

No. 09-1272

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF KENTUCKY,

Petitioner

v.

HOLLIS DESHAUN KING,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S MOTION TO DISMISS
THE PETITION AS IMPROVIDENTLY GRANTED

On September 27, 2010, this Court granted the Commonwealth's Petition for writ of certiorari to the Kentucky Supreme Court. Since that time, Counsel for the Respondent has become aware of proceedings in this case in the state trial court that rendered the case moot before the Commonwealth's Petition for Certiorari was filed on April 19, 2010. Upon learning of these proceedings, Counsel for the Respondent immediately contacted Counsel for the Petitioner, who then initiated additional litigation in state court. Counsel for the Respondent promptly notified the Clerk of this Court about that litigation. Counsel now moves this Court to dismiss the petition as improvidently granted.

The following events occurred in this case, both before and after the Commonwealth filed its petition for certiorari:

1. On January 21, 2010, the Kentucky Supreme Court vacated the Respondent's conviction. *King v. Commonwealth*, 302 S.W.3d 649 (2010). However, the Commonwealth did not seek a stay of the court's mandate and, as a result, the case was remanded to the Fayette Circuit Court "for further proceedings consistent with" the Kentucky Supreme Court's opinion. *Id.* at 657.

2. On March 4, 2010, the Commonwealth moved to dismiss the charges against the Respondent in Fayette Circuit Court. Appendix at 1, 12, 14. The Fayette Circuit Court held a hearing on how to proceed in the case entered against the Respondent. Regarding the possibility of further prosecution, the trial judge asked the prosecutor whether, "once all this evidence inside the apartment is suppressed...is there anything more to move forward with by the Commonwealth?" The prosecutor replied: "No, that's why we move to dismiss it, Judge." Appendix at 13-14. The prosecutor's representation that the Commonwealth had no admissible evidence against King prompted the trial court to dismiss the charges with prejudice.

The trial court explained: "I understand the Commonwealth's position – I think that in this case, when there's really not anything else that I don't think can come up, I'm going to dismiss the charges...." Appendix at 14; *see also* Appendix 34-35. ("It is undisputed that the Fayette Commonwealth's Attorney's Office has represented to this Court, both at the hearing after Remand from the Kentucky

Supreme Court and in oral arguments on this Motion, that it would have no evidence to support any charges against King that was not the subject of the Kentucky Supreme Court's Reversal and Remand....")

4. The Commonwealth did not appeal the order dismissing the case with prejudice.

5. The Commonwealth filed its Petition for Certiorari in this Court on April 19, 2010. The Commonwealth's Petition for Certiorari did not mention that all of the charges against the Respondent had been previously dismissed with prejudice on March 8, 2010.

6. Counsel for Respondent filed her Brief in Opposition before this Court to the Commonwealth's Petition for Certiorari on August 24, 2010. At that time, however, Counsel for Respondent was unaware of the dismissal of the charges against the Respondent that occurred in the Fayette Circuit Court. As a result, the Brief in Opposition did not discuss the dismissal of the charges against the Respondent.¹

7. On September 27, 2010, this Court granted the Commonwealth's Petition for Certiorari. Seven days later, on October 4, 2010, after the Court granted the

¹ Undersigned counsel deeply regrets this oversight, and she apologizes for the added work that her lapse has caused this Court. While the case was on remand to the Fayette Circuit Court, the presiding judge assembled the local prosecutor and King's former trial attorney, who is not employed by the Department of Public Advocacy. Although undersigned counsel was counsel of record for King at the time, she was not notified of the hearing or copied on the Order dismissing the case with prejudice. After this Court granted review, King's former trial attorney contacted undersigned counsel and notified her of that Order. Undersigned counsel immediately contacted counsel of record for the Commonwealth and wrote to the Clerk of this Court informing him of the Order, the Commonwealth's motion to "rescind" the Order, and of King's intent to file this Motion to Dismiss.

Petition, Counsel for Respondent learned that the charges against the Respondent had been dismissed with prejudice months earlier, before the Petition for Certiorari had been filed. Counsel for Respondent immediately contacted Counsel for the Petitioner, who then initiated litigation in state court. By letter dated October 12, 2010, Counsel for Respondent promptly notified the Clerk of this Court of this ongoing litigation. Appendix at 22.

8. On October 8, 2010, the Commonwealth filed a motion in Fayette Circuit Court asking that court to “rescind” the Order dismissing the case with prejudice. In support of its motion, the Commonwealth told the court that if it did not rescind the Order, it “could forever prevent review of this case by the Supreme Court of the United States.” Appendix at 7.

9. On October 19, 2010, the Fayette Circuit Court issued an opinion, which provided in part:

The dilemma in which the Attorney General now finds itself was of its own making, i.e. not letting any Counsel of Record, the Fayette Commonwealth’s Attorney’s Officer or this Court know that it was contemplating, drafting or filing a Petition for Writ of *Certiorari* with the United States Supreme Court. That is undisputed and confirmed by Counsel at the oral arguments on October 8, 2010.

Appendix at 35.

Nevertheless, the Fayette Circuit Court entered an Amended Order which provided that “this case is now Dismissed Without Prejudice as of March 8, 2010.” Appendix at 38. Respondent has appealed that Amended Order to the Kentucky Court of Appeals and, if necessary, he will seek discretionary review to the

Kentucky Supreme Court. It is possible, but unlikely, that the appeal will be resolved by the end of this Term.

10. On October 22, 2010, Counsel for Respondent filed a Notice of State Court Proceedings to alert this Court to the Fayette Circuit Court's Amended Order. Appendix at 40.

* * * *

Counsel for Respondent respectfully submits that the developments in the Fayette Circuit Court justify this Court dismissing the petition as improvidently granted. That is true for three reasons. First, the Court lacks Article III jurisdiction because the case is moot and there is no case or controversy pending in this case. Second, Double Jeopardy has attached and bars further proceedings in this case. Third, even if this Court concludes that Double Jeopardy has not attached and a case or controversy exists, the case nonetheless should be dismissed on ripeness grounds.

The first reason to dismiss the petition is that there is no case or controversy pending against the Respondent. The case is moot. The charges against the Respondent were dismissed. No charges are pending. Because there are no charges pending against the Respondent, there is no case or controversy and therefore the federal courts have no power to adjudicate the case under Article III. Any opinion in this case would be an advisory opinion. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 621 n. 1 (1989) ("In the absence of any live case or controversy, we lack jurisdiction and thus also the power to disturb the state court's judgment.");

Deakins v. Monaghan, 484 U.S. 193, 199 (1988). A federal court may not “decide questions that cannot affect the rights of litigants in the case before them.” *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). A litigant must have suffered, or be threatened with, an actual injury that is likely to be redressed by a favorable judicial decision. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

Second, further proceedings in this case are barred by the Double Jeopardy Clause. The Fayette Circuit Court’s order of dismissal constitutes an acquittal for double jeopardy purposes. The order reflects the court’s finding that the Commonwealth – by its own admission – was unable to prove its case against King. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (If “the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged” then the ruling meets the definition of “acquittal” for double jeopardy purposes.); *accord Smith v. Massachusetts*, 543 U.S. 462, 467-68 (2005). This ruling bars the Commonwealth from prosecuting King in the event that it prevails on appeal and the case is remanded by this Court.² *See Ball v. United States*, 163 U.S. 662, 671 (1896) (a verdict of acquittal may not be reviewed without putting a defendant twice in jeopardy).

Third, even if this Court concludes that there is an Article III case or controversy and that Double Jeopardy does not bar further proceedings, the petition

² In *Martin Linen Supply Co.*, this Court explained that “a postverdict dismissal of an indictment after a jury rendered a guilty verdict has been held to be appealable by the United States because restoration of the guilty verdict, and not a new trial, would necessarily result if the Government prevailed.” 430 U.S. at 570. The procedural posture of this case is distinguishable. Here, the automatic restoration of King’s conditional guilty plea, which has been withdrawn, would not result; rather, the opportunity for a new trial would result because the Kentucky Supreme Court has vacated King’s convictions.

should nonetheless be dismissed on ripeness grounds. Ripeness is a prudential doctrine that requires the Court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The issues in this case are not fit for judicial decision because there is no actual case pending against the Respondent. Further, there is no hardship to the parties of withholding court consideration. Even assuming that the Commonwealth still has the constitutional authority to bring charges once again in state court – a claim the Respondent denies – the only hardship to the Commonwealth in dismissing this case at the present time is in delaying the Commonwealth's opportunity to re-litigate the case it lost in the Kentucky Supreme Court.

For the foregoing reasons, this Court should dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,



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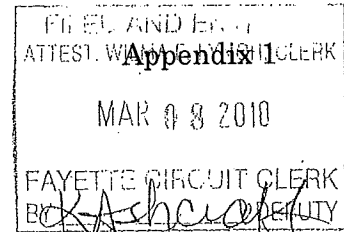
* Counsel of Record for Hollis Deshaun King

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FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION



COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

ORDER

NO. 05-CR-1500-2

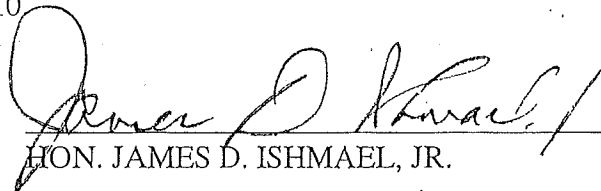
HOLLIS DESHAUN KING

DEFENDANT

Based upon the Remand from the Kentucky Supreme Court, it is ORDERED that the Defendant's Motion to Suppress is hereby SUSTAINED.

The Commonwealth made a Motion to Dismiss the case without prejudice over the objection of the Defendant to the case being dismissed without prejudice. The Court having heard arguments of Counsel and being otherwise sufficiently advised; IT IS ORDERED that the case shall be Dismissed With Prejudice.

Dated this the 8th day of March, 2010


HON. JAMES D. ISHMAEL, JR.

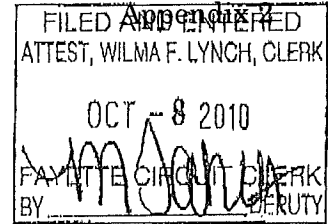
ATTESTED COPIES TO:

Hon. Matthew Boyd
Commonwealth Attorney
Department of Corrections
Probation & Parole

This the 8 day of March, 2010

WILMA F. LYNCH, C.F.C.C.
BY: *Kashcraft* D.C.

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION
No. 05-CR-1500-2



COMMONWEALTH OF KENTUCKY

PETITIONER

vs.

MOTION PURSUANT TO CR 60.02

HOLLIS DESHAUN KING

RESPONDENT

Comes now the Commonwealth, by counsel, and files this motion pursuant to CR 60.02 seeking relief from the Fayette Circuit Court's order entered on March 8, 2010, in *Commonwealth of Kentucky v. Hollis King*, Fayette Circuit Court Indictment No. 05-CR-01500-002, dismissing the above-styled action with prejudice. The Fayette Circuit Court dismissed the case with prejudice while the Commonwealth was in the process of seeking a writ of *certiorari* with the United States Supreme Court. The trial court was without authority to do this. *Gibson v. Commonwealth*, 291 S.W.3d 686 (Ky, 2009). Therefore, this Court should grant the Commonwealth's motion pursuant to CR 60.02 to relieve the Commonwealth of the order entered March 8, 2010, dismissing the above-styled case with prejudice. In support of this motion, the Commonwealth states the following:

I. On November 21, 2005, the Fayette County Grand Jury returned a true bill in Indictment No. 05-CR-1500 charging Respondent with first-degree trafficking in a controlled substance, trafficking in marijuana (eight ounces to five pounds), and being a second-degree persistent felony offender ("PFO"). (TR, 6 - 7). Respondent was subsequently arraigned on the

[Handwritten signature]

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foregoing charges, at which time he entered a plea of not guilty. (TR, 20).

2. On January 16, 2006, Respondent filed a motion to suppress the evidence seized by the police in this matter. (TR, 21 - 22). On March 23, 2006, the Fayette Circuit Court conducted a suppression hearing. (TR, 30). Officer Cobb was the only witness to testify at this proceeding. (TR, 72). The circuit court entered a written opinion and order denying the suppression motion on June 2, 2006. (TR, 72 - 80). Respondent then moved the circuit court to reconsider this decision. (TR, 81). This request was denied by the circuit court as well. (TR, 88).

3. After his suppression motion was denied, Respondent elected to change his plea and enter into a plea agreement with the Commonwealth. (TR, 94 - 96). On July 21, 2006, the Fayette Circuit Court accepted Respondent's guilty plea to first-degree trafficking in a controlled substance, possession of marijuana (amended from trafficking in marijuana), and being a second-degree PFO. (TR, 97 - 98). The guilty plea was conditioned on Respondent reserving his right to appeal from the circuit court's decision regarding his motion to suppress. (TR, 97).

4. Respondent was finally sentenced on August 25, 2006. (TR, 112 - 114). The written final judgment was entered on August 29, 2006. (TR, 112 - 114). In accordance with the plea agreement, the circuit court imposed a sentence of five years as to the trafficking in a controlled substance charge, enhanced to ten years by the PFO charge, and twelve months as to the marijuana possession charge. (TR, 112 - 114).

5. Respondent appealed the trial court's denial of his motion to suppress to the Kentucky Court of Appeals. (Kentucky Court of Appeals Opinion: Appendix, p. 1 - 9). On

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appeal, the Office of Attorney General represented the Commonwealth. The Department of Public Advocacy represented Respondent. The Court of Appeals affirmed Respondent's conviction in a not-to-be published opinion rendered March 14, 2008. (Kentucky Court of Appeals Opinion: Appendix, p. 1 - 9).

6. Respondent sought discretionary review with the Kentucky Supreme Court. The Kentucky Supreme Court granted discretionary review and reversed the Kentucky Court of Appeals' decision, and remanded the case to the Fayette Circuit Court in a to-be-published opinion rendered January 21, 2010. (Kentucky Supreme Court Opinion: Appendix, pp. 10 - 25). The Kentucky Supreme Court's Opinion became final on February 11, 2010.

7. Following the Kentucky Supreme Court's opinion, the Commonwealth began drafting a Petition for Writ of *Certiorari* with the United States Supreme Court. The due date for the Petitioner's Writ was April 21, 2010. (Docket Sheet: Appendix, pp. 26 - 27). Petitioner filed its Petition with the United States Supreme Court on April 19, 2010. (Docket Sheet: Appendix, pp. 26 - 27).

8. While the Office of Attorney General, who prosecuted the case for the Commonwealth on appeal, was drafting the petition for writ of *certiorari*, this Court docketed Respondent's case on remand. This Court granted the Respondent's motion to suppress and, over the Commonwealth's objection, dismissed the case with prejudice. (Appendix, p. 28).

9. Appellate counsel for Respondent likewise was unaware of this Court's actions and filed several pleadings on Respondent's behalf with the United States Supreme Court, including a waiver of right to respond (May 17, 2010), an extension motion, motion to proceed in forma pauperis (August 24, 2010), and a brief in opposition to the writ of *certiorari*.

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(August 24, 2010). (Docket Sheet: Appendix, pp. 26 - 27).

10. On September 28, 2010, the United States Supreme Court granted the Commonwealth's petition for a writ of certiorari. (Docket Sheet: Appendix, pp. 26 - 27). The Commonwealth's brief is currently due November 12, 2010. Oral arguments are tentatively scheduled for January 2011.

11. On October 4, 2010, Respondent's appellate counsel contacted the undersigned counsel and informed them that she would be filing a motion to dismiss the action in the United States Supreme Court because the Fayette Circuit Court had dismissed Respondent's case with prejudice on March 8, 2010.

12. The Commonwealth's motion pursuant to CR 60.02 follows.

MEMORANDUM IN SUPPORT OF THE MOTION FOR BELATED APPEAL

Under CR 60.02 this court may relieve the Commonwealth of this Court's final order entered March 8, 2010, upon the following grounds: "(a) mistake, inadvertence, surprise or excusable neglect; . . . or (f) any other reason of an extraordinary nature justifying relief." This Court should grant the Commonwealth's CR 60.02 motion because this Court had no authority to dismiss the Respondent's case with prejudice. Moreover, the United States Supreme Court has granted *certiorari* in this case resulting in extraordinary circumstances justifying relief under CR 60.02.

This Court had no authority to dismiss Petitioner's case with prejudice. The Kentucky Supreme Court has held that a trial judge does not have the authority to dismiss a charge with prejudice unless it has the Commonwealth's consent. *Gibson v. Commonwealth*, 291 S.W.3d 686 (Ky. 2009). In *Gibson*, the Court discussed the interrelationship of the three

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branches of government in resolving criminal matters. Section 28 of the Kentucky Constitution prohibits any member of our three branches of government from exercising power that is vested in another branch. *Id.*, at 689. The Constitution confers upon the executive branch the power to charge persons with crimes and to prosecute them. *Id.*, at 689 - 90. The judicial branch has the power to "conduct criminal trials, to adjudicate guilt and to impose sentences within the penalty range prescribed by the legislature." *Ibid.* The Court concluded that a dismissal with prejudice must be supported by substantive law or serious governmental misconduct related to the prosecution; otherwise, dismissal of a criminal charge by a court "is not within the province of the judicial branch of our government[.]" *Id.* at 691. *See also Commonwealth v. Baker*, 11 S.W.3d 585, 590 (Ky. App. 2000) (where the Court of Appeals observed that a trial court may dismiss an indictment (without prejudice) if prosecutorial misconduct occurred during the grand jury proceedings. However, the Court held that it was an abuse of discretion for the dismissal to be with prejudice.)

Here, this unknowingly encroached upon the power of the executive branch to prosecute by dismissing the case with prejudice. This Court acted without authority and in direct contradiction to Kentucky Supreme Court precedent. *Gibson*, 291 S.W.3d at 689 - 90. Indeed, as the concurrence in *Gibson* states, "the trial court's characterization of dismissing a criminal charge 'with prejudice' is an unconstitutional invasion by the judiciary into an executive function, and is without any legal effect pursuant to Sections 27 and 28 of the Kentucky Constitution. The trial court has no constitutional authority to instruct the prosecution as to what crimes it can prosecute." *Id.*, at 692 (Cunningham, J., concurring). Therefore, this Court should grant the Commonwealth's motion pursuant to CR 60.02 and determine that it was without

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authority to dismiss the present action with prejudice.

Additionally, extraordinary circumstances necessitate the granting of the Commonwealth's CR 60.02 motion. When this Court dismissed Respondent's case, the Commonwealth was already in the process of drafting a petition for a writ of *certiorari* with the United States Supreme Court. The Commonwealth had 90 days from the time the Kentucky Supreme Court's opinion became final to file its petition for a writ of *certiorari*. As this Court is well aware, the United States Supreme Court denies the vast majority of petitions filed. In the term that was most recently-concluded as of June 9, 2009, for example, 8,241 petitions were filed, with a grant rate of approximately 1.1%. *Caperton v. A.T. Massey Coal Co., Inc.*, — U.S. —, 129 S.Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting). The Commonwealth filed its petition for a writ of *certiorari* on April 19, 2010. Respondent's appellate counsel filed a response on Respondent's behalf. Neither appellate counsel was aware of this Court's order dismissing with prejudice.

The Commonwealth now has only a short period of time to correct this error. The United States Supreme Court granted *certiorari* on September 28, 2010 and has tentatively scheduled oral arguments for January, 2011. As such, time is of the essence to correct this clear error. Without correction by this Court, a clear and unintentional mistake could forever prevent review of this case by the Supreme Court of the United States.

Appendix 8

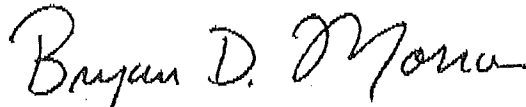
CONCLUSION

Wherefore, for all the foregoing reasons, this Court must grant the Commonwealth's motion pursuant to CR 60.02 and rescind its order entered March 8, 2010, which dismissed Respondent's case with prejudice.

Respectfully submitted,



JOSHUA D. FARLEY



BRYAN D. MORROW

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NOTICE

The parties will take notice that the foregoing motion will come on for hearing before the Fayette Circuit Court, Criminal Branch, Third Division, on Friday, October 8, 2010, at the hour of 10:30 a.m., or as soon thereafter as counsel may be heard.

CERTIFICATE OF SERVICE

This certifies that a true and accurate copy of the foregoing motion has been delivered on this the 6th day of October, 2010, upon the following:

Fayette Circuit Court Clerk
Criminal Branch
120 North Limestone Street
Lexington, Kentucky 40507
(via fax and United States mail first-class postage prepaid)

Hon. James D. Ishmael, Jr.
Judge, Fayette Circuit Court
503 Robert F. Stephens Courthouse
120 North Limestone Street
Lexington, Kentucky 40507
(via fax and United States mail first-class postage prepaid)

Hon. Andrea Mattingly Williams
Assistant Commonwealth Attorney
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Hon. Matthew W. Boyd
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Hon. Jamesa J. Drake
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302

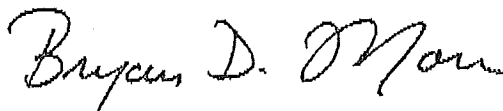
Appendix 10

Frankfort, Kentucky 40601
(via email and United States mail, first-class postage prepaid)

Respectfully submitted,



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COUNSEL FOR THE COMMONWEALTH

COPY

FILED AND ENTERED
ATTEST WILLIAM E. LYNCH, CLERK

OCT 12 2010

FAYETTE CIRCUIT CLERK
BY _____ DEPUTY

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CRIMINAL BRANCH – THIRD DIVISION
CASE NO. 05-CR-1500-2

COMMONWEALTH OF KENTUCKY

PETITIONER

v. REPLY TO THE COMMONWEALTH'S 60.02 MOTION

HOLLIS DESHAUN KING

RESPONDENT

INTRODUCTION

The Commonwealth urges this Court to “rescind” its March 8, 2010, Order dismissing the indictment in the above-captioned case “with prejudice” pursuant to either CR 60.02(a) or (f). Neither subsection entitles the Commonwealth to the relief it seeks.

CR 60.02(a) authorizes a court to relieve a party of an order when a “mistake” has occurred.¹ According to the Commonwealth, the “mistake” in question is this Court’s Order dismissing the case “with prejudice.” There are two problems with the Commonwealth’s argument. First, this Court did not err when it dismissed the above-captioned case with prejudice, and *Gibson v. Commonwealth*, 291 S.W.3d 686 (Ky. 2009), does not suggest otherwise. Second, even assuming, *arguendo*, that this Court did err, Kentucky courts have long held that legal error, which could have been addressed through the normal appellate process, does not constitute a “mistake” or ground for relief under CR 60.02.

¹ CR 60.02(a) also authorizes a court to relieve a party of an order on the basis of “excusable neglect.” The Commonwealth makes no argument that its failure to timely file a motion to stay the mandate of the Kentucky Supreme Court or its failure to take an appeal from the Order dismissing the case “with prejudice” is “excusable.”

CR 60.02(f) does not help the Commonwealth, either. That subsection permits a court to grant relief when a "reason of an extraordinary nature" exists. As far as King can tell, the gist of the Commonwealth's argument is that this Court should look askance at its failure to take appropriate measures to ensure that this case was in the proper procedural posture for further appellate review because the U.S. Supreme Court rarely grants a petition for writ of *certiorari*. That argument inexplicably ignores King's overriding entitlement to finality. As discussed more fully herein, neither CR 60.02(a) or (f) applies here. This Court should deny the Commonwealth's CR 60.02 motion.

SUPPLEMENTAL STATEMENT OF PROCEDURAL HISTORY

King accepts the Commonwealth's statement of the procedural history of this case, and supplements it with these facts. Following the Kentucky Supreme Court's mandate reversing the denial of King's motion to suppress evidence, vacating King's conviction, and remanding the case to the Fayette Circuit Court for proceedings "consistent with" its opinion, *see King v. Commonwealth*, 302 S.W.3d 649, 657 (Ky. 2010), this Court convened a hearing attended by King, King's trial attorney, and the Commonwealth's Attorney. This Court read the mandate aloud to the parties, VR: 3/4/10; 1:04:00-1:04:45, and it sustained King's motion to suppress evidence, VR: 3/4/10; 1:05:02. This exchange followed:

COURT:

That being the case, Ms. Williams, is there anything to come before the court?

PROSECUTOR:

We would just move to dismiss the case, Your Honor, without prejudice.

DEFENSE COUNSEL: Your Honor, we'd object to a dismissal without prejudice. It should be a dismissal with prejudice.

PROSECUTOR: Judge, if we have any other evidence that surfaces in light of this, then, um, we could bring the case back before the Grand Jury.

DEFENSE COUNSEL: Judge, with all due respect, there's no evidence, it's all been suppressed.

PROSECUTOR: There was -- if I remember correctly, he was seen outside making a deal with someone.^[2]

DEFENSE COUNSEL: Absolutely not. Absolutely not. And, Your Honor, I think that with the ruling and the dismissal, we should be entitled to have these charges expunged or at least ask for that, and with or without prejudice he's not allowed to. He's already served four years and two months in prison.

COURT: As I remember this case, there was a confidential informant and a buy and somebody ran into this apartment building, ran down the hall, the officers lost track and heard a door slam, thought -- they weren't sure exactly which door it was -- they went down the end of the hall and they smelled the marijuana coming from underneath the door where Mr. King and two other individuals were later found and they went into that door, when in fact as it later turned out, the defendant that they were pursuing -- or the suspect that they were pursuing -- actually went into the door on the right. That's my recollection of what happened. You know, I don't know of any -- anything they could bring back up. I don't know of anything else that could be discovered. I mean, you know, they were in there. It is, what it is, as the old saying goes. You know,

² The Commonwealth's repeated mischaracterization of the facts is troubling. Among other things, the Commonwealth asserted in its Petition for Writ of *Certiorari* -- erroneously -- that King sold cocaine to an undercover police officer. See Pet. at 31 ("Had the Respondent in this case made the sale in Virginia.... Respondent, however, did not make the sale in Virginia. He made it in Kentucky....") As this Court has repeatedly reminded the Commonwealth, the cocaine dealer and King are not the same person.

what was in there, and the Supremes have ruled that the entry by the law enforcement was in violation of Mr. King's rights and I respect that. I'm going to -- in view of the fact -- once all this evidence inside the apartment is suppressed, Ms. Williams, at the present time is there anything more to move forward with by the Commonwealth?

PROSECUTOR:

No. That's why we move to dismiss it, Judge.

COURT:

I understand the Commonwealth's position -- I think that in this case, when there's really not anything else that I don't think can come up, I'm going to dismiss the charges at the request of the defendant. I'm going to dismiss the charges with prejudice and let Mr. King get on with his life and move on. So, I'll enter an order and the charges are dismissed with prejudice.

(VR: 3/4/10; 1:05:10-1:08:30).

As the foregoing demonstrates, this Court dismissed the indictment "with prejudice" because the Commonwealth Attorney's was unable to identify any evidence not subject to the suppression order that could be used to prove the allegations against King.

The resulting Order, which was entered on March 8, 2010, provided:

Based upon the Remand from the Kentucky Supreme Court, it is ORDERED that the Defendant's Motion to Suppress is hereby SUSTAINED.

The Commonwealth made a Motion to Dismiss the case without prejudice over the objection of the Defendant to the case being dismissed without prejudice. The Court having heard arguments of Counsel and being otherwise sufficiently advised; IT IS ORDERED that the case shall be Dismissed With Prejudice.³

On October 6, 2010, this Court convened a hearing concerning the Commonwealth's CR 60.02 motion. Again, this Court inquired about the Commonwealth's evidence against Mr. King. For a second time, the Commonwealth was unable to identify any evidence not subject to the suppression order that could be used to prove the allegations against King.⁴

ARGUMENT

- I. CR 60.02(a) does not provide an avenue for relief because this Court was not "mistaken" when it dismissed the indictment "with prejudice" and because legal error does not constitute a "mistake" for purposes of the rule.

CR 60.02(a) provides that a court "may, upon such terms as are just, relieve a party...from its...order...upon the following grounds: (a) mistake...." Given the Commonwealth's failure to take adequate measures to ensure that King's case was in the proper procedural posture for United States Supreme Court review (*e.g.* by filing a motion to stay the Kentucky Supreme Court's mandate or appealing the March 8, 2010, Order), one would have expected the Commonwealth to argue that the "mistake" in question was its own oversight. *But see United Bonding Ins. Co. v. Commonwealth*, 461 S.W.2d 535 (Ky. 1970) (the "unexplained failure to perfect a proper appeal was not ground for relief under CR 60.02.")

Instead, the Commonwealth boldly claims that the "mistake" in question lies with this Court. Referring to *Gibson v. Commonwealth*, 291 S.W.3d 686 (Ky. 2009), and this Court's Order dismissing the case "with prejudice," the Commonwealth

⁴ King attempted to recite the exact exchange that occurred between this Court and the Commonwealth's Attorney on October 8, 2010. However, the Clerk's Office has informed counsel that as of this filing date, this Court's recording equipment is not functioning properly and therefore counsel is unable to review a recording of the October 8, 2010, proceedings.

argues: “[T]ime is of the essence to correct this clear error. Without correction by this Court, a clear and unintentional mistake could forever prevent review of this Court by the Supreme Court of the United States.” Commonwealth’s motion at 6.

This Court’s Order dismissing the indictment against King is not “mistaken.” In *Gibson*, the Commonwealth moved the trial court to dismiss the indictment “without prejudice” “on the eve of trial” because “its case...had substantially deteriorated.” *Id.* at 687. The opinion provides no additional information about how or why the case had “deteriorated,” but the Court assumed that it could be “resurrected” at a later date. *Id.* at 688.

After the defendant learned of the order dismissing the case “without prejudice,” she moved the trial court to amend the order to reflect a dismissal “with prejudice.” *Id.* at 688. The trial court denied that motion, and the defendant appealed. *Id.* at 688. The Kentucky Supreme Court affirmed the trial court’s ruling, and it encouraged the defendant to “demand the trial she needs to ‘clear her name.’” *Id.* at 691.

Gibson instructs that, as a general principle, a trial court violates the separation of powers provision of the state constitution when it prematurely forecloses any future attempt by the Commonwealth to prosecute a criminal defendant by dismissing a case “with prejudice.” *Gibson v. Commonwealth*, 291 S.W.3d 686, 691 (Ky. 2009).

Gibson further instructs that, concomitantly, a trial court does not err when it dismisses a case “with prejudice” if the Commonwealth consents or when the

"underlying substantive law" dictates that result. *Id.* at 691. Accordingly, if "recognized principles of Constitutional law" operate independently to preclude any further prosecution, then a dismissal "with prejudice" is appropriate. *Id.* at 691. For example, a trial court does not err when it dismisses an indictment "with prejudice" when the prosecution in question is jeopardy barred. *Id.* at 691.

This Court's Order dismissing the indictment "with prejudice" is fully supported by the rationale in *Gibson*. After the Kentucky Supreme Court vacated King's judgment of conviction and remanded his case back to this Court, the Commonwealth had the option of taking the case to trial. Instead, the Commonwealth chose to dismiss the indictment because it could conceive of no evidence against King, other than the evidence rendered inadmissible pursuant to the suppression order. The Order did not prematurely preempt the Commonwealth from prosecuting King; rather, the lack of evidence prevents the Commonwealth from prosecuting King.

Stated differently, "underlying substantive law" operates independently to dictate a dismissal "with prejudice." The Commonwealth has repeatedly represented that it can conceive of no admissible evidence against King. The "underlying substantive law" concerning due process and sufficiency of the evidence would support a directed verdict of acquittal if the case went to trial. Those same "principles of Constitutional law" support this Court's decision to dismiss the case "with prejudice." *See e.g. In re Winship*, 397 U.S. 358 (1970).

Eight months have now passed between the time that this Court entered the Order dismissing the indictment “with prejudice” and the time that the Commonwealth filed its CR 60.02 motion. The Commonwealth has had ample opportunity to contemplate what additional evidence might exist against King. On October 8, 2010, this Court again asked the Commonwealth whether it could identify any evidence, not subject to the suppression order, which could be used to prosecute King. And again, the Commonwealth could think of nothing.

Gibson suggests that a defendant who seeks to “clear his name” should demand a trial, rather than seek a dismissal “with prejudice.” *Id.* at 691. However, given the Commonwealth’s acknowledgement that no admissible evidence against King exists, this Court was not required to waste precious judicial resources presiding over a sham trial that was certain to end in a directed verdict. *In re Winship*, supports this Court’s Order. The Commonwealth is not entitled to perpetually hang the possibility of a trial over a defendant’s head when it admits (repeatedly) that it can conceive of no admissible evidence against him.

Even assuming *arguendo* that this Court did err by dismissing the case “with prejudice,” CR 60.02(a) would not entitle the Commonwealth to the relief it seeks. Kentucky courts have long held that legal error, which could have been addressed through the normal appellate process, does not constitute a ground for relief under CR 60.02. *See e.g. Howard v. Commonwealth*, 364 S.W.2d 809, 810-11 (Ky. 1963) (so stating); *Wimsatt v. Haydon Oil Co.*, 414 S.W.2d 908, 910 (Ky. 1967) (“The error, if any, was an error of law by the trial court, and subject to review upon

appeal in due course; in such a circumstance CR 60.02 may not be invoked as an alternative method of review.”); *City of Covington v. Sanitation District No. 1 of Campbell and Kenton Counties*, 459 S.W.2d 85, 87 (Ky. App. 1970) (“[N]o ground for relief under CR 60.02 was alleged except that the judgment was based on an error of law. This, of course, was not sufficient to permit a reopening of the judgment.”); *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (CR 60.02 is “for relief that is not available by direct appeal”). This Court should decline the Commonwealth’s invitation to “rescind” its Order dismissing the case “with prejudice” pursuant to CR 60.02(a).

II. CR 60.02(f) does not provide an avenue for relief because “extraordinary circumstances” do not justify rescinding this Court’s Order.

CR 60.02 provides that “a court may, upon such terms as are just, relieve a party...from its...order...upon the following grounds:...(f) any other reason of an extraordinary nature justifying relief.” In *Cawood v. Cawood*, 329 S.W.2d 569, 571 (Ky. 1959), the Court instructed that “because of the desirability of according finality to judgments, this clause must be invoked only with extreme caution, and only in the most unusual circumstances.” See also *Bashir v. Bashir*, 698 S.W.2d 823, 826 (Ky. 1985) (“The strong and sensible policy of the law in favor of the finality of judgments has historically been overcome only in the presence of the most compelling equities. Relief under CR 60.02(f) is available where a clear showing of extraordinary and compelling equities is made.”)

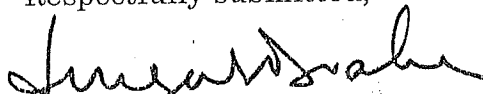
The "equities" at play here do not militate in the Commonwealth's favor.

King spent over four years in prison on this case and he would like nothing more than to take this Court's advice to "get on with his life and move on." (VR: 3/4/10; 1:08:29). King's strong interest in finality is "axiomatic." *Baze v. Commonwealth*, 276 S.W.3d 761, 768 (Ky. 2008). The Commonwealth's interest in overturning the Kentucky Supreme Court's mandate ceased to outweigh King's interest in finality when the Commonwealth failed to avail itself of the proper mechanisms for ensuring that the case could be reviewed by the United States Supreme Court. The grant of a writ of *certiorari* is "extraordinary" in the colloquial sense of the word, but that fact alone is not a cure-all for the Commonwealth's failure to get its own house in order. CR 60.02(f) does not provide a basis for the relief the Commonwealth seeks.

CONCLUSION

This Court should deny the Commonwealth's CR 60.02 motion. Just cause does not exist for this Court to "rescind" its March 8, 2010, Order dismissing the indictment in the above-captioned case "with prejudice."

Respectfully submitted,



Jamesa J. Drake*

Assistant Public Advocate
Department of Public Advocacy

100 Fair Oaks Lane
Frankfort, KY 40601

(502) 564-8006

Jamesa.Drake@ky.gov

*Counsel of Record for Hollis King

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing motion was served this 12th day of

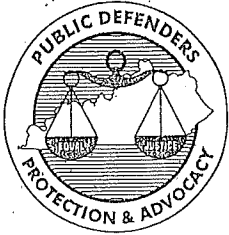
October, 2010, upon the following parties:

Fayette Circuit Clerk
Criminal Branch
120 North Limestone
Lexington, KY 40507
(hand delivered)

Hon. James D. Ishamel, Jr.
Judge, Fayette Circuit Court
503 Robert F. Stephens Courthouse
120 North Limestone
Lexington, KY 40507
(hand delivered)

Hon. Andrea Mattingly Williams
Assistant Commonwealth Attorney
116 North Upper Street, Suite 300
Lexington, KY 40507
(via United States mail first-class postage prepaid)

Hon. Joshua D. Farley
Hon. Bryan D. Morrow
Assistant Attorney Generals
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204
(via email and United States mail first-class postage prepaid)



COMMONWEALTH OF KENTUCKY

Appendix 22

DEPARTMENT OF PUBLIC ADVOCACY

100 FAIR OAKS LANE, SUITE 301 • FRANKFORT, KENTUCKY 40601 • 502-564-3948 • FAX: 502-564-3949

October 12, 2010

William K. Suter
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

Re: *Kentucky v. Hollis Deshaun King*, No. 09-1272

Dear General Suter:

The purpose of this letter is to inform the Court about the litigation the Commonwealth has initiated in state court following the grant of *certiorari* on September 28, 2010.

On October 4, 2010, undersigned counsel learned that when this case was on remand from the Kentucky Supreme Court, the Fayette Circuit Court entered an order dismissing the indictment "with prejudice." The Commonwealth did not file a motion to stay the Kentucky Supreme Court's mandate reversing the denial of King's motion to suppress and vacating the judgment against him, and it did not appeal the order dismissing the case "with prejudice." That order became final before the Commonwealth filed its Petition for Writ of *Certiorari*.

On October 6, 2010, the Commonwealth filed a motion to "rescind" the order dismissing the case "with prejudice." On October 8, 2010, the parties argued that motion in Fayette Circuit Court and the presiding judge indicated that he expects to rule on or before October 15, 2010. Copies of the Commonwealth's motion and King's response are appended.

The order dismissing the case "with prejudice" renders this case moot and any decision by this Court advisory in nature. King intends to file a Motion to Dismiss the Commonwealth's appeal on or before October 22, 2010.

Sincerely,

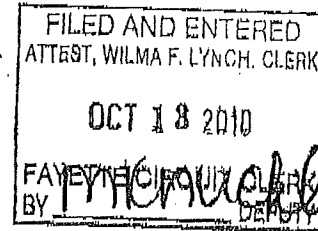
Jamesa J. Drake
Counsel of Record for Mr. King

Cc: Joshua D. Farley
Bryan D. Morrow
Judge James D. Ishmael, Jr., Fayette Circuit Court



Appendix 23

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION
No. 05-CR-1500-2



COMMONWEALTH OF KENTUCKY

PETITIONER

vs.

MOVANT'S REPLY PURSUANT TO
CR 60.02

HOLLIS DESHAUN KING

RESPONDENT

REPLY IN SUPPORT OF THE CR 60.02 MOTION

This Court had no authority under the Kentucky Constitution to dismiss Petitioner's case with prejudice. The Kentucky Supreme Court has held that a trial judge does not have the authority to dismiss a charge with prejudice unless it has the Commonwealth's consent. Gibson v. Commonwealth, 291 S.W.3d 686 (Ky. 2009). In Gibson, the Court discussed the interrelationship of the three branches of government in resolving criminal matters. Section 28 of the Kentucky Constitution prohibits any member of our three branches of government from exercising power that is vested in another branch. Id., at 689. The Constitution confers upon the executive branch the power to charge persons with crimes and to prosecute them. Id., at 689 - 90. The judicial branch has the power to "conduct criminal trials, to adjudicate guilt and to impose sentences within the penalty range prescribed by the legislature." Ibid. The Court concluded that a dismissal with prejudice must be supported by substantive law or serious governmental misconduct related to the prosecution; otherwise, dismissal of a criminal charge by a court "is not within the province of the judicial branch of our government[.]" Id. at 691. See

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also Commonwealth v. Baker, 11 S.W.3d 585, 590 (Ky. App. 2000) (where the Court of Appeals observed that a trial court may dismiss an indictment (without prejudice) if prosecutorial misconduct occurred during the grand jury proceedings. However, the Court held that it was an abuse of discretion for the dismissal to be with prejudice.) Other cases set forth this same premise. See Commonwealth v. Isham, 98 S.W.3d 59 (Ky. 2003) (holding “In Hicks v. Commonwealth, S.W.2d 35 (Ky. 1994), we held that it was not the province of a trial judge to evaluate evidence in advance in order to decide whether a trial should be held. Id. at 37. It was further held that the proper time for such an evaluation is upon motion for directed verdict. Id.” and further stating that the trial court lacked the authority to dismiss the complaint prior to trial); and Commonwealth v. Shaw, unpublished 2004 WL 178703 (Ky. App. 2004) (holding that the trial court lacked the authority to dismiss the indictment).

Indeed, as the concurrence in Gibson states, “the trial court’s characterization of dismissing a criminal charge ‘with prejudice’ is an unconstitutional invasion by the judiciary into an executive function, and is without any legal effect pursuant to Sections 27 and 28 of the Kentucky Constitution. The trial court has no constitutional authority to instruct the prosecution as to what crimes it can prosecute.” Id., at 692 (Cunningham, J., concurring). Therefore, this Court’s dismissal “with prejudice” was void *ab initio*. See City of Henderson v. Lieber’s EX’R ET AL., 192 S.W. 830 (Ky. App. 1917) (holding that a statute enacted in contravention of the Constitution is “void ab initio and any action taken thereunder is a nullity.”). Here, this Court’s judgment in dismissing the current case “with prejudice” was in contravention of the Kentucky Constitution and as such its judgment is also void *ab initio*. A void judgment is not entitled to any respect or deference by the courts. Mathews v. Mathews, 731 S.W.2d 832, 833 (Ky.App.

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1987). Just as the concurrence in Gibson seems to emphasize, the ruling is therefore a legal nullity and a court has no discretion in determining whether it should be set aside. See Foremost Insurance Company v. Whitaker, 892 S.W.2d 607 (Ky.App. 1995).

Given that this Court's dismissal with prejudice is void *ab initio* it may be challenged upon a CR 60.02 motion, simply within a reasonable time. See Foremost, at 610. The Commonwealth was not required to avail itself of a direct appeal. While that may appear to be a preferable course of action, here since this Court's judgement is void, it must be set aside when brought within a reasonable time via a CR 60.02 motion. Ibid.; See City of Henderson at 830-833 and Mathews at 833. It should also be noted that the Commonwealth may avail themselves of CR 60.02. See Winstead v. Commonwealth, unpublished 2008 WL 5191197 (Ky.App. 2008). The Commonwealth has properly brought its CR 60.02 motion within a reasonable time, setting forth that this Court's dismissal with prejudice is void *ab initio*. Under CR 60.02 (e) the trial court has no discretion in determining whether to set the judgment aside, it must do so since the judgement is void *ab initio*. See Foremost at 610. Therefore, this Court should grant the Commonwealth's motion pursuant to CR 60.02 and determine that it was without authority to dismiss the present action with prejudice.

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CONCLUSION

Wherefore, for all the foregoing reasons, this Court must grant the Commonwealth's motion pursuant to CR 60.02 and rescind its order entered March 8, 2010, which dismissed Respondent's case with prejudice.

Respectfully submitted,



JOSHUA D. FARLEY



BRYAN D. MORROW

ASSISTANT ATTORNEY GENERAL
OFFICE OF CRIMINAL APPEALS
OFFICE OF THE ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601-8204
(502)696-5342

COUNSEL FOR THE COMMONWEALTH

Appendix 27

CERTIFICATE OF SERVICE

This certifies that a true and accurate copy of the foregoing motion has been

delivered on this the 13th day of October, 2010, upon the following:

Fayette Circuit Court Clerk
Criminal Branch
120 North Limestone Street
Lexington, Kentucky 40507
(via fax and hand delivery)

Hon. James D. Ishmael, Jr.
Judge, Fayette Circuit Court
503 Robert F. Stephens Courthouse
120 North Limestone Street
Lexington, Kentucky 40507
(via fax and hand delivery)

Hon. Andrea Mattingly Williams
Assistant Commonwealth Attorney
116 North Upper Street, Suite 300
Lexington, Kentucky 40507
(via email)

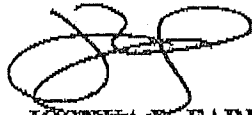
Hon. Matthew W. Boyd
Boyd & Boyd, PLLC
101 W. Short St., Ste 300
Lexington, Kentucky 40507
(via fax (859) 252-0188)
(via email, fax, and United States mail, first-class postage prepaid)

Hon. Jamesa J. Drake
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302

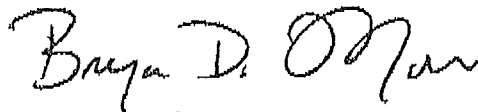
Frankfort, Kentucky 40601
(via email and United States mail, first-class postage prepaid)

Appendix 28

Respectfully submitted,



JOSHUA D. FARLEY



BRYAN D. MORROW

ASSISTANT ATTORNEY GENERAL
OFFICE OF CRIMINAL APPEALS
OFFICE OF THE ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
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(502)696-5342

COUNSEL FOR THE COMMONWEALTH

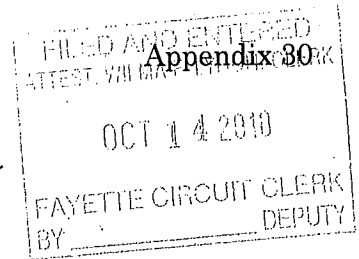
Appendix 29

APPENDIX

Hollis Deshaun King 2005-CR-1500-2

- 1) Westlaw, 2004 WL 178703 (Ky. App.)
Commonwealth v. Shaw, 2003-CA-000522-MR A1-A6
- 2) Westlaw, 2008 WL 5191197 (Ky. App.)
Winstead v. Commonwealth, 2006-CA-002459 A7-A14

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CRIMINAL BRANCH – THIRD DIVISION
CASE NO. 05-CR-1500-2



COMMONWEALTH OF KENTUCKY

PETITIONER

v.

RESPONSE TO THE COMMONWEALTH'S REPLY
IN SUPPORT OF THE CR 60.02 MOTION

HOLLIS DESHAUN KING

RESPONDENT

On October 8, 2010, the Commonwealth filed a CR 60.02 motion. On October 12, 2010, King filed a Reply. On October 13, 2010, the Commonwealth filed a Response to King's Reply. King now responds to the Commonwealth's most recent pleading.

In its original motion, the Commonwealth urged this Court to "rescind" the March 8, 2010, Order dismissing the case "with prejudice" pursuant to CR 60.02(a) and (f). King responded by explaining that neither subsection entitled the Commonwealth to the relief it seeks.

In its Reply in Support of the CR 60.02 motion, the Commonwealth raises a new argument. In this latest pleading, the Commonwealth now contends that this Court should "rescind" the Order pursuant to CR 60.02 (e). *See* CW Reply at 3.

CR 60.02(e) provides that "a court may, upon such terms as are just, relieve a party or his legal representative from its...order...upon the following grounds:...(e) the judgment is void...."

The Commonwealth raises a three-part argument, which builds on itself. First, the Commonwealth renews its argument that this Court erred by dismissing the case “with prejudice” in violation of the Kentucky Constitution. *See* CW Reply at 1-2 (discussing *Gibson v. Commonwealth*, 291 S.W.3d 686 (Ky. 2009)). Second, the Commonwealth argues that because the Order violated the Kentucky Constitution, it was void ab initio. *See* CW Reply at 2 (“Here, this Court’s judgment in dismissing the current case ‘with prejudice’ was in contravention of the Kentucky Constitution and as such its judgment is void *ab initio*.”) Third, the Commonwealth asserts that because the Order was void ab initio, it was “not required to avail itself of a direct appeal.” CW Reply at 3.

That argument is not well-taken for three reasons. First, as discussed at length in King’s Reply to the Commonwealth’s CR 60.02 motion – and thus not repeated here – the March 8, 2010, Order was not in error. Pursuant to *Gibson*, a court may dismiss a case “with prejudice” when the “underlying substantive law” “precludes further litigation” and dictates that result. *Gibson*, 291 S.W.3d at 691. A conviction founded on legally insufficient evidence violates due process; the Commonwealth’s lack of admissible evidence “precludes further litigation” here. *See Jackson v. Virginia*, 443 U.S. 307, 317 (1979) (“It is axiomatic that a conviction upon a charge not made...constitutes a violation of due process.”)

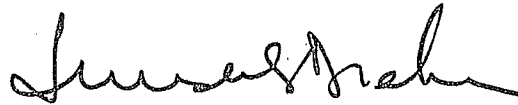
Second, even assuming, *arguendo*, that this Court’s Order dismissing the case “with prejudice” was in error, the error did not render the Order void ab initio. Kentucky courts have long-held that: “The generally accepted rule is that where the

court has jurisdiction of the parties and subject matter, the judgment, if erroneous, is voidable, not void.” *Dix v. Dix*, 222 S.W.2d 839, 842 (Ky. 1949). And, an “error rendering a judgment voidable cannot be challenged in a collateral action.” *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 431 (Ky. App. 2008).

Third, the Commonwealth was required “to avail itself of a direct appeal.” Again, even assuming, *arguendo*, that the Order was in error, a party may not work an end-around the direct appeal process by raising a claim of legal error for the first time in a CR 60.02 motion. *See McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (“CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies but is available only to raise issues which cannot be raised in other proceedings.”); *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (CR 60.02 is “for relief that is not available by direct appeal and not available under RCr 11.42.”); *Covington v. Sanitation Dist. No. 1*, 45 S.W.2d 85, 87 (Ky. 1970) (“[N]o ground for relief under CR 60.02 was alleged except that the judgment was based on an error of law. This, of course, was not sufficient to permit a reopening of the judgment.”).

For all of the reasons advanced herein and in King’s Reply to the Commonwealth’s 60.02 Motion, King respectfully requests that this Court deny the Commonwealth’s CR 60.02 motion.

Respectfully submitted,



Jamesa J. Drake
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing motion was served this 14th day of October, 2010, upon the following:

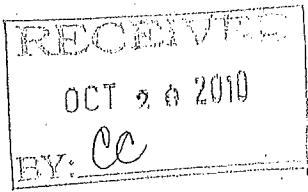
Fayette Circuit Clerk
Criminal Branch
120 North Limestone
Lexington, KY 40507
(hand delivered)

Hon. James D. Ishamél, Jr.
Judge, Fayette Circuit Court
503 Robert F. Stephens Courthouse
120 North Limestone
Lexington, KY 40507
(hand delivered)

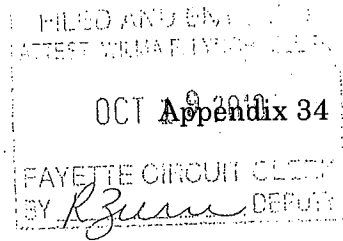
Hon. Andrea Mattingly Williams
Assistant Commonwealth Attorney
116 North Upper Street, Suite 300
Lexington, KY 40507
(via United States mail first-class
postage)

Hon. Joshua D. Farley
Hon. Bryan D. Morrow
Assistant Attorneys General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204
(via email and United States mail
first-class postage)

Hon. Matthew W. Boyd
Boyd & Boyd, PLLC
155 East Main Street, Ste. 220
Lexington, KY 40507
(via United States mail first-class
postage)



FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION



COMMONWEALTH OF KENTUCKY

PLAINTIFF

V

OPINION

NO. 05-CR-1500-2

HOLLIS DESHAUN KING

DEFENDANT

This matter is before the Court on Motion of the Commonwealth, through the Attorney General's Office, pursuant to CR 60.02(a)(f), for the Court to "relieve the Commonwealth" of the Court's Order entered March 8, 2002 that Dismissed the charges against the Defendant with prejudice. The Court has considered the Motion, the Response by the Defendant's Counsel and, although unauthorized, the Reply by the Attorney General's Office and the Reply by King's attorney. The Court has also had the benefit of oral arguments of Counsel.

The Commonwealth argues that this Court had no authority to Dismiss the charges against King with prejudice citing *Gibson v Commonwealth*, 291 S.W.3d 686 (Ky. 2009). *Gibson, supra* involved a pre-trial matter wherein the trial court, without the benefit of hearing evidence or conducting a trial or having the case Remanded from the Kentucky Supreme Court.¹ *Gibson, supra* is not controlling authority on the issue before the Court because of the significant differences in the posture of the cases and the differences in the obligations of the trial courts under the particular circumstances. It is undisputed that the Fayette Commonwealth Attorney's Office has represented to this Court, both at the hearing after Remand from the Kentucky

¹ The Remand held that "...the denial of King's Motion to Suppress evidence is reversed, and King's judgment of conviction is vacated", *King v Commonwealth*, 302 S.W.3d 649, 657 (Ky. 2010)]

Supreme Court and in oral arguments on this Motion, that it would have no evidence to support any charges against King that was not the subject of the Kentucky Supreme Court's Reversal and Remand cited above. *King, supra* at 657.

The Attorney General argues that the Order of March 8, 2010 should be modified to delete the Dismissal "with prejudice" language pursuant to CR 60.02(a) "mistake, inadvertence, surprise or excusable neglect..." or "(f) any other reason of an extraordinary nature justifying relief." Without reference to the Record or to any factor set out in CR 60.02(a) above, the Attorney General, in both the written filings and in oral arguments, in a tone and manner that can only be described as abrasive, argues that this Court had no authority to Dismiss the charges against King with prejudice notwithstanding the Kentucky Supreme Court mandate and the Fayette County Attorney's representations to the Court. There was no appeal of the Court's March 8, 2010 Order by the Commonwealth.

Strangely, the Attorney General does not argue, and this Court does not find, that any factor set out in CR 60.02(a) is applicable to the pending Motion. The dilemma in which the Attorney General now finds itself was of its own making, i.e., not letting any Counsel of Record, the Fayette Commonwealth Attorney's Office or this Court know that it was contemplating, drafting or filing a Petition for Writ of *Certiorari* with the United States Supreme Court. That is undisputed and confirmed by Counsel at the oral arguments on October 8, 2010. The Motion to Modify the Order pursuant to CR 60.02(a) is DENIED.

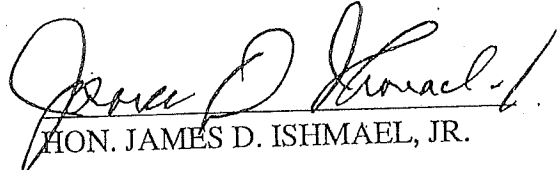
Turning to CR 60.02(f), the Attorney General again argues that this Court had no authority to Dismiss the case with prejudice. That argument has been considered and rejected by this Court. The last argument is that the Granting of the Petition for Writ of *Certiorari* by the

United States Supreme Court should be considered as a "...reason of an extraordinary nature justifying relief." No case authority was cited by the Attorney General that this action satisfies the requisite "extraordinary nature justifying relief." Rather, the Attorney General blames this Court for following the mandate of the Kentucky Supreme Court for the quandary in which it now finds itself. That is neither sound legal reasoning nor fair to this Court.

This Court is always amenable to having full review of its proceedings and rulings. The "bottom line" is that the ruling should be correct and fair to all parties. In this case, the Attorney General does not deserve any relief based on its own conduct, the tone and nature of its arguments, and the lack of merit to the foregoing arguments.

Nonetheless, this Court will Grant the Motion pursuant to CR 60.02(f) to allow for further review based on the "extraordinary nature" of the Writ of *Certiorari* granted by the United States Supreme Court. An Amended Order is attached hereto and made a part hereof by reference.

Dated this 19 day of October, 2010


HON. JAMES D. ISHMAEL, JR.

Appendix 37

This is to certify that a true and correct copy of the foregoing Order was served upon the following parties, via First Class Mail, this 19 day of October, 2010:

Joshua D. Farley, Esq.
Bryan D. Morrow, Esq.
Assistant Attorneys General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204

Jamesa J. Drake, Esq.
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
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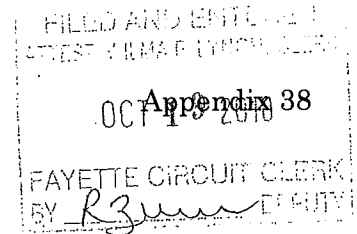
WILMA F. LYNCH
BY: R. Z. [Signature] d.c.

Andrea Mattingly Williams, Esq.
Assistant Commonwealth Attorney
116 North Upper Street, Suite 300
Lexington, KY 40507

Matthew W. Boyd, Esq.
Boyd & Boyd, PLLC
The Lyon Building
155 East Main Street, Suite 220
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A True Copy
ATTEST: WILMA F. LYNCH, CLERK
FAYETTE CIRCUIT COURT
By: R. Z. [Signature] Deputy

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION



COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

AMENDED ORDER

NO. 05-CR-1500-2

HOLLIS DESHAUN KING

DEFENDANT

On Motion of the Commonwealth, by and through the Attorney General's Office, and this Court having rendered an Opinion which is made a part hereof by reference as if set out at length herein, and this Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

The Order of this Court entered on March 8, 2010 is hereby Modified to the extent that this case is now Dismissed Without Prejudice as of March 8, 2010. In all other respects, the original Order of March 8, 2010 remains as entered.

Dated this the 19 day of October, 2010.

James P. Howard, Jr.
JUDGE, FAYETTE CIRCUIT COURT

This is to certify that a true and correct copy of the foregoing Amended Order was served upon the following parties, via First Class Mail, this 19 day of October, 2010:

Joshua D. Farley, Esq.
Bryan D. Morrow, Esq.
Assistant Attorneys General
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Office of the Attorney General
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WILMA F. LYNCH
BY: R. Z. Miller d.c.

A True Copy
ATTEST: WILMA F. LYNCH, CLERK
FAYETTE CIRCUIT COURT
By: R. Z. Miller Deputy

No. 09-1272

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF KENTUCKY,

Petitioner

v.

HOLLIS DESHAUN KING,

Respondent

NOTICE OF STATE COURT PROCEEDINGS

On September 27, 2010, this Court granted the Commonwealth's Petition for Writ of Certiorari to the Kentucky Supreme Court, limited to the First Question Presented. Since that time, the Commonwealth has initiated litigation in state court concerning this case.

On October 4, 2010, undersigned counsel learned that when this case was on remand from the Kentucky Supreme Court, the Fayette Circuit Court entered an order dismissing the case "with prejudice." The Commonwealth did not file a motion to stay the Kentucky Supreme Court's mandate, *inter alia*, vacating the judgment against him, and it did not appeal the order dismissing the case "with prejudice." Undersigned counsel immediately contacted the Commonwealth.

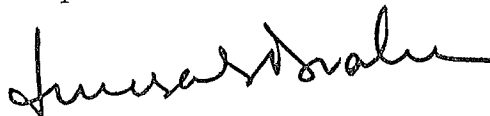
On October 6, 2010, the Commonwealth filed a motion in Fayette Circuit Court to "rescind" the order dismissing the case with prejudice, and on October 8,

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2010, the parties argued that motion. On October 19, 2010, the Fayette Circuit Court granted the Commonwealth's motion and entered an amended order, which provided that this case was dismissed without prejudice "as of March 8, 2010." A copy of the court's opinion and order are appended. King has until November 18, 2010, to appeal the Amended Order to the Kentucky Court of Appeals.

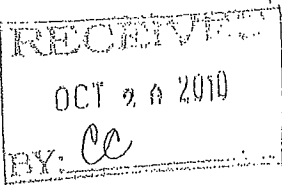
King understands that he must quickly decide how to proceed both in this Court and in state court. King anticipates making any necessary motions to this Court by October 29, 2010. Of course, King will keep this Court apprised of any new developments.

Respectfully submitted,



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* Counsel of Record for Hollis Deshaun King



FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION

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OCT 19 2010

FAYETTE CIRCUIT COURT
BY: *R. J. ...*

COMMONWEALTH OF KENTUCKY

PLAINTIFF

V

OPINION

NO. 05-CR-1500-2

HOLLIS DESHAUN KING

DEFENDANT

This matter is before the Court on Motion of the Commonwealth, through the Attorney General's Office, pursuant to CR 60.02(a)(f), for the Court to "relieve the Commonwealth" of the Court's Order entered March 8, 2002 that Dismissed the charges against the Defendant with prejudice. The Court has considered the Motion, the Response by the Defendant's Counsel and, although unauthorized, the Reply by the Attorney General's Office and the Reply by King's attorney. The Court has also had the benefit of oral arguments of Counsel.

The Commonwealth argues that this Court had no authority to Dismiss the charges against King with prejudice citing *Gibson v Commonwealth*, 291 S.W.3d 686 (Ky. 2009). *Gibson, supra* involved a pre-trial matter wherein the trial court, without the benefit of hearing evidence or conducting a trial or having the case Remanded from the Kentucky Supreme Court.¹ *Gibson, supra* is not controlling authority on the issue before the Court because of the significant differences in the posture of the cases and the differences in the obligations of the trial courts under the particular circumstances. It is undisputed that the Fayette Commonwealth Attorney's Office has represented to this Court, both at the hearing after Remand from the Kentucky

¹ The Remand held that "...the denial of King's Motion to Suppress evidence is reversed, and King's judgment of conviction is vacated", *King v Commonwealth*, 302 S.W.3d 649, 657 (Ky. 2010)]

Supreme Court and in oral arguments on this Motion, that it would have no evidence to support any charges against King that was not the subject of the Kentucky Supreme Court's Reversal and Remand cited above. *King, supra* at 657.

The Attorney General argues that the Order of March 8, 2010 should be modified to delete the Dismissal "with prejudice" language pursuant to CR 60.02(a) "mistake, inadvertence, surprise or excusable neglect..." or "(f) any other reason of an extraordinary nature justifying relief." Without reference to the Record or to any factor set out in CR 60.02(a) above, the Attorney General, in both the written filings and in oral arguments, in a tone and manner that can only be described as abrasive, argues that this Court had no authority to Dismiss the charges against King with prejudice notwithstanding the Kentucky Supreme Court mandate and the Fayette County Attorney's representations to the Court. There was no appeal of the Court's March 8, 2010 Order by the Commonwealth.

Strangely, the Attorney General does not argue, and this Court does not find, that any factor set out in CR 60.02(a) is applicable to the pending Motion. The dilemma in which the Attorney General now finds itself was of its own making, i.e., not letting any Counsel of Record, the Fayette Commonwealth Attorney's Office or this Court know that it was contemplating, drafting or filing a Petition for Writ of *Certiorari* with the United States Supreme Court. That is undisputed and confirmed by Counsel at the oral arguments on October 8, 2010. The Motion to Modify the Order pursuant to CR 60.02(a) is DENIED.

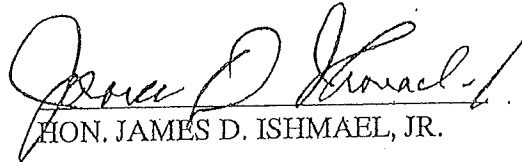
Turning to CR 60.02(f), the Attorney General again argues that this Court had no authority to Dismiss the case with prejudice. That argument has been considered and rejected by this Court. The last argument is that the Granting of the Petition for Writ of *Certiorari* by the

United States Supreme Court should be considered as a "...reason of an extraordinary nature justifying relief." No case authority was cited by the Attorney General that this action satisfies the requisite "extraordinary nature justifying relief." Rather, the Attorney General blames this Court for following the mandate of the Kentucky Supreme Court for the quandary in which it now finds itself. That is neither sound legal reasoning nor fair to this Court.

This Court is always amenable to having full review of its proceedings and rulings. The "bottom line" is that the ruling should be correct and fair to all parties. In this case, the Attorney General does not deserve any relief based on its own conduct, the tone and nature of its arguments, and the lack of merit to the foregoing arguments.

Nonetheless, this Court will Grant the Motion pursuant to CR 60.02(f) to allow for further review based on the "extraordinary nature" of the Writ of *Certiorari* granted by the United States Supreme Court. An Amended Order is attached hereto and made a part hereof by reference.

Dated this 19 day of October, 2010


HON. JAMES D. ISHMAEL, JR.

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OCT 19 2010
FAYETTE CIRCUIT CLERK
R. Z...

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

AMENDED ORDER

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HOLLIS DESHAUN KING

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Dated this the 19 day of October, 2010.

J. P. ...
JUDGE, FAYETTE CIRCUIT COURT