict transfer to use of the firearm by the juvenile as the Ohio statute does, and complicity in the use of the firearm is sufficient for transfer in Kentucky.

Appellant also argues that the lower courts' interpretation of KRS 635.020(4) is contrary to the "true intent of the Legislature" because it "would create a system in which the offense itself is the focus" rather than the juvenile. App. Br. P. 21. Appellant cites Caldwell, 133 S.W.3d at 453, in support of the contention that a transfer decision "involves the determination of which system is appropriate for a juvenile defendant." App. Br. 20. This is true, but Caldwell holds that KRS 635.020(4) is constitutional because "[t]here is an obvious legitimate governmental interest in curtailing violent crimes by juveniles and protecting the public from harm" and "[t]he decision of the legislature to further that interest by transferring certain juveniles to circuit court to be tried as adults after a finding of probable cause by the district judge is reasonably related to the pursuit of that legitimate goal." 133 S.W.3d at 453. Appellant's argument gives undue weight to the interests of the juvenile without recognizing the public interest that is also addressed by transfer. KRS 635.020(4) does not improperly shift the focus to the offense rather than the juvenile. It does not provide a list of offenses for which transfer is automatic for any juvenile regardless of other circumstances. It requires that the juvenile be at least 14 years old and commit a felony and that a firearm be used in the commission of that felony. The statute appropriately focuses on the juvenile *and* the protection of the public from deadly firearms used in the commission of crimes committed by juveniles.

Appellant argues alternatively that "even if this Court does interpret KRS 635.020(4) to include complicity the appellant submits that this Court should require the

lower courts to specifically examine whether or not probable cause exists for both the underlying felony and the child's use or actual complicity in the use of the firearm.”

App. Br. P. 21. However, under the specific facts of this case, no separate examination is required. The District Court found that Appellant was complicit in first-degree assault.

- (1) A person is guilty of assault in the first degree when:
  - (a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
  - (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

KRS 508.010(1). A person is complicit in first-degree assault when she “[s]olicits or engages in a conspiracy . . . to engage in the conduct” causing serious physical injury or “[a]ids, counsels, or attempts to aid another person in planning, or engaging in the conduct” causing serious physical injury. KRS 502.020(2). Thus, in order to be complicit in the first-degree assault, Appellant had to be complicit in the causing of serious physical injury to another. She was and the District Court properly held so when it found probable cause that she committed complicity to first-degree assault. The undisputed evidence before the District Court was that the serious physical injury to the victim was caused by his being shot with a firearm. Because Appellant was complicit in causing the serious physical injury required as an element of first-degree assault and that serious physical injury was caused by use of a firearm, Appellant was complicit in the use of the firearm. The evidence does not allow any other conclusion. The lower courts already considered this in their determinations that a writ of mandamus was warranted. Appellant's request for additional findings in this regard should be denied.

CONCLUSION

The District Court erred in refusing to transfer Appellant to circuit court under the mandatory provisions of KRS 635.020(4), and the Circuit Court properly issued a writ of mandamus requiring the transfer. The Court of Appeals was correct in affirming issuance of the writ of mandamus.

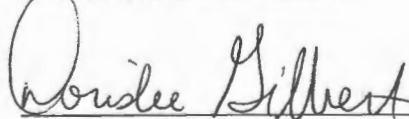
The District Court incorrectly interpreted KRS 635.020(4) as requiring that the juvenile being transferred be the one who used the firearm in commission of the felony in order to be transferred when the plain and unambiguous language of the statute requires only that the firearm be used in commission of the felony not that it be used by the juvenile.

The Commonwealth was entitled to relief in the form of a writ of mandamus because it had no adequate remedy by appeal or otherwise and because the proper administration of justice required issuance of the writ. The Commonwealth also showed that it would be irreparably injured by the District Court's erroneous order.

WHEREFORE, the Commonwealth requests that this Court affirm the opinion of the Court of Appeals affirming the Circuit Court's issuance of a writ of mandamus.

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