

No.

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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ALI AL-MAQABLH,

*Petitioner,*

v.

COMMONWEALTH OF KENTUCKY,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
KENTUCKY CIRCUIT COURT FOR THE 12<sup>th</sup>  
JUDICIAL DISTRICT (COUNTY OF TRIMBLE)

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**PETITION FOR A WRIT OF CERTIORARI**

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MICHAEL R. SLAUGHTER  
*Counsel for the Petitioner*  
P.O. Box 32  
WESTPORT, KY 40077  
502-225-5889  
attny4u2@hotmail.com

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## QUESTIONS PRESENTED

The Petitioner, Ali Al-Maqabhlh, saw bruises on his child's face. When he reported them to Kentucky's Child Protective Services, he was charged, tried, convicted, and sentenced to six months of imprisonment and more than \$1200 in fines in a jury trial in a rural Kentucky district. Kentucky ranks highest in the nation in incidents of child abuse. Incredibly, the state prosecutes citizens who report suspected child abuse for filing a false police report. Kentucky is a recipient of federal funds under the Child Abuse Prevention and Treatment Act (CAPTA). That federal law requires states, including Kentucky, to enact immunity laws that shield reporters of suspected child abuse from civil and criminal liability. Kentucky codified, such an immunity statute, which gave it the ability to qualify it for federal funds.

In 1974, Congress enacted CAPTA in an effort to curb child neglect and abuse and "create a unified focus for preventing and responding to instances of child abuse and neglect." (CAPTA, P.L. 93-247). As a requirement for establishing eligibility for federal grants under CAPTA, states are required to provide immunity from prosecution for individuals making good-faith reports of known or suspected instances of child abuse or neglect. (42 U.S.C. § 5106a(b)(2)(B)(vii) (2016)). States are also required to implement procedures for receiving and responding to allegations of abuse or neglect in an attempt to ensure children's safety. *Id.* In satisfying these

requirements, Kentucky enacted “immunity” and “reporting” statutes codified as Kentucky Revised Statutes (KRS) 620.010-050 also known as CAPTA laws.

Unfortunately, Kentucky does not recognize immunity as a defense to criminal liabilities, even though that defense is specifically codified in its statutes. The legal process employed by the state has the effect of not shielding reporters of suspected child abuse from criminal liability. While at the same time that Kentucky is ignoring its immunity statutes, it continues to be the recipient of more than 400 million dollars in federal fund under CAPTA. These legal shortcomings are inherent in Kentucky law and require the intervention of this Court. In particular, while KRS 620.050, specifically enacted to protect a reporter of suspected child from criminal and civil liability, a current Kentucky Supreme Court’s decision disallows immunity as a defense in criminal cases.

These failures are multilayered in nature. First, Kentucky prosecutes reporters of suspected child abuse as a Class-A misdemeanor, which carries up to one year of imprisonment, under unrelated statutes. Due to a procedural limitation in Kentucky appellate rules, misdemeanor convictions are not reviewable as Matter-Of-Right in Kentucky Appellate Courts and that glaring issue has remained off the radar for decades. Second, because CAPTA funds are extremely essential to Kentucky governmental operations, it is widely believed that the appellate court’s refusal to address these issues

is motivated in an attempt to shield Kentucky from potential financial harm. Third, under a Kentucky Supreme Court Precedent (Commonwealth v. Farmer, Appendix F), criminal defendants invoking immunity as a defense have no constitutional right to an evidentiary hearing to establish the factual basis of that defense. Fourth, under that same precedent, appellate courts in Kentucky are deprived of the constitutional power and jurisdiction to review the denial of an immunity defense in criminal cases. Fifth, even if evidentiary hearings were allowed, they would be pointless because, as the case at bar exemplifies, under another Kentucky Supreme Court precedent (Commonwealth v. Bishop 245 S. W. 3d (KY, 2008), Kentucky's trial courts are deprived of the constitutional power to dismiss charges prior to trial (Appendix A, D). Even though Bishop grants such a power in limited cases, CAPTA-based immunity is not one of those cases. Sixth, as a precedent set by the case at bar, Bishop now deprives Kentucky trial courts of the authority to direct a verdict of acquittal but instead requires the jury to resolve questions of law such as immunity. Seventh, as another precedent set by this case, the current law in Kentucky disregards the venue entitlement under the Sixth Amendment as interpreted by this Court in United States v. Johnson, 323 U.S. 273, 276 (1961), United States v. Travis, 364 U.S. 631 (1961) and relies on the "felt effect" jurisprudence rather than the actual location of the crime to determine the proper venue for purposes of prosecuting false statements. Simply put, Kentucky law deprives criminal

defendants, who invoke immunity as a statuary and constitutional entitlement, their right to be prosecuted in the venue of the alleged crime, and their right to acquittal as a matter of law. The questions presented:

1) Whether CAPTA-based immunity falls within the narrow exception to the rule against interlocutory appeals and whether it meets the standards under the Collateral Order Doctrine.

2) Whether a state violates federal law and the U.S. Constitution when it deprives its trial courts of the authority to summarily dismiss a misdemeanor charge on a defense of immunity invoked under CAPTA and when it deprives its courts of the authority to address a pretrial constitutional and statutory entitlement granted under an act of the U.S. Congress or when it deprives trial courts of the authority to direct a verdict of acquittal.

3) Whether a state violates the U.S. Constitution when it prosecutes a crime of false reporting via a criminal warrant that is devoid of the element of venue in a jurisdiction where the effect of the crime is felt rather than where the statement was filed or made.

## **PARTIES TO THE PROCEEDINGS BELOW**

Ali Al-Maqablh was the Defendant in Kentucky District Court for Trimble County, the Appellants in the Kentucky Circuit Court for Trimble County, and the Petitioner for discretionary review before the Kentucky Court of Appeals and before the Kentucky Supreme Court.

The Commonwealth of Kentucky was the Plaintiff in the Kentucky District Court for Trimble County, the Appellee for the Kentucky Circuit Court for Trimble County, and the Respondent in a petition for discretionary review before the Kentucky Court of Appeals and the Kentucky Supreme Court.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Ali Al Maqablh (“Maqablh”) respectfully petitions for a writ of certiorari to review the opinion of the Kentucky Circuit Court for the 12th Judicial District (County of Trimble).

### **OPINIONS BELOW**

The opinion of the Kentucky Circuit Court is unpublished and attached herein as Appendix A. The order of the Kentucky Supreme Court denying discretionary review is unpublished and attached here as Appendix B. The order of the Kentucky Court of Appeals denying discretionary review is unpublished and attached herein as Appendix C. The order of the Kentucky District Court (trial court) denying immunity is unpublished and attached herein as Appendix D. The order of the Kentucky trial court denying the Petitioner’s motion to transfer venue is unpublished and attached here as Appendix E. The Opinion of the Kentucky Supreme Court barring interlocutory appeals from an order denying immunity is published as Commonwealth v. Farmer, 423 S.W.3d 690 (2014) and attached here as Appendix F. The Opinion of the Kentucky Court of Appeals allowing interlocutory appeals from an order denying immunity for a criminal defendant is unpublished and attached here as Appendix G. The Opinion of the Kentucky Supreme Court barring pretrial dismissal is published as Commonwealth v. Bishop 245 S. W. 3d (KY, 2008).

## **JURISDICTION**

The Court has jurisdiction pursuant to 28 U.S.C. § 1257 and 28 U.S. Code § 1254(1). The Kentucky Circuit Court issued its opinion affirming on June 13, 2018. The Kentucky Supreme Court denied Maqabhl's petition for discretionary review on June 5, 2019. Application to extend the time to file the petition was granted by Justice Sotomayor on September 6, 2019, under docket number 19A261. This Petition is due on or before November 2, 2019.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The pertinent provisions of the Child Abuse Prevention and Treatment Act of 1974 as amended in 2016 are contained in 42 U.S.C. § 5106a Subsection (b)(2)(B)(vii) states:

[states' plan submitted under paragraph (1) of the act shall contain] provisions for immunity from civil or criminal liability under State and local laws and regulations for individuals making good faith reports of suspected or known instances of child abuse or neglect, or who otherwise provide information or assistance, including medical evaluations or consultations, in connection with a report, investigation, or legal intervention pursuant to a good faith report of child abuse or neglect;

Kentucky Revised Statute 620.050(1) reads:

Anyone **acting upon reasonable cause** in the making of a report **or acting** under KRS 620.030 to 620.050 **in good faith** shall have **immunity from any liability, civil or criminal, that might otherwise be incurred or imposed**. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report or action. However, **any person who knowingly makes a false report** and does so with malice shall be guilty of a Class A misdemeanor. (emphasis added)

Kentucky Revised Statute KRS 519.040 reads:

- (1) A person is guilty of falsely reporting an incident when he:
  - (a) Knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, that deals with emergencies involving danger to life or property; or
  - (b) Reports to law enforcement authorities an offense or incident within their official concern knowing that it did not occur; or
  - (c) Furnishes law enforcement authorities with information allegedly relating to an offense or incident within their official concern when he knows he has no information relating to such offense or incident; or
  - (d) Knowingly gives false information to any law enforcement officer with intent to implicate another; or
  - (e) Initiates or circulates a report or warning of an alleged occurrence or impending occurrence of a fire or other emergency under circumstances likely to cause public inconvenience or alarm when he knows the information reported, conveyed or circulated is false or baseless.
- (2) Falsely reporting an incident is a Class A misdemeanor.

Kentucky Revised Statute KRS 452.550 reads:

Where an offense is committed partly in one and partly in another county, or if acts and their effects constituting an offense occur in different counties, the prosecution may be in either county in which any of such acts occurs.

## STATEMENT OF THE CASE

### 1. The Petitioner's Case in the State's Trial Court

The Petitioner, had been charged with 2 counts of false reporting and one count harassment for reporting injuries he observed on his child's face. After Kentucky state workers determined the report to be accurate, they documented these injuries and opened an investigation. Subsequently, a disgruntled private citizen managed to press the charges underlying this petition via a rural Kentucky prosecutor in an unrelated district. The charges were initiated even before the state workers begun their investigations via a string of similarly-scripted criminal summons lacking probable cause, venue, and factual sufficiency.

At the early stages of proceedings, the Petitioner invoked his right to be immune from prosecution under Kentucky's CAPTA law, KRS 620.050. In response, the Kentucky prosecutors denied that injuries existed and, on that basis, they sought to have the Petitioner motion for immunity denied. Under a Kentucky precedent (Commonwealth v. Farmer, Appendix F), the trial court refused to hold an evidentiary hearing to address that inquiry and summarily denied the Petitioner's motion holding, *inter alia*, that the court lacked authority to dismiss misdemeanor charges prior to trial. (Appendix D). The

court recognized certain exceptions to that rule but held that CAPTA immunity was not one of them. *Id.* Under Farmer, the Kentucky Supreme Court issued a sweeping bar to interlocutory appeals from an order denying a criminal defendant a defense of immunity. Subsequently, the Petitioner was denied the opportunity to challenge such dismissal via direct appeal. The Petitioner then challenged the venue of the trial arguing that the criminal summons lacked that element and that no statements, false or otherwise, had been submitted, filed, or received in that district. The trial court denied that motion as well without holding an evidentiary hearing and without establishing the facts. The trial court held that the effect of the false statement was felt in that District. (Appendix E).

The Petitioner was required to await trial to establish the factual basis of his immunity defense, which defeated the purpose of immunity statute altogether. At trial, Kentucky exhibited nothing but exculpatory evidence, including pictures showing injuries, state reports proving that the report of suspected abuse was accurate and true, and state workers' testimonies that foreclosed any and all grounds for prosecution. Instead of dropping the charges, however, Kentucky's position quickly shifted to allege that CAPTA law requires *certain knowledge* prior to making a report of *suspected* child abuse. Then, to make matters worse, after these facts became known to the trial Court, Ali moved to dismiss the criminal charges but the court emphatically

denied that motion reciting its previous holding that it lacked authority to dismiss charges and that Petitioner's fate is in the Jury's hand.

Kentucky instructed the jury [contrary to CAPTA] that a reporter of child abuse not having *certain knowledge* is liable under another unrelated Kentucky statute KRS 519.040. Thereafter, Kentucky's argument became that KRS 620.050 dictated that a lack of *certain knowledge* in making a report of child abuse exposes the reporting source to criminal liability and in such cases, the burden of proof then shifts to the defendant. For that, Kentucky's evidence was limited to showing that the injuries occurred but that the Petitioner "did not know that they were a result of abuse." At the conclusion of the trial, the Petitioner was convicted on all charges regardless of any evidence of culpability. On January 23, 2018, the trial court sentenced the Petitioner to 180 days of imprisonment and \$1256 in fines and cost.

## **2. Appeal in The State's Appellate Courts**

The Petitioner timely appealed the trial court's decisions to the Kentucky Circuit Court as prescribed by Kentucky Rule 72. On Appeal, the Circuit Court declared that it chose to adopt the prosecution's views, which declared, *inter alia*, that a report of child abuse is deemed false unless it is based on *certain knowledge*. Even though the Petitioner had been charged and tried under an unrelated statute, the prosecution argued that the issue of immunity was resolved by the jury. In adopting these views, the Circuit Court

summarily affirmed the trial court's ruling and incorrectly held, *inter alia*, that the trial court lacked authority to direct a verdict of acquittal and that the issue of immunity was resolved properly (Appendix A). In formulating its opinion, the Circuit Court incorrectly cited the Kentucky Supreme Court ruling in Commonwealth v. Bishop 245 S. W. 3d (KY, 2008), which selectively prohibits trial courts from dismissing indictments prior to trial. The two and a half pages, which make up the Circuit Court's ruling, lacks clarity and fell far short of the required scrutiny under the standards of *de novo* reviews. Following that, the Petitioner moved the Circuit Court to expand on, or reconsider, that erroneous opinion. The Circuit Court refused to hear that motion holding that error-correction mechanisms are unavailable to appeals in Circuit Court. A timely motion for discretionary review was filed in the Court of Appeals, which was denied on February 7, 2019 (Appendix C). A timely motion for discretionary review was also filed in the state court of last resort, the Kentucky Supreme Court, which was also denied on June 5, 2019 (Appendix B).

It is worth mentioning that the Kentucky Circuit Court's opinion revealed that the appellate judge had also presided over the case as a substitute trial judge. While this is a common practice in rural America, it furthers an inherent conflict of interest that characterizes the small-town justice.

## **REASONS FOR GRANTING THE PETITION**

Certiorari should be granted for 4 reasons.

## I. THE STATE COURT'S OPINION CRIMINALIZES THE INTENT OF THE U.S. CONGRESS

The Single Appellate Judge issued a sweeping opinion that criminalizes the reporting of suspected child abuse and deprives trial courts and citizens of their constitutional entitlement. The opinion of the Kentucky Circuit Court is a final judgment rendered by the highest state court in which a decision could be had and, as the current law, it exposes millions of Kentucky children to harm, abuse, and jeopardizes the wellbeing of children in Kentucky, the highest state in incidents of child abuse.

At this point this Court represents the only hope for Kentucky children. While this case demonstrates an egregious example of a miscarriage of justice; and while it explains, in some ways, Kentucky's vast increase in rates of incarceration and extreme sentencing guidelines<sup>1</sup>, the purpose of this petition is not particularly seeking a vindication. A favorable resolution will not alleviate the Petitioner's suffering since he has completed his sentence. The Petitioner is advancing this Petition to help Kentucky children and remove this bad precedent. The fact that this case is before this Court is a natural progression caused by the procedural evolution of the Kentucky Appellate Court's in this matter. A Certiorari will help Kentucky children in more ways

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<sup>1</sup> According to the U.S. Department of Justice, Kentucky has the ninth highest rate of incarceration in the nation. See <https://www.bjs.gov/content/pub/pdf/p16.pdf>

than this petition asserts. In addition to holding the responsible accountable, it will address the federal government frustration with Kentucky in regard to permanency and protection. As mentioned above, even though Kentucky ranks worst in the nation in rates of child abuse, it remains to be the undeserved recipient of CAPTA funds.

Likewise, a review by this Court will alert other states that have enacted such void statutes for the sole purpose of qualifying for federal funds to prefect their governance. A review by this Court will also address the repeated refusal to address these issues by Kentucky's intermediate and high appellate courts. The fact that Kentucky prosecutors repeatedly sidestep CAPTA laws altogether indicates that the scheme is deeply rooted in Kentucky's politics; one that is motivated by saving Kentucky from financial harm and the discontinuation of CAPTA funds. Should this Court decide not to review this case, it must know that Kentucky appellate courts will not address this legal conundrum, which is the proximate reason behind Kentucky's alarming rates of child abuse.

## II. THE STATE COURT'S OPINION INVITES CONSTITUTIONAL INFRACTION AND ENDANGERS PROTECTED RIGHTS

The Kentucky Circuit Court violated the United States Constitution, Federal and Kentucky laws and controlling U.S. Supreme Court precedents, and did so in five areas of law: (1) it affirmed a lower court position that reporting child abuse based on *suspicion* is a crime not protected by immunity extended by the state under an act of the United States Congress; (2) it held

that immunity is not a question of law but a question of material facts to be resolved only by the jury not the court; (3) it held that a citizen who is charged with a misdemeanor crime in a state court pursuant to a summons authorized by a state judge has no constitutional rights to challenge the charge prior to trial and must face a jury trial; (4) it held that a trial court lacks authority to summarily dismiss a misdemeanor charge on grounds of immunity extended by the state under an act of the United States Congress; (5) it held that a trial court has no authority to direct a verdict of acquittal when the underlying conduct is only questionable.

An integral part of this case is also the Kentucky Supreme Court's jurisprudence, which directly influenced both of Kentucky Courts' opinions which held that state immunity under CAPTA is (1) not an established right; (2) a criminal defendant invoking this defense has no constitutional right to a pretrial evidentiary hearing or (3) a right to challenge the denial of that defense in appellate courts. Furthermore, by failing to address the issue of venue regarding the crime of false statement, the Circuit Court affirmed and endorsed a statewide practice that a crime of false statement should be tried in a jurisdiction where "the effect of the crime" is felt rather than where the statement was filed or made.

The Kentucky Circuit Court's erroneous opinion as to each of those areas of law raises questions of exceptional importance meriting this Court's immediate intervention and review. Because the Kentucky Circuit Court's

opinion represents the current Kentucky law, particularly as it pertains to reporting suspected child abuse, it is impacting the substantial rights of millions of children across Kentucky and threatens their wellbeing. In addition, it deprives 4.5 million Kentucky citizens of a constitutional right to a valid defense.

The facts underlying this case will explain why Kentucky ranks highest in the nation in rates of child abuse. In a newly issued report by the U.S. Department of Health and Human Services, Children's Bureau, Kentucky was determined to be the highest state in incidents of child abuse.<sup>2</sup> Not only that, the same report found that Kentucky rates at more than double the national average. *Id.*

### III. CERTIORARI WILL CLARIFY WHETHER DENYING IMMUNITY, EXTENDED UNDER CAPTA, IS APPEALABLE AS AN EXCEPTION TO THE COLLATERAL ORDER DOCTRINE

Third, a review by this Court will clarify CAPTA-based immunity and whether it falls within the narrow exception to the rule against interlocutory appeals. As mentioned above, Kentucky's appellate courts don't review immunity in criminal cases via applications for discretionary review, bar interlocutory criminal appeals, and hold that immunity is non-reviewable on appeal because it is a shield from prosecution and therefore it is forever lost.

The U.S. Congress enacted CAPTA as a preventive measure to address the issue of child neglect and abuse. Kentucky enacted KRS 620.030-50 to

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<sup>2</sup> <https://www.acf.hhs.gov/sites/default/files/cb/cm2017.pdf>

qualify for these federal monies. Under this law reporting child abuse, even if based on *suspicion and belief*, is mandatory and failure to report is considered a crime. At the same time, as in the case at bar, Kentucky also prosecutes individuals making reports based on *suspicion and belief* depending on who and where the individuals are involved.

While the Kentucky Supreme Court has not issued an opinion in this case, it is responsible for impeding the application of immunity and has directly and indirectly influenced the trial court's decision and the Circuit Court's opinion. The Kentucky Supreme Court's failure to recognize immunity as an exception to the bar on pretrial dismissal under Bishop, its holding in Farmer (see Appendix F) that evidentiary hearings are not a constitutional right, and its bar on interlocutory appeals taken by a defendant for denying his immunity in Farmer are some of the reasons that produced this sweeping legal stalemate that violates a defendant's constitutional rights and an act of the U.S. Congress.

KRS 620.050 was enacted as a condition and an incentive imposed by the federal government for the states to qualify for federal funds earmarked for permanency and protection of minors. See 42 U.S.C. §5106a(b)(2)(B)(vii) (2010). The declared purpose of that statute is to shield reporters of suspected child abuse not only from liability but also from prosecution both civil and criminal. KRS 620.050(1) reads:

Anyone acting upon reasonable cause in the making of a report or acting under KRS 620.030 to 620.050 in good faith shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report or action. However, any person who knowingly makes a false report and does so with malice shall be guilty of a Class A misdemeanor. See KRS 620.050(1).

The statutory text is clear that it grants immunity from criminal liability, both imminent and imposed. So far, Kentucky Appellate Courts have only reviewed CAPTA-based immunity in civil cases. (See e.g., Norton Hospital v. Peyton, 381 S.W.3d (Ky. 2012); J. S. v Berla, 456 S. W. 3d 19 at 23 (Ky. App. 2015), and Morgan v Bird, 289 S.W. 3d 222 (KY App 2009)). In all cases reviewed, the Kentucky Supreme Court and the Kentucky Court of Appeals have both held that immunity is a bar from prosecution and a shield from the burdens of litigation and should be invoked at the earliest stage of the proceeding. (See also Rodgers v. Comm., 285 S.W.3d 755 (Ky. 2009), White v. Norton Healthcare, Inc., 435 S.W.3d 68, 75 (Ky. App. 2014)). Both courts have also held that denying immunity is an exception to appealable judgments as defined by Rule of 54.<sup>3</sup> (See e.g. Breathitt County Bd. of Educ. v. Prater, 292 S.W.3d 883 (Ky. 2009)).

While the statutory text addresses criminal prosecution, Kentucky Courts' rejection of the applications for discretionary review leaves lower

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<sup>3</sup> Kentucky's Rules of Civil Procedure mirror Federal Rules of Civil Procedure.

courts without guidance and Kentucky citizens without defined rights. The Kentucky legislature is aware of this legal stalemate and yet continues to be silent on an issue that not only endangers children but also invites judicial abuse and gives jurists, prosecutors, and law enforcement officers unbridled discretion.

By criminally charging citizens who report suspected child abuse based on a subjective belief, Kentucky violates federal law, an act of the U.S. Congress, and due process guaranteed by the U.S. Constitution. In so doing, Kentucky also risks the wellbeing and furthers the endangerment of more than a million child under its jurisdiction. In addition, by enacting moot statutes for purposes of qualifying for federal funds while prosecuting the very conduct these statutes were meant to encourage defines absurdity. By depriving citizens of the right to invoke CAPTA immunity as a defense to a criminal liability, the right to address that defense via evidentiary hearings, and the right to appeal the denial of that right, Kentucky unlawfully deprives citizens of an established right extended through the act of the U.S. Congress, which strikes at the heart of the rule of law and is in direct conflict with the United States Constitution.

This Court's jurisprudence has long been that immunity is not only an entitlement to be free from the burdens of defending the action, but also an order denying a substantial claim of immunity is immediately appealable prior

to a final judgment. (See Mitchell v. Forsyth, 472 U.S. (1985); Nixon v. Fitzgerald, 457 U.S. (1982) (recognizing an exception to the federal final judgment rule codified at 28 U.S.C. § 1291 in immunity cases)). This Jurisprudence, however, is not persuasive on Kentucky Courts. The Kentucky Supreme Court bars legal procedures set forth to invoke and challenge the denial of such a right and at the same time incorrectly applied this Court's jurisprudence as pertains to the Collateral Order Doctrine in Comm. v. Farmer. (See Appendix F). That is, if a defendant, who invokes a CAPTA-based immunity faces a bar on an evidentiary hearing, then faces another bar on a pretrial dismissal, and yet another bar on interlocutory appeal, and must endure the irreparable harm, the expense, the pain, and the suffering of a trial. This begs the question, what good does CAPTA do? This is clearly not the outcome the United States. Congress had in mind when enacted CAPTA.

By the current case law in Kentucky, the defendant must endure the possibility of a potential conviction and penalty, and the cost of trial and appeal only to then ultimately face the reality that immunity is an inquiry addressed by the jury and not reviewable on appeal.

In addressing this ambivalence, the Kentucky Court of Appeals expressed its frustration by holding that it cannot ignore the futility in an appeal of the denial of immunity after a defendant's conviction. The Court of Appeals further explained that following a trial and conviction, any argument

that immunity was improperly denied would be subject to the harmless error rule, and the defendant required to overcome the strong preference in the law for deferring to a jury's verdict. (Appendix G, page 4). "It is simply nonsensical for the [Kentucky] General Assembly to have clearly established immunity from prosecution that is to be determined by the court, but leave a defendant denied immunity without an opportunity for meaningful judicial review." *Id.* Ultimately, the Kentucky Court of Appeal granted a review from a trial court's order denying immunity citing the jurisprudence of the D.C. Circuit Court in Stein v. U.S., 532 A.2d 641, 644 (D.C. 1987) reasoning that if a criminal defendant is entitled to immunity, he cannot be tried and should be entitled to an immediate review of the trial court's decision.<sup>4</sup> However, the Kentucky Supreme Court reversed that decision holding that the Kentucky Court of Appeals lacked statutory or constitutional jurisdiction over appeals from an interlocutory order in a criminal case. (Appendix F ). That jurisprudence, however, is in conflict with what has been established by this Court.

In Nixon 457 U.S., this Court held that a federal appellate court has jurisdiction to review an interlocutory appeal involving immunity under a narrow exception to the rule against interlocutory appeals. In Cohen v. Beneficial Industrial Loan Corp. 337 U.S. (1949), this Court set a precedent for, and recognized, the standards for a narrow example of interlocutory but

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<sup>4</sup>In *Stein*, the D.C. Circuit Court held that the trial court's order denying immunity is immediately appealable as a collateral order.

appealable orders in which "finally determine claims of right separable from, and collateral to, rights asserted in the action, [are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id* at 546. In Flanagan v. United States, 465 U.S. (1984), this Court addressed the collateral order's narrow and stringent, but possible, exceptions to the final judgment rule for interlocutory appeals in criminal cases.

The exceptions to the collateral order as established by this Court in Coopers & Lybrand v. Livesay, 437 U. S. (1978) says that "a trial court order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Id* at 463, 468. In this case, the first prerequisite -- whether the trial court has addressed and entered a final judgment on the issue has been indisputability established. (Appendix D). The Petitioner, invoked immunity at the earliest stages of proceedings under KRS 620.050 via a written motion, which was denied. Therefore, the disputed question became whether the Petitioner was immune from prosecution and liability under that particular statute. The Kentucky trial court ruled on that question, and its ruling has become the law on that case, not subject to reconsideration before final judgment. *Id*. The second requirement-- whether the challenged ruling on the immunity issue is completely separate from the merits of the criminal prosecution, had also been

established. This Court "has recognized that a question of immunity is separate from the merits of the underlying action [ ] even though a reviewing court must consider the [ ] factual allegations in resolving the immunity issue."  
Mitchell 472 U.S. (footnote omitted). The inquiry of immunity under CAPTA-based state law is separate from the merits of the case because the plain language of KRS 620.050 statute on which immunity was invoked, expressly provides that a compliant person "shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed." This provision provides more than just a shield from the prosecution and a defense to the criminal charge itself, but also a vindication from an imposed liability in a retroactive manner. Regardless, Kentucky ignored these standards in the interest of preserving its financial interest leaving Kentucky Children without protection.

As mentioned earlier, the Kentucky Circuit Court's opinion is the opinion of a state court of last resort and represents the current law in Kentucky; one that discourages citizens from reporting suspected child abuse. One striking example is a Western Kentucky High School principal who was facing criminal charges for *failing* to report suspected child abuse, has cited such jurisprudence and managed to have charges against him dismissed. If the case before the bar with this petition is allowed to stand, Kentucky will be in the questionable position of criminally charging its citizens for reporting

*suspected* child abuse, and granting immunity for *not* reporting suspected child abuse. Such a legal paradox must not be allowed to stand.

CAPTA require states to define child abuse and neglect in a way that is consistent with that act, which defines the term as “at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.” 42 U.S.C. § 5106a(b)(2)(B)(vii) (2016). It is clear that the United States Congress enacted CAPTA in an effort to curb child abuse, not as a means for the states to siphon federal funds. A review by this Court will clarify whether invoking CAPTA-based immunity is an exception to the collateral order doctrine and whether Kentucky violates the United States Constitution in depriving its trial court of the power to dismiss a misdemeanor charge based on an established right extended by the state via an act of the United States Congress.

#### IV. CERTIORARI WILL FORTIFY THE RIGHTS OF INDIVIDUALS WHO REPORT SUSPECTED CHILD ABUSE AGAINST RETALIATORY CONDUCT BY AGGRIEVED PARTIES

A review by this Court will encourage citizens to report suspected child abuse by defining their right to be tried in the district where their report is filed, which will ultimately protect them from retaliatory prosecution by aggrieved parties. The Sixth Amendment provides a guarantee of trial in the state and district in which the crime was committed. In this case, Kentucky

prosecuted the Petitioner via a group of similarly-scripted criminal complaints, none of which identifies the venue.

The Sixth Amendment also requires the element of venue to be alleged in every indictment although it is not an element of the charged offense. Evidently, Kentucky treats venue rules lightly. Yet this Court has cautioned that the venue rules are not to be treated lightly. United States v. Johnson, 323 U.S. 273, 276 (1961).

In Kentucky and all other states, filing a statement reporting suspected child abuse takes place via a centralized intake hotline. The case at bar is an alleged false statement equivalent to crimes under 18 U.S.C. § 1001. In United States v. Travis, 364 U.S. 631 (1961), this Court held that venue is proper in the district of receiving a false statement. Kentucky Courts contradict this jurisprudence in holding that venue is proper where the effect of a false statement is felt. Appendix E.

Much like the United States Congress, the Kentucky legislature failed to provide an explicit provision regarding venue for crimes of false statements. This issue undermines the purpose of CAPTA and stifles citizens from reporting *suspected* child abuse.

In Travis, 364 U.S., the central issue was whether venue was proper in the place of mailing a false statement. This Court held that at the time of mailing, the false statement was not within the jurisdiction of the government

and such cause was unactionable until the document was received by the government. This Court reasoned that a provision that governs a false statement did not apply until the affidavit was in the files of the government agency. In the case at bar, Kentucky's venue of choice was neither the venue of making the alleged false statement nor the venue of receiving it. It may have been that the state selected Trimble County as the venue because there was an assumption that a conviction would have been more easily obtained there instead in a more proper venue.

Furthermore, a review will have a wide application and will help clarify the law as it pertains to the definition of venue in cases involving "e-crimes." It will address a deeply flawed issue that characterizes Kentucky law as it pertains to venue and will help in shielding individuals who report *suspected* child abuse against retaliatory actions by disgruntled and supposedly aggrieved parties. It will also help in centralizing the jurisdiction for prosecuting these individuals to one district, which will possibly encourage more citizens to report *suspected* child abuse.

## **CONCLUSION**

For the foregoing reasons, the Petition for a Writ of Certiorari should be accepted.

Respectfully submitted,

Michael slaughter

Michael Slaughter,

Counsel for Petitioner

P. O. Box 32

*Westport, KY 40077.*

Attny4u2@hotmail.com

(502) 225-5889