



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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January 29, 2021

LETTER OPINION

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By Special Appearance

Re: Defendant's Motion to Dismiss in *Commonwealth of Virginia v. Sherrell D. Chastain*
Case Number MI-2020-961

Dear Counsel:

Before the Court is the Defendant's oral Motion to Dismiss, as supplemented by a memorandum filed on January 13, 2021. The specific question before the Court is whether the Motion to Dismiss should be granted or denied in a circumstance where:

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- (1) the defendant was charged with the misdemeanor crime of assault;¹
- (2) the charge arose out of a sworn criminal complaint made by the victim of the alleged assault, John Harris Karau (hereafter “victim” or “Mr. Karau”);²
- (3) Magistrate Marla McCormick then issued a Summons requiring the defendant’s appearance at a trial in the General District Court;
- (4) the Commonwealth declined to participate in the prosecution of the case;
- (5) the defendant was convicted at the trial in the General District Court;
- (6) the defendant noted an appeal and a trial date was set in the Circuit Court for January 7, 2021;
- (7) the Commonwealth’s Attorney was notified of the Circuit Court trial date but did not notify the victim;
- (8) the police officer who responded to the incident was notified of the Circuit Court trial date but did not notify the victim;
- (9) there is no indication in the court file indicating that the victim was otherwise notified of the Circuit Court trial date;
- (10) on the date of trial, the defendant and his counsel appeared but the victim did not appear; and
- (11) due to the non-appearance of the victim, the defense moved to dismiss the case.

In summary, the issue before the Court is as follows: ***Should the Court grant or deny the defendant’s motion to dismiss based on the non-appearance of the victim where the record indicates that the victim was never notified of the trial date by the Commonwealth’s Attorney as required by statute?*** For the reasons stated in this Opinion, the Court holds that the motion to dismiss must be denied.

The Court also addresses three related issues:

¹ The Court expresses no view as to the merits of the case.

² The Crime Victim and Witness Rights Act does not require that the defendant already have been convicted before an individual is denominated as a “victim.” That would render the Act nearly meaningless. As a federal magistrate judge stated in *U.S. v. Turner*, with respect to the federal Crime Victims’ Rights Act (“CVRA”), it would produce “an absurd result” if the CVRA was interpreted to be “inapplicable to this or any other criminal case unless and until the defendant is proved guilty beyond a reasonable doubt...” *U.S. v. Turner*, 367 F. Supp. 2d 319, 326 (E.D.N.Y. 2005) (Orenstein, J.). In *Turner*, the Court interpreted the definition of “crime victim” to include “any person who would be considered a ‘crime victim’ if the government were to establish the truth of the factual allegations in its charging instrument.” *Id.* This Court adopts the same interpretation. Virginia Code § 19.2-11.01(B) defines “victim,” among other criteria, as a “person who has suffered physical, psychological, or economic harm as a direct result of the commission of (a) a felony, (b) assault and battery in violation of Section 18.2-57...” Va. Code § 19.2-11.01(B)(i). The Summons charged the defendant with an assault on John Karau in violation of Virginia Code § 18.2-57. Therefore, for purposes of the Crime Victim and Witness Rights Act, Mr. Karau is a “victim.”

When the Commonwealth’s Attorney exercises his discretion not to prosecute a misdemeanor case that is subject to the notification provisions of the Crime Victim and Witness Rights Act, is the Commonwealth’s Attorney still required by Virginia Code § 19.2-11.01(A)(3)(b) and Virginia Code § 19.2-265.01 to provide the victim advance notification of judicial proceedings? For the reasons stated in this Opinion, the Court holds that the Commonwealth’s Attorney must comply with these notification provisions even when it opts out of the underlying prosecution.

Is a victim required by the Crime Victim and Witness Rights Act to make a specific “request” for advance notification of judicial proceedings in order to be entitled to such notice pursuant to Virginia Code § 19.2-11.01(A)(3)(b) and Virginia Code § 19.2-265.01? For the reasons stated in this Opinion, the Court holds that a victim is not required to specifically “request” advance notification of judicial proceedings in order to be statutorily entitled to such notice. In other words, the attorney for the Commonwealth must provide the victim advance notification of judicial proceedings so long as the victim has provided his name, address, and phone number.

In a case in which the Commonwealth’s Attorney is not participating, is a victim entitled to advance notification of judicial proceedings pursuant to Virginia Code § 19.2-11.01(A)(3)(b) and Virginia Code § 19.2-265.01 when the victim has provided his name, address, and phone number to an agent of the Commonwealth, a Fairfax County Police Department officer? For the reasons stated in this Opinion, the Court holds that a victim is entitled to advance notification under these circumstances.

I. FACTS

On August 24, 2020, according to documents in the court’s file, an event occurred in a parking lot of a Chick-fil-A.³ The police were called but did not make an arrest. Later that same day, Mr. Karau appeared before a magistrate and swore out a Criminal Complaint. Mr. Karau provided his name, phone number, and address, each of which appear in a document entitled “Information for Purpose of Securing a Warrant” that is in the court’s file. The magistrate issued a Summons, charging the defendant, Sherrell D. Chastain, with an assault on John Karau. A trial date of October 28, 2020 was set out in the Summons.⁴

³ For the limited purpose of determining whether to grant or deny the Motion to Dismiss based on the non-appearance of the victim on the trial date, the Court takes judicial notice of the contents of the court file. *See generally Williams v. Commonwealth*, 57 Va. App. 750, 761, 706 S.E2d 530, 535 (2011) (trial court took judicial notice of its “entire record”); *Taylor v. Commonwealth*, 28 Va. App. 1, 7-8, 502 S.E.2d 113, 116 (1998) (trial court took judicial notice of a Circuit Court date stamp on a Certificate of Analysis); *Nelson v. Commonwealth*, 2015 WL 9304447 (Va. Ct. App. Dec. 22, 2015) (trial court took judicial notice of a note in the trial court’s file). *See also* Va. Sup. Ct. R. 2:201.

⁴ The trial date was subsequently continued to December 14, 2020.

On December 14, 2020, the defendant, his counsel, and the victim appeared in the General District Court for trial.⁵ The defendant was convicted and sentenced. The defendant noted a timely appeal.⁶ The “Notice of Appeal – Criminal” indicates a Circuit Court trial date of

⁵ Defense counsel represents at footnote 1 of her *Memorandum in Support of Defendant’s Oral Motion to Dismiss* that the “complaining witness” was present at the trial. Memo. in Support of Oral Mot. to Dismiss 1 n.1 (Jan. 13, 2021). At Page 8 of the same memorandum, defense counsel indicates that “... the alleged victim was present in the General District Court courtroom where undersigned counsel notified the presiding judge of intention to appeal this matter to Circuit Court and sought a continuance of bond.” *Id.* at 8.

⁶ At the hearing on January 29, 2021, the Commonwealth, by Assistant Commonwealth’s Attorney Claiborne Richardson, presented a document entitled “Praeceptum for Special Appearance.” The Commonwealth asserted in this document that it was appearing “specially and specifically only to address that the appeal has not been perfected and that the Commonwealth’s Attorney is not a proper party.” Praeceptum For Special Appearance 1 (Jan. 29, 2021). The Commonwealth argued the following:

That the defendant was found guilty in Fairfax County General District Court, after a trial, regarding a misdemeanor citizen warrant issued by a magistrate and that the Commonwealth’s Attorney’s Office did not participate in or initiate a trial and no information has been given by the defendant that the police department participated in said trial. That upon a finding of guilt upon the defendant, the defendant unsuccessfully attempted to perfect an appeal. The defendant did not inform the Clerk of the General District Court or the Circuit Court that the Commonwealth’s Attorney was not a party and neglected to place the name and address of the complainant upon the appeal request, thereby voiding the appeal and its Notice. **THEREFORE**, this matter should be remanded to the Fairfax County General District Court to place the proper parties and addresses upon the notifications for any appeal that may be available and produce the proper information.

Praeceptum For Special Appearance 1 (Jan. 29, 2021) [emphasis in original]. The Commonwealth cites no authority in support of its position and the Court finds the assertion that the Defendant failed to perfect his appeal to be without merit. Virginia Code §16.1-132 sets out the requirement for an appeal from the General District Court. It requires that the appeal be filed within ten days of conviction. Va. Code § 16.1-132. That was done here. There is no requirement in the statute that the defendant “inform the Clerk of the General District Court or the Circuit Court that the Commonwealth’s Attorney [is] not a party,” nor is there a requirement that the defendant “place the name and address of the complainant upon the appeal request,” nor does the statute state that the failure to do so “void[s] the appeal and its Notice.” *Id.* See, e.g., *Hill v. Middlesex Cty.*, 12 Va. App. 58, 59-60, 402 S.E.2d 243 (1991) (“No condition is imposed upon the exercise of the statutory right [of appeal] other than the requirement that the appeal be made within ten days from conviction in the district court.”). When a criminal case is initiated based on a sworn criminal complaint by a civilian complainant, and a magistrate finds probable

January 7, 2021, which date it appears the defendant initialed, along with initialing that the trial would be non-jury and that no interpreter was necessary. There is no indication on the face of the Notice of Appeal, or in any other document in the Court file, that Mr. Karau was notified of the Circuit Court trial date.⁷

On December 28, 2020, the defendant filed a Motion to Dismiss based on the Commonwealth's Attorney's determination not to participate in the prosecution. The defendant argued in this motion "that a trial without a Commonwealth's attorney violates his due process rights." Mot. to Dismiss 1 (Dec. 28, 2020). The defendant further argued that the defendant is "being prosecuted by a private individual, acting in his own capacity, on behalf of the Commonwealth, who intends to personally prosecute the defendant through trial" and that this constitutes a prohibited act. *Id.* This motion is not before the Court today and the Court expresses no view with regard to its merits.⁸

On January 7, 2021, the Court called the case. Defense counsel stated the following⁹:

Counsel: This was going to be a motion for dismissal. And if not, the motion not be granted, then trial. However, the victim is not here, so I'm asking the Court to dismiss because the victim is not here.

Court: Counsel and Mr. ... is it Mr. Chastain?

Defendant: Yes sir.

Court: Why don't you come up here. Mr. Chastain, sit at the second table, Counsel sit at the first table please. I received, this morning, your 20 page brief on the motion to dismiss. So I have not had a chance to study it at this point. And

cause to issue a Summons, the case is the Commonwealth of Virginia v. the Defendant, not the Victim v. the Defendant. *See, generally*, Va. Code §19.2-73 and Va. Sup. Ct. R. 3A:4.

⁷ The Clerk of the Circuit Court did issue a "NOTICE OF HEARING DATE" on December 28, 2020, but it was sent only to the defendant, police officer, and Commonwealth's Attorney.

⁸ Neither the Commonwealth nor the victim was served with the motion or the memorandum in support of the motion. Defense counsel's Certificate of Service reads as follows: "Pursuant to Rule 3A:21(a), copies of written motions and notices must be served on each counsel of record. Since there is no counsel of record, and the victim in a criminal case who is individually pursuing a prosecution is not a party in a criminal case, counsel has not served anyone." *See* Mot. to Dismiss 3 (Dec. 28, 2020) and Memo. in Support of Oral Mot. to Dismiss 9 (Jan. 13, 2021).

⁹ Verbatim quotations from the January 7, 2021 are based on a review of the recording of court proceedings. There was no court reporter present at the hearing.

I'm not in a position certainly to rule on it. Am I correct that the victim in this case has not been given a copy of your motion?

Counsel: He does not have a copy of the motion because he is a victim in the case, as opposed to a prosecuting attorney. My understanding as to the rules of court is that I am to serve opposing counsel, and because there is no opposing counsel, I had no one to serve. However, he's not here physically present for the trial, that motion aside, which makes the motion moot. And because he is not present, I'm asking for dismissal for the inability of that party to make a case as a whole. He is not here, so that motion is irrelevant.

Court: And what is the name of the victim?

Counsel: Mr. Karau, I believe it's John Karau.

Hr'g (Jan. 7, 2021).

The Court then inquired of the Court Clerk whether there was any indication in the file that the Clerk of the Court had notified the victim of the trial date and was advised that there was no indication in the file that this was done. The Court then inquired of Fairfax County Police Department Officer Iva Robertson, who was the officer who responded to the scene of the alleged assault, as to whether she had notified the victim. The officer told the Court that she had not done so. The Court then asked the Assistant Commonwealth's Attorney present in the courtroom whether the Commonwealth had notified the victim. Assistant Commonwealth's Attorney Renee Hayes stated that "we did try to notify the victim, but because the appeal paperwork came up as a civilian complaint, we didn't have any contact information for the victim and so we didn't we weren't able to send notice that way as well."¹⁰ *Id.*

Defense counsel argued for dismissal of the case due to the non-appearance of the victim. The Court initially denied the motion to dismiss and stated that the "next question is how does the victim get notified to be here at the next appearance." *Id.* After further argument from the defense, the Court withdrew its denial of the motion to dismiss in order to give further consideration to the matter. The Court ordered the defendant to file a pleading regarding its oral motion to dismiss and ordered the defense to serve the Commonwealth with the motion. The Court described the issue before the Court as follows: "Whether your motion to dismiss should be granted where the victim is not present and the victim was not notified by the Commonwealth, which is what they acknowledge they did not do." *Id.* The Court also gave the

¹⁰ The victim's address and phone number were in the court file in multiple locations. The Court asked the Commonwealth: "So, do you know why, if the victim's address and phone number's in the file, do you know why the Commonwealth was unable to notify the victim?" The Commonwealth responded: "Your honor, I don't. I looked at what we had in the appeal paperwork and I didn't see an address on it. We didn't, I don't know whether we checked the Circuit Court file, but that would be my only representation." Hr'g (Jan. 7, 2021).

Commonwealth a deadline to file its response and directed that the Commonwealth “be present at the argument, because if I understand it, what the defense is asking is that I dismiss this case because the victim is not here when the Commonwealth has failed to notify the victim. And I have not had this issue come up before. And I want the opportunity to think further about it.” *Id.* Argument was set for January 29, 2021.

On January 13, 2021, the defendant filed its Memorandum in Support of Defendant’s Oral Motion to Dismiss. On January 22, 2021, the Commonwealth made a special appearance in a filing entitled Commonwealth’s Response to the Defendant’s Motion to Dismiss. On January 29, 2021, the Court heard argument on the Defendant’s oral motion to dismiss.

II. DISCUSSION WITH REGARD TO VICTIM RIGHTS OBLIGATIONS OF THE COMMONWEALTH’S ATTORNEY

A. Position of the Commonwealth’s Attorney

The Commonwealth’s Attorney makes two arguments in its response.¹¹

First, the Commonwealth argues that it is under no obligation to provide notice to a civilian complainant in a case in which it is not participating. Commonwealth’s Resp. 2 (Jan. 22, 2021). Whether this is correct or not, it is also not germane to the issues now before the Court. Any entitlement that Mr. Karau had to notice from the Commonwealth is based on his status as a victim of an alleged assault, not on his status as a civilian complainant.

Second, the Commonwealth argues that it was not required to provide advance notice to the victim when the victim did not provide a written request to the Commonwealth’s Attorney’s Office. *Id.* at 4. The Commonwealth asserts: “[B]efore the Commonwealth’s Attorney’s office is obligated to provide advance notice of case hearing and status information, the victim must make a written request to the Commonwealth’s Attorney’s office and provide their name, address, and telephone number.” *Id.* at 4. The Commonwealth further asserts that “the civilian complaint/victim did not make such a request.” *Id.* And, therefore, “[b]ecause this victim did not provide such request to the office, the Commonwealth’s Attorney’s office was not obligated to provide notice to this victim/civilian complainant.” *Id.* at 4-5.

The Court disagrees with the position of the Commonwealth’s Attorney. For the reasons stated below, a written request from the victim to the Commonwealth’s Attorney is not required in order to trigger the Commonwealth’s obligations to provide advance notification of judicial proceedings.

Before turning to that issue, however, there are two other reasons why the Court does not accept the Commonwealth’s Attorney’s position that it was under no obligation to provide the victim advance notification.

¹¹ The Commonwealth expresses no view on the merits of the Defendant’s Motion to Dismiss.

First, absent from the Commonwealth's Response is a representation that the victim was provided the statutorily-required form pursuant to Virginia Code § 19.2-11.01(A). That form "shall include a telephone number by which the victim can receive further information and assistance in securing the rights afforded crime victims, *the name, address and telephone number of the office of the attorney for the Commonwealth*, the name, address and telephone number of the investigating law-enforcement agency, and a summary of the victim's rights under §40.1-28.7:2." Va. Code § 19.2-11.01(A) [emphasis added].

Second, also absent from the Commonwealth's Response is a representation that the victim was provided the statutorily-required warning pursuant to Virginia Code § 19.2-11.01(A)(3)(e). That warning reads in part as follows: "Victims shall be advised that, in order to protect their right to receive notices and offer input, all agencies and persons having such duties must have current victim addresses and telephone numbers given by the victims." Va. Code § 19.2-11.01(A)(3)(e).

These statutory notices are mandatory and their importance obvious. The notices are especially significant, indeed crucial, in a case in which the Commonwealth's Attorney declines to participate, meaning the victim will have no other contact or interaction with the Commonwealth's Attorney. The mandatory notices tell a victim both what he needs to do in order to be provided advance notification and how to reach the Commonwealth's Attorney. Absent representations that these notices were provided, the Court cannot accept – as asserted by the Commonwealth's Attorney – that the victim's failure to make a specific request for advance notification is dispositive.

It should be emphasized here that, even if the victim did receive both statutory notifications, the Court would still find that the Commonwealth's Attorney did not comply with its obligation to provide advance notification of judicial proceedings to a victim. As discussed below, this is (1) because a specific request is not required; and (2) because the victim – by providing his name, address and phone number to the Fairfax County Police Department, an agent of the Commonwealth – satisfied the statutory requirement to be entitled to advance notification.

B. The Commonwealth of Virginia's Commitment to the Rights of Crime Victims

The Commonwealth of Virginia is committed to the robust and vigorous protection of the rights of crime victims. Nothing illustrates this point more clearly than the fact that rights of victims are not only codified by statute but by the Virginia Constitution. Article I, Section 8-A of the Constitution begins as follows:

That in criminal prosecutions, the victim shall be accorded fairness, dignity and respect by the officers, employees and agents of the Commonwealth and its political subdivisions and officers of the courts and, as the General Assembly may define and provide by law, may be accorded rights to reasonable and appropriate notice, information, restitution, protection, and access to a meaningful role in the criminal justice process.

Va. Const. art. I, § 8-A.

The General Assembly has done exactly what the Constitution authorized it to do – enact laws to protect the rights of victims. Virginia Code § 19.2-11.01, known as the Crime Victim and Witness Rights Act, begins as follows:

In recognition of the Commonwealth’s concern for the victims and witnesses of crime, it is the purpose of this chapter to ensure that the full impact of crime is brought to the attention of the courts of the Commonwealth; that crime victims and witnesses are treated with dignity, respect and sensitivity; and that their privacy is protected to the extent permissible under law. It is the further purpose of this chapter to ensure that victims and witnesses are informed of the rights provided to them under the laws of the Commonwealth; that they receive authorized services as appropriate; and that they have the opportunity to be heard by law-enforcement agencies, attorneys for the Commonwealth, corrections agencies and the judiciary at all critical stages of the criminal justice process to the extent permissible under law.

Va. Code § 19.2-11.01(A).

C. Advance Notification is a Critical Right of Crime Victims

The right of crime victims to advance notice of judicial proceedings is a core protection afforded victims. The Constitution explicitly lists as one of the rights that may be provided by the General Assembly to crime victims “[t]he right to receive timely notification of judicial proceedings.” Va. Const. art. I, § 8-A(4). The General Assembly provided just such a right. See Va. Code § 19.2-11.01(A)(3)(b), which reads: “Victims shall receive advance notification when practicable from the attorney for the Commonwealth of judicial proceedings relating to their case and shall be notified when practicable of any change in court dates in accordance with Section 19.2-265.01 if they have provided their names, current addresses and telephone numbers.” Similarly, Virginia Code § 19.2-265.01 states, in part, “The attorney for the Commonwealth shall give prior notice when practicable of such trial and attendant proceedings and changes in the scheduling thereof to any known victim and to any adult chosen in accordance with this section by a minor victim, at the address or telephone number, or both, provided in writing by such person.” Va. Code § 19.2-265.01.¹²

D. The Advance Notification Obligation of the “Attorney for the Commonwealth” Does Not Depend on Whether the Commonwealth is Participating in the Prosecution

The Commonwealth’s Attorney’s constitutional and statutory obligations to protect the rights of crime victims is not excused or negated or diminished in those cases in which the

¹² See also Va. Code § 16.1-302.1(A) (Imposing an obligation on the Commonwealth’s Attorney to notify victims of court proceedings in the Juvenile and Domestic Relations District Court).

Commonwealth's Attorney exercises its discretion not to participate in a prosecution. In other words, while the Commonwealth's Attorney may exercise its discretion not to participate in certain misdemeanor prosecutions, it has no discretion to opt out of the Crime Victim and Witness Rights Act. The Crime Victim and Witness Rights Act makes no distinction between those cases in which the Commonwealth's Attorney *is* participating in the prosecution and those cases in which the Commonwealth's Attorney *is not* participating in the prosecution. *See generally* Va. Code § 19.2-11.01. *Compare with* Va. Sup. Ct. R. 7C:5(b) (imposing a discovery obligation on law enforcement officers if the Commonwealth's Attorney is not participating in the prosecution).

Significantly, the Commonwealth's Attorney's response does not assert a contrary position. In other words, the Commonwealth's Attorney does not argue that it had no advance notification obligation because it was not prosecuting the case. Rather, the Commonwealth argues that it was relieved of this obligation because the victim never requested advance notification. Commonwealth's Resp. 4 (Jan. 22, 2021).

The Court accepts, of course, Ms. Hayes' factual representation that "the civilian complainant/victim did not make such a request." *Id.* What the Court does not accept is that a request was required.

E. A Crime Victim's Right to Advance Notification is Not Conditioned on a Request

Numerous sections of the Crime Victim and Witness Rights Act condition the provision of services on a request from the victim. *See, e.g.*, Va. Code § 19.2-11.01(A)(3)(c) (victim notification regarding appeal or habeas corpus proceedings required "if requested"); Va. Code § 19.2-11.01(A)(3)(g) (victim notification by the Commissioner of Behavioral Health and Developmental Services of the release of a defendant in certain circumstances "[u]pon the victim's request."); Va. Code § 19.2-11.01(A)(4)(d) (consultation with victim regarding plea agreements required "upon the victim's written request"); Va. Code § 19.2-11.01(A)(4)(d) (victim notification of a proceeding in which a plea agreement will be tendered to the court required "[u]pon the victim's written request"); *and* Va. Code § 19.2-11.01(A)(6)(a) (victim notification of case disposition required "[w]ithin 30 days of receipt of a victim's written request...").

In contrast, Virginia Code § 19.2-11.01(A)(3)(b) has no "upon request" requirement.¹³ It reads in its entirety: "Victims shall receive advance notification when practicable from the

¹³ Certain other states do condition notification of judicial proceedings on a specific request. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-4409(C) ("On receiving the notice from the court, the prosecutor's office shall, *on request*, give notice to the victim in a timely manner of scheduled proceedings and any changes in that schedule, including any continuances.") [emphasis added]; Md. Code Ann., Crim. Proc. § 11-104(e)(1) ("The prosecuting attorney shall send a victim or victim's representative prior notice of each court proceeding in the case ... *if * * * (ii) the victim or victim's representative has filed a notification request...*") [emphasis added].

attorney for the Commonwealth of judicial proceedings relating to their case and shall be notified when practicable of any change in court dates in accordance with Section 19.2-265.01 if they have provided their names, current addresses and telephone numbers.”¹⁴ Va. Code § 19.2-11.01(A)(3)(b).

The Court cannot read into a statute a requirement that does not exist – especially when it would have the effect of depriving victims of a right to which they are entitled and especially when it would work a particular hardship on victims in criminal cases that the Commonwealth’s Attorney declines to prosecute. In such situations, the “attorney for the Commonwealth” will have no contact or interaction with the victim. The “attorney for the Commonwealth” will be a complete stranger to the victim. So, how exactly is a victim to figure out who is the “attorney for the Commonwealth” to whom the purported “request” must be made, particularly if the victim has not been provided contact information for the Commonwealth’s Attorney (as required) or warned that he has to provide all “agencies and persons” having notice obligations with his current name and address (as also required)?

Victim rights statutes, in general, are to be liberally construed in order to effectuate their purposes. This is true of both the federal Crime Victim Rights Act (“CVRA”)¹⁵ and comparable state statutes.¹⁶ Here, the Commonwealth’s Attorney not only fails to give the statute a liberal construction but imposes on victims a “request” requirement that does not appear in the statute itself.

F. The Victim “Provided” His Name, Current Address, and Telephone Number

Virginia Code § 19.2-11.01(A)(3)(b) requires that victims “have provided their names, current addresses and telephone numbers.” The victim did so. It is an undisputed fact that the victim’s name, address, and telephone number was provided to the Fairfax County Police

¹⁴ Not only does the Commonwealth read into this statute a “request” requirement but the additional requirement that the “request” be in writing. While Va. Code § 19.2-265.01 does require that the contact information be “provided in writing,” Va. Code § 19.2-11.01(A)(3)(b) does not contain such a requirement. In any event, the court file includes the written police report in which the victim communicated his name, address and phone number. Surely, even if a writing was required, the writing would not need to be handwritten or typed by the victim himself in order to qualify the victim for services.

¹⁵ See *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008), *United States v. Nix*, 256 F. Supp. 3d 272, 278 (W.D.N.Y. 2017), and *United States v. Mahon*, 2010 WL 94247, at *1 (D. Ariz. 2010).

¹⁶ See, e.g., *People v. Fawaz*, 299 Mich. App. 55, 65, 829 N.W.2d 259, 265 (2012) (Michigan); *Dester v. Dester*, 50 Kan. App. 2d 914, 917, 335 P.3d 119, 122 (2014) (Kansas); Ariz. Rev. Stat. Ann. §13-4418 (Arizona).

Department. The Incident/Investigation Report that is in the court file lists Mr. Karau under the “Victims” section and has his name, address, and home phone number.¹⁷

It is also undisputed that the Fairfax County Police Department is an agent of the Commonwealth, a point that is frequently noted in the context of criminal discovery. “Where an agency is such a part of the prosecution, the prosecutor will be charged with constructive knowledge of agency information and Rule 3A:11 provisions will apply to the agency.” *Ramirez v. Commonwealth*, 20 Va. App. 292, 297 n.1, 456 S.E.2d 531, 533 n.1 (1995) (citing *Cox v. Commonwealth*, 227 Va. 324, 329 n.4, 315 S.E.2d 228, 231 n.4 (1984)). See also *Commonwealth v. Marsh*, 65 Va. Cir. 229 (2004) (denying defendant’s subpoena duces tecum because the dispatcher was “equally employed on behalf of the Virginia State Police, the Lancaster County Sheriff’s Department and the Town of Kilmarnock Police Department, all three of which acted as agents for the Commonwealth” and ordering discovery under Va. Sup. Ct. R. 3A:11).¹⁸

The Crime Victim and Witness Rights Act does not state that the victim must provide “their names, current addresses and telephone numbers” directly to the Commonwealth’s Attorney. To read such a requirement into the statute – especially in a case in which the Commonwealth’s Attorney declines to participate in the prosecution and, therefore, will have no contact with the victim – would convert the Crime Victim and Witness Rights Act from a statute designed “to ensure that the full impact of crime is brought to the attention of the courts of the Commonwealth,” Va. Code § 19.2-11.01(A), into an obstacle course that only the most resourceful of victims could hope to negotiate.

The Court holds that, in a case in which the Commonwealth’s Attorney is not participating, a victim who provides his name, address, and phone number to the Fairfax County Police Department is entitled to advance notification of judicial proceedings pursuant to Virginia Code § 19.2-11.01(A)(3)(b) and Virginia Code § 19.2-265.01.

¹⁷ Although not necessary to a resolution of this motion, the Court would also note that the victim’s name, address, and phone number was also in the court file in a document entitled “Information for Purpose of Securing a Warrant,” which appears to have been filled out and signed by the victim himself.

¹⁸ Nor, for these purposes, is it legally significant that the investigating officer did not make an arrest at the scene. According to documents in the court file, the investigating officer completed an Incident/Investigation Report, which included a narrative of the incident and information concerning the defendant, a witness, and the victim. Although the “Disposition” listed is “Closed by Arrest,” the Court’s understanding is that the investigating officer did not make an arrest at the scene. Rather, later on the day of the incident, the victim swore out a criminal complaint and a magistrate issued a summons for an assault on the victim. A Fairfax County Police Department officer served the warrant on the defendant at the police station the following day.

G. The Commonwealth’s Attorney was Legally Obligated to Notify the Victim

For the foregoing reasons, the Court holds that the Commonwealth’s Attorney had a legal obligation to notify the victim of the trial date in this case. The Commonwealth’s Attorney stated at the January 7, 2021 hearing that “we did try to notify the victim,” but acknowledges that it did not ultimately do so.

H. The Court has the Constitutional and Statutory Duty to Ensure Compliance with the Crime Victims and Witness Rights Act.

The judiciary has an essential role in ensuring the protection of the rights of crime victims. The Virginia Constitution makes this point abundantly clear: “That in criminal prosecutions, the victim shall be accorded fairness, dignity and respect by the officers, employees and agents of the Commonwealth and its political subdivisions and *officers of the courts...*” Va. Const. art. I, § 8-A [emphasis added]. Similarly, Virginia Code § 19.2-11.01(C) states as follows:

Officials and employees of the judiciary, including court services units, law-enforcement agencies, the Department of Corrections, attorneys for the Commonwealth and public defenders, shall be provided with copies of this chapter by the Department of Criminal Justice Services or a crime victim and witness assistance program. Each agency, officer or employee who has a responsibility or responsibilities to victims under this chapter or other applicable law shall make reasonable efforts to become informed about these responsibilities and to ensure that victims and witnesses receive such information and services to which they may be entitled under applicable law...

Va. Code § 19.2-11.01(C) [emphasis added]. Thus, for example, a court may not accept a plea agreement “unless it finds that, except for good cause shown, the Commonwealth has complied” with the notification and consultation requirements of Virginia Code § 19.2-11.01(A)(4)(d). Another example more pertinent to the instant case is a situation where the Commonwealth has failed to notify a victim of the trial date despite its statutory obligation to do so pursuant to Virginia Code § 19.2-11.01(A)(3)(b) and Virginia Code § 19.2-265.01. The Court is not required – or, for that matter, permitted – to turn a blind eye to such an occurrence.

The Office of the Commonwealth’s Attorney did not meet its legal obligation to provide a victim of an alleged assault notice of the trial date. While the statute does limit the Commonwealth’s Attorney’s obligation to those circumstances where notification is “practicable,” there was nothing impracticable in the instant case with providing the victim notice. The victim’s name, address and phone number were readily available. All it would have taken is a review of the police reports described above, or a review of the court file, or consultation with an officer of the Fairfax County Police Department.

Given the Commonwealth's acknowledgement that it did not notify the victim of the trial date, it would be an abdication of the Court's responsibility and duty for it to dismiss a criminal case because the victim did not appear.

III. DISCUSSION WITH REGARD TO THE DEFENDANT'S MOTION TO DISMISS

The defendant makes ten arguments in support of his motion to dismiss. The Court finds each of these arguments to be without merit.

A. Defense Argument #1

The defendant argues that the Court improperly "reached a conclusion that the Code reserves for the Commonwealth – that a witness in the case pending against the defendant is a 'victim'..." Memo. in Support of Oral Mot. to Dismiss 4 (Jan. 13, 2021).¹⁹ This is incorrect for several reasons.

First, it was the Commonwealth Attorney's Office – not the Court – that initially made the judgment that Mr. Karau fit the definition of a "victim" under the victim right's statute. The

¹⁹ Defense counsel made a similar argument at the January 7th hearing:

Counsel: Judge, were you saying the word victim here? The word victim would not be appropriate. It's actually a specific designation under the Crime Victims and Witness Rights Act that the Commonwealth's Attorney uses to define their witnesses. So it's a type of witness designation for the Commonwealth's Attorney. Under 19.2-11.01, which is the Crime Victim and Witness Rights Act, right, subsection 3B, is the section on notices. And Judge, it says victims shall receive notices when practicable from the Attorney for the Commonwealth of judicial proceedings relating to the case. And so, under this Act, it is the Commonwealth's duty to notify who they designate as a victim. It is not the court's duty. And so the Clerk's Office, while they'll frequently send out notices to individuals with addresses in the file, that's not their responsibility nor is it any kind of right that he has to receive any kind of notification from the court. The notifications as far as his rights are concerned comes from the Commonwealth's Attorney's Office. As far as the Defendant, he's ready to go forward. And the fact that the Commonwealth's Attorney chose not to notify or engage with this matter – they chose not to prosecute it altogether for that matter – the fact that that has happened, and the fact that they chose not to fulfill an obligation they had, is not a penalty that the Defendant should receive as far as a continuance of this matter. I am asking for a dismissal, I think that is fair and equitable under the circumstances.

Hr'g (Jan. 7, 2021).

following colloquy occurred between the Court and Assistant Commonwealth's Attorney Renee Hayes:

Court: I'd ask the Commonwealth whether the Commonwealth notified the victim.

Assistant Commonwealth's Attorney Renee Hayes: Your Honor, when this was added to the docket, we initially thought we were involved in it. But I don't believe we were involved in the underlying, so I don't understand why ... we did try to notify the victim, but because the appeal paperwork came up as a civilian complaint, we didn't have any contact information for the victim and so we didn't we weren't able to send notice that way as well."

Hr'g (Jan. 7, 2021). In other words, prior to the January 7, 2021 hearing, the prosecutor determined that Mr. Karau fit the definition of a "victim" and made some effort to notify him of the trial date. That this was not actually accomplished does not detract from the fact that the prosecution made the judgment – which the defense now attributes to the Court -- that Mr. Karau fit the legal definition of a "victim." Nor does the Commonwealth take a different position on this issue in its written response, referring to Mr. Karau as the "civilian complainant/victim." Commonwealth's Resp. 4. While it does assert that it was under no obligation to provide notification of the trial date to Mr. Karau, that is not because it contests Mr. Karau's status as a "victim" under the statute but, rather, because Mr. Karau did not make the "request" that the Commonwealth argues was required. *See id.*

The police officer in the case made the same judgment as the prosecutor that Mr. Karau was a "victim," listing him in her report in the court's file under the category "Victims." Officer Robertson viewed the Commonwealth's Attorney as having the obligation to notify the victim because she initially believed the Commonwealth was "on the case" and, in any event, said: "I was not notified in time to subpoena the victim." Hr'g (Jan. 7, 2021).

Second, it was the defense – not the Court, not the prosecutor – that first characterized Mr. Karau as the "victim" at the January 7, 2021 hearing. Defense counsel's initial statement to the Court was as follows: "This was going to be a motion for dismissal. And if not, the motion not be granted, then trial. However, the victim is not here, so I'm asking the Court to dismiss because the victim is not here." *Id.* When the Court then asked – "Am I correct that the victim in this case has not been given a copy of your motion?" – defense counsel's response was: "He does not have a copy of the motion because he is a victim in the case, as opposed to a prosecuting attorney." *Id.* When the Court asked counsel for the name of the victim, defense counsel responded: "Mr. Karau, I believe it's John Karau."²⁰ *Id.*

²⁰ This is consistent with the defendant's description of Mr. Karau in his Memorandum in Support of Motion to Dismiss, filed more than a week before the trial date. "Surely, a victim cannot fill the shoes of a prosecutor in his own case, and cannot fulfill the duties a prosecutor owes to the people. Virginia Constitution, Article VII, Section 4 gave Virginia voters the power to choose their prosecutor. Virginia voters did not choose Mr. Karau." Memo. in Support of

Third, it is not at all surprising that the prosecution, the defense, and the police would each have characterized Mr. Karau as the “victim” in the alleged assault, given the definition of a “victim” in Virginia Code § 19.2-11.01(B), which defines “victim,” among other criteria, as a “person who has suffered physical, psychological, or economic harm as a direct result of the commission of (a) a felony, (b) assault and battery in violation of Section 18.2-57...” Va. Code § 19.2-11.01(B)(i). The Summons explicitly charged the defendant with an assault on John Karau in violation of Virginia Code § 18.2-57.

In short, the Court’s treatment of Mr. Karau as the victim of an alleged assault is consistent with the statute, consistent with the charging document, consistent with statements made by both the prosecution and defense at the January 7, 2021 hearing, and consistent with the Court’s responsibility and duty “to ensure that victims and witnesses receive such information and services to which they may be entitled under applicable law.” Va. Code § 19.2-11.01(C).

The defendant further argues that while the Virginia Constitution and the Crime Victim and Witness Rights Act do provide crime victims “rights,” they “do not provide a remedy” when those rights are violated. Memo. in Support of Oral Mot. to Dismiss 8 n.6 (Jan. 13, 2021). In support of this assertion, the defendant notes that the statute excludes civil remedies, such as a cause of action by a victim against a prosecutor. *Id.* According to the defendant, the act is merely “an outline of duties and responsibilities that the Commonwealth’s attorney has to the victim, as opposed to rights a Commonwealth can interpose on a defendant or the Court.” *Id.* The Court disagrees. This assertion, if true, would reduce the act to nothing more than a set of recommendations and would render meaningless the statute’s assignment to “[o]fficials and employees of the judiciary” (among others) the obligation “to ensure that victims and witnesses receive such information and services to which they may be entitled under applicable law...” Va. Code § 19.2-11.01(C). More specifically, the fact that the Act says a victim cannot sue a prosecutor for violating the victim’s rights does not mean that the Court cannot grant a continuance of a trial to ensure that the victim was given notice of the trial date.

B. Defense Argument #2

The defendant argues that the Court “*sua sponte*, moved to continue the trial date to give the private individual prosecuting the defendant, without standing to do so and in violation of defendant’s due process rights, yet another opportunity to take a shot at the defendant.” Memo. in Support of Oral Mot. to Dismiss 3 (Jan. 13, 2021).

The Court disagrees. The Court’s inquiries and actions in this case cannot be characterized as *sua sponte*. Rather, they were in direct response to the defendant’s own motion

Mot. to Dismiss 4 (Dec. 28, 2020) [italics added]. Similarly, in defense counsel’s Certificate of Service in the initial motion to dismiss, counsel writes: “*Since there is no counsel of record, and the victim in a criminal case who is individually pursuing a prosecution is not a party in a criminal case, counsel has not served anyone.*” Mot. to Dismiss 3 (Dec. 28, 2020) [italics added].

to dismiss the case on the grounds that “the victim is not here.” How, exactly, could the Court have resolved the motion without making the precise inquiries the Court made: Did the prosecution notify the victim? Did the police officer? Did the Clerk? By making the motion, the defendant asked this Court to make a decision. One possible decision was to grant the motion. A second possible decision was to continue the matter for briefing and further argument (which is what the Court ultimately did). A third possible decision was to deny the motion, which meant the case would naturally and inevitably have to be continued to a new date so that the Commonwealth could comply with its constitutional and statutory obligation of notification.

Even if it were true that the Court acted *sua sponte*, it would be well within the Court’s authority under the circumstances. As the Supreme Court of Virginia said in the context of a speedy trial issue: “[W]e recognized that not all continuances will be requested by either the Commonwealth or the defendant. Indeed, due to the nature of trial proceedings, sometimes continuances are initiated by the court.” *Young v. Commonwealth*, 297 Va. 443, 452, 829 S.E.2d 548, 552 (2019) (citing *Howard v. Commonwealth*, 281 Va. 455, 461, 706 S.E.2d 885, 887 (2011)). See also *Williams v. Commonwealth*, 2 Va. App. 566, 569, 347 S.E.2d 146, 148 (1986) (“[Virginia Code 19.2-241]... contemplates an orderly procedure for setting criminal cases and expressly places the control of that process under the supervision of the trial court, not a party litigant.”).

C. Defense Argument #3

The defendant argues that by considering a continuance of the case so that the victim could be given notice of the trial date, the Court “proceeded to usurp the powers reserved to the Commonwealth’s attorney under the Code...” Memo. in Support of Oral Mot. to Dismiss 4 (Jan. 13, 2021).

The Court disagrees. The Court is explicitly charged by the Virginia Constitution with an obligation to accord victims of crime “fairness, dignity and respect.” Va. Const. art. I, § 8-A. The first paragraph of the Crime Victim and Witness Rights Act makes it clear that one of the rights to which victims of crime are entitled is that “they have the opportunity to be heard by... the judiciary at all critical stages of the criminal justice process to the extent permissible under law.” Va. Code § 19.2-11.01(A). A trial is surely a “critical” stage of the criminal justice process. And while it is the Commonwealth’s Attorney who has the responsibility to provide “advance notification” of judicial proceedings, see Va. Code § 19.2-11.01(A)(3)(b), it is the “[o]fficials and employees of the judiciary” – among other entities – that have the responsibility “to ensure that victims and witnesses receive such information and services to which they may be entitled under applicable law...” Va. Code § 19.2-11.01(A). Ensuring that the Commonwealth’s Attorney fulfills its legal obligation to notify victims of court dates does not constitute a usurpation of the Commonwealth’s Attorney’s “powers.” Compare with *In re Horan*, 271 Va. 258, 264, 634 S.E.2d 675, 679 (2006) (holding the trial court “performed an executive function and exercised discretion that resides solely in the Commonwealth’s Attorney” by preventing the Commonwealth from seeking the death penalty).

D. Defense Argument #4

The defendant argues that because the Commonwealth's Attorney made no motion to continue to case, it was improper for the Court to continue the case in order for the victim to receive notification of the trial date. Memo. in Support of Oral Mot. to Dismiss 5 (Jan. 13, 2021). The Court disagrees.

First, the Commonwealth's Attorney could not have made a motion to continue the case because it was not participating in the case. An Assistant Commonwealth's Attorney was in the courtroom when the case was called because there were other cases on the docket in which the Commonwealth's Attorney was participating.

Second, the Court is well within its authority to continue a case, with or without a motion from the Commonwealth. *See, e.g., Baker v. Commonwealth*, 25 Va. App. 19, 24, 486 S.E.2d 111, 113 (1997) ("It is the responsibility of the trial court, not the prosecutor or the accused, to control the court's docket and schedule criminal cases for trial.") [citations omitted]; *Howard v. Commonwealth*, 281 Va. 455, 459, 706 S.E.2d 885, 887 (2011) ("Circumstances will arise, however, that require and justify delay in the prosecution of a defendant.") [citations omitted]. The instant case presents just such a circumstance.

Third, even if there was not an explicit provision in the Crime Victim and Witness Rights Act requiring "officials" of the judiciary to "ensure" that victims receive the services to which they are entitled, the Court would have the authority to deny the motion to dismiss and continue the trial date. As the Virginia Court of Appeals stated, "The conduct of a trial is committed to the sound discretion of the trial court." *Cunningham v. Commonwealth*, 2 Va. App. 358, 365, 344 S.E.2d 389, 393 (1986).

Indeed, even if there was no victim rights statute, or even if the Court agreed with the Commonwealth that the victim was not entitled to advance notification of the trial date because he failed to make a specific request, the Court would still have the discretion to continue the trial under the present circumstances. *See, e.g., Reyes v. Commonwealth*, 68 Va. App. 379, 385, 808 S.E.2d 838, 841 (2018) ("The decision to grant a motion for a continuance is within the sound discretion of the circuit court and must be considered in view of the circumstances unique to each case.") (citing *Haugen v. Shenandoah Valley Dep't of Soc. Servs.*, 274 Va. 27, 34, 645 S.E.2d 261, 265 (2007)). The "circumstances unique" to this case is that the victim was never notified of the trial date by Commonwealth's Attorney, by the police, or by the Clerk of the Circuit Court.²¹ To dismiss the case due to the non-appearance of the victim – given these facts – would be unwarranted and unjustified.

²¹ The Court is not suggesting that it was the responsibility of the Clerk of the Circuit Court to notify the victim of the trial date.

E. Defense Argument #5

The defendant argues that the Court “has a conflict of interest, to put it mildly, in moving for a continuance on behalf of a party’s witness without that party seeking a continuance on its own.” Memo. in Support of Oral Mot. to Dismiss 5 (Jan. 13, 2021). The Court disagrees.

The defendant’s characterization of what the Court did – “moving for a continuance on behalf of a party’s witness” – is not correct. What the Court actually did is to engage in the process of adjudicating the defendant’s motion to dismiss. That a continuance would be the natural and ineluctable consequence of denying the motion to dismiss – which leaves the case pending and requiring a new trial date – does not convert the Court’s function as an adjudicator into that of an advocate for a party, let alone create a “conflict of interest.” As to the defendant’s assertion that no “party” was “seeking a continuance on its own,” it only needs to be observed that (1) the victim was not present in the courtroom; and (2) the Commonwealth was not participating in the case.

F. Defense Argument #6

The defendant argues that “the Court made itself a representative of a party to the matter, advocating on behalf of a party that is adverse to the defendant” and thereby violated the separation of powers under the Virginia Constitution and took “control of the case away from the Commonwealth.” Memo. in Support of Oral Mot. to Dismiss 6 (Jan. 13, 2021). The Court disagrees.

What the Court actually did, and what the Court is now doing, is to ensure that a victim of an alleged assault is afforded his constitutional and statutory right to advance notice of a trial date. That does not make the Court the victim’s “representative” or “advocat[e],” any more than enforcing a discovery order, or suppressing evidence, or making virtually any ruling that benefits a party would make the Court a “representative” or “advocat[e]” of a party. *See, e.g.*, Va. Sup. Ct. R. 7C:5(f) (authorizing the Court to issue discovery orders when the prosecuting attorney or representative of the Commonwealth has failed to comply with discovery rules or orders). Further, the Court could not have taken “control of the case away from the Commonwealth” when the Commonwealth had already decided not to participate in the case.

G. Defense Argument #7

The defendant argues that the Court “also runs afoul of Canon 2 of the Canons of Judicial Conduct for the State of Virginia, which states that ‘A Judge Shall avoid Impropriety and the Appearance of Impropriety in All the Judge’s Activities.’” Memo. in Support of Oral Mot. to Dismiss 6 (Jan. 13, 2021). The defendant asserts that “[w]hen a judge, on behalf of the Court, moves to continue a case to benefit a Commonwealth’s witness, without any request to do so by the Commonwealth, and at the expense of, and in face of an objection from, the defendant, the Court undertakes the role of advocacy for that witness and the appearance of bias and

impropriety.” *Id.* at 7. The defense also characterizes this as “biased partiality.” *Id.* at 7. The Court disagrees.

In his motion, the defendant states that “[t]he issues at [the] heart of the matter are rather basic.” *Id.* at 6. This is certainly true, but not for the reasons stated by the defendant. Before the Court is a motion raised by the defense seeking dismissal of a case because the victim is not present. The Court inquired as to whether the victim received notice of the trial date. The answer was that he did not. Virginia Code § 19.2-11.01(A)(3)(b) entitles the victim to such notice. The statute charges the Court, among other entities, with ensuring that victims receive the rights to which they are entitled. Therefore, the motion to dismiss must be denied and the matter continued for the purpose of the victim receiving his statutory notice. There is no merit to the claim of the defendant that this constitutes an “appearance of impropriety” or “biased partiality” or a violation of the Canons of Judicial Conduct.

H. Defense Argument #8

The defendant argues that “the Court is portraying a desire to sweep in heroically to provide assistance to all alleged victims in light of a Commonwealth’s attorney’s perceived abandonment of them.” Memo. in Support of Oral Mot. to Dismiss 7 (Jan. 13, 2021) [footnote omitted]. The defendant notes that “Fairfax County voters chose Steve Descano. Mr. Descano’s desertion of certain victims is the choice he made as an elected official acting in what he believes is the best interest of the County” and that “it is not the place of the judiciary to question the will of the voters.” *Id.* at 7 n.5. The defendant is incorrect in his characterization of what has occurred here.

There is nothing “heroic[.]” in the Court ensuring compliance with the Crime Victim and Witness Rights Act. Nor is the Court “question[ing] the will of the voters.” The decisions made by the Commonwealth’s Attorney as to whether or not to participate in particular misdemeanor prosecutions is not before the Court. What is before the Court is simply this question: *Should a criminal case be dismissed because the victim is not present when the victim was not provided notice of the trial date by the Commonwealth’s Attorney as required by statute?* The Court concludes that the answer to that question is “No.”

I. Defense Argument #9

The defendant argues that it was the Mr. Karau’s responsibility to keep “himself notified about the subsequent hearings on this matter” and, “[e]ven if he did not receive additional notice of the January 7 trial, he had open opportunity to call or visit the Clerk’s office to check on the status of the case.” Memo. in Support of Oral Mot. to Dismiss 7-8 (Jan. 13, 2021).

It is certainly true that Mr. Karau could have done these things. But that is not at all the issue before the Court. Rather, the issue before the Court is whether dismissal is warranted for the non-appearance of the victim when the Commonwealth’s Attorney did not notify the victim of the trial date in accordance with the Crime Victim and Witness Rights Act. That act does not assign to the victim the responsibility to “call or visit the Clerk’s office to check on the status of

the case;” rather, it assigns the responsibility of advance notice to the Commonwealth’s Attorney. And the Commonwealth’s Attorney did not do what was statutorily required.

J. Defense Argument #10

Finally, the defense argues that the rights “of a victim are protected by the Commonwealth” and that it is the Court’s role “to adjudicate the matter at hand and to protect a *defendant’s* rights.” Memo. in Support of Oral Mot. to Dismiss 8 (Jan. 13, 2021) [emphasis in the original]. While it is certainly true that the Court has a responsibility to “adjudicate the matter at hand and to protect a *defendant’s* rights,” the Court *also* has both a constitutional and statutory responsibility to ensure compliance with the rights accorded a victim. These obligations are not mutually exclusive nor are they incompatible with each other.

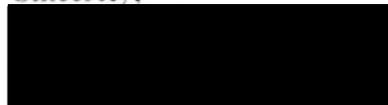
IV. CONCLUSION

The Virginia Constitution states that “officers of the courts” will accord victims “fairness, dignity and respect.” Va. Const. art. I, § 8-A. There would be nothing “fair[]” in dismissing a case for the non-appearance of a victim when the victim did not receive the advance notice of the trial date to which he was legally entitled. In a recent case, the Virginia Court of Appeals rejected an argument for restriction on the scope of victim impact testimony, stating that it “would be the antithesis of the goal of the Crime Victim and Witness Rights Act, which is to ensure that the victim has the opportunity to convey to the court the full impact of the crime.” *Baldwin v. Commonwealth*, 69 Va. App. 75, 89, 815 S.E.2d 809, 816 (2018). Similarly, here, the dismissal of this case under these circumstances would be the “antithesis” of the goal of the Crime Victim and Witness Rights Acts. *Id.*

Even if the Court were to agree with the Commonwealth’s Attorney that it was not obligated to notify the victim, the Court would still find that the Motion to Dismiss based on the non-appearance of the victim should be denied and a continuance granted, where the record indicates that the victim was not notified of the trial date by the Commonwealth’s Attorney, by the police, or by the Clerk of the Circuit Court.

For the reasons stated above, the Court DENIES the Motion to Dismiss for non-appearance of the victim. An ORDER, in accordance with this opinion, shall issue forthwith. For the reasons stated in the ORDER, the Court does not now set a continuance date.

Sincerely,



Randy I. Bellows
Circuit Court Judge

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA) CRIMINAL NUMBER MI-2020-961
VERSUS)
SHERRELL D. CHASTAIN) APPEAL – ASSAULT

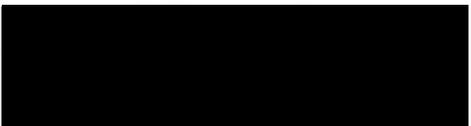
ORDER

Before the Court is the Defendant’s oral Motion to Dismiss, as supplemented by his Memorandum in Support of Defendant’s Oral Motion to Dismiss. For the reasons stated in the Letter Opinion issued on today’s date, the motion is DENIED.

Further, the Commonwealth’s Attorney shall henceforth provide the victim of the alleged assault charged in the instant case notice of further judicial proceedings as required by Va. Code § 19.2-11.01(A)(3)(b), and Va. Code § 19.2-265.01.

Given that there remains a pending Motion to Dismiss, asserting that “a trial without a Commonwealth’s attorney violates [the defendant’s] due process rights,” the Court refers the case to the Chief Judge for assignment of the pending motion. The judge assigned to decide the pending Motion to Dismiss will also set a new trial date if necessary after resolution of the motion.

SO ORDERED, this 29 day of January, 2021.


JUDGE RANDY I. BELLOWS

Endorsement of this order by Counsel of Record for the parties is waived in the discretion of the Court pursuant to Va. Sup. Ct. R. 1:13.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA) CRIMINAL NUMBER MI-2020-961
VERSUS)
SHERRELL D. CHASTAIN) APPEAL – ASSAULT

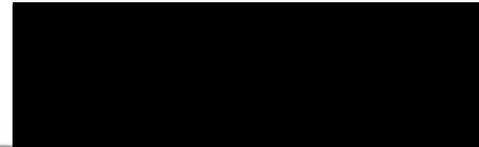
ORDER

On January 29, 2021, SHERRELL D. CHASTAIN, the Defendant, and Marina Medvin, Counsel for the Defendant, appeared before this Court. Claiborne Richardson, the Assistant Commonwealth’s Attorney was present in the courtroom.

This case came before the Court this date for argument on the Defendant’s motion to dismiss based on the non-appearance of the victim. The Commonwealth’s Attorney filed in open court a document entitled Praecipe for Special Appearance, asserting that the appeal had not been properly perfected. The Commonwealth further stated that it had no further argument with respect to the motion to dismiss. Counsel for the Defendant advised that the Defendant had no further argument with respect to the motion to dismiss.

The Court advised the parties that a written decision on the Defendant’s motion to dismiss based on the non-appearance of the victim would be issued and that Counsel for the Defendant would be notified in the event that a response was necessary with respect to the issue raised by the Commonwealth in the Praecipe for Special Appearance.

Entered this 29 day of January, 2021.



JUDGE RANDY I. BELLOWS