In the

Supreme Court of Virginia

At Richmond

Record No. 091987

JAMES CARROLL,

Appellant,

– v. –

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

I. **THE COURT OF APPEALS ERRED IN FINDING THAT, AT THE CLOSE OF THE EVIDENCE AT APPELLANT'S REVOCATION HEARING, APPELLANT DID NOT ARGUE THAT THE TRIAL COURT COULD NOT FIND HIM IN VIOLATION OF PROBATION BECAUSE OF THE TERMS OF ANY PLEA AGREEMENT.**

II. **THE COURT OF APPEALS ERRED IN HOLDING THAT IT COULD NOT CONSIDER THE PLEA AGREEMENT TERMS OF APPELLANT'S *ALFORD* PLEA AS A BASIS FOR REVERSAL OF THE TRIAL COURT'S REVOCATION, BECAUSE APPELLANT DID NOT ASK THE COURT OF APPEALS TO CONSIDER WHETHER THE TRIAL COURT'S DECISION FINDING THAT APPELLANT WAS IN VIOLATION OF HIS PROBATION WAS A BREACH OF THE TERMS OF THE PLEA AGREEMENT BETWEEN APPELLANT AND THE COMMONWEALTH.**

III. **THE COURT OF APPEALS ERRED, BASED UPON THE FACTS OF THIS CASE, IN AFFIRMING THE COURT'S REVOCATION OF APPELLANT'S PROBATION BECAUSE APPELLANT REFUSED TO ACCEPT RESPONSIBILITY IN SEX-OFFENDER TREATMENT BY ADMITTING TO RAPE BASED UPON HIS *ALFORD* PLEA AS A MATTER OF LAW.**

IV. **THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO CONSIDER A REASONABLE ALTERNATIVE TREATMENT MODALITY, SUCH AS INDIVIDUAL SEX-OFFENDER THERAPY, IN LIEU OF PROBATION REVOCATION COUPLED WITH THE CONDITION OF SUCCESSFULLY COMPLETING THE <u>SAME</u> PROGRAM FROM WHICH APPELLANT WAS TERMINATED.**

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED IN FINDING THAT, AT THE CLOSE OF THE EVIDENCE AT APPELLANT'S REVOCATION HEARING, APPELLANT DID NOT ARGUE THAT THE TRIAL COURT COULD NOT FIND HIM IN VIOLATION OF PROBATION BECAUSE OF THE TERMS OF ANY PLEA AGREEMENT? (Assignment of Error 1)

II. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT IT COULD NOT CONSIDER THE PLEA AGREEMENT TERMS OF APPELLANT'S *ALFORD* PLEA AS A BASIS FOR REVERSAL OF THE TRIAL COURT'S REVOCATION, BECAUSE APPELLANT DID NOT ASK THE COURT OF APPEALS TO CONSIDER WHETHER THE TRIAL COURT'S DECISION FINDING THAT APPELLANT WAS IN VIOLATION OF HIS PROBATION WAS A BREACH OF THE TERMS OF THE PLEA AGREEMENT BETWEEN APPELLANT AND THE COMMONWEALTH? (Assignment of Error 2)

III. WHETHER THE COURT OF APPEALS ERRED, BASED UPON THE FACTS OF THIS CASE, IN AFFIRMING THE COURT'S REVOCATION OF APPELLANT'S PROBATION BECAUSE APPELLANT REFUSED TO ACCEPT RESPONSIBILITY IN SEX-OFFENDER TREATMENT BY ADMITTING TO RAPE BASED UPON HIS *ALFORD* PLEA AS A MATTER OF LAW? (Assignment of Error 3)

IV. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO CONSIDER A REASONABLE ALTERNATIVE TREATMENT MODALITY, SUCH AS INDIVIDUAL SEX-OFFENDER THERAPY, IN LIEU OF PROBATION REVOCATION COUPLED WITH THE

CONDITION OF SUCCESSFULLY COMPLETING THE <u>SAME</u> PROGRAM FROM WHICH APPELLANT WAS TERMINATED? (Assignment of Error 4)

STATEMENT OF THE CASE

Appellant was indicted on June 18, 2007, in the Arlington County Circuit Court on a charge of rape that allegedly occurred between March 27, 1982 and March 27, 1984, albeit July 12, 1983, is the date the Commonwealth used to support a warrant for Appellant's arrest (JA:1). Appellant filed motions for discovery and to dismiss the indictment. In response to the discovery motion, a Certificate of Analysis from the Bureau of Forensic Science, prepared in 1983, was produced and it disclosed that, from specimens obtained on July 12, 1983, no spermatozoa or spermatozoa heads or seminal fluid were found in or about the alleged victim's vaginal and rectal areas. The specimens and other evidence, which were obtained by Arlington police using a physical evidence recovery kit (P.E.R.K.) on July 12, 1983, were destroyed by the Commonwealth on December 20, 1984 (JA:7, 15-17).

Appellant did not prevail in his motion to dismiss on the issues of the Commonwealth destroying evidence, potentially exculpatory, and then charging Appellant with the offense of rape over 20 years later, and, after negotiations with the Commonwealth Attorney, on September 6, 2007, he entered an *Alford* plea to the indictment. At that time, Appellant advised the court during the plea colloquy, under oath, that he did not believe he was guilty, but did not want to "roll the bones", as suggested by the court (JA: 29). The court did not require any special probation conditions when it accepted the plea other than Appellant to have no contact with the victim or her family. The court placed Appellant on supervised probation and granted a suspended imposition of sentence, whereby the plea to the rape would be vacated after five (5) years, at which time Appellant would then plea to simple assault and battery (JA:32-33). However, the sentencing order, entered September 20, 2007, required Appellant to comply with all rules and requirements set by the probation officer, including any substance abuse

counseling, testing, and/or treatment as prescribed by the probation officer (JA:35-36).

Appellant's probation officer required that he participate in a sex-offender treatment program. Appellant then moved the court not to require sex-offender treatment because of the time lapse from the alleged rape with no intervening criminal activity of any kind. Nevertheless, the court denied Appellant's motion and required that any sex-offender treatment be determined by the probation officer (JA:37-38, 41-42, 45-46).

Appellant entered treatment (group therapy), but was terminated solely because he refused to admit to the rape, even though the trial court's sentencing order specifically recited that he protested his innocence and had established his plea by standards set forth by the U.S. Supreme Court in the case of *Alford v. North Carolina* (JA:35-36). The court held a revocation hearing as a result of a May 19, 2008 letter received from Appellant's probation officer, Lynn McCardle. At the revocation hearing, Appellant's probation officer did not appear, and the court would not strike the testimony of another probation officer,

Michael Simmons, who had no personal knowledge of the case (JA:55-56). Further, the court, over Appellant's objection, admitted the letter from McCardle and a May 7, 2008 letter, attached to McCardle's letter, from a clinician at the sex-offender treatment program from which Appellant was terminated (JA:58-59).

The court made a finding of probation violation before Appellant's counsel could finish his argument on his motion to strike or to present any evidence (JA:65). Appellant's counsel proceeded to argue against revocation and incarceration and requested that Appellant be allowed to receive sex-offender treatment from a well-known, expert forensic psychologist rather than group therapy (JA:66-69).

The court revoked probation and vacated the suspended imposition of sentence, thus convicting Appellant of rape. Then, the court ordered Appellant to successfully complete sex-offender treatment as required by his probation officer (JA:74-75).

Appellant, by his retained counsel, Clarence F. Stanback, Jr., timely filed a Notice of Appeal with the Court of Appeals of

Virginia (JA:79-80). The Court of Appeals granted an appeal on the issues of 1) whether the trial court erred in finding Appellant in violation of probation based solely on Appellant's refusal to admit to rape during sex offender therapy given the fact that the Commonwealth agreed to and the court accepted an *Alford* plea and 2) whether the trial court erred in not considering a reasonable alternative treatment modality (sex-offender treatment with an expert forensic psychologist) in lieu of probation revocation coupled with the condition of successfully completing the same program from which Appellant was terminated (JA:81-85). In a published opinion, the Court of Appeals affirmed the decision of the trial court on both issues (JA:86-115).

Accordingly, Appellant, by his retained counsel, Clarence F. Stanback, Jr., timely filed a Notice of Appeal with this Court (JA:116-117). This Court awarded an appeal from the judgment rendered by the Court of Appeals of Virginia.

STATEMENT OF FACTS

Appellant was charged (in the Arlington Juvenile and Domestic Relations Court) by warrant in July, 1983, with the rape of his stepdaughter, which rape allegedly occurred on or about July 12, 1983. This charge was terminated by entry of a *nolle prosequi* (JA:6). Twenty-four (24) years later, on or about February 9, 2007, Appellant was re-charged, by warrant, with the rape as a result of an investigation of Appellant and a brother for allegedly raping their sister. Appellant and his brother were charged with allegedly raping their sister over thirty (30) years prior, but the charge against Appellant was terminated by entry of a *nolle prosequi*. However, Appellant was indicted in the Arlington County Circuit Court, after preliminary hearing, with the rape of his stepdaughter (JA:1).

After conducting discovery, Appellant filed a Motion to Dismiss, and a hearing thereon was held on August 23, 2007. A Certificate of Analysis from the Bureau of Forensic Science, dated September 30, 1983, disclosed that neither spermatozoa or spermatozoa heads were identified on perineal, vaginal or rectal

smears nor was there evidence of seminal fluid on perineal, vaginal or rectal swabs (JA:5, 15). The stepdaughter had testified at the preliminary hearing and also stated to the investigating detective that the Appellant always ejaculated inside her, including July 12, 1983 (JA:8-10). This and other evidence obtained by the Arlington County police in 1983 were destroyed on December 20, 1984 (JA:7, 16-17). Therefore, no DNA analysis could be performed in an effort to exonerate Appellant.

The Motion to Dismiss was denied, and, after plea negotiations, on September 6, 2007, Appellant entered into a Plea Agreement Memorandum with the Commonwealth Attorney and then tendered, and the court accepted, an *Alford* plea to a charge of rape (JA:18-22, 32). During the plea colloquy, Appellant stated, under oath, to the court that he did not think he was guilty of the crime (JA:25, 29). The Plea Agreement between Appellant and the Commonwealth Attorney specifically stated the Appellant did not admit that he committed the crime to which he was pleading guilty. The Agreement further provided, and the court so advised, that Appellant's case would be

continued for five (5) years. The court advised further that, during this five (5) year period, Appellant must be of general uniform good behavior, have no contact with the victim and her family, and pay court costs; and, that at the end of the period, <u>if all these conditions are fulfilled,</u> Appellant can withdraw his plea, enter a plea of guilty to assault and battery, and pay a fine of $750.00. Finally, the court advised Appellant that he would be on supervised probation (JA:32-33). On September 20, 2007, the court entered an order concerning the *Alford* plea, wherein it stated that probation shall include any substance abuse counseling, testing, and/or treatment as prescribed by the probation officer (JA:35-36).

Thereafter, Appellant's probation officer in Fairfax County (where Appellant resided) was requiring Appellant to enroll in a sex-offender treatment program, among other things, and Appellant moved the court to transfer supervision back to Arlington County and not require sex-offender treatment given the circumstances of his case. On October 9, 2007, the court

heard the motion and denied Appellant's request relative to the sex-offender treatment (JA:41-42, 45-46).

Appellant was required to enroll in a sex-offender treatment program located in Fairfax County and was terminated from the program solely because he would not admit that he raped his stepdaughter, notwithstanding the court's order concerning his *Alford* plea (JA:35). On May 19, 2008, the probation officer, Lynn McCardle, wrote to the court requesting a bench warrant for Appellant in order to convene a probation revocation hearing. Appellant surrendered himself, and the court held a revocation hearing on June 13, 2008. Appellant denied that he was in violation of probation, but the court found him in violation based upon the letter dated May 19, 2008, from Lynn McCardle, who was not present at the hearing, and a letter dated May 7, 2008, from a clinician, unknown to Appellant, apparently associated with the treatment program that terminated Appellant (JA:55, 66). Appellant's counsel objected to the absence of the probation officer, Lynn McCardle, and the admission into evidence of both letters, and moved to strike the evidence (JA:57-61).

Before Appellant's counsel could finish his argument on the motion to strike, or to introduce any evidence, the court found Appellant to be in violation of probation (JA:65). Appellant requested that the court consider individual (sex offender) therapy with an expert forensic psychologist, Stanton Samenow, in lieu of probation revocation and incarceration (JA: 66-69). The Commonwealth Attorney requested that the court vacate the suspended imposition of sentence (JA:72). The court revoked Appellant's probation, vacated the suspended imposition of sentence, and sentenced him to five (5) years in the penitentiary, suspended for five (5) years with the special condition that Appellant successfully complete sex-offender treatment as required by his probation officer (JA:74-77).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FINDING THAT, AT THE CLOSE OF THE EVIDENCE AT APPELLANT'S REVOCATION HEARING, APPELLANT DID NOT ARGUE THAT THE TRIAL COURT COULD NOT FIND HIM IN VIOLATION OF PROBATION BECAUSE OF THE TERMS OF ANY PLEA AGREEMENT.

The Court of Appeals erred in finding that Appellant did not argue, at the close of the evidence at his revocation hearing, that the trial court

could not find him in violation of probation because of the terms of his (any) plea agreement (JA:89).

After cross-examining Probation Officer Simmons and the Commonwealth Attorney moved the sentencing revocation report into evidence, Appellant moved to strike the evidence and argued that a case of probation violation had not been demonstrated. Appellant specifically stated to the trial court that the requirement to have Appellant admit that a rape occurred would be a breach of the plea agreement (JA:61-63).

> MR. STANBACK: ....The fact that he will not admit to the rape or the requirement to have him admit that a rape occurred, I would suggest to the Court would be a violation of the

condition – I'm sorry -- would be a breach of the plea agreement, to the extent that specifically in the plea agreement in paragraph 5 he recites, I do not admit that I committed the crime to which I am pleading guilty.

THE COURT: As part of an Alford plea.

MR. STANBACK: Exactly, Your Honor. In fact, if the Court will remember in the colloquy that the Court put to Mr. Carroll about what that meant because the Court – I attempted to answer – you said, I think you know what it means, Mr. Stanback, but I want to hear from Mr. Carroll.

Mr. Carroll, under oath, told you at that time what he believed it meant and that he was maintaining his innocence, which again, is recited in paragraph 15 of the agreement, I still claim innocence.

(Emphasis added).

Therefore, the Court of Appeals erred. Appellant did argue that the trial court could not find him in violation because of the terms of the plea agreement, which, as the trial court noted, was "part of an *Alford* plea."

During argument on February 26, 2010, for a Certificate of Appeal from this Court, Justice Koontz asked Appellant's counsel did he have to assign this issue as error. Appellant's counsel submitted that, had this issue not been assigned as error, the Commonwealth would argue, as her counsel has done previously, that the issue (of whether the finding of violation breached the plea agreement) was not preserved for appeal and, hence, could not be considered by this Court. Thus, the reason for this assignment of error.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT IT COULD NOT CONSIDER THE PLEA AGREEMENT TERMS OF APPELLANT'S *ALFORD* PLEA AS A BASIS FOR REVERSAL OF THE TRIAL COURT'S REVOCATION, BECAUSE APPELLANT DID NOT ASK THE COURT OF APPEALS TO CONSIDER WHETHER THE TRIAL COURT'S DECISION FINDING THAT APPELLANT WAS IN VIOLATION OF HIS PROBATION WAS A BREACH OF THE TERMS OF THE PLEA AGREEMENT BETWEEN APPELLANT AND THE COMMONWEALTH.

Black's Law Dictionary, Ninth Edition, defines an *Alford* plea as a "guilty plea that a defendant enters as part of a plea bargain, without actually admitting guilt." Appellant submits that, but for the plea bargain, manifested as a written plea

agreement in this case, there is no *Alford* plea; they are not divisible in this case, and the elements of an *Alford* plea, paragraphs 5 and 15, are contained within the Plea Agreement Memorandum (JA:18-21).

Applicant submits further that, by definition, and as used in his "Statement of Questions Presented", in both his Petition for Appeal and Opening Brief in the Court of Appeals, the *Alford* plea comprised the plea agreement and guilty plea without admitting guilt, which was agreed to by the Commonwealth and accepted by the trial court. This is clearly demonstrated by the subtitle used in the Petition and Opening Brief under Principles of Law, Argument and Authorities, to-wit: Breach of Plea Agreement and *Alford* Plea. More importantly, however, is the fact that Question 1 under "Statement of Questions Presented" recites, in part, "that the Commonwealth agreed to and the court accepted an *Alford* plea.

A general plea is not agreed to by the Commonwealth. The consent of the Commonwealth to a guilty plea is required only when the plea is a conditional guilty plea to a felony pursuant to

Virginia Code Section 19.2-254, as amended. Otherwise, an accused may plead guilty or *nolo contendere* to an offense without the Commonwealth's agreement or consent; and, the trial court must accept such pleas, unless the plea is to a lesser included offense upon which the accused is arraigned, in which case the trial court can refuse to accept the plea, or unless the plea is a part of a plea agreement, which the trial court does not have to accept.

Virginia Supreme Court Rule 3A:8 sets forth requirements for entering pleas in criminal cases and specifically speaks to the plea agreement procedure. The plea agreement in Appellant's case was of the type specified in Rule 3A:8 (c)(1)(A) and (C). The plea agreement not only is <u>agreed to</u> by the Commonwealth, but also must be <u>accepted</u> by the trial court to make the plea effective. If the trial court had rejected the plea agreement, neither party would have been bound by the agreement and the Appellant would have had the right to withdraw his plea. Rule 3A:8(c)(4).

In Appellant's case, the trial court questioned Appellant about what an *Alford* plea is, questioned him about the plea agreement, and then asked for his *Alford* plea (JA:28-29, 31).

The Court:	Did you sign this written agreement on the fourth page after you read it and discussed it thoroughly with your attorney?
The Defendant:	Yes, Sir, I did sign it.
The Court:	Are you satisfied with your lawyer's services?
The Defendant:	Absolutely.
The Court:	What is your plea? *Alford* plea at this time?
The Defendant:	Yes, Sir.
The Court:	Is that what you want to enter?
The Defendant:	Yes, Sir.

Appellant submits that the trial court accepted the *Alford* plea, which embodied the terms of the plea agreement. The plea agreement was the essence of the *Alford* plea, as was noted by the trial court during the revocation hearing (JA:31, 62).

Accordingly, Applicant submits that he did ask the Court of Appeals to consider whether the trial court's decision finding Appellant in violation of his probation was a breach of the terms of the plea agreement between the Commonwealth and Appellant and to reverse the trial court's revocation. Appellant relied upon the same reasons both in the trial court and the Court of Appeals that a finding of probation violation would be a breach of the plea agreement and *Alford* plea. There was no new argument asserted by Appellant in the Court of Appeals.

However, if this Court is of the opinion that the Appellant did not preserve for consideration the question of whether the finding of probation violation breached the plea agreement, then Appellant, pursuant to Virginia Supreme Court Rule 5:25, requests this Court to consider the question in order to attain the ends of justice. Otherwise, a miscarriage of justice will occur because the trial court, the Court of Appeals and the Commonwealth all were clearly on notice as to the substance of Appellant's argument.

III. THE COURT OF APPEALS ERRED, BASED UPON THE FACTS OF THIS CASE, IN AFFIRMING THE COURT'S REVOCATION OF APPELLANT'S PROBATION BECAUSE APPELLANT REFUSED TO ACCEPT RESPONSIBILITY IN SEX-OFFENDER TREATMENT BY ADMITTING TO RAPE BASED UPON HIS *ALFORD* PLEA AS A MATTER OF LAW.

The Court of Appeals erred, based upon the facts of this case, in affirming the trial court's revocation of Appellant's probation because Appellant refused to accept responsibility in sex-offender treatment by admitting to rape based upon his *Alford* plea as a matter of law.

The Appellant respectfully traverses the opinion of the Court of Appeals and argues that, in Virginia, probation of one who has entered an *Alford* plea cannot be revoked for refusing to admit to the offense, thereby accepting responsibility for the offense, after entering the plea. This is particularly the case when the trial court does not warn the defendant prior to or at the time of entering the plea that he/she will be required to admit to the offense at a later time, such as, in treatment.

Appellant submits that the "legal consequences" of an *Alford* plea being the same as a guilty plea or a finding of guilt, as expressed by the trial court when Appellant entered his plea, are that the person may have a conviction and is subject to the imposition of a criminal penalty; but, not having to admit to the offense in a treatment program (JA:29-30). This is particularly true in Appellant's case because the court neither ordered sex-offender treatment at the time the plea was accepted, nor did the court even intimate or suggest that treatment would be ordered and that an admission of guilt may be required.

While this appears to be a case of first impression in Virginia, Appellant submits that the case law in Virginia concerning *Alford* pleas is dispositive of the issue here. The Court of Appeals stated that Virginia courts must follow their own precedents, holding that "the *Alford* plea, and any potential inconsistencies that may accompany the same, are an accepted part of Virginia's law," and cited *Parson v. Carroll*, 272 Va. 560, 636 S.E. 2d 452 (Va. 2006) and *Smith v. Commonwealth*, 27 Va. App. 357, 499 S.E. 2d 11 (Va. App. 1998) (JA:104). Appellant

cannot discern any inconsistency in this Court's opinion in *Parson*, but submits that the time has come to clearly resolve any inconsistent holdings in Virginia law concerning *Alford* pleas on the issue of whether an accused who has entered an *Alford* plea must accept responsibility for the offense by admitting to it in treatment, particularly when not required to do so at the time the *Alford* plea was accepted by the trial court.

The trial court revoked Appellant's probation because he refused to accept responsibility for the offense and, as a result thereof, was terminated from treatment (JA:66). Yet, in the *Smith* case (where the sole issue was whether the defendant's entry of an *Alford* plea required the trial court to disregard his lack of remorse at sentencing), the Court of Appeals stated, while the *Alford* plea does not require that the trial court disregard defendant's lack of remorse at sentencing, this holding does not require him to assume responsibility for crimes while asserting his innocence. *Smith*, 499 S.E.2d at 14. The Court of Appeals stated further that the defendant's denial of responsibility is not inconsistent with an expression of sympathy (for the victims of

the offense) and an expression of remorse does not presuppose acceptance of criminal responsibility. *Id.*

Appellant argues, as he did before the Court of Appeals panel that ruled in this case, that, while the Court of Appeals' statements in *Smith* may be dicta and, thus, the principle of *stare decisis* is not applicable, to require him to accept responsibility in treatment by admitting to a rape, which he claims he did not commit, is clearly inconsistent with *Smith.*

In *Parson,* wherein the issue of judicial estoppel was raised in a defamation action, this Court defined an *Alford* plea as, Appellant submits, it should be defined and understood. This Court stated that, in entering an *Alford* plea, a defendant "assumed a position of law, not a position of fact." *Id.* at 566, 636 S.E. 2d at 455. The Court stated further that Parson, the person who entered the *Alford* plea, only conceded that the evidence was sufficient to convict him of the offenses, but that he "did not admit as a factual matter that he had participated in the acts constituting the crime." *Id.* This is exactly the point that Appellant argues as to why he should not be required to admit to

a rape in sex-offender treatment to which he did not admit when he entered his *Alford* plea. He told the trial court that he was not guilty of the crime and the court accepted the plea as an *Alford* plea (JA:29, 32).

Appellant cites two (2) cases that are factually similar to his case and reflect the correct, Appellant contends, understanding of an *Alford* plea; and, in view of *Parson,* should persuade this Court to reverse the Court of Appeals' decision and, thus, the trial court's revocation of Appellant's probation. The cases are *State v. Birchler*, 2000 OH 46323 (OHCA 2000) and *People v. Walters*, 164 Misc. 2d 986, 627 N.Y.S. 2d 289 (N.Y.Co.Ct. 1995).

In *Birchler*, the Court of Appeals of Ohio (Tenth Appellant District) held that the trial court committed prejudicial error in revoking Birchler's probation based solely on his refusal to admit to specific criminal conduct and a specific victim as a condition of probation given the fact that the court had accepted his guilty plea with an *Alford* plea. In this case, the trial court did not inform Birchler that he would be required to admit he had a

victim in order to complete probation, despite his maintenance of factual innocence pursuant to *Alford*.

In *Walters*, the court reached the same conclusion as *Birchler*. The defendant, Walters, was not informed at the time of entry of his *Alford* plea that he would be required to admit in therapy his factual guilt to the underlying charge of sexual abuse. The treatment/counseling facility would no longer allow Walters to participate in its program because he failed to admit to the crime of sexual abuse. He attended meetings at the facility and abided by all other aspects of his probation order, but maintained his denial until he was terminated from treatment. The court held that, as a matter of fairness, and in the interests of justice, the finding of a violation of probation, the revocation of probation and the imposition of a prison sentence could not be allowed to stand.

The fact patterns of *Walters* and *Birchler* are very similar to the facts in Appellant's case in that Appellant was never advised by the trial court that he would be required to admit that he raped his step-daughter. In fact, sex-offender treatment was not

mentioned or ordered by the trial court at the time Appellant entered his plea. The first mention of the word "treatment" was in the order entered two (2) weeks later (JA:35-36). When it became known that sex offender therapy would be required, Appellant moved the trial court not to order sex-offender treatment, given the fact that almost 25 years had lapsed and Appellant had had absolutely no issues with legal authorities. Nevertheless, the trial court then ordered that any sex-offender treatment for Appellant be determined by the probation officer; but, there was no requirement that Appellant admit to any rape.

Appellants submits further, as he did in the Court of Appeals, that he had to be fairly warned of the type of conduct that could lead to revocation and to the loss of liberty as a result of probation revocation. *United States v. Simmons*, 812 F.2d 561, 565 (9th Cir. 1987). Appellant had no warnings that his refusal to admit to a rape would be cause for his probation to be revoked.

The Court of Appeals and the Commonwealth cite the case of *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 579 N.W.

2d 698 (Wis. 1998), as the best authority to support the affirmance of the trial court's revocation of Appellant's probation, apparently operating under the belief that there is no difference between an *Alford* plea and an ordinary guilty plea. Appellant contends that this is an erroneous belief. Further, Appellant submits that *Warren* is incongruous with *Parson* and that the *Warren* court appears to engage in circuitous, double-minded reasoning to reach an outcome that it apparently desired, which was to ensure Warren's conviction of a sex offense.

First, the facts in *Warren* are different from Appellant's case. In *Warren*, before accepting the *Alford* plea, the trial judge advised Warren that, if the court granted probation, the court very likely was going to order counseling and that he would be expected to enter into counseling in "good faith" with the counselor, the psychiatrist, or doctor, or whoever. *State ex rel. Warren*, 579 N.W. 2d at 703. Further, the probation agent consistently expressed to Warren that he had to admit responsibility for the offense in order to successfully complete the counseling that was a condition of his probation. *Id*. at 711. The

Warren court does not define "good faith," but none of these critical facts occurred in Appellant's case.

Second, and most importantly, Appellant contends that the *Warren* decision reflects a misperception of the nature of a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed. 2d 162 (1970). In *Alford*, the Court explained that, "while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty." *Id*. at 37, 91 S.Ct. 160. The Court stated further that, therefore, one accused of a crime may voluntarily, knowingly and understandingly consent to the imposition of a criminal sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime. *Id*.

Appellant contends then that, based upon the *Alford* holding, if a court, in its discretion, accepts an *Alford* plea, the defendant is conceding that the evidence is sufficient to convict him, but he is maintaining that he did not participate in the acts constituting the crime; and, that he cannot be compelled to admit to the

crime at a subsequent time. The *Warren* court, however, opined that, "[a] defendant's protestations of innocence under an *Alford* plea extend only to the plea itself." *State ex rel. Warren*, 579 N.W. 2d at 707. However, the *Warren* court cites no authority for this proposition! In fact, it goes on further to state, as it relates to *Warren*, "that when a defendant enters such a plea, he becomes a convicted sex offender and is treated no differently than he would be had he gone to trial and been convicted by a jury." *Id*. Appellant submits that, if a defendant is found guilty at trial wherein he takes the stand and denies committing the sex offense, he should <u>not</u> be required to admit to the offense in treatment as a condition of probation. He never admitted committing the offense, so how can he be required to admit to it in therapy?! Moreover, an admission could potentially subject him to perjury or certainly affect post-conviction proceedings if newly discovered evidence would exonerate the defendant but for his admission. To that end, the *Warren* court <u>would</u> be correct if it had this perspective; but, that was not the position taken by that court.

Third, the *Warren* court's circuitous logic, Appellant submits, further undermines its opinion. This court cites a Colorado Supreme Court case concerning the issue of the deficiency of an *Alford* plea because a trial court did not advise the defendant that he would have to admit guilt in order to complete treatment. *Id.* at 710, citing *People v. Birdsong*, 958 P. 2d 1124 (Colo. 1998). While the *Warren* court acknowledges that *Birdsong* is not directly on point with Warren's case, both courts' view of an *Alford* plea's significance is that the (*Alford*) plea is a guilty plea and, as such, the trial court's obligations to advise a defendant are no greater than any other guilty plea. To that end, "[T]he specific requirements of a treatment program and the harmony between those requirements and the defendant's perception of his guilt does not fall within the aegis of the trial court's necessary advisement to the defendant." *Id.*

However, four (4) pages later, the *Warren* court calls for a "heightened diligence on the part of circuit courts in accepting *Alford* pleas--particularly in cases involving sex offenses," because there is an inherent conflict when a charged sex offender

enters an *Alford* plea, to wit: the offender cannot maintain his innocence under the *Alford* plea and successfully complete therapy, which requires an admission of guilt. *Id*. at 714. Appellant submits that the *Warren* court is now beginning to acknowledge that an *Alford* plea is not just an ordinary guilty plea, contrary to its initial position. *Id*. at 706.

Yet, the *Warren* court goes further and states the following at page 715 of the opinion:

> Should the circuit courts in their discretion decide to accept *Alford* pleas in such cases, we strongly advise them to give *Alford*-pleading defendants an instruct-tion at the time of the plea that their protestations of innocence extend only to the plea itself, and do not serve as a guarantee that they cannot subse- quently be punished for violating the terms of their probation which require an admission of guilt. Because of the unique nature of *Alford* pleas, circuit courts accepting such pleas should take extra care to ensure that defendants understand that in order to successfully complete the treatment program, they will be required to admit guilt. Such instructions will avert any misconceptions by defendants that the *Alford* plea provides any "promises" or "guarantees" of what is constitutionally appropriate probationary treatment.

Appellant submits that the *Warren* court is double-minded. The court is finally agreeing that an *Alford* plea is unique and that the defendant should be put on notice with a specific instruction prior to a court accepting an *Alford* plea (apparently only in sex cases) when a defendant is required to admit to the offense in therapy; but, it did not so hold for Warren, and the "extra care" was lacking in his case.

As previously argued, Appellant's case is different from the *Warren* case factually, and, Appellant submits, the *Warren* court's comprehension of the nature of an *Alford* plea is not in accord with how this Court understands an *Alford* plea. The analysis in which the *Warren* court engaged, and to which the Court of Appeals subscribed, is based upon a misperception of the nature of an *Alford* plea. Additionally, the nature of the offense giving rise to the *Alford* plea should not affect the legal consequences of the plea. Whether the offense giving rise to an *Alford* plea is murder, arson or grand larceny, the legal consequences are that the defendant, except for a specific plea agreement precluding conviction such as that in Appellant's case, will be convicted and

subject to a criminal penalty for that offense. Appellant contends that there should be no other legal consequences unless specifically required by the court prior to the entry of the *Alford* plea.

The Court of Appeals finds no value in *Birchler* and *Walters* because they "do not review the reasoning of *Alford* and they contain propositions with no basis in the text of that decision" (JA:100). Appellant respectfully cites for this Court's consideration *State v. Case*, 289 Kan. 457, 213 P.3d 429 (Kan. 2009), a Kansas Supreme Court case decided just three (3) weeks prior to the Court of Appeals' decision in Appellant's case. While the issue in *Case* is whether sentence enhancement (a longer period of postrelease supervision) can be based upon stipulated facts in an *Alford* plea, the real issue is, what is the nature of an *Alford* plea. In *Case*, the court found that Case's stipulation to the State's facts presented to a court at a plea hearing to provide a factual basis for his *Alford* plea does not mean that he stipulates or agrees that they are true, because this

type of admission of guilt is contrary to the fundamental nature of an *Alford* plea. *Case*, 213 P.3d at 431.

The *Case* court does review the reasoning of *Alford*. Further still, in discussing the nature of an *Alford* plea, the *Case* court cites this Court's *Parson* opinion as authority for its position that an acknowledgment of the State's evidence being sufficient to convict is not an admission to its truth. *Id.* at 433.

Therefore, in view of *Smith* and particularly in view of *Parson*, Appellant submits that the Court of Appeals erred in affirming the trial court's revocation of Appellant's probation as a matter of law.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO CONSIDER A REASONABLE ALTERNATIVE TREATMENT MODALITY, SUCH AS INDIVIDUAL SEX-OFFENDER THERAPY, IN LIEU OF PROBATION REVOCATION COUPLED WITH THE CONDITION OF SUCCESSFULLY COMPLETING THE SAME PROGRAM FROM WHICH APPELLANT WAS TERMINATED.

Appellant contends that the trial court's failure to consider a reasonable alternative treatment modality in lieu of probation revocation and revocation of his suspended imposition of

sentence and, then, to require Appellant to successfully complete the same sex-offender treatment program from which he was terminated, was an abuse of discretion.

It was unreasonable for the trial court to revoke Appellant's probation for refusing to admit to a crime, which Appellant told the Court, under oath, he did not commit, in a sex-offender treatment program that would terminate any participant who failed to admit to his/her crime, and then to order Appellant to successfully complete the <u>same</u> program. If Appellant does not lie during his participation in the program, he will be terminated again from the program and then incarcerated. Therefore, the terms of Appellant's probation at this time are not reasonably related to the purpose of probation: rehabilitation.

Appellant argues that the trial court's revocation of probation and its subsequent requirement to complete the <u>same</u> treatment program is calculated to punish Appellant and not to rehabilitate him, assuming rehabilitation was the goal when Appellant was first ordered to complete a sex-offender treatment program as required by his probation officer. Under the

circumstances of this case, the revocation of Appellant's probation in lieu of an alternative treatment modality, and then the requirement for successful completion of the same program, are unreasonable and are not an appropriate exercise of conscientious judgment by the trial court. *Peyton v. Commonwealth,* 268 Va. 503, 604 S.E. 2d 17 (Va. 2004).

The sex-offender treatment program enrolling Appellant appears to be the only such program used by probation departments in Northern Virginia. The program's modality of treatment requires admission to and acceptance of responsibility for an offender's crime irrespective of the plea, and the treatment occurs in a group setting. There is no individual therapy, either as a stand-alone modality or as a component of an overall treatment plan. This is a huge problem because sex-offender treatment programs almost universally require the offender to admit responsibility for the offense giving rise to conviction or to the need for treatment, either as a condition of entry and/or as a condition to continue participation, regardless of what the plea was.

Where, as in this case, the plea is an *Alford* plea and the offender maintains his innocence, to sentence the offender to a treatment program wherein he must admit guilt or responsibility, the court sets the offender up to fail to meet the requirement of treatment, thereby thwarting rehabilitation and the protection of society. In view of this problem, there is debate in the treatment community as to whether admission (of guilt) is necessary for success in sex-offender treatment programs and whether a motivational approach, among others, is better than the confrontational approach; the latter being the approach used by the program that terminated the Appellant and is used by most treatment programs (JA:47-48, 73). Thus, this is the reason why an alternative modality of treatment was, and is, required if the goals of treatment are rehabilitation and protection of society. See generally, Kaden, *Therapy for Committed Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. CRIM. L. & CRIMINOLOGY 347, 365– 373 (1998).

Accordingly, this is also why individual treatment was, and is, warranted as a reasonable alternative treatment modality in

Appellant's case, rather than to revoke his probation. This is especially the case because there is no history or evidence of any aberrant behavior, sexual or otherwise, or involvement in any criminal activity by Appellant except for this case. Therefore, a viable treatment plan would have to consider this fact and expect that, assuming *arguendo*, the Appellant committed the rape, denial would be expected, significant and would need to be treated accordingly. The program in which Appellant was, and is, enrolled was not, and is not, capable of rendering treatment that would allow Applicant to successfully complete the program, unless he lies his way through the program in order to preclude incarceration.

The Commonwealth will argue that there is no evidence in the record that Appellant was ordered to complete the <u>same</u> program. Obviously, there could not have been any evidence at the time of the revocation hearing that the sex-offender treatment program is the same program that terminated Appellant because Appellant was detained, the probation officer to whom the trial court entrusted treatment decisions was not

present at the revocation hearing, and, thus, Appellant had not been scheduled to return to treatment by the probation officer. Appellant submits, however, that the program from which he was terminated is the <u>same</u> program wherein he is currently enrolled. While the Commonwealth cannot dispute this, if the Court believes it is necessary, Appellant respectfully suggests that the case be remanded to ascertain this fact on the record.

Further, Appellant submits that, under the circumstances of this case, the trial court should have realized that 1) it was unreasonable to revoke Appellant's probation without allowing him a reasonable opportunity to complete sex-offender treatment and that 2) the program in which Appellant was placed by the probation officer was not a program that Appellant could successfully complete. The trial court knew this because of the letter of May 7, 2008, from Cynthia Taylor Urick to Lynn McCardle, Appellant's probation officer (JA:47-48). This letter evidences the problem with having Appellant participate in this program.

This program did not conduct any assessment of the Appellant, and automatically placed him in group therapy after reviewing police records, because it believed that Appellant had been convicted of rape (JA:50). Further, this program requires that all offenders take responsibility for the referral offense in order to successfully complete the program. If a participant does not accept responsibility for the offense, then the program will discharge that person as being not amenable to treatment (JA:47). Inasmuch as Appellant repeatedly has denied guilt for an offense that allegedly occurred twenty-four (24) years previously, presenting him with several opportunities to take responsibility for the offense will not change his response. Therefore, Appellant could never successfully complete this program, or any other program that is not designed for cases involving very old sex offenses.

Appellant submits that an evaluation and conditions of treatment must be reasonably related where sex offenses are very old. There is no evidence of Appellant being involved in any criminal activity since the 1983 incident. The conditions of the

treatment program in which he is enrolled are not reasonably related to him and the facts in this case in order for him to successfully complete the program. Appellant cites the following, albeit federal cases, to illustrate the point that a court must require reasonable conditions of probation, particularly in sex offender cases. *U.S. v. Carter*, 463 F.3d 526 (6 Cir. 2006) (sex offender evaluation and treatment not reasonably related where sex offense convictions were 17 years old; the inquiry is fact specific and should be decided on a case-by-case basis); *U.S. v. T.M.,* 330 F.3d 1235 (9th Cir. 2003) (sex offender conditions not reasonably related based on 20 year old sex offense conviction and 40 year old dismissed charge); *U.S. v. Scott*, 270 F.3d 632 (8th Cir. 2001) (sex offender conditions not reasonably related where sex offense committed 15 years ago and government offered no evidence of propensity to commit future sex crimes).

Finally, Appellant respectfully submits that the case of *Gilfillen v. State*, 582 N.E. 2d 821 (Ind. 1991) is instructional relative to Appellant's case, even though it is not an *Alford* plea

case, because Appellant did not admit that he committed the crime to which he pled guilty and he still claims innocence.

Gilfillen was convicted by a jury of child molesting and was required by the trial court to receive sexual abuse counseling following his jail term for a specific period or until he was released from counseling by the probation department as a condition of probation. Gilfillen attended counseling in one program for a year, but was required by his probation officer to attend another program, because a counselor in the first program wrote a letter advising that Gilfillen was attending counseling in order to satisfy the conditions of probation and to prove his innocence rather than to work on his issues related to sexual abuse. However, Gilfillen was not admitted into the second program because of the strength of his denial, during a pre-sentencing interview, that he had a sexual abuse problem. The probation officer then filed a notice of probation violation and Gilfillen's probation was revoked because he did not make a good faith effort to work on his sexual abuse problem and had failed, twice, to complete a counseling program.

The issue for the Supreme Court in *Gilfillen* that is pertinent to Appellant's case was, "that he cannot be required to demonstrate that he benefited from counseling or that he successfully completed a therapy program which required that he admit his guilt." The Indiana Supreme Court found that Gilfillen did not plead guilty and, therefore, had not admitted to having any child molesting problem; and, that he continued to protest his innocence. Further, the Indiana Supreme Court found that reasonable conditions on probation may be imposed on a defendant, but "thought control" was not one of them. Therefore, based upon the circumstances of Gilfillen's case, a "trial court may not insist on an admission of guilt as the basis for revocation".

Accordingly, Appellant submits that, under the circumstances of his case, termination from the sex-offender treatment program, as prescribed by the probation officer, was not a reasonable cause for the trial court to revoke Appellant's probation and to vacate the suspended imposition of sentence. Further, Appellant submits that, to require successful completion

of the <u>same</u> sex offender program which previously terminated him as a condition of continued probation, and to avoid incarceration, under the circumstances of his case, was also an abuse of discretion by the trial court; and, the Court of Appeals erred in affirming same.

CONCLUSION

This Court should reverse the decision revoking Appellant's probation and vacating his suspended imposition of sentence, reinstate the terms of his Plea Agreement Memorandum, remove and expunge his name from any and all sex offender registrations and criminal records, and order any other appropriate relief warranted in this case.

JAMES CARROLL

By Counsel

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CERTIFICATE (Rule 5:26 (d))

Appellant hereby certifies:

1. The name of the Appellant is: James Carroll.
2. The name of the Appellee is: Commonwealth of Virginia.
3. The name, address and telephone number of Counsel for the Appellant is: Clarence F. Stanback, Jr., 2408 Muncy Circle, Hyattsville, MD 20785, (301) 341-9850.
4. The name, address and telephone number of the Appellee is: Commonwealth of Virginia, c/o Richard B. Smith, Special Assistant Attorney General, Office of the Attorney General,900 Main Street, Richmond, Virginia 23219, (804) 786-2071.
5. Three copies of this Brief have been mailed or delivered to the Special Assistant Attorney General of Virginia at the above address on the 3rd day of May, 2010. On the same date, fifteen (15) copies of the Brief were hand-delivered to the Clerk's Office, and an electronic copy of the Brief was filed by CD.

6. Counsel for the Appellant is **retained**.

7. Counsel for Appellant desires oral argument, in person.

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