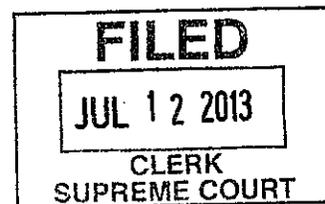


Commonwealth of Kentucky  
Supreme Court  
No. 2013-SC-00120



COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT  
HONORABLE VERNON MINIARD, JUDGE  
INDICTMENT NO. 12-CR-00074

CHARLES P. FARMER

APPELLEE

**BRIEF FOR APPELLEE CHARLES P. FARMER**

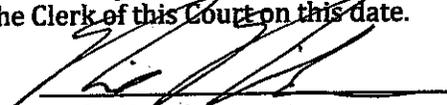
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**Certificate of Service**

This is to certify that a copy of this Brief was mailed, first class postage prepaid, to: Matthew Leverage, 109 North Main Street, P.O. Box 530 Jamestown, KY 42629; Jason B. Moore Assistant Attorney General, Office of Attorney General, 1024 Capital Center Drive Frankfort, KY 40506; Hon. Vernon Miniard, Jr., Judge, Russell Circuit Court, Wayne County Justice Center, 125 Columbia Avenue, P.O. Box 727, Monticello, KY 42633; Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601 on this 12 day of July 2013. I further certify that the record on appeal was returned to the Clerk of this Court on this date.

  
Nick Nicholson

**STATEMENT CONCERNING ORAL ARGUMENT**

Appellee, Charles P. Farmer, agrees that oral argument in this case would be beneficial because this case presents a question of first impression for this Court.

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## STATEMENT OF THE CASE

1. The decedent, Daniel Popplewell ("Popplewell"), a convicted felon, had a demonstrable propensity for violence, including a marked history of aggression and trespass directed at women, neighbors, others and Appellee Charles P. Farmer. TR 1, 10-29. On April 27, 2012, Popplewell, high on drugs and armed with two pieces of large tobacco sticks, stormed Farmer's Russell Springs property and physically attacked Farmer. TR 1, 10-29. Farmer legitimately defended himself and his property by shooting and killing Popplewell with a single shot to the chest area. TR 1, 10-29.

2. On June 22, 2012, a Russell County grand jury indicted Farmer for one count of murder, KRS 507.020. TR I, 1. On the day of his arraignment, Farmer filed a motion to dismiss, contending he was immune from prosecution under KRS 503.085(1) because he had justifiably acted in self-defense. TR 1, 10-29. Following the Commonwealth's filing of discovery, and further briefing by the parties, see TR II, 219-27, 228-34, the Circuit Court denied the motion to dismiss. Commonwealth's Brief Appendix ("Com. Br. App.") 19-23.

3a. Farmer filed a timely notice of appeal from the Circuit Court's order denying his dismissal motion. TR II, 243. The Kentucky Court of Appeals thereafter directed Farmer to show cause why his appeal should not be dismissed because the Circuit Court's order was not an appealable judgment. On October 30, 2012, Farmer filed a timely response to the rule to show cause. See Com. Br. 2.

On February 15, 2013, the Court of Appeals issued a 2-1 published decision in which the majority ruled that Farmer had established sufficient cause to prevent

dismissal of his appeal. See Com. Br. App. 2. The Court of Appeals found this case to present a question of first impression: “whether an order denying immunity from prosecution pursuant to Kentucky Revised Statute (KRS) 503.085 is immediately appealable.” Com. Br. App. 1. The Court of Appeals derived guidance in established precedent, noting that, in the civil context, “an order denying absolute immunity is an exception to the definition of an appealable judgment contained in Kentucky Rules of Civil Procedure (CR) 54.01.” Com. Br. App. 2. “An interlocutory appeal is permissible because to hold otherwise would defeat the purpose of immunity,” so wrote the Court of Appeals. Com. Br. App. 2.

Citing *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009), which, in turn, relied on United States Supreme Court precedent, the majority emphasized, “[I]mmunity is an entitlement that frees a defendant from the financial and emotional costs of litigation.” Com. Br. App. 3. The Court of Appeals found *Prater’s* logic applicable to KRS 503.085(1) immunity. Com. Br. App. 3. Based on this Court’s decision in *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009), the court of appeals also identified the purpose of Kentucky’s self-defense immunity statute as “no different than other types of absolute immunity,” in that it is designed to relieve a defendant from litigation burdens at the earliest stage of the proceedings. Com. Br. App. 3-4.

The Court of Appeals ruled that postponing an appeal from a denial of self-defense immunity would effectively render KRS 503.085(1) impotent. The majority declared:

It is obvious that if a defendant cannot immediately appeal the trial court’s decision and must await the outcome of a criminal trial,

nothing is gained by invoking KRS 503.085 at the “earliest stage of the proceeding.” After trial and conviction, the burdens have been shouldered and the harm irreparable.

We cannot ignore the futility in an appeal of the denial of KRS 503.085 immunity after a defendant's conviction. As explained by the author of this opinion in his dissent in *Lemons v. Commonwealth*, 2012 WL 2360131 (Ky. App. 2012)(2010-CA-001942-MR), motion for discretionary review pending, following a trial and conviction, any argument that immunity was improperly denied would be subject to the harmless error rule, and the defendant required to overcome the strong preference in the law for deferring to a jury's verdict. It is simply nonsensical for the General Assembly to have clearly established immunity from prosecution that is to be determined by the court, but leave a defendant denied immunity without an opportunity for meaningful judicial review.

Com. App. Br. 4.

Because the question of whether a defendant is immune is effectively unreviewable after a conviction and would be forever lost in the absence of an interlocutory appeal, the Court of Appeals held that Farmer was entitled to immediate review of the Circuit Court's decision refusing to dismiss the indictment on self-defense immunity grounds.<sup>1</sup> Com. App. Br. 4-5.

3b. Chief Judge Acree filed a dissenting opinion. The dissent believed that no interlocutory jurisdiction to hear the appeal existed absent an express grant of appellate jurisdiction. Com. App. Br. 6-7. Concerning the majority's reliance on *Prater*, the dissent suggested that *Will v. Hallock*, 546 U.S. 345 (2006), had limited it.

Focusing on the third prong of the three-part test under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the dissent reasoned that “[n]o

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<sup>1</sup> In accordance with the Court of Appeals briefing order, Farmer filed his merits brief. The Court of Appeals briefing schedule, however, has been stayed in view of these proceedings. See Com. Br. 4.

substantial public interest comparable to those listed in *Will* is at stake in this case that would distinguish it from the multitude of criminal cases for which post-judgment review of procedural and jurisdictional decisions has been found effective.” Com. Br. App. 14.

### **ARGUMENT**

**I. A Circuit Court’s Pre-Trial Order Denying A Defendant In A Criminal Case Self-Defense Immunity Under KRS 503.085(1) Constitutes A Final Order That Is Immediately Appealable To The Kentucky Court Of Appeals.**

**A. The law permits an interlocutory appeal from an adverse pre-trial immunity ruling.**

Although the Commonwealth agrees that the issue for review has been properly preserved, see Com. Br. 5, it fires its first shot at a straw-man. The Commonwealth contends that the Court of Appeals lacks jurisdiction to consider the merits of Farmer’s interlocutory appeal from the Circuit Court’s denial of self-defense immunity because no law provides for such an appeal. See Com. Br. 6-11. The Commonwealth’s argument fails because the law – specifically, the collateral order doctrine, see *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) – in fact permits an interlocutory appeal from an adverse trial court immunity ruling.

Citing Section 111 of the Kentucky Constitution, the Commonwealth concedes that the Court of Appeals “shall exercise appellate jurisdiction as provided by law.” See Com. Br. 6-7. In support of its argument about the absence of a law allowing an interlocutory appeal in the circumstances of this case, the

Commonwealth cites KRS 22A.020.<sup>2</sup> The Commonwealth's reliance on KRS 22A.020(4), which permits an interlocutory appeal "by the State" in certain criminal cases, and cases considering this subsection, *e.g.*, *Commonwealth v. Nichols*, 280 S.W.3d 39, 42 (Ky. 2009), is a red herring. Farmer has never contended that KRS 22A.020(4) supplies the basis for interlocutory appellate jurisdiction. See Farmer's Response to Motion for Discretionary Review, p. 7 n. 2.

It is true that KRS 22A.020 does not specifically address interlocutory appeals from Circuit Court orders denying self-defense immunity by criminal defendants. (Indeed, KRS 22A.020 was first enacted before the 2006 enactment of the self-defense immunity statute. See Com. Br. 6-7, 10.) The Commonwealth's argument that there is no interlocutory appellate jurisdiction because KRS 503.085 does not provide for it, see Com. Br. 10-11, however, is a non-starter.

KRS 22A.020(1) confers appellate jurisdiction from "any ... final judgment, order, or decree in any case in Circuit Court ..." A Circuit Court's order denying self-defense immunity constitutes a final order within the framework established by the United States Supreme Court in *Cohen*. Moreover, as explained below, the existence of interlocutory appellate jurisdiction over adverse trial court immunity rulings has long been the law. See, *e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Nixon v.*

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<sup>2</sup> Incorporated into criminal cases by RCr 13.04, Cr 54.01 also grants a right to appeal, providing:

A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02. Where the context requires, the term "judgment" as used in these rules shall be construed "final judgment" or "final order".

*Fitzgerald*, 457 U.S. 731 (1982). Accordingly, when the General Assembly created the self-defense immunity statute in 2006, there was no need to create additional rules on the subject of interlocutory appellate jurisdiction.

The Court of Appeals dissent acknowledged that that “Kentucky is guided by federal jurisprudence regarding procedural issues. Our civil and criminal rules of procedure are greatly influenced by the federal rules and federal case law interpreting them.” Com. Br. App. 9. Like Kentucky law, the United States Code provides for a right to appeal from “final decisions.” See 28 U.S.C. § 1291. The *Cohen* Court observed that it had long given § 1291 “practical rather than a technical construction,” and decreed that the right to an interlocutory appeal exists in a “small class of cases,” in which the claim is “too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” 337 U.S. at 546.

Furthermore, interlocutory appeals are not wholly taboo in this Commonwealth. See *Ballard v. Commonwealth*, 320 S.W.3d 69, 72 (Ky. 2010); see also Kentucky Court of Appeals, *Basic Appellate Practice Handbook*, p. 10 (3d ed. 2010) (discussing “exceptions to the finality rule that may be available”). More particularly, in *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883, 885 (Ky. 2009), this Court addressed whether the trial court’s denial of a defendant’s immunity claim could be appealed on an interlocutory basis. This Court answered the question in the affirmative, emphasizing, “There are exceptions to [the] final judgment rule.” *Id.* at 886. This Court noted that the exceptions are generally triggered when the underlying claim involves a substantial right “which would be

rendered moot by litigation and thus are not subject to meaningful review in the ordinary course following a final judgment.” *Id.*

On the subject of immunity, the *Prater* Court pronounced, “[I]mmunity entitles its possessor to be free from the burdens of defending the action, not merely ... from liability.” *Id.* (citation omitted). The *Prater* Court continued, “Obviously such an entitlement cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action.” *Id.* In support of this proposition, this Court discussed *Mitchell* and *Nixon*, which “recognized in immunity cases an exception to the federal final judgment rule codified at 28 U.S.C. § 1291.” 292 S.W.3d at 886. The *Prater* Court agreed with these decisions, and held that “an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment.” *Id.* at 887 (emphasis added); see also *South Woodford Water District v. Byrd*, 352 S.W.3d 340, 342 (Ky. Ct. App. 2011) (collateral order doctrine “justifies appellate review of interlocutory orders denying motions to dismiss and motions for summary judgment by which common law immunity is claimed”).

The Commonwealth’s reliance on *Will v. Hallock*, 546 U.S. 345 (2006), is misplaced. *Will* is not an immunity case. In *Will*, the district court dismissed the plaintiffs’ Federal Tort Claims Act lawsuit against government agents. While that suit was pending, one of the plaintiffs filed an action against the agents pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The *Bivens*-action defendants sought dismissal on grounds that the district court’s ruling in the first suit raised a judgment-bar. The district court denied that motion, and the

defendants filed an interlocutory appeal. The Court of Appeals ascertained it had jurisdiction, and affirmed. The Supreme Court granted certiorari, and considered the threshold jurisdictional issue.

The *Will* Court distinguished between the types of cases for which interlocutory appellate jurisdiction is available, and those for which it is not:

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

546 U.S. at 350.

The *Will* Court emphasized that the order at issue did not fall within the class of cases over which interlocutory jurisdiction exists, *i.e.*, orders rejecting immunity claims. Stuck with this reality, the defendants were left to analogize a judgment-bar to an immunity denial. See also *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) (although petitioner had analogized an order rescinding a settlement agreement to an immunity denial (because the right not to stand trial was implicated), the Court found a lack of interlocutory appellate jurisdiction). The *Will* Court, however, determined that loose reliance on the right not to stand trial (in a non-immunity case) did not suffice to confer interlocutory appellate jurisdiction, as something more is needed to bring a case within the *Cohen* exception. The *Will* Court identified plus-factors by looking to cases that had found the existence of

interlocutory appellate jurisdiction:

Thus, in *Nixon, supra*, we stressed the “compelling public ends,” *id.*, at 758, 102 S.Ct. 2690, “rooted in ... the separation of powers,” *id.*, at 749, 102 S.Ct. 2690, that would be compromised by failing to allow immediate appeal of a denial of absolute Presidential immunity, *id.*, at 743, 752, n. 32, 102 S.Ct. 2690. In explaining collateral order treatment when a qualified immunity claim was at issue in *Mitchell, supra*, we spoke of the threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service if a full trial were threatened whenever they acted reasonably in the face of law that is not “clearly established.” *Id.*, at 526, 105 S.Ct. 2806. *Puerto Rico Aqueduct*, 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605, explained the immediate appealability of an order denying a claim of Eleventh Amendment immunity by adverting not only to the burdens of litigation but to the need to ensure vindication of a State's dignitary interests. *Id.*, at 146, 113 S.Ct. 684. And although the double jeopardy claim given *Cohen* treatment in *Abney, supra*, did not implicate a right to be free of all proceedings whatsoever (since prior jeopardy is essential to the defense), we described the enormous prosecutorial power of the Government to subject an individual “to embarrassment, expense and ordeal ... compelling him to live in a continuing state of anxiety,” *id.*, at 661–662, 97 S.Ct. 2034 (internal quotation marks omitted); the only way to alleviate these consequences of the Government's superior position was by collateral order appeal.

546 U.S. at 352.

Importantly, for purposes of whether interlocutory jurisdiction is present, the *Will* Court distinguished a qualified immunity claim from a claim grounded in judgment-bar principles. The Court determined that qualified immunity laws – the denial of which can be immediately appealed – do more than simply save trouble for the government and its employees. *Id.* at 353. Rather, qualified immunity laws recognize that the burden of trial is unjustified in the face of a colorable qualified immunity claim. *Id.* Accordingly, the *Will* Court deemed it essential that qualified immunity claims be quickly resolved. *Id.* On the other hand, the *Will* Court found no comparable public interest at stake in judgment-bar types of claims.

The *Will* Court also examined timing considerations. The Court stressed that “a qualified immunity claim is timely from the moment an official is served with a complaint,” as opposed to a judgment-bar claim that can only be raised after an adjudication. *Id.* at 354. The *Will* Court thus stated that a judgment-bar claim is not analogous to immunity, adding that a statutory judgment-bar, like issue preclusion and res judicata, does not reflect “a policy that a defendant should be scot free of any liability.” *Id.*

*Will* does not defeat interlocutory appellate jurisdiction here; rather, *Will* actually supports it. The Circuit Court’s order denying Farmer’s self-defense immunity claim is immediately appealable because, like the immunity claims found to be immediately appealable in *Will*, it is an order rejecting immunity. This Court need not traverse further.

There can be no dispute that KRS 503.085(1) grants absolute immunity from civil and criminal liability when a person justifiably used deadly force. Speaking in broad terms, KRS 503.085(1) provides:

A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.

As the Court of Appeals below recognized, this Court in *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009), determined that KRS 503.085(1)’s

purpose is “no different than other types of absolute immunity.” Com. Br. App. 3. In *Rodgers*, this Court stated:

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.

285 S.W.3d at 753.

Here, the Commonwealth puts the cart before the horse. Because the order appealed-from is an order denying immunity, this case falls within the *Cohen* doctrine. It falls within the class of cases that have conferred interlocutory appellate jurisdiction when a party challenges an adverse immunity order. Consequently, there is no need to analogize Farmer’s claim to an immunity claim, and then determine whether a factor in addition to the right not to stand trial is at stake. Indeed, Farmer is asserting more than a right not to stand trial. He is invoking immunity, which under *Will*, involves more than a generalized right not to stand trial.

Given that KRS 503.085(1) accords immunity from arrest, detention, criminal charging and civil liability, Farmer’s claim, unlike the *Will* defendants’ judgment-bar claim, was ripe the moment the Commonwealth obtained the indictment. Further unlike the judgment-bar claim in *Will*, and, as with any immunity statute, KRS 503.085(1) clearly reflects “a policy that a defendant should be scot free of any liability.” *Will*, 546 U.S. at 354.

In *Rodgers*, this Court determined that Kentucky's self-defense immunity statute is "designed to relieve a defendant from the burdens of litigation," and that "a defendant should be able to invoke KRS 503.085(1) at the earliest stage of the proceeding." 285 S.W.3d at 753. As the Court of Appeals below wrote:

It is obvious that if a defendant cannot immediately appeal the trial court's decision and must await the outcome of a criminal trial, nothing is gained by invoking KRS 503.085 at the 'earliest stage of the proceeding.' After trial and conviction, the burdens have been shouldered and the harm irreparable."

Com. Br. App. 4.

Early resolution of self-defense immunity claims is also on par with assertions of qualified immunity. A defendant is permitted to appeal a trial court's denial of a qualified immunity on an interlocutory basis since it is essential to resolve a qualified immunity claim quickly. See *Will*, 546 U.S. at 353; see also *Osborn v. Haley*, 549 U.S. 225, 258 (2007) ("Where the parties' immunity-related disagreement amounts to a dispute about the *law*, namely, whether the particular set of facts alleged by the plaintiff does, or does not, fall within the immunity's legal scope, the defendant is entitled to a quick determination of the legal question by the trial judge and, if necessary, an immediate interlocutory appeal.") (emphasis original).<sup>3</sup> The Commonwealth has not adequately addressed or refuted this proposition.

That the interlocutory appellate jurisdiction over immunity denials has

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<sup>3</sup> Notably, an interlocutory appeal of an adverse immunity ruling under KRS 503.085(1) would involve review of a legal question, since, under the procedures set forth by this Court in *Rodgers*, the trial court does not conduct an evidentiary hearing on an immunity claim, or consider facts extraneous to the evidence record. 285 S.W. at 755.

arisen in civil, as opposed to criminal cases, does not defeat Farmer's position. Immunity is immunity. And here, the immunity granted by KRS 503.085(1) extends to both criminal and civil cases. What's more, the exception to the prohibition against interlocutory appeals has been extended to certain criminal cases. In *Abney v. United States*, 431 U.S. 651, 659 (1977), the Court ruled that a trial court's order denying double jeopardy relief in a criminal case constitutes "a complete, formal, and in the trial court, final rejection of a criminal defendant's double jeopardy claim." Accordingly, the *Abney* Court granted the right to appeal the denial of a double jeopardy claim on an interlocutory basis. The Court stressed that a defendant's double jeopardy rights would be "significantly undermined" if appellate review were deferred until after a conviction since, by that time, the defendant would have been "forced ... to endure the personal strain, public embarrassment and expense of a criminal trial." *Id.* at 660.

A criminal defendant's right to pursue an appeal before a judgment of conviction has also been recognized in a certain circumstances in this Commonwealth. For example, this Court has held that "[t]he right of appeal is not an adequate remedy against double jeopardy." *Crawley v. Kunzman*, 585 S.W.2d 387, 388 (1979); see also *Ignatow v. Ryan*, 40 S.W.3d 861, 865 (Ky. 2001) (commenting that there is no adequate appellate remedy once a person has been placed in double jeopardy). Consequently, the Commonwealth's contention that there is no legal basis for a criminal defendant to file an interlocutory appeal, see Com. Br. 9, lacks merit.

The concerns animating appellate jurisdiction in the immunity context

arguably are more significant than in the double jeopardy context. As the Supreme Court pronounced in *Will*, “the double jeopardy claim given *Cohen* treatment in *Abney, supra*, did not implicate a right to be free of all proceedings whatsoever ...” 546 U.S. at 352. Contrast this with immunity, which does in fact implicate the “a right to be free of all proceedings whatsoever.”

The same concerns supporting an interlocutory appeal in a double jeopardy case are applicable when immunity is at stake. Just as interlocutory appeals are allowed in double jeopardy cases to vindicate the individual’s position in relation to the all-powerful Commonwealth, so too with self-defense immunity claims. The Kentucky legislature has decreed that an individual has the absolute right to be free from criminal prosecution when he justifiably used deadly force. As the Court of Appeals correctly determined, this broad right would be illusory if interlocutory appeals from denials of immunity claims are forbidden.

On a related note, the Commonwealth’s attempt to distinguish *Prater* and other cases recognizing interlocutory appellate jurisdiction over adverse immunity rulings by contending that such cases involved immunity claims by government actors is a distinction without a difference. Interlocutory appellate jurisdiction has been extended to individuals in criminal cases. See, *e.g., Abney*, 431 U.S. 651.

The Commonwealth acknowledges that “important” interests are implicated when a defendant asserts immunity under KRS 503.085(1). See Com. Br. 16. When a defendant meets the terms of KRS 503.085(1), more than just individual interests are at stake. If a defendant is immune, the Commonwealth should not be required to expend prosecutorial and judicial resources unjustifiably putting a person to trial.

The time of witnesses, jurors and court personnel should not be taxed for a trial that should not occur in the first place.

Moreover, *Will* accepted that a substantial public interest could be at stake in a criminal case:

And although the double jeopardy claim ... in *Abney* did not implicate a right to be free of all proceedings whatsoever (since prior jeopardy is essential to the defense), we described the enormous prosecutorial power of the Government to subject an individual "to embarrassment, expense and ordeal ... compelling him to live in a continuing state of anxiety," ... the only way to alleviate these consequences of the Government's superior position was by collateral order appeal.

546 U.S. at 352.

**B. Adverse trial court rulings on immunity claims satisfy the three-part test for determining the existence of interlocutory appellate jurisdiction.**

Unable to argue that KRS 503.085(1) is anything but absolute immunity, the Commonwealth resorts to *Cohen's* three-part test. This argument is futile because courts have already analyzed denials of immunity under *Cohen*, and determined that interlocutory appellate jurisdiction lies when an appellant appeals from an adverse immunity order. In all events, even applying the three-part test, there is interlocutory appellate jurisdiction here.

The conditions necessary for invocation of the collateral order rule are as follows: "that an order [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." Com. Br. App. 11 (Acree, C.J., dissenting); see also *Will*, 546 U.S. at 349.

The Commonwealth concedes that "[t]he first element, that the order

conclusively determine the disputed question is met in this matter.” Com. Br. 16. This concession is well-taken. The trial court’s order is conclusive and final on the issue of self-defense immunity. See *Abney*, 431 U.S. at 659 (trial court’s order denying double jeopardy relief constitutes “a complete, formal, and in the trial court, final rejection of a criminal defendant’s double jeopardy claim”).

Contrary to the Commonwealth’s arguments, the second condition of the *Cohen* test is satisfied. To the extent there are two components to the second condition, the Commonwealth again concedes one of them, *i.e.*, that the issue is “important.” See Com. Br. 16.

Furthermore, the underlying claim – immunity – is completely separable from the merits of the action. A judge – not a jury – decides immunity. A jury is not given instructions on immunity, and does not resolve immunity questions. Put another way, self-defense immunity is a legal conclusion to be determined by the trial judge (based on the evidence record, but not an evidentiary hearing) at the earliest possible stage of the proceeding. See *Rodgers*, 285 S.W.3d 740. For this reason, a pre-trial judicial immunity determination is completely divorced from any subsequent trial issues.

To be sure, any immunity question has factual components to it. How else could a court resolve whether a person is entitled to immunity without at least considering factual predicates? That a pre-trial immunity question and a trial self-defense defense may involve a degree of overlap does not render the underlying issue the same. Again, it is not for the jury (or the finder-of-fact at trial) to determine KRS 503.085(1) immunity. By the time of trial, the self-defense immunity

question would have already been resolved, and is a judicially-determined issue completely separate from the trial issue of self-defense. Indeed, a trial court's order denying immunity is in the nature of a probable cause ruling, *Rodgers*, 285 S.W.3d at 754 – a quintessential *legal* issue to be resolved by a court rather than a jury. Cf. *Ornelas v. United States*, 517 U.S. 690 (1996).

In addition, the distinctiveness of a pre-trial immunity proceeding and a criminal trial in which self-defense is raised is evident from the procedures governing each proceeding. In the pre-trial immunity context, the court does not conduct an evidentiary hearing. *Rodgers*, 285 S.W.3d at 755. A defendant is not permitted to submit supplemental evidence, even by way of affidavit. See *Commonwealth v. Bushart*, 337 S.W.3d 666 (Ky. App. 2011). Absent an adversarial proceeding, the trial court rules on the immunity question based on a paper record. On the other hand, a trial assertion of self-defense requires sufficient evidence of self-defense. See, e.g., *Hilbert v. Commonwealth*, 162 S.W.3d 921, 925 (Ky. 2005). At a trial, of course, witnesses must testify, and the rules of evidence apply. While appellate review of the former proceeding would involve examination of a legal question, appellate review in the latter proceeding does not.

The third *Cohen* condition also has been met.<sup>4</sup> Again contrary to the Commonwealth's claim, a trial court's pre-trial immunity determination effectively is not reviewable after a final judgment. Appellate issues associated with a pre-trial self-defense immunity claim (determined by a judge), and a post-trial challenge to

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<sup>4</sup> The Commonwealth has attempted to add an additional factor to the third element, *i.e.*, that the order involves an important public interest. See Com. Br. 18. This actually is not part of the third component. In any event, we discuss the role of public importance above.

the sufficiency of the evidence when a jury (or judicial fact-finder) has rejected a self-defense defense, substantially differ. In the pre-trial context, once a defendant “claims immunity the court *must* dismiss the case unless there is probable cause to conclude that the force used was not legally justified.” *Rodgers*, 285 S.W.3d at 754 (emphasis added). On the other hand, post-trial review of an unsuccessful self-defense assertion does not involve a judicially-determined *legal* question of probable cause. Rather, the Commonwealth is entitled to all reasonable inferences in its favor, and the reviewing court does not second-guess credibility determinations. See, e.g., *Beaumont v. Commonwealth*, 295 S.W.3d 60, 67 (Ky. 2009). The post-trial standard of review thus presents a high hurdle for any criminal defendant who assails the sufficiency of the evidence, including in self-defense cases. E.g., *Barnes v. Commonwealth*, 91 S.W.3d 564, 570 (Ky. 2002).

The third *Cohen* component also looks to substance as opposed to form – is the order “effectively” unreviewable? Practically speaking, in view of the harmless error doctrine, the relief afforded by KRS 503.085(1) would be a mirage if review were postponed until after a trial. The Court of Appeals below perceptively captured this point:

[A]ny argument that immunity was improperly denied would be subject to the harmless error rule, and the defendant required to overcome the strong preference in the law for deferring to a jury's verdict. It is simply nonsensical for the General Assembly to have clearly established immunity from prosecution that is to be determined by the court, but leave a defendant denied immunity without an opportunity for meaningful judicial review.

Com. Br. App. 3.

Kentucky's self-defense immunity statute serves the purpose of saving a

person, who legitimately acted in self-defense, the pain, costs, anxiety, embarrassment, uncertainty and stigma associated with criminal litigation and trial. See *Rodgers*, 285 S.W.3d at 755 (KRS 503.085 “immunity is designed to relieve a defendant from the burdens of litigation”); see also Com. Br. App. 3. As the Court of Appeals correctly determined, the substantial right conferred by KRS 503.085(1) would not be subject to meaningful review in the absence of an interlocutory appeal. Following a conviction, the accused will have undergone a trial and forever lost the protection afforded by KRS 503.085(1). See *Abney*, 431 U.S. at 660.

Kentucky’s self-defense immunity statute would have no teeth if an erroneous immunity denial cannot be immediately appealed. Such a regime commits all discretion on the issue of self-defense immunity to trial judges, and, as more fully discussed below, makes their decisions adverse to defendants effectively unreviewable. This is because if the judge was wrong and a jury acquits, the Commonwealth has no right to appeal, yet the accused would have undergone the ordeal of a trial. If the judge was wrong and the jury convicts, a defendant may be unable to vindicate his rights under KRS 503.085(1) due to deferential standards of review. See Com. Br. App 3. In fact, accepting the Commonwealth’s last argument – that a jury verdict subsumes a trial judge’s pre-trial immunity ruling – would wholly eviscerate any right to appeal a self-defense immunity ruling. This Court’s decision in *Rodgers* does not countenance this result.

**C. The other reasons posited by the Commonwealth for denying interlocutory appellate jurisdiction are not compelling.**

*Crane v. State*, 641 S.E.2d 795 (Ga. 2007), does not dictate a different result. *Crane*, a decision from a sister State, does not have precedential value in this case.

Further, it does not appear that the *Crane* defendant made the arguments advanced by Farmer. The *Crane* court did not address the substantive differences between a pre-trial immunity determination made by a judge, and a post-trial guilt/innocence determination made by a jury. Nor did the *Crane* court consider that a pre-trial judicial immunity ruling becomes effectively unreviewable following a trial.

The “other means” for a defendant to obtain review of a trial court’s immunity determination, see Com Br. 19, do not work a sea change over the fact that interlocutory appellate jurisdiction can exist in criminal cases, and does exist when an immunity ruling is at issue. Notably, a writ of prohibition substantially differs from an interlocutory appeal. As the Commonwealth notes, “appellate courts have great discretion in granting or denying such writs.” Com. Br. 19. Committing appellate jurisdiction over an immunity denial to judicial discretion will not produce a uniform body of law, as appellate decisions on self-defense immunity will be committed to the subjective judicial views. Cf. *Crawford v. Washington*, 541 U.S. 36, 63-68 (2004). Furthermore, a writ of prohibition is an extraordinary remedy available in only limited circumstances. See, e.g., *Karem v. Bryant*, 370 S.W.3d 867, 869 (Ky. 2012). A defendant should not be saddled with additional hurdles associated with an extraordinary writ when original interlocutory appellate jurisdiction already exists.

Similarly, requiring a conditional guilty plea reserving the right to appeal is not a viable alternative. That would require a defendant to admit guilt. But when a person justifiably acts in self-defense, he is not guilty and should not be compelled to aver otherwise. Additionally, requiring a guilty plea as a precondition to the right

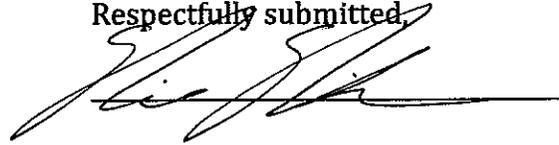
to appeal eviscerates KRS 503.085(1)'s requirement that an immunity assertion be resolved at the earliest stage of the proceedings. See *Rodgers*, 285 S.W. at 755.

Finally, the Commonwealth attempts analogize a pre-trial KRS 503.085(1) immunity determination to a grand jury's probable cause determination. The Commonwealth cites no authority for the proposition that a judge's KRS 503.085(1) immunity determination is unreviewable and subsumed into a later guilty verdict. As noted, such a procedure would wholly deny the right to appeal a KRS 503.085(1) determination, which is not the law in this Commonwealth. See *Rodgers*, 285 S.W. at 755. That a grand jury's probable determination is not appealable is irrelevant to the question posed in this case. A grand jury proceeding, entailing secret deliberations by a group of citizens, is much different than a trial court's legal ruling, made in open court.

#### **CONCLUSION**

WHEREFORE, based on the foregoing, Appellee Charles P. Farmer respectfully moves this Honorable Court to find that interlocutory appellate jurisdiction exists in this case, remand to the Kentucky Court of Appeals for merits consideration of Farmer's interlocutory appeal on the question of KRS 503.085(1) immunity, or, alternatively, grant any other equitable and just relief.

Respectfully submitted,



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