IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 121579

JEREMY WADE SMITH,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

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STATEMENT OF THE CASE

This appeal, arising from a final judgment entered against Jeremy Wade Smith in the Circuit Court for the City of Richmond, asks the Court to determine whether the Commonwealth breached its plea agreement with Appellant. Appellant alleges that his plea agreement contained terms regarding his sex offender registration requirements and the

Commonwealth breached the plea agreement by changing the classification of Appellant's prior conviction.

ASSIGNMENTS OF ERROR

This Court granted review on the following issues:

1. The Circuit Court erred in denying Smith's motion for summary judgment as to Count 1 and granting summary judgment to the Defendant on that Count, because the sex offender registration requirements and limitations effective in 1999 were material terms of Mr. Smith's contract with the Commonwealth that the Commonwealth breached by unilaterally imposing higher registration requirements on him in violation of the common law of Virginia.

2. The Circuit Court erred by interpreting the post-conviction legislative amendments as applicable to Smith in derogation of his vested contractual rights, in violation of Virginia Code § 1-239 and Article I, § 11 of the Virginia Constitution.

3. The Circuit Court erred in denying Smith's motion for summary judgment as to Count 2 and granting summary judgment to the Defendant on that Count, because depriving Smith of his common law contractual rights under his plea agreement without just compensation constituted an unconstitutional taking in violation of Article I, § 11 of the Virginia Constitution.

4. The Circuit Court erred in denying Smith's motion for summary judgment as to Count 3 and granting summary judgment to the Defendant on that Count, because depriving Mr. Smith of his common law contractual rights under his plea agreement without a hearing and depriving Smith of the benefit of his bargain constituted a deprivation of property with due process in violation of Article I, § 11 of the Virginia Constitution.

5. The Circuit Court erred in denying Smith's motion for summary judgment as to Count 4 and Count 5 and granting summary judgment to the Defendant on those Counts on the basis that there was no contractual or constitutional violation, because those violations have not been established.

STATEMENT OF FACTS

Originally charged with rape, the Circuit Court of the City of Richmond convicted Jeremy Wade Smith of carnal knowledge of a minor, in violation of Virginia Code § 18.2-63, pursuant to a written plea agreement. (JA at 19-20, 26-29). The plea agreement expressly provided, "This written Plea Agreement contains the entire agreement between the parties, both oral and written." (JA at 18, 208).

Smith's obligation to register as a sex offender stems from this 1999 conviction. (JA at 200). At the time of his conviction, a conviction of carnal knowledge of a minor was an offense for which registration was required, but it was not classified as a "sexually violent offense." Va. Code § 19.2-298.1 (1999). In 2006, however, the federal government enacted the Adam Walsh Child Protection and Safety Act. Title I of the Act, known as the Sex Offender Registration and Notification Act ("SORNA"), required Virginia to implement a comprehensive set of sex offender registry standards. *See* 42 U.S.C. § 16911 *et seq*. Failure to implement such standards would result in a partial loss of federal funding for state and local law enforcement

programs. *See* 42 U.S.C. § 16925. In 2008, the Virginia General Assembly amended Virginia Code § 9.1-902 to comply with SORNA. Chapter 877 of the Acts of Assembly of 2008. One of the consequences of this amendment was that Smith's 1999 conviction was reclassified as a "sexually violent offense."

MATERIAL PROCEEDINGS BELOW

On February 25, 2010, Smith filed a five count Complaint against the Commonwealth of Virginia alleging various contractual and constitutional violations. (JA at 1-29). On May 20, 2010, the Attorney General was served with the Plaintiff's Complaint. (JA at 36). On June 11, 2010, the Virginia Department of State Police ("Department") filed a Demurrer to the Plaintiff's Complaint. (JA at 30-33). On July 9, 2010, Plaintiff filed his Brief in Opposition to Demurrer and Motion for Default Judgment. (JA at 37-64). On August 2, 2010, the Department filed replies to the Plaintiff's Brief in Opposition and Motion for Default Judgment. (JA at 65-72). On September 13, 2010, the trial court held a hearing on all outstanding motions. (JA at 73-118). On October 14, 2010, the trial court denied the Department's Demurrer and the Plaintiff's Motion for Default Judgment and granted the Department's motion leave to file a late response. (JA at 119-120). The trial court ordered the Department to file an Answer by October

19, 2010. The Department filed an timely Answer to the Complaint on October 18, 2010. (JA at 121-130).

On January 26, 2012, Smith filed a motion for summary judgment. (JA at 133-182). On February 2, 2012, the Department filed its response to Smith's summary judgment motion along with a cross motion for summary judgment. (JA at 187-230). On April 13, 2012, the trial court held a hearing on the summary judgment motions. (JA at 293-364). On June 21, 2012, the trial court issued a written opinion and order granting summary judgment in favor of the Commonwealth on the Department's motion and denying Smith's motion for summary judgment. (JA at 448-469).

On December 17, 2012, this Court granted the appeal.

ARGUMENT

I. Standard of Review

Appellant's claims all present questions of law, which the Court reviews de novo. *See, e.g.*, *St. Joe Co. v. Norfolk Redevelopment & Hous. Auth.*, 283 Va. 403, 407, 722 S.E.2d 622, 625 (2012) (reviewing grant of summary judgment); *Bentley Funding Group, L.L.C. v. SK & R Group, L.L.C.*, 269 Va. 315, 324, 609 S.E.2d 49, 53 (2005) (reviewing interpretation of contract).

II. Appellant's plea agreement did not concern Appellant's obligation to register as a sex offender.

Appellant claims his obligation to register as a sex offender, including the terms and conditions of his obligation to register, was incorporated into his plea agreement as a matter of law. Appellant's claim fails for several reasons; therefore, this Court should affirm the judgment of the circuit court.

A. Sex offender registration is outside the plea agreement process.

The crux of Appellant's claim is that his plea agreement contained terms regarding his sex offender registration requirements and the Commonwealth breached the plea agreement by statutorily changing the classification of his prior conviction. However in making this claim, Appellant has incorrectly presupposed that the obligation to register as a sex offender is a negotiable term of the plea agreement process.

Plea agreements in the Commonwealth are controlled by Rule 3A:8. Appellants' plea agreement was of the type specified in Rule 3A:8(c)(1)(B). (JA at 18, 219). Rule 3A:8(c)(1)(B) provides that the attorney for the Commonwealth will "[m]ake a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding on the court."

Although "sentence" is not defined in the Rules, in the Code of Virginia "sentence" is analogous with ascertainment of punishment. *See* Va. Code §§ 19.2-295 and 295.1.

In Virginia, the obligation to register as sex offender is not punishment. *Kitze v. Commonwealth*, 23 Va. App. 213, 220, 475 S.E.2d 830, 833 (1996). Additionally, very much like the imposition of political or firearm disabilities, or the administrative suspension of a driver's license, or the collection of DNA from a convicted felon for inclusion in the Commonwealth's DNA databank, the obligation to register as a sex offender is a collateral consequence of conviction. *Id. See Wilson v. Flaherty*, 689 F.3d 332, 337 (4th Cir. 2012); *see also Ward v. State*, 315 S.W.3d 461, 470-71 (Tenn. 2010) (overwhelming majority of courts, 32 of 33, have concluded that sex offender registration requirement is a collateral consequence and a trial court's failure to advise defendant of requirement does not render guilty plea constitutionally infirm.) There is no authority for a collateral consequence to be negotiated or bargained away in the plea agreement process.

Furthermore, the obligation to register arises automatically upon conviction and conviction is the only fact relevant to registration and classification determination. *McCabe v. Commonwealth*, 274 Va. 558, 567,

650 S.E.2d 508, 513 (2007). Accordingly, as the obligation to register as a sex offender is not punishment, a collateral consequence of conviction, and the only fact relevant to registration and classification determination is conviction, the terms and conditions of sex offender registration are seemingly outside the scope of the plea agreement process.[1]

B. The plea agreement did not contain any terms regarding sex offender registration.

Appellant claims that the obligation to register as a sex offender was incorporated into the plea agreement as a matter of law.[2] Appellant relies on *Wright v. Commonwealth*, 275 Va. 77, 655 S.E.2d 7 (2008), for the proposition "[t]he law effective when the contract is made is as much a part of the contract as if incorporated therein." *Wright,* 275 Va. at 81, 655

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[1] The Commonwealth recognizes that the Court of Appeals in *Kitze* stated that "registration is merely a remedial aspect of a sex offender's sentence." *Kitze*, 23 Va. App. at 218; 475 S.E.2d at 833. However, even if registration is a remedial aspect of a sentence, the terms and conditions of sex offender registration must lie outside the scope of the plea agreement process as no authority exists to include them in the process. Stated differently, the registration requirements are set by the legislature and neither the Commonwealth's Attorney nor the trial judge has any authority or discretion to modify them.

[2] Appellant does not claim the plea agreement was modified by an oral or written agreement. (Brief of Appellant p. 13). Appellant's sole claim is that his obligation to register as a sex offender, under the terms defined by the statute in effect at the time of his conviction, was incorporated into the plea agreement as a matter of law.

S.E.2d at 10 (quoting *Paul v. Paul,* 214 Va. 651, 653, 203 S.E.2d 123, 125 (1974)). However, his reliance on *Wright* is misplaced.

In *Wright*, the issue before this Court was whether a defendant could withdraw his guilty plea when the trial court imposed additional terms of suspended incarceration and post-release supervision pursuant to Virginia Code §§ 18.2-10(g) and 19.2-295.2(A) when post-release supervision was not part of the plea agreement. Wright had entered into an "Agreed Disposition" with the Commonwealth in which the Commonwealth agreed to limit the charges to first degree murder instead of capital murder and Wright agreed that he would plead guilty to first degree murder. Both parties agreed that Wright would be sentenced to imprisonment for life, among other provisions. In sentencing Wright, the trial court imposed an additional term of suspended incarceration and post-release supervision pursuant to Virginia Code §§ 18.2-10(g) and 19.2-295.2(A). This Court held that these additional terms were implicit in the plea agreement and Wright had no right to withdraw his guilty plea. *Wright*, 275 Va. at 82, 655 S.E.2d at 10.

Wright differs from the Appellant's claim in two important respects. First, the additional terms that Wright claimed were not part of his plea agreement were a material consequence of his guilty plea, not a collateral

consequence as in Appellant's case. *See Kitze*, 23 Va. App. at 217, 475 S.E.2d at 833; *Wilson*, 689 F.3d at 337. Additionally, Wright's plea agreement did contain a provision regarding incarceration and the additional terms were incorporated therein to "insure the defendant what is reasonably due him." *Wright,* 275 Va. at 82, 655 S.E.2d at 10 (*quoting United States v. Baldacchino,* 762 F.2d 170, 79 (1st Cir. 1985)). Unlike the Appellant's claim, the terms that were incorporated into Wright's plea agreement went the heart of his plea agreement.

Likewise, the issue before this Court in *Paul* was to determine if Virginia § 1-13.42, addressing the age of majority, altered the property and settlement agreement between the parties. The property and settlement agreement contained a clause "that husband shall pay wife $175.00 per month for the support of each child 'until said children are 21, shall marry, enter or be inducted into the armed forces of the United States, become full-time gainfully employed or otherwise emancipated." *Paul,* 214 Va. at 652, 203 S.E.2d. at 124. The sole issue before the Court was whether the enactment of Virginia § 1-13.42 caused the Paul children to become "otherwise emancipated." *Id.* Unlike in Smith's plea agreement, the Paul contract contained an express provision concerning child support. Therefore, the court in *Paul* properly looked to "the law in force at the date

of making a contract determines the rights of the parties under the contract." *Paul*, 214 Va. at 653, 203 S.E.2d. at 125. *Paul* and *Wright* are inapposite to Appellant's claim. Unlike *Paul* and *Wright* where the Court looked to law in force on the date of the contract to determine the rights of the parties as it related to specific terms contained within those contracts, Appellant's plea agreement is void of any terms regarding sex offender registration.

Additionally, Appellant's claim also fails to acknowledge that the plea agreement contained an integration clause. Appellant would have the Court add a new term into the contract, one concerning sex offender registration; however, when the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning. *See Bridgestone/Firestone Inc. v. Prince William Square Assocs.*, 250 Va. 402, 407, 463 S.E.2d 661, 664 (1995). Appellant's argument fails to construe the plain meaning of the contract.

C. The Commonwealth has completed its obligation under the plea agreement.

Assuming, *arguendo*, that the obligation to register as a sex offender is a negotiable term of the plea agreement process and that the plea agreement contained any such term, Appellant's claim still fails as the Commonwealth has completed its obligation under the plea agreement.

Appellant's plea agreement falls within Rule 3A:8(c)(1)(B), which provides that the attorney for the Commonwealth will "[m]ake a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding on the court." *Id.* Nothing in the plain language of the Rule suggests or provides that the Commonwealth's plea agreement obligations continue after making a recommendation for a particular sentence. Moreover, when a plea agreement is of the type specified in Rule 3A:8(c)(1)(B), if a court rejects the recommendation or request, the defendant nevertheless has no right to withdraw his plea, unless the Commonwealth fails to perform its part of the agreement.[3] *See* Rule 3A:8(c)(2).

Under this type of plea agreement, a defendant knowingly and willingly pleads guilty in exchange for the benefit of having the Commonwealth recommend a sentence. Additionally, the defendant

[3] It should also speak volumes to the true intent of the plea agreement as Appellant has made no attempt to withdraw his plea. "Ascertainment of the intent of the contracting parties is the cardinal rule in the construction of agreements. To do that the court will put itself in the situation occupied by the parties and look to the language employed, the subject matter and purpose of the parties, and all other pertinent circumstances. Occupying that status, it will apply the language used to the subject matter and object sought to be accomplished and so judge and determine its meaning." *Knit v. MacLeod*, 191 Va. 665, 671, 62 S.E.2d 42, 44 (1950).

cannot withdraw his plea if the Commonwealth makes the agreed recommendation even if the court does not accept it. It would seem illogical to conclude the Commonwealth's obligations continue after making a recommendation for a particular sentence, as Appellant suggests, when the defendant can only withdraw his guilty plea when the Commonwealth fails to make the agreed recommendation. Here, the Commonwealth made the agreed-upon recommendation, which the trial court accepted. (JA at 19-20).[4]

III. The Commonwealth may impact contractual rights in the interest of public safety.

Appellant alleges that his plea agreement also incorporates Va. Code § 1-239 and Art. 1, § 11 of the Virginia Constitution which prohibits the Commonwealth from altering contracts. Even assuming the statutory registration requirement can be "frozen" at the time of a conviction, this Court has held that contracts must be considered as containing an implied condition that subjects them to the exercise of the state's regulatory police power. *Haughton v. Lankford*, 189 Va. 183, 190, 52 S.E.2d 111, 114 (1949). "Such sovereign power of the government to protect the general welfare of the people of the State is paramount to any rights which may be

[4] Appellant also received the substantial benefit of avoiding the possibility of a rape conviction, which carries a maximum penalty of life imprisonment. Va. Code § 18.2-61.

acquired by individuals by virtue of any contracts between them." *Id. See also East New York Sav. Bank v. Hahn*, 326 U.S. 230, 232, 66 S. Ct. 69, 70, 90 L. Ed. 34 (1945); *Veix v. Sixth Ward Bldg., etc., Ass'n*, 310 U.S. 32, 38, 60 S. Ct. 792, 794, 84 L. Ed. 1061 (1940); *Home Bldg., etc., Ass'n v. Blaisdell,* 290 U.S. 398, 436-439, 54 S. Ct. 231, 239, 240, 78 L. Ed. 413 (1934). This Court has also stated:

> The exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the State or the municipality to abrogate this power so necessary to the public safety.

Richmond v. Virginia R. & P. Co., 141 Va. 69, 94, 126 S.E. 353, 360 (1925) (citing *Northern Pacific R.R.* v. *Duluth,* 208 U.S. 583, 598, 28 S.Ct. 341, 346, 52 L.Ed. 630 (1908)).

The purpose of the Virginia Sex Offender and Crimes Against Minors Registry ("Registry") was and remains:

> [T]o assist the efforts of law-enforcement agencies to protect their communities from repeat sex offenders and to protect children from becoming the victims of repeat sex offenders by helping to prevent such individuals from being hired or allowed to volunteer to work directly with children.

Va. Code § 19.2-390.1(A) (1999); Va. Code § 9.1-900. The creation and maintenance of the Registry, along with the registration obligations imposed on convicted sex offenders, is an exercise of the state's regulatory

police power. Therefore, even assuming Appellant had a contractual right in his plea agreement concerning sex offender registration, the Commonwealth can alter his registration obligations in the exercise of its police powers. Accordingly, all of Appellant's contractual claims must fail as the Commonwealth can alter Appellant's contractual rights.[5]

IV. Appellant does not have any vested contractual rights.

As discussed above, Appellant does not have any contractual rights regarding his obligation to register as a sex offender, both because the plea agreement did not concern Appellant's registration obligation and because the Commonwealth may impact contractual rights in the interest of public safety. Nevertheless, because Appellant's claim may touch on his sentencing order as the source of his vested rights claim, the Commonwealth addresses Appellant's claims below.

In Virginia, a vested right is "a right, so fixed, that it is not dependant on any future act, contingency, or decisions to make it more secure." *Bain v. Boykin*, 180 Va. 259, 264, 23 S.E.2d 127 (1942). Virginia Code § 1-239 provides in relevant part:

> No new act of the General Assembly shall be construed to repeal a former law . . . or any right accrued under . . . the

[5] The Commonwealth notes that Appellant's claims are all based on contractual common law violations and not constitutional concerns.

> former law, or in any way whatever to affect such . . . right accrued, or claim arising before the new act of the General Assembly takes effect.

Virginia Code § 1-239 applies to accrued rights categorized as "substantive" or "vested." *Morency v. Commonwealth*, 274 Va. 569, 573, 649 S.E.2d 682 (2007); *City of Norfolk v. Kohler*, 234 Va. 341, 345, 362 S.E.2d 894 (1987). "[A] final judgment of a court creates a vested right in the holder of that judgment which cannot be abrogated by subsequent legislation under Code § 1-239." *Morency,* 274 Va. at 573-74, 649 S.E. 2d at 684.

In *Paul,* the Court noted that when interpreting newly enacted laws the pertinent rule of statutory construction is "that new laws, except as to matters of remedy which may be applied retrospectively, are usually presumed to be prospective and not retrospective in their operation." *Paul,* 214 Va. at 653, 203 S.E.2d at 125. The Court noted that "this principle of law is recognized in Code § 1-16 which provides that no new law shall affect 'any right accrued or claim arising' before the effective date of the new law."[6] *Id.* Therefore, Appellant's reliance on Code § 1-239 fails because the Registry specifically states that it applies retroactively. *See* Va. Code § 9.1-901(C). Thus, the amendments to the Virginia Sex

[6] In 2005, Code § 1-239 was enacted to replace Code § 1-16. Code § 1-239 embodies the same principle as Code § 1-16.

Offender and Crimes Against Minors Registry Act may impact any claims or rights that had already arisen prior to those amendments. Additionally, Appellant fails to complete the "vested rights" analysis as stated in *Morency*:

> Applying these principles, we conclude that a final judgment order **may** vest a litigant with an accrued right for purposes of Code § 1-239. This conclusion, however, does not end our inquiry. The nature of the specific "right" embodied in the judgment order must be determined. *See Town of Danville v. Pace*, 66 Va. (25 Gratt.) 1, 11 (1874) ("[I]t is not competent for the legislature by retroactive laws to interfere with vested rights. But the inquiry still recurs, what are these vested rights that are secured against legislative invasion.").

Id. at 574-75, 649 S.E. 2d at 684. (emphasis added).

Although Appellant claims he had a vested right in his removal from the sex offender registry after 10 years from his initial registration (based upon what the law provided at the time of his conviction), one has no right to rely on the continued existence of civil statutes. A right created by a statute is terminated when that statute is repealed (or amended), unless the repealing statute expressly saves the right. *See Allen v. Mottley Constr. Co.,* 160 Va. 875, 888, 170 S.E. 412, 417 (1933).

The repeal of Virginia Code § 19.2-298.3 would have terminated Appellant's right to be removed from the registry, even assuming, at best, that such a statutory remedy could have created such a right. Further,

Appellant was required to petition the circuit court in which he was convicted or the circuit court in the jurisdiction in which he resides to have his information removed from the Registry. See Va. Code § 19.2-298.3(A) (1999).[7] Such a right to petition does not equal a vested right. *Morency,* 274 Va. at 576-77, 649 S.E.2d at 685.

In *Commonwealth v. Shaffer*, 263 Va. 428, 432, 559 S.E.2d 623, 626 (2002), the petitioner argued that his right to petition for judicial review of the administrative revocation of his driver's license was a substantive right which had accrued prior to the enactment of a statute eliminating such judicial review, and therefore, the statute could not be retroactively applied. This Court held that the right to judicial review was not a substantive right, but merely a procedural remedy which "may be altered, curtailed, or repealed at the will of the legislature" and therefore did not give rise to any vested interest. *Id.* at 432-33, 559 S.E.2d at 626. *See also Morency,* 274 Va. at 576-77, 649 S.E.2d at 685. Applying the same analysis to the case

[7] Appellant alleges that compliance with the registry requirements is not itself a condition precedent to the termination of the obligation to register. However, failure to comply with the registration requirements is a class 1 misdemeanor and any period of confinement would toll the registration period. *See* Va. Code §§ 18.2-472.1 and 19.2-298.2 (1999). Accordingly, failure to comply with the registry requirements may lead to an extended registration period.

at bar, it is clear Appellant had not "vested" right to have his name removed from the Sex Offender Registry. *Id.*

V. Appellant was Not Deprived of any Constitutional Right and is Not Entitled to Injunctive relief.

Appellant's remaining claims: that he suffered an unconstitutional taking, his due process rights were violated and he is entitled to injunctive relief, are without merit.

To begin, it is an "established principle that all acts of the General Assembly are presumed to be constitutional." *In Re: Iris Lynn Phillips,* 265 Va. 81, 85, 574 S.E.2d 270, __ (2003); *see also Yamaha Motor Corp., U.S.A. v. Quillian*, 264 Va. 656, 665, 571 S.E.2d 122, 126 (2002). Appellant's arguments fail to account for, let alone overcome, this presumption.

Furthermore, as discussed above, Appellant did not have any contractual rights—vested or otherwise—regarding his registration obligations. As noted, Appellant's plea agreement did not address his obligation to register as a sex offender and the Commonwealth may, in the exercise of its police powers, extend, modify or repeal civil statutes.

Similarly, because the Commonwealth properly exercised its police powers, Appellant suffered no violation of due process of a contractual

right.[8] Indeed, he had no contractual right governing his obligation to register as a sex offender. His registration obligations were established and governed by statute, which the General Assembly may amend. *Haughton*, 189 Va. at 190, 52 S.E.2d at 114.

Finally, for all the reasons set forth above, Appellant was not entitled to an injunction or expungement of his sex offender registration information.

For all these reasons, the judgment of the Circuit Court for the City of Richmond should be affirmed.

CONCLUSION

The Circuit Court of the City of Richmond correctly granted summary judgment in favor of the Commonwealth because Appellant's plea agreement did not concern Appellant's obligation to register as a sex offender. Accordingly, the judgment of the trial court should be affirmed.

Respectfully submitted,

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[8] Appellant acknowledges that *McCabe v. Commonwealth*, 274 Va. 558, 650 S.E.2d 508 (2007), has foreclosed any due process argument regarding a constitutional liberty interest. See Brief of Appellant, p. 47.

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CERTIFICATE OF SERVICE

On February 22, 2013, the required number of copies of this brief were hand delivered to the Clerk of this Court and three copies were mailed to: Thomas H. Roberts, Esquire, and Andrew T. Bodoh, Esq., THOMAS H. ROBERTS & ASSOCIATES, P.C. 105 South 1st Street, Richmond, VA 23219, counsel for the appellant.

Pursuant to Rule 5:26(b), I certify the brief, excluding the cover page, table of contents, table of authorities and certificate contains 4,466 words.

In compliance with Rule 5:26(e), a digital copy of this brief was submitted to the Clerk of this Court and transmitted to opposing counsel via e-mail delivery.

_____
Charles A. Quagliato
Assistant Attorney General