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SUPREME COURT

GERALD BARKER APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HON. TIMOTHY C. STARK, JUDGE
INDICTMENT NO. 03-CR-175

COMMONWEALTH OF KENTUCKY APPELLEE

BRIEF FOR APPELLANT, GERALD BARKER

Submitted by:

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The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Timothy L. Stark, Judge, Graves Circuit Court, Courthouse Box 5, 100 E. Broadway, Mayfield, Kentucky, 42066; the Hon. David Hargrove, Commonwealth's Attorney, P.O. Box 135, Mayfield, Kentucky 42066-0315; the Hon. Josh W. Nacey, Department of Public Advocacy, 503 N. 16th Street, Murray, Kentucky 42701; and to Hon. Joshua D. Farley, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on October 18, 2010. The record on appeal was not checked out from the Clerk of this Court.

Frederick W. Rhynhart by kks
FREDERICK W. RHYNHART

INTRODUCTION

Appellant, Gerald Lewis Barker, was charged with misdemeanor assault in the fourth degree while on probation. Prior to adjudication on the merits of the underlying charge, a nine- minute probation revocation hearing was held before after Judge Timothy C. Stark. Appellant's counsel raised the issue that the hearing was premature as these misdemeanor assault charges had not been heard in court. Mr. Barker tried to raise the issue of self defense to these charges. Both requests were denied. Upon the testimony of the probation officer alone, the trial court concluded the probation revocation hearing by revoking appellant's probationary liberty interest.

This case raises three issues: 1) whether the precedent of *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky.App. 1986), relied upon below, is based on a valid statutory interpretation, 2) whether said hearing can withstand the three prong test of *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2D 18 (1976), and 3) whether the hearing and order meets procedural due process standards for such due process hearings as set out by the U.S. Supreme Court.

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Appellant requests oral argument before the Court.

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RCr 10.26 4

Tiryung v. Commonwealth, 717 S.W.2d 503 (Ky.App. 1986) 5, 10

KRS 533.030 5

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House Journal, March 4, 1974, p.1174 7

House Journal, March 21, 1974, p.2107 7

KRS 533.010 7

Hardin v. Commonwealth, 327 S.W.2d 93 (Ky. 1959) 7

Kentucky Penal Code, Kentucky Crime Commission/LRC Commentary, at 362. 7

Hardin v. Commonwealth, 327 S.W.2d 93, 94 (Ky. 1959) 8

Black's Law Dictionary, 6th Edition, p.273 8

Black's Law Dictionary, 6th Edition, p.1081 9

John Locke, *Second Treatise on Government* (London: Awnsham Churchill Publishing, 1689) 10

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2. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2D 18 (1976), provides the optimal test for evaluating probation revocation hearings within the Commonwealth to determine if such hearings meet required constitutional due process standards given: 1) the legislature's limited definition of such a hearing and 2) Mathews' widespread use in the Commonwealth in evaluating administrative hearings wherein due process rights are based upon statutory entitlement and 3) the essentially administrative process of plea bargaining through which probation status and its corresponding liberty interest are created. 11

Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) .... passim

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Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593; 33 L. Ed. 2d 484 {1972} .... passim

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Commonwealth v. Raines, 847 S.W.2d 724 (Ky. 1993) 15

Division of Driver Licensing v. Bergmann, 740 S.W.2d 948 (Ky. 1987) 15

A. The private interest that was affected by the official action, Barker's liberty interest, the freedom from bodily restraint, i.e., the liberty to move about in his local community, was a significant one and its loss was a grievous one. 16

Ky. Const. § 1 17

U.S. Const. Amend. V 17

U.S. Const. Amend. XIV, Section 1 17

Commonwealth v. Meyers, 8 S.W.3d 58 (Ky. App. 1999) 18, 23

B. The risk of an erroneous deprivation of such a due process liberty interest was heightened through the procedures the revoking court used. 19

C. Additional or substituted procedures that the revoking court could have easily adopted would have served the government function and the state interests better than the procedures the court actually used; the administrative and fiscal burden that would result

from additional or substituted procedures were slight and the potential cost savings to the state of such additional procedures were great. 21

Ridley v. Commonwealth, 287 S.W.2d 156 (Ky. 1956) 26

Miller v. Eldridge, 146 S.W.3d 909 (Ky. 2004) 26

Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000) 27

3. The hearing which revoked Gerald Barker's probation did not meet minimal due process standards required by the Kentucky Constitution Section 11 and by the case-law of the United States Supreme Court. 27

RCr 10.26 27

A. It is a violation of the minimal due process requirements for a court in a pre-adjudication probation revocation hearing to prevent a respondent from asserting minimal due constitutional process rights in the form of a coerced waiver of the privilege against self-incrimination. 27

Murphy v. Commonwealth, 551 S.W.2d 838 (Ky. App. 1977) 28

Ky. Const. § 11 ..... passim

Akers v. Fuller, 228 S.W.2d 29 (Ky. 1950) 28

Kindt v. Murphy, 227 S.W.2d 895 (Ky. 1950) 28, 29

Gentry v. Commonwealth, 286 S.W. 1040 (Ky 1926) 29

U.S. Const. Amend. V 29

U.S. Const. Amend. XIV 29, 31

B. It is a violation of minimal due process requirements required by the Kentucky Constitution and United States Constitution for a court to hold a probation hearing to prevent a respondent from meaningful cross-examination through the use of hearsay evidence, some of which is double hearsay, as the only evidence to revoke respondent's liberty interest. 29

Foley v. Commonwealth, 15 S.W.2d 444 (Ky. 1929) 30

Mattox v. U. S.,156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895) 30

Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed.2d 656 (1973) 30

U.S. Const. Amend. VI 30

C. It is a violation of the minimal due process requirements required by the United States Supreme Court for a court in a probation hearing to failing to provide findings of facts and reason to support the revocation. 31

Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593;
33 L. Ed. 2d 484 {1972} 31, 32

Baumgardner v. Commonwealth, 687 S.W.2d 560 (Ky. App. 1985) 32

Tiryung v. Commonwealth, 717 S.W. 2d 503 (Ky. App. 1986) 32

Commonwealth v. Alleman, 306 S.W.3d 484 (Ky. 2010) 32, 33

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STATEMENT OF THE CASE

This action stems from an indictment filed in Graves Circuit Court on July 29, 2003 charging Gerald Lewis Barker with nine violations of fraudulent use of credit cards, one count of first degree possession of cocaine, and one count of use and/or possession of drug paraphernalia. (Transcript of Record (hereinafter TR) 1-5. Barker, being indigent, was represented by Department of Public Advocacy counsel. (TR 101,105). On October 14, 2004, the Commonwealth filed its offer of a plea agreement, recommending five years on each of the ten counts of fraudulent use of credit cards and one year for first degree possession of cocaine, all to be served concurrently with no opposition to probation. The prosecution's support for probation had certain preconditions: 1) evaluation for drug treatment, 2) permanently refraining from running internet service, 3) paying restitution to the victims, and forfeiting all seizure including cash. (TR 172-173).

On that same day, Mr. Barker pled guilty under *Alford v. North Carolina* pursuant to the terms of the plea agreement. On January 13, the court ratified this *Alford* plea agreement including an order of probation to be filed later. (TR 171). On January 19, the court entered its judgment and sentence. (TR 182-183). The court's order of probation was originally signed by the judge on November 22, 2004 and filed on January 19, 2005. This order of probation placed Mr. Barker under the supervision of the Division of Probation and Parole for five years on the condition that the probationer:

1. not commit another offense;
2. avoid injurious or vicious habits;
3. avoid persons or places of disreputable or harmful characters;
4. work faithfully at suitable employment as far as possible;
5. make reparation or restitution pursuant to separate order;
6. undergo available or psychiatric as follows: substance abuse assessment and treatment as recommended including aftercare;
7. support dependents and meet other family responsibilities;
8. pay the cost of proceeding as set by the court: per Graves Circuit Court $228.75 within 90 days;
9. obey all rules and regulation of Probation and Parole;
10. Report to the probation officer as ordered;
11. Answer all reasonable inquires by the probation officer and promptly notify the probation officer of any change in address or employment;
12. Pay $15 per month supervisory fee;
13. Other: Forfeit Computers pursuant to separate order.

(TR 184).

On May 30, 2008, Officer McGuire filed a Special Supervision Report and a probation violation charge against Mr. Barker based on new misdemeanor assault charges he received, asking for a cash bond of $10,000. (TR 210-213). On June 2, the court set bond at $10,000. (TR 212-213). On June 9, a probation revocation was held before after Judge Timothy C. Stark.

The entire hearing took just a little less than eight and one-half minutes. (VR: 6/09/08; 09:19:26-9:27:51). Defense counsel raised the issue that the hearing was premature and these misdemeanor assault charges have not been heard in court. (VR: 6/09/08; 09:20:51) Mr. Barker tried to raise the issue of self defense to these charges. (VR: 6/09/08; 09:21:17). The trial court replied: "Have a seat please." (VR: 6/09/08; 09:21:20). Most of the hearing, well over five minutes, was taken up by the testimony of the

probation agent McGuire, nearly all of it hearsay, some of it double hearsay. (VR: 6/09/08; 09:21:24-09:26:29.).

Agent McGuire presented one piece of non-hearsay evidence. She testified that she administered a drug test the day after Mr. Barker's arrest and that he passed. (VR: 6/09/08; 09:25:40). Agent McGuire testified in hearsay fashion that on that day, Mr. Barker had been drinking. (VR: 6/09/08; 09:22:37). On cross, Agent McGuire did concede that Mr. Barker had been not charged with alcoholic intoxication nor had any test of his alcohol level been taken. (VR: 6/09/08; 09:25:29).

At the close of the hearing, defense counsel maintained that a decision should be withheld until the upcoming charges could be disposed of. Defense counsel noted that such an approach would allow the full airing of the self-defense issues. (VR: 6/09/08; 09:27:16). Somewhat suddenly, the trial court concluded the hearing by saying he decided these cases on hearsay evidence and revoked Mr. Barker's probation. (VR: 6/09/08; 09:27:48). Following this hearing, the court issued an Order Revoking Probation.(TR 242).

Notice of Appeal to the Court of Appeals was filed on June 30, 2008. (TR 248). The Court of Appeals affirmed Mr. Barker's probation revocation on January 22, 2009 on a 2-1 vote. The Court of Appeals published the opinion. Appellant filed a Motion for Discretionary with this Court and the motion was granted on August 18, 2010.

ARGUMENTS

1. The precedent relied on by the majority below provides no analysis for its legal conclusion; said precedent relies on an earlier case whose issue is different and whose facts can be distinguished and it is thereby incumbent upon a reviewing court to inquire as to the meaning of a statute when previous case law is inadequate through an analysis of the legislature's words as well as the statute's legislative history to give those words their clear and simple meaning and to make sure that case law interpreting statutes reflects legislative intent.

Preservation: Defense counsel objected to the defendant's probation being revoked, on the grounds that he was being denied proper due process because his misdemeanor arrest charges and possible self-defense to the charges had been not heard. The trial court refused to hear the self-defense claim either from the defendant or to delay the hearing until the trial court would hear the misdemeanor case to consider any corresponding self-defense claim and revoked the conditional discharge and its corresponding liberty interest.[1] Furthermore, the Court of Appeals reviewed this issue on the merits in its opinion. If this issue is deemed unpreserved to any extent, it should be reviewed under RCr 10.26.

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1 VR: 6/09/08; 09:20:51; VR: 6/09/08; 09:21:17; VR: 6/09/08; 09:27:16; VR: 6/09/08; 09:27:48.

Appellant's revocation of probation was affirmed by the Court of Appeals majority relying in large part on the precedent of *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky.App. 1986). The Court of Appeals held in *Tiryung* that it "is not necessary that the Commonwealth obtain a conviction in order to accomplish revocation of probation." Id. at 504. At first glance this statement looks like good precedent but upon analysis it is mere assertion without a cited supporting precedent. Neither does *Tiryung* examine KRS 533.030, its meaning and precedent as Appellant does below. Instead, the Court of Appeals in *Tiryung* relied indirectly on *Brown v. Commonwealth*, 564 S.W.2d 21 (Ky. App. 1977). This is a misplaced reliance as it is based upon a misunderstanding of *Brown*. In *Tiryung*, *supra* at 504, the Court of Appeals said, "Probation is recognized as a privilege rather than a right." It cited *Brown*, *supra* at 23. But the reference in *Brown* is to a different issue of law- can probation be revoked before the term of probation starts- and not the issue in this appeal- can probation be revoked on mere arrest as opposed to conviction. Not only does the Court in *Tiryung* confuse the issue of law raised in *Brown* but misunderstood its facts entirely as well. If the facts in *Brown* are examined, one finds the appellant in that case had been indicted and convicted of another crime prior to revocation. Hence the facts in *Brown* distinguish it from the facts in *Tiryung* and probably support the Appellant in this case. Therefore the Court of Appeals' reliance on *Tiryung* is misplaced to say the least.

Having eliminated the value of the precedent relied on below, KRS 533.030 (1) must be analyzed to determine its meaning:

> The conditions of probation and conditional discharge shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so. The court shall provide as an explicit condition of every sentence to probation or conditional discharge that the defendant not commit another offense during the period for which the sentence remains subject to revocation. {underlining added}.

In the 1974 session, the current Chapter of K.R.S. 533.030 was included in House Bill 232, the reform bill that was the Penal Code. The Kentucky Penal Code was drafted by a joint commission made of the Kentucky Crime Commission and the Legislative Research Commission. This joint commission was ordered by the 1968 General Assembly to provide a revision of the state's substantive criminal laws. Within the proposed Kentucky Penal Code was Section 3515 (1) which contains the exact wording in KRS 533.030 (1) today:

> The conditions of probation and conditional discharge shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-biding life or assist him to do so. The court shall provide as an explicit condition of every sentence to probation or conditional discharge that the defendant not commit another offense during the period for which the sentence remains subject to revocation.

Kentucky Penal Code (1971) p. 361.

This same wording appeared when it became HB 232 Section 285 (1) in the 1974 session of the General Assembly and retained the same wording although the section number changed to Section 287 (1)

as the Committee Substitute. _House Journal_, March 4, 1974, p.1174. Although there were amendments adopted from the floor to HB 232 in both houses, none affected the wording of the above section as the bill passed both houses and was ordered delivered to the governor. _House Journal_, March 21, 1974, p.2107.

This section of HB 232 became codified as section (1) of 533.030. Although there was no definition of the term "offense" or phrase "commit another offense" in this section, the Kentucky Crime Commission, the body set up by the legislature and the governor to draft the Penal Code reform, including the section under analysis here, made the following comment on "the defendant not commit another offense during the period for which the sentence remains subject to revocation":

> In its second part, the subsection (533.010) adopts the ruling of _Hardin v. Commonwealth_, 327 S.W.2d 93 (Ky. 1959), a case in which the Court of Appeals held revocation of probation proper when based upon conviction of another felony.

Kentucky Penal Code, Kentucky Crime Commission/LRC Commentary, at 362,363.

In the case cited in the commentary, Eugene Hardin had had his probation revoked on two convictions in Jefferson Circuit Court and was sentenced to prison for a period of four years. He appealed on the grounds that the court has abused its discretion. In affirming the lower court, the Court of Appeals noted that Hardin had "during the period

of probation participated in much unlawful activity". This activity consisted of two items:

1. indicted on the charge of possessing burglary tools, and
2. a conviction in a West Virginia court on a felony charge.

It is significant that this precedent included a felony conviction in the unlawful activity sufficient to serve as a basis for the revocation. Hardin v. Commonwealth, 327 S.W.2d 93, 94 (Ky. 1959).

The above legislative history of KRS 533.030 (1) leads one to believe that to "commit another offense" would include a conviction for a charge to become an offense. The next inquiry is whether the plain meaning of KRS 533.030 (1) is consistent with the historical view above. As there is no definition of terms within KRS Chapter 533, one looks to the plain and simple meaning of the words. The key term in KRS 533.030 (1) is the defendant shall not "commit another offense". Black's Law Dictionary defines "commit" as to "perpetrate, as a crime; to perform as an act". Black's Law Dictionary, 6th Edition, p.273 [hereinafter BLD]. A crime is more than an act or *actus reus* but it flows additionally from the guilty mind or *mens rea.* A criminal offense cannot be determined solely by an act but must be seen through the union of act and mind as adjudged by a neutral arbitrator in the form of the court's determination of law and fact or the judge as the interpreter of law and the jury as trier of fact.

The liable mental state as determined by the court might one of malice, sudden passion, recklessness, or simple negligence, any one of which could in certain conditions supply the mental link to make an act a criminal offense. But given the act alone it is not known whether this a criminal act. Of course, it is even possible in the presentation of evidence including cross-examination of witnesses that the defendant might show that he is acting in self defense or in defense of his property or may even be insane and thereby has not committed a crime or an "offense." "Offense" is defined as a "felony or misdemeanor; a breach of the criminal laws; violation of law for which penalty is prescribed". BLD, p.1081. Certainly an arrest for misdemeanor assault in the fourth degree is not the same as a conviction for misdemeanor assault in the fourth degree. Certainly the Kentucky legislature could not intend that its use of the term "commit a crime" or "commit another offense" would imply that a mere arrest could be made equivalent to a committing an offense or a crime in face of the structure of Kentucky's criminal law. To arrest is to "take, real or assumed authority, custody of another for the purpose of holding or detaining him to answer for a criminal charge". BLD, p.111.

If the legislature wanted probation revoked on such terms it certainly would have stated, in simple clear language, the words "arrest upon another charge" or "upon being held to answer for another criminal charge". Certainly one must give that branch of government that John Locke termed in the

Second Treatise on Government {1689} as the most basic of our branches of government, the benefit of the clear meanings of the words it issues in its enactments but at the same interpret within the context of preexisting legal understanding.

Although there is great need for judicial economy given the heavy burden of cases in the Commonwealth, judicial economy, in the form of abbreviated revocation hearings is of little utility in achieving judicial economy and it would behoove probation revocation courts to take better account of the clear meaning of the legislature's enactments that guide the probation process. It is good practice to read the legislature's intent consistent with the meaning of common language, existing understanding of criminal law and due process. Without the precedent of *Tiryung v. Commonwealth* relied on by the Court of Appeals, it is inconsistent with the legislative intent of KRS 533, existing criminal law, and due process to read "to commit another offense" to mean simply an arrest. The Court of Appeal's decision must be reversed.

2. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2D 18 (1976), provides the optimal test for evaluating probation revocation hearings within the Commonwealth to determine if such hearings meet required constitutional due process standards given: 1) the legislature's limited definition of such a hearing and 2) Mathews' widespread use in the Commonwealth in evaluating

administrative hearings wherein due process rights are based upon statutory entitlement and 3) the essentially administrative process of plea bargaining through which probation status and its corresponding liberty interest are created.

Preservation: Defense counsel objected to the defendant's probation being revoked, on the grounds that he was being denied proper due process because his misdemeanor arrest charges and possible self defense to the charges had been not heard. The trial court refused to hear the self defense claim either from the defendant or to delay the hearing until the trial court would hear the misdemeanor case to consider any corresponding self defense claim and revoked the conditional discharge and its corresponding liberty interest.2 An Order was entered by the trial court revoking Appellant's conditional discharge.3 Furthermore, this issue was raised before the Court of Appeals and reviewed on the merits. If this issue is deemed unpreserved to any extent, it should be reviewed under RCr 10.26.

Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. *Morrissey v. Brewer,* 408 U.S. 471, 494; 92 S. Ct. 2593; 33 L. Ed. 2d 484 {1972} (J., Douglas, dissenting in

2 VR: 6/09/08; 09:20:51; VR: 6/09/08; 09:21:17; VR: 6/09/08; 09:27:16; VR: 6/09/08; 09:27:48.

3 VR: 6/09/08; 09:27:16.; VR: 6/09/08; 09:27:48

part), citing *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748-1749, 6 L.Ed.2d 1230 (1961).

Although there is no constitutional right to probation, *Tiryung v. Commonwealth*, 717 S.W. 2d 503 (Ky. App. 1986), there is a liberty interest created in the probation bargain found within plea agreements, accepted and ordered as they are by the court. Probation is a legislative entitlement that once extended to the defendant by the state through the prosecutor and the court creates a liberty interest that is protected by constitutional due process and entitles the probationer to a hearing prior to its revocation. *Gagnon v. Scarpelli*, 411 U.S. 778, 779, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). It goes without saying that an overwhelming majority of probation revocation cases concern liberty interests secured through the plea bargaining process. A recent study of the method of adjudication of felony cases filed in the 75 U.S. largest counties in May 2000 and disposed within one year found 89.4% of the cases were plea bargained and 3.8% went to trial.4 The replacement of trial by plea bargaining in the overwhelming majority of criminal cases has made our criminal justice system far more administrative than adjudicative in character.5 Given that the probation agreement is found in so many of these plea agreements, it has allowed modern constitutional-administrative law first to require and now to shape revocation due process hearings. The

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4 Bureau of Justice Statistics, Felony Defendants in Large Urban Counties, 2000, State Court Processing Statistics Program, Analysis by Gerard Rainville and Brian A. Reaves http://www.ojp.usdoj.gov/bjs/abstract/fdluc00.htm

5 Albert W. Alschuler, "Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System" 50 U. Chi. L. Rev. 931 (1983) at 933

question has become what kind of hearing is due the defendant prior to the revocation of his liberty interest created by such an administrative bargaining process, approved as it has been by the court. The U.S. Supreme Court in *Gagnon, supra,* followed M*orrissey*, *supra,* provided for six elements required for such a due process liberty interest revocation hearing:

> (a) written notice of the claimed violations of [probation or] parole;
> (b) disclosure to the [probationer or] parolee of evidence against him;
> {c}opportunity to be heard in person and to present witnesses and documentary evidence;
> (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
> (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
> (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking [probation or] parole.

Morrissey v. Brewer, supra at 489.

A year following *Gagnon*, *supra*, the Kentucky legislature added another element to the revocation hearing, requiring that a lawyer represent the defendant. However, other than this requirement that the legislature added, and the repetition of the first element in the above list from *Gagnon* (prior "written notice of the grounds for revocation or modification"), the legislature did not define the nature of such a hearing. KRS 533.050 (2). Given that the Kentucky legislature in KRS 533.050 (2) did not define the nature of the due process through replicating the list from the *Gagnon*, the legislature left the hearing to be developed by Kentucky case law in an *ad hoc* fashion that swings between the list established by constitutional due process

precedent in *Gagnon* and the freedom implied in the truncated legislative list.

Case law applying *Gagnon* in the Commonwealth to revocation hearings holds that the defendant is not entitled to a "trial" on the issues. *Marshall v. Commonwealth*, 638 S.W.2d 288, 289 (Ky. App. 1982). In the revocation proceedings, there is no need of a double hearing mentioned in *Morrissey, supra,* as the procedure beyond the noted six elements of the hearing is left to the states, i.e., the legislature or the courts using due process analysis, *Murphy v. Commonwealth*, 551 S.W.2d 838 (Ky. App. 1977). The trial court must prepare a written statement regarding the evidence relied on and the reasons for revoking probation. *Baumgardner v. Commonwealth*, 687 S.W.2d 560 (Ky. App. 1985). The appearance of impartiality in the presiding judge is "next in importance on to the fact itself." *Small v. Commonwealth*, 617 S.W.2d 61, 63 (Ky. App. 1981) citing *Wells v. Walter*, 501 S.W.2d 259, 260 (Ky. 1973). Given the fact that the legislature is providing a two point list and the U.S. Supreme Court a six point list in *Gagnon,* a single framework or test would be useful in structuring this evolving case law.

.In reviewing the nature of a due process hearing in Kentucky, it "is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.'" *Belcher v. The Kentucky Parole Board*, 917 S.W.2d 584, 587 (Ky. App. 1996), citing *Greenholtz v.*

Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979), quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972). The Court in *Belcher, supra,* further said that a certain "flexibility is necessary to tailor the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error," citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976).

The single test for a due process hearing was indeed laid out by the United States Supreme Court in *Mathews v. Eldridge, supra,* and remains precedent today. The three prong test is: (1) The nature and weight of the private interest that will be affected by the official action challenged; (2) The risk of an erroneous deprivation of such interest as a consequence of the summary procedures used; and (3) The governmental function involved and the state interests served by such procedures, as well as the administrative and fiscal burden, if any, that would result from the additional or substituted procedures sought. *Mathews v. Eldridge*, supra. This three-prong analysis, set forth by the United States Supreme Court in *Matthews,* has been incorporated into Kentucky jurisprudence since 1987. *Commonwealth v. Raines*, 847 S.W.2d 724, 727 (Ky. 1993), citing D*ivision of Driver Licensing v. Bergmann*, 740 S.W.2d 948 (Ky. 1987).

The three prong test in *Mathews* would provide a consistent framework for determining whether a probation revocation hearing in Kentucky meets due process requirements in terminating the defendant's liberty interest. This is especially true since the legislature has provided so little guidance in Kentucky and the revocation hearing cases approach those of a patch quilt without consistency. In the aesthetics of patch quilting, repetition or symmetry need not appear for there to be great beauty, yet in an area of law involving due process liberty interests the consistency of a test would provide the Courts of the Commonwealth a common framework from which repetition or symmetry would appear in each case, would relate each case to the other through Mathews, and bring the clarity of simplicity to this area. The Mathews three prong test is the legal measure for due process hearings in Kentucky and provides a ready framework steeped in precedent.

A. The private interest that was affected by the official action, Barker's liberty interest, the freedom from bodily restraint, i.e., the liberty to move about in his local community, was a significant one and its loss was a grievous one.

Prong one of the Mathews test is the nature and weight of the private interest that will be affected by the official action challenged. In Barker's case it was his liberty interest, freedom from bodily restraint, secured by his plea agreement and the probationary order. Liberty, according to American tradition, was originally granted by God to man prior to the establishment of

government. 6. The American tradition etched this God-given right of liberty unto our positive law as a basic right. *Kentucky Constitution*, Section 1; *U.S. Constitution*, 5th Amendment and 14th Amendment, Section 1. Under the traditional American view of liberty, the reasonable person accepts that a citizen who transgresses upon the basic rights of others may, following due process of law, forfeits pieces of his liberty, either for a time or permanently, as the cost of his transgression. That reasonable person of ordinary intelligence and common sense can prudently foresee his potential violation of other's rights calls for reciprocal action by the government if it is to do its basic job, i.e., protecting the life, liberty, and property of its citizens. For a probated convict under the modern criminal justice system of plea bargaining that results in probationary status in so many cases, the question becomes what pieces of liberty are forfeited under the terms of the plea agreement that once accepted by the court facilitates probation status.

Since the probation contract with Barker is part of the court record, we know the pieces of liberty from the entirety of liberty. Although the loss of several pieces of liberty noted above and provided in most probation contracts may appear significant to the new probationer, it barely intrudes upon the primary core of liberty, the freedom from bodily restraint.7. To the average citizen, the probation-plea agreement provides the basic freedom that they

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6 Declaration of Independence and John Locke, Second Treatise on Government, 1689.

7 Mihal Nahari, "Due Process and Probation Revocation",56 Fordham L. Rev. 759 (1988), citing Ingraham v. Wright, 430 U.S. 651, 673-74 (1977) and Shattuck, "The True Meaning of the Term "Liberty" in those Clauses in the Federal and State Constitutions which Protect "Life, Liberty, and Property," 4 Harv. L. Rev. 365 (1891

exercise, the freedom to move about. To the average probationer, the escape from imprisonment and a return to their family, their job and their local community constitutes the essence of the freedom that they exercised daily previously. It must be admitted that there are significant losses in many such agreements, such as: : 1) the right to bear arms within one's home, 2) the loss of the right to judicial examination and approval of searches of one's home by agents of the executive branch, 3) the loss of the right to vote, 4) the regular reporting requirement to one's probation supervisor, 5) drug tests without notice, and 6) the loss of the right to travel freely throughout the country and the world.

These are indeed significant impositions upon one's liberties, however. The liberty nugget that most defendants readily seek to retain in the plea bargain is to avoid confinement, the loss of the freedom to move about in their local community. *Commonwealth v. Meyers*, 8 S.W.3d 58 (Ky. App. 1999). Probationers choose the plea agreement not just to lower charges and lessen sentences but they do so in order to protect the basic liberties they exercise daily in their ordinarily life: 1) ordinary home life with their family, 2) the freedom to work and accumulate property, and 3) freedom to move about in their local community. This is the liberty the ordinary American exercises. *Morrissey, supra*, at 2601. The revocation of this probation which provides these basic liberties that the ordinary citizen exercises in his day to day life, the escape from imprisonment and a return to his family, his job and

his community, is a grievous loss of this liberty interest. Barker suffered such a loss at his probation revocation hearing.

B. The risk of an erroneous deprivation of such a due process liberty interest was heightened through the procedures the revoking court used.

The second prong of the *Mathews* test weighs the risk of an erroneous deprivation of the due process interest present through the procedures used. Here the court denied the defense's request to wait until the outcome of the trial scheduled for his arrest although the trial would be held soon. The court also refused to hear the defendant's plea to consider a justification defense to that arrest. Thus the court did not determine whether or not this claim would provide a complete justification for his actions that led to his arrest. The court did not determine whether the degree of alleged violence used was comparable or proportionate to the threat faced by the probationer.

The court had two paths open to it in exploring the defense of justification to the arrest charge. First, it could have done as the probationer's attorney at the hearing argued, i.e., to wait until the trial would be held. At his trial the defendant could raise his defense and the trial court would make a determination about the existence of this defense in its findings of fact and conclusions of law. In the alternative, the hearing judge could have taken the time during the probation revocation hearing to hear direct testimony on this claim from a person in the courtroom, the

probationer. In this scenario the judge could have allowed cross-examination by the state of the probationer.

Instead, the court decided to hear only one side in regard to the charge and relied instead upon hearsay and double hearsay evidence. The court relied primarily upon the use of hearsay evidence on the level of probable cause, i.e., the police report mentioned in the probation supervisor's report. The court may have used as well the probation officer's hearsay evidence gathered from the probationer, interviews of people involved but as these are not mentioned in his order it is impossible to determine exactly what the judge made his decision on.

Although his decision was based upon the preponderance of evidence, this was only the evidence the court decided to hear in refusing to consider the defendant's justification defense before denying the defense attorney's plea to wait until defendant's trial. The preponderance of evidence was limited by the refusal of the court to explore alternative sources of evidence and by the very nature of hearsay and double hearsay. The judge's actions take on the appearance of partiality. The appearance of propriety in the form of impartiality in the presiding judge is "next in importance on to the fact itself." Small, *supra*. More importantly is that the court's failure to consider a wider range of evidence significantly increased the risk of an erroneous deprivation of Barker's liberty interest.

C. Additional or substituted procedures that the revoking court could have easily adopted would have served the government function and the state interests better than the procedures the court actually used; the administrative and fiscal burden that would result from additional or substituted procedures were slight and the potential cost savings to the state of such additional procedures were great.

The governmental function herein considered is a hearing designed to assure that due process is adhered to while considering the termination of the probationer's remaining liberty interest such that the probationer is converted to a inmate in the state prison/jail system. The state's interests served by this procedure are: 1) the safeguarding of public from violent criminals, 2) the removal of those probationers whose rehabilitation outside the prison/jail system is failing to a more structured environment; and 3) the determination to see if there is possibility for the court to continue the mutuality of advantage achieved in the probation pact, i.e., for the state to conserve resources through the community placement of felons and for the probationer to maintain his liberty interest that arises in the probation contract and the plea bargain.

The protection of the public from violent convicts who continue on their path of aggression is based on the most fundamental function of government, i.e., providing security for its people. In those cases, however, such as this one, wherein a nonviolent felon with a drug problem is granted probation through his plea bargain and has made it through most of his probationary

period, i.e., 71% of the five year probationary period, and passed drug screening and is accused of an assault through an arrest, it would behoove the court to determine if this an accurate charge and assess any possible explanations or justifications for it because it was inconsistent with the probationer's previous record.

The second state interest is the removal of those probationers whose rehabilitation outside the prison/jail system is failing in the less structured environment of the community. Rehabilitation of the probationer through the conditions of probation and the liberty granted therein may fail. This potential failure is a basic state interest the consideration of which the court must give attention as a probationer who fails to act as a reasonable person may well wreak havoc upon civil society and upon the individual rights of others within civil society. This determination is a complex one that should be made on a reasoned basis.8

Finally, the court needs to determine if there is possibility for the court to continue the mutuality of advantage, i.e., for the state to conserve resources through the community placement of felons and for the probationer to maintain his liberty interest that arises in the probation contract and the plea bargain. The state has several interests here: 1) judicial economy, and 2)

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8 Such a basis would include research-based assessments of risk, e.g., "third generation" instruments that include both factors that are unchangeable (like prior criminal record) and that are changeable (such as substance abuse) and to make strategic choices about responses to violations rather than a rush to judgment. "When Offenders Break the Rules Smart Responses to Parole and Probation Violations: Key Questions for Policy Makers and Practitioners", The Pew Center on the States , # 3 November 2007

the cost of housing the prisoner until another hearing as well as 3) the fiscal savings for the state of having the convict support himself rather than a state prison for the remainder his term. This last consideration is no small matter, the average cost per year for housing a Kentucky state inmate is $17,818. 9 This means that a felon whose liberty interest is terminated and enters the state prison/jail system to serve a five year term will cost the Commonwealth $89,090 over his term. As the Court of Appeals observed:

> Probation and conditional discharge are contemporary facets of present day penology. They afford the state an opportunity to accomplish rehabilitation without incarceration, thus lessening the financial burden to society.

Commonwealth v. Meyers, 8 S.W.3d 58 (Ky. App. 1999).

More money spent on prisons is a key interest for the state as this impacts the state's interest in providing other modern services. Across the states, total state correctional spending increases an average 6.2% annually, and 6.4% specifically for prisons. These increases in the cost of adult incarceration have outpaced those of health care (5.8%), education (4.2%), and natural resources (3.3%). (Table 1)10 Governor Beshear spoke to this state interest in his 2008 state budget address:

> In 1970, Kentucky had 2,838 state prisoners. As of last week, the state's inmate population stood at 22,442. By the end of the upcoming biennium, that number is expected to easily top 23,000. Kentucky's corrections budget has swelled to nearly $398 million in general funds. And it is still not enough.11

9 U.S. Department of Justice: Office of Justice Programs, James J. Stephen, BJS Statisticians, June 2004, NCJ 20294.

10 Ibid.

11 Governor Steve Beshear, *State Budget Address*, January 29, 2008.

The state interest in the number of persons in prison and its impact has been documented by other influential Kentuckians. Robert G. Lawson 12, the Charles S. Cassis Professor of Law at the University of Kentucky School, has described how prison overcrowding in Kentucky has lead to using jails to warehouse state prisoners. In the early 1970s, Kentucky had no inmates permanently housed in county jails. By late 2005, the Commonwealth had almost twenty-nine percent of its inmates13 incarcerated in jails, and forty-six percent of the state's inmate population increase since 2000 has gone to jails.14. The administrative effects of housing state prison inmates in county are: less space, meals in cells, few exercises opportunity, limited library, if any, and education and training programs limited to GED preparation, making rehabilitation extremely difficult if not impossible.15 An ironic and unintended consequence of returning probationers whose rehabilitation fails in the community is to warehouse a goodly proportion of them in county jails where rehabilitation is nearly impossible.

The final consideration in *Mathew's* third prong is what the administrative and fiscal burden, if any, that would result from additional or substituted procedures to assure due process. For the court the additional procedures for a proper due process hearing in this would have been: 1) wait

12 Professor Lawson is also the principal drafter of the Kentucky Penal Code and the Kentucky Rules of Evidence.

13 5,674 of 19,852 .

14 2,035 of 4,408.

15 Robert G. Lawson *95 Ky. L.J. 1*, 2006 / 2007, " "Turning Jails Into Prisons-Collateral Damage from Kentucky's "War on Crime"".

for the arrest charge to be heard and determination made on that charge; 2) hearing the justification of self defense in the hearing; and 3) writing up the findings for proper review. Waiting until the charge was heard would have involved little or no cost to the court. Another short hearing would be held taking up little of the court's time. For the court to hear the defendant's self defense argument would not have taken long, increasing the court's time on the case only slightly. Writing up the finding in a manner that review would be easier would again take up little of the court's time.

For the state, the increased cost and administrative burden would have been slight to have a more prudent due process hearing. To wait until the arrest charge was heard would have required the prosecutor and the probation officer to return to court once. The state would have to pay for the prisoner's incarceration until the trial for the arrest that would have occurred in any event so that cost would remain constant. These administrative and fiscal burdens for the state are slight compared to paying for the incarceration of probationer Barker for the remainder of his term at $17,818 per annum or $25, 836.10 for the 535 days remaining on Gerald Lewis Barker's sentence. A careful examination of the case at hand may well result in significant cost savings to the state to be added to the savings that probation for Gerald Barker had already achieved for the state, $63,353.90 for the first 1290 days of his probation.

The prudent judicial guardian of due process under _Mathews_ needs to

proceed by taking his time and collecting all probative evidence that should be considered under *Mathews* prior to weighing evidence at the preponderance level and imposing costly incarceration. In sum, the state benefits from a more careful, probing due process hearing which takes a bit longer yet finds numerous cases of probationers who did not need to be incarcerated at state expenses but might be in a hearing lasting less than ten minutes.

In conclusion, as these three factors are weighed and balanced, the liberty interest to the probationer was a grievous one, the risk of an erroneous deprivation of the liberty interest given the court's procedure high, and the increased cost and administrative burden of a properly run hearing would be slight and might even result in a significant cost savings for the state. Given this weighing, it is clear that the court's refusal to wait until the case was heard or in the alterative to hear the defense of the probation and his reliance upon hearsay and double hearsay in an eight and one half minute hearing was partial, arbitrary, and capricious and an abuse of discretion. The Court of Appeals' standard of review of a circuit court's decision to revoke probation or conditional discharge is whether the circuit court abused its discretion. *Ridley v. Commonwealth*, 287 S.W.2d 156 (Ky. 1956). An abuse of discretion occurs when the "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004), quoting *Goodyear Tire & Rubber*

Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

Weighing and balancing the three factors provided by the precedent of *Mathews*, 1) wherein Barker's loss of his liberty interest was grievous, 2) the procedures used by the revoking court heightened substantially the risk of an erroneous deprivation, and 3) the projected additional cost of such additional procedures was substantially less than the projected cost savings to the Commonwealth, the revoking court committed reversible error under the *Mathews* test.

3. The hearing which revoked Gerald Barker's probation did not meet minimal due process standards required by the Kentucky Constitution Section 11 and by the case-law of the United States Supreme Court.

Preservation: This issue is preserved for appellate review as the trial judge denied the request for hearing the underlying charge first and refused to hear evidence of self-defense and because the trial court's order revoking Appellant's conditional discharge did not provide sufficient findings of facts and reasons to support revocation. TR 242. If this Court finds that it is not, preserved, Appellant asks that it be reviewed under RCr 10.26.

A. It is a violation of the minimal due process requirements for a court in a pre-adjudication probation revocation hearing to prevent a respondent from asserting minimal due constitutional process rights in the form of a coerced waiver of the privilege against self-incrimination.

In this pre-adjudication probation revocation hearing, Barker was placed in a difficult position as he had to choose between the privilege against self-incrimination on the underlying charge and waiving that privilege in order to present a defense in the pre-adjudication probation revocation hearing in which the Commonwealth sought to deprive him of his remaining liberty interest. Either Appellant testifies to save himself from revocation and compromises his right not to testify later on the underlying charge or he stands on his right against self-incrimination and his liberty interest is swept away upon a preponderance of hearsay evidence in the pre-adjudication probation revocation. Given the standard of proof in a probation revocation hearing is akin to a civil case, i.e., a preponderance of evidence (*Murphy v. Commonwealth*, 551 S.W.2d 838, 841 (Ky. App. 1977), it is important to note that the Section 11 confrontation clause in the Kentucky Constitution applies to civil as well as criminal cases. In *Akers v. Fuller,* 228 S.W.2d 29 (Ky. 1950), the Kentucky Court Appeals wrote that "it was early declared, and has since been universally held, that the privilege against self-incrimination may be asserted as of right in any ordinary civil case," citing *Kindt v. Murphy,* 227 S.W.2d 895, 898-899 (Ky. 1950). This is normally why cases using a lower standard of proof that involve a lesser right to possibly be sacrificed, property, i.e., civil cases, are held after the criminal proceeding which involves the loss of a higher right, liberty with a corresponding higher level of proof, in order not to jeopardize this privilege against self-incrimination. It

thereby makes sense if the standard of proof in revocation hearings is to remain at the preponderance level, that the hearing be held after the underlying criminal charge in line with Kindt v. Murphy, *supra*. Less we forget the Jeffersonian respect for individual rights embedded in the Section 11 confrontation clause of our Constitution which states: "He cannot be compelled to give evidence against himself", let us turn to the admonition of an earlier court of last resort: "No principle of law is more firmly imbedded in our jurisprudence than that self-incrimination may not be enforced." *Gentry v. Commonwealth*, 286 S.W. 1040 (Ky 1926). See also Fifth and Fourteenth Amendment, U.S. Const.

B. It is a violation of minimal due process requirements required by the Kentucky Constitution and United States Constitution for a court to hold a probation hearing to prevent a respondent from meaningful cross-examination through the use of hearsay evidence, some of which is double hearsay, as the only evidence to revoke respondent's liberty interest.

The trial court relied on hearsay and double hearsay in the revocation hearing. The evidence presented was the hearsay testimony of the Appellant's probation officer who had no direct knowledge of the facts. This meant that Appellant had no significant cross-examination in the revocation hearing. Here the Appellant raised the issue of self-defense and certainly cross-examination of those with first hand knowledge by the Appellant would have been useful to court in determining if an offense had been committed.

Section 11 of the Constitution of the Commonwealth of Kentucky promises those forfeiting liberty the right to "to meet the witnesses face to face". In _Foley v. Commonwealth,_ 15 S.W.2d 444, 445 (Ky. 1929), the Court of Appeals stressed the importance of "cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief," citing _Mattox v. U. S.,_156 U.S. 237, 242, 15 S. Ct. 337, 339, 39 L. Ed. 409 (1895). Allowing the underlying charge to he heard would have provided significant opportunity to cross-examine those with first hand knowledge.

Directly on point is the United States Supreme Court's opinion in _Gagnon v. Scarpelli_, 411 U.S. 778, 786, 93 S. Ct. 1756, 36 L.Ed.2d 656 (1973), the Supreme Court of the United States declared that in probation revocations, minimum requirements of due process include "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." Here the trial officer did not take the time to find good cause for not allowing such confrontation or to hear the self-defense plea or to allow the underlying charge to be adjudicated and in this way denied federally protected and required due process rights and rights to confront witnesses under the Sixth

and Fourteenth Amendments, as well as Section 11 of the Kentucky Constitution

C. It is a violation of the minimal due process requirements required by the United States Supreme Court for a court in a probation hearing to failing to provide findings of facts and reason to support the revocation.

Gerald Barker's due process rights were violated when the court did not provide a written statement giving the evidence relied on and reasons for revoking probation. *Morrissey,* supra. In the written order revoking Appellant's probation, the trial court states:

> On November 22, 2004, this Court entered its Judgment and Sentence upon the Defendant's plea of guilty to fraudulent use of credit cards, over $100.00, one count of 1st degree Possession of Cocaine, and Possession of drug paraphernalia, and fixed the Defendant's punishment at five (5), and said sentence was probated for a period of five (5) years.
>
> This matter is now before the Court on motion of the Commonwealth to revoke the Defendant's probation on grounds of violation of the terms of probation by arrest for assault in the 4th degree four (4) counts. The Defendant appeared in Court with counsel, and the Court having heard testimony and being sufficiently advised from the record, finds that the Defendant has violated the conditions of his probation. Being so advised, the Court hereby **GRANTS** the Commonwealth and hereby **REVOKES** the Defendant's probation for violations as set forth above. It is hereby **ORDERED** that the remainder of the Defendant's sentence shall be served in an institution under the control of the Kentucky Corrections Cabinet.[16]

The trial court did not prepare a written statement regarding the evidence

16 TR 242

relied on and the reasons for revoking probation. _Baumgardner v. Commonwealth,_ 687 S.W.2d 560 (Ky. App. 1985). The fact-finder should write out the finding providing the evidence relied on in order for a proper review by this court. Therefore, this order falls short of detailing the grounds for revocation and evidence relied on as required by federal and state law.

Gerald L. Barker's due process rights were transgressed when the trial court failed to provide a proper written statement. The trial court did not note any of the facts surrounding the violation or evidence relied on in revoking Gerald Barker's conditional discharge. The trial court may not assume the basis for revocation is obvious from the record and neglect its duty to recite its reasons in writing. The standard of review for these hearings is abuse of discretion by the judge. _Tiryung,_ supra. The trial court did abuse its discretion by offering a written statement that does not satisfy the minimal requirements established by the United States Supreme Court, and adopted by Kentucky Courts.

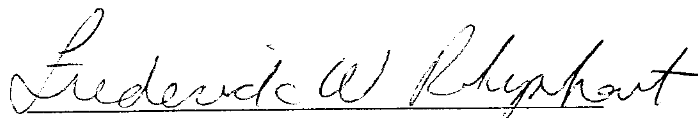
Appellant is aware of _Commonwealth v. Allleman_, 306 S.W.3d 484 (Ky. 2010). However, Appellant urges this Court to reconsider its holding in that case. Additionally, in _Alleman_, the Court held that written findings that do not comply with _Morrissey's_ requirements still comport with due process only if coupled with adequate oral findings that are recorded and sufficiently complete for the parties to determine the evidence relied upon and the reasons for revoking probation. But the Court of Appeals did not affirm the

trial court's written order because of its oral pronouncements but rather held that the written order itself was sufficient to meet due process requirements. Therefore, *Alleman* does not prevent review and relief on this issue. Furthermore, relief must be granted unless the Commonwealth can show that the trial court's oral statements were an adequate substitute for written findings concerning the reasons for revocation and the evidence relied upon.

CONCLUSION

The ruling of the Court of Appeals should be reversed with remand to the Circuit Court to reverse its probation revocation.

Respectfully Submitted,



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