IN THE

Supreme Court of Virginia

RECORD NO. 092461

WASEEM ALI,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

S. Jane Chittom, Esq. (VSB No. 27464)
Appellate Defender
Office of the Appellate Defender
701 East Franklin Street, Suite 1001
Richmond, VA 23219
Tel. (804) 225-3598
Fax (804) 225-3673
jchittom@idc.virginia.gov

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

Table of Contents 2

Table of Authorities 3

Statement of the Case 4

Assignments of Error 7

Questions Presented 8

Statement of Facts 9

Argument 12

I. **The evidence was insufficient to convict of robbery.**

II. **The appellant cannot lawfully be convicted and punished for both robbery and grand larceny from the person where both convictions arise from one and the same act.**

III. **The ends of justice exception is appropriate to allow an appellate court to reach the issue of two convictions and two punishments for one and the same act.**

Conclusion 28

Certificate 29

TABLE OF AUTHORITIES

CASES:

Ali v. *Commonwealth,* Ct. App. Rec. No. 1650-08-4 (November 10, 2009) ..... *passim*

Bivins v. Commonwealth, 19 Va. App. 750, 454 S.E.2d 741 (1995) 13, 17

Blockburger v. United States, 284 U.S. 299 (1932) 20

Bradshaw v. Stumpf, 545 U.S. 175 (2005) 21

Broady v. Commonwealth, 16 Va. App. 281, 429 S.E.2d 468 (1993) 15

Brown, Dwayne v. Commonwealth, 279 Va. 210, 688 S.E.2d 185 (2010) 26

Brown v. Ohio, 432 U.S. 161 (1977) 25

Charles v. Commonwealth, 270 Va. 14, 613 S.E.2d 432 (2005) 26

Commonwealth v. Hudgins, 269 Va. 602, 611 S.E.2d 362 (2005) 20

Commonwealth v. Jason William Anderson, 278 Va. 419, 683 S.E.2d 536 (2009) 14

Fullwood v. Commonwealth, 279 Va. 531, 689 S.E.2d 742 (2010) 18, 19

Green v. Commonwealth, 133 Va. 695, 112 S.E. 562 (1922) 24

Harris v. Commonwealth, 3 Va. App. 519, 351 S.E.2d 356 (1986) 17

TABLE OF AUTHORITIES (Con't)

CASES:

Jackson v. Commonwealth, 267 Va. 666,
594 S.E.2d 595 (2004) 19

Johnson v. Commonwealth, 209 Va. 291,
163 S.E.2d 570 (1968) 13

Jordan v. Commonwealth, 2 Va. App. 590,
347 S.E.2d 152 (1986) 14

LaPrade v. Commonwealth, 191 Va. 410,
61 S.E.2d 313 (1950) 12

Mason v. Commonwealth, 200 Va. 253,
105 S.E.2d 149 (1958) 24

Phillips v. Commonwealth, 257 Va. 548,
514 S.E.2d 340 (1999) 20

Pritchard v. Commonwealth, 225 Va. 559,
303 S.E.2d 911 (1983) 13

Redman v. Commonwealth, 25 Va. App. 215,
487 S.E.2d 269 (1997) 27

Richardson v. Commonwealth, 25 Va. App. 491,
489 S.E.2d 697 (1997) (*en banc*) 23-24

Smith v. Groose, 205 F.3rd 1045 (8th Cir. 2000) 21

State v. Graham. 941 A.2d 848 (R.I. 2008) 21

Sutton v. Commonwealth, 228 Va. 654,
324 S.E.2d 665 (1985) 17

Tarpley v. Commonwealth, 261 Va. 251,
542 S.E.2d 761 (2001) 13

TABLE OF AUTHORITIES (Con't)

CASES:

Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) (en banc), *rev'd on other grounds*, 523 U.S. 538 (1998)..... 21

Turman v. Commonwealth, 276 Va. 558, 667 S.E.2d 767 (2008) 19

United States v. Higgs, 353 F.3rd 281 (4th Cir. 2003) 21

Welch v. Commonwealth, 271 Va. 558, 628 S.E.2d 340 (2006) 12

West v. Commonwealth, 43 Va. App. 327, 597 S.E.2d 274 (2004) 26

West v. Commonwealth, 125 Va. 747, 99 S.E. 654 (1919) 23

Williams, Dekota v. Commonwealth, 278 Va. 633, 685 S.E.2d 178 (2009) 24, 25, 27

Winn v. Commonwealth, 21 Va. App. 179, 462 S.E.2d 911 (1995) 13

STATUTES:

Virginia Code § 18.2-58..... 14

Virginia Code § 19.2-294..... 20

RULES OF COURT:

Rule 5:25 of The Rules of the Supreme Court of Virginia 8

Rule 5A:18 of The Rules of the Supreme Court of Virginia.....8, 9, 26

STATEMENT OF THE CASE

This case originated in the Circuit Court of Stafford County. The Hon. Gordon Willis presided at trial and sentencing.

The appellant, Waseem Ali, was charged with robbery, grand larceny from the person, statutory burglary with the intent to commit robbery, statutory burglary with the intent to commit larceny, feloniously eluding a police officer, reckless driving and driving while his license was suspended or revoked, third or subsequent offense. Immediately before trial, the trial court granted the prosecutor's motion to *nolle prosequi* the charge of statutory burglary with the intent to commit robbery.

Appellant Ali requested trial by jury. The jury convicted him of robbery, grand larceny from the person, reckless driving and driving while his license was suspended or revoked, third or subsequent offense. The jury acquitted Ali of the remaining statutory burglary charge and of feloniously eluding a police officer.

The jury recommended sentences of twelve years on the conviction of robbery, five years on the conviction of grand larceny from the person, twelve months on the conviction of driving suspended or revoked and six months on the conviction of reckless

driving. The court imposed the sentences recommended by the jury. The court did not suspend any portion of any sentence. The court also imposed a three year term of post-release supervision.

The final order in the case was entered on June 24, 2008. At sentencing, Ali's retained counsel was allowed to withdraw from further representation and the Public Defender was appointed to perfect the appeal. Notice of appeal and a petition for appeal were timely filed.

The Court of Appeals granted review of two questions presented but affirmed all convictions by unpublished opinion on November 10, 2009. This Court granted appeal of three assignments of error on April 7, 2010.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in denying appellant's motion to dismiss the robbery charge, and the Court of Appeals erred in affirming the robbery conviction, because the evidence did not establish that the taking was accomplished by force or intimidation before or concomitant with the taking.

2. The Circuit Court erred in affirming convictions and sentences for both robbery and larceny from the person arising from one and the same act, and the Court of Appeals erred in affirming the two convictions arising from the same act.

3. The Court of Appeals erred in refusing to apply the ends of justice exception to Rule 5A:18 when considering whether appellant could be convicted of both robbery and larceny from the person arising from the same act.

QUESTIONS PRESENTED

1. Whether the evidence was insufficient to convict of robbery where the evidence did not prove that the taking was accomplished by force or intimidation before or concomitant with the taking. (Assignment of Error 1)

Preserved, Joint Appendix (App.) at 122-24 (argument), 132 (motion denied).

2. Whether a defendant can lawfully be convicted and sentenced for both robbery and grand larceny from the person arising from one and the same act. (Assignment of Error 2)

Not preserved. Appellant asks that the question be considered under the ends of justice exception to Rule 5:25 because the

undisputed evidence shows that only one criminal act occurred and because, as argued below, the two convictions can only be sustained upon inconsistent theories on the part of the Commonwealth. The question was presented to the Court of Appeals in appellant's petition and opening brief in that court.

3. Whether the Court of Appeals erred in refusing to apply the ends of justice exception to the question of whether appellant was wrongly convicted of both robbery and larceny from the person arising from one act. (Assignment of Error 3)

The question was presented to the Court of Appeals in appellant's petition and opening brief in that court. The Court of Appeals held that Question Presented 2, above, was barred by Rule 5A:18. The Court of Appeals declined to apply the ends of justice because the evidence, arguably, could be interpreted as two acts of taking, not just one and thus, did not constitute affirmative evidence of innocence. *See Ali v. Commonwealth*, Ct. App. Rec. No. 1650-08-4 (November 10, 2009), App. at 21-22.

STATEMENT OF FACTS

Pauline Kessler manages a 7-Eleven store in Stafford County. On May 20, 2007, around 11:30 p.m. Mrs. Kessler's daughter Tara

was at the cash register; two other helpers ("Tim and his wife") were working in the "cooler," and Mrs. Kessler herself was in the office at the back of the store. App. at 32-41. On a monitor, Mrs. Kessler could see the cash register area. On the monitor, Mrs. Kessler saw Tara crouching away from a man; [1] Tara was screaming "Mommy." Mrs. Kessler came out into the store, yelling expletives. App. at 40-41. She saw the man, appellant Waseem Ali, with money in his hand. He looked at Mrs. Kessler and ran out. She followed him, telling the others to dial 911. App. at 42-43. Mrs. Kessler testified that her daughter Tara was fearful and upset afterward. App. at 61.

Tara Kessler testified that Ali came to the register area and asked for a certain kind of cigar. Cigars are kept behind the register. She handed him the cigar and he handed her money for it. App. at 82-83. When she opened the register to put the money in it, Ali

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[1] Mrs. Kessler said the man was "attacking" Tara, but that conclusion was not supported by the photographs made from the video camera. *See* Commonwealth's Exhibit 7 (series of still photographs taken from video). Ali entered the store videotape into evidence but it is "sped up" to a degree that makes it difficult to follow. The video is in the record as Defendant's Exhibit 1. Mrs. Kessler testified that the video tendered to the court by Ali was complete and conceded that it did not show Ali "attacking" Tara. App. at 73. The video was played for the jury at defense counsel's request. The court gave a cautionary instruction that the video was sped up and did not accurately reflect the time elapsed for the incident. App. at 74-75.

reached over and started taking the money out of the drawer. Tara tried to hold onto the money and Ali tried to pull. She said, "I was trying to hold onto the money and he was trying to pull....I was trying to get away and he was holding onto the money." App. at 83-84 (ellipsis supplied). Both had a grip on the money. App. at 85. Tara testified that she was "scared" and yelled for her mother. App. at 86. Ali yanked the money away and left. App. at 87.

Law enforcement officers arrested Ali soon after, when he wrecked his car during a highway chase.

Ali did not put on evidence in the guilt/innocence phase of trial but moved to dismiss the charges. App. at 122. In regard to the robbery, Ali's trial counsel argued that the taking of the money was not accomplished by force or intimidation against Tara Kessler. App. at 123-24. [2] The court denied the motion to dismiss.

The jury convicted Ali of robbery, grand larceny from the person, reckless driving and driving suspended/revoked third or

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[2] In regard to the charge of grand larceny from the person, Ali's trial counsel argued that the money was taken from the cash register, not from the person of Tara Kessler. App. at 126.

subsequent offense. The jury acquitted Ali of statutory burglary with intent to commit larceny and of felony eluding.

The jury recommended that Ali be sentenced to twelve years for robbery, five years for grand larceny from the person, six months for reckless driving and twelve months for driving suspended/revoked third or subsequent offense. The court imposed the sentences recommended by the jury and added a three year post-release supervision term.

ARGUMENT

I. The evidence was insufficient to convict of robbery. (Assignment of Error 1)

Standard of Review

An appellate court reviews questions of the sufficiency of the evidence in the light most favorable to the Commonwealth, the prevailing party below, granting it all reasonable inferences flowing from the evidence. *Welch v. Commonwealth*, 271 Va. 558, 561, 628 S.E.2d 340, 341 (2006). What inferences are to be drawn from the proved facts is within the province of the factfinder, "so long as the inferences are reasonable and justified." *LaPrade v. Commonwealth*, 191 Va. 410, 418, 61 S.E.2d 313, 316 (1950). A trial court's verdict will be upheld unless plainly wrong or without evidence to support it.

However, the appellate court is equally obligated to set aside a conviction when it contrary to the law and the evidence and is plainly wrong. *Tarpley v. Commonwealth*, 261 Va. 251, 256, 542 S.E.2d 761, 763 (2001).

Discussion

Robbery, a common law crime, is defined as the taking, with intent to steal, personal property of another, from his person or in his presence, against his will, by violence or intimidation. *Johnson v. Commonwealth*, 209 Va. 291, 292-93, 163 S.E.2d 570, 572-73 (1968). The element of violence or intimidation distinguishes robbery from larceny from the person. Without the element of violence, force or intimidation, the crime is larceny from the person, not robbery. *Winn v. Commonwealth*, 21 Va. App. 179, 182, 462 S.E.2d 911, 912 (1995). Violence or force requires a physical touching or violation of the victim's person, *Bivins v. Commonwealth*, 19 Va. App. 750, 454 S.E.2d 741 (1995); the touching or violation may be indirect, but it cannot result merely from the force associated with the taking. *Id.*

Robbery is "a crime against the <u>person</u>." *Pritchard v. Commonwealth*, 225 Va. 559, 561, 303 S.E.2d 911, 912 (1983) (emphasis supplied). The wording of the robbery punishment statute,

Va. Code § 18.2-58 ("If any person... commit robbery by partial strangulation...or by striking or beating, or by other violence to the person...or by the threat or presenting of firearms...") puts the focus of the statute on "actions directed toward the person robbed." *Jordan v. Commonwealth*, 2 Va. App. 590, 595, 347 S.E.2d 152, 155 (1986). The statute "suggests that the General Assembly's primary purpose was the protection of the individual from violence and from fear of harm during a robbery." *Id.* To sustain a robbery conviction, "force or intimidation must be directed at the person of the victim." *Commonwealth v. Jason William Anderson*, 278 Va. 419, 425, 683 S.E.2d 536, 539 (2009) (emphasis supplied).

In this case, Ali did not direct any force toward the person of the cashier, Tara Kessler. As the photographs submitted into evidence by the Commonwealth show, Ali directed his action solely at the money in the cash drawer. *See* Commonwealth's Exhibit 7, App. at 150-57. Ali reached over the counter and grabbed the money in the drawer. Tara put her hand on his to stop and tried to pull the money out of his hands. She did not succeed. At no time however, does Ali direct any force against Tara herself.

This is not a case where the defendant directs force against the rightful possessor to retain possession of the goods. *Compare Broady v. Commonwealth*, 16 Va. App. 281, 429 S.E.2d 468 (1993). In *Broady*, the robbers achieved momentary possession of the victim's purse, dropped it, then used force against the victim herself -- by pushing her away -- to regain possession of the purse. Since the victim in *Broady* had "constructive possession" of the purse when it was dropped, pushing her away was force against the person that constituted robbery. In this case, there was no such pushing or use of any other force by Ali against Tara Kessler. The only "force" used by Ali was pulling on the money. That "force" was directed toward the money, not toward Tara Kessler. "Violence or force (in robbery) requires a physical touching or violation of the victim's person. The touching or violation necessary to prove the offense may be indirect, but cannot result solely from the force associated with the taking. *Bivins*, 19 Va. App. at 752, 454 S.E.2d at 743.

In Ali's case, the still photographs submitted by the prosecutor show a series of movements of Ali and Tara Kessler. The still photographs, made from a store video, have a time at the top of each photo, a number apparently denoting elapsed time ("Media time"). In

the still photo at 00:00:01.36, Ali is shown reaching over the counter toward the cash drawer. At 00:00:01.46, he is reaching further but there is no contact between him and the clerk. At 00:00:01.60, the clerk, Tara, has put her hand on top of Ali's hand. At 00:00:01.80, he has put his hand or hands underneath the clerk's arms and picked up something from the drawer. At 00:00:01.83 and 00:00:01.86, he reaches toward the money while the clerk has her hand on his arm. By the photo at 00:00:01.90, the clerk has moved back a step and Ali is holding the money. In the last frame, 00.00.01.93, the clerk has again put her hand on or near Ali's hand. At no time does Ali direct any force or violence against the clerk. By the evidence of the pictures themselves, Ali has used only the force necessary to accomplish the taking of the money from the register drawer. He has not directed any force, not so much as a touch, toward the clerk herself. The only time they come in physical contact is when the clerk touches Ali.

Indeed as Tara Kessler herself described these events at trial, Ali simply held onto the money as Tara tried to take it back from him. App. at 84. ("I was trying to hold onto the money...and he was trying to pull.") As the pictures show, Ali had the money in his grasp, and

Tara was trying to pull it away from him. Because Ali never directed any force against Tara, but only against the money itself, the crime he committed was not robbery, it was larceny from the person.

Further, the fact that Tara Kessler described herself as "scared" does not supply an "intimidation" element that might prove robbery. "Intimidation" must result from "the words or conduct of the accused rather than from the temperamental timidity of the victim." *Bivins*, 19 Va. App. at 753, 454 S.E.2d at 743, quoting *Harris v. Commonwealth*, 3 Va. App. 519, 521, 351 S.E.2d 356, 357 (1986); *accord Sutton v. Commonwealth,* 228 Va. 654, 663, 324 S.E.2d 665, 670 (1985). In this case, like *Bivins*, the accused simply took the money and did no act to cause the victim to be fear personal violence from him. Ali, like the perpetrator in *Bivins*, took money from a cash drawer in the near presence of the clerk, who was frightened by his action. As *Bivins* correctly decided, that is larceny from the person, not robbery.

The reviewing judge in the Court of Appeals opined that the evidence was sufficient to prove robbery because Tara Kessler's mother testified that she saw, on the live video feed, Ali "physically attacking" Tara. Mrs. Kessler was in the back of the store at the time.

Per Curiam order issued December 11, 2008 at 2-3. [3] Mrs. Kessler acknowledged that she could not see any "attack" on the video, Defendant's Exhibit 1, that was presented at trial. App. at 73. She correctly said the video was "sped up" but also said the video, though complete, was "misleading." App. at 73. However, neither the video nor the still pictures made from the video and introduced by the Commonwealth show an attack by Ali on Tara Kessler. *See* Commonwealth's Exhibit 7, App. at 150-57.

II. The appellant cannot lawfully be convicted and punished for both robbery and grand larceny from the person where both convictions arise from one and the same act. (Assignment of Error 2)

Standard of Review

The question of whether multiple convictions and multiple punishments can be imposed for one act is a question of law which is reviewable *de novo* on appeal. *Fullwood v. Commonwealth*, 279 Va. 531, 539, 689 S.E.2d 742, 747 (2010) (discussing double jeopardy). In so far as the issue of whether there was one crime or two depends upon factual findings at trial, the appellate court would be bound by

[3] The Court of Appeals did not grant review of appellant's question presented on whether the evidence was sufficient to prove robbery rather than larceny from the person.

those findings, if any. *See Fullwood*, 279 Va. at 537, 689 S.E.2d at 746 ("The circuit court made a factual finding…"). The appellate court gives deference to the historical facts determined by the trial court but reviews independently the application of whether the proper legal standard was applied to those facts. *Jackson v. Commonwealth*, 267 Va. 666, 672, 594 S.E.2d 595, 598 (2004).

There is, however, a limitation on an appellate court's deference to a jury's determination of guilt. An appellate court's deference to findings of fact does not apply to a determination of facts by a jury where the jury was improperly instructed on a relevant issue. *See Turman v. Commonwealth*, 276 Va. 558, 566-67, 667 S.E.2d 767, 771 (2008) (conviction reversed where jury was improperly instructed on flight from the scene of the crime). The jury in Ali's case was instructed on both larceny from the person and robbery, without objection. Ali's trial counsel objected to the robbery instruction as unsupported by facts, App. at 102-105, but did not object on the grounds that larceny from the person and robbery cannot occur in one act. Even though the improper jury instructions are not challenged in this appeal, they should serve to limit the

appellate court's deference to the jury's decision that Ali was guilty of both crimes.

Discussion

Ali was convicted of both robbery and grand larceny from the person, but there was only one criminal act, only one wrongful taking. No one could reasonably contend, upon the undisputed facts of this case, that more than one taking occurred. Nevertheless, Ali was convicted twice and sentenced twice for this one act. He was punished as though he had committed two criminal acts when he took the money from the cash register in Tara Kessler's presence.

Ali acknowledges, as he must, that robbery and grand larceny from the person are distinct offenses for constitutional double jeopardy analysis under *Blockburger v. United States*, 284 U.S. 299 (1932); *see Commonwealth v. Hudgins*, 269 Va. 602, 611 S.E.2d 362 (2005). Ali acknowledges that that Va. Code Section 19.2-294, "statutory double jeopardy," does not preclude two convictions for the same act in a "simultaneous prosecution." *Phillips v. Commonwealth*, 257 Va. 548, 514 S.E.2d 340 (1999).

In this case, however, Ali's two convictions for one act could only come about because the Commonwealth relied on mutually

inconsistent theories to prove (1) that Ali took the cash by force or intimidation, which would be robbery and (2) that Ali took the cash without force or intimidation, which would be grand larceny from the person.

It is a violation of due process to obtain two convictions against two defendants on inconsistent theories in two separate trials. *United States v. Higgs,* 353 F.3rd 281, 326-27 (4th Cir. 2003), citing *Smith v. Groose*, 205 F.3rd 1045, 1052 (8th Cir. 2000). Due process may be violated if an inconsistency exists "at the *core*" of the government's case. *Higgs* at 326 (emphasis by the court); *accord Bradshaw v. Stumpf*, 545 U.S. 175, 187-88 (2005) (finding that the prosecutor's inconsistent arguments as to the identity of the triggerman was immaterial because proof of "triggerman" not essential to conviction but vacating and remanding for consideration of how the inconsistent arguments affected sentencing); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc), *rev'd on other grounds*, 523 U.S. 538 (1998) (inconsistent arguments in separate trial against two defendants charged with the same murder); *State v. Graham*. 941 A.2d 848 (R.I. 2008) (an instruction on vicarious liability presented an

alternative theory of guilt, not a core inconsistency in the prosecution's case.)

In this case, there is an inconsistency at the core of the Commonwealth's case that should preclude it from obtaining two convictions against Ali for the same act. The core issue is whether he took the money from Tara Kessler by force or not. If he did, it is robbery; if he did not, it is grand larceny from the person. The two sets of facts (force, no force) cannot logically co-exist and neither can the two convictions. Ali cannot lawfully be guilty of both.

As Judge Alston noted in his concurrence in the Court of Appeals, it is questionable "whether a reasonable factfinder could have concluded that there were two separate and independent criminal acts" of larceny from the person and robbery. *Ali* v. *Commonwealth,* Ct. App. Rec. No. 1650-08-4 (November 10, 2009) App. at 25. Indeed, the panel's view of the evidence supports Judge Alston's concurrence because the panel found the evidence "unclear" as to whether there were two crimes or only one. *Ali*, App. at 21. However, the panel found that the issue had not been preserved for appeal, refused to apply the ends of justice exception and sustained both convictions. Thus the panel found the ambiguity in the evidence

(one crime or two) to be, in effect, a reason to sustain both convictions, since the evidence did not affirmatively prove that only one crime occurred. *Id.* This inverts the usual legal principle that a conviction must be reversed if the evidence to sustain it is inconclusive.

The Court of Appeals surmised that "arguably" there may have been more than one "taking," namely a taking when Ali first grabbed the cash from the register and a second taking as he held onto the cash while Tara Kessler tried to get it away from him. *Id.* The Court of Appeals panel considered it a jury question as to whether there was one taking or two. *Id.,* App. at 21, n.2. The Court of Appeals is mistaken in its analysis.

Whether there was one taking or two in this case is governed by legal principles, not by a jury's interpretation of facts. Two separate acts of "taking" that are done pursuant to a single impulse and scheme are one larceny, not two. *West v. Commonwealth*, 125 Va. 747, 754, 99 S.E. 654, 656 (1919). The purpose of the "single larceny" rule recognized in *West* is to prevent the multiple criminal penalties arising from a single criminal act. *Richardson v.*

Commonwealth, 25 Va. App. 491, 496, 489 S.E.2d 697, 700 (1997) (*en banc*).

The Court of Appeals' reasoning concerning two "takings" is further mistaken because there was only one asportation, not two. Under Virginia law, both robbery and larceny require asportation, not merely seizure or laying hands on the goods. *Dekota Williams v. Commonwealth*, 278 Va. 633, 639, 685 S.E.2d 178, 181 (2009), citing *Green v. Commonwealth*, 133 Va. 695, 699, 112 S.E. 562, 563 (1922). "Asportation is defined as 'carrying away of the goods. Severance of the goods from the owner and absolute control of the property by the taker, even for an instant, constitutes an asportation." *Williams*, 278 Va. at 639, 685 S.E.2d at 181, citing *Mason v. Commonwealth*, 200 Va. 253, 256, 105 S.E.2d 149, 151 (1958). In Ali's case, there cannot be both a larceny and a robbery because there was only one asportation, only one instance in which the cash in the cash drawer was severed from the possession of Tara Kessler and came into the "absolute control" of Ali.

The Court of Appeals reasoned, mistakenly, that Ali "took" the money twice, once when he removed it from the cash drawer and then again when he "pried the money out of Tara's grasp…." *Ali*,

App. at 21. On the contrary, Ali could only have had "absolute control" of the money when he pulled it away from Tara, who was trying to hold on to it. [4] By the Court of Appeals' reasoning in this case, the defendant in *Williams*, *supra*, would have been guilty of both larceny and robbery -- larceny when he took the cell phone from the ledge where its owner left it and robbery when he pulled out a weapon to retain possession of it. In *Williams*, the defendant was properly convicted of robbery by intimidation because the larceny "ripened into" robbery when he pulled out an object that appeared to be a gun. 278 Va. at 638, 685 S.E.2d at 181. That is to say, Williams' act of larceny became robbery instead of larceny. It did not become both larceny and robbery of the same object from the same possessor at the same time. For that reason, the Court of Appeals' theory of "two takings" in this case is mistaken and is contrary to established law. [5]

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[4] Even if the evidence were sufficient to establish robbery, there would be only one crime, robbery, not both robbery and larceny.

[5] Writing of a similarly fallacious division of offenses in *Brown v. Ohio*, Justice Powell said "The Double Jeopardy clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." 432 U.S. 161, 169 (1977).

III. The ends of justice exception should apply to the question of whether Ali can be convicted of both larceny and robbery arising from the same act. (Assignment of Error 3).

Standard of Review

The interpretation of a court rule is a question of law and requires *de novo* review. *Dwayne Brown v. Commonwealth*, 279 Va. 210, 217, 688 S.E.2d 185, 189 (2010). The Court of Appeals' application of the procedural bar rule in that court, Rule 5A:18, is thus subject to review *de novo* in this Court. *Id.*

Discussion

On appeal, a litigant may raise an unpreserved issue based on the ends of justice if the error was "clear, substantial and material." *Id.*, quoting *West v. Commonwealth*, 43 Va. App. 327, 338, 597 S.E.2d 274, 279 (2004). "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." *Charles v. Commonwealth*, 270 Va. 14, 17, 613 S.E.2d 432, 433 (2005).

The error in this case was clear, substantial and material. For the reasons set out in Argument II above, it is logically and legally erroneous to convict Ali of both robbery and larceny from the person.

There was only a single asportation of the stolen cash, taken from one possessor, at one and the same time.

The Court of Appeals panel used its fallacious theory of "two takings" or "possibly two takings" as a reason to reject consideration of the issue under the ends of justice exception. *Ali*, App. at 21-22. The panel reasoned that because there may have been two acts of taking, Ali "cannot affirmatively prove that an element of the offense did not occur." App. at 21, citing *Redman v. Commonwealth,* 25 Va. App. 215, 221-22, 487 S.E.2d 269, 272 (1997).

The Court of Appeals panel is mistaken in that claim. Ali can and does prove that only one asportation occurred; consequently, only one offense occurred and he cannot be guilty of two offenses. Only once, not twice, did Ali completely sever the money from the possession of Tara Kessler. Only once, not twice, did Ali achieve "absolute control" of the money, as required to prove the asportation element of either larceny or robbery. *See Williams*, 278 Va. at 639, 685 S.E.2d at 181. That is affirmative evidence that Ali committed only one crime, not two.

Judge Alston correctly summarized the problems with these two convictions in his concurrence to the panel opinion. He said:

> I have reservations regarding the legality of a dual conviction of larceny from the person and robbery in circumstances such as those presented in this case. I am not entirely convinced from this record that a reasonable fact finder could have concluded that there were two separate and independent criminal acts herein. I question the constitutionality of two separate convictions when the crimes alleged involve the theft of a single item taken in a fluid course of action from a single victim.

Ali, App. at 25.

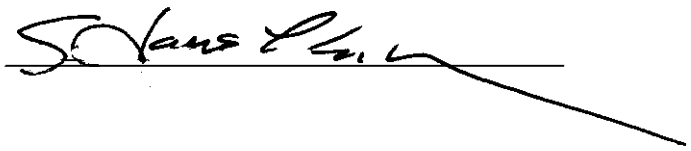
It should not be seriously disputed that a grave injustice arises when a person suffers two convictions and two punishments for the commission of only one crime. For that reason, it is appropriate to apply the ends of justice exception in this case and the Court of Appeals erred in refusing to do so. Had the Court of Appeals applied the ends of justice exception, it would have had to reverse one of the two convictions at issue. In the words of the Court of Appeals' opinion in this case, the evidence was "unclear...whether the evidence ...established two distinct criminal acts or one." *Ali*, App. at 21. If the evidence does not clearly establish two criminal acts, then an appellate court ought not sustain two convictions.

CONCLUSION

For the foregoing reasons, the appellant, Waseem Ali, asks this Court to reverse his robbery conviction and dismiss the robbery

indictment or in the alternative to remand for a new trial on the charges of robbery and larceny from the person.

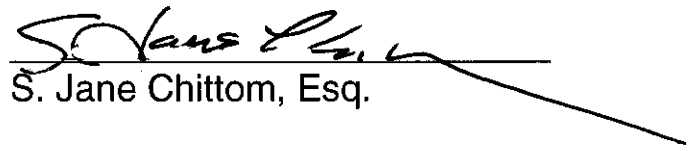
RESPECTFULLY SUBMITTED



S. Jane Chittom, VSB No. 27464
Appellate Defender
701 East Franklin Street, Suite 1001
Richmond, Va 23219
(804) 225-3598 Tel.
(804) 225-3673 Fax
jchittom@idc.virginia.gov
Counsel for Appellant

CERTIFICATE

I, S. Jane Chittom, Esq., Counsel for Appellant, do hereby certify that on May 7, 2010 I filed by hand the required number of copies of Appellant's Opening Brief with the Clerk, Supreme Court of Virginia, and on the same day mailed or delivered a true copy of this Opening Brief to Gregory Franklin, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond VA 23219.



S. Jane Chittom, Esq.