IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 082228

WILLIAM S. SMALLWOOD

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

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WILLIAM S. SMALLWOOD

Appellant

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BRIEF FOR THE COMMONWEALTH

This appeal from the Court of Appeals of Virginia assigns error to the alleged insufficiency of the evidence to sustain William S. Smallwood's conviction for possession of a firearm by a convicted felon in violation of § 18.2-308.2 of the Code of Virginia.

STATEMENT OF THE CASE

Smallwood was indicted by the Cumberland County grand jury, in CR07000057-00, on October 22, 2007, for the felonious possession of a firearm by a convicted felon on July 27, 2007, in violation of Code § 18.2-308.2. (App.1). He had already been charged with driving on a suspended license that same day. (App. 54).

Trial

On February 8, 2008, the defendant pled guilty in the Circuit Court of Cumberland County to the misdemeanor and not guilty to the felony charge. Smallwood waived a jury and was tried by the judge alone. Smallwood's motions to strike at the end of the Commonwealth's case and at the conclusion of all the evidence were denied, and he was convicted as charged. (App. 54).

A sentencing hearing was held in the circuit court on April 11, 2008, after which the judge sentenced the defendant to 5 years in prison, for the felony, but suspended 3 years thereof. (App. 73).

The court's judgment order was entered on April 16, 2008. (A00. 74).

Appeal

Smallwood appealed to the Court of Appeals, which denied his appeal in Record No. 1070-08-2 on October 16, 2008. That court found the evidence sufficient to sustain his felony conviction and held a Second Amendment-based complaint to be procedurally barred from appellate review. (App. 113-115).

APPELLANT'S ASSIGNMENT OF ERROR

> "It was error for the Court of Appeals to fail to overturn the trial court ruling and the trial court erred in ruling that there was sufficient evidence to convict the defendant of one count of felony possession of a firearm after having been previously convicted of a felony."

QUESTIONS PRESENTED

I. WAS THE EVIDENCE SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION FOR POSSESSION OF A FIREARM BY A CONVICTED FELON?

2. WAS THE EVIDENCE SUFFICIENT TO PROVE THAT THE DEFENDANT HAD CONSTRUCTIVE POSSESSION OF THE FIREARM?

3. COULD THE DEFENDANT, A CONVICTED FELON, RELY VICARIOUSLY ON HIS COMPANION'S SECOND AMENDMENT RIGHT TO BEAR A FIREARM, AN ISSUE NOT RAISED IN THE TRIAL COURT AND UNRELATED TO SMALLWOOD'S ASSIGNMENT OF ERROR IN THIS COURT?

STATEMENT OF FACTS

On July 27, 2007, the Cumberland County Sheriff's Office was conducting a "checking detail" at the intersection of Mahan Road and Virginia Route 45. A car driven by the defendant approached the checkpoint about 1:00 a.m.; Chrystal Barnett was Smallwood's passenger. (App. 22-23).

Smallwood stopped the vehicle. Deputy J. F. Lampkin approached and had him pull over after the defendant admitted that his driving privileges had been suspended. (App. 22-23).

Deputy M. Boggs then approached the vehicle, which was owned by Barnett, and looked inside with his flashlight. The officer saw a ".38 silver revolver" lying in plain view on the middle console between Smallwood and Ms. Barnett. (App. 24). The defendant told Boggs that he knew the gun was in the vehicle, but said it belonged to Ms. Barnett and that he supposedly had not handled or otherwise possessed it. (App. 25). Smallwood also said that he thought that because the gun was Barnett's "'it wouldn't fall on him.'" (App. 25).

Ms. Barnett testified the gun belonged to her and said it was in plain view because her application for a concealed weapon permit

was still being processed. She claimed the defendant had never touched or handled the gun. (App. 36-37).

Smallwood was arrested on the firearm charge after the deputies ran his record and determined that he was a convicted felon. (App. 25). The Commonwealth submitted two prior felony conviction orders as exhibits at trial. (App. 48-53).

ARGUMENT

In pertinent part, Code § 18.2-308.2 makes it unlawful for "any person who has been convicted of a felony . . . to knowingly and intentionally possess ***or*** transport any firearm . . . . Any person who violates this section shall be guilty of a Class 6 felony." (Emphasis added).

Smallwood contends that the evidence was insufficient to sustain his conviction under this provision because it failed to prove he possessed the firearm and also argues that the prohibition against him possessing the gun was trumped by his companion's Second Amendment right to bear firearms. His first complaint is without merit; his second contention is not cognizable on appeal and would have no merit even if it were.

SUFFICIENCY OF THE EVIDENCE: STANDARD OF REVIEW

It is of course axiomatic that the evidence must establish a defendant's guilt beyond a reasonable doubt; suspicion, no matter how strong, is not enough to sustain a criminal conviction. Burrows v. Commonwealth, 224 Va. 317, 319-20, 295 S.E.2d 893, 895 (1982). However, "[a]n appellate court does not 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Rather, the relevant question is whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Williams v. Commonwealth, 278 Va. ___, 677 S.E.2d 280, ___ (2009) (quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979)) (emphasis in original).

Thus, when addressing a claim on appeal that the evidence is insufficient, the appellate court considers the evidence and all inferences fairly deducible therefrom in the light most favorable to the prevailing party at trial, *i.e.*, here the Commonwealth. Commonwealth v. Hudson, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003). This controlling principle requires an appellate court to "discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the

Commonwealth and all fair inferences to be drawn therefrom." Parks v. Commonwealth, 221 Va. 492, 498, 270 S.E.2d 755, 759 (1980).

"[C]ircumstantial evidence is as competent and is entitled to as much weight as direct evidence. . . ," Coleman v. Commonwealth, 226 Va. 31, 53, 307 S.E.2d 864, 876 (1983), and the inferences to be drawn from the evidence are solely within the province of the fact finder. LaPrade v. Commonwealth, 191 Va. 410, 418, 61 S.E.2d 313, 316 (1950). For example, a fact finder may infer guilt from a defendant's false statements to the police. See Ford v. Commonwealth, 28 Va. App. 249, 260, 503 S.E.2d 803, 808 (1998).

Because a "trial court is in a unique position to evaluate the demeanor of the witnesses," Sapp v. Commonwealth, 263 Va. 415, 427, 559 S.E.2d 645, 651 (2002), it is the province of the fact finder, not an appellate court, to judge their credibility. Commonwealth v. Presley, 256 Va. 465, 470, 507 S.E.2d 72, 75 (1998). And, the weight given a fact finder's determination of witness credibility is the same whether it was a bench or jury trial. Evans v. Commonwealth, 215 Va. 609, 613, 212 S.E.2d 268, 271 (1975).

Finally, Virginia Code § 8.01-680 mandates that when a party objects to a trial court's refusal to overturn his conviction because it

allegedly is contrary to the evidence, "the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it." And, as the Supreme Court of the United States has noted, "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." Anderson v. Bassemer City, 470 U.S. 564, 574 (1985).

"POSSESSION"

Proof of possession can rest on circumstantial evidence, Burchette v. Commonwealth, 15 Va. App. 432, 434,425 S.E.2d 81, 83 (1992), and this Court has said as follows vis-á-vis challenges to the sufficiency of the evidence to prove that a defendant possessed a firearm in violation of Code § 18.2-308.2:

> A conviction for the unlawful possession of a firearm can be supported exclusively by evidence of constructive possession; evidence of actual possession is not necessary. To establish constructive possession of the firearm by a defendant, "the Commonwealth must present evidence of acts, statements, or conduct by the defendant or other facts and circumstances proving that the defendant was aware of the presence and character of the firearm and that the firearm was subject to his dominion and control." While the Commonwealth does not meet its burden of proof simply by showing the defendant's proximity to the firearm, it is a circumstance probative of possession and may be considered as a

> factor in determining whether the defendant possessed the firearm.

Bolden v. Commonwealth, 275 Va. 144, 148, 654 S.E.2d 584, 586 (2008)(citations omitted). And, importantly, "'[p]ossession' of [contraband] does not have to be exclusive, but may be joint." Italiano v. Commonwealth, 214 Va. 334, 335-36, 200 S.E.2d 526, 528 (1973).

Smallwood says that "circumstantial evidence of constructive possession is sufficient to support a conviction only when the circumstantial evidence excludes every reasonable hypothesis of innocence." (Def. Br. 6-7). However, this statement "is simply another way of stating that the Commonwealth has the burden of proof beyond a reasonable doubt. *** The issue upon appellate review is not whether 'there is some evidence to support' these hypotheses [of innocence]. The issue is whether a reasonable [fact finder], upon consideration of all the evidence, could have rejected [the appellant's] theories in his defense and found him guilty . . . beyond a reasonable doubt." Hudson, 265 Va. at 513, 578 S.E.2d at 785 (citation omitted). Indeed, other than when an accused confesses, every case of constructive possession must by its nature be based on circumstantial evidence.

THE EVIDENCE WAS SUFFICIENT

The trial court made the following findings of fact at the conclusion of the evidence:

- There was a firearm in the car driven by the defendant;
- The weapon was in plain view on the open console "immediately adjacent to [Smallwood's] right leg";
- The defendant was "aware of the presence and the character of the firearm";' and
- "It is clear to the Court that this weapon was subject to [Smallwood's] dominion and control."

(App. 42). The court thus concluded, "That's sufficient to find him guilty of the charge" (App. 42-43), and the Court of Appeals correctly affirmed the judge's ruling.

As previously noted, "'[p]roof of actual possession is not required; proof of constructive possession will suffice. Constructive possession may be established when there are . . . facts or circumstanes which tend to show that the [accused] was aware of both the presence and character of the [item] and that it was ***subject*** to his dominion and control.'" Wilson v. Commonwealth, 272 Va. 19, 27, 630 S.E.2d 326, 330 (2006) (citation omitted). Unlike cases where "[t]he record contains no evidence of statements or conduct which tend to show that [the accused] was aware of the presence of

[the contraband]," see Drew v. Commonwealth, 230 Va. 471, 473, 338 S.E.2d 844, 845 (1986), a firearm lying between the driver and passenger seats "would have been plainly visible to anyone sitting in the driver's seat." White v. Commonwealth, 24 Va. App. 446, 452, 482 S.E.2d 876, 879 (1997). See Maye v. Commonwealth, 44 Va. App. 463, 484, 605 S.E.2d 353, 363 (2004) (no error in trial court's conclusion that the evidence supported defendant's conviction for possession of a firearm, where the gun was in his open and obvious view). And, of course, Smallwood admitted to Officer Lampkin that he was aware the gun was there and that he was not supposed to possess it. (App. 25).

The firearm being within Smallwood's easy reach allowed the judge to find it was subject to his dominion and control. See Davis v. Commonwealth, 12 Va. App. 728, 733, 406 S.E.2d 922, 924-25 (1991) (upholding conviction of defendant who knew where contraband was located in his house, despite presence of wife and a friend who claimed at trial that the item belonged to him rather than accused, because the evidence "was sufficient . . . to establish that [defendant] had knowledge of the presence of the [item], and that [it] was subject to his dominion and control."); Maryland v. Pringle, 540

U.S. 366, 372 (2003) (Supreme Court noting in unanimous decision that, in case where "baggies of cocaine were behind the back-seat armrest and accessible to all three men" in front and backseats of vehicle, "[w]e think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine.")

Smallwood, of course, argues that he could not have exercised dominion and control over the gun because, since "Ms. Barnett testified to owning the car, the gun, and being the person who placed the gun in the car and on the console. . . , the gun was under the dominion and control of Ms. Barnett at all times." (Def. Br. 14). However, there was no evidence that Barnett ever forbade the defendant to handle the gun or, indeed, that there was any way she could have stopped him from doing so. In any event, there are two erroneous assumptions underlying Smallwood's argument.

First, he assumes that the trial judge had to accept Barnett's testimony as true, but this is not the case. The fact finder is "not required to accept in full the testimony of any witness." Henry v. Commonwealth, 195 Va. 281, 290, 775 S.E.2d 863, 859 (1953). "'They have the right to reject that part of the evidence believed by

them to be untrue and to accept that found by them to be true.'" Barrett v. Commonwealth, 231 Va. 102, 107, 341 S.E.2d 190, 193 (1986) (citation omitted). Indeed, "even if defendant's story was not *inherently* incredible, the trier of fact need not have believed the explanation." Montgomery v. Commonwealth, 221 Va. 188, 190, 269 S.E.2d 352, 353 (1980) (emphasis in original) (finding evidence sufficient even though accused and his witness gave innocent explanation for possession of stolen property). And, that the fact finder did not believe a witness does not have to be articulated expressly, but can be inferred from the result. See, Id. at 190, 269 S.E.2d at 353; Barrett, 231 Va. at 107, 341 S.E.2d at 193; Shaver v. Commonwealth, 151 Va. 545, 550, 145 S.E.2d 377, 378 (1928). Shackelford v. Commonwealth, 263 Va. 196, 209, 547 S.E.2d 899, 907 (2001) ("[W]e reiterate that the circuit court, as the fact finder, was not bound to accept Shackelford's explanation. . . .") Here, given Barnett's inherent bias in favor of the defendant, the judge could well conclude that her testimony concerning Smallwood's alleged lack of involvement with the gun was not credible. See Wyoming v. Houghton, 526 U.S. 295, 304-05 (1999) (noting that "a car passenger

– unlike an unwitting tavern patron in Ybarra – will often be engaged in a common enterprise with the driver. . . .")

Moreover, the issue is not whether Smallwood actually handled the gun, but whether it was ***subject*** to his dominion and control. "Since exclusive possession includes joint possession by two or more persons, [the defendant] had exclusive possession of the [items found in the vehicle] even if the woman who was . . . with [him] also had possession of [them]." Carter v. Commonwealth, 209 Va. 317, 323, 163 S.E.2d 589, 594 (1968). "Possession and not ownership is the vital issue. Possession may be joint or several. Two or more persons may be in possession where each has the power of control and intends to exercise control jointly." Burnette v. Commonwealth, 194 Va. 785, 792, 75 S.E.2d 482, 487 (1953). See Gillis v. Commonwealth, 215 Va. 298, 208 S.E.2d 768 (1974) (evidence sufficient to support finding that the defendant was in possession of illegal drugs and paraphernalia sitting in plain view in common area of apartment he shared with roommate, even though defendant claimed contraband did not belong to him and that roommate had bought the pipe was corroborated by another witness).

The defendant relies on and discusses at length the dissenting opinion in Dodd v. Commonwealth, 50 Va. App. 301, 649 S.E.2d 222 (2007), but the issue in Dodd was not the sufficiency of the evidence; the only question there concerned whether the police had probable cause to search. The instant case also is distinguishable from several cases in which this Court has found the evidence insufficient to prove constructive possession.

For example, in Maxwell v. Commonwealth, 275 Va. 437, 657 S.E.2d 499 (2008), drugs were found in a pile of wood located outside of a fence enclosing a lumberyard. Id. at 440-41, 657 S.E.2d at 501. The police had been pursuing the accused, who was seen walking out from behind the stacks of plywood. Id. at 440, 657 S.E.2d at 501. The Court held:

> All the Commonwealth is really left with . . . is evidence that the defendant was seen near the stacks of plywood where the drugs were found. ***But it was not shown that he was ever in such close proximity as would support a finding that he was aware of both the presence and the character of the drugs and that they were subject to his dominion and control.*** In any event, while proximity is a factor to be considered along with other evidence, mere proximity is not sufficient to prove possession, and the utter lack of any other evidence connecting the defendant to the drugs creates a wide gap in the chain of circumstances that is fatal to the Commonwealth's case.

Id. at 444, 657 S.E.2d at 503 (emphasis added).

Similarly, in Drew v. Commonwealth, 230 Va. 471, 338 S.E.2d 844 (1986), the Court reversed a conviction based on constructive possession where the record contained no evidence tending to show that the accused was aware of the presence of the contraband and the only evidence of his dominion and control was a document listing the address as his residence. Id. at 473, 338 S.E.2d at 845.

And, in Jordan v. Commonwealth, 273 Va. 639, 643 S.E.2d 166 (2007), drugs were found on the ground outside a vehicle on the passenger side, and only the passenger was seen making furtive movements. The Court reversed the driver's conviction for possession because the evidence did not establish that ***he*** was aware of the presence and character of the drugs or that it had been subject to ***his*** dominion and control. Id. at 647, 643 S.E.2d at 170-71.

Instead of these inapposite cases, the Court's decision in Susan Eckhart v. Commonwealth, 222 Va. 447, 281 S.E.2d 853 (1981), is instructive. There, the defendant shared a house with her husband. The police found both at home, where the defendant was sitting on a stool from which she could see drug paraphernalia and large packages of marijuana in another room. Both the defendant

and her husband denied owning the contraband, but this Court sustained the sufficiency of the evidence to convict defendant of possession of the marijuana because, while "[t]here is no presumption of knowing or intentional possession of the marijuana from Susan's occupancy of the residence. . . , [t]he trial court could reasonably conclude that she was aware of the contents of the room and had stationed herself where she could exercise dominion and control over the marijuana." Id. at 450-51, 281 S.E.2d at 855.

Finally, Code § 18.2-308.2 proscribes several different scenarios. Pertinent to this case, the statute makes it illegal for a felon to possess a firearm, either actually or constructively, ***or*** for a felon to "***transport"*** one. Here, even assuming for the sake of argument that Smallwood did not possess the gun, he certainly "transported" it by driving the car knowing that the firearm was in it.

DEFENDANT'S SECOND AMENDMENT-BASED CLAIM

The appellant also says that "Mr. Smallwood is being convicted of constructively possessing a firearm because Ms. Barnett exercised her right [Second Amendment] right to carry a firearm" and posits that Barnett's "rights have not been circumscribed, as in the case of Mr. Smallwood, and the circumspection of Mr. Smallwood's rights should

not interfere with Ms. Barnett's right to bear arms." (Def. Br. 19, 18). However, this argument is defaulted, violates Rule 5:17(c) and the defendant cannot assert the constitutional rights of someone else.

This Court's Rule 5:17(c) mandates that, "[u]nder a separate heading entitled 'Assignmetns of Error,' the petition [for appeal] shall list the specific errors in the rulings below upon which the appellant intends to rely. Only errors assigned in the petition for appeal will be noticed by this Court." For example, in Commonwealth v. Tweed, 264 Va. 524, 528, 570 S.E.2d 797, 800 (2002), the Court held that the failure to specifically assign as error a complaint about a Court of Appeals procedural ruling precludes its consideration by this Court, and in Yeatts v. Murray, 249 Va. 285, 290-91, 455 S.E.2d 18, 20 (1995), the Court found that a challenge to a substantive trial court ruling was not covered by an assignment of error complaining only about an alleged procedural error.

In this case, the appellant's assignment of error challenges only the ***sufficiency of the evidence*** to sustain his firearm conviction; it does not encompass any argument about Smallwood's companion and ***her*** right to bear a firearm. (App. 118). See Bitar v. Rahman, 272 Va. 130, 140, 630 S.E.2d 319, 325 (2002) (citing Poole v.

Commonwealth, 211 Va. 258, 176 S.E.2d 821 (1970)) (challenge to sufficiency of the evidence different from one about admissibility of evidence). Rule 5:17(c), therefore, bars such an argument. See Commonwealth v. Cary, 271 Va. 87, 97, 623 S.E.2d 906, 911 (2006) ("[B]ecause the . . . assignment of error asserts only that the default related to 'the issue of self-defense,' we will confine our consideration of the alleged procedural default to the failure to grant a self-defense instruction."); Swisher v. Commonwealth, 256 Va. 471, 484, 506 S.E.2d 763, 770 (1998) ("Swisher does not assign as error that he was subject to an illegal arrest. Thus, this argument is beyond the scope of any assignment of error, and it is procedurally defaulted."); Taylor v. Flair Property Assocs., 248 Va. 410, 416, 448 S.E.2d 413, 417 (1994) ("We do not consider Taylor's argument that the trial court erred in admitting certain parole evidence, since this issue was not raised by separate assignment of error and is not within the scope of the error assigned here.")

In fact, Smallwood's argument is doubly barred by Rule 5:17(c). Because his Second Amendment-based complaint was not raised in the trial court, the Court of Appeals correctly held it to be procedurally

barred from appellate review by Rule 5A:18.[1] (App. 114-115). See West Alexandria Prop., Inc. v. First Virginia Mortgage and Real Estate Inv. Trust, 221 Va. 134, 138, 267 S.E.2d 149, 151 (1980) ("On appeal, though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court."). See also Floyd v. Commonwealth, 219 Va. 575, 583-84, 249 S.E.2d 171, 176 (1978) (appellate court will not consider argument why evidence supposedly insufficient different from sufficiency argument raised at trial). Yet, Smallwood failed to assign as error the Court of Appeals' procedural ruling, thus again violating Rule 5:17(c). See Commonwealth v. Tweed, supra; Yeatts v. Murray, supra.

Moreover, in neither this Court nor the Court of Appeals has Smallwood contended that the "ends of justice" or "good cause" exceptions to the procedural default rule should allow him to raise his Second Amendment argument for the first time on appeal. See Alston v. Commonwealth, 274 Va. at 773, 652 S.E.2d at 464

[1] This complaint also is barred by this Court's similar Rule 5:25. See Alston v. Commonwealth, 274 Va. 759, 773, 652 S.E.2d 456, 464 (2007) (Rules 5A:18 and 5:25 similarly limit the consideration of issues by the Court of Appeals and this Court, respectively.)

(appellant's failure to assert good cause for failure to raise issue in trial court or to seek application of ends of justice exception precludes finding error in Court of Appeals' application of procedural default rule). See also Edwards v. Commonwealth, 41 Va. App. 752, 761, 589 S.E.2d 444, 448 (2003) (en banc) (miscarriage of justice exception not applied *sua sponte* by appellate court).

Even if Smallwood had relied on the ends of justice exception, he would not have prevailed. "'Application of the ends of justice exception is appropriate when the judgment of the trial court was error and application of the exception is necessary to avoid a grave injustice or the denial of essential rights.'" Rowe v. Commonwealth, 277 Va. 495, 503, 675 S.E.2d 161, 165 (2009) (citation omitted) (validating Court of Appeals' refusal to apply ends of justice exception). Clearly, the rejection of Smallwood's newly coined appellate argument would not result in a "grave injustice or the denial of essential rights."

First, Smallwood does not claim that ***his*** Second Amendment rights were violated; he instead suggests that somehow Ms. Barnett's were infringed. But Barnett was not charged or convicted of any crime relating to the firearm, nor did the possibility that ***Smallwood***

could get into trouble due to the gun's presence deter her – or him – from having it in the vehicle.

Second, "constitutional rights are personal and may not be asserted vicariously." Broaderick v. Oklahoma, 413 U.S. 601, 610 (1973) (citation omitted). Thus, "'[t]hat [a] statute may apply unconstitutionally to another is irrelevant; one cannot raise third party rights.'" Depriest v. Commonwealth, 33 Va. App. 754, 761, 537 S.E.2d 1, 4 (2000) (citation omitted). See, e.g., Jones v. United States, 362 U.S. 257, 261 (1960) ("[I]t is entirely proper to require of one who seeks to challenge the legality of a search . . . that he . . . establish that he himself was the victim of an invasion of privacy.")[2]

In sum, the ends of justice exception does not compel the consideration of Smallwood's Second Amendment-based claim because, not only did "the circumscription of Mr. Smallwood's rights ... not interfere with Ms. Barnett's right to bear arms" (Def. Br. 18), the defendant cannot vicariously rely on Barnett's constitutional rights.

[2] An exception to the general rule exists in certain First Amendment situations involving statutory overbreadth, see, e.g., Virginia v. Hicks, 539 U.S. 113, 118 (2003), which this case does not implicate.

CONCLUSION

Code § 18.2-308.2 is not a "use" statute, where the accused must have actually used a firearm to be convicted; it is instead a prophylactic provision barring the actual or constructive "possession" of a firearm by a felon in order to forestall the potential of his using it. See Armstrong v. Commonwealth, 263 Va. 573, 581-84, 562 S.E.2d 139, 143-46 (2002) (discussing the two types of firearm provisions). It is the ***threat*** of potential harm which the General Assembly sought to address, a concern which "regularly underlie[s] the creation of criminal offenses." Commonwealth v. Burns, 240 Va. 171, 177, 395 S.E.2d 456, 459 (1990) (concerning drug free school zones).

A felon driving a car with a firearm lying "immediately adjacent to his right leg" where he can easily grab it is just as much of a threat as if he had the gun in a holster on his hip. Indeed, if the evidence here does not establish constructive possession of a firearm, then felons will be free to drive around the Commonwealth with a firearm in easy reach, so long as someone else is with them. This would thwart the legislative intent behind Code § 18.2-308.2, and this Court should affirm the judgment of the Court of Appeals of Virginia appealed herein. See also Esteban v. Commonwealth, 266 Va. 605,

609, 387 S.E.2d 523, 526 (2003) (this Court strives to construe statute in way that "will render it harmonious with [the legislative] purpose rather than one which will defeat it.")

Respectfully submitted,

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CERTIFICATE OF COUNSEL

On July 30, 2009, the required copies of this brief were hand-filed with this Court, and three copies were mailed to appellant's counsel: Jason Moore, Esquire, P.O. Box 394, Powhatan, VA 23139.

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