Supreme Court of Kentucky
No. 2012-SC-00431-DG

Commonwealth of Kentucky — **Appellant**

v.

On Review from the Court of Appeals
No. 2010-CA-1942
Campbell Circuit Court No. 08-CR-706

Brian J. Lemons — **Appellee**

Brief for Appellee Lemons

Submitted by:

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Certificate required by CR 76. 12(b):

This will certify that true and correct copies of this Brief for Appellee were mailed, first class postage prepaid, to the Hon. Fred A. Stine, V, Chief Circuit Judge, 330 York Street, Newport, Kentucky 41071; the Hon. Michelle Snodgrass, Commonwealth's Attorney, 600 Columbia Street, Newport, Kentucky 41071; the Hon. Aaron J. Currin, Assistant Public Advocate, 333 Scott Street, Suite 400, Covington, Kentucky 41011, and the Hon. Jason B. Moore, Assistant Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601, on August 14, 2013. The record has been returned to the Kentucky Supreme Court.

Susan Jackson Balliet

INTRODUCTION

When a big man slammed Appellee Brian J. Lemons' girlfriend to the ground, and another man twice as big as Appellee knocked out his best friend-- breaking three of his teeth-- and jammed Appellee against a car, Appellee defended with the only thing he had (a pocket knife), and his attacker died from a stab wound. This Court should uphold the Court of Appeals' correct reversal of the trial court because the Commonwealth failed to establish probable cause that Appellee did not act in self-defense, a result required under the KRS 503.085 immunity statute.

STATEMENT CONCERNING ORAL ARGUMENT

KRS 503.085 places the burden squarely on the Commonwealth to establish probable cause that a person claiming immunity did not act in self-defense. The questions for discretionary review are: what evidence must the Commonwealth present to satisfy probable cause in the context of a KRS 503.085 immunity question, whether the evidence presented by the Commonwealth met that standard, and whether the Court of Appeals applied the correct standard of appellate review. Practically the complete record relied on by the trial court is attached to this brief. The Court can readily determine the issues without oral argument.

TABLE OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Police Reports

Cory Kessnick, age 25, 6'2" tall and 255 lbs.[1] died after a fight outside the Brass Mule (hereinafter "Brass Ass") bar in Newport, Kentucky, from stab wounds received from a pocket knife.[2] Appellee Brian Lemons, age 28, 5'9" and 160 lbs., who had come to the bar to pick up his girlfriend Yvonne Weaver, was arrested at 3:24 a.m. on October 11, 2008, in the parking lot behind the bar, where Cory lay still alive but bleeding. Cory died at a hospital later that morning. Appellee's prior record, contained in the trial court record, indicates a history of minor traffic, theft, and drug crimes, but no serious jail time. Nothing in his past record indicates a propensity for violence.[3]

The incident report narrative attached to the Uniform Citation completed by **Officer Richard Gibbs** states he arrived at the Brass Ass around 3:05 a.m. and found Cory. He also found Appellee's best friend Pat Link lying there apparently unconscious and covered with blood. According to Gibbs' report Appellee admitted to stabbing Cory twice.[4] Cory's brother, Dustin Kessnick, was covered with blood from an injury to his head and eye. Appellee's blood-stained pocket

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[1] Autopsy Report, Collected Materials, Tab 12.

[2] Police reports, citations, early informal narratives before the recorded and transcribed witness statements, the autopsy –everything relied on by the trial court except the transcribed witness statements—may be found in Collected Materials, at Tab 12. The witness statements are attached individually. The Brass Mule is referred to as the "Brass Ass" because all witnesses referred to it by that name.

[3] Courtnet records, TR 4-8, at Tab 13.

[4] It is unclear whether Appellee admitted this to Gibbs at the scene. Apparently he may have.

knife was collected from a near-by trash-can.[5] Cory's Autopsy Report indicated the knife found could have inflicted Cory's wounds.[6]

Cory and Dustin's half-brother Gary Damon was 6'1" and weighed 285 lbs.[7] Gary was described as getting in an officer's face and continuing to yell and scream after the police told him to stop. He was charged with disorderly conduct.[8] The narrative attached to Gary Damon's Uniform Citation says he claimed an altercation occurred between him, Appellee, and Pat Link was over when Cory drove up.[9]

Officer Gross of the Newport Police reported separately that on the date of the incident, October 11, 2008, at first Appellee told Gross he had "nothing to do with the events…" and had not stabbed anyone. Gross took Appellee to the Newport Police Department and over the course of the morning Appellee "continued to change the story of the events…from running away, to running around the crime scene." Gross stated that Appellee "would not tell the same details [to Gross] twice about the event…" However --apart from correcting the detail "running away" to state that what he meant was "running around the crime scene," and apart from the fact that for a while, at least, Appellee "continued to

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[5] Uniform Citation, in Collected Materials, pp. 2-3, Tab 12.
[6] Officer Gross report and Autopsy (p. 5), in Collected Materials, at Tab 12.
[7] Gary Damon was Cory and Dustin's half-brother. In this brief for simplicity the three brothers will be referenced by their first names, and at some points collectively as the Kessnick brothers.
[8] Uniform Citation, Collected Materials, Tab 12. Dustin Kessnick's height and weight do not appear in the record. But Dustin was quoted as saying that he and his brothers were "all pretty big fucking guys, you know what I'm saying? They had to hit us with something." 1st Statement of Dustin Kessnick, October 11, 2008, p. 8, Tab 10.
[9] Gary Damon's Uniform Citation and police reports, in Collected Materials, at Tab 12.

state that he did not stab anyone"—neither Gross's report nor any other report in the record identifies a single other detail that Appellee ever told differently and then changed.

By 7:39 a.m. Appellee had made his final statement, below, in which he describes hitting an unnamed brother in the face, threatening the unnamed brother and Cory with his knife and stabbing Cory twice in self-defense, running when Cory's brother [or brothers] chased him, and returning to the scene of the fight before the police arrived. Appellee has not since changed his October 11, 2008 statement.

Statement of Appellee Brian Lemons on October 11, 2008, at 7:39 a.m.

The Appellee Brian Lemons was 28 years old. On October 11, 2008, Lemons and his friend Link drove to the Brass Ass in Newport, Kentucky, to pick up their girlfriends when the bar closed.[10] A crowd of people was sitting outside, including Appellee's girlfriend Yvonne Weaver, with some women and a couple of guys.[11] Weaver, who worked at the bar, was complaining that she hadn't made any money. One of the guys said he gave her five dollars, and Weaver started arguing and trying to "get up in his face and push him." Appellee tried to pull her back, and told her to "calm down, calm down."[12]

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[10] Statement of Appellee Lemons, October 11, 2008, p. 2, at Tab 3.
[11] At this point, "the truck" references the jeep-like vehicle that Appellee and Pat arrived in. See Statement of Goodwin, October 11, 2008, p. 4, Tab 6.
[12] Statement of Appellee Lemons, October 11, 2008, pp. 1-2, at Tab 3.

The two guys [Dustin Kessnick and Gary Damon] started "exchanging words" with Link, and got "real hyped up." "[N]ext thing you know" a third guy [Cory Kessnick] pulled up in a black truck, got out, and punched Link in the face, knocking him to the ground.[13] Link got up, and then Dustin or Gary also started punching Link and then [Dustin] hit Weaver and knocked her to the ground, busting her head.

Appellee began his description of the attack by Dustin and Cory and his response in self-defense as follows:

> And at that point I started fighting with the guy in the white striped shirt[14] because he hit my girlfriend and I was basically trying to defend her and myself ... And he's a very big guy. So he starts coming at me, punching me in my ribs. I was punching him in his face. He backed off for a second. Talking about he was gonna kill me, this and that. And his brother was talking, they just seemed like they were out of their minds, crazy. And I said, well, okay, well, this is how it's gonna be. I pulled out the knife, basically, and said, you know, I mean, get the fuck away, leave me alone, I don't want to use this but if I have to I will, basically. Not those exact words, but something similar to that. I said to get away, you know. And the dude come at me again and when he came at me I stabbed him in the left shoulder blade or shoulder area and I pulled it out. And he's still coming at me like he's trying, you know, tackle me to the ground so I stabbed him again. And at that point his brother noticed what was going on and he started coming at me, so I took off running around the side of the building. And the guy that I stabbed come running around the side of the building after me.[15] I run all the way across the street. They

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[13] Statement of Appellee Lemons, October 11, 2008, p. 3, at Tab 3.

[14] Dustin was wearing a T-shirt that at 2:30 a.m. apparently appeared gray to some and white/black striped to others. Goodwin identified Dustin as the one who slammed Weaver, and said he was wearing a gray T-shirt. Appellee said he punched the brother who slammed Weaver to the ground [identified by Goodwin in her statement as Dustin] and he was wearing a white striped T-shirt. Weaver told Cassie Maggard the man who slammed her [Dustin] was wearing a striped shirt. See relevant statements, infra.

[15] Obviously, Appellee is not referencing Cory at this point. He is more likely referring to Dustin, whom Link described in his statement as having a gash above his right eye. See also Collected Materials.

> stopped running after me. They turn around and start walking back towards the parking lot area. Excuse me. And at that point in time my girlfriend had walked around the corner. And I went to go check on her to make sure she was okay. She had a huge lump in the back of her head. …So we went back over that way looking for [Link]. And when we went to go look for him we seen the guy laying on the ground.

Appellee had been hit in the head with a bottle two days previously and hospitalized with pneumonia less than two weeks before that. Appellee wasn't strong; he stated he was in fear for his life, his girlfriend's life, and his best friend's life.[16] He said he "started fighting with [Dustin][17] because he hit my girlfriend and I was basically trying to defend her and myself because, you know, there were three guys and me and my friend and another woman and my girlfriend. So basically I was trying to defend myself….And [Dustin] is a very big guy."[18]

In his statement, Appellee provided additional details regarding the moment he pulled his knife, as follows:

[Dustin], who was a "very big guy," came at Appellee and punched him in his ribs. Appellee punched [Dustin] in the face, and [Dustin] backed off for a second. [Dustin or Cory][19] was saying "he was gonna kill [Appellee]…."[20] It was at this moment that Appellee describes pulling out his knife and saying something like, "…get the fuck away, leave me alone…."[21]

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[16] Statement of Appellee Lemons, October 11, 2008, p. 5, at Tab 3.
[17] Given that Appellee was indicted for injuring Dustin, it appears at this point he is starting to describe how he injured Dustin in the head and face.
[18] Statement of Appellee Lemons, October 11, 2008, p. 3, Tab 3.
[19] At this point in Appellee's statement it is unclear which brother he is talking about.
[20] Statement of Appellee Lemons, October 11, 2008, p. 3, Tab 3.
[21] Statement of Appellee Lemons, October 11, 2008, p. 3, Tab 3.

But [Cory][22] came at Appellee again, swinging, and backed Appellee up against the side of a car so hard it caught [Cory] off guard and Cory missed Appellee's face, hit him in the side of the ribs and fell into Appellee.[23] At this point Appellee stabbed [Cory] in the left shoulder blade or shoulder area and pulled the knife out, saying, "Okay, stop, stop. Everybody just stop, please everybody stop."[24] This enraged [Cory] more, and he came at Appellee again, as if trying to tackle Appellee, putting Appellee in more fear for his life. Cory was 6'2" tall and weighed 255 pounds.[25] Appellee was 5'9" and 160.[26] Appellee stabbed Cory a second time.[27] Appellee did not intend to kill [Cory]. It was a reflex. Appellee's intent was to scare him. He thought if he hit [Cory] with the knife, Cory would stop.[28] After Appellee stabbed [Cory] a second time, [one of Cory's brothers] started coming at Appellee, and Appellee took off running. "The guy that Appellee had stabbed"[29] came running around the side of the building and chased Appellee across the street. At the corner of Monmouth and 6th, Appellee threw the knife in a garbage can.[30]

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[22] It is clear at this point Appellee is talking about Cory.
[23] Statement of Appellee Lemons, October 11, 2008, p. 6, Tab 3.
[24] Statement of Appellee Lemons, October 11, 2008, p. 7, Tab 3.
[25] Cory Kessnick Autopsy, in Police Reports, Collected Materials, at Tab 12.
[26] Uniform Citation, TR 3, Collected Materials, at Tab 12.
[27] Statement of Appellee Lemons, October 11, 2008, p. 7, Tab 3.
[28] Statement of Appellee Lemons, October 11, 2008, pp. 7-8, at Tab 3.
[29] This may have been Cory. Or it could have been Dustin, whom Patrick described as having a gash above his right eye after the fight. See Statement of Patrick Link, below. No name appears of record for the victim of the 2nd-degree assault. See Second Indictment, TR 67.
[30] Statement of Appellee Lemons, October 11, 2008, pp. 4-5, at Tab 3.

Appellee ran briefly from the immediate scene of the fight.[31] As soon as people stopped chasing him he headed back towards the parking lot.[32] He and Weaver found [Cory] and Link on the ground in the parking lot.[33] Appellee was leaning over to check Link when the police pulled up.[34] Appellee gives the reason he stabbed Cory: "All I wanted was the guy [Cory] to stop coming at us."[35]

Statement of Patrick Link on October 15, 2008, at 2:30 p.m.

Patrick "Pat" Link and Appellee showed up at the Brass Ass at closing time together around 2:30 a.m..[36] "Jaemichael Goodwin and Weaver and two other guys [Dustin and Gary] were outside talking, smoking a joint."[37] Dustin, wearing a gray or white (Link couldn't tell) "beater" (T-shirt) said something to Weaver like, "well, I gave you five dollars." Weaver took offense and got up and shook her finger in the guy's face.[38] Appellee started pushing Weaver away, holding her back, saying, "just quit…."[39] Link told the guy Weaver had been drinking, don't pay any attention, and the guy said, "Don't worry, it's cool."

At that point, another guy [Cory] pulled up in a black Avalanche, really fast into the parking lot, jumped out and "for no damn reason" hit Link on the nose, and a second time on the neck. The second punch put Link on the ground, in a

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[31] Statement of Appellee Lemons, October 11, 2008, p. 7, Tab 3.
[32] Statement of Appellee Lemons, October 11, 2008, p. 4, at Tab 3.
[33] Statement of Appellee Lemons, October 11, 2008, p. 4, Tab 3.
[34] Statement of Appellee Lemons, October 11, 2008, p. 4, Tab 3.
[35] Statement of Appellee Lemons, October 11, 2008, p. 4, Tab 3. Again, it is not clear whether this was said in the parking lot or later at the police station.
[36] Statement of Pat Link, October 15, 2008, pp. 1-2, Tab 4.
[37] Statement of Pat Link, October 15, 2008, p. 2, Tab 4.
[38] Statement of Pat Link, October 15, 2008, p. 11, Tab 4.
[39] Statement of Pat Link, October 15, 2008, p. 3, Tab 4.

near fetal position.[40] Link estimated he was out for a "minute." "While I was down, at first I didn't, I was trying to make sure everything was okay, but I was laying right beside a car and when I turned and looked all I could hear was [Goodwin] was saying 'you stupid mother fuckers why'd you hit him, he wasn't even doing anything to you.' And at that point I think the guy just went down or he was already down."[41]

Link didn't see how that happened.[42] Link thought [Cory] must have passed out from drinking.[43] The last Link saw of Appellee, Appellee was trying to calm Weaver, and Weaver was "trying to get over [Appellee's] back."[44] When Link got up, he noticed [Dustin]… had a gash above his right eye, but didn't know how he got it.[45] There were "just so many people flying in and out of the scene."[46] Link's injuries included two black eyes and three chipped teeth.[47]

Statement of Yvonne Weaver on October 11, 2008, at 5:50 a.m.

Yvonne Weaver got off work around 2:15 a.m. and went outside with some other women to wait for her daughter Cassandra ("Cassie") Maggard, who also worked at the bar. Weaver was crying because she hadn't "made a drink" in three nights, and had bills to pay. There were three guys out there [the Kessnick brothers], including one who'd been making lewd comments to her all night while

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[40] Statement of Pat Link, October 15, 2008, pp. 4, 11, and 13, Tab 4.
[41] Statement of Pat Link, October 15, 2008, p. 4, Tab 4.
[42] Statement of Pat Link, October 15, 2008, p. 4, Tab 4.
[43] Statement of Pat Link, October 15, 2008, p. 4, Tab 4.
[44] Statement of Pat Link, October 15, 2008, p. 11, Tab 4.
[45] Statement of Pat Link, October 15, 2008, p. 8, Tab 4.
[46] Statement of Pat Link, October 15, 2008, pp. 8-9, Tab 4.
[47] Statement of Pat Link, October 15, 2008, p. 12, Tab 4.

the other two laughed and went along with it. Outside, one of the guys [Dustin] made a comment how he'd given Weaver five dollars to play the jukebox and that was all she deserved.[48] Weaver told him, "Man, who the hell do you think you are…?" She and Goodwin went and sat in the back parking lot.[49] The three guys followed them and started "running their mouths." When Appellee and Link drove up, Weaver was crying, upset, telling one of the guys he had "no right to treat me that way, he was a freakin' asshole."[50]

When Weaver got up to greet Appellee, one of the guys [Dustin] said something rude, and Weaver "tried to jump in his face."[51] Appellee grabbed ahold of her,[52] but she jerked away, pointing her finger in the guy's face. And the guy [Dustin] picked her up and "slammed" her down.[53] As she was trying to get up, she saw "the other two guys that are with them, and then the guy pull up in the truck....all three of them, they jumped on [Link] and [Appellee]."[54] Weaver was still trying to get up when she saw that the three guys "pretty much" had Appellee and Link "down." Weaver saw both Link and Appellee get "jumped."[55]

She saw Link get hit, but wasn't sure who did it.[56] Just as Weaver saw a guy coming out of [the truck] she got picked up again and slammed back down. She

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[48] Statement of Yvonne Weaver, October 11, 2008, p. 2, Tab 5.
[49] Statement of Yvonne Weaver, October 11, 2008, p. 3, at Tab 5.
[50] Statement of Yvonne Weaver, October 11, 2008, p. 3, at Tab 5.
[51] Statement of Yvonne Weaver, October 11, 2008, p. 3, Tab 5.
[52] Statement of Yvonne Weaver, October 11, 2008, p. 4, Tab 5.
[53] Statement of Yvonne Weaver, October 11, 2008, pp. 4 and 7, Tab 5.
[54] Statement of Yvonne Weaver, October 11, 2008, pp. 5 and 7, Tab 5.
[55] Statement of Yvonne Weaver, October 11, 2008, p. 6, Tab 5.
[56] Statement of Yvonne Weaver, October 11, 2008, p. 5, Tab 5.

thought this time she was slammed down by the guy coming out of the truck, but wasn't sure.[57] "There was just so many bodies fighting."[58]

The next thing Weaver recalled was Appellee carrying her to the corner of the building next to the Brass Ass, and Appellee wouldn't let her go.[59] She recalled that when she "came to," Appellee was holding her over his shoulder on the corner of the building.[60] She wanted to go back to check on Link and her daughter.[61] When Appellee let her go, she returned to the parking lot and found Link and [Cory] on the ground next to a vehicle.[62] Cory's head was behind the wheel of the vehicle.[63]

Statement of Jaemichael Goodwin on October 11, 2008, at 4:58 a.m.

Jaemichael "Jae" Goodwin had just graduated from paralegal school and was employed at a law office.[64] She was at the Brass Ass when it closed October 11, 2008, because she was celebrating, and she was a friend of Cassie Maggard, who worked there.[65] Around 2:30 a.m. there were three guys out front, and Goodwin started chit-chatting with them.[66] Her friend, Cassie's mom, [Weaver], came out upset because she hadn't made any drinks. One of the guys told Weaver

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[57] Statement of Yvonne Weaver, October 11, 2008, pp. 4 and 7, Tab 5.
[58] Statement of Yvonne Weaver, October 11, 2008, p. 4, Tab 5.
[59] Statement of Yvonne Weaver, October 11, 2008, pp. 4 and 7, Tab 5.
[60] Statement of Yvonne Weaver, October 11, 2008, pp. 5 and 7, Tab 5.
[61] Statement of Yvonne Weaver, October 11, 2008, pp. 5-6, Tab 5.
[62] Statement of Yvonne Weaver, October 11, 2008, pp. 6 and 8, Tab 5.
[63] Statement of Yvonne Weaver, October 11, 2008, p. 8, Tab 5.
[64] Incident Report Narrative filed by Officer R. Gibb, pg. 5 of 6, Collected Materials, Tab 12.
[65] Statement of Jae Goodwin, October 11, 2008, pp. 2 and 14, Tab 6.
[66] Statement of Jae Goodwin, October 11, 2008, p. 2, Tab 6.

"I gave you some money, so don't feel so bad."[67] Weaver and Goodwin were with some girls smoking cigarettes.[68] The other girls went back in the bar leaving Goodwin and Weaver sitting there. At that point, Appellee and Link drove up in a Jeep.[69] Appellee and Link came over, and the other three guys came around to the parking lot.[70] Goodwin saw two guys leave to get their truck.[71]

The guy [Dustin] who told Weaver he gave her five dollars started "antagonizing" Weaver, saying things like "I should have only gave you like two dollars, you don't deserve…"[72] This man was wearing a gray T-shirt.[73] Weaver got upset, and started squaring off and yelling at him.[74] Appellee and Link were telling her to calm down. All of a sudden a truck pulled up real quick. [Cory] got out of the driver's side, and [according to Goodwin [but no one else] another guy got out the passenger side.

The minute [Cory] got out [Dustin] the guy in the gray T-shirt told him something. Cory then hit Maggard's boyfriend Link and knocked him out, even though Link had his hands up "like calm down, everything's cool, trying to calm Weaver down." Goodwin was standing right next to Link when Cory hit him.[75]

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[67] Statement of Jae Goodwin, October 11, 2008, p. 3, Tab 6
[68] Statement of Jae Goodwin, October 11, 2008, pp. 2-4, Tab 6
[69] Statement of Jae Goodwin, October 11, 2008, pp. 3-4, Tab 6
[70] Statement of Jae Goodwin, October 11, 2008, p. 4, Tab 6
[71] Statement of Jae Goodwin, October 11, 2008, p. 4, Tab 6.
[72] Statement of Jae Goodwin, October 11, 2008, p. 5, Tab 6.
[73] Statement of Jae Goodwin, October 11, 2008, p. 5, Tab 6.
[74] Statement of Jae Goodwin, October 11, 2008, pp. 5-6, Tab 6.
[75] Statement of Jae Goodwin, October 11, 2008, pp. 6 and 9, Tab 6.

When Cory knocked Link down, [one of Cory's brothers] was standing next to him.[76] Goodwin saw Link sit down on the ground and start breathing heavy and saw blood "just pouring out of his mouth."[77] Goodwin started tending to Link. She was yelling at Cory, "Why'd you do that, he didn't do anything." But when she looked around, Cory was on the ground bleeding. Goodwin didn't see who hurt Cory because she was tending to Link when that happened.[78] Goodwin left Link to tend to Cory, because he was seriously bleeding. When Goodwin looked up from helping Link, Appellee was pushing Weaver back.[79]

After Cory was hurt, Goodwin described the reaction of the brother in gray [Dustin] as follows: He was "really drunk, you could tell he was really drunk, so he was a little silly acting so he didn't even know what was going on. But he started what's going on, what's going on? I'm like your brother's hurt. And he's like my brother's hurt? And he started chasing after [Weaver] and her boyfriend."[80] The other brother, Gary Damon, identified by Goodwin as "the guy that got arrested tonight" also started chasing Weaver and Appellee after the brother in gray [Dustin] said something to him.[81]

Asked if Weaver could have "done something" to hurt Cory, Goodwin "didn't think so." Asked if Appellee could have done it, Goodwin didn't honestly

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[76] Statement of Jae Goodwin, October 11, 2008, p. 8, Tab 6
[77] Statement of Jae Goodwin, October 11, 2008, p. 9, Tab 6.
[78] Statement of Jae Goodwin, October 11, 2008, pp. 8-9, Tab 6.
[79] Statement of Jae Goodwin, October 11, 2008, pp 7 and 10, Tab 6.
[80] Statement of Jae Goodwin, October 11, 2008, p. 7, Tab 6
[81] Statement of Jae Goodwin, October 11, 2008, p. 7, Tab 6.

know.[82] Goodwin said Cory was wearing a black T-shirt and Link was wearing a white T-shirt.[83]

Statement of Cassandra Maggard, October 11, 2008, at 5:28 a.m.

Weaver's daughter Cassie Maggard wasn't present and didn't see anything that happened until afterward.[84] When she first ran outside she saw "gobs of cop cars, ambulances. I seen a bunch of blood coming out from underneath the one truck…[a]nd when I ran over, it wasn't …my boyfriend [Link]…."[85] Cassie went back inside the bar to cash out. When she came back outside and the police finally let her go to Link, he was spitting blood. Link laid his head on Cassie and collapsed.[86]

Weaver told her the man who slammed her was wearing a striped shirt, but Goodwin said it was the man in the gray shirt, i.e., Dustin.[87]

1st Statement of Gary Damon, October 11, 2008, at 4:45 a.m.

Gary Damon was one of the three Kessnick brothers at the Brass Ass on October 11, 2008. His brother Cory was at the hospital during Gary's first interview. The third brother [Dustin] was injured but refused to go to the hospital.[88] Gary and his brothers had been at the bar drinking. When they left at closing time, there were some girls around the corner talking. Gary and Dustin

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[82] Statement of Jae Goodwin, October 11, 2008, p. 10, Tab 6.
[83] Statement of Jae Goodwin, October 11, 2008, p. 6, Tab 6
[84] Statement of Cassie Maggard, October 11, 2008, pp. 3 and 9, Tab 7.
[85] Statement of Cassie Maggard, October 11, 2008, p. 3, Tab 7.
[86] Statement of Cassie Maggard, October 11, 2008, p. 4, Tab 7.
[87] Statement of Cassie Maggard, October 11, 2008, p. 4, Tab 7.
[88] 1st Statement of Gary Damon, October 11, 2008, p. 1, Tab 8.

told Cory to go get the truck. Cory went to get the truck while Gary and Dustin kept talking to the girls.

When Cory pulled up and got out of the truck, one of the guys said something. The next thing Gary knew, he turned around and there was a big fight going on, and his brother Cory was lying on the ground in a puddle of blood.[89] Gary saw nothing[90] because he and Dustin were talking to the girls when it happened.[91] He recalled there was an older blonde-haired girl yelling that she had only made five dollars. Appellee said something to her, and Link said, "Hey, it's alright, it's cool, she's alright."[92] Gary said he responded saying "everything's fine, whatever, we're cool, we're leaving."[93]

The girl [Weaver] kept running her mouth, and when Gary turned around, his brother Cory was in a pool of blood. He heard Cory say, "That guy just jacked me up."[94] Link was gone, and Appellee took off running. Gary chased him, but Appellee was faster, so Gary returned to check on Cory.[95] Gary didn't see anyone injure either one of his brothers. He turned around and there were three guys on top of Dustin "swinging." Two of the men turned out to be bouncers. Gary ran

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[89] 1st Statement of Gary Damon, October 11, 2008, p. 2, Tab 8.
[90] 1st Statement of Gary Damon, October 11, 2008, p. 2, Tab 8.
[91] 1st Statement of Gary Damon, October 11, 2008, p. 2, Tab 8.
[92] 1st Statement of Gary Damon, October 11, 2008, pp. 2-3, Tab 8.
[93] 1st Statement of Gary Damon, October 11, 2008, p. 3, Tab 8.
[94] 1st Statement of Gary Damon, October 11, 2008, p. 5, Tab 8. In a 2nd Statement three days later, Gary said Cory said, "...they got me." See p. 4, Tab 9.
[95] 1st Statement of Gary Damon, October 11, 2008, p. 3, Tab 8.

over and his description was, "I swing.... I hit the wrong guy I guess...."[96] Gary was charged with disorderly conduct.[97]

2nd Statement of Gary Damon on October 14, 2008.

In his second interview Gary Damon, age 35,[98] said a stripper started throwing a fit in a corner of the parking lot and hollering at Gary's brother Dustin. Dustin started to walk over there and that's "when these guys got up."[99] Cory wasn't there when the arguing was going on; he was getting the car.[100] During the arguing, Gary said he was trying to stay in between everybody. He said he heard the truck, and said let's go, let's get out of here. Then he turned around and Cory was on the ground.[101] Gary didn't know if his brother Cory punched anybody.[102] Gary didn't see how Dustin got injured."[103] Gary said, "...Cory did not get one step out of that truck and he was on the ground. ...He did not get away from the truck. He pulled up and then he hollered, he said they got me. And I turned around and he was going down right there by the truck." [104] Gary, who was 6'1" tall and weighed 285 lbs., estimated he had drunk twelve beers that night.[105]

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[96] 1st Statement of Gary Damon, October 11, 2008, p. 3, Tab 8.
[97] Gary Damon's Uniform Citation, included in Collected Materials, at Tab 12.
[98] Gary was the eldest brother. 2nd Statement of Dustin Kessnick, October 14, 2008, p. 3, Tab 10.
[99] 2nd Statement of Gary Damon, October 14, 2008, p. 2, Tab 9.
[100] 2nd Statement of Gary Damon, October 14, 2008,p. 2, Tab 9.
[101] 2nd Statement of Gary Damon, October 14, 2008,p. 3, Tab 9.
[102] 2nd Statement of Gary Damon, October 14, 2008,p. 3, Tab 9.
[103] 2nd Statement of Gary Damon, October 14, 2008,p. 5, Tab 9.
[104] 2nd Statement of Gary Damon, October 14, 2008. p. 4, Tab 9.
[105] 2nd Statement of Gary Damon, October 14, 2008,p. 5, Tab 9.

1st Statement of Dustin Kessnick on October 11, 2008, at 4:32 a.m.

The officer interviewing Dustin Kessnick, age 27, two hours after the incident tried to talk him into going to the hospital for what appeared to be a "serious injury" to his head. But at 4:32 a.m. after the incident Dustin still had "a little buzz" and for a while refused to go to the hospital.[106] Dustin said he arrived at the Brass Ass with his brothers around 9:15 p.m. on October 11, 2008.[107] After a night of beer-drinking, he and his brothers left at closing time and started hanging out with a couple of girls smoking pot in the parking lot. Dustin didn't know what happened, because he "got hit in the head or something."[108] There was fighting before the truck was there.[109] Dustin didn't know what happened because he blacked out. When he came to, he saw his brother [Cory] pull in the parking lot, but Dustin "guessed… we was fighting already." Cory jumped out, and then he was on the ground.[110] Dustin ran to help Cory, but someone hit Dustin in the back of the head. Dustin didn't know if he was hit by a man or a woman.[111] Dustin said, "I don't have a clue."[112] Dustin said that he and his brothers were "all pretty big fucking guys, you know what I'm saying? They had to hit us with something."[113]

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106 1st Statement of Dustin Kessnick, October 11, 2008, pp. 2-3, Tab 10.
107 1st Statement of Dustin Kessnick, October 11, 2008, pp. 1-2, Tab 10.
108 1st Statement of Dustin Kessnick, October 11, 2008, p. 3, Tab 10.
109 1st Statement of Dustin Kessnick, October 11, 2008, pp 1-5, Tab 10.
110 1st Statement of Dustin Kessnick, October 11, 2008, p. 6, Tab 10.
111 1st Statement of Dustin Kessnick, October 11, 2008, pp. 6-7, Tab 10.
112 1st Statement of Dustin Kessnick, October 11, 2008, p. 7, Tab 10..
113 1st Statement of Dustin Kessnick, October 11, 2008, p. 8, Tab 10.

2nd Statement of Dustin Kessnick on October 14, 2008

After his 1st Statement was interrupted by his trip to the hospital, three days later Dustin gave a 2nd Statement. He confirmed again that he and his brothers went to the bar at 9:30 and left about 2:20 a.m. Cory went to get the truck. A bunch of girls went to the back parking lot, and Dustin went back there waiting for Cory. One girl was angry and running her mouth. Dustin told her to be quiet. An argument broke out.[114]

Two guys pulled up. Dustin and Gary were talking to them, and an argument started. According to Dustin he and Gary were "trying to break it up." "My brother [Cory] pulls in the parking lot…got out, and said, 'What's going on?' I turned and looked 'cause people was all crowding me. I turned back around and he was on the ground bleeding. I go over there, I'm trying to stop the blood. Somebody hits me in the back of the head with something and knocks me down. I slide on my face and I get back up. I told my brother, the truck was running still, my brother's head was laying right by the tire, so I jump in here and turned it off so ain't nobody can get in there and try to take off."[115] According to Dustin, Cory was the designated driver and had only "like three beers the whole time we was there."[116] Dustin didn't recall hitting anybody, and said Cory couldn't have hit anybody because as soon as he was out of the car, he was on the ground.[117]

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[114] 2nd Statement of Dustin Kessnick, October 11, 2008, p. 2, Tab 11.
[115] 2nd Statement of Dustin Kessnick, October 11, 2008, p. 3, Tab 11.
[116] 2nd Statement of Dustin Kessnick, October 11, 2008, p. 3, Tab 11.
[117] 2nd Statement of Dustin Kessnick, October 11, 2008, p.4, Tab 11.

Appellee's motion for immunity and conditional plea.

The Commonwealth added a second count to the indictment for second-degree assault. No victim was named, but this count apparently related to the head wound received by Dustin Kessnick.[118] Appellee made a motion under KRS 503.085 to dismiss both counts in his claim for immunity.[119] The Court of Appeals rejected the Commonwealth's argument that the motion was untimely. The Commonwealth has not raised timeliness as an issue for discretionary review.

A court hearing on Appellee's immunity motion occurred on April 29, 2010, in which no testimony was taken. Based entirely on its consideration of the transcripts of the witness statements, collected materials attached to this brief, and all other papers contained in the transcript of record, the court entered an Order overruling Appellee's immunity claim on July 9, 2010.[120] Appellee entered a conditional *Alford* plea reserving the right to appeal his claim of immunity and agreeing (conditionally) to a conviction for 2nd-degree manslaughter and a sentence of ten years, plus a conviction on an amended charge of assault under extreme emotional disturbance and sentence of four years, consecutive for 14 years.[121] No victim name was included in the judgment for the second count.

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[118] Indictment No.08-CR-706, at TR 67.
[119] Motion to Dismiss, TR 69- 73.
[120] Order, TR 85-95, at Tab 2.
[121] Motion to Enter Guilty Plea Pursuant to *North Carolina vs. Alford*, TR 100-101.

The trial court's Order.

The trial court's Order describes the evidence from the witness statements in a confused manner with numerous errors which will become apparent through a comparison of Appellee's counter-statement of the case to the Order.[122] One such error includes the statement that "[t]here is conflicting testimony as to who was the initial aggressor."[123] This is incorrect because no one who actually saw what happened contradicted Weaver, Goodwin, Link, or Appellee that Dustin and Cory were the initial aggressors.[124] After misstating and confusing the witness statements, the court stated it ***could not determine witness credibility***, threw up its hands and erroneously based a legal conclusion --that the Commonwealth had shown probable cause-- on the fact that it could not determine witness credibility and the evidence was confused:

> These contradictions cannot support a determination that the force used by the Defendant was lawful or that he was acting in self-defense. As noted above, if the Defendant can adduce enough of facts from the witnesses at trial that corroborate his version of the events, an instruction on self-defense may be warranted. However, **the factual contrarieties are sufficient to find that probable cause exists to conclude the use of force in this case was unlawful. This Court cannot make a determination of which witness is being truthful and who is not from the limited record the Court has reviewed.** Thus the Court, looking at the evidence in the record and considering the totality of the circumstances finds that there is a sufficient basis to conclude probable cause exists that the use of force employed by the Defendant was unlawful.

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[122] Order, at Tab 2.

[123] Order, p. 10 of 11, at Tab 2.

[124] The only witnesses who attempt to contradict this are Dustin Kessnick and Gary Damon, Cory's brothers, neither of whom saw what happened. The only contradictions they offered were their **opinions,** as discussed fully below.

Dated this 8th of July, 2010. /s/ [signed by circuit judge][125]

(emphasis added)

The Court of Appeals overturned Lemons' guilty plea and remanded with instructions to the trial court to dismiss the indictment pursuant to KRS 503.085.[126] The trial court released Appellee in September 2012 on an appeal bond which imposes strict conditions requiring him to live with his parents, work, and abide by a strict curfew.[127]

ARGUMENT

1. The presumption in favor of jury trials in RCr 9.26 is irrelevant; KRS 503.085 is a substantive change in the law; "substantial basis" appellate review violates separation of powers.

The U.S. Supreme Court in *Illinois v. Gates,* 462 U.S. 213 (1983) called for "substantial basis" review of warranted searches on appeal because a grudging attitude toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant. *Id.*, at 236-237. If, as the Commonwealth urges, the *Gates* standard applies on appellate review of immunity decisions, then a trial court's findings of fact must be reviewed for clear error and the conclusions of law must be reviewed *de novo.* However, on appeal, the evaluation of the sufficiency of the witness statements and collective paperwork

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[125] Order, at Tab 2.
[126] *Lemons v. Com.*, No. 2010-CA-001942-MR, (June 22, 2012) at Tab 1.
[127] Notice etc.

which underlie the probable cause decision made by the trial court receives great deference:

> ..."when judging the sufficiency of an affidavit to establish probable cause in support of a search warrant, the Supreme Court has 'repeatedly said that after-the-fact scrutiny ... should not take the form of *de novo* review.' Rather, reviewing courts are to accord the magistrate's determination 'great deference,' " *United States v. Terry,* 522 F.3d 645, 647 (6th Cir.2008) (quoting *Illinois v. Gates,* 462 U.S. 213, 236, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)..."[s]o long as the magistrate had a 'substantial basis for ... conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Gates,* 462 U.S. at 236, 103 S.Ct. 2317 (quotations omitted).

United States v. Kinison, 710 F.3d 678, 681-82 (6th Cir. 2013)

This Court should not adopt the *Gates* appellate standard. While the Fourth Amendment states a great preference for searches conducted pursuant to a warrant, the Kentucky legislature in 2006 with the passage of KRS 503.085 has stated a great preference for complete immunity from arrest, prosecution, and jury trials for those who act in self-defense under defined circumstances. Therefore, by analogy to the reasoning in *Gates,* a grudging attitude toward immunity for those acting in self-defense and affording great deference to denials of immunity on appeal would be clearly contrary to legislative intent. The legislative intent to create a true immunity from prosecution and trial is "clear":

> ...the General Assembly has made unmistakably clear its intent to create a true immunity, not simply a defense to criminal charges. This aspect of the new law is meant to provide not merely a defense against liability, but protection against the burdens of prosecution and trial as well.

Rodgers, 285 S.W.3d at 753.

By contrast, in RCr 9.26,[128] this Court has stated a great preference –***once probable cause has been established***--for jury trials:

> In RCr 9.26 this Court has evinced its strong preference for jury trials on all elements of a criminal case by providing specifically that even if a defendant waives a jury trial in writing, the court and the Commonwealth must consent to a bench trial. Thus, where probable cause exists in criminal matters the longstanding practice and policy has been to submit those matters to a jury and we find no rational basis for abandoning that stance.

Rodgers v. Com., 285 S.W.3d 740, 755 (Ky. 2009)

But RCr 9.26 applies only to "[c]ases required to be tried by jury," i.e., in cases where probable cause to arrest and prosecute has already been established. Cases involving questions of immunity arise at a time when it is **unknown** whether they are "required to be tried." At the immunity question stage, whether there is probable cause even to arrest has not been established. The very question before the court in an immunity case is **whether** the case is required to be tried at all. Until it is decided whether this defendant is immune from **all trials,** the RCr 9.26 strong preference for a **jury** trial as opposed to a **bench** trial is not relevant. The *Rodgers* court's reliance on RCr 9.26 as a reason for imposing "substantial basis" appellate review is misplaced cart-before-the-horse reasoning. If this Court agrees that RCr 9.26 does not apply until after the immunity question has been

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[128] RCr 9.26 reads as follows: (1) **Cases required to be tried by jury** shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Commonwealth. (2) In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear in it. (emphasis added)

resolved, *Gates* "substantial basis" review should not be applied because RCr 9.26 and the preference for a jury somewhere further down the road has no application to a question of immunity.

Kentucky Constitution Sections 27, 28, 29 and separation of powers.

But if this Court feels that the strong preference for jury trials expressed in RCr 9.26 attaches to every situation even before it is known whether an arrest is appropriate, then under *Rodgers,* the proper appellate standard may depend on whether KRS 503.085 represents a substantive or a procedural change in the law. Under Kentucky Constitution Section 29 the Kentucky legislature has exclusive authority to enact substantive law. This Court has the exclusive authority to enact rules of court procedure:

> The Kentucky Constitution specifically articulates the doctrine of separation of powers, *see* Ky. Const. §§ 27–28, under which the legislature has the exclusive authority to enact substantive law, *see* Ky. Const. § 29; *Elk Horn Court of Appeals Corp. v. Cheyenne Res., Inc.,* 163 S.W.3d 408, 422 & n. 68 (Ky.2005), whereas this Court has the exclusive authority to enact "rules of practice and procedure for the Court of Justice," *see* Ky. Const. § 116; *Elk Horn,* 163 S.W.3d at 423 & n. 69.

Com., Cabinet for Health & Family Services v. Chauvin, 316 S.W.3d 279, 285 (Ky. 2010).

If KRS 503.085 is a substantive law, arguably the Court of Appeals was constitutionally required to effectuate the presumption against arrest, prosecution, and trials contained in KRS 503.085, and insofar as that court reviewed the trial court's Order *de novo,* it was correctly implementing the legislative intent.

KRS 503.085 effects a substantive change in the law.

Justice Noble, dissenting in *Rodgers,* argues that the question was not properly before the Court and that the immunity provision of KRS 503.085 is not a procedural change in the law; it is a substantive change:

> In my view, the immunity provision of KRS 503.085 is not procedural. In fact, the statute grants a new status, under certain circumstances, that did not exist before its enactment. This can only be a substantive change in the law. As such, this provision can have no retrospective application. While I otherwise agree with Justice Abramson's excellent discussion on how the immunity issue is to be determined, I do not believe it is appropriate to reach that issue in this case. However, she concludes that in fact the trial court conducted an adequate immunity hearing, and consequently the majority holding has no effect on the judgment in this case. Therefore, I concur in result.

Rodgers v. Com., 285 S.W.3d 740, 761 (Ky. 2009)

Contrary to Judge Noble, the *Rodgers* majority states KRS 503.085 effects procedural not substantive change. .. However, that portion of the *Rodgers* opinion is dicta and not binding on the question of immunity.[129] Moreover, the majority opinion in *Rodgers* grows very, very strained when it attempts to explain

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[129] The *Rodgers* court expressly states that "the precise mechanism for judicial implementation of KRS 503.085 is purely academic as to Rodgers because he has been tried and convicted by a properly instructed jury in a trial with no reversible error." *Id.* at 28. *See Cawood v. Hensley*, 247 S.W.2d 27, 29 (Ky. 1952) ("A statement in an opinion not necessary to the decision of the case is *obiter dictum.* It is not authoritative though it may be persuasive or entitled to respect according to the reasoning and application or whether it was intended to lay down a controlling principle.") *Rodgers* is arguably an advisory opinion. *See Com. v. Hughes. 873* S.W.2d 828, 829 (Ky. 1994) (a court cannot render a mere advisory opinion."); *The Lexington Herald Leader Co. v. Beard,* 690 S.W.2d 374-378 (Ky. 1985) (Vance, J., dissenting) ("we have, by dicta, issued an advisory opinion"); Ky. Const. Sec. 110. This Court is free to redefine the trial level procedures for immunity as well as the appellate standard. Seeing that *Rodgers* did not include even dicta regarding the appellate standard, the Court of Appeals was absolutely free in regard to that question, as is this Court in deciding this case on discretionary review.

why –out of all the 2006 amendments to the self-defense statutes—KRS 503.085 alone creates a **procedural** as opposed to a **substantive** change in the law:

> At least in cases such as this one, that do not involve a peace officer, the immunity provision does not constitute substantive law; it has nothing to do with who is entitled to use self-defense or under what circumstances self-defense is justified. It is, rather, purely procedural, and by prohibiting prosecution of one who has justifiably defended himself, his property or others, it in effect creates a new exception to the general rule that trial courts may not dismiss indictments prior to trial.[5] By declaring that one who is justified in using force "is immune from criminal prosecution," and by defining "criminal prosecution" to include "arresting, detaining in custody, and charging or prosecuting the defendant," the General Assembly has made unmistakably clear its intent to create a true immunity, not simply a defense to criminal charges. This aspect of the new law is meant to provide not merely a defense against liability, but protection against the burdens of prosecution and trial as well. With KRS 503.085, the General Assembly has created a new procedural bar to prosecution, and that bar, like other procedural statutes, is to be applied retroactively.
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> 5. Other exceptions exist to the prohibition against pretrial dismissals, of course, such as where the statute allegedly violated is unconstitutional, *Commonwealth v. Bishop,* 245 S.W.3d 733 (Ky.2008), or where prosecution is barred by the Double Jeopardy Clause. *Commonwealth v. Stephenson,* 82 S.W.3d 876 (Ky.2002).

Rodgers v. Com., 285 S.W.3d 740, 753 (Ky. 2009).

The *Rodgers* majority begins by hedging that KRS 503.085 is probably *only partly* procedural, saying, "At least in cases such as this one, that do not involve a peace officer …." In the end, the *Rodgers* majority doesn't even attempt to explain how being an exception to the prohibition against pretrial dismissal of indictments makes KRS 503.085 procedural. When we look at the "other exceptions" offered by the majority in footnote 5, we receive no guidance. The fact that a substantive

statute is unconstitutional does not make that statute procedural. Nor does the fact that a prosecution is barred by Double Jeopardy make that prosecution procedural. In every prosecution one is being accused of violating substantive law. This very strained argument in *Rodgers* is dicta; it is not binding and should not be followed now that the issue is fully before the court.

KRS 503.085 is substantive because it substantively redefines an individual's rights in relationship to others, greatly increasing the individual's right to use self-defense without fear of arrest, prosecution, or trial. It also redefines an individual's rights in relationship to the police and to the state. KRS 503.085 has dramatically "changed and redefined the out-of-court rights, obligations and duties of persons in their transactions with others," and therefore must absolutely be considered to have changed substantive law in Kentucky:

> Amendments which change and redefine the out-of-court rights, obligations and duties of persons in their transactions with others are considered to be changes in substantive law and come within the rule that statutory amendments cannot be applied retroactively to events which occurred prior to the effective date of the amendment. *Benson's Inc. v. Fields,* Ky., 941 S.W.2d 473 (1997). Those amendments which apply to the in-court procedures and remedies which are used in handling pending litigation, even if the litigation results from events which occurred prior to the effective date of the amendment, do not come within the rule prohibiting retroactive application. *Peabody Court of Appeals Co. v. Gossett,* Ky., 819 S.W.2d 33 (1991).

Commonwealth Dept. of Agriculture v. Vinson, 30 S.W.3d 162, 168-69 (Ky. 2000). KRS 503.085 redefines the rights of persons in their transactions with those who threaten life or limb. In addition, it redefines the rights of police officers

performing their duties in relation to the citizens they encounter. KRS 503.085 does not mention or address any "in-court procedures and remedies used to handle pending litigation." KRS 503.085 redefines real life rights and relationships outside the courtroom for people and for the police. Therefore KRS 503.085 cannot be considered to change procedural law even though procedures will necessarily have to be changed in order to effectuate the new out-of court substantive rights that KRS 503.085 creates. In that regard, if KRS 503.085 is procedural, it shouldn't require this Court to invent procedure from the ground up to implement it.

If KRS 503.085 were procedural as opposed to substantive, then this Court's preference for trials expressed in RCr 9.26 could justify overriding at least to some extent the legislative intent to create immunity. But KRS 503.085 must be seen as a substantive change in the law; therefore, this court cannot allow trial court denials of immunity to be judged on appeal under a lenient *Gates* "substantial basis" standard of review.

2. Whether judged by a "substantial basis" or *de novo* standard, the Commonwealth presented insufficient evidence to support probable cause.

The facts presented by the Commonwealth equally fail "substantial basis" and *de novo* appellate review. If this Court agrees that *de novo* review applies, the historical facts presented by the Commonwealth, when reviewed *de novo*, fail to withstand appellate review under the standard in *Ornelas*:

> We therefore hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

Ornelas v. United States, 517 U.S. 690, 699 (1996).

The Court of Appeals expressly cited *Gates* and arguably applied *Gates* fluidly and correctly. If this Court agrees the COA reached the correct result but misstated *Gates,* it can uphold the COA and de-publish the COA opinion.

Both Judge Thompson's dissent and the Commonwealth argue that *Rodgers v. Com.*, 285 S.W.3d 740 (Ky. 2009) holds the proper standard of appellate review for immunity cases in Kentucky is the *Illinois v. Gates*, 462 U.S. 213 (1983) standard applied in reviewing warrant decisions. Both cite *Com. v. Pride*, 302 S.W.3d 43 (Ky. 2010), which distinguishes the *Gates* standard from the *de novo* review of warrantless search and seizures under *Ornelas.*

But *Rodgers* does not hold that the *Gates* warrant review standard applies to immunity review. As discussed above, immunity questions were not before the *Rodgers* court, and *Rodgers* contains no holdings on immunity.[130] The *Rodgers* court does not even mention what the appellate standard should be.

Since *Rodgers* does not discuss or mention "substantial basis" appellate review, Appellant's complaint that the Court of Appeals used the phrase "objectively reasonable" in reviewing the trial court's determination of probable cause is not

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[130] *Rogers,* 285 S.W.3d at 754-755.

well taken. Moreover, reasonableness is understood as part of every probable cause equation, even when it is not expressly stated. *Maryland v. Pringle*, 540 U.S. 366 (2003) explained that the very "substance" of probable cause in any context requires that the evidence relied on must present a "reasonable ground" for believing this particular defendant is guilty. Under *Maryland v. Pringle*, probable cause for a search or seizure boils down to a reasonable ground for belief in a particular person's guilt:

> The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. We have stated, however, that **the substance of all the definitions of probable cause is a reasonable ground for belief of guilt**, and that the belief of guilt must be particularized with respect to the person to be searched or seized.

Maryland v. Pringle, 540 U.S. at 370-71 (internal citations, quotations, and brackets omitted) (emphasis added). Even a *Gates* "substantial basis" review necessarily looks for reasonableness.

The trial court made no fact-findings; the Court of Appeals correctly conducted *de novo* review.

In a section of its Order titled "Analysis" the trial court describes the evidence inaccurately, admits it finds the facts confusing, states it is making no fact-findings and refuses to judge witness credibility.[131] **Expressly on that basis,** the court draws the legal conclusion that the "factual contrarieties are sufficient to find that probable cause exists to conclude the use of force in this case was

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[131] Order, TR 85-95, at Tab 2.

unlawful."[132] This Court in *Com. v. Jones,* 217 S.W.3d 190 (Ky. 2006) stated that when a trial court has omitted fact-findings, appellate review is completely *de novo*:

> Although an appellate court must defer to the findings of fact made by a trial court, "as a general matter determinations of reasonable suspicion and probable cause should be reviewed [de novo] on appeal." Since the trial court made no real findings of fact in this case, our review is completely *de novo*.

Com. v. Jones, 217 S.W.3d at 196.

With non-existent fact-findings, the Court of Appeals had no choice *but* to conduct *de novo* review. "Since the trial court's factual findings are not at issue, this Court conducts a *de novo* review of the trial court's conclusions regarding the existence of probable cause."[133]

Gates identifies three factors: 1) basis of knowledge, 2) reliability of informants, and 3) corroborative evidence.

Gates identified three factors that must be examined on appeal to determine whether probable cause exists: 1) the **basis** of the informant's knowledge; 2) the **reliability** of the informant; and 3) the **corroborative evidence** presented by the government. *Gates,* 462 U.S. at 230–32, 245. The *Gates* court noted that these factors are not to be analyzed as "separate and independent requirements to be rigidly exacted in every case." *Gates,* 462 U.S. at 230. Rather, the reviewing court is to weigh them together in determining whether they form a substantial basis for finding probable cause. *Id.* The strength of one or more of these factors may compensate for the deficiencies of another factor. *Gates,* 462 U.S. at 233–34.

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[132] Order, TR 85-95, at Tab 2.
[133] *Lemons v. Com.*, No. 2010-CA-001942-MR, (June 22, 2012), at Tab 1.

All *Gates* "totality of the circumstances" reviews require consideration of the veracity and credibility of the witnesses as well as the reputation of the defendant:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, **including the "veracity" and "basis of knowledge" of persons supplying hearsay information**, there is a **fair probability** that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed. *Jones v. United States, supra,* 362 U.S., at 271, 80 S.Ct., at 736.

Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (emphasis added).

The factors appropriate to consider in any fluid appellate determination whether a basis is "substantial" appear in *Jones v. United States* (cited in *Gates*) and include consideration of witness credibility, corroboration, and the reputation of the defendant:

> [The witness] swore to a basis for accepting the informant's story. The informant had previously given accurate information. His story was corroborated by other sources of information. And petitioner was known by the police to be a user of narcotics.

Jones v. United States, 362 U.S. 257, 271 (1960) *overruled on other grounds by U. S. v. Salvucci*, 448 U.S. 83 (1980).

Probable cause requires affirmative evidence.

The Court of Appeals recognized that to establish probable cause the type of corroborating evidence the Commonwealth must produce is **affirmative evidence**:

> By its enactment of KRS 503.085, the General Assembly firmly required the Commonwealth to bear the initial burden of going forward with evidence establishing probable cause that the defendant's use of force was unlawful. As we interpret the statute, the Commonwealth cannot meet this burden simply by asserting that a jury could reject the defendant's version of the facts. Otherwise, KRS 503.085 would not result in any meaningful change in the law in circumstances where a change was clearly intended. **Rather, the Commonwealth must now present affirmative evidence to establish probable cause on the issue.**[134]

The Commonwealth pointed to inconsistencies and doubts about Appellee's story, but failed to produce affirmative evidence to meet its burden of proof. Its reliance on simple rejection of Appellee's story based on inconsistencies and the "normal variation" in witness statements "expected when different people describe the same event" is insufficient. *Burden v. Hampton*, 2012 WL 162710 (Ky. App. Jan. 20, 2012), review denied (Nov. 14, 2012). (Copy attached).

The difference between establishing reasonable suspicion and probable cause illustrates the fact that to establish probable cause (as opposed to reasonable suspicion) the party bearing the burden must produce **affirmative evidence**. In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court defined "reasonable suspicion" as unusual conduct that makes an officer think criminal activity **may be happening:**

> We merely hold today that where a police officer observes *unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot* and that the persons with whom he is dealing may be armed and presently dangerous....

Terry, 392 U.S. at 30-31 (emphasis added).

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[134] *Lemons v. Com.*, No. 2010-CA-001942-MR, Opinion Reversing and Remanding, (June 22, 2012) (emphasis added). attached at Tab 1.

By contrast, probable cause exists only when there are facts and circumstances sufficient to cause a reasonable, prudent person to conclude **an accusation is actually true**:

> 'Probable cause does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances that would be sufficient to induce a reasonable belief in the truth of the accusation. It depends on the facts known, at the time of the arrest, to the person by whom the arrest is made....'

Wilson v. Com., 403 S.W.2d 705, 707-08 (Ky. 1966). By definition the facts and circumstances required to support reasonable suspicion are less than the facts and circumstances sufficient to cause a reasonable person to believe the charge is true:

> [T]he term 'probable cause' has been defined to be a suspicion founded upon circumstances sufficiently strong to warrant a reasonable person in the belief that the charge is true.

Prewitt v. Sexton, 777 S.W.2d 891, 896 (Ky.1989).

Requiring affirmative evidence to establish or defeat probable cause is well-established in Kentucky. For instance, in a malicious prosecution action a plaintiff seeking damages has the burden to present affirmative evidence to **negate** probable cause to arrest, not just inconsistencies, discrepancies, and misrepresentations:

> ...Burden points to a number of discrepancies and inconsistencies in the accounts and actions by the officers. ...conflicting testimony... [and] alleged misrepresentations in various reports.....
>
> After reviewing the record, **we cannot find any affirmative evidence** of the type of deliberate misconduct which would negate a finding that Officers Hampton and Hicks had probable cause to believe that Burden possessed marijuana. Burden presents no evidence to question the testimony that the police dog alerted on her car.

> Furthermore, as the trial court noted, the inconsistencies in the police testimony and reports about the search merely fall within the normal variation expected when different people describe the same event. The irregularities in the handling of the evidence might have affected its admissibility in a criminal proceeding. Likewise, the discrepancies in the officers' accounts could have been sufficient to raise reasonable doubt about Burden's guilt...Consequently, the trial court properly found that Officers Hampton and Hicks had probable cause to arrest....

Burden v. Hampton, 2012 WL 162710 (Ky. App. Jan. 20, 2012), review denied (Nov. 14, 2012) (Copy attached).

Probable cause requires a coherent story.

A case decided after *Gates* describes what a trial court must seek as a "substantial basis" to support probable cause. A trial court should look for a story in which the "pieces fit neatly together," a story with surrounding facts that possess "an internal coherence that gives weight to the whole":

> **.... the pieces fit neatly together** and, so viewed, support the Magistrate's determination that there was "a fair probability that contraband or evidence of a crime" would be found in Upton's motor home. The informant claimed to have seen the stolen goods and gave a description of them which tallied with the items taken in recent burglaries. She knew of the raid on the motel room—which produced evidence connected to those burglaries—and that the room had been reserved by Kelleher. She explained the connection between Kelleher's motel room and the stolen goods in Upton's motor home. And she provided a motive both for her attempt at anonymity—fear of Upton's retaliation—and for furnishing the information—her recent breakup with Upton and her desire "to burn him."
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> ***
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> In concluding that there was probable cause for the issuance of this warrant, the Magistrate can hardly be accused of approving a mere "hunch" or a bare recital of legal conclusions. **The informant's story and the surrounding facts possessed an internal coherence that gave weight to the whole.** Accordingly, we conclude that the information contained in Lieutenant Beland's affidavit provided a sufficient basis for

> the "practical, common-sense decision" of the Magistrate. "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, **the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."**

Massachusetts v. Upton, 466 U.S. 727, 732-34 (1984).

Arguably the instant case is not a "marginal" case. With three witnesses agreeing that the Kessnick brothers were initial aggressors and no one contradicting Appellee's need to respond in self-defense, the resolution of this case should be largely determined by the preference for immunity clearly stated in KRS 503.085 by the Kentucky legislature. Even if Appellee had struck Cory Kessnick immediately upon seeing him knock Link to the ground, breaking his teeth, blackening his eyes, knocking him unconscious for a moment and causing blood to gush from his mouth, he would have been justified in reacting against Cory in order to defend Link with deadly force, as well as himself. In *Upton* the court made a "practical common-sense decision" considering the informant witness's motivation and surrounding facts as well as the fact that her description matched items taken in recent burglaries. Like Appellee Lemons, Upton's story had internal coherence that gave weight to the whole.

Appellee's subjective belief in the need for self-defense.

Appellee had just seen Cory break three of Link's teeth and blacken both his eyes, and blood was gushing out of Link's mouth. A man acting in concert with Cory had just thrown Weaver to the ground so hard that it would leave a

large bump on her head. This was legally sufficient justification for Appellee's actions. Under KRS 503.050, Appellee was privileged to use deadly physical force to protect himself and/or **others**[135] if he ***subjectively*** believed deadly force was necessary to protect himself and/or others against "serious physical injury":

> (1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.
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> (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.
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> (4) A person does not have a duty to retreat prior to the use of deadly physical force. KRS 503.085.

This Court has found "serious physical injury" based on "dislodged" teeth. *Parson v. Com.*, 144 S.W.3d 775, 787 (Ky. 2004). Appellee had just seen Cory, a 6' 2" 255-pound man, knock his best friend out cold on the ground and leave him bleeding, and had just seen Cory or one of his brothers slam Weaver to the ground. Based on what he saw, he was justified in believing that Cory was about to inflict serious injury on him. Under KRS 503.050 Appellee was privileged not to retreat, and to use deadly force in self-defense, to protect himself.

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[135] Under KRS 503.055 (3): A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.

This is not a purely circumstantial evidence case involving Appellee's word against a deceased victim. Here there are witnesses who are less biased and more credible who corroborate that Dustin and Cory were the initial aggressors against Weaver and Link before Cory came at Appellee. The Kessnick brothers did not see what happened. Apart from their very naturally biased, alcohol-influenced opinions, there is nothing to contradict Appellee's description that after knocking Link out, Cory backed him against a vehicle in a manner that made Appellee fear for life and limb. Cory was found lying immediately beside this vehicle.[136]

Maybe it was Dustin and maybe it was Cory who threatened to kill Appellee. But the fact that Appellee, Goodwin, and Link all witnessed Cory knock Link to the ground leaving him dazed and gushing blood, and the fact that Weaver and Appellee both witnessed Dustin knock Weaver hard enough to the ground to injure her head justified Appellee's use of force against these men.

Commonwealth's evidence fails the substantial basis test.

Inconsistencies and contradictions do not amount to a substantial basis. The Commonwealth cannot point to a coherent story.[137] No question exists that

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[136] Statement of Yvonne Weaver, October 11, 2008, p 8, Tab 5.; Statement of Cassie Maggard, October 11, 2008, p. 3, Tab 7; 2nd Statement of Gary Damon, October 14, 2008. p. 4, Tab 9.

[137] There is no burden on an Appellee claiming self-defense to tell a coherent story, but compared to the Kessnicks, this Appellee's story fits together with a great deal of internal coherence supporting the need for self-defense:

The night of October 11, 2008, Appellee's drunk girlfriend got in an argument with two big men named Dustin and Gary outside the bar where she worked. Dustin picked her up and slammed her on the ground. Then Dustin and Gary's brother Cory, also big, drove up, jumped out and knocked Appellee's best friend out, breaking his teeth. Then Cory (or maybe Dustin) threw Appellee's girlfriend on the ground again. Appellee nicked Dustin's head with his pocket knife; then Cory came at him. Meanwhile, bouncers were trying to subdue Dustin, and Gary slugged one of the

Link was injured seriously and Weaver was attacked. No evidence exists that Lemons or his friends or anyone else did that. Cory clearly did not pull up and immediately hit the ground because too many people saw him hit Link. There is no way the Kessnick brothers' story fits neatly together to support probable cause: one of them making lewd comments all night to Weaver while the other two laughed, Dustin drinking 12 beers, his sudden throwing of Weaver on the ground in the parking lot, Cory knocking out Link's teeth, and Gary yelling in the face of the police, slugging a bouncer and getting arrested. These are facts that may fit together, but they lack the internal coherence of a whole story that supports probable cause that Appellee did not act in self-defense.

The trial court relied entirely on the "fact" that it could not decide the facts and on its inability to judge witness credibility. The Commonwealth does not attempt to justify the court's ruling on the basis the court stated. Instead, the Commonwealth points to additional points and inconsistencies in the evidence in its Brief for Appellant at pages 27 – 31. But nothing Appellant points to provides the missing substantial basis.

First, the Commonwealth points to the inconsistency between Appellee's claim that he punched Cory in the face during the altercation and the fact that Cory had no facial injuries. As noted, however, Appellee never said he punched Cory in the face. Appellee did not name in his statement whom he punched in the

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bouncers. Cory had Appellee pushed against a vehicle, and Appellee stabbed him with his pocket knife in self-defense.

face, whether Cory or Dustin. He merely described hitting the brother who had hit Weaver and said the person he punched in the face was wearing a white striped T-shirt. Dustin is the only brother positively identified as hitting Weaver, and it is Dustin who went to the hospital with a head and eye injury. Cory, who was stabbed, was wearing a black T-shirt. As discussed elsewhere, Dustin may have been wearing a white [and black] striped T-shirt that appeared gray to some witnesses and striped to others, including Appellee.

Second, the Commonwealth claims that witnesses gave statements "contradicting" Appellee's claim that Cory got out of the truck and immediately punched Link to the ground. This is incorrect. No one contradicted this claim. Both Dustin and Gary admitted they did not see what happened after Cory got out of the truck. Their statements do not "contradict" Link, Weaver, and Appellee's statements as to what happened after Cory got out of the truck are pure conclusory opinions as to the time it might have taken for the assault by Cory that Appellee described.

Third, the Commonwealth says the fact Goodwin saw Appellee "still" holding Weaver back after Cory was down contradicts Appellee's claim that Weaver was knocked down by Cory before the stabbing. This is incorrect. Appellee never claimed Cory knocked Weaver down. Only Weaver said that Cory might have been the one who knocked her down that second time. Appellee said,

only, that he saw the guy in the "white striped shirt" knock Weaver down, and Appellee punched that guy in the face.

Fourth, the Commonwealth points generally to Appellee's inconsistencies, initial denials, the fact that at first he ran, threw away the knife, and denied stabbing anyone. That this was the normal behavior of a scared 28-year-old was accepted and explained by the Court of Appeals. The only inconsistencies have already been explained, that first he said he ran away, and later he said he ran around the parking lot, and then returned. This is not the affirmative evidence required to establish probable cause.

Gary and Dustin's credibility is weakened by their acts of violence, bias, & alcohol consumption.

The trial court stated it made no determination of witness credibility. As a result, the Court of Appeals was free and this Court is free to make witness credibility determinations *de novo*. Reliability and credibility of witnesses are important factors. *Gates,* 462 U.S. at 233. The Appellee's prior record shows that he has no history of violence.[138] Gary, Dustin, and Cory all demonstrated their character for extreme drunken violence by acting as initial aggressors. Dustin slammed Weaver to the ground. Cory knocked out Link. Gary was arrested for assaulting a bouncer. Gary and Dustin were not known, reliable witnesses. They lacked motivation to sustain a working relationship with the police. They were intoxicated, biased blood relatives of the victim, and their estimates regarding the

[138] Courtnet records, TR 4-8, at Tab 13.

amount of time that elapsed while they were **not watching** Cory were mere conclusory opinions. Gary and Dustin's unreliability is underscored by the fact both had been drinking for five hours prior to the incident, and both were seen smoking marijuana almost immediately prior to the incident.[139] There is no evidence that the Appellee or Link were drinking or smoking marijuana.

It is practical common-sense knowledge that alcohol and marijuana distort a person's sense of time.[140] According to their statements, Gary and Dustin were "big men," but they were drinking for about five hours prior to the incident.[141] Goodwin described Dustin [the "gray guy"] at the time of the incident as "really drunk… silly-acting,"[142] and described Gary's behavior at the scene as still trying to fight a security guard after Cory was down, even when the security guard was saying, "I'm a security guard, stop, stop, what you doing?"[143]

Gary and Dustin's opinions –even had they been sober-- were conclusory allegations of the type condemned in *Nathanson v. United States,* 290 U.S. 41 (1933) (sworn statement that an affiant "has cause to suspect and does believe" that

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[139] Statement of Pat Link, October 15, 2008, p. 2, Tab 4.

[140] *State ex rel. Zander v. District Court of Fourth Judicial Dist In and For Missoula County*, 181 Mont. 454, 488, 594 P.2d 273 (Mont. 1979) (describing the effect of marijuana as an altered sense of time);*State v. Canerdy*, 315 A.2d 237, 239 (Vt. 1974) (doctor's testimony 0.15 blood alcohol causes inability to appreciate one's position in space and time); *State v. S.S.*, 73 P.3d 301, 305 (Or. Ct. App. 2003) (appellant with alcohol problem seemed to have no sense of time); *People v. Libberton*, 807 N.E.2d 1, 4-5 (Ill. App. Ct. 2003) (witness who drank at two bars had no sense of time for that period).

[141] A man weighing 225 pounds who consumes 12 beers over a period of five hours would still have a blood alcohol level of about .163. See blood alcohol charts at :http://brown.edu/Student_Services/Health_Services/Health_Education/alcohol,_tobacco,_&_other_drugs/alcohol/alcohol_&_your_body.php (last checked on July 28, 2013).

[142] Statement of Jae Goodwin, October 11, 2008, p. 7, Tab 6.

[143] Statement of Jae Goodwin, October 11, 2008, pp. 10-11, Tab 6.

illegal substances are present at a particular location held to be insufficient to support issuance of a search warrant). It is possible that Gary and Dustin believed that there was not enough time for what Appellee described. But even an officer's sworn sincere belief **is inadequate**. *Aguilar v. Texas*, 378 U.S. 108 (1964) (sworn statement that he has received reliable information from a credible person and believes heroin is stored in a home); *Butts v. City of Bowling Green*, 374 F. Supp. 2d 532, 542 (W.D. Ky. 2005); see also *Hensley v. Com.*, 248 S.W.3d 572, 576 (Ky. App. 2007) (affidavit contained conclusory allegations and conclusory remarks from officer about reliability of confidential informant).

Rodgers denies the right to a hearing on the question of immunity and requires defendants claiming immunity to submit to a purely paper procedure in which, apparently, the police may allow the victims to submit multiple statements over a period of several days while taking only a single statement from the defendant immediately after the incident when he is exhausted from being questioned all night. The substantial basis standard does not allow probable cause to be based on an affidavit relying on conclusory opinions of witnesses who did not see what happened. Neither Dustin nor Cory saw what happened. There must be affirmative evidence.

Goodwin's observation that she "still" saw Appellee holding Weaver back after Cory was on the ground does not constitute affirmative evidence contradicting Appellee's statement that Cory attacked him or that afterward he

was chased around the parking lot. To Goodwin it looked like Appellee was "still" holding Weaver, but apparently Goodwin wasn't looking when Cory attacked Appellee and by the time Goodwin looked around it was over and Appellee was again holding Weaver. Appellee and Weaver both ran when they were chased, and both quickly returned before the police arrived.

Beyond any doubt both Link and Weaver were attacked and injured by the Kessnicks. The common sense probability is that both Gary and Dustin are exaggerating how short the time was before Cory was down because they loved him and they wanted Appellee to pay for his death. They also exaggerated the time because they were drinking. Dustin's and Gary's opinions on the timing, contradicted by the other witnesses, are probably wrong. The common-sense probabilities, the most coherent story, the totality of all the circumstantial and affirmative evidence supports Appellee's scenario: that Appellee and his friend Link did not initiate any violence and both tried to calm the situation, that Dustin initiated violence by decking Weaver, that Cory initiated more violence when -- unprovoked—he attacked and seriously injured Link, that Cory (like his brother Dustin) was five inches taller and close to a hundred pounds heavier than Appellee, and that Appellee was justified in defending himself and/or others with the only weapon he had, a pocket knife.

All three Kessnicks were initial aggressors.

As noted in the trial court Order, p. 4 of 11,[144] Appellee stated that Cory got out of the truck and immediately knocked Link out. But Appellee is not the only witness to this. Link said Cory got out of the truck and for no reason immediately struck him in the face and neck, knocking him out leaving him dazed on the ground. Goodwin, arguably the most detached witness, corroborated that Cory was the totally unprovoked initial aggressor. She said the truck pulled up real quick, that Cory got out of the driver's side and immediately knocked Link out even though Link had his hands up trying to calm things down. After Link fell, Goodwin turned and got down to tend to Link. Goodwin doesn't say how long she tended to Link before she looked around and saw that Cory was on the ground. It could have been long enough to allow Appellee and Cory, both young men in their 20's, to perform the following swift series of events:

> 1) Cory [or more likely Dustin] coming at Appellee threatening to kill him and Appellee punching him in the head/face;
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> 2) Appellee showing his knife saying "get the fuck away ...."
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> 3) Cory backing Appellee against the vehicle, simultaneously hitting him in the ribs & falling into him, Appellee stabbing Cory.
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> 4) Cory coming at Appellee again, and receiving a second stab wound.

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[144] Order, at Tab 2.

Alcohol.

The trial court complained it had no way to evaluate witness credibility, but it could have relied on evidence of alcohol consumption. Gary does not explain how much time elapsed between the moment when he saw Cory get out of his truck and the moment when "the next thing [Gary] knew" occurred. But **Gary had drunk 12 beers** over the course of five hours. Gary stated the timing of the "big fight" blatantly incorrectly, and he fails to say how long it was after Cory got out of the truck before Cory was on the ground. Gary admits it was after he turned around from focusing on Weaver. Dustin is no more specific regarding timing. He saw Cory jump out of the truck and ask what was going on. Then Dustin turned away for an unspecified amount of time. It was only when Dustin turned back that Cory was on the ground.

The Court of Appeals applied a proper *de novo* review based on a lack of fact-findings and the strong presumption against prosecution and trials in KRS 503.085. Under this standard the Court of Appeals found that the totality of the evidence contradicting Lemons' claim of self-defense is not "substantial." The Kessnicks were not shown as reliable or accurate. Their claim that there wasn't time for Appellee to be attacked and respond in self-defense was biased, speculative, uncorroborated, and contradicted by Appellee, Weaver, and Goodwin. Appellee had no history of violence. No one said Appellee was the initial aggressor and there was substantial evidence that the three Kessnicks were

initial aggressors. Witnesses said Appellee initially tried to calm the situation by pulling Weaver away from the Kessnicks. Appellee didn't start this fight, and he didn't join in until he saw a Kessnick brother seriously injure his best friend and saw his girlfriend lifted up and thrown to the ground. Neither Appellee nor Link had been drinking. Appellee had no motive to attack the Kessnicks with deadly force ***except*** in self-defense. The Commonwealth produced no pieces that fit neatly together, no story with internal coherence that gave weight to the whole. The Court of Appeals correctly reviewed the case on appeal and found that the trial court's conclusion that Appellee did not act in self-defense lacked a substantial basis given the totality of the circumstances.

When the facts are confused, conflicting and unclear, the burden of proof is determinative.

The trial court made no formal fact-findings, merely described the evidence, stated that the evidence was too confusing to allow any conclusions and –on that basis—found that the Commonwealth had produced probable cause to believe Lemons had not acted in self-defense.[145] But a procedure in which defendants claiming immunity are denied a hearing, denied the right to submit affidavits, and limited to witness statements and other evidence collected by the police will frequently result in just the sort of confusing, conflicting record of contrary facts and difficult-to-evaluate witnesses that occurred here. In *Rodgers* the defendant's immunity claim was denied on the same basis, that the evidence was too

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[145] Order, TR 94, at Tab 2.

conflicting. But if the burden of proof is on the Commonwealth, under KRS 503.085 if the "factual contrarieties" are so abundant that the trial court cannot determine what happened then the trial court must rule that the **Commonwealth** has not presented a substantial basis to support probable cause. If the burden of proof is on the **Commonwealth** under KRS 503.085, and with the strong presumption in favor of immunity, the legislative intent is that an evidentiary tie must favor the defendant claiming immunity:

> **The burden of proof can often determine the result** in a false arrest case. Often the police officer and the plaintiff are the only two witnesses to the incident, with little or no physical evidence. If the plaintiff bears the burden of proof on the absence of probable cause, the police officer often can win the case on summary judgment.[8] Conversely, if the defendant officer must prove that he had probable cause for the arrest, he will be required to testify at trial. Being forced to justify one's actions on the witness stand can provide an important deterrent effect on the officer's actions.

73 U. Chi. L. Rev. 347, 348. (emphasis added)

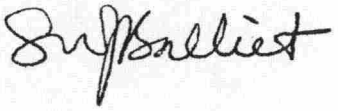
Since the burden of proof was on the Commonwealth, and the Commonwealth failed to produce evidence sufficient to constitute a substantial basis to support probable cause, the trial court should have ruled in favor of immunity.

This Court should find that the evidence presented by the Commonwealth was insufficient to establish probable cause to believe that Appellee Lemons did not act in self-defense and/or defense of others.

CONCLUSION

In *Rodgers* and again in the instant case, trial courts have now thrown up their hands and stated that they cannot make determinations on immunity claims either of fact or of witness credibility from the "limited record" available when no evidentiary hearing has occurred. Denying the right to a hearing causes trial courts to rule against immunity based simply on confusing limited records and effectively allows the courts to frustrate legislative intent in a *de facto* violation of separation of powers. This Court should reverse *Rodgers* and uphold the Court of Appeals decision remanding this case with directions that both counts of Appellee's conviction should be reversed and dismissed with prejudice. In the alternative, the Court should reverse and remand Appellee's case for an evidentiary hearing on the immunity issue in which all concerned, including Appellee, may testify and call witnesses. The Court should rule that any testimony at an immunity hearing will not be introduced at a subsequent trial, except as impeachment.

Respectfully submitted,



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