

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
FILE NO. 2013-SC-000684-CL

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SUPREME COURT

COMMONWEALTH OF KENTUCKY

APPELLANT

vs.

Certification of the Law from Jefferson District Court  
Division 104  
File Nos. 13-F-008009 and 13-F-008010

SHANNANDOAH CARMAN  
AND KENNETH WESTBAY

APPELLEES

\*\*\*\*\*  
**BRIEF FOR THE COMMONWEALTH**  
\*\*\*\*\*

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Brief for the Commonwealth* was mailed by U.S. First Class mail, postage prepaid, to: the Honorable James Moore, 119 South Seventh Street, Louisville, Kentucky 40202, Honorable Scott J. Barton, Kentucky Home Life Building, Suite 1916, 239 South Fifth Street, Louisville, Kentucky 40202, Honorable Michael R. Mazzoli, Cox & Mazzoli, PLLC, 600 West Main Street, Suite 300, Louisville, Kentucky 40202; Honorable Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601; the Honorable Donald E. Armstrong, Jr., Honorable David P. Bowles, Jefferson District Court, Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202, and the Honorable Stephanie Pearee Burke, Jefferson District Court, Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202 on this the nineteenth (19<sup>th</sup>) day of May, 2014. I hereby further certify that the record has not been withdrawn from the Clerk of the Supreme Court or the Jefferson District Court.

  
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DAVID A. SEXTON  
Assistant Jefferson County Attorney

## INTRODUCTION

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

**In light of this Court's decision in *Commonwealth v. Wilson*, 384 S.W.3d 113 (Ky. 2012), does Kentucky law authorize ex parte communications to change the conditions of release after the initial fixing of bail with no notice for the Commonwealth to be heard?**

**STATEMENT CONCERNING ORAL ARGUMENT**

In this Court's *Order Granting Motion for Reconsideration and Accepting Request for Certification of The Law* entered on April 17, 2014, this Court specifically directed that "oral argument will be set upon the completion of briefing."

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STATEMENT OF THE CASE

This certification of the law proceeding arises from the *ex parte* orders of the Jefferson District Court of July 25, 2013 releasing the Appellees on their own recognizance after the designated on-call duty judge of the Jefferson District Court initially fixed bail at \$5,000.00 full cash for Appellee Westbay and \$1,000.00 full cash for Appellee Carman and the orders of the Jefferson District of August 29, 2013 on the Commonwealth's motions to reinstate bond and to conduct a hearing into the manner in which the Appellees were released on their own recognizance.

Appellees Kenneth Westbay and Shannondoah Carman, along with their co-defendant Robert Jecker, were arrested on July 24, 2013 and charged with multiple offenses as set out in their respective *Uniform Citations*. Appellee Westbay and Jecker were charged with enhanced trafficking in a controlled substance (methamphetamine), possession of drug paraphernalia, possession of marijuana, and possession of a handgun by a convicted felon. (Appendix, p. 3). Appellee Carman was charged with the same three drug offenses but not the firearm possession charge. (Appendix, p. 2). Appellees Carman and Westbay are brothers. (VR 7-29-13, 11:23:25).

After all three defendants were arrested and taken into custody the Jefferson District Court on-call duty judge, the Honorable David P. Bowles, set a bond of \$5,000.00 full cash for Jecker and Westbay and a \$1,000.00 full cash bond for Carman. (Appendix, pp. 5; 9; 14). The Appellees were scheduled to make their initial appearance in the Jefferson District Court at 9:00 a.m. on July 25, 2013. (Appendix, pp. 5; 9). However, after Judge Bowles set the initial cash

bonds the Jefferson County Attorney subsequently learned that Jefferson District Court Judge Donald E. Armstrong, Jr., who was **not** one of the designated on-call judges that night, ordered that the bonds for Appellees Westbay and Carman be set aside and that both Appellees Carman and Westbay be released upon their own recognizance. (Appendix, pp. 4; 6; 8; 10; 11; 13). Appellees Carman and Westbay were also directed to appear back in the Jefferson District Court – on July 29, 2013 – some four days later than what had been their original initial appearance date of July 25, 2013. (Appendix, pp. 4; 8; 10; 13). Jecker was **not** released on his own recognizance. (VR 7-29-13, 11:23:05).

On July 29, 2013 the Commonwealth filed a *Motion to Reinstate Bond* in both the Carman and Westbay cases. (Appendix, pp. 26-33). The Commonwealth’s *Motion to Reinstate Bond* recited that the Jefferson County Attorney had learned that “[a]t some point after Judge Bowles set these bonds and before the arraignment of these defendants, **Pre-trial Services reports that another Judge, who was not one of the on-call judges that day, called in and lowered the bonds for Westbay and Carman to ROR. [emphasis added]**” (Appendix, pp. 26; 30). The Commonwealth complained in its motion that the release of the Respondents on their own recognizance was “inappropriately low.” *Id.* The Commonwealth’s motion further set forth that the complained about “bond change was purportedly done by a Judge who was not on call. The on-call judges for the 24<sup>th</sup> were Hon. David Bowles and the secondary judge was Hon. Stephanie Burke.” (Appendix, pp. 26-27; 30-31).

The Commonwealth, through the Jefferson County Attorney, further informed the District Court that it had learned through listening to jail phone calls placed by Appellee Carman “that a third party by the name of “Dre” may be involved in the lowering of these bonds.” (Appendix, pp. 27; 31). The Commonwealth’s motions recited that Appellee Carman stated in a

jail phone call that “Dre’s one of those that can get me out of here.” *Id.* The Commonwealth went on to relate in its *Motion to Reinstate Bond* that Appellee Carman’s mother, in one of the phone calls, informed her son that he was going to be released on his own recognizance but that it would take a few hours. *Id.* The Commonwealth’s motions further recited that one of the jail phone calls contained a statement to Appellee Carman by his mother that “Dre pulled strings and got you ROR’d.” *Id.* At some point in one of the jail phone conversations, Appellee Carman’s mother reminded her son that “you need to thank Dre a whole lot.” *Id.*

The Commonwealth’s motions went on to allege that “the bond change appears irregular and outside the normal procedure for the review of bond.” *Id.* The Commonwealth then went on to request that the original bond as set by Judge Bowles be reinstated as to both Appellees Westbay and Carman. *Id.* Further, the Commonwealth requested a hearing regarding the issue of the change in bond at which the Commonwealth requested an opportunity to subpoena “any and all recordings or documents related to these bond changes, ....” *Id.*

The Assistant County Attorney representing the Commonwealth in both cases on July 29, 2013 stated on the record that “[w]e’re asking that their bond be reinstated today.” (VR 7-29-13, 11:18:05). However, neither Appellee was represented by counsel. Mr. Moore explained that Appellee Carman had “stopped me in the hallway” and that he “told him he could make arrangements to hire me.” (VR 7-29-13, 11:19:45). Appellee Westbay appeared without counsel that day, although he indicated he was attempting to retain a lawyer. (VR 7-29-13, 11:23:55). After requesting reinstatement of the initial bonds, the prosecutor went on to request that “in the alternative, I’d ask for a hearing on 8-5” regarding “any recordings and documents that they may have regarding the bonds being changed”. (VR 7-29-13, 11:18:15). The prosecutor also informed the Jefferson District Court that she had spent “several hours on Friday listening to jail

phone calls between these defendants, at least Mr. Carman and his mother. And I do believe that something out of the ordinary and irregular occurred with regards to their bonds being changed after being set by the on-call judge.” (VR 7-29-13, 11:18:45).

While the Commonwealth, as previously noted, called what happened in these two cases “out of the ordinary and irregular”, the presiding Judge of the Jefferson District Court at the hearing on July 29, 2013 informed the Commonwealth otherwise. Specifically, Judge Stephanie Pearce Burke declared on the record that “**it is not unusual** for a district court judge to change a bond even after a bond had been set by the on-call judge prior to arraignment because it’s still the initial setting of bond.” (VR 7-29-13, 11:20:18). Judge Burke went on to state on the record that “an attorney probably called Judge Armstrong and he probably reviewed the record, **and that is not unusual.**” (VR 7-29-13, 11:21:20). In response, the Assistant County Attorney representing the Commonwealth that day promptly objected, stating “that it is therefore improper and not allowed”. (VR 7-29-13, 11:21:30). According to Judge Burke, “actually it’s still the initial setting of bond until they get to arraignment court, and that’s the way the judges are interpreting it. So it’s not improper if they’re not... I mean, for one judge to change it and until it has been.....” (VR 7-29-13, 11:21:35).

The Commonwealth went on to note on the record that Appellee Westbay was a four-time convicted felon and that in its view release upon his own recognizance was not appropriate for someone with his criminal record facing a firearm offense and trafficking in methamphetamine (VR 7-29-13, 11:22:35). The Commonwealth explained that it sought reinstatement of the \$1,000.00 full cash bond as to Appellee Carman as he was not a convicted felon. (VR 7-29-13, 11:23:48). The Jefferson District Court continued the two cases to August

5, 2013 on the issue of reinstating bond, stating “OK, I’ll grant your hearing.” (VR 7-29-13, 11:24:25). Additionally, Judge Burke further stated that “I wanna hear the calls.” (VR 7-29-13, 11:25:38).

These two cases against Appellees Carman and Westbay returned to the Jefferson District Court on August 5, 2013. The Appellees expressly waived the requirement that their preliminary hearings be conducted within twenty days of their arrest, (VR 8-5-13, 11:43:25), and also noted on the record that “Mr. Barton got retained this morning”. *Id.* The Commonwealth stated on the record that it did not object to the Appellee’s motion to continue the case and that while it was prepared to go forward it also acknowledged it would agree to the continuance so that the attorney retained by Appellee Westbay had adequate time “to prepare and at least get familiar with the case.” (VR 8-5-13, 11:44:05).

The Commonwealth went on to note that it had subpoenaed the mother of Appellees Carman and Westbay as the Commonwealth had “asked her to come and testify.” (VR 8-5-13, 11:44:30). The Assistant County Attorney explained that “we believe it is necessary to call her to testify regarding who it is that she is speaking to on the phone and identify the voices that she’s speaking to, at the very least.” (VR 8-5-13, 11:45:18). The Commonwealth once again on the record reiterated that “[w]e are saying that the bond was lowered improperly....” (VR 8-5-13, 11:46:42).

The Jefferson County Attorney, who was also present in court on August 5, 2013 told the presiding judge of the Jefferson District Court that “[w]e are just trying to find out what happened.” (VR 8-5-13, 11:47:37). The Jefferson County Attorney reminded Judge Burke that “[t]his bond was set, it was set by the duty judge.” (VR 8-5-13, 11:48:45). As the County Attorney recounted, “[a]nd all of the sudden, at some point another bond was set”. (VR 8-5-13,

11:47:48). The County Attorney further stated that “[w]e are entitled to know who the people are involved, how it was set and we were not heard.” (VR 8-3-13, 11:48:04). As the Jefferson County Attorney went on to point out, “[w]e had no opportunity to be heard on the matter.” (VR 8-5-13, 11:48:06).

Judge Burke specifically stated on the record at the August 5, 2013 proceedings that “[t]he bond was set and it was changed by another judge, it obviously was not me and I believe it was stated who the other judge who changed it was.” (VR 8-5-13, 11:48:14). While Judge Burke had indicated on July 29, 2013 that the court would conduct a hearing and that the court wanted to hear the jail phone call tapes, less than two weeks later the court rebuffed the Commonwealth’s efforts. Regarding the Commonwealth’s efforts to develop the record concerning just how and why the initially fixed bail was modified, Judge Burke stated that “I don’t believe that the forum for that is to be heard in this court.” (VR 8-5-13, 11:46:07). According to Judge Burke, “I don’t believe it is my position to set aside another judge’s order. If you believe it was inappropriate, you will need to challenge the appropriateness of that order in a different forum. Not in this court.” (VR 8-5-13, 11:47:25).

Later in the proceedings on August 5, 2013 the Jefferson County Attorney observed that “the judge did not change this bond on his own motion, so someone approached the judge and asked that this be done.” (VR 8-5-13, 11:49:45). In response to that observation by the Jefferson County Attorney, Judge Burke immediately stated that “[t]ypically that’s the way it would work.” (VR 8-5-13, 11:49:54). The Jefferson County Attorney went on to inquire of Judge Burke as follows, “[c]an you assist the Commonwealth on how we find out who and how that request was made?” (VR 8-5-13, 11:50:00). In response, Judge Burke stated that “I’m not going to call, I mean I don’t think it would be appropriate for this court to challenge the judge’s order.

I understand your position, but I think that a different forum is the place for that to take place.” (VR 8-5-13, 11:50:05).

A bit later in the proceedings of August 5, 2013 the Jefferson County Attorney once more stated that “we just want to know how the modification came to be without the Commonwealth not having a moment to be heard on that.” (VR 8-5-13, 11:51:48). Before the proceedings on August 5, 2013 concluded counsel for Appellee Carman stated that “I find it necessary to let this court know that neither myself, nor Mr. Barton are involved in this in any way. We made no phone calls to any judges who set bonds, and I think madam prosecutor will tell you how I got drug into this. I’m glad, I have no problem representing my client Mr. Carman in this mess but I, and myself and Mr. Barton are not going to have any issues as it relates to contacting any judge to set any bond, whether it’s appropriate or not.” (VR 8-5-13, 11:53:35). In support of the Commonwealth’s efforts to inquire into the complained about modification, the County Attorney observed that “an hour or so right before arraignment, it gets modified with no showing of anything.” (VR 8-5-13, 12:25:25).

Before the Commonwealth returned to the Jefferson District Court on August 29, 2013 on its motions to reinstate the bonds for both the Appellees, it filed a *Supplemental Memorandum* to its initial motions to reinstate bond. (Appendix, pp. 34-53). In that *Supplemental Memorandum*, the Commonwealth specifically requested “that this Court conduct a hearing into the matter of the setting aside of the initial cash bonds fixed by Judge Bowles wherein the known principals are required to testify **and** that this Court reinstate the requirement of the posting of cash bonds as was initially required by Judge Bowles the night of the defendants’ arrest [emphasis original].” (Appendix, pp. 36; 46). The Commonwealth went on set forth the legal authority for the Jefferson District Court to take the requested action and specifically noted what appeared to

be the apparent violation of the principles forbidding *ex parte* contacts recently set out by the Supreme Court of Kentucky in Commonwealth v. Wilson, 384 S.W.3d 113 (Ky. 2012). (Appendix, pp. 39-42; 49-52).

On August 28, 2013, *The Courier-Journal* reported that the Jefferson County Attorney had “asked that pre-trial officials and others be required to testify about why the defendants were freed July 24 without any input from prosecutors.” (Appendix, p. 24). *The Courier-Journal* report related that “[i]n an interview, Armstrong said he was called by an attorney **whose name he could not recall** and asked to set bond for the defendants. He said that the lawyer didn’t indicate – and may not have known – that another judge had already set bail at \$5,000.00 and \$1,000.00 for each [emphasis added].” The news report further related that Judge Armstrong “said he didn’t consider the call from the lawyer to be improper *ex parte* contact because judicial ethics rules exempt contacts for initially setting bail. He said he was never called by anyone named ‘Dre’.” *Id.*

When the two cases returned back to the Jefferson District Court on August 29, 2013 the Commonwealth requested that the court impose “a \$1,000.00 bond on Mr. Carman, which was the original bond that Judge David Bowles put on him at the time this case began, at the initial setting of bond.” (VR 8-29-13, 11:26:51). The Commonwealth also noted that “[w]e now have a stipulation of probable cause for this felony, and I’m asking you to place a minimum bond of \$1,000.00, which just happens to be the same amount that Judge Bowles originally established on this young man.” (VR 8-29-13, 11:28:01). The Commonwealth’s motion to reinstate the bond regarding Appellee Carman was denied. (VR 8-29-13, 11:28:04).

As regards Appellee Westbay, his attorney recited that “I’ve had no contact with Mr. Westbay since our last court date.” (VR 8-29-13, 11:28:19). Appellee Westbay’s lawyer

explained that Westbay had absconded, stating that **“I cannot tell the court where Mr. Westbay is at present.”** (VR 8-29-13, 11:28:38). The Jefferson County Attorney confirmed that information, stating that “we understand that Mr. Westbay, who was released on his own recognizance, has now absconded from parole.” (VR 8-29-13, 11:28:49). Thereafter, the Jefferson District Court issued a bench warrant for Appellee Westbay in the amount of \$25,000.00, full cash. (VR 8-29-13, 11:29:04).

The Jefferson County Attorney then went on to state that “the Commonwealth is asking this court to permit us to have a hearing today to make a record with regard to the events surrounding the release of these defendants by Judge Armstrong on their own recognizance.” (VR 8-29-13, 11:29:50). The Jefferson County Attorney observed that “you’ve have indicated that you weren’t going to reinstate their bonds. Well, we’re – we’re down the river past that now. We’ve got a bench warrant outstanding for one who’s absconded we’ve got probable cause established on the other, but the remaining issue that is still before this court, of which this court has clear jurisdiction and inherent authority to inquire into it, are the events of the night when the – when the two – two of these defendants were released on their own recognizance by Judge Armstrong. And if you decline to give us a hearing on that today, then alternatively, I’m going to ask that we be permitted whether you’re present or not to make a record today in court by avowal of what we would do and we would want to do, to be able to ask questions and to inquire into what happened. You swore Mr. Carman and Westbay’s mother to be appeared here today. She is here. We want to question her. We have tapes from the jail. We have other evidence that we want to introduce, and we think it’s in the extraordinary interest of justice – and the administration of justice in this building – that we be allowed to have a hearing to determine what happened that evening.” (VR 8-29-13, 11:30:25 – 11:31:35).

In response to the Commonwealth's request, Judge Burke stated that "Mr. O'Connell, I have made it very clear that I do not believe that this is the appropriate forum to address that issue, and I have made that ruling. And we are not having a hearing, and I am not conducting a hearing on this issue." (VR 8-29-13, 11:31:40). Judge Burke went on to further state that "I am not going to permit you to turn your dispute with the sitting judge into a circus in my court. That is my ruling." (VR 8-29-13, 11:32:05).

The Jefferson County Attorney went on to ask Judge Burke, "[m]ay we have the hearing outside your presence on the record?" The Jefferson District Court then refused to permit the County Attorney to make an avowal setting forth the proof he would have elicited if permitted to do so. In direct response to the County Attorney's request, Judge Burke responded in no uncertain terms: "No. You are not going to use my court as a forum to turn this dispute between you and another sitting judge into a circus." (VR 8-29-13, 11:32:15 – 11:32:20). The Jefferson County Attorney, on behalf of the Commonwealth then responded, "No, judge, this is not a circus. This has to do with the justice that goes on in this building." (VR 8-29-13, 11:32:30). The Jefferson County Attorney went on to remind Judge Burke that "[y]ou were the back-up judge that night, and you weren't even consulted on this." (VR 8-29-13, 11:32:47) Despite declining to conduct a hearing and forbidding the making of an avowal, Judge Burke declared that "your allegations are unfounded..." (VR 8-29-13, 11:33:09). A bit later Judge Burke summarily stated that "we are done." (VR 8-29-13, 11:33:20). In response, the County Attorney asked "so you – you will not let us make a record for ..." (VR 8-29-13, 11:33:22). In response, Judge Burke stated in no uncertain terms that "Mr. O'Connell, you are out of order." (VR 8-29-13, 11:33:25). The Commonwealth thereafter initiated its request for a certification of the law.

This Court subsequently granted the Commonwealth's motion seeking certification of the law pursuant to Section 115 of the Kentucky Constitution and CR 76.037(10) with respect to the following question of law:

**In light of this Court's decision in *Commonwealth v. Wilson*, 384 S.W.3d 113 (Ky. 2012), does Kentucky law authorize *ex parte* communications to change the conditions of release after the initial fixing of bail with no notice for the Commonwealth to be heard?**

This *Brief* is now filed on behalf of the Commonwealth pursuant to this Court's *Order* of April 17, 2014 which directed "that the parties shall comply with the briefing schedule as specified in CR 76.37(6)".

## ARGUMENT

### "WE FORBID IT." – THIS COURT'S DECISION IN WILSON PROHIBITS EX PARTE COMMUNICATIONS TO ALTER CONDITIONS OF RELEASE AFTER INITIAL FIXING OF BAIL

#### **A. Introduction.**

Once again, the Commonwealth is before this Court in a certification of the law proceeding concerning *ex parte* communications with judges in the Jefferson District Court. This Court made it abundantly clear in no uncertain terms that Kentucky law prohibited one sided *ex parte* contact with judges on substantive matters in pending criminal prosecutions in *Commonwealth v. Wilson*, 384 S.W.3d 113 (Ky. 2012). In *Wilson*, this Court stated in terms that ought to be readily apparent to even lay readers, much less those schooled in the law, that criminal defendants may **not** engage in *ex parte* contact with a judge of their own choosing to summarily set aside what another judge has properly done according to established rules and procedures on a substantive matter.

In Wilson, a criminal defendant, through his lawyer, engaged in *ex parte* contact with a Jefferson District Court judge who set aside the arrest warrant which had been issued by another judge of the Jefferson District Court according to the established rules and procedures governing the issuance of arrest warrants. In both Wilson and these two cases, a judge of the Jefferson District Court permitted criminal defendants to engage in one sided *ex parte* communications to summarily secure a criminal defendant's release into the community outside the established rules and procedures which govern criminal cases in this Commonwealth. In Wilson, this Court expressed nothing less than "the need to put this particular *ex parte* practice to rest." Wilson, at 114. Unfortunately, this practice has not been put to rest in the Jefferson District Court, but has regrettably returned, as Justice Scalia remarked in a different context, "[I]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried,...." Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 398, 113 S.Ct. 2141, 2149, 124 L.Ed.2d 352 (1993) (Scalia, J., concurring).

There is no gray area or subtle nuisance to this Court's admonition concerning *ex parte* contacts on substantive matters when it succinctly stated that "**We forbid it** [emphasis added]." Wilson, at 116. The complained about *ex parte* contact with Judge Armstrong came but seven months after this Court's decision in Wilson became final on December 20, 2012. As best the Commonwealth has been able to glean from the statements of Judge Burke on the record in open court and the public statements of Judge Armstrong as reported by *The Courier-Journal*, the *ex parte* contact that happened in the Carman and Westbay cases was **not** some sort of aberration within the Jefferson District Court. As the Commonwealth has previously noted herein, Judge Burke expressly observed on the record in open court that "**it is not unusual** for a District Court Judge to change a bond even after a bond had been set by the on call judge prior to arraignment

because it is still the initial setting of bond.” (VR 7-29-13, 11:20:18). Judge Burke went on to state on the record that “an attorney probably called Judge Armstrong and probably reviewed the record, and **that is not unusual.**” (VR 7-29-13, 11:21:20). According to Judge Burke, the *ex parte* communications Judge Armstrong publicly acknowledged occurred in the Carman and Westbay cases was not unauthorized *ex parte* contact since “it still the initial setting of bond until they get to arraignment court, and **that is the way the judges are interpreting it.**” (VR 7-29-13, 11:21:35). Of course, that interpretation is wrong since this Court expressly explained that “[o]ne-sided contacts between judges and lawyers or parties regarding pending and impending cases are prohibited” and that “Kentucky’s Judicial Canons forbid one-sided contacts relating to all judicial proceedings, “except for some limited instances that “do not deal with substantive matters...” Wilson, at 116. Of course, the decision to release Appellees Carmen and Westbay back into the community was a “substantive matter” as was the decision in Wilson to release the offender back into the community when the arrest warrant was set aside.

Most assuredly, the law of this Commonwealth as announced by this Court does not permit or authorize the type of *ex parte* communication with a judge that occurred in this case. It is uncontroverted that Judge Bowles was one of the two designated on call duty judges the night Carman and Westbay were arrested. He properly considered information communicated to him by Pretrial Services as authorized by the *Judicial Guidelines For Pretrial Release And Monitored Conditional Release* adopted by this Court as the law of this Commonwealth in its *Order 2011-12* effective on December 15, 2011. (Appendix, pp. 54-62). Section 4 of those *Judicial Guidelines* enacted by this Court provide that “[i]nformation obtained by Pretrial Services during the interview of the defendant, its investigation and will be presented to the court within twelve hours of the defendant’s incarceration.” (Appendix, p. 58). The Commonwealth

should rightly expect that the initial fixing of bail in Jefferson County will be undertaken by neutral Pretrial Service employees who will present information to the appropriately designated on call duty judge to receive such information and to initially affix the bail.

However, the record reflects that the initial fixing of bail by the duly appointed on call duty judge based upon information provided by Pretrial Services, at least in Jefferson County, is but the initiation of some sort of legal free for all up until criminal defendants actually appear in Jefferson District Court. The Jefferson County Attorney has learned, from the public declarations of Jefferson District Court Judges Burke and Armstrong, that “**it is not unusual** for criminal defendants to enlist the assistance of unknown persons or lawyers to obtain their release by *ex parte* contact with whatever judge they may fancy **and** that somehow these one sided contacts to summarily set aside the bail decisions of the designated on call duty judge does not offend the principles declared by this Court in Wilson.

This Court could not have used any stronger words than what was used in Wilson to condemn one sided contacts to undo prior judicial action taken on substantive matters in pending criminal cases. In Wilson, the one sided *ex parte* contact summarily undid a judicially approved warrant of arrest issued in accordance with the applicable rules and procedures. In this case, the one sided *ex parte* contact resulted in the summary setting aside of the initial bail fixed in accordance with the applicable rules and procedures. Unless the Commonwealth is somehow badly mistaken, this Court’s declarations in Wilson were mandatory directions and not some sort of precatory guidelines or suggestions which can be simply ignored or altered by litigants, their lawyers, or judges at their whim.

### B. “We Forbid It” – The Wilson Decision.

As this Court explained in Commonwealth v. Wilson, 384 S.W.3d 113 (Ky. 2012) the facts and circumstances of that case “graphically depict the need to put this particular *ex parte* practice to rest.” Wilson, at 114. The Court in Wilson recounted that the victim in that case had suffered physical injuries and as a result thereof the defendant was charged with the criminal offense of Assault in the Fourth Degree. An arrest warrant was issued on February 17, 2011 and on the following day – and before Wilson was arrested – his attorney made an *ex parte* request to a different Jefferson District Court judge than the one who had initially issued the original arrest warrant. *Id.* As a result of the one sided version of events given to a different District Court judge, the previously issued arrest warrant was withdrawn and a summons issued instead. As this Court observed in Wilson, “[b]oth sides apparently agree that such *ex parte* communication by a criminal defense lawyers with judges after warrants have been issued, is a common practice in Jefferson District Court.” *Id.*

This Court then went on to explain that “[w]e need to go no further to **deplore this practice** than Supreme Court Rule 4.300, Canon 3B(7) which prohibits *ex parte* contacts in these circumstances [emphasis added].” This Court went on to explain that “[t]here are exceptions in this rule when dealing with certain matters that do not deal with substantive matters.” *Id.* This Court went on to observe that the effort to set aside the arrest warrant was “undoubtedly” addressing a “substantive” matter for which one sided *ex parte* communications are forbidden. *Id.*

Regarding the practice and policy of the Jefferson District Court permitting *ex parte* motions to set aside arrest warrants, this Court stated that in no uncertain terms that: “**We forbid it** [emphasis added].” Wilson, at 116. This Court then went on to set out the law regarding one

sided contacts in this state between judges and lawyers or parties regarding pending and impending cases. What this Court said in Wilson bears repeating here. Wilson, at 116:

**One-sided contacts between judges and lawyers or parties regarding pending and impending cases are prohibited**, even in matters where the legal stakes are lower than those at issue in this case. In particular, Kentucky's district judges handle a large volume of routine matters, including traffic citations and criminal misdemeanor cases. Disposition of most of these cases evades public scrutiny and lawyerly oversight. As a result, the lines of ethical conduct have, in some areas, become blurred. Courthouse culture seems to tolerate, and perhaps even encourage, in these low-stakes cases a one-sided intercession with the judge by parties, lawyers, or even elected officials. **But Kentucky's Judicial Canons forbid one-sided contacts relating to all judicial proceedings, except in regards to scheduling, initial fixing of bail, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits.** SCR 4.300, Canon 3(B)(7)(a). And even those exceptions are limited to instances in which nobody will gain a procedural or tactical advantage, and the judge notifies all other parties of the substance of the ex parte communication and allows an opportunity to respond. SCR 4.300, Canon 3(B)(7)(a)(i) and (ii). “[A] judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met.” SCR Commentary on SCR 4.300, Canon 3(B)(6)-(7). And “local policy” does not come within the enumerated exceptions...” *Thomas v. Judicial Conduct Com'n*, 77 S.W.3d 578, 580 (Ky. 2002). It is the judge's ethical responsibility to maintain the high standard for local practice, prohibiting improper ex parte contacts by lawyers and non-lawyers alike. It is the lawyer's correlative ethical duty under SCR 1.130-3.5 to avoid engaging in one-sided practice [emphasis added].

The law as set out by this Court in Wilson could not be any more clear. This Court explained in no uncertain terms that Kentucky's Judicial Canons “forbid one-sided contacts relating to all judicial proceedings, except in regards to scheduling, initial fixing of bail, administrative proceedings, except emergencies **that do not deal with substantive matters or issues on the merits.**” *Id.*

Furthermore, this Court went on to note that “even these exceptions are limited to instances in which nobody will gain a procedural or tactical advantage, and the judge notifies all other parties of the substance of the *ex parte* communications and allows an opportunity to respond.” *Id.* The one sided communication which set aside the initial bail determination in these cases concerned a substantive matter which may **not** be taken up by way of one sided contacts.

### C. Application of Wilson.

What happened in this case falls squarely within the prohibition against *ex parte* contacts announced in Wilson. In these cases, Judge Bowles’ actions as the designated on call duty judge was taken in conformity with the law and most certainly did not constitute some sort of unauthorized *ex parte* action. Judge Bowles was authorized to act on information provided to him by Pretrial Services and to make a judicial determination, given the nature of the charged offenses and the Appellees’ criminal histories, that cash bonds were appropriate. The initial fixing of bail undertaken by Judge Bowles was entirely appropriate and in accordance with the law.

However, what occurred a few hours before the Appellees were to appear for their initial appearance in Jefferson District Court most certainly ran afoul of what this Court expressly declared in Wilson and the provisions set out in SCR 4.300, Canon (B)(7)(a). This Court made abundantly clear in Wilson that one sided *ex parte* contacts with a judge cannot “**deal with substantive matters or issues on the merits** [emphasis added].” Wilson, at 116. The complained about one sided *ex parte* contact with Judge Armstrong most certainly dealt with a “substantive matter.” The prosecutorial arm of the Commonwealth’s Executive Branch has a strong and legitimate interest in seeing that it is not intentionally excluded from proceedings

which seek to modify or set aside an initial bail determination. The decision concerning whether to set aside a bail determination which has been previously approved by a reviewing judge addresses critical issues of court integrity and public safety. Changes or modifications to bail to ensure the appearance of criminal defendants and the protection of the community surely constitute “substantive matters” about which the Commonwealth is rightly entitled to be included in any discussion.

Bail determinations constitute “substantive matters” which should afford the Commonwealth the opportunity to weigh in and to be heard when a criminal defendant seeks to change bail decisions. The Commonwealth is rightly entitled to be heard concerning the setting of bail and other conditions of pretrial release since the “basic objective of a criminal justice system” is “bringing the accused to trial.” U.S. v. Salerno, 481 U.S. 739, 745, 107 S.Ct.2095, 2100, 95 L.Ed.2d 697 (1987). The setting of bail is a substantive matter which must be fairly and accurately determined so that the charged offender actually appears in court to answer the charged criminal offense. Additionally, the setting of an appropriate bail amount and other appropriate conditions of release serves the interests of preventing a repetition of the charged offenses or the commission of further offenses against others. Additionally, the Commonwealth should be permitted to weigh in as the law rightly recognizes that “the Government’s regulatory interests in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.” Salerno, 481 U.S. 739, 748, 107 S.Ct. 2095, 2102, 95 L.Ed. 2d 697 (1987). Decisions concerning bail consider a defendant’s past criminal acts, reasonably anticipated future conduct, the nature of the charged offenses, and whether the defendant is a flight risk. *See*, KRS 431.520; KRS 431.525(1).

That the one sided *ex parte* contact in these two cases runs afoul of multiple prongs of Kentucky Judicial Canons discussed in Wilson should be readily apparent. If permitted to stand, the one sided *ex parte* practice permitted by the Jefferson District Court in this case would most certainly would give criminal defendants “a procedural or tactical advantage.” See, SCR 4.300, Canon 3(B)(7)(a). Wilson, at 116. That Westbay absconded after being summarily released is precisely the sort of advantage offenders can gain if the practice goes unchecked. This Court in Wilson further observed that once a permissible *ex parte* contact occurs the judge is mandated to notify all other parties of the substance of the *ex parte* communication **and** allow an opportunity to respond. *Id.* The Commonwealth was never notified by the judge who entertained the complained about *ex parte* communication of the substance of that admitted *ex parte* communication, other than reading his public acknowledgement several weeks later in *The Courier-Journal*. Nor was the Commonwealth permitted an opportunity to respond to the one sided *ex parte* communication which the unknown person undertook with Judge Armstrong. Needless to say, the complained about *ex parte* contact which summarily released the Appellees back into the community on nothing more than their own recognizance was one that fell well short of satisfying all the criteria set forth in SCR 4.300, Canon 3(B)(7)(a).

The Appellees will undoubtedly continue to attempt to justify or excuse the *ex parte* communication which led to their release shortly before their initial appearance as being but part of a “process” of the “initial fixing of bail.” ( *Response to Commonwealth’s Motion for Certification of the Law*, p. 4). According to them, the “initial fixing of bail” is “committed to the court” and therefore what happened in these two cases was appropriate because “two judges of equal standing in Jefferson District Court could take part in the ‘initial fixing of bail’ for one or more defendants in a case,…” (*Id.*, at 5).

While the Appellees understandably went to turn the “initial fixing of bail” into some sort of legal free-fire zone where defendants who know the “right” lawyer can contact the “right” judge to gain their immediate release, their position finds no basis in SCR 4.300, Canon 3(B)(7)(a) or Wilson. First, the “initial fixing of bail” was when Judge Bowles set bail as he was legally authorized to do. Secondly, even if the “initial fixing of bail” was an ongoing process, the Appellees conveniently ignore the obvious restriction that the exceptions set out in the Judicial Canons cannot “deal with substantive matters or issues on the merits.” Wilson, at 116. Just as the setting aside of an arrest warrant was a prohibited “substantive matter” so is the setting aside of bail.

It is uncontroverted that the *ex parte* requests in this case were made to a Jefferson District Court Judge who was not the designated on call duty Judge or to whom the underlying criminal case had been assigned. The initial fixing of bail correctly and properly occurred when Judge Bowles made the judicial determination, based upon the information that was provided to him by Pretrial Services, that full cash bonds were appropriate given the nature of the charges and the Appellees’ criminal histories. The Commonwealth was rightly entitled to be given at least the opportunity to be heard when the Appellees set in motion their communication with Judge Armstrong seeking to set aside Judge Bowles’ earlier judicial determination regarding the setting of an appropriate bail. Just as the setting aside of an arrest warrant was a substantive matter for which one sided *ex parte* contacts are forbidden, the setting aside of bail and the release of the Appellees back into the community was a substantive matter about which the Commonwealth was rightly entitled to be heard. The *ex parte* practice approved by the Jefferson District Court in these two cases once again deprived the Jefferson County Attorney of that most basic right of any litigant before the Court of Justice – the simple right to be heard.

## **D. Application of the Prohibition against Ex Parte Contacts Preserves the Integrity of the Judicial System.**

### **1. Introduction.**

This Court's prohibition against one sided *ex parte* contacts on substantive matters in litigation is not some sort of end in itself. This Court's announced adherence to the fundamental principle that "fervent and competent representation of opposing viewpoints of litigation would serve to forge the essence of the truth and that justice would prevail." Wilson, at 116, ensures that the integrity of the judicial process, particularly in criminal matters where the Government exercises its broad authority, is maintained. Vigorous adherence to the prohibition against one sided *ex parte* communication protects several fundamental principles of both constitutional and statutory law critical to the proper functioning of our criminal justice system and bear repeating:

### **2. Open Court Proceedings.**

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

As this Court has recently acknowledged, the value “of openness lies in the fact that people not actually attending trials can have confidence in the standards of fairness of being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known.” Riley v. Gibson, 338 S.W.3d 230, 235 (Ky. 2011) quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). The *ex parte* practice approved by the Jefferson District Court in this case excluding the elected official who is duty bound by law to protect the Commonwealth’s interest frustrates the reasons why we have open court proceedings. *See also*, Estes v. Texas, 381 U.S. 532, 588, 85 S.Ct. 1628, 1662, 14 L.Ed.2d 543 (1965) (Harlan, J., concurring) (“Essentially the public – trial guarantee embodies a view of human nature, true as a general rule that judges, lawyers, witnesses and jurors will perform their respective functions more responsibly in an open court than in secret proceedings”; In re Oliver, 333 U.S. at 270, 68 S.Ct. at 506 (“The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint of possible abuse of judicial power”).

Further, those who would attempt to defend the *ex parte* practice in this case can take no refuge in the fact that the off the record *ex parte* communication concerned a bail matter. “While the Sixth Amendment speaks only of a “public trial” the Supreme Court has construed this right to apply to a range of criminal proceedings, including jury selection, ... suppression hearings,... and even pre-indictment probable cause hearings.... Bail hearings fit comfortably within the sphere of adversarial proceedings closely related to trial. Bail litigation arises only after a defendant is formally charged with crimes that the prosecution must to prepared to prove within a specified time at trial.... Further, bail hearings, like probable cause and suppression hearings, are frequently hotly contested and require a court’s careful consideration of a host of facts about

the defendant and the crimes charged. Thus, there is an interest in conducting such hearings in open courtrooms so that persons with relevant information can come forward....While the presentation of evidence at bail hearings may be more informal than probable cause and suppression hearings, the matter in dispute in of no less public concern....[B]ail hearings determine whether a defendant will be allowed to retain, or force to surrender, his liberty during the pendency of his criminal case.” United States v. Abuhamra, 389 Fd.3d 309, 323-324, (2nd Circuit 2004).

The complained of *ex parte* practice of the Jefferson District Court with no notice to the Commonwealth and no opportunity for the people’s representative to be heard violates the fundamental principle that criminal prosecutions are two-party proceedings which are to be open to the public. Sections Eight and Eleven of the Kentucky Constitution “when viewed in the context of their history and the history and tradition of our people can only be taken as an expression of the principal that justice cannot survive behind walls of silence and of an intent and spirit there be a ‘presumption of openness’ to criminal proceedings in the court.” Ashland Publishing Co. v. Ashbury, 612 S.W.2d 759, 761 (Ky. App.1980). “The public has a legitimate interest in criminal proceedings, and this is thwarted by *ex parte* proceedings.” Storer Communications, Inc. v. Pressor, 818 Fd.2d 330, 335 (6th Circuit 1987). “Ex parte proceedings, particularly in criminal cases, are contrary to most basic concepts of American justice....” *Id.* The decision to summarily set aside what Judge Bowles did in conformity with the law violates the fundamental principles of openness.

We do not know who called Judge Armstrong nor do we know what was said to him which caused him to summarily order the immediate release of the Appellees. The Commonwealth would have liked to have been given the opportunity to defend the bail

previously set by Judge Bowles in light of the charged offenses and the Appellees' criminal histories. The public's confidence in the integrity of the judicial system is rightly called into question when unknown persons can contact a judge of their choosing and engage in an off the record *ex parte* communication to obtain their summary release contrary to the rules and procedures promulgated by this Court in its supervisory capacity over the Court of Justice.

### 3. Due Process of Law.

The Jefferson District Court's continued adherence to *ex parte* proceedings is so fundamentally unfair that it constitutes a violation of due process of law as guaranteed by the Kentucky and Federal Constitutions. "Section 2 of the Kentucky Constitution provides that the Commonwealth shall be free of arbitrary actions. With respect to adjudications, whether judicial or administrative, this guarantee is generally understood as a due process provision whereby Kentucky citizens may be assured of fundamentally fair and unbiased procedures." National Resources and Environmental Protection Cabinet v. Kentec Coal Co., 177 S.W.3d 718, 724 (Ky. 2005). The protections of Section 2 of the Kentucky Constitution are "a concept we consider broad enough to embrace both due process and equal protection of the laws, both fundamental fairness and impartiality." Pritchett v. Marshall, 375 S.W.2d 253, 258 (Ky. 1963).

In the criminal context, a criminal procedure will be held to violate due process if the procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to the rank as fundamental." Medina v. California, 505 U.S. 437, 445, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). There is a "strong presumption against *ex parte* submissions" since "fairness can rarely be obtained by secret, one-sided determination of facts decisive of right." Abuhamra, at 322. "Particularly where liberty is at stake, due process demands that the individual and the government each be afforded the opportunity not only to advance their

respective positions but to correct or contradict arguments or evidence offered by the other.” Abuhamra, at 322. The Jefferson County Attorney seeks only the opportunity to receive notice and the opportunity to be heard. The complained about *ex parte* practice of the Jefferson District Court is contrary to the fundamental principle that litigants are entitled to notice and the opportunity to be heard. Storm v. Mullins, 199 S.W.3d 156, 162 (Ky. 2006). (“Ordinarily notice and an opportunity to be heard are the basic requirements of due process.”).

#### **4. The County Attorney’s Constitutional and Statutory Authority.**

The ongoing practice of the Jefferson District court constitutes an impermissible restraint on the constitutional and statutory duties and obligations of the Jefferson County Attorney. Intentionally excluding the County Attorney when *ex parte* communications are made about substantive matters in criminal cases infringes upon the County Attorney’s duties delegated exclusively to the County Attorney to defend the Commonwealth’s interests in criminal cases. The Commonwealth has a right to receive notice and an opportunity to be heard when a criminal defendant seeks to alter or modify his bail or other conditions of release previously imposed in accordance with the law.

It is fundamental that the executive branch is responsible for the enforcement of the laws of the Commonwealth. *See*, Kentucky Constitution Section 81. It is “the duty of the executive department to enforce criminal laws.” Bradshaw v. Bell, 487 S.W.2d 294, 299 (Ky. 1972). Section 27 of the Kentucky Constitution specifically provides for three branches of state government: legislative, executive and judicial branches. Kentucky has strictly adhered to the separation of powers doctrine. Legislative Research Commission v. Brown, 664 S.W.2d 907, 912 (Ky. 1984). “Perhaps no state forming a part of the national government of the United States has a Constitution whose language more emphatically separates and perpetuates what

might be termed the American tripod form of government more than does our Constitution....” Silbert v. Garrett, 197 Ky. 17, 246 S.W. 455, 457 (1972). Its purpose is to retain the balance of powers contemplated in the Kentucky Constitution. Dannheiser v. Commonwealth, 4 S.W.3d 542, 547 (Ky. 1999) (“Section 27 and 28 of the Kentucky Constitution have separate duties and powers in order to maintain a balance of government.”).

As the prosecution of crime is exclusively an executive function, Flynt v. Commonwealth, 105 S.W.3d 415 (Ky. 2003), it is no answer that somehow the Judge of the Jefferson District Court to whom *ex parte* communications are directed will somehow adequately protect the Commonwealth’s interest as “[t]he judge does not represent the state any more than he does the defendant in the prosecution.” Hoskins v. Maricle, 150 S.W.3d 1, 14 (Ky. 2004). Simply put, the Judge cannot substitute for the County Attorney or one of his assistants since it is improper for a trial court to assume the role of a prosecutor in a criminal action. Legrand v. Commonwealth, 454 S.W.2d 726 (Ky. 1973). The facts and circumstances of this case well illustrate the inherent flaw in the Jefferson District Court’s ongoing *ex parte* procedure – no one was present before the court whose job it was to point out that the bail amounts were proper and appropriate given the crimes charged and the criminal histories of the Appellees.

Given Kentucky’s unequivocal recognition of each governmental branch’s sphere of proper authority, the complained about ongoing practice of the Jefferson District Court which intentionally excludes the County Attorney impermissibly prohibits the fundamental role of the County Attorney in exercising his prosecutorial function. The obvious harm of the complained about practice is that it excludes from participation those attorneys who represent the prosecutorial arm of the executive branch from doing that which lawyers do in our adversarial system-present evidence and make arguments on behalf of those whom they represent. Without

notice and an opportunity to be heard, no one is present who can present evidence and make objections in opposition to the assertion that offenders like the Appellees ought to be summarily released back into the community.

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

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

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

#### **5. The Ongoing Ex Parte Practice is Contrary to Kentucky Constitution Section 116.**

This Court has set out in Chapter 4 of the Kentucky Rules of Criminal Procedure a comprehensive set of rules for how bail is to be administered in this Commonwealth. The Jefferson District Court is not free to simply disregard the express provisions governing bail as

set out by this Court in its adoption of the Kentucky Rules of Criminal Procedure. It ought to go without saying that the various judges of the Court of Justice exercise their judicial authority “subject to the administrative authority of the respective chief judges and the Chief Justice **and subject to the rule-making power of the Supreme Court** [emphasis added].” Richmond v. Commonwealth, 637 S.W.2d 642, 646 (Ky. 1982). *See also*, Brutley v. Commonwealth, 967 S.W.2d 20 (Ky. 1998). Pursuant to Section 116 of the Kentucky Constitution, the power to proscribe rules of procedure and practice is “vested exclusively in the Supreme Court and should not be undertaken by other courts.” Abernathy v. Nicholson, 899 S.W.2d 85, 87 (Ky. 1995). The ongoing practice of the Jefferson District Court constitutes a rule: “[i]t is not limited to a particular case; it is prospective by its terms; and it is indefinite in nature.” Delahanty v. Commonwealth, 295 S.W.3d 136, 143 (Ky. App. 2009). Both Judge Burke and Judge Armstrong have publically confirmed that the *ex parte* communication in these two cases is an ongoing practice which constitutes nothing less than an ongoing rule of practice in at least some of the divisions of the Jefferson District Court.

While the Jefferson District Court is certainly free to adopt local rules of practice, such rules are effective only “when approved by the Supreme Court” and “cannot contradict...any rule of practice and procedure promulgated by the Supreme Court....”. *Id.* Because the Jefferson District Court lacks the authority to contradict the Kentucky Rules of Criminal Procedure promulgated by this Court, the ongoing *ex parte* practice of the Jefferson District Court is invalid as a matter of law on that basis alone. The complained about ongoing practice is contrary to the rules of procedure promulgated by this Court in the Kentucky Rules of Criminal Procedure and as such violates Section 116 of the Kentucky Constitution.

## 6. Violation of SCR 1.040(4)(c).

As previously explained herein, the complained about *ex parte* communication was made to Judge Armstrong who was not the on call duty judge assigned to initially set bail nor was he the judge assigned to the underlying criminal cases against Appellees Carman and Westbay. These uncontroverted facts suggest a violation of SCR 1.040(4)(c) which provides in relevant part that “[i]n the absence of good cause to the contrary, all matters connected with a pending or supplemental proceeding shall be heard by the judge to whom the proceeding was originally assigned.”

This Court has explained that the rule adopted by it has the “primary purpose of requiring all matters connected with a pending or supplemental proceeding” to be heard by the judge to whom the proceeding was originally assigned to prevent...forum shopping.” Cox v. Braden, 266 S.W.3d 792, 798 (Ky. 2008). The record is completely silent as to why the complained about *ex parte* communication directed to Judge Armstrong was directed to Judge Armstrong rather than the judge to whom the underlying criminal case had been assigned. Summarily taking up the issue of bail and releasing the Appellees without a prosecutor present inexplicably places the narrow interest of the Appellees “ahead of all interest, including the protection of the public.” In re Honorable Cynthia Gray Hathaway, 464 Mich. 672, 630 N.W.2d 850, 860 (Mich. 2001).

Nor can the complained about ongoing *ex parte* practice find safe harbor in the notion that is the common and accepted practice of the Jefferson District Court to allow these sorts of one sided communications. Surely, the criminal justice process should not be reduced to some sort of “cat and mouse game” where criminal defendants can short circuit the procedures established by this Court and earn their summary release by merely calling the “right” lawyer who knows the “right” judge to contact. In Thomas v. Judicial Conduct Commission, 77 S.W.3d

578 (Ky. 2002), this Court addressed the very issue of *ex parte* proceedings when it held that a judge's suspension of a defendant's jail sentence without the County Attorney present to be a violation of the Kentucky Code of Judicial Conduct. This Court went on to note that any "defense by Judge Thomas that his actions shall be permitted because of a 'long standing judicial policy in Marshall County' which permits such *ex parte* communications is without merit." *Id.*, at 580. The same is absolutely true in this case. The various divisions of the Jefferson District Court are simply not free to suspend as inconvenient or unnecessary requirements imposed by this Court in its supervisory capacity over the Court of Justice. This Court has established a clear prohibition against *ex parte* communications through its rule-making authority and as set out in the recent Wilson decision – the Jefferson District Court is not free to ignore that authority. Bell v. Commonwealth, et al, 423 S.W.3d 742, 747 (Ky. 2014).

### CONCLUSION

The Commonwealth respectfully requests that for the reasons set out above, this Court should certify the law of this Commonwealth as expressly forbidding *ex parte* communications to change the conditions of release after the initial fixing of bail with no notice or opportunity for the Commonwealth to be heard.

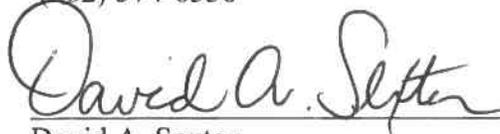
The Jefferson District Court's declaration that the Commonwealth's efforts were nothing more than a "circus" belittles the County Attorney's, the Commonwealth's, and most importantly in this instance, the public's right to fair and open proceedings in our criminal justice system. The *ex parte* contact about which the Commonwealth complains in this case is the sort of ongoing practice in the Jefferson District Court which causes the public to understandably lose confidence and trust in the criminal justice system. The "not unusual" practice is one which reduces our criminal justice system to one where summary release from custody can be obtained

if a criminal defendant knows the "right" persons and judges to contact. Surely, those of us responsible for the fair administration of criminal justice can do better.

Respectfully submitted,



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