IN THE SUPREME COURT OF THE STATE OF NEVADA

KAMESHA JOANN COOPER,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

Case No. 71402

APPELLANT'S OPENING BRIEF
FIRST JUDICIAL DISTRICT COURT, CARSON CITY

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I. JURISDICTIONAL STATEMENT

The Supreme Court's jurisdiction in this case is pursuant to NRS 177.015(3)

II. ROUTING STATEMENT

The case should be retained by the Nevada Supreme Court because the principal issue is one of first impression under NRAP 17(a)(13).

III. STATEMENT OF THE ISSUES

A. Whether the district court should have continued Appellant's probation revocation hearing for a violation of laws until any criminal proceedings were completed.

IV. STATEMENT OF THE CASE

On March 25, 2014, Appellant was convicted of burglary, and sentenced to a suspended sentence of 24 to 72 months in the Nevada Department of Corrections. Appellant's Appendix at 118.[1] Appellant entered into an interstate compact with California for supervision. AA at 23:7-15.

A report dated April 4, 2016 was filed with the district court alleging that Appellant violated the following conditions of her probation: reporting; residence; directives and conduct; and special condition (2): substance abuse evaluation and comply with any recommendations for counseling. AA at 1-2. Following that, a

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[1] Hereinafter "AA."

supplemental violation report dated July 28, 2016 was filed alleging that Appellant additionally violated intoxicants and laws. AA at 4-5.

A probation violation hearing was held on September 8, 2016. AA at 13. Defense counsel informed the district court as to the laws violation that, although they were not disputing that Appellant had been arrested, the criminal complaint had been dismissed without prejudice. Counsel further informed the court that she advised her client not to speak of the circumstances of her arrest and that she should exercise her Fifth Amendment right not to incriminate herself in case the charges were refiled. Counsel stated that usually violation hearings are continued until after the criminal proceedings on the charge are concluded. AA at 17:1-11.

The district court initially agreed with defense counsel, but then decided to allow the State to present evidence of Appellant's arrest in Elko, stating "I'm mindful of the Defendant's Fifth Amendment right to remain silent and that she's either going to be prejudiced here by not testifying or prejudiced potentially in Elko and potentially in other [sic] jurisdiction if she does testify. However, the evidence at this point is close to the line on whether she would be revoked or not." AA at 60:20-61:2.

The Elko Highway Patrol officer who initiated the vehicle stop and conducted the arrest testified at the hearing. AA at 62-93. Additionally, Chad

Thompson from the Elko District Attorney's office testified. AA at 94-101. Appellant did not testify and did not address the arrest in her statement to the court.

In verbalizing its finding, the district court stated:

> I want to go back to the Fifth Amendment issue for just a moment. I indicated, I recognize and that's why we proceeded way out of order, but I didn't state that the State also has an interest in proceeding promptly. Mr. Thompson's testimony just makes that stronger in my mind. He started his answer about if he was going to file new charges and he said if the evidence supports them that he has more work to do.
>
> And later he indicated that he does have evidence, he thinks there's more evidence. The point is charges may be filed, when they're going to be filed, there's no way to know. The criminal process if there is a trial and all of that, it could be months, more than a year.
>
> And so that's why the court has proceeded in spite of the Defendant's Fifth Amendment that the quandary that she's in about testifying or not. But the court does not hold against her that she didn't talk about the facts of the case. She did make a statement and the court has considered that.[2]
>
> The court finds that on the absconding allegation there is not sufficient evidence to find that she absconded. And that's based upon Officer Scott's testimony. The substance abuse evaluation, the court find there's not sufficient evidence, that also is based upon Officer Scott's testimony.
>
> The court finds that there is evidence that reasonably satisfies the court that the Defendant traveled to Denver, Colorado, Jackson, Wyoming, Idaho and Nevada without the knowledge or consent of her probation officer in California.

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[2] Appellant made a statement which did not include any facts about the arrest.

AA at 113:9-1114:14. The court then went on to revoke Appellant's probation based on the evidence presented regarding her arrest in Elko. AA at 114:160-115:11.

VI. SUMMARY OF THE ARGUMENT

This case offers an issue of first impression for Nevada. While on probation, Appellant was charged with new crimes in the county of Elko. The Elko District Attorney dismissed the charges without prejudice. In the meantime, Appellant was facing probation revocation for various alleged violations, including laws for her arrest in Elko. Because charges could be refiled, and Appellant risked that her testimony could be used against her in later proceedings, the meaningful opportunity to be heard assured under *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1971) was essentially nugatory. The district court erred in admitting the evidence of the arrest.

VII. ARGUMENT

A. STANDARD OF REVIEW

As stated by this Court in *Anaya v. State*:

> Parole and probation revocations are not criminal prosecutions; the full panoply of constitutional protections afforded a criminal defendant does not apply. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). Revocation proceedings, however, may very well result in a loss of liberty, thereby triggering the flexible but fundamental protections of the due process clause of the Fourteenth Amendment. *Id.* Due process requires, at a minimum, that a

> revocation be based upon "verified facts" so that "the exercise of discretion will be informed by an accurate knowledge of the [probationer's] behavior." *Morrissey,* 408 U.S. at 484.
>
> In order to insure that this constitutional standard is achieved and to offer guidance to the states in structuring their respective revocation procedures, the United States Supreme Court, in *Morrissey* and *Gagnon,* outlined the minimal procedures necessary to revoke probation or parole. A preliminary inquiry, to determine whether there is probable cause to believe that the probationer violated the conditions of his or her probation, is required, at which the probationer must be given notice of the alleged probation violations, an opportunity to appear and speak on his own behalf and to bring in relevant information, an opportunity to question persons giving adverse information, and written findings by the hearing officer, who must be "someone not directly involved in the case." *Morrissey,* 408 U.S. at 485-87. If probable cause is found, the probationer is entitled to a formal revocation hearing, less summary than the preliminary inquiry, at which the same rights attach, *Gagnon,* 411 U.S. at 786, before a "neutral and detached" hearing body, *Morrissey,* 408 U.S. at 489. The function of the final hearing is to determine not only whether the alleged violations actually occurred, but whether "the facts as determined warrant revocation." *Id.* at 480, 488; *see Gagnon,* 411 U.S. at 790.

Anaya v. State, 96 Nev. 119, 122, 606 P.2d 156, 157-58 (1980).

B. THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OF LAWS VIOLATION PRIOR TO THE ADJUDICATION OF CRIMINAL PROCEEDINGS ON THE SAME EVIDENCE, THEREBY CREATING AN UNFAIR QUANDARY WHERE APPELLANT COULD NOT TESTIFY ON HER OWN BEHALF OR RISK THAT HER TESTIMONY, OR THE FRUITS OF THE TESTIMONY, BE USED AGAINST HER AT A LATER DATE.

The Appellant in this case was forced to forego her opportunity to testify on her own behalf at her revocation hearing in order to avoid incriminating herself at a possible future trial.

The Supreme Court of California and the Supreme Court of Alaska have both held that either the defendant should be offered immunity in future prosecutions or the probation revocation proceedings should be held after any criminal proceedings. *People v. Coleman*, 533 P.2d 1024 (Cal. 1975); *McCracken v. Corey*, 612 P.2d 990 (Alaska 1980).[3]

In *Coleman*, the defendant had appealed from an order revoking his probation on a suspended sentence after entry of a guilty plea for grand theft. 533 P.2d at 1029. The district attorney initiated proceedings where the defendant had not yet been tried. *Id.* Cole contended that it was a violation of his due process rights because he was "forced to forego his opportunity to testify on his own behalf at his revocation hearing in order to avoid incriminating himself at his pending trial." *Id.* The Court held, that although they were not compelled to adjudicate defendant's constitutional claim, the "choice forced upon him at his revocation hearing was unnecessarily inconsistent with constitutional views." *Id.* at 1030.

The California Supreme Court stressed that

> A fundamental requisite of due process is the meaningful opportunity to be heard and to explain one's actions, and this right is one of the "minimum requirements of due process" which must be accorded an individual at a probation revocation hearing. A probationer, moreover, is not limited to denying or defending against a charged violation of the

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[3] The district attorney did not offer immunity. Although the State courts discuss use immunity, Nevada only has transactional immunity. *State v. Tricas*, 128 Nev. ___, 290 P.3d 255 (2012).

> conditions of his probation. Even where a violation is proven or admitted, a probationer has a due process right to explain any mitigating circumstances and argue that the ends of justice do not warrant revocation.
>
> The principal policy underlying a probationer's right to an opportunity to be heard at a revocation hearing, as well as the other procedural protections mandated by *Morrissey*, is to assure informed, intelligent and just revocation decisions. "Both the probationer . . . and the State have interests in the accurate finding of fact and the informed use of discretion -- the probationer . . . to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community." It is thus detrimental to the state and the probationer alike if probation is revoked "because of erroneous information or because of an erroneous evaluation of the need to revoke . . . ."

People v. Coleman, 533 P.2d 1024, 1030-31 (1975), quoting *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1187 (1973) (internal citations omitted).

In justifying its holding, the California Supreme Court discussed the holdings by the United States Supreme Court in *Simmons. V. United States*, 390 U.S. 377, 88 S. Ct. 967 (1968)(holding that testimony by a defendant at a suppression hearing cannot later be used against him in a criminal trial) and *McGautha v. California,* 402 U.S. 183, 91 S. Ct. 1454 (1971) (Discussing the issue of a single-trial system in a death penalty case and a defendant's inability to testify for mitigation purposes). The California Supreme Court crafted a rule that the testimony of a probationer at a revocation hearing held prior to the disposition of criminal charges arising out of the alleged violation of the conditions of his

probation, and the fruits of that evidence, should not be used against him at the later trial. *Coleman,* 533 P.2d at 889-90.

The Rhode Island Supreme Court has also adopted the requirement of either a grant of use and derivative use immunity for testimony given at a probation revocation hearing, or postponement of the revocation proceeding until after the criminal trial, on the reasoning that "the unfairness of the current practice, even if not so severe as to rise to the level of a constitutional deprivation, is nevertheless so real and substantial that it calls for action by us on public policy grounds and in furtherance of our responsibility to assure a sound and enlightened administration of justice." *State v. DeLomba*, 370 A.2d 1273, 1275 (RI 1977).

The Alaskan Supreme Court in *McCraken*, held that the "'most desirable method of handling the problems of concurrent criminal and probation revocation proceedings may well be for revocation proceedings not even to be initiated until after disposition of the related criminal proceedings.'" 612 P.2d at 998, quoting *Coleman*, 533 P.2d at 1275.

The Ninth Circuit Court of Appeals, on the other hand, has upheld a Montana ruling that the decision to testify or not at a probation hearing held prior to the criminal trial is a strategic decision. However, prior to affirming, the Ninth Circuit stated that

> If our opinion as to the wisdom of the Montana rule were dispositive, we might prefer the California procedure, mandated by the state court

> under its supervisory power, which provides use immunity for a probationer's testimony if it is given at a revocation hearing held prior to trial on criminal charges which were the basis for the revocation proceeding *People v. Coleman*, 533 P.2d 1024 (1975)(en banc). It is not unreasonable to conclude that the lesser standard of proof at a revocation proceeding and the objectives of making an accurate determination of revocation charges and a proper assessment of the penalty to be imposed are factors that make it proper for a state to encourage testimony by a grant of use immunity.

Ryan v. Montana, 580 F.2d 988, 994 (9th Cir. 1978). A year later, the Ninth Circuit again rejected the argument that a federal revocation proceeding before defendant's trial on the state charges did not violate his Fifth Amendment rights because his refusal to waive his rights did not lead automatically to imposition of sanctions. *United States v. Rilliet*, 595 F.2d 1138 (9th Cir. 1979).

In the present case, Appellant's ability to testify was further hampered by the chance that her testimony would be used as evidence to recharge the criminal cases that had been previously dismissed. Further inflaming the unfairness of the choice that Appellant had to make is the ease in which the district court could have proceeded on the initial violation report and delayed the hearing on the supplemental violation report until it was determined whether charges would be refiled against her and those criminal proceedings were completed. Instead, the district court heard evidence and made its findings and decision without Appellant having the benefit of testifying on her own behalf. Appellant requests that this

Court follow the other State court's holdings and find that it was error to proceed on the laws violation prior to the criminal proceedings conclusion.

VIII. CONCLUSION

Based on the foregoing argument, Appellant respectfully requests the Court find that district court erred in proceeding on the laws violation at the revocation hearing prior to criminal charges being refiled, thus, forcing Appellant to not be able to testify and risk incriminating herself.

RESPECTFULLY SUBMITTED this 6th day of February, 2017.

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VERIFICATION AND CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

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RESPECTFULLY SUBMITTED.

DATED this 6th day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 6th day of February, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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DATED this 6th day of February, 2017.

SIGNED: /s/ SALLY DESOTO