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**COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
2023-SC-0364  
*Electronically Filed***

**KENTUCKY PAROLE BOARD**

**APPELLANT**

**V.**

**ON REVIEW FROM COURT OF APPEALS  
NO. 2022-CA-0135  
FRANKLIN CIRCUIT COURT NO. 20-CI-00834**

**TIMOTHY SHANE**

**APPELLEE**

\*\*\*\*\*  
**BRIEF OF APPELLANT**  
\*\*\*\*\*

Respectfully submitted,

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**CERTIFICATION REQUIRED BY RAP 5(A) and 30(B)**

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by first class mail, postage prepaid, on February 5, 2024: Clerk, Kentucky Court of Appeals, 669 Chamberlin Ave., Suite B, Frankfort, Kentucky, 40601; Clerk, Franklin Circuit Court, 222 St. Clair St., Frankfort, Kentucky 40601; Hon. Timothy G. Arnold, Department of Public Advocacy, Post-Trial Division, 5 Mill Creek Park, Frankfort, KY, 40601.

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**INTRODUCTION AND STATEMENT CONCERNING ORAL ARGUMENT**

This matter examines whether due process and Kentucky statutes allow the Kentucky Parole Board to delegate parole revocation hearings to administrative law judges. The Order granting Discretionary Review designated this appeal for oral arguments.

**WORD-COUNT CERTIFICATE**

This document complies with the word limit of RAP 31(G)(3)(a) because, excluding the part of the documents exempted by RAP 15(D) and 31(G)(5), this document contains 5,376 words.

/s/ Seth E. Fawns  
Seth E. Fawns

**NOTE REGARDING CITATION TO RECORD**

For ease of reference and consistency, the Kentucky Parole Board has cited the record in a manner similar to the underlying Court of Appeals Briefs. The record is cited in standard format with “TR” for the Trial Court Record. In addition, at TR 220 there is a CD containing a .pdf file and two audio recordings. This material is the Parole Revocation Record and recordings of the Parole Revocation Hearings. Consistent with the briefs filed at the Court of Appeals, Appellee’s citation of “PBR” refers to the .pdf file of the Parole Revocation Record submitted within the trial court record.

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## STATEMENT OF CASE

In 2005, Appellee Timothy Shane was convicted of Burglary, 1<sup>st</sup> degree. PBR at 24. In 2009, he was convicted of Rape, 1<sup>st</sup> degree; Robbery, 2<sup>nd</sup> degree; and Unlawful Imprisonment, 1<sup>st</sup> degree. PBR at 22. On July 2, 2018, Shane was released from custody to parole supervision. TR at 2. The Parole Board required Shane to adhere to several supervision conditions, including a prohibition on consuming alcohol. PBR at 26.

On December 13, 2019, Officer Bassler of the Louisville Metropolitan Police Department stopped a vehicle driven by Shane because Shane was not wearing his seatbelt. PBR at 30. Officer Bassler smelled a strong odor of alcohol. PBR at 12. Shane admitted to drinking that evening and showed the officer an open pint of brandy. *Id.* A breathalyzer test revealed that Shane’s blood alcohol level was .16, twice the legal limit.<sup>1</sup> PBR at 12. Officer Bassler also discovered that Shane was without a driver’s license, registration, and insurance. PBR at 30-31.

On December 23, 2019, Probation and Parole served Shane with a parole revocation probable cause hearing notice, which informed him of the revocation process, the allegations against him, and his rights and responsibilities. PBR at 1-3. Specifically, the written notice identified the allegation against him as “use of alcohol”, and the notice provided the factual basis supporting that allegation. *Id.* Shane elected to waive the probable cause hearing, agreeing probable cause existed to believe he committed the acts that constituted a violation of his parole. PBR at 3.

In advance of the April 22, 2022 final revocation hearing – a hearing to determine

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<sup>1</sup> Shane has since pled guilty to operating a motor vehicle under the influence of drugs or alcohol. *See Commonwealth v. Shane*, Jefferson Dist. Ct., 19-T-44279.

whether by a preponderance of evidence Shane violated the conditions of his parole – Probation and Parole again served Shane with a detailed notice, this one outlining the final revocation hearing. PBR at 14-18. Again, the notice outlined Shane’s rights and responsibilities, including his right to counsel and his right to present witnesses and evidence, including mitigating evidence. *Id.* Shane was represented by counsel, given the opportunity to testify (if he so chose), present witnesses, examine witnesses, and present mitigating evidence. PBR at 11-13. Shane’s counsel provided evidence regarding Shane’s employment and family support. PBR at 12. Shane’s Parole Officer testified as to the conditions of his parole, specifically the condition that he refrain from consuming alcohol. *Id.* Officer Bassler testified regarding the night he stopped Shane’s vehicle and Shane’s admission that he consumed alcohol. *Id.* At no point in the revocation process, or since, has Shane denied that he did indeed consume alcohol.

At the conclusion of the hearing, the Administrative Law Judge (“ALJ”) made recommended, nonbinding findings of fact that: Shane had been previously released onto parole supervision with a condition to refrain from using controlled substances and that on December 13, 2019, Officer Bassler pulled Shane over for a traffic violation, discovered Shane smelled of alcohol, and spotted an open container of brandy in the center console; and Shane admitted to Officer Bassler that he had consumed alcohol and was found to have a blood alcohol level of 0.16. *Id.* The ALJ noted mitigating evidence regarding Shane’s employment history, family support, and medical concerns. *Id.* Finally, the ALJ made the nonbinding conclusion that there was a preponderance of evidence to find Shane had violated the condition of his supervision prohibiting him from consuming alcohol. *Id.*

On May 21, 2020, a two-member panel of the Parole Board adopted the ALJ’s

findings of fact and found by a preponderance of evidence that Shane violated the conditions of his supervision. PBR at 43. Additionally, as required by KRS 439.3106, the panel determined that Shane's failure to comply with the conditions of supervision constituted a significant risk to prior victims or the community at large and he could not be appropriately managed in the community. *Id.*

The two-member panel ordered a 15-month deferment, meaning Shane would be eligible for parole again in 15 months. PBR at 43-44. The Parole Board also recommended Shane participate in a Substance Abuse Program. PBR at 44. Following the Parole Board's order, Shane sought reconsideration. PBR at 47-49. The Board Chairperson referred the request to the full Board. PBR at 53-54. A majority of the Board voted to deny reconsideration. PBR at 50-51.

On September 28, 2020, Shane filed a Complaint for Declaratory Judgment and Injunctive Relief in Franklin Circuit Court. TR at 1-11. Shane argued that the evidence did not support revocation and that it was improper for an ALJ to hold the final revocation hearing. *Id.* In a well-reasoned and detailed seven-page Opinion and Order, the Franklin Circuit Court denied Shane's Motion for Summary Judgment and Petition for declaratory and injunctive relief and dismissed the action on January 11, 2022. TR at 283-90. The Circuit Court found that the Board's action did not violate any statutory or constitutional requirements. TR at 290. On February 1, 2022, Shane appealed the Order and Opinion of the Franklin Circuit Court to the Kentucky Court of Appeals. TR at 296-97.

While this case proceeded on appeal, the Parole Board recommended Shane for parole in April 2022, and he was subsequently discharged from custody and placed back on supervision in May 2022. *Shane v. Kentucky Parole Board*, 2021-CA- 0135, Appellee's

November 17, 2022 Motion to Dismiss Appeal as Moot, Court of Appeal’s Docket #17, at Exhibits 1 and 2. As a result, the Board moved the Court of Appeals to dismiss the appeal as moot. *Id.* The Court of Appeals denied the motion and ordered the Board to address the issue of whether a hearing officer may conduct a final (evidentiary) parole revocation hearing. Court of Appeals’ February 1, 2023 Order, Court of Appeal’s Docket #21. The Court of Appeals also requested that the Board cite to any pending or final cases that address the issue. *Id.* at 2.

On March 1, 2023, the Board filed its brief before the Court of Appeals. March 1, 2023 Court of Appeals Appellee Brief, Court of Appeal’s Docket #23. The Board informed the Court of the case of *Hodge v. Kentucky Parole Board*, 2021-CA-1512 (Ky. App. January 27, 2023) (Opinion attached at Appendix Tab A), where the Court of Appeals held that due process does not require the Board to conduct a final parole revocation hearing itself, but instead may delegate that task to ALJs.<sup>2</sup> The Board also directed the Court of Appeals to two then-pending cases addressing that same issue: *Ivy v. Kentucky Parole Board*, 2022-CA-0369 (Ky. App. March 10, 2023) (Unpublished and nonbinding, opinion attached at Appendix Tab B)<sup>3</sup>, which was at that time pending, but shortly thereafter the *Ivy* Court issued its opinion following *Hodge* and finding that both due process and Kentucky statutory law allow ALJs to conduct final revocation hearings; and *Starks v.*

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<sup>2</sup> This Court has also accepted *Hodge* on Discretionary Review, 2023-SC-0091.

<sup>3</sup> It appears that *Ivy* was only denied publication because *Hodge* had already been decided and designated as “to be published.” *Ivy v. Kentucky Parole Board*, 2022-CA-0369, April 11, 2023, Order Denying Motion to Publish, attached at Appendix Tab C (“Having considered the motion, the court orders that the motion be and is hereby, denied. The Court recently rendered an Opinion in *Hodge v. Kentucky Parole Board*, No. 2021-CA-1512-MR, which addresses the same issues raised in this appeal and was ordered to be published on March 24, 2023.”).

*Kentucky Parole Board*, 2022-CA-1463, which is being held in abeyance pending the outcome of this matter and *Hodge*.

Despite the well-reasoned opinion of the Franklin Circuit Court and the decisions in *Hodge* and *Ivy*, the Court of Appeals in this matter reversed course and held that both due process and statutory law prohibit the Board from using hearing officers to conduct final revocation hearings. *Shane v. Kentucky Parole Board*, 2022-CA-0135, (Ky. App. July 14, 2023). The Court found, despite Shane's rerelease onto parole, the matter was partly excepted from the mootness doctrine because the question before it was of a public nature, likely to reoccur in the future, and there was a need for an authoritative determination for future guidance. *Id.* at 4-5. The Court declined to address Shane's moot claims that the Board's order did not make the requisite findings pursuant to KRS 439.3106, and that the evidence was insufficient to establish that he was a danger to or could not be appropriately managed in the community. *Id.* at 9.

The Board subsequently sought discretionary review, which this Court granted.

### **ARGUMENT**

The Court of Appeals erred by reversing the Franklin Circuit Court and holding that both due process and Kentucky statutory law require that final parole revocation hearings be conducted by no less than two members of the Board. First, the issue was moot because Shane is no longer confined as a result of the parole revocation hearing. Second, due process requires a neutral and detached hearing body; it does not require that body be the Board. Third, no Kentucky statute prohibits the Board's use of an ALJ to conduct the hearing, provided that the Board makes the final decision regarding parole revocation. In fact, Kentucky statute expressly permits the Board to delegate duties to an ALJ. Because

the Court of Appeals erroneously applied the mootness doctrine and misinterpreted federal and state law, this Court should reverse its Opinion and Order and reinstate the Judgment of the Franklin Circuit Court.

**I. STANDARD OF REVIEW.**

The only issues in this appeal, whether Shane’s claims became moot upon his parole and whether due process and Kentucky statutes permit the Board to delegate to ALJs the responsibility of presiding over final parole revocation hearings, are purely questions of law. Questions of law are reviewed *de novo* by this Court. *University of Louisville v. Rothstein*, 532 S.W.3d 644, 647 (Ky. 2017) (citing *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007)). In such review, no deference is given to the conclusions reached by the Circuit Court or the Court of Appeals. *Commonwealth v. Love*, 334 S.W.3d 92, 93 (Ky. 2011).

**II. THE COURT OF APPEALS ERRED IN APPLYING THE PUBLIC INTEREST EXCEPTION TO MOOTNESS.**

Appellate courts lack jurisdiction to decide cases that have become moot because they lack justiciable controversies involving the rights of specific parties. *Commonwealth, Kentucky Bd. of Nursing v. Sullivan Univ. Sys., Inc.* 433 S.W.3d 341, 344 (Ky. 2014). An appeal is required to be dismissed as moot when a change in circumstances renders the court unable to grant meaningful relief. *Id.* (quoting *Med. Vision Group, P.S.C., v. Philpot*, 261 S.W.3d 485, 491 (Ky. 2008)). Exceptions to the mootness rule exist, however, and courts may review otherwise moot cases if they are capable of repetition yet evading review or involve collateral consequences, voluntary cessation, or matters of public interest. *Morgan v. Getter*, 441 S.W.3d 94, 99-101 (Ky. 2014).

For the public interest exception to apply, the matter must involve a question of a

public nature, there must be a need for an authorized determination for future guidance, and there must be a likelihood of recurrence of the question. *Morgan*, 441 S.W.3d at 102. The Kentucky Supreme Court has cautioned that the public interest exception is an extreme option, warning that courts “must be vigilant and use our discretion only when a demonstrated need justifies a ruling from this Court. Otherwise, the public interest ‘exception would be so broad as to virtually eliminate the notion of mootness.’” *Commonwealth v. Collinsworth*, 628 S.W.3d 82, 87 (Ky. 2021) (citing *Morgan*, 441 S.W.3d at 102).

The Court of Appeals acknowledged the mootness of this case but held that the public interest exception applied to the singular claim of whether the Parole Board could delegate final revocation hearings to ALJs, as there was a need for an “authoritative determination for the future guidance of public officers” because the Board’s revised revocation procedures permitted delegation to the ALJs. *Shane v. Kentucky Parole Board*, 2022-CA-0135, at 5 (Ky. App. July 14, 2023) (quoting *Collinsworth*, 628 S.W.3d at 87). But the Court of Appeals had already issued that authoritative opinion in *Hodge v. Kentucky Parole Board*, 2021-CA-1512 (Ordered to be published Mar. 24, 2023) (Discretionary Review Granted December 6, 2023, 2023-SC-0091) and reiterated the same in the unpublished case of *Ivy v. Kentucky Parole Board*, No. 2022-CA-369 (Mar. 10, 2023). By the same logic the Court of Appeals used to deny the motion to publish in *Ivy*, No. 2022-CA-369, –that “[t]he Court recently rendered an Opinion in *Hodge v. Kentucky Parole Board*, No. 2021-CA-1512, which addresses the same issues in this appeal and was ordered to be published” – it should be said that authoritative guidance for public officers already existed. Despite this, the Court applied the public interest exception here to render

a decision in an otherwise moot case because it disagreed with the authoritative guidance set forth in *Hodge* and followed in *Ivy*. However, disagreement with prior panels of the Court does not create a public interest exception to moot cases.<sup>4</sup>

Given the to-be-published *Hodge* opinion and the Court’s position in declining to publish *Ivy*, the public interest exception could not apply in *Shane*. The Court rendered an inappropriate advisory opinion that should not have been rendered. This Court should reverse and dismiss the appeal as moot.

**III. THE COURT OF APPEALS ERRED BY HOLDING DUE PROCESS PROHIBITS THE BOARD’S USE OF ALJS TO CONDUCT FINAL REVOCATION HEARINGS.**

The United States Supreme Court notes that “Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.” *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972). As a result, it held that “the full panoply of rights due a defendant in [a criminal] proceeding does not apply to parole revocations.” *Id.* The process requires “an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee’s behavior.” *Id.* at 484. The process is constitutionally sufficient if it provides:

- (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

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<sup>4</sup> The Court also erred in footnote 4, where the Court stated that since *Jones v. Bailey*, 576 S.W.3d 128 (Ky. 2019) did not address the statutory argument, only due process, this was a matter of first impression. *Shane*, 2022-CA-0135, at n. 4. However, *Ivy* does address the statutory issue, finding that ALJs holding final revocation hearings complies with due process and is consistent with Kentucky statutes. *Ivy*, 2022-CA-0369 at 9. If the Court wished further authoritative guidance on that matter, *Ivy* provided just that.

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 Kentucky, supervised individuals are subject to:

- (a) Violation revocation proceedings and possible incarceration for failure to comply with the conditions of supervision when such failure constitutes a significant risk to prior victims of the supervised individual or the community at large, and cannot be appropriately managed in the community; or
- (b) Sanctions other than revocation and incarceration as appropriate to the severity of the violation behavior, the risk of future criminal behavior by the offender, and the need for, and availability of, interventions which may assist the offender to remain compliant and crime-free in the community.

KRS 439.3106(1).

In *Jones v. Bailey*, 576 S.W.3d 128 (Ky. 2019), the Kentucky Supreme Court applied *Morrissey*, to find that supervised individuals have a constitutional right to a procedure beyond the single probable cause hearing and enables the individual to be heard and given an opportunity to present evidence. *Id.* Since *Jones*, the Board amended 501 KAR 1:040 to provide supervised individuals, such as Shane, a process that includes a probable cause hearing, a final revocation hearing (using a preponderance of evidence standard), and a written final revocation decision by the Board that includes the determination required by KRS 439.3106. This process – provided to Shane in this matter – is consistent with the requirements set forth in *Morrissey*.

Here, Shane does not dispute that he received ample notice, disclosure of the evidence against him, the right to counsel, the opportunity for a probable cause hearing

(which he waived), a final revocation hearing (at the preponderance of evidence standard), and the opportunity to testify, present witnesses, examine witnesses, and present documentation, a neutral and detached hearing body, and a written statement by the factfinders as to the evidence relied on and reasons for revocation. Accordingly, Shane’s right to due process at the final revocation hearing was satisfied in accordance with *Morrissey* and *Jones*.

Despite these procedures afforded to Shane, the Court of Appeals found that the Board’s delegation of Shane’s final revocation hearing to an ALJ denied him due process. *Shane v. Kentucky Parole Board*, 2022-CA-0135 at 7 (Ky. App. July 14, 2023). However, the use of hearing officers with legal training to conduct such hearings is not prohibited under *Morrissey*. In fact, the Court held due process required only “a ‘neutral and detached’ hearing body.” 408 U.S. at 489. While it mentioned the “traditional parole board” would be such a body, it did not require the hearing to be conducted by the Board itself. *Id.* Rather, *Morrissey* assumed that hearing officers would be used:

**Control over the required proceedings by the hearing officers** can assure that delaying tactics and other abuses sometimes present in the traditional adversary trial situation do not occur. Obviously, a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime.

*Id.* at 490 (emphasis added). And the Court further noted that “The few basis requirements set out above, which are applicable to future revocations at parole, should not impose a great burden on any State’s parole system.” *Id.* Assigning the duty of presiding over a final revocation hearing to an ALJ would only violate due process if the ALJ were not a neutral and detached hearing body. The Court of Appeals did not make this finding, and therefore erred when it held the use of an ALJ violated due process.

Rather than applying the process set forth in *Morrissey*, the Court of Appeals misapplied *Jones*. In *Jones*, this Court addressed the lack of any final revocation hearing provided for in Kentucky law, finding the Board’s sole reliance on the administrative record created at the probable cause hearing to fail to provide due process. *See* 576 S.W.3d at 144 (“Because Bailey was not afforded an evidentiary final revocation hearing where he could present evidence and confront witnesses, we must conclude he was denied due process.” (internal footnote omitted)). It did not require a final evidentiary hearing to be conducted solely by the Board.

*Jones* merely applied the processes set forth in *Morrissey* to Kentucky revocation proceedings, and therefore, only requires “a neutral and detached hearing body.” *Morrissey*, 408 U.S. at 489. Here, the Court of Appeals cited an abbreviated quote from *Jones* in support of the position that the Parole Board itself must hold the final revocation hearings:

We read *Jones* as requiring the Board to conduct the final revocation hearing so it may make an informed decision as to revocation, having heard all the evidence. “Due process requires that the Parole Board . . . conduct the constitutionally-required final evidentiary hearing prior to revocation[.]” *Jones*, 576 S.W.3d at 133.

*Shane*, 2022-CA-0135 at 7.

The entirety of that portion of *Jones* reads:

The Board does not conduct a final evidentiary hearing that extends beyond the initial probable cause determination nor does it inform the offender of his right to request counsel for that final revocation hearing. While Kentucky currently employs a two-stage process, it fails to satisfy federal constitutional standards. Due process requires that the Parole Board inform the offender of his right to request counsel to represent him at the final hearing; conduct the constitutionally-required final evidentiary hearing prior to revocation; provide the offender timely notice of the time and place of that final hearing; consider the evidence and determine pursuant to the preponderance of the evidence standard whether the offender committed the

alleged violation(s); and timely inform the offender in writing of the Board's decision, including the evidence relied on and reasons for the decision.

576 S.W.3d at 113.

Clearly, that list of requirements is merely a recitation of what process is owed to an offender consistent with the U.S. Supreme Court's holding in *Morrissey*, but it is not an edict as to what individual must carry out the specific tasks.

Here, in compliance with *Jones*, the Board provided Shane "a constitutional right to a hearing pursuant to procedures that enabled him to make his case to the Board, who would then have full awareness of all the evidence presented and would be able to decide whether there were any mitigating factors in his favor." *Id.* Only after that final hearing and the record it created did the Board develop and issue its decision. The Board is not bound by the ALJ's findings and conclusion as to whether a violation has occurred. 501 KAR 1:040(13)(2)(d). The Board can choose to adopt the ALJ's findings or not. The ALJ makes no finding, conclusion, or recommendation as to whether revocation is appropriate under KRS 439.3106. This process meets the requirements of *Morrissey*, as applied in *Jones*.

The Franklin Circuit Court correctly applied *Jones*, holding:

The Board's current process attempts to remedy the deficiencies identified by *Jones*; again, the Kentucky Supreme Court found that simply incorporating the findings at the probable cause hearing was insufficient, and that a final hearing must be an opportunity for evaluation of contested facts. *Jones*, 576 S.W.3d at 144. And, the final hearing now provides an offender the chance to show that he did not violate the conditions of his release, or if he did that mitigating circumstances exist. *Id.* (citing *Morrissey*, 408 U.S. at 488).

TR at 288.

The Franklin Circuit Court properly recognized that *Jones* did not require the Board

itself to hold the final revocation hearings. Rather, *Jones*'s reference to the insufficiency of the administrative record merely made clear that a single probable cause hearing is insufficient to create a record upon which a revocation decision can be based. The *Hodge* Court similarly found that nothing in *Morrissey* or *Jones* requires that the final hearing be before the Board itself, and that so long as the hearing provided notice of the allegations and an opportunity to respond thereto, adequate due process was provided. 2021-CA-1512, at 3 (Motion for Discretionary Review Granted December 6, 2023, 2023-SC-0091). Likewise, the *Ivy* court found that *Morrissey* foresaw the necessity of using hearing officers during the revocation process and that *Jones* permits the Parole Board to conduct its review by relying on the record made by an ALJ as long as the underlying hearing process includes more than just a probable cause hearing. No. 2022-CA-369, at 8 (Opinion rendered March 10, 2023) (unpublished and nonbinding, as *Hodge* was already ordered to-be-published on the subject)

All of the rights outlined in *Morrissey* and *Jones* are provided to offenders in the post-*Jones* hearing that Shane received. By the Court of Appeal's reasoning, the above-quoted passage would not only require the Board, personally, to hear every final revocation hearing, but it would also require the Parole Board to personally inform each offender of his right to counsel, personally serve the requisite notices, and personally inform the offender of the Board's decision. Obviously, those tasks are completed by individuals other than the Parole Board, and no one contends that the Parole Board must personally perform them. The *Jones* decision was about bringing Kentucky parole revocation proceedings in line with federal constitutional standards as set forth by *Morrissey*, which expressly contemplated the use of hearing officers. *Jones* takes its requirements for final revocation

hearings directly from *Morrissey*. See *Jones*, 576 S.W.3d at 137-38.

The use of hearing officers is practical and pragmatic, as *Morrissey* envisioned. The Kentucky Parole Board is statutorily constrained to nine people. KRS 439.320. Being tasked with personally conducting parole revocation hearings would add literally thousands of additional hearings to the Parole Board’s already packed docket. It would be logistically impossible to meet the additional demand, and the Parole Board cannot simply add more members to address the new workload. The use of Administrative Law Judges to address this reality is the exact kind of use envisioned by *Morrissey* and allowed by *Jones*. As attorneys admitted by this Court to practice in the Commonwealth, ALJs are uniquely equipped to handle these proceedings and provide findings on the requisite standard of proof. See KRS 439.341.

Still, the Parole Board retains its discretion. It may review the entire record, and it is not bound to the ALJ’s findings, and may choose whether to accept the ALJ’s findings of fact and conclusions of law. Moreover, the ALJ does not make any finding or recommendation as to whether revocation is appropriate. The decision regarding revocation is left to the Parole Board in exercising its unique discretion as empowered by the legislature. Accordingly, the Board’s use of ALJs to conduct final revocation hearings does not violate due process and is a reasonable and practical application of the use of hearing officers as allowed under *Morrissey* and *Jones*. This Court should reverse the Court of Appeals.

**IV. THE COURT OF APPEALS ERRED BY FINDING KENTUCKY LAW PROHIBITS AN ALJ FROM PRESIDING OVER A FINAL REVOCATION HEARING.**

The Court of Appeals misconstrued the relevant statutes to find that Kentucky law

requires the Board – rather than an ALJ – to conduct the final revocation hearing. But this Court need look no further than KRS 439.341, which provides:

Probable cause revocation hearings of probation, parole, and postincarceration supervision violators shall be conducted by hearing officers. These hearing officers shall be attorneys, appointed by the board and admitted to practice in Kentucky, who shall perform the aforementioned duties **and any others assigned by the board.**

(Emphasis added).

Here, the Board assigned its duty to conduct a final revocation hearing to a hearing officer. Assigning hearing officers to hear final revocation hearings is an additional duty assigned by the Board and is an appropriate exercise of its authority under KRS 439.341. In fact, few other duties of the Board could be said to be as related to or as reasonably empowered by the additional language of KRS 439.341.<sup>5</sup>

The Court of Appeals ignored this provision in KRS 439.341. Instead, it relied on KRS 439.440, which provides that “Any prisoner returned to state custody for violation of his or her release shall be heard by the board within sixty (60) days on the propriety of his or her rerelease.” But that statute, as with all statutes, “must be read as a whole and in context with other parts of the law.” *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005). Considered with KRS 439.341, KRS 439.440 clearly sets the time in which a hearing must be conducted, not who must conduct the hearing.

The Court also relied on KRS 439.330(1)(e), which sets forth duties of the Board. It requires the Board to “issue warrants for persons charged with violations of parole and post-incarceration supervision and conduct hearings on such charges,” but as the Court of

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<sup>5</sup> It is worth noting that to further ensure independent factfinding, the particular ALJ that holds the probable cause hearing for a specific offender will not hold the subsequent final revocation hearing. A different ALJ is assigned to conduct the subsequent final hearing.

Appeals failed to quote “**subject to the provisions of KRS 439.341, 532.043, and 532.400.**” KRS 439.330(3)(1)(e)(emphasis added).<sup>6</sup> As already explained, KRS 439.341 permits hearing officers to perform any other duties assigned by the Board, including the duties set forth in KRS 439.330(1)(e). Thus, delegation of final revocation hearings to ALJs is consistent with KRS 439.330(1)(e).

The Court of Appeals also relied on KRS 439.320(4), but it likewise does not require the Board to preside over final revocation hearings. KRS 439.320(4) provides, in relevant part:

Parole and final parole revocation hearings may be done by panels of the board, subject to the following requirements:

- (a) If a two (2) member panel is utilized, both members of the panel shall agree on the decision or the matter shall be referred to the full board;
- (b) If a three (3) member panel is utilized, two (2) of the three (3) members of the panel shall agree on a decision or the matter shall be referred to the full board; and
- (c) If a panel of four (4) members is utilized, a majority of the panel shall agree on a decision or the matter shall be referred to the full board.

Thus, KRS 439.320(4) simply describes how the Board may divide its work, allowing for decisions to be made in panels from 2 to 4 members. It says nothing about whether ALJs may conduct final revocation hearings, and it does not limit KRS 439.341, which again permits the Board to assign any other duties to hearing officers.

Here, the Parole Board’s final revocation decision was made by two board members. PBR at 44. Because the Board retained ultimate decision-making power

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<sup>6</sup> The Court of Appeals only quoted the opening clause of KRS 439.330(1)(e). *Shane v. Kentucky Parole Board*, 2022-CA-0135 at 7-8 (Ky. App. July 14, 2023) (“Further, KRS 439.330(1)(e) provides that one of the Board’s duties is to “[i]ssue warrants for persons charged with violations of parole and postincarceration supervision and *conduct hearings on such charges* .... (Emphasis added.)”) It failed to cite the second clause subjecting that duty to the provisions of KRS 439.341.

regarding whether to accept the ALJ's factual findings and whether to revoke parole, the use of a hearing officer to preside over the final revocation hearing does not run afoul of any Kentucky law. The two-person panel of the Board was the decision-maker who "did" the revocation decision-making pursuant to KRS 439.320(4) ("...final parole revocation hearings may be done by panels of the Board...").

Board members are currently tasked with, at least, their regular weekly meeting, victims hearings, face-to-face hearings for parole eligible inmates, file reviews on inmates for whom a face-to-face hearing is not required (KRS 439.340(2)), votes on cases brought before the full board pursuant to KRS 439.340(14)(a) or 439.320(a)-(c), reconsideration requests, parole revocation warrants, specialty early release requests (such as terminal medical related requests under KRS 439.3405), and revocations. Unlike some other state boards and commissions, the Parole Board is a full-time job. KRS 439.320(1).<sup>7</sup>

The legislature, recognizing the Board's workload and statutorily-constrained size, has provided the Board the ability to assign "any" duties to hearing officers, as long as the Board retains final decision-making authority. KRS 439.341. Assigning these post-*Jones* final parole revocation hearings to ALJs is the exact kind of assignment contemplated by the statute. The Board regularly utilizes four full-time ALJs working forty-hour weeks to meet the workload demand presented by the revocation hearing process. The delegation of this task is both necessary and allowed by statute.

For all of these reasons, Kentucky law does not prohibit the Board from delegating

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<sup>7</sup> In addition, the Parole Board undergoes training, deals with policy and procedural matters, may have precious time consumed by litigation or open records request, and faces the same limitations any organization may face in relation to expected and unexpected absences, scheduling, and technology issues.

final revocation hearings to ALJs. This Court should reverse the Court of Appeals.

**CONCLUSION**

The Court of Appeals erred when it found that due process and Kentucky law prohibit the Parole Board from delegating authority to preside over final revocation hearings to ALJs. This Court should reverse the Opinion of the Court of Appeals and reinstate the Franklin Circuit Court's Order dismissing Shane's Complaint.

Respectfully Submitted,

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