NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 24, 2019

LETTER OPINION

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RE: *Commonwealth of Virginia v. Nathan Elmore Thomas*
Case No. MI-2018-1248

Dear Counsel:

This case came before the Court for trial of Nathan Elmore Thomas ("Defendant") on a criminal charge of possession of marijuana, wherein Defendant challenges the

reliability of the drug field test kit employed by the arresting police officer, and posits that no incarceration may be imposed on Defendant in this *de novo* prosecution irrespective of any prior record, as the Fairfax General District Court ("GDC") recorded "jail waived" on the summons of conviction. This Court holds that in an appeal from a criminal conviction occurring in the GDC, wherein the lower court judge noted jail was waived on behalf of the Commonwealth of Virginia, judicial estoppel bars the imposition of incarceration on the Defendant upon trial *de novo* in the Circuit Court. This Court further holds that inasmuch as the GDC judge failed to date the summons of conviction, while such order was final, this Court cannot presume the undated order was signed *before* the notice of appeal was filed. This Court is unable to infer from the record whether the case is properly before the Court as a matter of jurisdiction. The Court is presented with two equally viable inferential alternatives, namely, that the Court can proceed to pronounce its verdict or may instead not do so for want of jurisdiction. Because trial has commenced and jeopardy may have attached, the Court is also prevented from dismissing the appeal without first finding it lacks jurisdiction. As the evidence of jurisdiction is in equipoise, the Court has no choice but to dismiss the marijuana charge with prejudice, for determination of jurisdiction is in legal stasis.

BACKGROUND

Defendant was charged with Possession of Marijuana by summons and directed to appear before the GDC on June 11, 2018. On that date, a judge of the GDC noted a continuance to August 13, 2018, with the notation "TGA", which this Court infers to mean "to get attorney." There is a further notation on the summons: "jail waived." Next to the

charge "Possession of Marijuana," the judge, in the same distinctive color of ink, noted but then crossed off the words "4th" and then "2nd." Thus, it appears that all these notations were made on June 11, 2018, wherein the case was continued for trial to August 13, 2018. The summons further reflects a conviction for a first offense,[1] including a fine of $500 and a 6-month driver's license suspension, but is undated by the trial judge, all done in ink different from that of the June 11, 2018, notations.

On August 13, 2018, Defendant pled "not guilty" in GDC, proceeded to trial and appealed his case. His notice of appeal, though dated August 13, 2018, was not transmitted to the Clerk of the Fairfax Circuit Court until August 28, 2018. On December 3, 2018, the Commonwealth's Attorney filed a Notice of Intention to Use Prior Record pursuant to Virginia Code § 19.2-195. On June 21, 2019, the Commonwealth filed two certificates of analysis from the Department of Forensic Science pertaining to evidence collected from Defendant on April 27, 2018, the date of offense, purporting to show the presence of marijuana in the samples collected. The reports were dated October 22, 2018, and January 29, 2019. For reasons unclear from the record, the Assistant Commonwealth's Attorney prosecuting the instant case did not introduce these reports into evidence at trial.

The Defendant appeared before this Court on August 7, 2019, for trial *de novo* by jury on his charge. Upon consideration of preliminary motions, the parties opted to waive jury and instead try the case to the undersigned judge. The Commonwealth presented

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[1] The prosecutor was thus prevented from amending the charge to state a greater grade of the offense because on appeal the Defendant is considered to have been acquitted of the greater uncharged offense when convicted of the lesser grade at trial. *See Buck v. City of Danville*, 213 Va. 387, 388, 192 S.E.2d 758, 759 (1972).

evidence through the arresting police officer, which consisted in part of the Defendant being stopped for a routine traffic infraction and apologizing to the officer when the purported marijuana was located, which substance the officer collected and field-tested. The officer testified that based on his training and seven years of experience, the substance which he also photographed, was marijuana, and that further, his field test, which is specific for marijuana and hash oil, turned a color which additionally confirmed the leafy material was marijuana. Defendant presented an expert chemist as well as argument challenging the reliability of the field test. While the Assistant Commonwealth's Attorney conceded the test was specific for more substances than just marijuana, she averred the test corroborated the other evidence that the substance seized was marijuana, namely, the statements of Defendant and the police officer's testimony the green leafy substance was marijuana.

At the conclusion of presentation of evidence, the Court took this matter under advisement, affording the parties time to brief their respective positions.

ANALYSIS

I. The General District Court's waiver of a jail sentence on behalf of the Commonwealth of Virginia forecloses the imposition of incarceration upon trial *de novo* in the Circuit Court.

"[A] defendant who receives a suspended or probated sentence *to imprisonment* has a constitutional right to counsel." *Alabama v. Shelton*, 535 U.S. 654, 674, 122 S. Ct. 1764, 1776 (2002) (emphasis in original; internal citation omitted). With respect to whether an indigent defendant may be denied appointed counsel, the Virginia Code specifically states,

> if, prior to the commencement of the trial, the court *states in writing*, either upon the request of the attorney for the Commonwealth or, in the absence of the attorney for the Commonwealth, upon the court's own motion, that a sentence of incarceration will not be imposed if the defendant is convicted, the court may try the case without appointing counsel, and *in such event no sentence of incarceration shall be imposed*.

Va. Code § 19.2-160 (emphasis added). In the instant case, the Commonwealth's Attorney was voluntarily absent from the trial in the GDC and therefore it was that court which waived jail time upon its own initiative.[2] Central to interpretation of whether the

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[2] A court asking the police officer whether jail time is waived is inconsistent with the authority conferred on judges by the statute. Other than the court exercising its own discretion, it is only upon the request of the Commonwealth's Attorney, i.e., the prosecutor, that the court may waive jail time. Arresting police officers are witnesses and at best stand in the role of complainant. They bring forth the allegations by means of a summons or warrant but are not the prosecutor. In the instant case, the officer works for the Washington Metropolitan Airports Authority and not for the Commonwealth of Virginia. As complainant, the officer brought the charge by summons as authorized under Virginia Code §§ 19.2-73(A) and 19.2-81(B) when there is a crime committed in his presence. The officer's statutory authority is not one of deciding *how* those charges should be adjudicated as a matter of prosecutorial discretion. Nor is this the circumstance where the police officer was appointed as a private prosecutor by the court. The common law "role of privately employed prosecutors developed during a time when Commonwealth's Attorneys were not required to be members of the bar," but later statutory amendments required bar membership for Commonwealth's Attorneys. *See Cantrell v. Commonwealth*, 229 Va. 387, 391, 329 S.E.2d 22, 25 (1985); *see also* Va. Code § 15.2-1600.

> The *right of a citizen* to hire a private prosecutor is rooted in the early common law of England. Criminal prosecutions, like civil actions, were conducted within the framework of a pure adversary system. The Crown did not provide a public prosecutor in routine felony cases; rather, the victim or his family retained private counsel to prosecute and the defendant retained counsel to defend.

Cantrell, 229 Va. at 392, 329 S.E.2d at 25 (emphasis added). The Supreme Court of Virginia has historically "approved of the practice, expressly or by implication" in cases dating from at least 1849. *See id.*; *Lemmon's Case*, 47 Va. (6 Gratt.) 684, 685 (1849). Though the Supreme Court found there are sound "policy arguments . . . for a total prohibition of privately employed prosecutors," it ruled it "advisable to leave to the General Assembly such a basic change in the long-established common law of Virginia." *Cantrell*, 229 Va. at 392, 329 S.E.2d at 25.

Setting aside whether a private prosecutor could currently be a non-attorney in light of the prohibition of Virginia Code § 54.1-390 against practicing law without a license, appointment of a private prosecutor at common law had to come at the behest of an aggrieved victim. Moreover, "the Supreme Court [has] stated that when a private prosecutor has been engaged to assist in a criminal proceeding, 'the public prosecutor must remain in continuous control of the case.'" *Adkins v. Commonwealth*, 26 Va. App. 14, 18, 492 S.E.2d 833, 835 (1997) (quoting *Cantrell*, 229 Va. at 393, 329 S.E.2d at 26 (1985)). Consistent with such precedent, an opinion by the Attorney General held that the General District Court did not have authority to appoint even private attorneys who volunteer to serve as unpaid private prosecutors in misdemeanor cases when the Commonwealth's Attorney has decided not to prosecute such cases in that court. Op. Atty. Gen., Opinion No. 139 (March 31, 1995), 1995 WL 228580.

Thus, while the GDC may have been able to seek input from the police officer as to the facts alleged for prosecution, the lower court cannot devolve onto the police the authority of whether to seek or waive jail

statutory waiver continues on appeal *de novo* is to first discern the meaning of "in such event." "[C]ourts apply the plain language of a statute unless the terms are ambiguous . . . . [I]f the language is plain, certain and unambiguous, so that no doubt arises from its own terms as to its meaning, then there is no room for interpretation." *Lynchburg Div. of Soc. Servs. v. Cook*, 276 Va. 465, 480, 666 S.E.2d 361, 368 (2008) (internal quotation marks and citations omitted). Under a plain reading of the statute, "in such event" refers not to the trial itself but to the operative *factual decision* of the lower court that "states in writing, . . . that a sentence of incarceration will not be imposed if the defendant is convicted . . . ." Va. Code § 19.2-160. Irrespective of whether the waiver comes at the behest of the Commonwealth's Attorney or is product of the initiative of a court, the effect is the same: The Commonwealth of Virginia waives incarceration once the court so affirms in writing.

The General Assembly did not account in detail for what is to occur "in such event" of the waiver of jail time when a conviction is appealed *de novo*. The General Assembly may not have anticipated the Commonwealth of Virginia could potentially take inconsistent positions with respect to waiving jail time in the GDC from those on appeal in the Circuit Court. However, neither did the Legislature give license in Virginia Code § 19.2-160 for the government to take successive inconsistent positions as to whether the facts support a waiver of jail time.

Where jail is waived in the GDC and sought in the Circuit Court, it is the prosecuting *party*, the Commonwealth of Virginia, that is being inconsistent. The prosecuting *attorney*,

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time when the intent of the General Assembly is clear that only the court itself or the Commonwealth's Attorney can make such prosecutorial decision.

the Commonwealth's Attorney, was not present and therefore did not waive jail in the instant case in the GDC. The prosecutor's position in this Court is now, however, undertaken on behalf of the Commonwealth of Virginia, the prosecuting party, which was nominally present in the lower court.[3]

It has been a rule of long-standing that a court in exercise of discretion, such as for instance in waiving incarceration under Virginia Code § 19.2-160, "must not be arbitrary, vague and fanciful, but legal and regular." *Harris v. Harris*, 31 Gratt. (72 Va.) 13 (1878). Implicit in the waiver of jail time by a court is that it is acting on behalf of the state in the determining the facts do not warrant incarceration. The waiving court does not act on mere whim detached from reasoned fact that arguably supports the conclusion that incarceration is unwarranted. The clear purpose of Virginia Code § 19.2-160 is to impose on the government, the prosecuting party, through the court, the duty to consider waiver of jail time when appropriate to conserve taxpayer funds. The court does not need the added statutory authority to decide not to impose a jail sentence, which is already within its inherent powers. Virginia Code § 19.2-160 legally affords the courts a role that could otherwise be of some concern as a matter of mere unprompted discretion, that is, to

[3] The Commonwealth's Attorney's action to seek jail time in the Circuit Court is not personally vindictive on its face since such office was not involved in the court below. *See Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098 (1974) (discussing the concept of prosecutorial vindictiveness and prohibiting the prosecutor from indicting a more serious charge covering the same conduct appealed for trial *de novo*). Additionally, it is generally constitutionally permissible in a trial *de novo* for this Court to impose a greater sentence than that imposed in the lower court because it cannot be automatically inferred that it is any more likely "that such a sentence is a vindictive penalty for seeking a superior court trial than that the inferior court imposed a lenient penalty." *Colten v. Kentucky*, 407 U.S. 104, 117, 92 S. Ct. 1953, 1960–61 (1972). Nevertheless, even if the Commonwealth's Attorney is not being vengeful in seeking jail time in the current proceedings, this Court must still determine whether the prosecution is bound by the waiver of jail time in the lower court.

prejudge whether, before all the evidence has been heard, the facts warrant the possibility that the state will jail the accused.

Logically, there are sound economic reasons for the existence of the statute, principally, that taxpayer funds need not be expended on court-appointed counsel to protect the accused's constitutional rights when there is no probability the accused will face even a suspended jail sentence.[4] The purpose of the statute is not to enhance some powers of the court at trial, but rather to promote the Commonwealth of Virginia's economic interest in efficient use of taxpayer funds. In this task, whether prompted by motion of the Commonwealth's Attorney or on its own, the court is determining facts concerning the economic obligation of the prosecuting party, the Commonwealth of Virginia, i.e., the state.[5]

Particularly because the Commonwealth's Attorney was not present for the first prosecution, the GDC carried forward certain trial functions which, in the case of waiving incarceration, operate as striding into the shoes of the Commonwealth of Virginia by limiting the potential sentencing power of the court. The court steps into the shoes of the state in this instance, by, in essence, prejudging the evidence to determine the severity

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[4] *Alabama v. Shelton*, 535 U.S. at 674, 122 S. Ct. at 1776.

[5] It is noteworthy that the General Assembly did not explicitly clothe prosecutors of the towns, cities and localities who are not Commonwealth's Attorneys, with the power to seek waiver of jail time pursuant to Virginia Code § 19.2-160. The elegantly simple reason for such limitation may be that local prosecutors who are not employees of Virginia, may not speak for the state in deciding whether its economic interests, when scaled against prosecutorial discretion, militate in favor of a waiver of jail time. Irrespective, while the statute does not explicitly provide the right to local prosecutors to seek a waiver of jail time in contemplation of such local economic interest as preventing continuance of a cause, neither does it preclude such prosecutors from taking a factual position that jail time is unwarranted, upon which the trial court may waive jail time on its own motion. In such circumstance, the courts are given authority under the statute to bind the local government with respect to whether jail time is waived.

of the offense and the possible penalties to be imposed after the evidence is presented. This is comparable to prosecutorial discretion when making plea bargains or planning for trial and puts the court in an unusual posture as the court does not traditionally make such factual determinations pre-plea.[6]

Since the GDC stepped into the role of the Commonwealth of Virginia in making the pre-plea prosecutorial decision of whether jail time is foreclosed, this Court must next resort to analyzing what would have happened if it was the Commonwealth's Attorney who instead, on behalf of the Commonwealth of Virginia, invoked the waiver of jail time to the GDC. The text of Virginia Code § 19.2-160 makes no distinction in result whether a waiver of jail time comes "upon the request of the attorney for the Commonwealth or, in the absence of the attorney for the Commonwealth, upon the court's own motion," so the General Assembly clearly did not intend a court's waiver to be differentiated in effect from one initiated by the Commonwealth's Attorney. In either scenario, the waiver is binding on the Commonwealth of Virginia, the nominal prosecuting party.

When the prosecuting government, through its courts, waives jail time, it takes a particular factual and legal position which has the consequence of on the one hand divesting an indigent defendant of the right to court-appointed counsel,[7] while on the other

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[6] Additionally, the prosecutor's absence from the proceedings in the court below was a functional acquiescence in the GDC's exercise of discretion to waive jail time. The GDC may have inferred from the disinterest in participation by the Commonwealth's lawyer that the matter did not justify consideration of a jail sentence.

[7] Omission of the consequences of a plea of guilty by a defendant's attorney can constitute a violation of the Sixth Amendment right to counsel. *See Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010). If omission as to the consequences of a plea is a violation of Due Process, this may apply equally if the source of the incomplete information is the court itself. Here, however, the GDC's failure to delineate with more precision whether the waiver of jail time was binding on appeal, unlike in *Padilla*, resulted in a plea of "not guilty." This distinction is important because the Defendant was not deprived of a trial in the GDC, albeit that it was uncounseled by operation of law. Nevertheless, when an arm of the state, the lower court, induces the waiver of the assertion of constitutional rights and a plea of guilty by the accused, through

hand affording such accused the certainty that incarceration will not result from plea or trial. Such decision is, however, driven by an economic benefit-burden analysis, where each party to the litigation derives advantage. This is a prosecutorial discretion function not a post-evidentiary hearing sentencing act, and therefore the decision is a governmental function of the Commonwealth of Virginia or locality in question. The parties act in reliance on the resulting position taken by the government, in this instance, waiver of jail time with respect to the Defendant. The defendant acts based on this reliance, making choices such as not attempting to continue a case to hire an attorney, expecting that the range of possible penalties will be as the government has indicated, and the right to appeal will not be deterred by a return to the *status quo ante*. Thus, whether the Commonwealth's Attorney is present or the court acts on its own in waiving jail time, such act is done on behalf of the prosecuting government as authorized by statute.

Suffused in Virginia jurisprudence is the notion that litigants may not benefit from taking one factual legal position and then repudiating that position when convenient, to the detriment of an opposing party. "The prohibition against approbation and reprobation

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assurance that incarceration is no longer a sentencing option, such court may have to first fully inform the defendant of any limitations of such inducement. Otherwise, the defendant's plea is not in full knowledge of the consequences of such decision, which may implicate voluntariness. The Due Process concept the courts must ensure pleas are knowingly and voluntarily tendered with full knowledge of their consequences is infused throughout American constitutional jurisprudence.

> The defendant relinquishes many of the traditional benefits associated with the right to counsel when he represents himself, and therefore, must knowingly and intelligently forego those benefits. *Id.* at 835. "The purpose of the 'knowing and voluntary' inquiry . . . is to determine whether the defendant actually does understand and the significance and consequences of a particular decision and whether the decision is uncoerced." *Godinez v. Moran*, 509 U.S. 389, 401 n. 12, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). To that end, "he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525.

Herrington v. Commonwealth, 291 Va. 181, 189, 781 S.E.2d 561, 565-66 (2016).

forces a litigant to elect a particular position, and *confines a litigant to the position . . . first adopted.*" *Matthews v. Matthews*, 277 Va. 522, 528, 675 S.E.2d 157, 160 (2009) (citation omitted; emphasis added). While the Commonwealth's Attorney elected not to be present in prosecution of the Defendant in the GDC, the Commonwealth of Virginia is the named party litigating this criminal suit against the Defendant. On the summons in this case, the GDC judge wrote "jail waived" in the right margin. Giving the words their plain meaning, while they do not track exactly with the more detailed language of Virginia Code § 19.2-160, their effect is to state broadly there will be no jail time imposed without any qualifier that such condition would not survive into the appeal. Since the government, through its court, waived jail time *in prosecution* of the Defendant pursuant to Virginia Code § 19.2-160, the resulting query is whether the doctrine of judicial estoppel is of application, barring the Commonwealth of Virginia from seeking incarceration in Defendant's appeal *de novo* when jail was waived by the court below.

Judicial estoppel is available in the criminal context when a party takes an inconsistent factual stance on appeal from that taken at trial. *See Rowe v. Commonwealth*, 277 Va. 495, 502, 675 S.E.2d 161, 164 (2009); *Mann's v. Commonwealth*, 13 Va. App. 677, 679, 414 S.E.2d 613, 615 (1992); *Fisher v. Commonwealth*, 236 Va. 403, 417, 374 S.E.2d 46, 54 (1988), *cert. denied*, 490 U.S. 1028 (1989); *Clark v. Commonwealth*, 220 Va. 201, 214, 257 S.E.2d 784, 792 (1979), *cert. denied*, 444 U.S. 1049 (1980); *Sullivan v. Commonwealth*, 157 Va. 867, 878, 161 S.E. 297, 300 (1931).

> Judicial estoppel is an equitable doctrine designed to prevent litigants from "'playing fast and loose' with the courts . . . or 'blowing hot and cold' depending on perceived self-interest." *Wooten v. Bank of Am., N.A.*, 290

> Va. 306, 310, 777 S.E.2d 848, 850 (2015) (internal citation omitted) (quoting *United Va. Bank v. B.F. Saul Real Estate Inv. Tr.*, 641 F.2d 185, 190 (4th Cir. 1981)). The "fundamental" requirement for its application is that "'the party sought to be estopped must be seeking to adopt *a* position that is inconsistent with a stance taken in a prior litigation.'" *Bentley Funding Group, L.L.C. v. SK&R Group, L.L.C.*, 269 Va. 315, 326, 608 S.E.2d 49, 54 (2005) (quoting *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996)).

D'Ambrosio v. Wolf, 295 Va. 48, 58, 809 S.E.2d 625, 630-31 (2018) (emphasis added).

> The inconsistent or contradictory assertions must be assertions of fact, not law, *Bentley Funding Group*, 269 Va. at 326, 609 S.E.2d at 54 (quoting *Lowry v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996)), the parties must be the same if the inconsistent positions involve different proceedings, *Lofton Ridge, LLC v. Norfolk S. Ry. Co.*, 268 Va. 377, 382, 601 S.E.2d 648, 651 (2004), and the prior inconsistent position must have been relied upon by the court or prior court in rendering its decision. *See Bentley Funding Group*, 269 Va. at 327, 609 S.E.2d at 54-55.

Virginia Elec. & Power Co. v. Norfolk S. Ry. Co., 278 Va. 444, 462, 683 S.E.2d 517, 527 (2009).

The threshold question of whether the doctrine of judicial estoppel bars jail time for the Defendant in this Court thus depends in large measure on whether the waiver of jail time constitutes a "position of fact" on the part of a party, in this case the Commonwealth of Virginia. The record is clear that by waiving jail time, the lower court accepted a position of fact on behalf of the state that the circumstances do not warrant incarceration. This was accentuated in the case of the Defendant's summons where the GDC explicitly first added and then scratched out two facts, namely, the allegations of "2nd" and "4th" offense.

The Supreme Court of Virginia has noted "the inherent malleability of the doctrine of judicial estoppel." *Bentley Funding Grp., L.L.C. v. SK & R Grp., L.L.C.*, 269 Va. 315, 325–26, 609 S.E.2d 49, 54 (2005). "The purpose of the doctrine [of judicial estoppel] is to

protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. Courts have recognized that the circumstances under which judicial estoppel may appropriately be invoked are not reducible to any general formulation." *New Hampshire v. Maine*, 532 U.S. 742, 743, 121 S. Ct. 1808, 1810–11 (2001).

> The doctrine applies equally against the government as a litigant unless the government can show that "estoppel would compromise a governmental interest in enforcing the law," "the shift in the government's position is 'the result of a change in public policy,' " or "the result of a change in facts essential to the prior judgment." *Id.* at 775–76, 121 S.Ct. 1808.

Cty. of San Miguel v. Kempthorne, 587 F. Supp. 2d 64, 73 (D.D.C. 2008). None of the circumstances restricting application of the doctrine against the government are here present.

> [T]he doctrine is not only a defense; because *it also protects the integrity of the judicial process*, a court may invoke judicial estoppel "at its discretion." *See New Hampshire*, 532 U.S. at 750, 121 S.Ct. 1808 (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)); *see also Allen v. C & H Distribs., LLC*, 813 F.3d 566, 571 n.4 (5th Cir. 2015) (explaining that the doctrine may be invoked " 'sua sponte' and therefore 'the court is not bound to accept a party's apparent waiver of the doctrine' " (quoting 18 *Moore's Federal Practice* § 134.34 (3d ed. 2015))).

Davis v. D.C., 925 F.3d 1240, 1256 (D.C. Cir. 2019) (emphasis added); *See Eilber v. Floor Care Specialists, Inc.*, 294 Va. 438, 445, 807 S.E.2d 219, 223 (2017) ("Because the circuit court had the authority to raise and apply the doctrine sua sponte, appellees did not waive it by failing to raise it in their pleadings"). A principal aspect to be considered is whether "judicial acceptance of an inconsistent position in a later proceeding would create the *perception* that either the first or the second *court was misled*." *New Hampshire*, 532 U.S. at 743, 121 S. Ct. at 1811 (emphasis added). Another weighty consideration is "whether the party seeking to assert an inconsistent position would derive an unfair

advantage *or impose an unfair detriment* on the opposing party if not estopped." *Id.* (emphasis added). These factors, however, do "not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." *Id.*

The core principles of fairness through consistency imbued in judicial estoppel focus on the courts avoiding ratification of successive shifting factual positions of a litigant to the detriment of another relying on the stance first taken. Here, the lower court waived jail time on behalf of the state, accepting the position of fact incarceration was unwarranted. The Defendant inferentially relied on the assurance the state was no longer seeking his incarceration in appealing his conviction. For this Court to now cast aside the Commonwealth of Virginia's waiver of jail time would create the "perception" the GDC was factually "misled," and would impose on Defendant the "unfair detriment" of jail time. *See id.* The doctrine of judicial estoppel directs that this Court should protect confidence in the integrity of the judicial process by not sustaining the inconsistent position now taken by the government in favor of seeking jail time previously waived in the lower court.

Thus, when a lower court on its own or at the behest of the Commonwealth's Attorney waives the Commonwealth of Virginia's right to seek jail time in a prosecution, the state takes a *position of fact* that the evidence does not support a jail sentence. Judicial estoppel bars the Commonwealth of Virginia, thereafter, including on appeal *de novo*, from inconsistently taking the countervailing position the facts support incarceration. Accordingly, the Commonwealth's Attorney may not seek incarceration of the Defendant in prosecution of this cause nor may a jail sentence be imposed by this Court.

II. The General District Court's failure to date its convicting summons, though a final order, requires the marijuana charge be dismissed with prejudice as this Court is unable to determine with certainty whether the case is procedurally proper for trial or conversely, whether jeopardy prevents a dismissal of the appeal for lack of jurisdiction.

The GDC order of conviction from which Defendant appealed to this Court, a summons, is signed but undated by the GDC judge. Defendant noted his appeal in the GDC on August 13, 2018, but such notice and accompanying summons of conviction was not transmitted to the Clerk this Court until August 28, 2018. The Supreme Court of Virginia has held that an undated order of conviction is a final order for purposes of the use of such order as a predicate offense in a subsequent prosecution. *See Perez v. Commonwealth*, 274 Va. 724, 730, 652 S.E.2d 95, 98 (2007). However, in *Perez*, the date range within which the conviction could have been entered was easily determinable as having occurred prior to the accused reaching his eighteenth birthday. Therefore, the trial court in the subsequent case could discern the predicate conviction had occurred prior to the new charge. *Id*. In the instant case, in contrast, the signature on the convicting order could have come before or after the Defendant noted his appeal since the time gap of transmittal to the Circuit Court spanned two weeks. This Court cannot presume entry of a date that is not determinable from the written record, for to do so would be to "engage in conjecture or surmise." *See id*.

"Any person convicted in a district court of an offense not felonious shall have the right, at any time within ten days *from such conviction*,[8] and whether or not such

[8] The rule for appeals from the Circuit Court to the Court of Appeals or the Supreme Court of Virginia, contains a saving provision which prevents uncertainty and waiver when a defendant appeals after the court announces its decision but before there is a written order. "A notice of appeal filed after the court announces a decision or ruling – but before the entry of such judgment or order – is treated as filed on the date of and after the entry." Va. Sup. Ct. R. 5:9. The enactment of this change to the Rules was necessitated

conviction was upon a plea of guilty, to appeal to the circuit court." Va. Code § 16.1-132 (emphasis added). Therefore, appeals to the Circuit Court from the GDC must be noted *after conviction*.[9] The Commonwealth has the burden of proving this Court possesses jurisdiction to try the Defendant, and this Court finds the evidence of whether it has jurisdiction to be in equipoise. The evidence could indicate the GDC did not enter a conviction, that is, sign the summons, until after the Defendant noted his appeal. Conversely, the evidence is equally consistent with the inference the summons was signed on the date of trial.

"It is well-established that a court speaks *only* through its written orders." *S'holder Representative Servs., LLC v. Airbus Americas, Inc.,* 292 Va. 682, 690, 791 S.E.2d 724, 728 (2016) (emphasis added). This Court is not permitted to make assumptions about when the GDC summons was signed by the trial judge. *See McBride v. Commonwealth*, 24 Va. App. 30, 35, 480 S.E.2d 126, 128 (1997) (rejecting application of presumptions about the discharge of duties on the part of district court judges in entering orders of

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by *Perez* and other instances like it of which the Supreme Court of Virginia clearly took note. In *Perez*, the judge presiding over the case was a retired judge who promptly went on vacation overseas while in possession of the Stafford Circuit Court Clerk's draft final order. Because the judge was purportedly not reachable for months by the Clerk and of the uncertainty of when the order was signed, defense counsel was forced to file the notice of appeal four times in order not to run afoul of the then-condition that the appeal had to be noted within 30 days *after* the entry of the written order of conviction. As a matter of timing, the third notice filed was that which secured defendant's right to appeal in *Perez*. The lack of appellate default was a matter of consequence in *Perez*. Although the Supreme Court did not reverse Perez's conviction based on the argument about the undated order, an earlier judgment by the Court of Appeals of Virginia was favorable to that defendant in ruling he was unlawfully subjected to double punishment, resulting in a ten-year sentence being reduced to five years. *Perez v. Commonwealth*, No. 1431-05-4, 2006 WL 2805159 (Va. Ct. App. Oct. 3, 2006), *aff'd*, 274 Va. 724, 652 S.E.2d 95 (2007). At the time of the *Perez* decision, the additional procedural default safety valve for defendants that might have covered an untimely filing of the notice of appeal under the delayed appeal provisions was not yet in existence as such statutes did not come into effect until July 1, 2011. Va. Code §§ 19.2-321.1 and 19.2-321.2.

[9] The rule respecting appeals from Juvenile and Domestic Relations District Courts uses the terminology "after conviction" instead of "from such conviction," a distinction this Court finds to be without difference. Va. Sup. Ct. R. 3A:19(B). Reading rule and statute consistently clarifies that respecting criminal appeals from courts not of record, they may only be noted after entry of a *written* judgment of conviction.

conviction). The Court could conclude therefore that it has no jurisdiction if the Defendant appealed before he was convicted, and dismiss the appeal because jeopardy does not attach where there is want of jurisdiction. *See Jones v. Commonwealth,* 220 Va. 666, 672, 261 S.E.2d 538, 541 (1980). In such a case, the Defendant's conviction in the lower court would stand because his ten-day period for appeal has expired inasmuch as the undated summons is nevertheless final under *Perez*. In the alternative, the Court could equally resolve it has jurisdiction, finding the first conviction was entered before the Defendant appealed, and proceed to enter a verdict.

"When as here, the facts are 'equally susceptible of two interpretations one of which is consistent with the innocence of the accused, [the trier of fact] cannot arbitrarily adopt that interpretation which incriminates [the accused].'" *Jay v. Commonwealth*, 275 Va. 510, 527, 659 S.E.2d 311, 321 (2008) (*quoting Burton v. Commonwealth,* 108 Va. 892, 899, 62 S.E. 376, 379 (1908)). Thus, because the Court is unable to determine from the record which jurisdictional path is most factually viable, finding itself in legal stasis, the Court has no choice but to dismiss the charge against the Defendant with prejudice.

CONCLUSION

This case came before the Court for trial of Nathan Elmore Thomas on a criminal charge of possession of marijuana, wherein Defendant challenged the reliability of the drug field test kit employed by the arresting police officer, and posited that no incarceration may be imposed on Defendant in this *de novo* prosecution irrespective of any prior record, as the Fairfax General District Court recorded "jail waived" on the summons of conviction. This Court holds that in an appeal from a criminal conviction occurring in the GDC,

wherein the lower court judge noted jail was waived on behalf of the Commonwealth of Virginia, judicial estoppel bars the imposition of incarceration on the Defendant upon trial *de novo* in the Circuit Court. This Court further holds that inasmuch as the GDC judge failed to date the summons of conviction, while such order was final, this Court cannot presume the undated order was signed *before* the notice of appeal was filed. This Court is unable to infer from the record whether the case is properly before the Court as a matter of jurisdiction. The Court is presented with two equally viable inferential alternatives, namely, that the Court can proceed to pronounce its verdict or may instead not do so for want of jurisdiction. Because trial has commenced and jeopardy may have attached, the Court is also prevented from dismissing the appeal without first finding it lacks jurisdiction. As the evidence of jurisdiction is in equipoise, the Court has no choice but to dismiss the marijuana charge with prejudice, for determination of jurisdiction is in legal stasis.

This Court shall issue a separate order incorporating the ruling in this Letter Opinion, and until such time, THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court