IN THE

Supreme Court of Virginia

RECORD NO. 092461

WASEEM ALI,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

S. Jane Chittom, Esq. (VSB No. 27464)
Virginia Indigent Commission
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

Argument.....4

Conclusion.....7

Certificate.....8

TABLE OF AUTHORITIES

CASES:

Commonwealth v. Jason William Anderson, 278 Va. 419, 683 S.E.2d 536 (2009).....4

Jones v. Commonwealth, 267 Va. 284, 591 S.E.2d 68 (2004).....4

ARGUMENT

1. The evidence does not prove robbery by force, violence or intimidation.

The Attorney General contends that appellant Waseem Ali committed robbery (in addition to larceny from the person) when he persisted in holding onto the money from the cash drawer as Tara Kessler tried to prevent him from doing so. Brief of the Commonwealth at 9. However, the Commonwealth's own evidence defeats the Attorney General's claim. To constitute robbery, the element of force, violence 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). The still photographs submitted at trial as Commonwealth's Exhibit 7, Joint Appendix (App.) at 150-57, show that Ali held onto the money but did not direct any force toward the person of Tara Kessler. The Attorney General's reliance on *Jones v. Commonwealth*, 267 Va. 284, 591 S.E.2d 68 (2004) is inapposite. In *Jones*, the perpetrator brandished a gun at the victim in order to retain possession of the property. That act, plainly, was intimidation directed against the person of the victim. No such act occurred in this case.

The Attorney General also contends that the still photographs "do not reflect everything that happened during the struggle." Brief of the Commonwealth at 11. The time intervals between the still photographs range from three seconds, App. at 154-55, 156-57, to ten seconds, App. at 150-51, as shown by the "media time" at the top of each individual photograph. The photographs that show Ali's hands and Tara Kessler's hands on the money display the action at three second intervals, App. at 154-55. The Attorney General's speculation that something else may have happened, other than what is shown, is just that—speculation.

Moreover, the still photographs were submitted by the Commonwealth as an exhibit at trial. The Commonwealth offered these photographs as an accurate record of what occurred. In so far as the Attorney General speculates that some unseen force may have occurred but was not photographed, he repudiates the Commonwealth's own evidence.

2. Ali cannot properly be convicted of both robbery and larceny from the person; therefore the ends of justice exception should apply.

The Attorney General contends that the Court of Appeals was correct in refusing to apply the ends of justice exception to reach the question of whether Ali can properly be convicted of both robbery and larceny from the person arising from one act. The Attorney General argues that "Because the record did not plainly show that any of the elements of either grand larceny from the person, or robbery, **did not occur**," the Court of Appeals' refusal was correct. Brief of the Commonwealth at 18 (emphasis in original).

The Attorney General misconstrues the issue. The question is not whether any crime at all occurred. One did. Ali does not dispute that he committed larceny from the person. The salient question, however, is whether both larceny from the person and robbery can occur in one and the same transaction or event. Ali argues that both crimes cannot occur in one transaction, because one of the crimes, larceny, by definition does not require force or intimidation. The other, robbery, does require force or intimidation. To prosecute for both crimes the Commonwealth must necessarily assume two contrary and mutually exclusive positions, namely that there was a

taking without force and a taking by force of the same property (cash) from the same person (Tara Kessler) in one continuous transaction lasting twenty seconds. That is an inconsistency at the heart of the Commonwealth's case. Thus the question of whether there was one crime or two is appropriate for consideration under the ends of justice exception to the procedural bar.

CONCLUSION

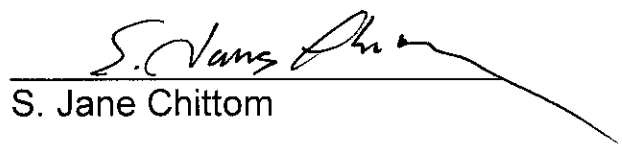
For the foregoing reasons, Waseem Ali asks this Court to reverse his conviction of robbery and to dismiss the indictment. In the alternative, Ali asks this Court to remand the case for a new trial on robbery and larceny from the person.

BY _____

S. Jane Chittom, VSB No. 27464
Virginia Indigent Commission
701 East Franklin Street
Suite 1001
Richmond, Virginia 23219
Tel. (804) 225-3598
Fax. (804) 225 3673
jchittom@idc.virginia.gov

CERTIFICATE OF SERVICE

I, S. Jane Chittom, certify that on June 15, 2010 I filed by hand the required number of copies of this Reply Brief with the Clerk, Supreme Court of Virginia and on the same day mailed or delivered three copis of the same to Gregory W. Franklin, Esq., Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond VA 23219 (804) 786-2071.



S. Jane Chittom