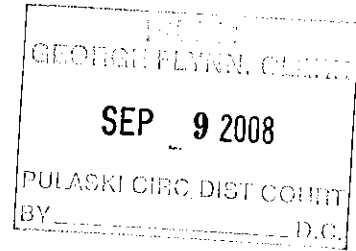


COMMONWEALTH OF KENTUCKY  
PULASKI CIRCUIT COURT  
DIVISION I  
CASE NO. 08-CI-01201



**EDDY F. MONTGOMERY, individually and  
in his official capacity as Commonwealth's  
Attorney for the 28<sup>th</sup> Judicial Circuit**

**PLAINTIFF**

v. **MEMORANDUM OF LAW**

**LaDONNA H. THOMPSON, in her official  
capacity as Commissioner, Kentucky  
Department of Corrections**

**DEFENDANT**

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COMES NOW the Defendant, by counsel, and files with the Court her Memorandum of Law in support of the Motion to Dismiss or in the Alternative to Transfer to Franklin Circuit Court.

**FACTS**

In this matter the Plaintiff has filed a declaratory judgment action with the Court challenging specific provisions of the 2008-2010 budget of the Commonwealth of Kentucky passed in House Bill 406. These provisions deal specifically with the application of parole supervision credit to the sentences of state inmates incarcerated by the Department of Corrections and offenders currently on parole under the supervision of the Division of Probation and Parole. The Plaintiff appears to base his standing to challenge these provisions on his position as Commonwealth Attorney, rather than on any existing harm or controversy affecting him.

14

The Plaintiff has specifically questioned the constitutionality of the subject provisions and has also raised questions regarding the intent of the General Assembly in the application of House Bill 406. The Plaintiff has also questioned whether the Defendant has violated certain statutes related to administrative regulations in the implementation of House Bill 406.

The Defendant in this matter is the Commissioner of the Kentucky Department of Corrections, an agency of the Commonwealth of Kentucky, Justice and Public Safety Cabinet, which is located in Franklin County, Kentucky. The Department of Corrections does not maintain a corrections facility in Pulaski County, and therefore has no corrections staff in Pulaski County. The Department of Corrections is responsible for the sentence calculation of all inmates sentenced to its custody throughout the Commonwealth. This process is done by the staff of the Offender Information Office located in Franklin County. Sentence calculations are not performed in Pulaski County. Division of Probation and Parole staff are not involved in any way in the calculation of inmate sentences.

The Department of Corrections does house inmates at the Pulaski County Detention Center, but these inmates are serving sentences from all over the Commonwealth not just the Pulaski Circuit Court. Furthermore, in regard to the inmates located in this Pulaski County Detention Center, the Plaintiff has not identified any inmates who have had their sentences re-calculated pursuant to House Bill 406 or who are due to be released as a result of that bill.

## ARGUMENT

### I. THIS CASE SHOULD BE DISMISSED AS PULASKI CIRCUIT COURT IS NOT THE PROPER VENUE

The Circuit Courts of the Commonwealth are courts of general jurisdiction and therefore the Pulaski Circuit Court has jurisdiction to consider constitutional questions. In this case venue is determined by KRS 452.405 which states in part that “actions shall be brought in the county where the cause of action, or some part thereof, arose...[a]gainst a public officer for an act done by him in virtue or under color of his office, or for a neglect of official duty.” In this matter there is no act identified by the Plaintiff that would establish venue. When venue is determined to be improper, the court should transfer the case to the proper venue. KRS 452.105.

In Community Services Project, Inc. v. BAWAC Cleaning Services, 226 S.W. 3d 852, 855 (Ky. App. 2007) quoting Fischer v. State Bd. Of Elections, 847 S.W. 2d 718, 721 (Ky. 1993), *abrogated on other grounds*, The Court of Appeals stated that: “the Kentucky Supreme Court held that a challenge to the constitutionality of a statute could be brought in the county in which the Plaintiff resided, since that was the county in which the plaintiff was harmed. The court noted that those actions of state government which occur in Franklin County ‘may not affect or injure any person’. Appreciable harm arises only when the [action] directly affects the individual by denying him a right or imposing upon him an obligation.”

When applying the above standard to the present set of facts it is clear that the Pulaski Circuit Court is not the proper venue. The Plaintiff has failed to

identify any appreciable harm that has occurred in Pulaski County. If any alleged injury is present in this matter it is in the nature of an unconstitutional statute.

Therefore, the case should be dismissed on the grounds that Pulaski Circuit Court is not the proper venue. Venue is proper in Franklin Circuit Court because that is the county where House Bill 406 was enacted by the General Assembly and where it is being applied by the Defendant.

## **II. FRANKLIN CIRCUIT COURT HAS JURISDICTION AND VENUE OVER THIS MATTER**

In the Commonwealth of Kentucky, "The Circuit Court is a court of general jurisdiction: it has original jurisdiction of all justiciable causes not exclusively vested in some other court". KRS 23A.010(1). See also Constitution of Kentucky § 112(5). In this matter the Franklin Circuit Court is a court of general jurisdiction pursuant to KRS 23A.010 (1) with the authority to consider the constitutionality of any act of the General Assembly. Therefore, in the present matter the Franklin Circuit Court can consider the issues raised by the Plaintiff in regard to House Bill 406.

The Franklin Circuit Court is also the proper venue for this matter pursuant to KRS 452.405 due to the fact that the cause of action, challenging an act of the Defendant, as a public official, arose in Franklin County.

**III. EVEN IF THE COURT DETERMINES THAT THE PULASKI CIRCUIT COURT HAS VENUE THE FRANKLIN CIRCUIT COURT IS THE APPROPRIATE FORUM PURSUANT TO THE DOCTRINE OF “FORUM NON CONVENIENS”.**

In Dollar General Stores v. Smith, 237 S.W. 3d 162, 166 (Ky. 2007), the Kentucky Supreme Court stated: “there are fundamental distinctions between the concepts of jurisdiction and venue, the former relating to the power of courts to adjudicate and the latter relating to the proper place for the claim to be heard, there is no such fundamental distinction between venue and forum non conveniens. In general, venue derives from a statutory mandate as to which county or counties is the proper place for a claim to be heard. Forum non conveniens presupposes proper venue, but posits that another county where venue would also be proper also is a more convenient forum, and calls for a discretionary ruling by a trial court to that effect.”

In Roos v. Kentucky Education Association, 580 S.W. 2d 508 (Ky. App. 1979), the Court of Appeals held that: “The doctrine of forum non conveniens recognizes that there are certain instances in which a court properly vested with jurisdiction and venue may, nonetheless, dismiss an action if it determines that it is more convenient for the litigants and witnesses that the action be tried in a different forum. The convenience vel non of a given forum is not determined by a fixed set of rules, but is arrived at by a consideration of various factors on a case by case basis.”

With the enactment of KRS 452.105, the General Assembly made it clear that venue should be transferred in a proper case, and that action should not be dismissed. It has been held that the same rule applies where the trial court

determines that another forum would be a more convenient place for the litigation. Dollar General Stores at 166.

In Roos, *supra*. the Kentucky Court of Appeals addressed the doctrine of forum non conveniens and quoting the United States Supreme Court listed the following factors to consider when applying the doctrine of forum non conveniens: “important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of the unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practicable problems that make trial of a case easy, expeditious, and inexpensive.” (emphasis added)

In this matter the most convenient forum to decide the merits is the Franklin Circuit Court. The basis of the Plaintiff's action is declaratory relief, declaring House Bill 406 unconstitutional and/or incorrectly applied by the Department of Corrections. The matter to be decided here is not just whether House Bill 406 is unconstitutional for Pulaski County or the 28<sup>th</sup> judicial circuit, but whether the specific sections of House Bill 406 are unconstitutional or incorrectly applied for the entire state. This is clearly a matter of statewide impact.

Given the nature of the case at hand and the issues raised by the Plaintiff Franklin Circuit Court is the most convenient and appropriate forum for this action. The Plaintiff has specifically chosen to question the legislative intent of the General Assembly in the enactment of House Bill 406. Therefore, for a Court to make a

decision on the merits of this issue, all evidence regarding the intent of the legislature should be reviewed.

The evidence that will have to be reviewed includes both witness testimony and documentary evidence. In this matter each and every witness with information relative to the determination of the legislative intent of House Bill 406 is in Franklin County. These witnesses include, but are not limited to: Department of Corrections budget office and offender information staff, Justice and Public Safety Cabinet legislative staff, Legislative Research Commission budget staff, House of Representative and Senate staff, and potentially members of the General Assembly themselves who are scattered across the Commonwealth, but maintain offices in Franklin County.

The position of the Defendant that Franklin County is the appropriate forum for this matter is further strengthened by the fact that the officers and employees of the Department of Corrections, other than a few Probation & Parole officers, are not subject to subpoena to testify in civil actions in Pulaski County. KRS 422.290(1) states that:

“No officer or employee of the Department of Corrections shall be required to give personal attendance as a witness in any civil suit arising from that person’s employment, out of the county in which his or her official workstation is situated, but his or her deposition shall be taken in lieu thereof. However, in the court in which the civil action is pending, if the court finds that the witness is a necessary witness for trial, the court may order the personal attendance of the witness at trial.”

KRS 422.290(1)

The necessity of deposing every witness necessary to this case and presenting that testimony to the Court in deposition form would be a needless burden on the Court and the parties. This statute combined with the fact that there are no Department of Corrections officers or staff in Pulaski County that calculate sentences clearly demonstrates that Franklin County is the proper venue for this case.

In regard to the documentary evidence that will be required for this case, it is all located in Franklin County. The potential documentary evidence that will be needed includes, but is not limited to: the legislative record of House Bill 406, audio and video recordings of committee meetings, Legislative Research Commission records, inmate records of the Department of Corrections and the Kentucky Parole Board (which is not a party to this case) etc. Because all of the relevant documentary evidence in this case is in Franklin County it is clear that pursuant to the doctrine of "forum non conveniens" the appropriate forum for this matter is the Franklin Circuit Court.

The Plaintiff has also questioned the actions of the Department of Corrections in regard to its retroactive implementation of House Bill 406 and whether the Department of Corrections is acting in violation of the applicable laws and statutes regarding the promulgation of administrative regulations. Once again this is a question that is best answered by reviewing potential evidence located in Franklin County.

The issues raised by the Plaintiff in this matter are best addressed by an analysis of all of the available evidence relevant to the issues, and it is clear that all of this evidence is located in Franklin County. The Department of Corrections does not have an institution in Pulaski County, nor does it calculate any inmate sentences in Pulaski County, therefore there is no evidence available in Pulaski County germane to the issues raised by the Plaintiff.

This fact has been clearly demonstrated on two occasions, first in the case of Commonwealth v. Larry Lee Ramsey, 01-CR-91 and 01-CR-111, in which the Plaintiff originally raised many of the issues that are currently before the court, and secondly at the hearing conducted on August 27, 2008 in this case. In each of these matters the only witnesses that were able to provide any relevant evidence to the Court were from jurisdictions other than Pulaski County and the most helpful witnesses were from the Department of Corrections located in Franklin County.

It is also of utmost importance for the laws and statutes of the Commonwealth of Kentucky to be applied in a consistent manner. The transfer of this case to the Franklin Circuit Court would best achieve this goal. The Franklin Circuit Court is the most appropriate forum to review House Bill 406 in order to best reach a determination of its constitutionality and correct application.

No interest is served to have a myriad of inconsistent decisions regarding this issue from courts throughout the Commonwealth. This fact is best illustrated by recent events that occurred in the Harlan Circuit Court. On August 29, 2008 the Harlan Circuit Court issued an order *sua sponte* that prohibited the Department of

Corrections from applying House Bill 406 to inmates serving sentences from the Harlan Circuit Court. This order was a general order not filed in any particular case. Upon receipt of this order the Department of Corrections immediately filed a Writ of Prohibition against the Harlan Circuit Court, Case No. 2008-CA-001656, and on September 4, 2008 received an order of the Court of Appeals staying the enforcement of the Harlan Circuit Court order pending a ruling on the merits. This case enforces the need to have the present case transferred to the Franklin Circuit Court for further proceedings in order to reach a decision that is uniform and recognized by all of the Courts of the Commonwealth. To fail to do so is a misuse of judicial resources.

### CONCLUSION

The issue at the heart of this matter is the constitutionality and statewide implementation of specific provisions of House Bill 406. There is no question that the Pulaski Circuit Court, as a court of general jurisdiction, has jurisdiction to hear constitutional questions. However, the same is true for the Franklin Circuit Court. In this matter we have two circuit courts that have jurisdiction over the subject matter, and as a result the question is one of venue.

It is the position of the Defendant that venue is improper in the Pulaski Circuit Court. However, if the Court feels that the Pulaski Circuit Court has venue along with Franklin Circuit Court, it is the position of the Defendant that pursuant to the doctrine of *forum non conveniens* that the Franklin Circuit Court is the appropriate forum for this action.

The Plaintiff has asked the Court to review an act of the General Assembly to consider its constitutionality, in addition to reviewing the actions of the Department of Corrections in its implementation of said statute. This is a task that is best suited for the Franklin Circuit Court due to the fact that the evidence required to make this decision is exclusively located in Franklin County and therefore, Franklin Circuit Court is the most convenient forum to consider this issue.

WHEREFORE, the Defendant prays for an order dismissing this matter or in the alternative transferring this matter to the Franklin Circuit Court for further proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed, postage prepaid, this 9<sup>th</sup> day of SEPT, 2008, to:

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