

**Commonwealth of Kentucky**  
**Supreme Court**  
File No. 2009-SC-00229-D

**FILED**  
JUN 17 2010  
SUPREME COURT CLERK

**COMMONWEALTH OF KENTUCKY**

**APPELLANT**

v.

Appeal from Graves Circuit Court  
Hon. Timothy C. Stark, Judge  
Indictment No. 2004-CR-00187

**RANDY MARSHALL**

**APPELLEE**

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**Brief for Commonwealth**

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Submitted by:

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**CERTIFICATE OF SERVICE**

I certify that the record has been returned this day along with the foregoing Brief for the Commonwealth was mailed first class, U. S. Mail, postage pre-paid this 17<sup>th</sup> day June, 2010, to: Hon. Timothy C. Stark, Judge, Graves Circuit Court, Courthouse Box 5, 100 E. Broadway, Mayfield, Ky. 42066; via state delivered messenger mail to: Hon. Kathleen Kallaher Schmidt, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601, Counsel for Appellant. Sent via electronic Mail to: Hon. David Hargrove, Commonwealth's Attorney.

  
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## **INTRODUCTION**

Appellee's conditional discharge was revoked by the circuit court and the Kentucky Court of Appeals reversed holding that written findings of fact were not issued. This Court has no granted discretionary review.

## **STATEMENT CONCERNING ORAL ARGUMENT**

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

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## STATEMENT OF THE CASE

On October 1, 2004, the Graves County Grand Jury handed down Indictment No. 04-CR-00187, charging appellee with flagrant non support (TR 19-20). Appellee pled not guilty at arraignment (TR 36), but on February 15, 2005, appellee accepted the Commonwealth's offer of three (3) years to serve, conditionally discharged for five (5) years, on a plea of guilty to the charged offense (TR 37-38). The plea offer was conditioned on appellee remaining current with his court-ordered monthly child support obligation, and paying an additional \$101.25 per month for sixty (60) months on his then outstanding arrearage of \$6,075 (Id.).

On April 19, 2005, the circuit court sentenced appellee in accordance with the terms of the plea agreement. On that same date, the circuit court entered its Judgement and Sentence, setting forth the terms and conditions of appellee's sentence and conditional discharge (TR 39-45). Just under two years later, however, on April 10, 2007, the Commonwealth filed a motion to revoke appellee's conditional discharge (TR 46-50). The motion included supporting affidavits showing that as of March 31, 2007, appellee had paid—under the terms of his conditional discharge—only \$957.42 on his child support obligation of \$4278.75, and that appellee had not made a child support payment as required by his conditional discharge since November 10, 2005 (Id.).

The circuit court held a hearing on the motion to vacate (VR No. 1; 6/4/07; 11:10:00-11:27:00). The Commonwealth called Betty Ingram, a child support caseworker with the county attorney's office, to testify regarding the record of appellee's child support payments (Id. at 11:11:00-11:14:00), and appellee testified in his own defense, claiming that his failure to comply with the conditional discharge agreement was

due to employment difficulties and his need to meet child support obligations for his other children (Id. at 11:14:00-11:24:00). After listening to the evidence and arguments of counsel, the circuit judge found from the record that appellee had violated the terms of his conditional discharge (Id. at 11:24:00-11:27:00). On June 6, 2007, the circuit court entered its order granting the Commonwealth's motion and revoking appellee's conditional discharge (TR 54-55). Appellee appealed and the Court of Appeals, while holding that his probation was properly revoked, vacated and remanded the case for the Circuit Court to enter written findings of fact. (Marshall v. Commonwealth, 2008 WL 3165791 Ky. App. 2008). The Commonwealth Petitioned for Rehearing or Modification and was denied on March 23, 2009.

The Commonwealth requested discretionary review by this Court and for this case to be held in abeyance pending this Court's decision in Commonwealth v. Alleman, 306 S.W.3d 484 (Ky. 2010). Discretionary review and abeyance were granted and the Commonwealth now asks this Court to reverse the Court of Appeals decision in this case in light of this Court's recent decision in Alleman.

## **ARGUMENT**

### **I.**

#### **COMMONWEALTH V. ALLEMAN, 306 S.W.3d 484 (Ky. 2010) IS DIRECTLY ON POINT AND IS CONTROLLING AUTHORITY**

Alleman is controlling precedential case law directly on point in these circumstances. In Alleman this Court held:

We conclude that oral findings and reasonings for revocation as stated by the trial court from the bench at the conclusion of a revocation hearing satisfy a probationer's due process rights, presuming the findings and reasons support the revocation, when they are preserved by a reliable means sufficiently complete to allow the parties and reviewing courts to determine the facts relied on and the reasons for revoking probation.

(Id. at 484).

Alleman directly controls in the case at hand. As set forth in the Commonwealth's Court of Appeals brief the trial court in this case gave an explanation, on the video record, as to the obvious reasons why appellant's probation was being revoked. The issue here is identical to the issue in Alleman. As stated, the Court of Appeals in Marshall v. Commonwealth, held that written findings of fact were required when the trial court revoked probation.

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) set forth the minimum due process requirements for parole revocations.

They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against

him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489. In the present case, the Court of Appeals cited the requirements from Morrissey and ultimately found that written findings of fact were required; however, the circuit court in its order of revocation clearly stated that its ruling was based on the recorded testimony heard by the judge at the revocation hearing at which both appellee and his attorney were present (TR 54). The evidence presented at the hearing has been discussed above, and—other than disagreeing with the court's conclusion based on that evidence—appellee does not dispute it.

In other words, the circuit court's revocation order—in its direct reference to the revocation motion, which included sworn affidavits, and to the hearing testimony, at the presentation of which appellee and counsel were present, and in which appellee himself participated—amply advised appellee as to the evidence relied on and the reasons for the revocation of his conditional discharge. For appellee here, based on the record of the revocation proceedings, to argue otherwise, and to claim that he was deprived of process due him in the revocation of his conditional discharge is wholly specious, particularly since the recorded evidence is not in dispute. The testimony was overwhelming that appellee violated the terms of his conditional discharge and such a violation need only be shown by a preponderance of the evidence. Murphy v. Commonwealth, 551 S.W.2d 838 at 841.

Thus, the Marshall trial court properly satisfied the demands of due process in accordance with Morrissey and Alleman. The trial court's statement in that its ruling was based on the record and testimony heard by the judge at the revocation hearing at which both appellee and his attorney were present (TR 54) gave appellee notice of the revocation and also provided him with an adequate basis for appellate review since the factual findings were entered into the record. Therefore the trial court's oral factual findings regarding the probation violation gives guidance into the trial judge's reason for revoking appellee's probation and the evidence from the hearing used to make the decision.

In this case the Court of Appeals—while quoting the circuit court order of revocation (Opinion Pp. 5-6)—“has overlooked a material fact in the record,” CR 76.32(b), in that the circuit court order in the plain language of its paragraph three states that the *reason* for revocation was “the violations set forth above” in its paragraph two, and that the delineated *evidence* relied upon was the record and the testimony heard when respondent appeared in court with counsel at the revocation hearing.

Consequently, the circuit court order of revocation conformed entirely with the due process standard articulated by Morrissey and Gagnon as cited by the Court of Appeals. If some further “statement delineating the evidence relied upon for revocation” (Opinion P. 6) is expected by the Court of Appeals, it is difficult to imagine—given the facts of the instant case—what such further statement would be. As it now stands, the circuit court order states that revocation is based on appellee's failure to comply with the terms of his conditional discharge, which required that he “keep current in his child support payments and . . . pay additional payments on his arrearage . . .” (Opinion P. 5). The revocation record and testimony—referenced by the circuit court

in its order—was uniformly that respondent did *neither* of these things. There was one witness for the Commonwealth (i.e., the child support caseworker), and she testified to this. There was one witness for the defense (i.e., appellee), and *he* testified to this. There is no further explanation—in terms of fairness, due process, or common sense—that could possibly be required of the circuit court than what it stated in its order.

The Court of Appeals stated, “We are not in a position nor are we permitted as an appellate court to make assumptions regarding the evidence and factual predicate relied upon by the circuit court in rendering its decision in this case.” (Opinion P. 6). However, upon the record on appeal, there are no assumptions regarding the evidence and the circuit court’s factual predicate to be made. While the rules of appellate procedure dictate that a videotape record be—as here—included in the record on appeal, CR 75.01, CR 98(2), the Court of Appeals’ opinion reads as though an appellate court is somehow precluded from viewing that record or taking any notice of its contents. Indeed, the Court of Appeals’ opinion construes the circuit court revocation order as though the record on appeal was nonexistent.

It has long been recognized that an appellate court “may affirm a circuit court on any grounds when it has reached the correct result.” Wright v. Sales, 78 S.W.2d 23, 24-25 (Ky. 1935). Unless this Court has now adopted a rule which requires that it totally ignore the record on appeal, it can *only* conclude—given the uncontested evidence, including appellee’s own admissions—that the circuit court correctly revoked appellee’s conditional discharge for the grounds set forth in its order and that Alleman is controlling upon this case.

Accordingly, appellee should not be allowed to defeat his revocation by simply arguing that written findings should have been entered into the record when this Court’s precedent

in Alleman holds that oral findings of fact entered onto the video record are sufficient to satisfy due process under Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). As such, this Court should reverse the Court of Appeals' decision which requires written findings of fact when oral findings are clear on the record. In its place, this Court should issue a published decision delineating that Alleman is controlling case law in these circumstances.

Oral findings of fact were issued on the record onto videotape. Thus, appellee was notified of the reasons for his revocation and the reviewing court was provided a record from which it could determine the basis of the trial court's ruling. The revocation of appellee's probation must be affirmed.

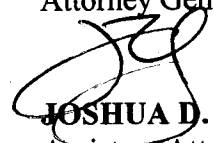
The published Kentucky Court of Appeals decision in this case stands in direct contradiction of Alleman and must be reversed.

**CONCLUSION**

For the above stated reasons, the judgment of the Kentucky Court of Appeals should be overturned.

Respectfully submitted,

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