Commonwealth of Kentucky
Supreme Court

Case No. 2013-SC-00120

COMMONWEALTH OF KENTUCKY — **APPELLANT**

v.

Appeal from Russell Circuit Court
Hon. Vernon Miniard, Judge
Indictment No. 12-CR-74

CHARLES FARMER — **APPELLEE**

Brief for Commonwealth

Submitted by,

JACK CONWAY
Attorney General of Kentucky

JASON B. MOORE
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Ky. 40601
(502) 696-5342

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2013, the foregoing Brief for the Commonwealth was served, first class, postage pre-paid, U.S. mail to Hon. Vernon Miniard, Jr., Judge, Russell Circuit Court, 109 N. Main St,, P. O. Box 530, Jamestown, Ky. 42629; and to Hon. R. Burly McCoy, and Hon. Nick Nicholson, Stoll Keenon Ogden PLLC, 300 W. Vine St., Suite 2100, Lexington, Ky. 40507 and Hon. Ralph E. Meczyk and Hon. Robert White, Meczyk and Assoc., 111 W. Washington St., Ste. 1025, Chicago, IL 60602, counsels for Appellee; and via electronic mail to Hon. Matthew Leverage, Commonwealth's Attorney. I further certify that the record on appeal was returned to the office of the Clerk of this Court on this date.

Jason B. Moore
Assistant Attorney General

INTRODUCTION

Appellee, Charles P. Farmer, moved the Russell Circuit Court to dismiss an indictment charging him with one count of murder on the basis of immunity from prosecution under KRS 503.085. Following the denial of that motion, appellee filed a notice of appeal to the Kentucky Court of Appeals which subsequently entered a to-be-published opinion and order holding that Court had jurisdiction to consider the appeal despite it being interlocutory. This Court granted the Commonwealth's motion for discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth requests oral argument in this matter as it presents a question of first impression for this Court concerning the scope of the Court of Appeals' appellate jurisdiction.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The issue in this matter concerns the scope of the Court of Appeals' appellate jurisdiction, and the particular facts of the underlying charge against appellee is irrelevant. The only facts relevant to this matter is the procedural history of the case.

Appellee was indicted by a Russell County grand jury on June 22, 2012, and charged with one count of murder under KRS 507.020 (TR I, 1). The charge arose after appellee shot and killed Daniel Shane Popplewell on April 27, 2012, and killed him (Id.). Appellee was arraigned on the charge in the indictment on July 10, 2012, and entered a plea of not guilty (TR I, 141) On the same day as his arraignment, appellee filed a motion to dismiss the indictment alleging that, because he acted in self-defense when he shot Mr. Popplewell, he was immune from prosecution under KRS 503.085(1) (TR I, 10-29).

The Commonwealth filed a response to appellee's motion to dismiss the indictment on August 10, 2012, asking the trial court to deny the motion (TR II, 219-227). The Commonwealth also filed discovery materials with the trial court for its consideration in ruling on the motion (Manila Envelope labeled "Discovery filed by Commonwealth", five cds). On August 17, 2012, appellee filed a reply to the Commonwealth's response (TR II, 228-234). On September 19, 2012, the trial court entered an order denying appellee's motion to dismiss by finding there was probable cause to believe

the use of force was unlawful, and appellee was not entitled to immunity (TR II, 238-242).[1]

Appellee then filed a notice of appeal that he was appealing the order denying his motion to dismiss to the Kentucky Court of Appeals on October 2, 2012 (TR II, 243). On October 16, 2012, the Kentucky Court of Appeals ordered appellee to show cause why his appeal should not be dismissed as interlocutory because a final and appealable judgment had not yet been entered by the trial court. Appellee filed his response to the show cause order on October 30, 2012.[2]

On February 15, 2013, a three judge motion panel of the Court of Appeals rendered a 2-1, to-be-published, opinion and order finding appellee had demonstrated sufficient cause to proceed with this interlocutory appeal. Writing for the majority, Judge Kelly Thompson found there would be "futility in an appeal of the denial of KRS 503.085 immunity after a defendant's conviction" because, as Judge Thompson had asserted in his dissent in *Lemons v. Commonwealth*, 2010-CA-001942-MR, 2012 WL 2360131 (Ky. App. 2012)[3], following a jury trial a claim of error in the denial

---

[1] A copy of the trial court's order is attached hereto in the appendix at Tab 2.

[2] According to the certificate of service, respondent served a copy of his show cause response on the Commonwealth's Attorney. A copy was not served on the Attorney General. The show cause order did not provide for the Commonwealth to file a reply, and the Court of Appeals did not request a reply from the Commonwealth.

[3] On February 13, 2013, two days before the Court of Appeals rendered its opinion and order in the case at bar, this Court granted the Commonwealth's motion for discretionary review in *Lemons*.

of immunity would be subject to harmless error review. Opinion and Order, p. 4.

The Court of Appeals' majority believed it was "simply nonsensical for the General Assembly to have clearly established immunity from prosecution that is to be determined by the court, but leave a defendant denied immunity without an opportunity for meaningful judicial review." The Court of Appeals majority then divined jurisdiction for itself over this interlocutory appeal from this Court's opinion in *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009), wherein this Court held the Court of Appeals had jurisdiction to consider an interlocutory appeal of a trial court's denial of the school board's motion to dismiss a civil action on the basis of governmental immunity. *Id.* at 885-887.

Chief Judge Acree dissented from the Court of Appeals' opinion and order in this matter. As noted by Chief Judge Acree, "[t]here is no express grant of appellate jurisdiction permitting our review of the interlocutory order from which this appeal is taken." Opinion and Order, p. 6 (Acree, CJ *dissenting*). Chief Judge Acree further noted that, when enacting KRS 503.085, the General Assembly did not include any provision for an interlocutory appeal from the denial of an immunity claim, nor did it amend KRS 22A.020 to provide for such, and neither the Rules of Criminal Procedure nor the Rules of Civil Procedure authorize the Court of Appeals to

exercise jurisdiction over such interlocutory appeals. Opinion and Order, p. 7 (Acree, CJ *dissenting*).

Chief Judge Acree disagreed with the majority's finding of "jurisdictional authority in inferences divined primarily from our Supreme Court's opinion in [*Prater*]." Chief Judge Acree concluded that *Prater*, and the decisions of the United States Supreme Court upon which it based its extension of jurisdiction, was not applicable to the case at bar because those cases involved "substantial *public* interests" not found in the case at bar which involves only private, personal interests. Opinion and Order, p. 14 (Acree, CJ *dissenting*).

This Court granted the Commonwealth's motion for discretionary review of the Court of Appeals' opinion and order. Further, this Court entered an order staying further proceedings in this matter before the Court of Appeals pending finality in this matter.[4]

---

[4] The Commonwealth is aware of four other cases before currently before the Court of Appeals wherein criminal defendants have filed interlocutory appeals following the denial of their motions to dismiss on the basis of immunity under KRS 503.085. Three of those cases have been stayed and are being held in abeyance by the Court of Appeals pending finality of this case. The fourth is pending before the Court of Appeals on the defendant's motion for leave to file a belated appeal.

ARGUMENT

I.

THE COURT OF APPEALS LACKED JURISDICTION TO CONSIDER APPELLEE'S APPEAL BECAUSE IT WAS INTERLOCUTORY IN NATURE

This issue is properly preserved for review by this Court by virtue of the Court of Appeals's *sua sponte* order for appellee to show cause why his appeal should not have been dismissed by that Court on the basis it was interlocutory in nature and the opinion and order of the Court of Appeals holding that it had jurisdiction to consider appellee's interlocutory appeal. This Court granted the Commonwealth's motion for discretionary review of that opinion and order.

"It is fundamental that a court must have jurisdiction before it has authority to decide a case. Jurisdiction is the ubiquitous procedural threshold through which all cases and controversies must pass prior to having their substance examined." *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005). In this matter, the Court of Appeals erred when it held that it had jurisdiction to consider the interlocutory appeal filed by appellee.

A. Neither Section 111 of the Kentucky Constitution, KRS 22A.020, nor KRS 503.085 confer jurisdiction to the Court of Appeals over this interlocutory appeal.

The Judicial Article of 1975 amended the Kentucky Constitution and created the current unified judicial system. 1974 Ky. Acts Ch. 84 (effective January 1, 1976). In doing so, the then-Court of Appeals was reconstituted into this Court, and the current-Court of Appeals was created as an intermediate appellate court. Ky. Const. §§ 109, 110 and 111. Under Sections 110 and 111, this Court and the Court of Appeals have "appellate jurisdiction only." Specifically, this Court's jurisdiction is established in Section 110(2)(b) as follows:

> Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules.

The jurisdiction of the Court of Appeals, on the other hand, is established by Section 111 of the Kentucky Constitution and its grant of jurisdiction is significantly more constrained than this Court's grant. Section 111(2) sets forth that jurisdiction as follows:

> The Court of Appeals shall have appellate jurisdiction only, except that it may be authorized by rules of the Supreme Court to review directly decisions of administrative agencies of the Commonwealth, and it may issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause within its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction as provided by law.

The key distinction between the appellate jurisdiction of this Court and the Court of Appeals is, therefore, clear. This Court's appellate jurisdiction is determined by itself through its rules (with the exception of criminal cases wherein a sentence of twenty years imprisonment or great has been imposed), whereas the Court of Appeals appellate jurisdiction extends only "as provided by law."

This Court has held that the language of Section 111(2) above, "authorized the General Assembly to prescribe the appellate jurisdiction of the newly-created Court of Appeals[.]" *Commonwealth v. Bailey*, 71 S.W.3d 73, 77 (Ky. 2002). *See also Moore v. Commonwealth*, 199 S.W.3d 132, 138 (Ky. 2006) and *Ballard v. Commonwealth*, 320 S.W.3d 69, 72-73 (Ky. 2010). In exercising its authority under Section 111(2), the General Assembly enacted KRS 22A.020. 1976 Ky. Acts Ch. 70, § 3 (effective March 23, 1976). That statute provides as follows:

> (1) Except as provided in Section 110 of the Constitution, an appeal may be taken as a matter of right to the Court of Appeals from any conviction, final judgment, order, or decree in any case in Circuit Court, including a family court division of Circuit Court, unless such conviction, final judgment, order, or decree was rendered on an appeal from a court inferior to Circuit Court.
>
> (2) The Court of Appeals has jurisdiction to review interlocutory orders of the Circuit Court in civil cases, but only as authorized by rules promulgated by the Supreme Court.
>
> (3) Notwithstanding any other provision in this section, there shall be no review by appeal or by writ of certiorari

> from that portion of a final judgment, order or decree of a Circuit Court dissolving a marriage.
>
> (4) An appeal may be taken to the Court of Appeals by the state in criminal cases from an adverse decision or ruling of the Circuit Court, but only under the following conditions:
>
> (a) Such appeal shall not suspend the proceedings in the case.
>
> (b) Such appeal shall be taken in the manner provided by the Rules of Criminal Procedure and the Rules of the Supreme Court, except that the record on appeal shall be transmitted by the clerk of the Circuit Court to the Attorney General; and if the Attorney General is satisfied that review by the Court of Appeals is important to the correct and uniform administration of the law, he may deliver the record to the clerk of the Court of Appeals within the time prescribed by the above-mentioned rules.
>
> (c) When an appeal is taken pursuant to this subsection, the Court of Appeals, if the record so warrants, may reverse the decision of the Circuit Court and order a new trial in any case in which a new trial would not constitute double jeopardy or otherwise violate any constitutional rights of the defendant.
>
> (5) Any party aggrieved by the judgment of the Circuit Court in a case appealed from a court inferior thereto may petition the Court of Appeals for a writ of certiorari.

Since its original enactment, the statute has been amended only once when the words "including a family court division of Circuit Court" were added to Section (1). 2003 Ky. Acts Ch. 66, § 16 (effective June 24, 2003).

In KRS 22A.020(2) and (4), the General Assembly prescribed the Court of Appeals limited jurisdiction to review interlocutory orders of the Commonwealth's Circuit Courts. Under subsection (2), "The Court of Appeals has jurisdiction to review interlocutory orders of the Circuit Court *in*

civil cases, but only as authorized by rules promulgated by the Supreme Court[ ]" (emphasis added), and, under subsection (4), the Commonwealth may take an appeal to the Court of Appeals "from an adverse decision or ruling of the Circuit Court." This Court has, however, clearly established that "KRS 22A.020(4) is uniquely for the benefit of the Commonwealth," *Commonwealth v. Nichols*, 280 S.W.3d 39, 42 (Ky. 2009), and "there is no comparable provision for an [interlocutory] appeal by the defendant." *Evans v. Commonwealth*, 645 S.W.2d 346, 347 (Ky. 1982). *See also James v. Commonwealth*, 360 S.W.3d 189, 194 (Ky. 2012) ("Because the charges were dismissed without prejudice, the Appellant's claim as to them is moot or at least is not justiciable. The charges are not currently pending, and there is no final judgment resolving them. Any review of them would necessarily be interlocutory in character, at the very least, which is not allowed by our rules."). Likewise, KRS 22A.020(2) provides no jurisdiction to the Court of Appeals over this interlocutory appeal because the underlying case is a criminal matter not a civil case.

Finally, in 2006, the General Assembly enacted the immunity provision at issue herein which became codified as KRS 503.085(1). 2006 Ky. Acts Ch. 192, § 6 (effective July 12, 2006). That statute provides as follows:

> A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in

> KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a police officer. As used in this section, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

In *Rodgers v. Commonwealth*, 285 S.W.3d 740, 755 (Ky. 2009), this Court interpreted the statute as requiring a trial court to make a determination as to whether there is probable cause to believe the defendant's use of force was unlawful. If the trial court finds that it was, the case may proceed to trial. If not, the trial court must enter an order dismissing the charges. *Id.*

KRS 503.085(1), however, does not in any manner create a right to an interlocutory appeal (or any appeal for that matter) of the denial of a claim of immunity. Further, it is presumed the General Assembly "h[as] knowledge of existing laws and the construction placed upon them by the courts[.]" *Baker v. White*, 65 S.W.2d 1022, 1024 (Ky. 1933). KRS 22A.020 had been in existence for thirty years when the General Assembly enacted KRS 503.085, and this Court had interpreted that statute as not creating any right to an interlocutory appeal by a defendant in a criminal case as early as 1982 in *Evans*, *supra*.

Despite the plain language of KRS 22A.020, and this Court's construction of it regarding interlocutory appeals by defendant's in criminal cases, the General Assembly did not provide for any such appeal from the

denial of a claim of immunity in the language of KRS 503.085(1) nor did it amend KRS 22A.020 to so provide. Thus, while the Court of Appeals' majority might believe it "nonsensical for the General Assembly to have clearly established immunity from prosecution that is to be determined by the court, but leave a defendant denied immunity without an opportunity for meaningful judicial review," Slip Opinion, p. 4,[5] that is precisely what the General Assembly did, and "a court may not engraft language onto a statute in order to achieve a desired result." *Crouch v. Commonwealth*, 323 S.W.3d 668, 674 (Ky. 2010).

In light of the foregoing, it is not surprising that the majority opinion of the Court of Appeals in this matter did not rely upon Section 111 of the Kentucky Constitution, KRS 22A.020, or KRS 503.085(1) in support of its holding that the Court had jurisdiction to consider appellee's interlocutory appeal. It is abundantly clear from the language of those provisions, and this Court's interpretation of them, that they do not provide the Court of Appeals with jurisdiction to consider an interlocutory appeal brought by a defendant in a criminal case. In fact, there is no mention whatsoever of Section 111 or KRS 22A.020 in the majority's opinion. Applying these provisions, it is clear that appellee's interlocutory appeal must be dismissed because it is interlocutory.

---

[5] As set forth below, the Commonwealth disagrees with the majority's conclusion that a defendant denied immunity is left without a meaningful opportunity for review.

B. The trial court's denial of appellee's motion to dismiss is not subject to immediate review under the collateral order doctrine.

Rather than relying upon Section 111 of the Kentucky Constitution, KRS 22A.020, or KRS 503.085(1) as the basis for holding it had jurisdiction to consider this interlocutory appeal, the majority opinion below relied upon this Court's decision in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009), wherein this Court held, in a civil case, that a trial court's denial of a claim of sovereign immunity was subject to immediate review despite being an interlocutory order. In doing so, the majority erred because the order of the trial court herein does not meet the conditions required for immediate review under the collateral order doctrine.

In *Prater*, this Court held that the Court of Appeals properly had jurisdiction to consider an interlocutory appeal from a circuit court's denial of the school board's motion to dismiss the complaint or for summary judgment on the basis it was "absolutely immune from damages claims brought in court, as opposed to the Board of Claims." 292 S.W.3d at 885. In so holding, this Court relied upon precedent from the United States Supreme Court wherein it recognized an exception to the federal final judgment rule, 28 U.S.C. § 1291, for immunity cases. *Id.* at 886-887 *citing Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). In *Mitchell*, the United States Supreme Court referred to this as the "collateral order doctrine" first announced by the Court in *Cohen v. Beneficial Industrial*

Loan Corp., 337 U.S. 541 (1949). The doctrine permits federal appellate courts to hear interlocutory appeals from "a small set of prejudgment orders that are 'collateral to' the merits of an action and 'too important' to be denied immediate review." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009).

In *Will v. Hallock*, 546 U.S. 345 (2006), the United States Supreme Court "made clear the limited scope of the collateral order doctrine." *Kelly v. Great Seneca Financial Corp.*, 447 F.3d 944, 946 (6th Cir. 2006). In *Will*, the Court stated as follows:

> The requirements for collateral order appeal have been distilled down to three conditions: that an order " '[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.' " *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The conditions are stringent, *Digital Equipment*[*Corp. v. Desktop Direct, Inc.*, 511 U.S. 863,] 868 [(1994)], and unless they are kept so, the underlying doctrine will overpower the substantial finality interests § 1291 is meant to further; judicial efficiency, for example, and the "sensible policy 'of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which litigation may give rise.' " *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)).

546 U.S. at 349-350.

The United States Supreme Court then identified the cases wherein it had held a collateral order was immediately appeal even though it was not final.

> Prior cases mark the line between rulings within the class and those outside. On the immediately appealable side are orders rejecting absolute immunity, *Nixon v. Fitzgerald,* 457 U.S. 731, 742, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), and qualified immunity, *Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). A State has the benefit of the doctrine to appeal a decision denying its claim to Eleventh Amendment immunity, *Puerto Rico Aqueduct, supra,* at 144–145, 113 S.Ct. 684, and a criminal defendant may collaterally appeal an adverse ruling on a defense of double jeopardy, *Abney v. United States,* 431 U.S. 651, 660, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

546 U.S. at 350. However, the Court was also quick to make clear that not all claims asserting a "right" not to stand trial could satisfy the third element of the collateral order doctrine. *Id.* at 351. The Court stated there was a "further characteristic that merits appealability under *Cohen*" that involved " 'a judgment about the value of the interests' " being asserted. *Id. citing Digital Equipment*, 511 U.S. at 878-879.

The Court in *Will* then analyzed its prior decisions and concluded as follows:

> Thus, in *Nixon,* we stressed the "compelling public ends rooted in ... the separation of powers" that would be compromised by failing to allow immediate appeal of a denial of absolute Presidential immunity. In explaining collateral order treatment when a qualified immunity claim was at issue in *Mitchell,* we spoke of the threatened

> disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service if a full trial were threatened whenever they acted reasonably in the face of law that is not "clearly established." *Puerto Rico Aqueduct* explained the immediate appealability of an order denying a claim of Eleventh Amendment immunity by adverting not only to the burdens of litigation but to the need to ensure vindication of a State's dignitary interests. And although the double jeopardy claim given *Cohen* treatment in *Abney* did not implicate a right to be free of all proceedings whatsoever (since prior jeopardy is essential to the defense), we described the enormous prosecutorial power of the Government to subject an individual "to embarrassment, expense and ordeal ... compelling him to live in a continuing state of anxiety"; the only way to alleviate these consequences of the Government's superior position was by collateral order appeal.
>
> In each case, some particular value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual. That is, it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is "effectively" unreviewable if review is to be left until later. *Coopers & Lybrand,* 437 U.S., at 468, 98 S.Ct. 2454.

546 U.S. at 351-352.

This reasoning supports this Court's decision in *Prater* that an order denying a claim of absolute governmental immunity was immediately appealable. As in *Nixon*, there are "compelling public ends ... rooted in separation of powers" that could be compromised by not allowing an immediate appeal. In the present case, there is simply no "substantial public

interests" at peril following the trial court's denial of appellee's motion to dismiss to justify an immediate appeal of the order under the collateral order doctrine.

Applying the three collateral order elements in this case confirms the error of the Court of Appeals' majority. The first element, that the order conclusively determine the disputed question is met in this matter, but the other two elements are not. Under the second element, the order must "resolve an important issue completely separate from the merits of the action." While the issue resolved by the trial court's order might be important, it in no way is "completely separate from the merits of the action." Appellee asserts that he is entitled to immunity because he acted in self-defense when he killed Mr. Popplewell. In a trial on the merits of the action, the central question will be is appellee guilty of murder (or a lesser offense) or is he not guilty because he was justified in his action. If he introduces evidence that he acted in self-defense, that then becomes an element of the offense charged that the Commonwealth must disprove beyond a reasonable doubt in order to withstand a motion for a directed verdict. Rather than being "completely separate from the merits of the action," the issue raised in appellee's motion to dismiss directly involves the merits of the action.

This fact is what distinguishes the order appellee seeks review of in this matter from an order denying a motion to dismiss on the basis of double jeopardy which the United States Supreme Court has held is subject

to immediate review under the collateral order doctrine. *Abney, supra.* As the Court stated therein, in regard to orders denying a motion based on double jeopardy:

> such orders constitute a complete, formal, and in the trial court, final rejection of a criminal defendant's double jeopardy claim .... Moreover, the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him.

431 U.S. at 659.

For this reason, the Supreme Court of Georgia rejected the exact argument appellee makes herein, that an order denying dismissal of charges under OCGA § 16-3-24.2[6] was not directly appealable under the collateral order doctrine. *Crane v. State*, 641 S.E.2d 795 (Ga. 2007). As the Georgia Court stated:

> In his motion to dismiss, Crane does not contest the State's assertion that he shot DeCesaro to death, but asserts the killing was justified. Since justification is an affirmative defense to a criminal charge, Crane would be entitled to a verdict of acquittal if he established the defense of justification and the State failed to disprove the defense beyond a reasonable doubt. Thus, the ultimate issue in Crane's motion to dismiss pursuant to OCGA § 16-3-24.2 is the same as the ultimate issue at trial,

---

[6] Like KRS 503.085(1), OGCA § 16-3-24.2 immunizes persons using threats or force in defense of self or others, in defense of habitation, and in defense of property other than a habitation from criminal prosecution.

> whether he was justified in killing DeCesaro or is guilty of the offense charged. That being so, the first requirement of the collateral-order exception, that the issue be substantially separate from the basic issue in the case, is not met in this case.

641 S.E.2d at 797. The same reasoning is applicable to the case at bar. Appellee's motion to dismiss on the basis of immunity under KRS 503.085 goes directly to merits of the charge against him (was he justified in killing Mr. Popplewell or is he guilty of the offense charged in the indictment). The trial court's order is also not a "final rejection" of appellee's claim of justification as appellee is still allowed to raise those claims in defense of the charge at trial and would be entitled to a directed verdict of acquittal if the Commonwealth fails to meet its burden of disproving the claim beyond a reasonable doubt.

The order denying appellee's motion to dismiss also does not meet the third condition for immediate review under the collateral order doctrine. As noted above, in the instances the United States Supreme Court has found meriting an immediate review of an order under the collateral order doctrine the order being reviewed has involved a substantial public interest. In this matter, there is no such public interest. Rather, the interest involved in this matter is strictly personal to appellee as Chief Judge Acree pointed out in his dissent from the Court of Appeals opinion and order. Slip Opinion, p. 15-16.

There are also other means available to defendant's to obtain review of a trial court's denial of an immunity claim under KRS 503.085. For instance, a defendant may seek to bring an original action for a writ of prohibition against the trial judge following the denial of such a motion. Obviously, the appellate courts have great discretion in granting or denying such writs, but a defendant is in no way precluded from seeking relief in this manner.[7] A defendant may also obtain review of an order denying an immunity claim by entering a conditional plea under RCr 8.09 and reserving the right to appellate review of the trial court's order. If the defendant is successful on the appeal, the rule requires the defendant be allowed to withdraw his plea.

Finally, the defendant may proceed to trial following the denial of a claim of immunity and assert his claim of justification in defense of the charge offense. As noted, once a defendant does so, the defense becomes an element of the offense and the Commonwealth is required to disprove it beyond a reasonable doubt, not merely by a showing of probable cause. The defendant may then seek review of the claim on appeal by attacking the sufficiency of the evidence. While the claim may no longer be was there

---

[7] This is the procedure utilized by other states that allow a pre-trial review of orders denying claims of immunity from prosecution because the use of force was justified or otherwise lawful. *See Wood v. People*, 255 P.3d 1136 (Colo. 2011) (Defendant may seek pre-trial review of order denying immunity under state's "make-my-day" statute under Colorado Appellate Rule 21 governing original actions.); *Peterson v. State*, 983 So.2d 27 (Fl. App. 2008) (pretrial review of order denying motion to dismiss under state's "Stand Your Ground" statute brought via petition for writ of prohibition.); *Velasquez v. State*, 9 So.3d 22 (Fla. App. 2009) (same); *Cruz v. State*, 54 So.3d 1067 (Fla. App. 2011) (same).

probable cause to proceed to trial in such an appeal, the evidence is still subject to review under the standard of *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991), under which the appellate court must determine that the evidence was sufficient for a reasonable juror to believe the defendant was guilty of the offense, a standard the Commonwealth submits is higher than a determination of mere probable cause that the use of force was unlawful.

This is consistent with other pre-trial probable cause determinations made in criminal cases that are not reviewable by interlocutory or direct appeal. For instance, a defendant may not bring an interlocutory appeal following a district court's finding of probable cause to send a criminal case to a grand jury nor is a defendant permitted to raise a claim on direct appeal that the district court erred in making such a determination after his conviction. The defendant may, however, challenge the sufficiency of the evidence to support his conviction under *Benham*. Likewise, a defendant may not bring an interlocutory appeal challenging a grand jury's finding of probable cause to support an indictment and he is not permitted to allege on direct appeal that probable cause before the grand jury was lacking. Again though, that same defendant may challenge the sufficiency of the evidence to support the jury's verdict.

The probable cause determinations made by the district court and by the grand jury are not subject to interlocutory appeal, and they

become subsumed by the jury's verdict following a conviction. The defendant is left to challenge these determinations, not directly, but via attack on the sufficiency of evidence to support the verdict. There is no reason a trial court's probable cause determination that the defendant's use of force was unlawful should be treated any differently than these other pre-trial probable cause determinations.

CONCLUSION

Based upon the foregoing, the Court must reverse the opinion and order rendered by the Court of Appeals finding that it has jurisdiction to consider appellee's interlocutory appeal in this matter and remand this matter to that Court for entry of an order dismissing appellee's appeal. Neither Section 111 of the Kentucky Constitution, KRS 22A.020, nor KRS 503.085 confer jurisdiction on that Court to consider such an interlocutory appeal. Further, the order denying appellee's claim of immunity does not meet the conditions required for immediate review under the collateral order doctrine.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky

JASON B. MOORE
Assistant Attorney General
Attorney General's Office
Office of Criminal Appeals
1024 Capitol Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

Counsel for Appellant