Commonwealth of Kentucky
Supreme Court of Kentucky

File No. 2010-SC-000116-DG
Court of Appeals File No. 2008-CA-001312

GERALD BARKER — **APPELLANT**

v.

Appeal from Graves Circuit Court
Hon. Timothy C. Starks, Judge
Indictment No. 2003-CR-00175

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the foregoing Brief for the Commonwealth was mailed first class, U. S. Mail, postage pre-paid this 17th day March, 2011, to: Hon. Timothy C. Stark, Judge, Graves Circuit Court, Courthouse, Box 5, 100 E. Broadway, Mayfeld, Ky. 42066; to: to: Hon. Frederick W. Rhynart, 2972 Holly Hill Drive, Burlington, Ky. 41005, Counsel for Appellant; sent via messenger mail to Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democratic Drive, Frankfort, Kentucky 40601 . Sent via electronic Mail to: Hon. David L. Hargrove, Commonwealth's Attorney, P. O. Box 315, Mayfeld, Ky. 42066 .

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INTRODUCTION

This is a criminal case in which Appellant is appealing the trial court's revocation of his probation.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe oral argument would be helpful to the Court in this case because the issues are thoroughly addressed in the parties' briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On July 28, 2003, a Graves County Grand Jury indicted Appellant on nine (9) counts of Fraudulent Use of a Credit Card Over $100, one (1) count of Possession of a Controlled Substance in the First Degree, Cocaine, and one (1) count of Possession of Drug Paraphernalia. (TR I, 1-5). On October, 14, 2004, Appellant entered a guilty plea to all counts on the Commonwealth's offer of a total of five (5) years, with no opposition to probation. (TR II, 170-173). On November 22, 2004, the trial court sentenced Appellant to probation for five (5) years. (Id. at 182- 184). Appellant's Order of Probation stated conditions of Appellant's probation as:

> Not commit another offense; Avoid injurious or vicious habits; Avoid persons or places of disreputable or harmful character; Work faithfully at suitable employment as far as possible; Make reparation or restitution pursuant to separate order; Undergo available medical or psychiatrc treatment as follows: substance abuse assessment and treatment as recommended including aftercare; Support dependents and meet other family responsibilities; Pay the cost of proceeding herein as set by the court; Obey all rules and regulations of Probation and Parole; Report to the probation officer as directed; Permit the probation officer to visit the defendant at home or elsewhere; Answer all reasonable inquiries by the probation officer and promptly notify the probation officer of any change in address; Pay $15.00 per month supervision fee; Forfeit computers pursuant to separate order.

(Id. at 184).

In a Special Supervision Report Appellant's probation and parole officer, Robin McGuire, stated that as of April 23, 2007, Appellant had not paid his supervision fee or reported during February, March, and April of 2007. Officer McGuire also stated that the Appellant had been charged with Criminal Possession of a Forged Instrument in

the Second Degree and Persistent Felony Offender in the Second Degree in McCracken County on April 21, 2006. Officer McGuire stated that the Persistent Felony Offender charge was dropped, but that Appellant was sentenced in the McCracken County case on April 4, 2007, to three (3) years imprisonment. Officer McGuire also stated that the Appellant failed to notify her of his court proceedings in McCracken County. Officer McGuire requested that a warrant for the Appellant's arrest be issued. (Id at 194). This warrant was later quashed by the trial court on April 30, 2007. (Id. at 195). Appellant's medical condition at the time, caused him to be bedridden, and due that condition the court granted him inactive status for the remainder of his sentence of probation on July 5, 2007. (Id. at 199). However on November 15, 2008, Appellant was arrested in Graves County for Assault Fourth Degree and Resisting Arrest. On December 20, 2008, Appellant was charged with Assault Third Degree and Persistent Felony Offender in the First Degree. On January 10, 2008, Appellant was sentenced to one (1) year imprisonment, and again on January 12, 2008, he was sentenced to sixty (60) days imprisonment. Due to these new convictions Officer McGuire filed a Special Supervisory Report on March 29, 2008, requesting that a warrant for Appellant's arrest be issued. (Id. at 199). Appellant appeared before the trial court for a probation revocation hearing on April 4, 2008, at which time the court found that he had violated his probation, but since the Commonwealth did not object, the trial court ordered that the Appellant remain on supervised probation. (Id. at 205).

Again on May 30, 2008, Officer McGuire filed a Special Supervisory Report stating that the Appellant had been arrested on May 29, 2008, on four (4) counts

of Assault in the Fourth Degree. Officer McGuire stated in her report that the Appellant had been arested by Kentucky State Police after drinking and becoming violent with his family members. Kentucky State Police informed Officer McGuire that the Appellant had bruised his step-father's forehead, choked his sister, struck his son in his face, and pushed his mother to the ground, before fleeing from the scene. Appellant's sister informed Officer McGuire that she believed that the Appellant had the intention to kill her and her family members and did not want him released to return to her home. Officer McGuire than again requested that an arrest warrant be issued for the Appellant to revoke his probation. (Id. at 207).

On June 9, 2008, Appellant appeared before the trial court for a probation revocation hearing. (VR CD: 06/09/08; 9: 19:30). At the revocation hearing Appellant's defense counsel stated that he felt that the revocation hearing was premature, because the Appellant had only been charged with crimes, not convicted of any crimes. He also stated that the Appellant had once before had a revocation hearing, but due to his medical condition he had not been revoked about a month prior. (Id. at 9:20:00). Appellant stated that he did not understand the terms of his probation and what was going on, and the trial court stated that the Special Supervisory Report spoke for itself, in that it stated that the Appellant tried to kill his family. The Appellant then began speaking without his attorney about how he had been shot, to which the trial court asked him to please sit down so they could proceed. (Id.). The Commonwealth called Appellant's probation and parole officer, Robin McGuire to testify. (Id. at 9:21 :30). Offcer McGuire testified that she received information that on May 29, 2008, Appellant had been arrested for attacking his entire

family. Officer McGuire explained the information that she received concerning the charges and the Appellant's arrest came from a Uniform Citation issued during Appellant's arrest. Officer McGuire then discussed the details set forth above concerning the Appellant's attack on his family members. (Id.). Appellant's defense counsel argued that there was no tangible physical evidence that the Appellant was under the influence at the time of the incident. He also argued that there were only charges against the Appellant and that without a conviction there was no probation violation. (Id. at 9:26:30). The Appellant called no witnesses or offered any rebuttal testimony. The trial court then stated;

> I decide these cases on hearsay evidence and I have hearsay, first-hand hearsay, but hearsay nonetheless, to the fact that he had been drinking and he assaulted four family members. That would be a violation of the conditions of his probation. For that reason the court finds that he has violated the conditions of his probation. His probation is revoked and he is remanded to the Department of Corrections to serve out the remainder of his sentence.

(Id. at 9:27:20).

Appellant now appealed the revocation of his probation to the Kentucky Court of Appeals, who affirmed the revocation. This Court granted discretionary review, and Appellant now appeals his revocation to this Court.

ARGUMENTS

I.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REVOKING APPELLANT'S PROBATION.

Appellant claims that the trial court erred in revoking Appellant's

probation and that the Court of Appeals erred in relying upon Tiryung v. Commonwealth, 717 S.W.2d 503 (Ky. App. 1986) to affirm that revocation. Aplt. Br. at 4-10. However, the trial court utilized well settled standards of review and properly revoked the Appellant's probation.

A. Tiryung v. Commonwealth, 717 S.W.2d 503 (Ky. App. 1986) is still binding precedent and should not be overruled.

Appellant argues that the Court of Appeals reliance on Tiryung v. Commonwealth, 717 S.W.2d 503 (Ky. App. 1986) is misplaced and that Tiryung should be overruled. Aplt. Br. At 4-10. These claims are without merit.

In Tiryung, the Kentucky Court of Appeals, on remand from this Court determined that "[i]t is not necessary that the Commonwealth obtain a conviction in order to accomplish revocation of probation." Tiryung at 504. This ruling has been upheld numerous times since it was rendered twenty-five (25) years ago. See e.g. Commonwealth v. Lopez, 292 S.W.3d 878 (Ky. 2009); Miller v. Commonwealth, 329 S.W.3d 358 (Ky. App. 2010). Probation is a privilege rather than a right. Brown v. Commonwealth, S.W.2d 21 (Ky. App. 1977). One may retain his status as a probationer only as long as the trial court is satisfied that he has not violated the terms or conditions of the probation. KRS 533.030; United States v. Markovich, 348 F.2d 238 (2nd Cir.1965). "It is entirely within the discretion of the trial court whether a defendant shall be given his liberty conditionally. This is regarded as a privilege or a 'species of grace extended to a convicted criminal' for his welfare and the welfare of organized society." Ridley v. Commonwealth, 287 S.W.2d 156, 158 (Ky. App. 1956). Every Federal Court of Appeal and a large portion of the state courts also hold that a conviction is not necessary to

revoke probation. See United States v. Czajak, 909 F.2d 20 (1st Cir. 1990); United States v. Markovich, 348 F.2d 238 (2nd Cir. 1965); United States v. D'Amato, 429 F.2d 1284 (3rd Cir. 1970); United States v. Cates, 402 F.2d 473 (4th Cir. 1968); Pickens v. State of Texas, 497 F.2d 981 (5th Cir. 1974); Amaya v. Beto, 424 F.2d 363 (5th Cir. 1970); United States v. Ambrose, 483 F.2d 742 (6th Cir. 1973); United States v. Fleming, 9 F.3d 1253 (7th Cir. 1993); Kartman v. Paratt, 535 F.2d 450 (8th Cir. 1976); Standlee v. Rhay, 557 F.2d 1303 (9th Cir. 1977); Yates v. United States, 308 F.2d 737 (10th Cir. 1962); United States v. Taylor, 931 F.2d 842 (11th Cir. 1991); United States v. Webster, 492 F.2d 1048 (D.C. Cir. 1974) See e.g. Commonwealth v. Infante, 888 A.2d 783 (Pa. 2005); Commonwealth v. Holmgren, 656 N.E.2d 577 (Mass. 1995); State v. Bailey, 464 N.W.2d 626 (S.D. 1991); Ex parte Caffie, 516 So.2d 831 (Ala.1987); Payne v. Robinson, 523 A.2d 917 (Conn.App. 1987); Johns v. Shulsen, 717 P.2d 1336 (Utah 1986); Jaynes v. State, 437 N.E.2d 137 (Ind.Ct.App. 1982); State v. Maier, 423 A.2d 235 (Me. 1980); People v. Buckner, 302 N.W.2d 848 (Mich.App. 1980); Ketcham v. State, 618 P.2d 1356 (Wyo. 1980); Johnson v. State, 235 S.E.2d 550 (Ga.App. 1977); Russ v. State, 313 So.2d 758 (Fla. 1975); State v. Rasler, 532 P.2d 1077 (Kan. 1975); State v. Kartman, 224 N.W.2d 753 (Neb. 1975); Stone v. Shea, 304 A.2d 647 (N.H. 1973); Snyder v. State, 496 P.2d 62 (Alaska 1972); Maes v. State, 501 P.2d 695 (N.M.App. 1972); Wright v. United States, 262 A.2d 350 (D.C. 1970); Hood v. State, 458 S.W.2d 662 (Tex.Cr.App. 1970); People v. Jones, 263 Cal.App.2d 818, 70 Cal.Rptr. 130 (1968).

The logic applied by each of these jurisdictions is imminently reasonable.

The due process which must be afforded to one about to lose his status as a probationer or parolee does not come with the "full panoply of rights accorded to one not yet convicted." Tiryung, 504 *quoting* Childers v. Commonwealth, 593 S.W.2d 80, 81 (Ky.App. 1980) *citing* Morrissey v. Brewer, 408 U.S. 471 (1972). This is because "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special [probation] restrictions." Morrissey v. Brewer, 408 U.S. 471, 480 (1972). It is, in effect, more a re-sentencing hearing than a taking of rights. United States v. Bazzano, 712 F.2d 826, 833 (3rd Cir. 1983). The requisite burden of proof in revocation proceedings is not beyond a reasonable doubt, but merely a "preponderance of the evidence." Murphy v. Commonwealth, 551 S.W.2d 838, 841 (Ky.App. 1977). Given this low threshold in comparison to the burden required for a criminal conviction of "beyond a reasonable doubt," it is only logical that probation could be revoked prior to a conviction. Therefore, collateral estoppel does not even bar revocation of probation after a defendant has been acquitted during a criminal trial of the charge upon which his revocation relies. This is true because of the difference in the types of sanctions imposed and in the burdens of proof. See One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1971). First, the sanctions for violation of parole are remedial in nature, rather than punitive. Second, the burden of proof in a criminal proceeding is beyond a reasonable doubt, whereas for probation revocation the trial court need only to find a violation by a preponderance of the evidence. See, e.g., Morishita v. Morris, 702 F.2d 207, 210 (10th Cir. 1983) (revocation of probation valid when defendant allegedly violated condition forbidding

possession of firearms, though defendant acquitted on criminal charge, because probation violation need only be shown by preponderance of evidence).

Proof of misconduct for probation revocation does not depend upon the result of a criminal trial. In fact, conduct not amounting to a crime may serve as a basis for revocation. Probation may be revoked for non-criminal acts such as those over the age of twenty-one (21) consuming alcohol, or associating with certain individuals. KRS 533.030 2(b), 2(l). It would absurd to hold, as Appellant would have this Court to hold, that where an act on which the revocation is based is criminal, that it is erroneous for the hearing judge to have based the revocation on that accusation unless the accused shall have first been tried and found guilty of the criminal charge. To hold that would be to elevate a criminal act to a legal status more respectable than an ordinary and reasonable condition expressed in a probationary sentence, the violation of which would not constitute even a misdemeanor.

If the trial court were forced to wait for a criminal conviction, rather than a criminal charge or arrest, to revoke probation it's ability to revoke probation for criminal actions would be eviscerated. A defendant's probation must be revoked prior to the expiration of his/her probationary period. Conrad v. Evridge, 315 S.W.3d 313 (Ky. 2010). Probationary periods in the Commonwealth may not exceed five (5) years. KRS 533.020 (4). This is a short period of time in which a defendant may commit an offense and obtain a criminal conviction for purposes of revoking the defendant's probation. Many prosecutions are lengthy and can last for several years, due in no part to the Commonwealth's actions or delay. Even the defendant's purposeful delay could remove

the conviction from occurring within the probationary period, thus preventing revocation. See Huffines v. Commonwealth, 2006 WL 16528668 (Ky. App. 2006) (unpublished opinion affirmed on discretionary review by this Court by way of a bare order pursuant to SCR 1.020(1)(a). Evridge at 316.) Requiring a conviction prior to probation revocation would, in many cases, prevent revocation from occurring based upon criminal actions. This too would be an absurd result, as probation could be timely revoked for non-criminal probation violations, but would rarely be revoked for the conviction of a new crime, as conviction would often occur outside of the period of probation. New criminal offenses committed and certainly convicted of, during the probationary period, are the penultimate reason for probation revocation, as they demonstrate that the probationer has not been rehabilitated by probation and cannot remain within the public at large; however the rule Appellant wishes this Court to adopt would prevent revocation for criminal actions in a large number of cases.

Appellant claims that Tiryung improperly relies upon Brown v. Commonwealth, 564 S.W.2d 21 (Ky.App. 1977); however, Tiryung only relies on Brown for the holding that probation is a privilege, not a right. Aplt. Br. at 5; Tiryung, 504. Appellant finds fault with this contention, alleging that the court in Brown, was only stating that probation was a privilege, not a right, with respect to the question of whether probation can be revoked prior to the probationary term beginning. Aplt. Br. at 5. However, the Brown Court relied on well-settled precedent in stating, generally, that probation was a privilege, not a right. The statement was not specific to the underlying facts in Brown. See Brown at 23 citing Ridley v. Commonwealth, 287 S.W.2d 156, 158

(Ky.App. 1956) citing Darden v. Commonwealth, 277 Ky. 75, 125 S.W.2d 1031, 1033, (Ky.App. 1939). The Tiryung Court's logic in determining that a conviction need not be obtained prior to probation revocation was also solidly based upon well-settled law and legal analysis. In both Darden and Ridley, the defendant had not been convicted of a crime, only arrested. However, in both cases the defendant's probation was revoked and affirmed. See Darden, *supra*; Ridley, *supra*.

Appellant next asks this Court to analyze KRS 533.030 (1) to determine the meaning of "commit another offense" and find that "commit another offense" means "convicted of another offense." Aplt. Br. at 6-10. Appellant essentially argues that if the legislature had intended for revocation to occur after a probationer had been arrested or charged with another offense they would have explicitly stated as much in the statute. Id. at 8-10. However, Appellant's logic can easily be turned on its head, in that had the legislature intended for revocation to occur only after a probationer had been *convicted* of another offense, they would have explicitly stated so in the statute. An analysis of the language "commit an offense" must be done under the proper legal standards, and not taken out of the applicable legal context. As discussed above, the burden of proof for probation revocation hearings is a mere "preponderance of the evidence," not the much higher standard of "beyond a reasonable doubt" used to convict a defendant in a criminal proceeding. Myers v. Commonwealth, 836 S.W.2d 431, 433 (Ky. App. 1992), overruled on other grounds by Sutherland v. Commonwealth, 910 S.W.2d 235 (Ky. 1995) (citing Rasdon v. Commonwealth, 701 S.W.2d 716, 719 (Ky. App. 1986) and Murphy v. Commonwealth, 551 S.W.2d 838 (Ky. App. 1977)). It is much easier for a trial court to

determine that a probationer has "committed an offense" for revocation purposes under this burden. Any ruling that a trial court must wait for a conviction to be obtained prior to revocation would necessarily raise the burden of proof in probation revocation hearings to the much higher "beyond a reasonable doubt" burden. Given that the burden for revocation is "preponderance of the evidence," the phrase "commit an offense" must logically not rise to the level of obtaining a conviction, otherwise the burden for probation revocation hearings must also rise to the level of a criminal trial. This cannot be the case as probation revocation hearings are not criminal in nature. Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

This Court should not follow Appellant's logic and overturn decades of solid legal precedent and analysis. Tiryung is well-established legal precedent and should remain so. Not allowing for revocation prior to conviction would eviscerate the trial court's ability to properly revoke a probationer within the applicable time constraints and raise the burden of proof for revocation hearings to the "beyond a reasonable doubt" standard of a criminal proceeding. Given that the burden of proof for a revocation hearing is a mere "preponderance of the evidence" a probationer can "commit an offense" without obtaining a conviction. This Court should remain in line with the majority of jurisdictions throughout the country and hold that probation may be revoked prior to conviction, reaffirming Tiryung.

B. Appellant's due process rights were not violated by revoking his probation prior to conviction.

1. Appellant's Fifth Amendment right against self-incrimination was not violated.

As discussed *supra*, see Argument I (A), revocation may properly be obtained prior to a subsequent conviction. Appellant alleges that this practice violates his Fifth Amendment right against self-incrimination. Aplt. Br. at 27-29. However, Appellant's allegations are without merit.

The Fifth Amendment provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself." Appellant was not called to testify. He was not asked to answer any question that might have incriminated him in a subsequent trial on the charges that constituted the violation on which his probation was revoked. Thus, he had no occasion to invoke the privilege in this case. So the question is whether "the pressure imposed" on Appellant to testify at the probation-revocation hearing rose "to a level where it is likely to 'compe[l]' a person 'to be a witness against himself.'" McKune v. Lile, 536 U.S. 24, 49 (2002) (O'Conner, J., concurring).

The pressure to testify can come from "penalties imposed upon a person as a result of the failure to incriminate himself." Id. Some penalties "are so great as to 'compe [l]' such testimony, while others do not rise to that level." Id. Penalties that "are capable of coercing incriminating testimony" include:

- Termination of employment. Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation of City of New York, 392 U.S. 280 (1968):

- Loss of a professional license. Spevack v. Klein, 385 U.S. 511(1967);

- Ineligibility to receive government contracts. Lefkowitz v. Turley, 414 U.S. 70 (1973); and

- Loss of the right to participate in political associations and to hold public office. Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

Id. at 49-50.

Minnesota v. Murphy, 465 U.S. 420 (1984) notes that automatic loss of probationary status falls among the type of penalties that are "capable of coercing incriminating testimony." The Murphy Court explained:

> There is . . . a substantial basis in our cases for concluding that if the state, either expressly or by implication, *asserts that invocation of the privilege would lead to revocation of probation*, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Id. at 435 (emphasis added).

But we do not have the above situation in this case. Nothing in this case suggests that the Commonwealth either asserted or implied that Appellant's probation would be automatically revoked if he did not testify at the revocation hearing. Rather, the record clearly and plainly demonstrates that the trial court revoked Appellant's probation based solely on its finding that Appellant "violated the conditions of his probation." TR II at 242. In turn, this finding was based solely on the evidence presented at the probation revocation hearing. The finding was not based in whole or in part on Appellant's decision not testify at the revocation hearing. So just like at in a criminal trial, Appellant had a Fifth Amendment privilege not to testify at the revocation hearing, his strategic decision to remain silent at the hearing carried consequences.

"[T]here are circumstances, even at criminal trials, when requiring a defendant to make a difficult strategic choice which necessarily results in relinquishing a constitutional right is both legitimate and, from a self-incrimination standpoint, noncompulsive." Ryan v. Montana, 580 F.2d 988, 992 (9th Cir. 1978) (citing McGautha v. California, 402 U.S. 183 (1971), vacated on other grounds, 408 U.S. 941 (1972)). Appellant's probation was not automatically revoked because he refused to testify. This is not a "penalty" case like Lefkowitz.

Under certain circumstances, it is unconstitutional to force a person to sacrifice one constitutional right in order to preserve another. Simmons v. United States, 390 U.S. 377, 394 (1968). In Simmons, the appellant elected to testify at a suppression hearing in order to establish standing to challenge the constitutionality of a search of a suitcase. Id. at 390. The appellant lost the suppression motion and his testimony at the suppression hearing was used against him at trial. Id. at 391. The Simmons Court described the appellant's dilemma as a Hobson's choice in which he was "obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." Id. at 394. The Court held that, under the circumstances of the case, it was "intolerable that one constitutional right should have to be surrendered in order to assert another." Id. Consequently, Simmons holds that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." Id. at 395.

Simmons creates use immunity for defendants who testify during a suppression motion. Relying on Simmons, this Court's predecessor court held that Kentucky defendants are likewise entitled to use immunity for testimony in suppression hearings. Shull v. Commonwealth, 475 S.W.2d 469, 472 (Ky. 1971). Appellant incorrectly asserts that he faced a similar choice between constitutional rights in his probation-revocation hearing. Aplt. Br. at 27-29.

Because a probation revocation hearing is not a stage of the criminal prosecution, a probationer is not entitled to the full panoply of rights afforded a criminal defendant. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973). Nonetheless, a probationer maintains some constitutional rights in a probation-revocation hearing. In particular, a probationer has the right to procedural due process. Id. This due-process right includes the "opportunity to be heard in person and to present witnesses and documentary evidence." Id. at 786. Based on Appellant's right to be heard at the revocation hearing, the Appellant improperly concludes that "Either [he] 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." Aplt. Br. at 28. This conclusion misstates the constitutional rights at stake in the revocation hearing and fails to take into account the actual "choice" Appellant faced at his probation hearing.

The right to procedural due process arises in a probation revocation hearing because revocation affects a constitutionally-protected liberty interest. See

Morrissey v. Brewer, 408 U.S. 471, 480 (1972). But this liberty interest is "not the absolute liberty to which every citizen is entitled, but only [a] *conditional* liberty properly dependent on the observance of special [probation] restrictions." Id. (emphasis added). So at stake in a revocation hearing is a *conditional* liberty interest that is simply not on par with the Fourth Amendment rights at issue in Simmons and Shull. Indeed, there is no constitutional right to probation. Rather, "[p]robation, like parole, is purely a matter of legislative grace." Commonwealth v. Vincent, 70 S.W.3d 422, 425 (Ky. 2002). Thus, at the revocation hearing, Appellant was not forced to sacrifice one constitutional right, i.e. his Fifth Amendment right, in order to preserve an equally important constitutional right. Appellant did not have the same sort of Hobson's choice between rights that the appellants had in Simmons and Shull.

In a probation-revocation hearing the Commonwealth has the burden of proving a probation violation, whereas in "[a] suppression hearing . . . the moving party [has] the burden of establishing the evidence was secured by an unlawful search." LaFollette v. Commonwealth, 915 S.W.2d 747, 749 (Ky. 1996). So in Simmons, the appellant had the burden of proving a Fourth Amendment violation including proving that he had standing to challenge the search of the suitcase. But in the revocation hearing, the Commonwealth had the burden of proving that Appellant violated the conditions of his probation. Consequently, Appellant was in no way forced to testify in order to preserve his probationary status. Rather, he faced the difficult, strategic choice of whether to testify in order to rebut the Commonwealth's evidence against him at the risk of making a statement that might be used against him at a subsequent criminal trial. Had he decided

to testify, that decision would have waived his Fifth Amendment privilege. See Sherley v. Commonwealth, 889 S.W.2d 794, 798 (Ky. 1994) (holding that "[o]nce the defendant decides to speak to police officers or testify in open court, he waives his Fifth Amendment privilege"). This type of choice is not uncommon. The Supreme Court of the United States summarized the difficult choices that defendants must sometimes make in McGautha v. California, 402 U.S. 183, 213 (1971) reh'g granted, judgment vacated sub nom. Crampton v. Ohio, 408 U.S. 941 (1972), when it stated:

> The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. McMann v. Richardson, 397 U.S., at 769, 90 S.Ct., at 1448. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.

Appellant was not faced with a Hobson's choice as he alleges, rather he was simply faced with same difficult decision that he would have had at trial, whether or not to testify. In fact, Appellant could have attempted to rebut the Commonwealth's evidence against him via cross-examination or by calling witnesses on his behalf, without ever testifying himself. Revocation of Appellant's probation prior to a conviction on the underlying charges did not violate due process by forcing him into a Hobson's choice.

2. Appellant was not prevented from cross-examination or presentation of witnesses.

Appellant claims that he was prevented from effectively cross-examining the Commonwealth's witness against him, because hearsay evidence was admitted against him via testimony. Aplt. Br. at 29-31. Again Appellant's allegations are without merit.

In Morrissey v. Brewer, 408 U.S. 471, 489 (1972) the Supreme Court of the United States stated that parole revocation hearings should be "flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." This same analysis was applied by the Supreme Court of the United States to probation revocation hearings in Gargon v. Scarpelli, 411 U.S. 778 (1973). Our courts have consistently held that Morrissey and Scarpelli did not "intend to foreclose the admission of hearsay evidence at these informal type of hearings..." Marshall v. Commonwealth, 638 S.W.2d 288, 289 (Ky.App. 1982). Appellant's complaints about the admissibility of hearsay evidence are poorly placed. Hearsay evidence is admissible in probation revocation hearings. Id. The admission of this evidence via testimony did not foreclose the Appellant from cross-examining the Commonwealth's witness about the veracity of the charges against him. Nor did this prevent the Appellant from calling his own witnesses to testify on his behalf concerning the allegations, or from calling hostile witnesses, i.e. the complainants on the arrest warrant. Appellant could have set forth a defense to the charges via cross-examination and presentation of witnesses; however he chose not to do so. Appellant cannot now

complain that he was denied his right to effectively cross-exam the Commonwealth's witness or to present testimony, when he made no effort to do so at the revocation hearing.

3. Sufficient findings of fact and conclusions of law were entered into the record in accordance with Commonwealth v. Alleman, 306 S.W.3d 484 (Ky. 2010), as such Appellant's due process rights were not violated.

The due process demands of a probation revocation hearing require in part "a written statement by the factfinder as to the evidence relied on and reasons for revoking probation." Morrissey, 408 U.S. at 488. KRS 533.050(2) also states that "the court may not revoke or modify the conditions of a sentence of probation... except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification." Appellant alleges that these due process demands were not met and urges this Court to overrule Commonwealth v. Alleman, 306 S.W.3d 484 (Ky. 2010). Aplt. Br. at 31-33. Appellant's claims are without merit.

After Appellant's probation revocation hearing the trial court specifically noted that Appellant's probation was being revoked for "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." TR II, 242. Additionally, sufficient evidence was produced at the revocation hearing that Appellant violated his probation. Once this was established, the Commonwealth had an overwhelming interest in being able to return Appellant to

imprisonment. Robinson v. Commonwealth, 86 S.W.3d 54, 56 (Ky. App. 2002). See also Tiryung, *supra* at 504 ("One may retain his status as a probationer only as long as the trial court is satisfied that he has not violated the terms or conditions of the probation."). Because of these specific violations, the trial court revoked Appellant's probation.

Appellant argues that his revocation did not meet due process demands since sufficient written findings of fact were not issued. Aplt. Br. at 31-33. However, this argument is without merit, in that the written findings specifically state that the trial court was relying upon the testimony and the record presented at the hearing alleging that the Appellant was arrested on four (4) new counts of assault to revoke his probation. TR II, 242. Also as Appellant notes, the hearing was approximately 9 minutes long, a relatively short period of time, during which the evidence against the Appellant was presented, and the Court stated (as set forth above) the specific reasons that it was revoking the Appellant's probation. Nonetheless, even if the written findings were deemed insufficient, this Court has held that oral findings of fact are sufficient to establish that due process demands have been met even though the written findings may have been deficient or general in nature. Commonwealth v. Alleman, 306 S.W.3d 484 (Ky. 2010).

Appellant admits that Alleman is controlling precedent on this point, but requests this Court to reconsider its holding in that case. Aplt. Br. at 32-33. In Alleman this Court held:

> We conclude that oral findings and reasonings for revocation as stated by the trial court from the bench at the conclusion of a revocation hearing satisfy a probationer's due process rights, presuming the findings and reasons support the revocation, when they are preserved by a

> reliable means sufficiently complete to allow the parties and reviewing courts to determine the facts relied on and the reasons for revoking probation.

Id. at 484.

Even if this Court were to find that the written findings issued by the trial court in this case were insufficient, oral findings of fact were issued on the record onto videotape. Thus, Appellant was notified of the reasons for his revocation and the reviewing court was provided a record from which it could determine the basis of the trial court's ruling. Appellant's allegation that this Court should reverse, because the Court of Appeals found solely that the written findings were sufficient is lacking. It has long been recognized that an appellate court "may affirm a circuit court on any grounds when it has reached the correct result." Wright v. Sales, 78 S.W.2d 23, 24-25 (Ky. 1935). Unless this Court has now adopted a rule which requires that it totally ignore the record on appeal, it can *only* conclude–given the wealth of information contained within the written findings and the video record–that sufficient written and/or oral findings were issued to satisfy the demands of due process and that Alleman is controlling upon this case. The revocation of Appellant's probation did not violate his due process rights.

C. The Guidlines Set Forth in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973) for Minimum Due Process Requirements of Probation Revocation Hearings Provide Clear Guidance to State Courts. There is No Need for a New Test.

Appellant argues that the minimum due process guidelines applicable to probation revocation hearings, as set forth by the Supreme Court of the United States in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973)

are not the most effective means of ensuring that probationers receive due process. Aplt. Br. at 10-27. Instead, Appellant urges this Court to forgo the guidelines clearly outlined in Morrissey and Scarpelli, as well as the well-established history of applying those guidelines within the Commonwealth, including statutory adoption, and apply the test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976) to all probation and parole revocation hearings. Aplt. Br. at 10-27.

Appellant's assertions are misplaced, the test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976) is not proper for ensuring that minimum due process demands are met during probation or parole revocation hearings. The test set forth in Mathews is only applicable to determining when a judicial hearing, rather than an administrative hearing, is mandated by due process because an administrative action implicates an individual's state-created interests. See Mathews; See also Wilkinson v. Austin, 545 U.S. 209, 221-230 (2005); Hamdi v. Rumsfeld, 542 U.S. 507, 524-539 (2004); City of Los Angeles v. David, 538 U.S. 715, 716-719 (2003); United States v. Brandon, 158 F.3d 947, 953-960 (6th Cir. 1998). It should also be noted that the Supreme Court of the United States did not overrule Morrissey or Scarpelli, when it rendered Mathews. By implication, had the Supreme Court of the United States intended for the test set forth in Mathews to be applied to probation and parole revocation hearings, it necessarily would have said so in its lengthy opinion rendered after Morrissey and Scarpelli. The fact that the Supreme Court of the United States did not overrule Morrissey or Scarpelli, is instructive. The test set forth in Mathews is inapplicable to probation and parole revocation hearings.

The Mathews test only determines whether a judicial hearing, rather than an administrative hearing, is necessary when an administrative action implicates an individual's state-created interests. Morrissey and Scarpelli mandate an automatic judicial hearing prior to the revocation of probation or parole and go further to set forth the specific due process mandates that must be met at such a hearing. Given that a judicial hearing, with the applicable due process requirements is already set forth, the Mathews test is not beneficial to the analysis.

The Commonwealth has adopted the mandates of Morrissey and Scarpelli both through case law and through statutory construction. See Hunt v. Commonwealth, 326 S.W.3d 437 (Ky. 2010); Wells v. Webb, 511 S.W.2d 214, 215 (Ky. 1974); KRS 535.050(2). Contrary to Appellant's assertions our courts' revocation opinions and applicable statutes do provide substantial guidance. Certainly they do not "approach those of a patch quilt without consistency." Aplt. Br. at 16. Even a cursory review of this Court's, as well as the Court of Appeals, decisions from the past thrity-nine (39) years reveals that Kentucky case law consistently upholds the due process mandates of Morrissey and Scarpelli. See, e.g., Miller v. Commonwealth, 329 S.W.3d 358 (Ky.App. 2010); Hunt v. Commonwealth, 326 S.W.3d 437 (Ky. 2010); Commonwealth v. Alleman, 306 S.W.3d 484 (Ky. 2010); Robinson v. Commonwealth, 86 S.W.3d 54 (Ky.App. 2002); Rasdon v. Commonwealth, 701 S.W.2d 716 (Ky.App. 1986); Wells v. Webb, 511 S.W.2d 214 (Ky.App. 1974); Reeder v. Commonwealth, 507 S.W.2d 491 (Ky.App. 1973)[1]. Our

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[1] A Westlaw search produced fifty-six (56) citing references to Scarpelli within Kentucky's case law, twenty-one (21) reported and thirty-five (35) unreported.

legislature has also gone an extra step to guarantee that the due process mandates of Morrissey and Scarpelli are met within the Commonwealth during probation revocation by requiring by statute that a probationer be represented by counsel at his revocation hearing. KRS 533.050(2).

The Appellant's assertions that the due process mandates set forth in Morrissey and Scarpelli are not being followed within the Commonwealth, or are too confusing to follow, is without merit. There is ample case law and history to contradict Appellant's contentions. Moreover, the test that Appellant recommends that this Court adopt is improper for probation revocation proceedings and was not designed for that purpose. Having been rendered after Morrissey and Scarpelli and without specifically overruling them the Supreme Court of the United States clearly did not intend for the Mathews test to be applicable to probation and parole revocation due process requirements.

CONCLUSION

Competent credible evidence existed to support the trial court's finding that Appellant had violated the terms and conditions of his probation. The trial court properly revoked Appellant's probation for a new charges. Thus, the trial court did not abuse its discretion when it revoked Appellant's probation. Tiryung, *supra*. The Court Appeals properly affirmed the revocation. For the reasons discussed above, this Court should reaffirm the binding precedent of Tiryung v. Commonwealth, 717 S.W.2d 503 (Ky.App. 1986) and Commonwealth v. Alleman, 306 S.W.3d 484 (Ky. 2010), holding that probation may properly be revoked prior to a conviction for a new offense and that due process demands are properly met under the guidelines of Morrissey and Scarpelli. Appellant's assignment of error is without merit.

For the foregoing reasons, the opinion of the Kentucky Court of Appeals should be affirmed.

Respectfully submitted,

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