IN THE
SUPREME COURT OF KENTUCKY
FILE NO. 2010-SC-000123-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

VS.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
INDICTMENT NO. 2006-CR-00208

RYAN JONES — APPELLEE

BRIEF FOR APPELLEE

SHELLY R. FEARS
ASSISTANT PUBLIC ADVOCATE
APPELLATE DIVISION
DEPARTMENT OF PUBLIC ADVOCACY
100 FAIR OAKS LANE, SUITE 302
FRANKFORT, KENTUCKY 40601
(502) 564-8006

COUNSEL FOR APPELLEE
RYAN JONES

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellee has been mailed, postage prepaid, to the Hon. Janet P. Coleman, Judge, Hardin Circuit Court, Justice Center, 120 E. Dixie Ave., Elizabethtown, Kentucky 42701-1469; Hon. Chris Shaw, Commonwealth's Attorney, Suite One, 54 Public Square, P.O. Box 1146, Elizabethtown, Kentucky 42702-1146; Hon. Aubrey Williams, trial counsel for Mr. Jones, 14603 Lake Bluff Place, Louisville, Kentucky 40245; and by state messenger service to the Hon. J. Hays Lawson, Assistant Attorney General, Commonwealth of Kentucky, 1024 Capital Center Dr., Frankfort, Kentucky 40601, this 21st day of March, 2011. I hereby further certify that the record on appeal has been returned to the Clerk of the Supreme Court of Kentucky.

Shelly R Fears

INTRODUCTION

This case comes before the Court on the Commonwealth's Motion for Discretionary Review. After noting that Ryan Jones was unconstitutionally forced to choose between his right to remain silent and his right to present a meaningful and complete defense at his probation hearing where the revocation was based on the same underlying facts as a pending criminal charge, the Court of Appeals of Kentucky held that a probationer's testimony cannot be used substantively against him at a subsequent criminal proceeding. The Court's decision was well reasoned and should stand.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee agrees that oral argument is necessary in this important case.

STATEMENT CONCERNING CITATIONS

The one-volume transcript of record will be cited as "TR" with the page number cited directly following (e.g., TR 1). The proceedings contained on one (1) videotape will be cited in conformance with CR 98(4) (a).

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellee, Ryan Jones, does not accept the Commonwealth's Statement of the Case because it does not provide all relevant facts that this Court should consider.

On February 27, 2007, Respondent, Ryan Jones, entered a guilty plea to the charges of Trafficking in a Controlled Substance in the First Degree (first offense), Tampering with Physical Evidence, Possession of Marijuana, and Possession of Drug Paraphernalia (first offense). (TR 55-58; VR No. 1: 02/27/07; 11:11:55). Ryan received a sentence of seven (7) years on the Trafficking conviction, three (3) years on the Tampering conviction, and 12 months each on the Possession of Marijuana and Possession of Paraphernalia offenses, said sentences to be served concurrently for a total of seven (7) years. (TR 56). However, the trial court found that Ryan was eligible for probation and sentenced him to "probationary supervision" for a period of five (5) years, subject to many conditions, in lieu of time in the penitentiary. (TR 56).

On April 8, 2008, a Special Supervision Report was filed by Probation and Parole Officer Steven Whiteley requesting that a bench warrant be issued for Ryan's arrest, and that his sentence of probation be revoked. (TR 76-77).

On May 27, 2008, a formal probation revocation hearing was held in Hardin Circuit Court. (TR 140). However, immediately prior to the hearing, defense counsel moved for a continuance on the grounds that the same underlying facts that were to be used as a basis for revoking Ryan's probation had also been the same facts that were the basis of an indictment returned by the Hardin County Grand Jury charging Ryan with Possession of a Controlled Substance. (VR No. 1: 05/27/08; 04:11:55). Defense counsel argued that he could not "run the risk" of putting Ryan on the stand at the probation

revocation hearing to refute the revocation charges because of the risk of self-incrimination on the felony charge, which arose out of the exact same incident. (VR No. 1:05/27/08; 05:11:06-05:16:59). The trial court denied Ryan's request for a continuance. (VR No. 1: 05/27/08; 04:58:59). After more argument on the matter, defense counsel objected to going forward with the hearing, stressing the need for a continuance because his client was "in a box" because of the need to defend on the revocation charges, but also the need to keep Ryan off the stand to avoid the potential for self-incrimination on the pending felony charge. Counsel noted that the pending felony charge was more serious because of the potential of subsequent offender status and possible sentence enhancement provisions. Counsel again explained that Appellee was basically being forced to defend on the pending felony charge under the less stringent litigation standards of a probation revocation proceeding, and that he could not run the risk of putting Appellee on the stand to testify. In short, Appellee stood to lose, but the Commonwealth did not. The trial court overruled defense counsel's objections and the hearing commenced. (VR No. 1: 05/27/08; 05:17:06, 05:17:57).

The Commonwealth first called Officer Steven Whiteley of Hardin County Probation and Parole, who supervised Ryan's probation. (VR No. 1: 05/27/08; 05:21:26). Officer Whiteley testified that he received a call on March 20, 2008 from the Radcliff Police Department that witnesses had seen Ryan shooting a gun in the neighborhood earlier that day. Whiteley was asked to accompany Officer Sullivan McCurdy and others to Ryan's residence at 1031 Ryan Court to look for a weapon. (VR No. 1: 05/27/08; 05:22:24-05:23:16). Upon their arrival at the house, Ryan was not home. However, there was a male, Justin Valentine, and two females outside on the front porch. Officer

McCurdy smelled marijuana. Valentine and the two women were immediately arrested and taken into custody. (VR No. 1: 05/27/08; 05:23:07-54, 05:49:54-05:50:25).

Ms. Vicki Spencer, Ryan's aunt, spoke with the officers and showed them the basement area of the house where Ryan resided with Justin Valentine. (VR No. 1:05/27/08; 05:23:18). According to Whiteley, there was marijuana residue (stems and seeds) in plain view on the dresser, which led to a more thorough search of the room. The search produced digital scales and $50.00 hidden under a mattress, as well as marijuana in plastic baggies, a white powdery residue in a gray tray, and marijuana in the pockets of various items of clothing. Baggies were strewn about the room. No weapon was found. (VR No. 1:05/27/08; 05:23:19-05:24:37).

Ryan arrived home while the officers were there, and was immediately arrested and taken into custody to the Radcliff Police Department. (VR No. 1:05/27/08; 05:27:11). Officer Whiteley asked Ryan if he knew anything about the drugs found in his room and Ryan denied any knowledge of the drugs. According to Whiteley, he then asked Ryan if he would pass a drug test, to which Ryan purportedly answered "No," and added that he had smoked marijuana the day before. (VR No. 1:05/27/08; 05:29:13-43).

Officer Whiteley also testified that while he was going over the terms and conditions of probation with Ryan when he was first assigned Ryan's case, he advised Ryan that if drugs or alcohol were found anywhere in his house in a common area, he could be considered to have "constructive possession" of the items. (VR No. 1:05/27/08; 05:58:39-06:00:02, 06:21:28-59). However, Whiteley acknowledged that the written document setting forth the terms and conditions of Ryan's probation did <u>not</u> contain any

mention of "constructive possession" whatsoever. (TR 56-58; VR No. 1: 05/27/08; 06:22:45).

Because of the trial court's ruling, Ryan was forced to exercise his Fifth Amendment right against self-incrimination due to the pending felony charge that arose out of the same incident. However, Ryan attempted to defend himself by presenting testimony from Justin Valentine, Vicki Spencer, and Theresa Ross. (VR No. 1: 05/27/08; 06:37:32, 06:46:59, 06:49:47).

Justin Valentine testified that he lived in the basement room at 1031 Ryan Court, and that the mattress under which the digital scales and money were found was, in fact, his bed. (VR No. 1: 05/27/08; 06:44:37). Valentine further stated that all of the items in question in the room were his, including the clothing. (VR No. 1: 05/27/08; 06:42:09, 06:43:44, 06:45:52). Valentine admitted to smoking marijuana on the front porch the day the officers arrived. After his arrest at the house that day, Valentine had pleaded guilty to Possession of a Controlled Substance (Marijuana). (VR No. 1: 05/27/08; 06:38:19; 06:40:15-06:42:01).

At the close of the hearing, the trial court made oral findings of fact that Ryan had violated his probation. The trial court cited Ryan's "admitted use of marijuana" and the fact that drugs and drug paraphernalia had been found in the basement room where he lived as sufficient to find a violation. The trial court noted that Ryan had been warned by his probation officer that he could be "blamed" for drugs found in his living area. (VR No. 1: 05/27/08; 07:03:51-07:05:13). On June 11, 2008, the trial court entered written findings of fact and an Order revoking Ryan's sentence of supervisory probation. (TR 140-141).

On March 30, 2009, Ryan appealed the revocation of his probation to the Court of Appeals of Kentucky. The argument presented on direct appeal was that Ryan was denied due process by the trial court's failure to grant a continuance or grant him use immunity for his testimony, which forced Ryan into a "Hobson's choice" of choosing his right against self-incrimination over his right to present a meaningful and complete defense at his probation revocation hearing.

On February 5, 2010, after briefing, oral argument, and supplemental briefing, the Court of Appeals rendered a well reasoned and well crafted Opinion reversing and remanding Ryan's case, Ryan Jones v. Commonwealth of Kentucky, 2008-CA-001517-MR. The Court of Appeals held that, based upon federal constitutional principles in Minnesota v. Murphy, 465 U.S. 420 (1984), and Section 11 of the Kentucky Constitution, a probationer's testimony at probation revocation hearing cannot be used substantively against him at a subsequent criminal proceeding arising from the same facts. The Court further held that the trial court must inform the probationer that, if he chooses to testify, his testimony at the probation revocation hearing cannot be used against him in a subsequent criminal trial on the underlying offense. (Opinion p. 12). The Court of Appeals' decision was premised on two bedrock constitutional principles: the due process principle of fundamental fairness and the right to be free from self-incrimination.

Because Ryan requested and was denied use immunity for his testimony, and thus did not testify, his case was reversed and remanded for a new hearing. (Opinion p. 13). This Court granted discretionary review on September 15, 2010.

ARGUMENT

APPELLEE WAS DENIED STATE AND FEDERAL DUE PROCESS OF LAW BY THE TRIAL COURT'S FAILURE TO GRANT A CONTINUANCE OR TO GRANT APPELLEE USE IMMUNITY AS TO HIS TESTIMONY, WHICH FORCED APPELEE INTO A "HOBSON'S CHOICE" OF CHOOSING HIS RIGHT AGAINST SELF-INCRIMINATION OVER HIS RIGHT TO PRESENT A MEANINGFUL AND COMPLETE DEFENSE AT HIS PAROLE REVOCATION PROCEEDING, WHEN A PENDING FELONY CHARGE AND THE PROBATION REVOCATION WERE BASED UPON THE SAME UNDERLYING FACTS.

Introduction

Until the Court of Appeals rendered its Opinion, there was no case law directly on point in Kentucky. Therefore, Ryan Jones, as Appellant in the Court of Appeals, presented a treatise in Kentucky, as well as the law in the federal circuits and other state courts for the Court of Appeals' consideration. In order for this Court to have a full understanding of the breadth of the law on this issue, Ryan Jones again offers the following discussion for this Court's consideration.

Treatise in Kentucky

In Kentucky Practice, Professor Abramson notes the following:

> The defendant has a right to have [a probation revocation] hearing held with reasonable promptness. However, if other pending charges form the basis for the proceedings, there may be compelling reasons to postpone the hearing pending the disposition of the other charges, either to protect the defendant from possible self-incrimination, to insulate the defendant from prosecutorial or judicial vindictiveness in seeking revocation to intimidate the defendant in asserting any rights with respect to the other charges, or to avoid the necessity for multiple adjudication of the same issues. 9 Ky. Prac. Crim. Prac. & Proc. § 31:156 (2010-2011) (emphasis added).

Professor Abramson also states that "[i]n granting or denying a hearing before the disposition of other charges, the court must take great care to protect the rights of the defendant." Id. In a footnote to that statement, Abramson provides as follows:

> Because the defendant has both a right to a prompt hearing and a right to protection from a premature hearing, the court should normally honor the preference of the defendant and should avoid putting pressure on the defendant with regard to the timing of the hearing. If an early hearing is held, the court should afford the defendant afford the defendant insulation from the possible incriminating use of his or her testimony in other proceedings. Id. at n.14 (emphasis added).

Finally, with respect to the self-incrimination point, Abramson notes the lack of clarity in Kentucky law as follows:

> The very real danger that the testimony of the defendant in the hearing may be used against him or her in other proceedings without violating the federal constitution has been heavily relied upon as a basis for postponing the hearing. However, it is not clear that the testimony of the defendant at the hearing may be used against him or her under the state constitution. Cf. Shull v. Com., 475 S.W.2d 469 (Ky. 1971).[1] Id. at n.11.

The Federal Circuits and the Supreme Court of the United States

While the federal circuits appear to agree that a parole or probation revocation hearing is not constitutionally required to be postponed pending the resolution of other charges, there is a split among the circuits as to whether a defendant's testimony at a revocation hearing can later be used against him or her at the criminal trial. In Melson v. Sard, 402 F.2d 653 (D.C. Cir. 1968), the District of Columbia Circuit held that, under the Fifth Amendment, use immunity must be afforded to a person who is confronted with a parole revocation hearing prior to the resolution of the criminal charges against him. In requiring use immunity as a matter of constitutional law, the court noted:

> If a parolee is not given the full and free ability to testify in his own behalf and present his case against revocation, his right to a hearing before the Board would be meaningless. Furthermore, his Fifth Amendment rights

[1] Shull v. Commonwealth, 475 S.W.2d 469 (Ky. 1971) addresses the issue of whether a defendant, under the Fifth Amendment and Section 11 of the Kentucky Constitution, can testify at a pretrial suppression hearing without that testimony being used as substantive evidence of guilt against him or her at the trial. The predecessor court to the Supreme Court of Kentucky followed the reasoning articulated in Simmons v. United States, 390 U.S. 377 (1968) in finding that such testimony may not be admitted against the defendant at trial on the issue of guilt unless he or she fails to object. Id. at 472.

> must not be conditioned 'by the exaction of a price.' Id. at 655 (citing Garrity v. State of New Jersey, 385 U.S. 493 (1967)).

The Melson court emphasized that a parolee must be allowed to testify freely if confronted by a parole revocation hearing conducted prior to the criminal charge underlying the revocation charge. Id. at 655. Melson was followed by the 10th Circuit in Shimabuku v. Britton, 503 F.2d 38 (10th Cir. 1974) (in the context of a prison disciplinary proceeding).

After Melson, the Supreme Court of the United States considered the right against self-incrimination in the context of a prison disciplinary proceeding in Baxter v. Palmigiano, 425 U.S. 308 (1976). While the Court held that drawing an adverse inference against as inmate who failed to testify at the proceeding did not impose a impermissible penalty on the exercise of one's Fifth Amendment right to remain silent, the Court did note that use immunity would be required should criminal proceedings later be instituted. Id. at 316.[2]

In 1978, in cases with similar facts as those in Melson, the First and Ninth Circuits held that no Fifth Amendment rights are implicated, reasoning that since there is no element of "compulsion" in a revocation proceeding, use immunity need not be afforded to the parolee. Ryan v. Montana, 580 F.2d 988 (9th Cir. 1978); Flint v. Mullen, 499 F.2d 100 (1st Cir. 1978). The Ninth Circuit in Ryan rejected the Melson reasoning (and by implication, that in Baxter), noting that the privilege not to testify always involves some negative consequences, and ultimately concluded that the "price" of invoking the privilege not to testify must amount to "certain non criminal sanctions" in

[2] The United States District Court for the Middle District of Tennessee followed Baxter requiring use immunity in the context of a prison disciplinary proceeding. Tinch v. Henderson, 430 F.Supp. 964, 969 (M.D.Tenn. 1977).

order to implicate the Fifth Amendment. Ryan, 580 F.2d at 990-91 (relying on Leftkowitz v.Cunningham, 431 U.S. 801 (1977) (immunity must be afforded only in cases in which the refusal to waive the Fifth Amendment privilege "leads automatically and without more to the imposition of sanctions.")).

Despite the language from the Supreme Court of the United States in Minnesota v. Murphy, 465 U.S. 420 (1984), supporting the reasoning of Melson in the interim, the Sixth and Second Circuits have followed the Ninth Circuit's reasoning in Ryan. See Lynott v. Story, 929 F.2d 228, 231 (6th Cir. 1990) (a prisoner's right against self-incrimination was not violated when his parole revocation hearing was conducted prior to trial of criminal charges without benefit of "use" immunity for his testimony); United States v. Jones, 299 F.3d 103, 111 (2nd Cir. 2002) ("[t]he Fifth Amendment does not immunize a defendant from all the potentially negative consequences of making such a choice.").

As the Court of Appeals correctly noted in its Opinion, the Supreme Court of the United States has not given definitive guidance on the use of testimony given at a probation revocation hearing. However, as noted above, the Court has commented in a way that has shed light on the issue. In Murphy, supra, the Supreme Court of the United States discussed the right against self-incrimination in the context of a requirement that a probationer be truthful with his probation officer. Although the Court held that the state may insist on answers to incriminating questions, it added the caveat that the answers could not be used in a criminal proceeding. Id. at 435 n.7. Addressing the situation when a probationer's responses to the state's questions might later implicate him or her in a pending or subsequent criminal proceeding, the Court stated:

> A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus 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, 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.

In its Opinion, the Court of Appeals stated that is has followed the reasoning in Murphy in Razor v. Commonwealth, 960 S.W.2d 472 (Ky.App. 1997), and Gamble v. Commonwealth, 293 S.W.3d 406 (Ky.App. 2009). In Razor, the Court held that requiring a probationer to admit to guilt in order to be admitted to a sex offender treatment program did not violate his Fifth Amendment right against self-incrimination. However, the Court so held because the probationer's non-compliance with his sex offender treatment could not serve as a basis for a criminal charge. Id. In Gamble, the Court held that a probationer may not assert the Fifth Amendment and refuse to answer questions at a probation revocation hearing regarding his failure to pay child support. However, the Court explicitly stated that the probationer's testimony could not be used at a subsequent criminal proceeding. Id. at 410.

The state court supervisory powers judicial rule approach

As previously noted, there is a split among the circuits as to what the federal constitution requires in Ryan Jones' particular circumstances. On the one hand, there is Melson v. Sard, 402 F.2d 653 (D.C. Cir. 1968), holding that any self-incriminating statements made in a parole revocation hearing may not be used affirmatively against a defendant in the subsequent criminal proceeding. On the other hand, there is Ryan v.

Montana, 580 F.2d 988 (9th Cir. 1978), holding that a state is not required, under the federal constitution, to grant a defendant immunity from the use of his testimony at a probation revocation hearing. However, there is yet a third way to resolve the issue (one that is actually endorsed by the Ryan Court), and that is to resolve the issue under the state court supervisory powers judicial rule approach, which is the approach adopted by many state appellate courts that have faced this issue.

In McCracken v. Corey, 612 P.2d 990 (Alaska 1980), the Supreme Court of Alaska was faced with a situation very similar to that in Ryan Jones' case. In McCracken, the defendant was arrested and charged with being a felon in possession of a firearm (three counts), in violation of both Alaska law and the conditions of his parole. Id. at 992-93. A parole revocation hearing was scheduled prior to his trial on the criminal charges. Id. at 993. On appeal, the defendant argued that, despite the grant of immunity bestowed upon him by the superior court, the scheduling of the parole revocation hearing prior to the resolution of the criminal charges forced him to make an unconstitutional election between his due process right to present a defense at the hearing and his right against compulsory self-incrimination. Id. Exercising its inherent supervisory powers of the administration of justice over the courts of Alaska, the Alaska Supreme Court held that where a parolee is faced with both revocation and a criminal trial based upon the same conduct, upon timely objection, any evidence or testimony presented by the parolee at a revocation hearing is inadmissible by the state in any subsequent criminal proceedings. Id. at 998. The Court further held that the parolee must be advised prior to the revocation proceedings that any evidence or testimony offered by him at the hearing may not be admitted against him at subsequent criminal proceedings. Id.

In a lengthy and detailed analysis, the Alaska Supreme Court noted that there were two distinctive lines of cases that address this type of situation: 1) cases that hold there is a penalty on the exercise of the privilege against self-incrimination only when there is the automatic loss of a tangible benefit,[3] and 2) cases which hold that the surrender of one constitutional right for the exercise of another imposes an impermissible penalty.[4] Id. at 993-995.

After analyzing the reasoning of United States Supreme Court decisions subsequent to Lefkowitz and Simmons that discussed the distinction between the imposition of a penalty for the exercise of a constitutional right versus a mere strategic decision in different factual contexts [McGautha v. California, 402 U.S. 183 (1971), Brooks v. Tennessee, 406 U.S. 605 (1972), and Baxter v. Palmigiano, 425 U.S. 308 (1976)[5]], the Court stated that "[i]t is apparent from analysis of the above cases that there is no clear standard for determining what choices constitute a penalty for the assertion of a constitutional right as opposed to a mere tactical decision." Id. at 995. The Court

---

[3] See Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (political official faced with immediate removal from office and further prohibited from holding office for five years if he refused to testify before a grand jury or waive immunity from the use of his testimony); Gardner v. Broderick, 392 U.S. 273 (1968) (police officer fired for refusal to waive immunity and privilege against self-incrimination before a grand jury investigating police misconduct); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968) (Sanitation Dept. employees fired for refusal to testify before grand jury and before administrative proceedings investigating corruption); Garrity v. New Jersey, 385 U.S. 493 (1967) (police officers threatened with dismissal for failure to testify at hearing investigating ticket fixing); Spevack v. Klein, 385 U.S. 511 (1967) (attorney disbarred for failure to furnish incriminating records)

[4] See Simmons v. United States, 390 U.S. 377 (1968) (when a defendant testifies at a suppression hearing to establish standing to object to the admission of evidence, his testimony cannot be used against him on the issue of guilt); Melson v. Sard, 402 F.2d 653 (D.C.Cir.1968) (parolee faced with either exercising his due process right to present a defense at his revocation hearing or exercise his right against self-incrimination where parole revocation and criminal charges are based on same underlying facts).

[5] As noted in Section A above, Baxter v. Palmigiano, 425 U.S. 308 (1976), is particularly relevant to the issue in Appellee's case because the Court suggests how it would rule if faced with this precise issue. Baxter involved a prison disciplinary proceeding. The precise holding is that drawing an adverse inference against an inmate for failure to testify at the proceeding does not impose an impermissible penalty on the

further stated, "[f]or this reason, most state courts which have faced the question of whether revocation of probation prior to the criminal trial on the same charges violates the probationer or parolee's Fifth Amendment rights have declined to decide constitutional issue and have instead based their decision on their supervisory powers." Id. Ultimately, the McCracken Court "was persuaded by the [supervisory powers] approach adopted" in People v. Coleman, 533 P.2d 1024 (Cal. 1975), and State v. DeLomba, 370 A.2d 1273 (R.I. 1977), and held that use immunity and derivative use immunity was necessary to protect the defendant at the later criminal trial. Id. at 997.

In People v. Rocha, 272 N.W.2d 699 (Mich.Ct.App.1978), the Michigan Court of Appeals engaged in a very detailed analysis quite similar to that of the Alaska Supreme Court in McCracken, supra. In Rocha, the defendant was on probation for possession of heroin when he was arrest again for heroin possession. Id. at 700. Probation revocation proceedings were instituted before the criminal trial. Id. The defendant refused to testify on his own behalf at the revocation hearing, specifically because he feared that any incriminating statements he might make would be used against him at the later criminal trial. Id. On appeal, the defendant challenged prosecution's timing of the probation revocation hearing prior to the criminal trial based on the same underlying facts. Id. at 701. After an analysis of much of the same case law as in McCracken, supra, the Rocha Court adopted the holding of the California Supreme Court in People v. Coleman, supra, verbatim as follows:

> We accordingly declare as a judicial rule of evidence that henceforth upon timely objection the testimony of a probationer at a probation revocation hearing held prior to the disposition of criminal charges arising out of the alleged violation of the conditions of his probation, and any

---

exercise of one's Fifth Amendment right to remain silent. However, in dictum, the Court noted that immunity would be required should criminal proceedings later be instituted. Id. at 316.

> evidence derived from such testimony, is inadmissible against the probationer during subsequent proceedings on the related criminal charges, save for purposes of impeachment or rebuttal where the probationer's revocation hearing testimony or evidence derived therefrom and his testimony on direct examination at the criminal proceeding are so clearly inconsistent as to warrant the trial court's admission of the revocation hearing testimony or its fruits in order to reveal to the trier of fact the probability that the probationer has committed perjury at either the trial or the revocation hearing. Id. at 706 (quoting People v. Coleman, 533 P.2d 1024, 1042 (Cal. 1975)).

In addition to those state courts already mentioned above, the following state courts that have adopted the supervisory powers judicial rule approach to resolving this issue include State v. Begins, 514 A.2d 719 (Vt. 1986); State v. Boyd, 625 P.2d 970 (Ariz. Ct. App. 1981); State v. Hass, 268 N.W.2d 456 (N.D. 1978), and State v. Evans, 252 N.W.2d 664 (Wis. 1977). The state appellate courts that have declined to follow the supervisory powers approach are State v. Flood, 986 A.2d 626 (N.H. 2009); State v. Whalert, 379 N.W. 2d 10 (Iowa 1985); State v. Gutierrez, 894 P.2d 395 (N.M. App. 1995), Dail v. State, 610 P.2d 1193 (Nev. 1980), and State v. Randall, 557 P.2d 1386 (Or. App. 1976).

It is important to note that even the 9th Circuit in Ryan, supra, states that it does not disagree with the state court supervisory approach taken by the California Supreme Court in Coleman, supra. In fact, the 9th Circuit says "we might prefer it." This is undoubtedly because the Ryan Court recognized that an environment that actually encourages the testimony of the probationer at the hearing ultimately leads to a better result – it is just not required to be that way (through the granting of use immunity) under the federal constitution. The Commonwealth emphasizes the Ryan holding in its Brief, and completely overlooks the importance of the probationer's testimony at the hearing. It

is telling that the Commonwealth fails to mention that the Ryan Court itself endorses the state court supervisory powers judicial rule approach.

In Ryan Jones' case, because the Supreme Court of the United States has not definitely resolved this issue under the federal constitution, and the federal courts are split, this Court could follow many other state appellate courts and resolve the issue utilizing its supervisory powers over the lower courts in the Commonwealth of Kentucky. Whether under a federal and state constitutional approach, or a state supervisory judicial rule approach, it is clear that for the proper administration of justice a probationer must be allowed to fully defend at the revocation hearing without fearing self-incrimination on a criminal charge based upon the same underlying facts.

Ryan Jones' case

In Ryan's case, defense counsel made it clear to the trial court that he could not put Ryan on the stand at the revocation hearing due to the risk of potential self-incrimination with a pending criminal charge based upon the same underlying facts. The trial court stated that the hearing could and would proceed, and implied that counsel would have to make the decision as to whether to put the defendant on the stand or not. The trial court's position unconstitutionally pressured Ryan and denied him due process of law in that his Fifth Amendment and Section 11 right to be free from self-incrimination was violated when he was forced to face the dilemma of whether to testify at the revocation hearing and seek his continued probationary status, but risk uttering incriminating statements that could be used against him at the criminal trial. On the other hand, if he remained silent, he would not fully be able to mount a defense to the revocation.

Due to the trial court's rulings, Ryan was unconstitutionally forced to remain silent and therefore could not mount a complete defense to the charged violations (i.e., by testifying that he did not tell Officer Whiteley that he had smoked marijuana the day before and would fail a drug test). Without Ryan's testimony at the hearing, there was no way to challenge Officer Whiteley's testimony on this point. (VR No. 1: 05/27/08; 05:26:46-05:29:10). Nor was there any way to challenge the supposed "constructive" possession of drugs and alcohol discussion that Officer Whiteley claims to have had with Ryan regarding the terms and conditions of his probation. (VR No. 1: 05/27/08; 06:21:28-06:22:45). This is critically important as the written terms and conditions of Ryan's probation included in the Judgment and Order Imposing Sentence do not include any mention of "constructive possession" whatsoever. (TR 56-58; VR No. 1: 05/27/08; 06:22:45). Ryan should never have been put between this "rock and the hard place," and forced to make a "Hobson's choice" as to which of his state and federal constitutional rights to exercise and which to forgo. See Simmons and Melson, supra. Ryan was substantially prejudiced by being placed in this position.

In summation, the trial court's ruling denying a continuance without granting Ryan use immunity[6] for his testimony was a clear abuse of discretion that denied Ryan a fundamentally fair probation revocation hearing, and, therefore, the hearing did not meet the minimal due process standards required for revocation proceedings under Gagnon v. Scarpelli, 411 U.S. 778 (1973) (defendant must be given a fair opportunity to present evidence in defense or mitigation of the accusations). 14th Amend. U.S. Const.; Section 11 Ky. Const.

The Court of Appeals' resolution of Ryan's case is well reasoned and leads to a fair and accurate result in probation revocation hearings. There is a constitutionally protected liberty interest at stake – a conditional liberty interest, but a constitutionally protected liberty interest nonetheless. That is why due process of law is required. The Commonwealth, in emphasizing Ryan, completely overlooks the fact that probation revocation hearings have a two-fold purpose: 1) to determine if the facts warrant revocation and 2) if the facts do warrant revocation, to determine if probation should be revoked in that probationer's case. It is important that the trial court be able to get all facts before it, including hearing from the probationer, before reaching a conclusion. It is vitally important that the conclusion be informed and just. Perhaps there is a technical violation under the terms and conditions of probation, but other facts suggest that probation should still be continued. This is particularly true with drug offenses, where public policy is shifting from a strict incarceration model to alternative resolution/treatment model in an effort to curb high institutional costs and address budget deficit concerns. See e.g., HB 463 (Kentucky's new Public Safety and Offender Accountability Act). Now more than ever the trial courts need to hear from the probationer. This is why the Commonwealth's Ryan approach, with its emphasis on a "tactical decision" on the part of the probationer regarding whether to testify at the probation hearing, is fundamentally flawed. The Court of Appeals decision must stand.

[6] Use immunity is defined as the prohibition against the use of testimony, or any evidence derived directly or indirectly from that testimony, against the witness in a criminal prosecution. See Kastigar v. United States, 406 U.S. 441 (1972) (use immunity defined and discussed at length).

CONCLUSION

For the reasons stated above, Appellee, Ryan Jones, respectfully requests that this Court affirm the Court of Appeals' decision.

Respectfully submitted,

SHELLY R. FEARS
APPELLATE DIVISION
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
100 FAIR OAKS LANE, SUITE 302
FRANKFORT, KENTUCKY 40601

COUNSEL FOR APPELLEE
RYAN JONES