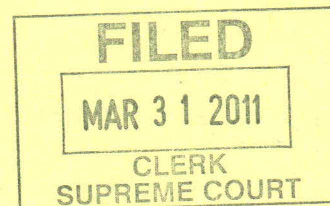

Commonwealth of Kentucky
Supreme Court

No. 2010-SC-123

COMMONWEALTH OF KENTUCKY **APPELLANT**

v.

Appeal from Hardin Circuit Court
Hon. Janet P. Coleman, Judge
Indictment No. 06-CR-208

RYAN JONES **APPELLEE**

Reply Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify that the record on appeal was not retrieved from the Clerk of this Court and that a copy of the Reply Brief for Commonwealth has been mailed this 31st day of March, 2011, to Hon. Janet P. Coleman, Judge, Hardin Circuit Court, 120 E. Dixie Avenue, Elizabethtown KY 42701; electronically mailed to Hon. Chris Shaw, Commonwealth's Attorney, 54 Public Square, P.O. Box 1146, Elizabethtown KY 42702-1146; by Messenger Mail to Hon. Shelly R. Fears, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601.

J. HAYS LAWSON
Assistant Attorney General

STATEMENT OF POINTS AND AUTHORITIES

Razor v. Commonwealth,
960 S.W.2d 472 (Ky. App. 1997) 1

Gamble v. Commonwealth,
293 S.W.3d 406 (Ky. App. 2009) 1

Minnesota v. Murphy,
465 U.S. 420 (1984) 1

Gamble v. Com.,
293 S.W.3d 406, 411 (Ky. App. 2009) 3

United States v. Gay,
567 F.2d 916, 918 (9th Cir. 1978) 3

Lefkowitz v. Cunningham,
431 U.S. 801 (1977) 3

Baxter v. Palmigiano,
425 U.S. 308 (1976) 3

Appellee relies on two Kentucky cases–*Razor v. Commonwealth*, 960 S.W.2d 472 (Ky. App. 1997); and *Gamble v. Commonwealth*, 293 S.W.3d 406 (Ky. App. 2009)-- that are not only distinguishable from the case at bar but in fact demonstrate why there was no Fifth Amendment violation here.

Appellee argues that the Court of Appeals correctly applied *Minnesota v. Murphy*, 465 U.S. 420 (1984) to reach its conclusion that use immunity is constitutionally required in a probation-revocation hearing. Appellee then argues that, because *Razor* and *Gamble* rely on *Murphy*, these two cases also support the Court of Appeals' opinion in this case. But as explained in the Commonwealth's main brief, *Murphy* does not support the Court of Appeals' opinion. Indeed, a close reading *Murphy* demonstrates the fallacy of the Court of Appeals's reasoning.

At issue in *Murphy* was "whether a statement made by a probationer to his probation officer without prior warnings is admissible in a subsequent criminal proceeding." *Id.* at 425. The Court held that it was. In discussing the case, the *Murphy* Court noted:

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

Id. at 435 (emphasis added).

But we do *not* have an automatic-penalty situation here. Appellee was never told explicitly or implicitly that his probationary status would be automatically revoked if he invoked his Fifth Amendment privilege. Rather, the burden in the revocation hearing to prove that

Appellee violated his parole remained with the Commonwealth at all times. The record is clear that Appellee's probation was not automatically revoked because he did not testify at the revocation hearing. Consequently, *Razor* and *Gamble* are clearly distinguishable.

In *Razor*, the appellant entered an *Alford* plea and was given a choice between two sentences: "either serving ten years, or receiving a sentence of twenty-five years which would be probated for a period of five years." *Razor*, 960 S.W.2d at 473. The appellant chose the latter. *Id.* One condition of the appellant's probation was successful completion of the Kentucky Corrections Cabinet Sexual Offender Treatment Program. *Id.* Under the program, the appellant was required to admit guilt to his crimes. *Id.* The appellant refused and the trial court revoked his probation. *Id.*

At issue on appeal was whether requiring admission of guilt in the program violated the appellant's Fifth Amendment rights. In rejecting the argument, the *Razor* Court explained that "even though the requirement [to admit guilt] was accompanied by a threat of possible probation revocation, any incriminating admissions made by appellant could not have been used as a basis for criminal charges against him." *Id.* at 474. So consistent with *Murphy*, *Razor* holds that the appellant's admission of guilt in the sexual-offender-treatment program could not have been used against him in a criminal proceeding because the appellant was *required* to admit guilt in the sexual-offender-treatment program, and the appellant was penalized with loss of his probation as a penalty for not testifying. Thus, *Razor* is distinguishable from this case because Appellee was neither required to testify at his revocation hearing nor penalized for choosing not to testify. *Gamble* is distinguishable for similar reasons.

Gamble holds that the probationer-appellant "had no right to assert a Fifth

Amendment privilege against self-incrimination in his probation revocation hearing in response to questions concerning why he had not paid past due child support." *Gamble v. Com.*, 293 S.W.3d 406, 411 (Ky. App. 2009). But the Court also held that the appellant was "protected by the fifth amendment from answering any questions where those answers could be used against him or her in any subsequent criminal proceedings." *Id.* at 410. So *Gamble* stands for the well-settled proposition that, under the Fifth Amendment, a person has "the privilege not to answer questions to which the answers might be incriminating" in a criminal proceeding. *United States v. Gay*, 567 F.2d 916, 918 (9th Cir. 1978). Conversely, *Gamble* holds that a person has no constitutional privilege to refuse to answer non-incriminating statements. So *Gamble* also supports the Commonwealth's argument.

Consistent with *Gamble*, Appellee was not compelled to testify to any statement that would incriminate him in a criminal proceeding. And consistent with *Murphy* and *Razor,* the Commonwealth did not automatically revoke his probation because he elected not to testify at the revocation hearing. Consequently, there was no Fifth Amendment violation. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

Cunningham is one of the primary U.S. Supreme Court "penalty" cases. At issue in *Cunningham* was "whether a political party officer can be removed from his position by the State of New York and barred for five years from holding any other party or public office, because he has refused to waive his constitutional privilege against compelled self-incrimination." *Id.* at 802. The Court held that the automatic penalty of banning the petitioner from holding public office for invoking his Fifth Amendment privilege was unconstitutional. *Id.* at 809.

In the course of discussion of the issue, the *Cunningham* Court distinguished *Baxter v. Palmigiano*, 425 U.S. 308 (1976). The Court explained that *Baxter* "involved an administrative disciplinary proceeding in which the respondent was advised that he was not required to testify, but that if he chose to remain silent his silence could be considered against him." *Cunningham*, 431 U.S. at 815, n. 5. *Baxter* held that in the context of the administrative proceeding the Fifth Amendment does not prohibit the finder of fact from drawing an "inference . . . from a party's refusal to testify." *Id.* The *Cunningham* Court distinguished *Bazter* on grounds that it was not an automatic-penalty case. Thus, under *Cunningham* and *Baxter*, in a non-criminal proceeding when a person invokes her Fifth Amendment privilege, the fact finder can consider the person's "silence . . . as . . . one of a number of factors to be considered . . . in assessing a penalty," as long as the person's silence is "given no more probative value than the facts of the case warrant[s.]" *Id.* But the Court made clear that a constitutional violation does occur where "refusal to waive the Fifth Amendment privilege leads automatically and without more to imposition of sanctions." *Id.*

Because Appellee's decision not to testify did not automatically lead to revocation of his probation, there was no constitutional violation in this case. The Court of Appeals erred in holding otherwise.

Next, the Court should reject out of hand Appellee's plea for the Court to change the rules of criminal procedure by judicial fiat. Regardless of the Court's view as to the utility of providing a probationer use immunity in a probation-revocation hearing, the issue is not of such great importance that the Court should short circuit the established rule-making process. The Court's criminal rule committee is in a much better position to examine the pros and cons of a

change in the criminal rules granting use immunity in probation-revocation hearings. The committee would have the benefit of input from members of the bench and the bar as to the efficacy of a rule change, and, just as importantly, how best to implement a rule change with as little disruption as possible.

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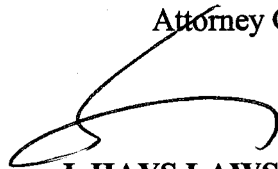

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