NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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March 29, 2021

Danielle Brown
9256 Mosby Street, Suite 104
Manassas, VA 20110

Re: *Commonwealth* v. *Harwinder Sangha*, MI 2020-565

Dear Ms. Brown:

This matter is before the court on Defendant's motion to dismiss a summons charging Defendant with driving without an ignition interlock system, in violation of Code § 18.2-272(C), a Class 1 misdemeanor.[1] The basis for the motion is that the Commonwealth Attorney has elected not to prosecute the case in this court.[2]

BACKGROUND

Like the vast majority of cases of this kind, this case began its judicial existence in the General District Court where, according to Defendant, the Commonwealth Attorney elected not to prosecute. Nonetheless, after Defendant entered a plea of not guilty, the General District Court conducted a trial without the Commonwealth Attorney by having the law enforcement officer testify, found Defendant guilty, and sentenced him to nine (9) months in jail, with 3 months suspended, and a fine of $2,500 with $1,000 suspended. Defendant timely

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[1] "Any person who drives or operates a motor vehicle on any highway, as defined in § 46.2-100, in the Commonwealth without a certified ignition interlock system as required by § 46.2-391.01 is guilty of a Class 1 misdemeanor and is subject to administrative revocation of his driver's license pursuant to §§ 46.2-389 and 46.2-391."

[2] The Commonwealth Attorney's website lists the categories of cases the Office is "handling" and further states that the Office will "not be involved" in misdemeanor cases (including traffic infractions) not listed. The court understands this to mean that the Office is electing not to prosecute the unlisted cases because he has determined that his resources should be focused on the listed categories of cases.

noted his appeal to this court and was released on bail.[3]

Trial in this court was scheduled for October 22, 2020. On the morning of trial, Defendant, by counsel, argued orally, and in an extensive supporting written motion, that, because the Commonwealth Attorney elected not to prosecute the case in this court, the charge should be dismissed. This court continued the trial to January, 2021 (and subsequently continued it to April 29, 2021) and took the motion under advisement.

By order of December 8, 2020, the court invited briefs *amicus curiae* from any interested party to be filed on or before December 29, 2020 addressing the following question:

> Whether the circuit court may conduct a trial where the Commonwealth Attorney has declined to prosecute a case and, if so, what role, if any, a police officer may play in such a trial and what role, if any, the court has in calling and examining witnesses. A brief *amicus curiae* should address, *inter alia*, the effect of Va. Const. Art. 1 § 5 and Va. Const. Art. 3, § 1, as well as the effect, if any, of Code § 15.2-1704(A), Code § 19.2-265.5, Va.Sup.Ct.R. 2:614, and *Brady* v. *Maryland*, 373 U.S. 83 (1963) and its progeny.

The court received briefs *amicus curiae* from the American Civil Liberties Union Foundation of Virginia, the Fairfax County Police Association, the Public Defender for the City and County of Fairfax, the Virginia Association of Criminal Defense Lawyers, the Commonwealth's Attorney for Fairfax County, and the Virginia Victim Assistance Network, all of which the court has carefully reviewed.

ANALYSIS

I.
The Commonwealth Attorney May Elect Not To Prosecute This Case

At the inception, one simple fact must be kept in mind; the Commonwealth of Virginia, a sovereign entity, is the real party in interest in a criminal proceeding. *See Johnson v. Woodard,* 281 Va. 403, 411 (2011) (in a criminal proceeding, "while the Commonwealth's Attorney may be advancing the interests of the . . . victim, the real party in interest is the Commonwealth"). In effect, the *Commonwealth*, as in all criminal cases, is the party "plaintiff" in this case, *i.e.*, the entity that initiated the case. The party "plaintiff" is not the law enforcement officer who issued the summons.

And it cannot be otherwise as Defendant is before the court only because he was issued a summons pursuant to the law enforcement officer's exercise of *his* specific, statutorily defined power as an agent of the Commonwealth to

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[3] This court declines to review the conduct of the trial in the General District Court as this case is in this court for a trial *de novo*, pursuant to Code § 16.1-136 ("Any appeal taken under the provisions of this chapter shall be heard *de novo* in the appellate court"), and the appeal "annuls the judgment of the inferior tribunal as completely as if there had been no previous trial." *Gaskill v. Commonwealth,* 206 Va. 486, 490 (1965). Thus, nothing in this opinion is intended to comment upon the General District Court proceedings; this opinion focuses solely on the case before this court.

detain Defendant and to command Defendant to "appear at a time and place to be specified in such summons . . . ." Code § 19.2-74(A)(1).[4]

Furthermore, because it is a judicial proceeding within which these issues arise, only an attorney may represent the Commonwealth. A non-attorney would be practicing law without a license were he/she to purport to represent the Commonwealth.[5] *See* Va.S.Ct.R. Part 6, Sec. I(2)(C):

> A person or entity engages in the practice of law when representing to another, by words or conduct, that one is authorized to do any of the following: . . . Represent another entity or person before a tribunal.[6]

Pursuant to the command of Va. Const. Art. 7 § 4 ("There shall be elected by the qualified voters of each county and city . . . an attorney for the Commonwealth . . . . The duties . . . of such officers shall be prescribed by general law or special act"), the Commonwealth Attorney represents the Commonwealth in criminal prosecutions. The duties of the elected Commonwealth Attorney are set forth in Code § 15.2-1627(B).

In pertinent part, Code § 15.2-1627(B) provides:

> The attorney for the Commonwealth and assistant attorney for the Commonwealth shall be a part of the department of law enforcement of the county or city in which he is elected or appointed, and shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging a felony, and **he may in his discretion, prosecute Class 1,** 2 and 3 **misdemeanors**, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of $500 or more, or both such confinement and fine. (Emphasis added).[7]

Code § 15.2-1627(B) is not, however, the only statutory provision

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[4] "Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of . . . any provision of this Code punishable as a Class 1 . . . misdemeanor . . ., the arresting officer shall take the name and address of such person and issue a summons . . . to appear at a time and place to be specified in such summons . . . . Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody."

[5] The General Assembly could authorize a law enforcement officer to represent the Commonwealth in place of a Commonwealth Attorney, but the General Assembly has not chosen to do so, as will be discussed, *infra*.

[6] Practicing law without a license is a Class 1 misdemeanor. *See* Code § 54.1-3904 (Any person "who practices law without being authorized or licensed shall be guilty of a Class 1 misdemeanor.").

[7] Code § 15.2-1627(B) thus does not address Class 4 misdemeanors (punishable by a fine of not more than $250) nor does it address traffic infractions which do not include a specific penalty, as they are punishable by a fine of not more than $250. *See* Code § 46.2-113. The instant case, however, involves a Class 1 misdemeanor; the court expresses no view on the effect on Class 4 misdemeanors and traffic infractions of the Commonwealth Attorney's election not to prosecute those categories of cases.

concerning the duties of the Commonwealth Attorney.[8] In seeming conflict with Code § 15.2-1627(B), Code § 19.2-201 provides:

> Every commissioner of the revenue, sheriff, constable or other officer shall promptly give information of the violation of any penal law to the attorney for the Commonwealth, who **shall forthwith institute and prosecute** all necessary and proper proceedings in such case . . . . (emphasis added).

This conflict is resolved by the rule of statutory construction that, "where there is a clear conflict between statutes, the more specific enactment prevails over the more general." *Eastlack v. Commonwealth,* 282 Va. 120, 126 (2011). Because Code § 15.2-1627(B) is the "more specific" statute in that it specifically addresses the classes of crimes which the Commonwealth Attorney is to required to prosecute and which he has discretion to prosecute, it prevails over Code § 19.2-201. Moreover, Code § 19.2-201 is part of Article 2 of Chapter 13 of Title 19.2, which relates to "Regular Grand Juries" and thus would not involve charges which the Commonwealth Attorney has elected not to prosecute. Finally, because "the use of 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent" (*Jamborsky* v. *Baskins*, 247 Va. 506, 511 (1994)), "shall" in Code § 19.2-201 is merely directory.

Thus, it is the duty of the Commonwealth Attorney to appear in court on behalf of the Commonwealth in a criminal case, although in cases involving a Class 1 misdemeanor, the Commonwealth Attorney may elect not to prosecute. But, importantly, no one else is given prosecutive authority in the absence of the Commonwealth Attorney, except the Attorney General, but only in very limited circumstances which do not apply to the instant case.[9]

With respect to a violation of Code § 18.2-272(C), therefore, because it is a Class 1 misdemeanor, the Commonwealth Attorney plainly has the discretion, pursuant to Code § 15.2-1627(B), not to prosecute an accused.

As observed in *Hicks v. Commonwealth,* 33 Va. App. 561 (2000), *rev'd on other grounds*, 36 Va. App. 49 (2001) (*en banc*), *aff'd in part and vacated in part*, 264 Va. 48 (2002), *rev'd and remanded*, 539 U.S. 113, *rev'd*, 267 Va. 573 (2004) (which commented on the Commonwealth's Attorney's discretion, but did not address the constitutional consequences of the Commonwealth's Attorney declining to prosecute):

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[8] By contrast, although not applicable to this case, Code § 16.1-232 appears to impose a duty on the Commonwealth Attorney to represent the Commonwealth in criminal matters appealed from the juvenile and domestic relations district court: "The attorney for the Commonwealth **shall** represent the Commonwealth in all cases appealed from the juvenile and domestic relations district court to the circuit court." (Emphasis added). This duty, however, is likely directory and not mandatory. See *Jamborsky* v. *Baskins*, 247 Va. 506, 511 (1994) ("the use of 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent").

[9] The Attorney General is forbidden "to institute or conduct criminal prosecutions in the circuit courts of the Commonwealth," "[u]nless specifically requested by the Governor to do so," except in sixteen (16) enumerated cases, half of which require the concurrence of the Commonwealth Attorney. Code § 2.2-511.

> While it would clearly be preferable for the Commonwealth to be represented by counsel in every case in which it is a party, the General Assembly has declined to mandate such representation. . . . Clearly, the General Assembly decided as a matter of policy to place **the discretion for the representation of the Commonwealth** in misdemeanor cases in the hands of the executive branch rather than the judicial branch of government.

33 Va. App. 561, 569 (emphasis added).[10]

Notably, *Hicks* refers to "the representation of the Commonwealth" as a power that rests only in the Commonwealth Attorney. And, if the Commonwealth Attorney elects not to prosecute a Class 1 misdemeanor, there is no one else authorized by the Virginia Constitution or by statute to prosecute it.[11]

There is, moreover, no statutory authority for the court to *request* the Commonwealth Attorney to appear in a case involving a violation of Code § 18.2-272(C). While Code § 46.2-385 authorizes a judge to request the Commonwealth Attorney to appear on behalf of the Commonwealth "in any contested criminal case wherein a resulting conviction is required to be reported to the Department under § 46.2-383," a conviction of a violation of Code § 18.2-272(C) is not required to be so reported because Code § 46.2-383(A) only requires reporting of the "convict[ion] of a charge described in subdivision 1 or 2 of § 46.2-382 or § 46.2-382.1."

In sum, therefore, the Commonwealth Attorney may elect not to prosecute the instant charge.

But that is not the end of the inquiry to resolve Defendant's motion. This court must address whether the court may still adjudicate the case or, because the Commonwealth Attorney has elected not to prosecute, whether the charge against Defendant should be dismissed.

II.
Neither A Law Enforcement Officer Nor A Crime Victim May Assume The Duties Of The Commonwealth Attorney

As relevant here, fundamental executive powers include the power to enforce the law and the power to prosecute criminal cases in a court.

As to the former, local law enforcement officers are:

> responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws,

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[10] This issue was not addressed by the *en banc* Court of Appeals, the Virginia Supreme Court, or the United States Supreme Court. It was only the panel's decision upholding the constitutionality of the "no-trespass" policy that was addressed by the United States Supreme Court in reversing the holding of the Virginia Supreme Court and the *en banc* decision of the Court of Appeals.

[11] There is nothing in *Hicks* that could be viewed as suggesting, because Code § 15.2-1627(B) allows the Commonwealth Attorney to elect not to prosecute, that someone else, *e.g.*, a law enforcement officer, could fill in for the Commonwealth Attorney.

regulations, and ordinances.

Code § 15.2-1704(A).

Sheriffs and the State Police have similar authority.[12] Crime victims are not assigned any executive powers by the Virginia Constitution or by statute.

By contrast, because the Commonwealth Attorney has the statutory "duty of prosecuting," a Commonwealth Attorney's authority of necessity includes, *inter alia*, the authority to make pre-trial motions, to participate in voir dire (if there is a jury), to make an opening statement, to call and examine witnesses and introduce evidence, to cross-examine defense witnesses, to object to evidence, and to make closing argument. In the absence of the Commonwealth Attorney, these functions could not be undertaken by a law enforcement officer or a crime victim.[13]

By statute, law enforcement officers and the Commonwealth Attorney have very different areas of authority and responsibility. As explained by the Court of Appeals:

> While police and prosecutors work together and ideally do so smoothly and cooperatively, they are separate, independent governmental entities with differing missions and responsibilities.

Amonett v. Commonwealth, 70 Va. App. 1, 7-8 (2019).

This concept is born out in Fairfax County by Code § 15.2-528, which states that, in the County Executive Form of Government:

> [The] department of law enforcement shall consist of such police as may be appointed pursuant to § 15.2-512, and police officers appointed by the board, pursuant to such section, including the chief of the department.

The only mention of the Commonwealth Attorney in Code § 15.2-528 is that the Commonwealth Attorney, along with the "department of law enforcement" and the sheriff, "shall be charged with the enforcement of all criminal laws throughout the county." Code § 15.2-528. Unlike Code § 15.2-1627(B), no specific duties are set forth.

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[12] A sheriff "shall enforce the law or see that it is enforced in the locality from which he is elected . . . ." Code § 15.2-1609. The State Police:

> are vested with the powers of a sheriff for the purpose of enforcing all the criminal laws of this Commonwealth . . . , and it shall be the duty of the Superintendent, his several assistants and police officers appointed by him to use their best efforts to enforce the same.

Code § 52-8.

[13] It is notable that Rule 7C:5 -- which applies only to the General District Court -- expressly allows, in the absence of the Commonwealth Attorney or other attorney prosecuting the case, "the representative of the Commonwealth shall be the law enforcement officer, or, if none, such person who appears on behalf of the Commonwealth, county, city or town in the case." No equivalent provision is found in Rule 3A:11.

Code § 15.2-836, which relates to the Urban County Executive Form of Government, is similar; the Commonwealth Attorney is a member of the department of law enforcement. But the Code provision goes on to state that the "attorney for the Commonwealth shall exercise the powers conferred and perform the duties imposed upon such officer by general law" -- which would include Code § 15.2-1627(B) and Code § 16.1-232 -- so Code § 15.2-836 is not an independent grant of power to the Commonwealth Attorney.

In light of the above, a law enforcement officer or a crime victim, by statute, can do none of the things that a Commonwealth Attorney is authorized to do, with one narrow exception. The exception is found in Code § 19.2-265.5, which allows the complaining witness (a law enforcement officer or a crime victim) in a misdemeanor case "to remain in court throughout the entire trial if necessary for the orderly presentation of witnesses for the prosecution" if "neither an attorney for the Commonwealth nor any other attorney for the prosecution is **present** . . . ." (Emphasis added).[14]

This authorization, however, is merely an exception to the "rule on witnesses" established by Code § 19.2-265.1.[15] *See* Code § 19.2-265.5 ("Notwithstanding any of the provisions of § 19.2-265.1"). And Code § 19.2-265.1 plainly contemplates the presence of a Commonwealth Attorney ("upon the motion of either the attorney for the Commonwealth or any defendant") at the commencement of the trial.

By using the word "present" in Code § 19.2-265.5, the General Assembly was not referring to a situation where no Commonwealth Attorney was *representing* the Commonwealth since the word "present" implies nothing more than a temporary physical absence from the courtroom. It would indeed be a very peculiar and obscure way to grant a non-lawyer the full prosecutorial authority of a Commonwealth Attorney to do so simply by creating an exception to the "rule on witnesses." Moreover, given the material distinction between the Commonwealth Attorney being temporarily absent from the courtroom and formally electing not to prosecute a case -- which means that the Commonwealth Attorney has evaluated the type of case and determined that it is not one that has prosecutive value in view of the Office's limited resources -- it is far more likely that the General Assembly would have spoken more plainly and directly if it had intended Code § 19.2-265.5 to be a general grant of authority for a non-lawyer law enforcement officer or crime victim to act in the role of an attorney by calling witnesses when the Commonwealth Attorney has not appeared to represent the

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[14] The title of Code § 19.2-265.5 is *Prosecuting misdemeanor cases without attorney*. Even if the title is used to construe the statute, the title does not shed any light on whether "present" in Code § 19.2-265.5 refers to the temporary physical absence of the Commonwealth Attorney from the courtroom or whether it refers to a situation where no Commonwealth Attorney was representing the Commonwealth. Moreover, the fact that the complaining witness may remain in court "throughout the entire trial" also does not help illuminate the meaning of "present" in Code § 19.2-265.5.

[15] "In the trial of every criminal case, the court, whether a court of record or a court not of record, may upon its own motion and shall **upon the motion of either the attorney for the Commonwealth** or any defendant, require the exclusion of every witness to be called, including, but not limited to, police officers or other investigators . . . ." (Emphasis added).

Commonwealth.[16]

In short, neither a law enforcement officer nor a crime victim has authority to assume, to any degree, the duties of the Commonwealth Attorney.[17]

III.
This Court May Not Adjudicate This Case

The starting point for the court's analysis of whether this court may adjudicate this case notwithstanding the Commonwealth Attorney's election not to prosecute is the Virginia Constitution. Flowing from the commands of Va. Const. Art. 1 § 5 and Va. Const. Art. 3, § 1 is the principle that the court cannot exercise executive power.

Va. Const. Art. 1 § 5 provides in pertinent part: "That the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct . . . ." This command is repeated, and its importance emphasized thereby, in Va. Const. Art. 3, § 1, which provides in pertinent part:

> The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time . . . .

In *Carter's Case,* 96 Va. 791 (1899), the Court commented on what are now Va. Const. Art. 1 § 5 and Va. Const. Art. 3, § 1: "Of such importance is this principle deemed that it is repeated . . . ." 96 Va. at 812. *See also Canales v. Torres Orellana,* 67 Va. App. 759 (2017):

> The fact that the framers of the Virginia Constitution included two provisions in the Virginia Constitution commanding that no branch of

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[16] It is presumably pursuant to this authority that the General District Court has traditionally conducted trials with just a law enforcement officer present in the courtroom at the time of trial, but where the Commonwealth Attorney has not elected not to prosecute and is merely outside the courtroom. The General District Court, of course, is a court not of record and defendant who has been convicted in the General District Court has a right of appeal for a trial *de novo* in the circuit court, which "annuls the judgment of the inferior tribunal as completely as if there had been no previous trial." *Gaskill, supra,* 206 Va. at 490.

[17] *Cf.* N.H. Rev. Stat. Ann. § 41:10-a:

> The selectmen of towns or the appropriate appointing authorities are hereby authorized to appoint and compensate one or more qualified members of the New Hampshire bar to serve as municipal prosecutors to represent the state, in place of police officers, in cases involving . . . violations or misdemeanors within the jurisdiction of the municipal or district courts except as provided in RSA 502-A:20-a and RSA 502:26-c. . . . Nothing in this section shall be construed to prohibit the state police from prosecuting any violation or misdemeanor in any district or municipal court in this state.

See also State ex rel. McLeod v. *Seaborn,* 270 S.C. 696, 699 (1978) ("the prosecution of misdemeanor traffic violations in the magistrates' courts by either the arresting officer or a supervisory officer assisting the arresting officer does not constitute the unlawful practice of law").

> government take actions properly belonging to another leaves no doubt as to the principle's importance as a bedrock pillar of our government. Indeed, the concept of separation of powers in Virginia government first appears as § 5 of the Virginia Declaration of Rights of 1776. It has continued in every Virginia Constitution since then. . . . Succinctly put in less legalistic terms, our Constitution's framers have clearly underscored this constitutional imperative thereby reminding us that, when it comes to separating and limiting the power and authority of government, they really mean it!

67 Va. App. at 789.

As noted in *Boyd v. County of Henrico,* 42 Va. App. 495, 521 (2004), "the structure of tripartite government creates a judicial presumption in favor of 'broad' prosecutorial discretion." Thus, "the institution of criminal charges, as well as their order and timing, are matters of prosecutorial discretion." *Bradshaw v. Commonwealth,* 228 Va. 484, 492 (1984). *See also Moore v. Commonwealth,* 59 Va. App. 795, 810 (2012) ("the prosecution is the first and, presumptively, best judge of where the public interest lies, and the trial court should not merely substitute its judgment for that of the prosecution.").

Further, in a case where the circuit court had erroneously "precluded the Commonwealth's Attorney from seeking the death penalty in the event [Defendant] is found guilty of capital murder," *In re: Robert F. Horan,* 271 Va. 258, 259 (2006), the Court concluded that "'prosecutorial discretion is an inherent executive power.'" 271 Va. at 264 (citation omitted). *See also Taylor v. Commonwealth,* 58 Va. App. 435, 442 (2011) ("Absent an unconstitutional abuse of that discretion, Virginia judges have no authority to substitute their judgment for the prosecutor's on such matters.").[18] Such prosecutorial discretion can only be understood to mean that a court cannot second guess a prosecutor with respect to the prosecutor's decisions on which cases to prosecute.[19]

In *In Re: Iris Lynn Phillips,* 265 Va. 81 (2003), the Court held that Va. Const. Art. 1 § 5 and Va. Const. Art. 3, § 1 mean that:

> "the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, but that either department may exercise the powers of another **to a limited extent.**"

265 Va. at 87 (citing *Winchester & Strasburg R.R. Co. v. Commonwealth,* 106 Va. 264, 268 (1906)) (emphasis added).

The "limited extent" to which the circuit court exercised executive authority in *Phillips* demonstrates just how truly limited that "limited extent" is: the circuit court could only "mak[e] a determination whether a petitioner

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[18] In the case at bar, there is no suggestion by Defendant that the Commonwealth Attorney is unconstitutionally abusing its discretion in electing not to prosecute. Indeed, it is Defendant who is requesting dismissal.

[19] The federal rule is similar. See *e.g., United States v. Karnes,* 531 F.2d 214, 216-217 (4th Cir. 1976) (court's "impartiality is destroyed when the court assumes the role of prosecutor and undertakes to produce evidence, *essential* to overcome the defendant's presumption of innocence, which the government has declined to present.").

has presented competent evidence supporting the specified statutory criteria" for "identifying felons who may qualify for restoration of their eligibility to vote . . . ." Moreover, while the circuit court could "approv[e] or den[y] . . . a petition," its denial of a petition "does not affect a convicted felon's constitutional right to apply directly to the Governor for restoration of the felon's voting eligibility" and a "felon seeking restoration of these rights is not required to file a petition in a circuit court before applying to the Governor for such relief." 265 Va. at 87. Thus, in effect, the circuit court had essentially no real executive power; at most, it shared a *de minimis* degree of executive power. Taking a role in prosecuting a misdemeanor charge, by contrast, entails a meaningful, and thus a much greater, exercise of executive power.

The power of the circuit courts -- the judicial power -- is set forth in Va. Con. Art. 6 § 1:

> The judicial power of the Commonwealth shall be vested in a Supreme Court and in such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish. Trial courts of general jurisdiction, appellate courts, and such other courts as shall be so designated by the General Assembly shall be known as courts of record.

In contrast to the Code provisions establishing the duties and responsibilities of the Commonwealth Attorney and law enforcement officers, the Code does not establish duties and responsibilities for judges; it establishes only the jurisdiction of the circuit court in Code § 17.1-513 as authorized by Va. Con. Art. 6 § 1:

> Subject to the foregoing limitations [on the jurisdiction of the Supreme Court], the General Assembly shall have the power to determine the original and appellate jurisdiction of the courts of the Commonwealth.

The power of a court, and the "essential function of the judiciary" is "the act of rendering judgment in matters properly before it . . . ." *Moreau* v. *Fuller*, 276 Va. 127, 136 (2008). Nothing in Va. Con. Art. 6 § 1 suggests that a circuit court has the authority to fill in for the Commonwealth Attorney when he has affirmatively decided not to prosecute a case since such filling in would not be the act of rendering judgment in a matter before the court.

Because a circuit court cannot exercise executive power, a court trying a criminal case can do none of the things that a Commonwealth Attorney is authorized to do. Indeed, the very fact of the occurrence of a trial without a Commonwealth Attorney means that the court has stepped into the executive's role in determining which cases should go forward because the court's role is limited to providing a forum where disputing parties may have their disputes resolved, not to determine which cases should go forward. And, because the Commonwealth Attorney would be entirely absent from a case he has elected not to prosecute, the "whole power" of the executive to prosecute would be effectively, and thus unconstitutionally, devolved to the court.[20]

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[20] In view of the constitutional principle of separation of powers -- which is presumed to be known by the General Assembly -- it cannot be inferred from Code § 15.2-1627(B) that, when the Commonwealth Attorney elects not to prosecute, the General

The General Assembly plainly contemplated that trials in the circuit court will only go forward if the Commonwealth Attorney is participating. Code § 19.2-258 states:

> If the accused plead not guilty, in person or by his counsel, the court, in its discretion, with the concurrence of the accused and **the attorney for the Commonwealth**, may hear and determine the case without the intervention of a jury. In each instance the court shall have and exercise all the powers and duties vested in juries by any statute relating to crimes and punishments. (Emphasis added).

In the absence of a Commonwealth Attorney, there is no one representing the Commonwealth.[21] As a result, there can be no proceeding in this court. It follows, if there can be no proceeding in this court, that this court must dismiss the charge, unless the court itself may call and examine witnesses.

IV.
The Court Has No Authority To Call, And Limited Authority To Examine, Witnesses

A court may, in a very limited circumstance, *examine* a witness. But such a power is not tantamount to a power to *call* a witness, *i.e.*, to choose which witnesses should testify.

The court's power to *examine* a witness is explained in *Mazer v.*

Assembly intended that charges would not be dismissed and that the court would fill in for the Commonwealth Attorney.

[21] In *Figueroa Ruiz* v. *Delgado*, 359 F.2d 718 (1st Cir. 1966), the First Circuit found a violation of due process "where the Commonwealth of Puerto Rico furnished no prosecutors in the District Court" and

> the Commonwealth's witnesses take the stand at the request of the trial judge, and are interrogated by him. They are then cross-examined by counsel for the defendant. Redirect, limited to what was brought out on cross, is conducted by the judge. Thereafter, if the defendant has witnesses, or chooses to take the stand, the examination in chief is conducted by his counsel. Cross-examination is conducted by the judge, and redirect by defendant's counsel. The judge can call prosecution witnesses for the purpose of rebuttal.

359 F.2d at 719.

See also Burhoe v. *Whaland*, 116 N.H. 222, 224 (1976) ("The authority of a trial judge to question witnesses is well established. . . . But the constitutional guarantee of due process is violated when the hearing officer presents the case for one party, cross-examines the witnesses of the other party, and then decides the case."); *People* v. *Martinez*, 185 Colo. 187, 189 (1974) ("assumption of the role of advocate for the prosecution is inconsistent with the proper function of the judiciary and constitutes reversible error"; "court not only moved *Sua sponte* for the admission of the transcript of the preliminary hearing into evidence, but called witnesses for the People, examined them and cross-examined defense witnesses. He made *Sua sponte* objections to defense counsel's questions and ruled on objections made to his own questions-many leading ones."); and *People* v. *Cofield*, 9 Ill. App. 3d 1048, 1051 (1973) ("trial judge called the State's witnesses, conducted the examinations and asked questions directed at eliciting testimony to support the allegations against the defendant"; "court acted as prosecutor and judge, and thus exceeded the grounds of judicial propriety.").

Commonwealth, 142 Va. 649 (1925):

> It is not to be inferred from what has been said [*i.e.*, the questions propounded to the witness by the court were irrelevant and their effect was to convey to the jury that the judge did not believe that the witness was telling the truth] that a trial judge may not **ask questions of a witness** either on his examination in chief or on cross-examination. The practice is common and perfectly permissible. Indeed, there are times when it is his duty to do so. He is not to sit there and see a failure of justice on account of omissions to prove facts plainly within the knowledge of a witness, but the character of his questions should not be such as to disclose bias on his part, or to discredit the truthfulness of the witness. In 16 C.J. section 2100, page 831, it is said:
>
> > "For the purpose of eliciting evidence which has not otherwise been brought out, it is proper for the judge to **put the questions to a witness** either on his examination in chief or on his cross-examination, and where anything material has been omitted, it is sometimes his duty to examine a witness."

142 Va. at 655 (emphasis added).

See also Goode v. Commonwealth, 217 Va. 863, 865 (1977) ("A trial judge has a right and, indeed, at times a duty to question a witness provided he does not disclose bias in so doing.").

While *Mazer* recognizes the authority of the court to *examine* witnesses, there is nothing in *Mazer* concerning a court's authority to *call* a witness. Rather, the plain inference of the above language is that the court may examine a witness only where a witness has been called by a party, and the parties have conducted their examination/cross-examination, but some fact has not been elicited.[22] Nothing in the court's authority to *ask questions* of a witness, and then only of a limited nature, can be understood to authorize the court to *call* a witness; that is the duty and responsibility of a party in an adversarial system of adjudication.

The limits of the court's authority to call witnesses is confirmed by Va.Sup.Ct.R. 2:614, which only permits the court to "call witnesses" in a civil case. Rule 2:614(a) (*Calling by the court in civil cases*). While the quoted language is arguably the caption for section (a), the better reading of the quoted language is that it is an essential part of section (a) in that it establishes the category of cases in which the court may call witnesses. And, even if the quoted language is a caption, "the caption or headline of the section, while accurately speaking, is not a part of it, it is valuable and indicative of legislative intent." *Krummert v. Commonwealth,* 186 Va. 581, 584 (1947). In this circumstance, of course, it is not "legislative intent" which is being divined -- as the Rules were adopted by the Virginia Supreme Court --

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[22] *Hicks, supra,* is not to the contrary as it did not "determine . . . whether the general district court judge's questions demonstrated an inappropriate bias or prejudice because the court granted Hicks' motion to strike the questions as well as his answers." 33 Va. App. at 568. Moreover, *Hicks* noted that, "by appealing to the circuit court for a trial *de novo*, a conviction in the district court is annulled . . . ." *Id.* at 569.

but the intent of the drafters of Rule 2:614. *See also Hawkins v. Commonwealth,* 255 Va. 261 (1998) ("title may be read in an attempt to ascertain an act's purpose, though it is no part of the act itself.").

By implication, therefore, pursuant to Rule 2:614, the court may not call a witness in a criminal case. That section (b) permits a court to "question witnesses" in "a civil or criminal case" "whether called by itself or a party" is not a grant of authority to the court to call witnesses in a criminal case; the "whether called by itself" language in section (b) refers to the court's authority in section (a) to call witnesses in civil cases and is not an independent grant of authority to call witnesses in criminal cases. Such an interpretation would make the limited authority of section (a) -- to call witnesses in civil cases -- meaningless, an interpretation a court may not adopt. *See e.g., Logan v. City Council of the City of Roanoke,* 275 Va. 483, 493 (2008) ("we presume that every part of a statute has some effect, and we will not consider any portion meaningless unless absolutely necessary.").

Moreover, as the Rules "are adopted to **implement established principles** under the common law" (Rule 2:102) (emphasis added) and, prior to the adoption of the Rules in 2012, there was no case law establishing that a court may call witnesses in a criminal case, viewing Rule 2:614 as authorizing a court to call witnesses in a criminal case stretches Rule 2:614 beyond permissible bounds. Thus, the best interpretation of Rule 2:614(a) is that allows a court to call witnesses in civil cases, but not in criminal cases.

Further, even where Va.Sup.Ct.R. 2:614 permits a court to call a witness, that authority "should be exercised with great care." Thus, the Rule contemplates that the court's calling of witnesses will only occur in very limited circumstances. The court's routinely calling witnesses in a criminal case to establish all the elements of an offense, when the Commonwealth Attorney has elected not to prosecute, is plainly not what Va.Sup.Ct.R. 2:614 contemplates.

The absence of authority to call witnesses would include the court inquiring, after a case has been announced, whether anyone in the courtroom would like to tell the court anything. In the great majority of cases, the only person responding would be the law enforcement officer who issued the summons to the defendant.

Merely inquiring whether anyone in the courtroom would like to tell the court anything oversteps the court's constitutional and statutory bounds because, by affording a law enforcement officer (or a victim) an opportunity to provide evidence in a case which the Commonwealth Attorney has affirmatively elected not to prosecute, the court would effectively be asking the law enforcement officer (or the victim) -- a mere witness with no authority to determine which cases to prosecute -- to decide whether to prosecute the case, in direct contravention of the decision of the Commonwealth Attorney, the only person with the authority to represent the Commonwealth. *See Bradshaw v. Commonwealth,* 228 Va. 484, 492 (1984) ("the institution of criminal charges, as well as their order and timing, are matters of prosecutorial discretion."). The court would thus be assigning to the law enforcement officer (or the victim) a duty which the Virginia Constitution and statutes assign to the Commonwealth Attorney, and which the court has no authority to reassign. *See* Va. Const. Art. 7 § 4 ("The duties . . . of [the Commonwealth Attorney] shall be prescribed by general law or special act") and Code § 15.2-1627(B) (setting forth the duties

of the elected Commonwealth Attorney).

The limited role of the court is part of an adversarial system of adjudication in which:

> [W]e follow the principle of party presentation. As this Court stated in *Greenlaw* v. *United States*, 554 U.S. 237 (2008), "in both civil and criminal cases, in the first instance and on appeal ..., we rely on the parties to frame the issues for decision and assign to courts **the role of neutral arbiter of matters the parties present.**" *Id.*, at 243. . . . [A]s a general rule, our system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." [*Castro* v. *United States*, 540 U.S. 375 (2003)] at 386 (Scalia, J., concurring in part and concurring in judgment).
>
> In short: "[C]ourts are essentially passive instruments of government." *United States* v. *Samuels*, 808 F.2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of *reh'g en banc*). They "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, **courts] normally decide only questions presented by the parties.**" *Ibid.*

United States v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (Emphasis added).

For this court to take a role in presenting the Commonwealth's case -- even a very minor role like calling and examining witnesses -- runs counter to the principle of party presentation and must be rejected by this court.

V.
The Commonwealth's Obligations Under *Brady* And Its Progeny Prevent The Court From Proceeding Without The Commonwealth Attorney

Highlighting that a criminal case cannot proceed without the Commonwealth Attorney is the Commonwealth Attorney's unique obligation under the Due Process Clauses of the United States Constitution and Virginia Constitution.

Pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), the Commonwealth has a duty to disclose exculpatory and impeachment evidence to an accused, a duty which Va.Sup.Ct.R. 3A:11(a)(2) emphasizes is a duty which lies with the Commonwealth Attorney: "The constitutional and statutory duties **of the Commonwealth's attorney** to provide exculpatory and/or impeachment evidence to an accused supersede any limitation or restriction on discovery provided pursuant to this Rule." (Emphasis added). *See also Burns v. Commonwealth,* 261 Va. 307, 328 (2001) ("In *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), the Supreme Court of the United States recognized that it is 'the individual prosecutor [who] has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.'").

Moreover, as the appellate courts have not established that law enforcement officers (or victims) have an independent duty to disclose *Brady* material to a defendant where no prosecutor is involved in the case, *Brady* material would not

be disclosed to an accused in the absence of a Commonwealth Attorney, nor would there be anyone even searching for, let alone disclosing, such evidence as the criminal record or prior inconsistent statements or other impeachment materials concerning a witness for the Commonwealth, or exculpatory notes, reports, examinations, lab tests, interview reports, or body camera videos.[23] Indeed, without a Commonwealth Attorney, law enforcement officers (and victims) are put in a difficult, if not impossible, position as they are generally not lawyers, and they would have to determine what every other officer knew, they would have to evaluate the potential witnesses and evidence, and would, most problematically, have to evaluate their own investigations (or, in the case of victims, their own stories).

Further, without the participation of the Commonwealth Attorney, the defendant has no meaningful mechanism to obtain exculpatory information.

Va.Sup.Ct.R. 3A:12(i) bars the use of a *subpoena duces tecum*:

> to obtain material from an agency or entity participating in, or charged with responsibility for, the investigation or prosecution of a criminal case such that the agency and its employees are deemed agents of the Commonwealth.

And, Code § 2.2-3706 gives law enforcement agencies discretion whether to disclose:

> [c]riminal investigative files, defined as any documents and information, including complaints, court orders, memoranda, notes, diagrams, maps, photographs, correspondence, reports, witness statements, and evidence relating to a criminal investigation or prosecution . . . .[24]

Under *Giglio* v. *United States*, 405 U.S. 150 (1972), moreover, it is the prosecutor who has a duty to alert the court if a witness (which may be a law enforcement officer or a victim) "present[s] known false evidence . . . ." 405 U.S. at 153. Indeed, "whether the nondisclosure was a result of negligence or

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[23] For purposes of Rule 7C:5 discovery in the general district court -- the only court in which it applies -- in the absence of the Commonwealth Attorney or other attorney prosecuting the case, "the representative of the Commonwealth shall be the law enforcement officer, or, if none, such person who appears on behalf of the Commonwealth, county, city or town in the case." Rule 7C:5 discovery, however, is limited to "(1) any relevant written or recorded statements or confessions made by the accused, or copies thereof and the substance of any oral statements and confession made by the accused to any law enforcement officer; and (2) any criminal record of the accused." Thus, even Rule 7C:5 does not require a law enforcement officer (or a victim) to provide *Brady* material to a defendant.

[24] While the court has the authority -- indeed, the duty -- to compel the Commonwealth Attorney to disclose *Brady* material, that duty only extends to cases being prosecuted, unlike the duty under Va. Con. Art. 1 § 8A ("Rights of victims of crime") and its implementing statutes. If the Commonwealth Attorney elects not to prosecute, he cannot be compelled to disclose *Brady* material. Thus, the court could not use its authority to compel the disclosure of *Brady* material as a roundabout means of forcing the Commonwealth Attorney to prosecute a case he has elected not to prosecute. Indeed, such an undertaking by the court would amount to an end run around the separation of powers.

design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government." *Id.* at 154. A law enforcement officer (or a victim) does not have these duties and would be hard pressed to carry them out since he would be monitoring himself.[25]

VI.

The Commonwealth Attorney Electing Not To Prosecute
Does Not Conflict With The *Nolle Prosequi* Statute

One final point should be addressed. If the court dismisses the charge based upon the Commonwealth Attorney electing not to prosecute pursuant to Code § 15.2-1627(B), Code § 15.2-1627(B) appears to conflict with Code § 19.2-265.3 ("Nolle prosequi shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown") because, to dismiss a case by a *nolle prosequi*, Code § 19.2-265.3 requires a motion of the Commonwealth and a showing of good cause. Thus, declining to prosecute could appear to be an end run around Code § 19.2-265.3. But it is not.

First, the requirement of a motion of the Commonwealth is effectively met when the Commonwealth Attorney elects not to prosecute because the Commonwealth Attorney notifies the court that he elects not to prosecute.

As to the "good cause" requirement of the *nolle prosequi* statute, it is first important to understand the very limited purpose of that requirement and thus the very limited reasons for which a court can deny a motion to *nolle prosequi* a charge. Judge (now Justice) Kelsey has cogently explained the reason for the "good cause" requirement of Code § 19.2-265.3:

> Under English common law, the public prosecutor could generally "enter a *nolle prosequi* in his discretion" without obtaining the trial court's permission. (Citations omitted). Some common law jurists, however, including Lord Chief Justice Mansfield, reserved the power to overrule a *nolle prosequi* when wielded as a weapon of "mischief or oppression" against an accused. (Citations omitted).
>
> Following Lord Mansfield's approach, Virginia jurists as early as 1803 likewise conditioned the *nolle prosequi* power upon receiving "the consent" of the trial court. (Citation omitted). In 1979, the General Assembly codified this tradition in Code § 19.2-265.3. *See* 1979 Va. Acts ch. 641. Under this statute, a trial court has the discretion to refuse a *nolle prosequi* if the prosecutor fails to show "good cause." *Id.* Consistent with the common law background of Code § 19.2-265.3, Virginia trial courts properly refuse a *nolle prosequi* when the circumstances "manifest a vindictive intent," (citation omitted), resulting in "oppressive and unfair trial tactics" or other

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[25] In light of the duty that *Brady* and its progeny impose on prosecutors, it could be argued that Code § 15.2-1627(B) (allowing the Commonwealth Attorney to elect not to prosecute certain offenses) is unconstitutional because it purports to allow the Commonwealth Attorney to avoid being involved in cases even though he has a duty to provide *Brady* material to defendants. The court, however, has "a duty when construing a statute to avoid any conflict with the Constitution." *Commonwealth v. Doe,* 278 Va. 223, 229 (2009). Thus, the court construes the Commonwealth Attorney's election not to prosecute pursuant to Code § 15.2-1627(B) of being, in effect, a motion to dismiss the charge so as to preserve the constitutionality of Code § 15.2-1627(B).

> prosecutorial misconduct (citation omitted). **Absent such mischief, however, courts defer to the public prosecutor given his constitutionally recognized prerogatives . . . .**

Duggins v. Commonwealth, 59 Va. App. 785, 790-791 (2012) (emphasis added).

See also Moore v. Commonwealth, 59 Va. App. 795, 808 (2012) (*nolle prosequi* "rules and statutes have been promulgated and enacted in order to curb abuses of executive prerogative and to protect a defendant from harassment by government through charging, dismissing, and then re-charging without placing a defendant in jeopardy.").[26]

Thus, the purpose of the "good cause" requirement is to give a defendant an opportunity to object to the Commonwealth's Attorney's dropping of a case to ensure that the defendant is not subject to "mischief" by the Commonwealth Attorney. When the Commonwealth Attorney elects not to prosecute pursuant to Code § 15.2-1627(B), a defendant could certainly object to the court that the election not to prosecute was due to such "mischief" by the Commonwealth Attorney and the court, in dismissing the case, could do so with prejudice to cure the "mischief." Thus, declining to prosecute pursuant to Code § 15.2-1627(B) is consistent with, not in conflict with, a *nolle prosequi* pursuant to Code § 19.2-265.3.

CONCLUSION

While the court is reluctant to dismiss the charge against Defendant because it would be better if what appears to be a legitimate charge was resolved on the merits and because the court is keenly aware of the consequences of its conclusion, nonetheless the court is bound by the law and cannot jump into the breach created by the absence of the Commonwealth Attorney and take on the role of the executive, even to a small degree. And the court cannot allow Defendant to be deprived of his rights pursuant to *Brady* and its progeny. To do otherwise would be to ignore the constitutional roles of the judiciary and the executive. If the court does so, then who is left to enforce the Virginia Constitution. The court is thus compelled to dismiss the charge against Defendant.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

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[26] Federal courts have recognized the same limitation to Rule 48(a) of the Federal Rules of Criminal Procedure, which requires a prosecutor to obtain "leave of court" before dismissing charges against a criminal defendant. See *e.g.*, *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741-42 (D.C. Cir. 2016) (the principal object of the "leave of court" requirement has been understood to be a narrow one -- to protect a defendant against prosecutorial harassment ... when the [g]overnment moves to dismiss an indictment over the defendant's objection.) (internal quotation marks omitted).

cc: Steve T. Descano
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V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	MI 2020-565
	)	
HARWINDER SANGHA	)	
	)	
Defendant	)	

ORDER

THIS MATTER came before the court on Defendant's motion to dismiss a summons charging Defendant with driving without an ignition interlock system, in violation of Code § 18.2-272(C), and

IT APPEARING to the court, for the reasons stated in the court's opinion letter of today's date, that Defendant's motion should be granted, it is hereby

ORDERED that Defendant's motion to dismiss a summons charging Defendant with driving without an ignition interlock system, in violation of Code § 18.2-272(C), is GRANTED, and it is further

ORDERED that the summons charging Defendant with driving without an ignition interlock system, in violation of Code § 18.2-272(C), is DISMISSED.

ENTERED this 29th day of March, 2021.

[redacted]

Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copy to:

Danielle Brown
Counsel for Defendant