IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 092524

RAFAEL HERNANDEZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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STATEMENT OF THE CASE

On June 12, 2008, a judge sitting without a jury in the Circuit Court for the City of Alexandria, convicted Rafael Hernandez of assault and battery of a law enforcement officer under Virginia Code § 18.2-57(C). On that same date the court sentenced the defendant to 11 months incarceration with 5 months suspended. (App. 2-3).

The Court of Appeals affirmed the conviction on November 17, 2009. Hernandez v. Commonwealth, 55 Va. App. 190, 684 S.E.2d 845 (2009). (App. 57-68). This Court granted an appeal on July 28, 2010.

ASSIGNMENT OF ERROR

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE TRIAL COURT DOES NOT HAVE INHERENT AUTHORITY TO DEFER JUDGMENT UPON TERMS CONTEMPLATING A FUTURE DISMISSAL OF CRIMINAL CHARGES.

STATEMENT OF FACTS

The Crime

On February 3, 2008, at approximately 4:00 a.m. Officer Nancy Everard of the Alexandra Police Department discovered the defendant in a vehicle in a mall parking lot. (App. 79-80). The officer was wearing her uniform and driving a marked police cruiser. (App. 80-81).

The defendant appeared to be asleep or unconscious. (App. 81). When the officers and the rescue squad had awakened him, Officer Everard asked him questions, to which he provided inconsistent responses. (App. 83). She noticed a strong odor of alcohol and observed that Hernandez' speech was slurred, he was disheveled and his eyes were bloodshot. (App. 83-84).

Having determined that he was drunk in public, Officer Everard and Officer Matthew Parker attempted to place the defendant under arrest. (App. 85). As the officers tried to handcuff the defendant, he struggled and continued to resist. (App. 86-87). During that struggle he punched Officer Parker with a closed fist. (App. 87, 105). As they fell to the ground, the defendant again struck Parker in the face. (App. 88, 95).

The Deferral

The defendant argued first that the trial court had authority to defer a finding of guilt and to continue the matter for later disposition. (App. 162-63). He did not then specify what the terms of such deferral would be. The court ruled that it did not have "the inherent authority to essentially find that there are sufficient facts to convict the Defendant but continue the case under probationary like conditions for future disposition." (App. 165-66).

After the judge denied the request for deferral and found him guilty, Hernandez asked the court to "defer sentencing and ultimately dismiss the case." (App. 175). He claimed that because no sentence had yet been entered, he had not been convicted. (App. 177). He suggested suspending the sentence, imposing community service or some other condition and

dismissing the case six months or a year later. (App. 177). The judge denied the motion.[1]

ARGUMENT

THE TRIAL COURT PROPERLY DETERMINED THAT IT DID NOT HAVE INHERENT AUTHORITY TO DEFER ADJUDICATION.

The defendant argues that the court had the authority to defer a finding of guilt in the defendant's case, but the authority he cites does not establish that principle. The trial court properly determined that the only authority to defer adjudication was statutory and no statute authorized such disposition in this case.

Standard of Review

The trial court's authority to grant a "deferred" finding of guilt is a question of law subject to *de novo* review upon appeal. Moreau v. Fuller, 276 Va. 127, 133, 661 S.E.2d 841 (2008).

Moreau Did Not Recognize Inherent Right To Defer With Conditions

Notwithstanding the trial court's conceded lack of ***statutory*** authority to grant him relief, Hernandez nevertheless contends that the court had "inherent authority . . . to decline to render judgment in a criminal case,

[1] The judge's ruling on the second motion is not addressed in the defendant's brief.

and continue the case with or without probationary type terms with the understanding or promise that the court will ultimately render a particular disposition after a specified period of time." (Def. Br. 7). Thus, he concludes that the trial court erred in holding to the contrary.

In pressing his claim, Hernandez relies solely on this Court's recent decision in Moreau. His reliance on that case, however, is misplaced for several reasons.

First, Hernandez's claim that the Supreme Court has ruled that trial courts have inherent power to defer adjudications is wrong. It should be made clear that the Court of Appeals' decision in Gibson v. Commonwealth, 50 Va. App. 285, 649 S.E.2d 214 (2007), was not reversed by this Court; the decision in that case was, in fact, affirmed, because the Court found that the issue of the authority to defer had not been preserved at trial. Gibson v. Commonwealth, 276 Va. 176, 180-81, 662 S.E.2d 54, 56-57 (2008).

Moreover, Moreau is factually and procedurally inapposite to the case at bar. Moreau addressed the question whether the extraordinary writ of mandamus may be used to direct a judge to enter judgment. 276 Va. at 131, 661 S.E.2d at 843. Moreau expressly did ***not*** address the question presented here. See id. at 137, 661 S.E.2d at 847 ("What may in a proper

case be reasonably subject to challenge is whether the judge may decline to render judgment and continue the case with or without terms akin to probation status with the promise from the court of a particular disposition at a later date. However, ***the case before us does not present such questions***.") (emphasis added; footnote omitted).

In Moreau, the Court did not reach the issue because the Court determined that the trial court's decision granting a deferral could not be attacked with a writ of mandamus. Id. at 138, 661 S.E.2d at 847. The four justices concurring in Moreau agreed that the effect of that and the Gibson decisions "necessarily leaves unresolved a significant issue concerning the inherent authority of the trial courts of this Commonwealth to defer rendering final judgments in criminal cases." Id. at 139, 661 S.E.2d at 848 (Koontz, J., concurring). "The record on appeal does not permit us to decide the question whether a trial court has the inherent authority . . . to decline to render judgment in a criminal case and continue the case with or without probationary-type terms with the understanding or promise that the court will ultimately render a particular disposition after a specified period of time." Id. at 140, S.E.2d at 848 (Kinser, J., concurring).

The Court's opinion in Moreau did say in a footnote that "[t]o the extent that the decision of the Court of Appeals in Gibson v.

Commonwealth, 50 Va. App. 285, 649 S.E.2d 214 (2007), is inconsistent with the holding of this case, it is expressly overruled." Id. at 138 n. 5, 661 S.E.2d at 847 n. 5. This footnote, however, is attached to the following text in the opinion:

> The underlying juvenile court order in this case has ***no terms or conditions and no provision of a future disposition***. It merely declares that the evidence is sufficient to convict the defendant and continues the matter to a date certain. Nothing contained in the order is beyond the power of the court.

Id. at 138, 661 S.E.2d at 847 (emphasis added). The Court then went on to explain that, since the determination of guilt was not a ministerial act, it could not be compelled by mandamus. Whether or not the three justices involved in the plurality opinion believed they had resolved the issue in Gibson, the other four justices did not. Whatever the footnote means, it does not establish the right of trial courts to defer adjudications with conditions such as those sought here. The Court merely affirmed that the trial court, or course, can defer its rulings. "No one contends that the judge must immediately render judgment upon the instant that the presentation of evidence has been concluded." Id. at 137, 661 S.E.2d at 847.

The trial court here recognized this and ruled that in its opinion the Virginia Supreme Court had not ruled on the issue presented here. (App. 164).

> Both the majority opinion and the concurring opinions make clear that the issue before the court was not whether a trial court has the inherent authority as opposed to the statutory authority in certain situations and it outlines the statutes that provide authority to decline to render judgment in a criminal case and continue the case with or without probationary type terms with the understanding or promise that the court will ultimately render a particular disposition after a specified period of time.

(App. 163-64). The court pointed out that the inherent authority issue is "unanswered or a question that has not been resolved yet by the Supreme Court." (App. 164). The trial court's ultimate ruling was that it did not have "the inherent authority to essentially find that there are sufficient facts to convict the Defendant but continue the case under probationary like conditions for future disposition." (App. 165-66). In the absence of a clear establishment of such inherent powers only the statutory authority existed, and it did not authorize what the defendant asked for here.

The defendant himself recognizes that Moreau did not reach the issue "of whether the legislature could limit a court's exercise of its judicial power to take cases under advisement." (Def. Br. 8). The Court of Appeals properly concluded:

> It is clear, manifestly clear, that the issue presented in the case presently before this Court; that is, does a trial court have the inherent authority to defer judgment upon terms contemplating a future dismissal of criminal charges, especially **without** the agreement of the Commonwealth, was not decided in either Moreau or Gibson.

55 Va. App. at 201, 684 S.E.2d at 851 (emphasis in original). (App. 65-66).

No Inherent Authority To Defer With Conditions

In Virginia, no statute generally authorizes deferring a finding of guilt, although several narrowly crafted statutes do grant the court this authority in specific situations. This Court has recognized the questionable nature of an interpretation that courts in Virginia generally may "defer" judgment on the issue of guilt:

> The Commonwealth did not challenge the authority of the general district court to "defer" judgment or assert the lack of such authority as a basis for opposing the expungement petition. Accordingly, we express no opinion as to whether the action of the general district court was proper. ***But see Code § 19.2-303.2 (excluding larceny offenses from those eligible for deferral).***

Commonwealth v. Jackson, 255 Va. 552, 555 n.1, 499 S.E.2d 276, 278 n.1 (1998) (emphasis added).

Limitations on Inherent Powers of Court

The Court of Appeals first discussed limitations of the powers of the trial court in other areas such as contempt and restitution. That Court relied upon this Court's decision in Reid v. Reid, 245 Va. 409, 429 S.E.2d 208 (1993), to demonstrate the limited nature of a court's inherent powers.

> In Reid v. Reid, 14 Va. App. 505, 511, 419 S.E.2d 398, 402 (1992) (*en banc*), this Court held the trial court had the authority to order restitution from a spouse who had received spousal

> support payments pursuant to a court order subsequently reversed on appeal. We found that authority in Code § 20-107.1 and in "[t]he legal and proper inherent power [of a court] 'to repair an injury occasioned by its own wrongful adjudication.' Flemings [v. Riddick's Executor], 46 Va. (5 Gratt.) [272,] 281 [(1848)]." Id.
>
> The Virginia Supreme Court reversed in Reid v. Reid, 245 Va. 409, 429 S.E.2d 208 (1993), finding the trial court had neither statutory nor inherent power to order restitution. The Court wrote: "But more important, the inherent authority discussed in Flemings is not absolute. For example, while courts possess 'an inherent power of self-defense and self-preservation' by way of contempt . . ., the power may be regulated by legislative enactment, provided it is not 'destroyed, or so diminished as to be rendered ineffectual.'" Id. at 413-14, 429 S.E.2d at 210.

55 Va. App. at 195-96, 684 S.E.2d at 848. (App. 60). This Court concluded, "[W]e think that the legislature has modified the inherent power described in Flemings." Reid, 245 Va. at 415, 429 S.E.2d at 211.

This Court has also recognized similar limitations in criminal restitution cases.

> The General Assembly has limited the scope of restitution a court may order to payments for "damages or losses caused by the offense." Code § 19.2-303 provides in relevant part
>
> > [a]fter conviction, . . . the court may . . . suspend the sentence in whole or part and . . . may, as a condition of a suspended sentence, require the defendant to make at least partial restitution to the aggrieved party or parties for damages or loss caused by the offense for which convicted.
>
> Restitution ordered as a condition of a suspended sentence is subject to Code § 19.2-305 (B) which provides that "[a] defendant placed on probation following conviction may be

> required to make at least partial restitution . . . for damages or loss caused by the offense for which conviction was had." Code § 19.2-305.1 (A) also provides that "no person convicted of a crime . . . which resulted in property damage or loss, shall be placed on probation or have his sentence suspended unless such person shall make at least partial restitution for such property damage or loss."

Howell v. Commonwealth, 274 Va. 737, 740, 652 S.E.2d 107, 108 (2007).

In Howell, the Court of Appeals had ruled:

> In Waiters [v. Commonwealth, 33 Va. App. 739, 536 S.E.2d 923 (2000)], we stated "[t]he first clause of Code § 19.2-303 gives broad power to the trial court to determine the conditions of a suspended sentence." Id. at 741, 536 S.E.2d at 925. "The clause[] [specifically pertaining to restitution] that ha[s] been added to the original enactment ha[s] not been interpreted as limiting or restricting the original statement of the court's broad powers." Id. at 741-42, 536 S.E.2d at 925 (footnote omitted). We further stated, "'[t]he sole statutory limitation placed upon a trial court's discretion in its determination of such conditions is one of reasonableness.'" Id. at 742, 536 S.E.2d at 925 (quoting Anderson v. Commonwealth, 256 Va. 580, 585, 507 S.E.2d 339, 341 (1998)).

Howell v. Commonwealth, 2006 Va. App. Lexis 576, 5-6. This Court did not accept the "broad power" of the trial court limited only by a requirement of reasonableness.

This Court has also limited the trial court's power to sanction attorneys appearing before it.

> [T]his Court has previously held that a circuit court does not have inherent authority to impose as a sanction an award of attorney's fees and costs:

> "In the absence of authority granted by a statute, such as Code § 8.01-271.1, or a rule of court, such as Rule 4:12, . . . a trial court's inherent power to supervise the conduct of attorneys practicing before it and to discipline an attorney who engages in misconduct does not include the power to impose as a sanction an award of attorneys' fees and costs to the opposing parties."

McNally v. Rey, 275 Va. 475, 480, 659 S.E.2d 279 (2008) *(*quoting Nusbaum v. Berlin, 273 Va. 385, 400-01, 641 S.E.2d 494, 502 (2007)). "[T]hus, we hold that the circuit court erred, as a matter of law, by concluding that it had the inherent power to impose the monetary sanction against Nusbaum as a means of disciplining him for his misconduct." Nusbaum, 273 Va. at 401, 641 S.E.2d at 502.

The Court of Appeals in Lilly v. Commonwealth, 50 Va. App. 173, 187-88, 647 S.E.2d 517, 524 (2007), discussed the limitations imposed on this courts by the enactment of mandatory minimum laws.

> The legislative development of the mandatory minimum sentence . . . produced a floor below which no judge or jury could go. A trial court's authority to depart downward below a mandatory minimum is "nonexistent," Mouberry v. Commonwealth, 39 Va. App. 576, 585, 575 S.E.2d 567, 571 (2003), because the legislative purpose was to divest trial judges and juries of "all discretion" to sentence below the threshold minimum, In re Commonwealth of Virginia, 229 Va. 159, 163, 326 S.E.2d 695, 697 (1985). Given this history, we find no basis for Lilly's characterization of mandatory minimum sentences as a legislative usurpation of a historically unique judicial function.

Legislature Has Not Recognized Inherent Power

The legislature clearly has not recognized the claimed inherent power. Otherwise, it would not have found it necessary to enact laws permitting its exercise only in specific situations. Moreover, its efforts to limit the deferral authority would be futile if the inherent power existed. The specific statutes authorizing deferred judgments of guilt usually address some special concern arising from the circumstances of particular crimes.

For example, Code § 19.2-303.2, one of the statutes that delineates when a court may defer judgment, states as follows:

> Whenever any person ***who has not previously been convicted of any felony*** pleads guilty to or enters a plea of not guilty to any ***crime against property constituting a misdemeanor***, under Articles 5, 6, 7 and 8 of Chapter 5 (§ 18.2-119 et seq.) of Title 18.2, the court, upon such plea if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation subject to terms and conditions, which may include restitution for losses caused, set by the court.

(Emphasis added). See also § 18.2-57.3 (addressing first-offense misdemeanor domestic battery); § 18.2-61(C) (spousal rape); § 18.2-138.1(B) (misdemeanor first-offense damage to public or private facilities); § 18.2-251 (drug possession offenders with no prior offense). If the General Assembly had intended to create a general statute allowing deferred judgments, it easily could have enacted one -- instead of using the

very restrictive wording found in the Code sections permitting this practice. See Forst v. Rockingham, 222 Va. 270, 278, 279 S.E.2d 400, 404 (1981) ("If the General Assembly had intended to use the term 'agricultural products,' it would have done so.").

A well-settled rule of statutory construction also controls here. "When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it should not be done another way." Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982); see also Commonwealth v. Brown, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000). Code §§ 18.2-61, 18.2-57.3, 18.2-138.1 and 19.2-303.2, as well as several other sections establish when deferred judgments are authorized; the offense involved here is not included under any of these statutes.

As the Court of Appeals said, "The General Assembly, by granting authority to courts to act in designated circumstances, negates any implied or inherent authority of a court to act in similar circumstances not designated." 55 Va. App. at 196, 684 S.E.2d at 848. (App. 61).

> To ascertain that intention, a principle of statutory construction is here relevant: "Interpretation of the statute by comparison to other, similar statutes supports this result . . . showing the General Assembly clearly knew how to limit a privilege . . . when it so desired." Schwartz v. Schwartz, 46 Va. App. 145, 157-58, 616 S.E.2d 59, 66 (2006) (quoted with approval in

> Marblex Design Intern., Inc. v. Stevens, 54 Va. App. 299, 304-05, 678 S.E.2d 276, 278 (2009). Succinctly stated: "The Legislature is presumed to know what it intends to do and can do." Miller v. Commonwealth, 172 Va. 639, 649, 2 S.E.2d 343, 348 (1939).
>
> As contrasted above, Code § 18.2-57.3 authorizes deferral and dismissal. Code § 18.2-57 (C) does not. The trial court did not have the inherent power, as Hernandez asserts, to add, in effect, a provision granting deferral and dismissal from the former statute to the latter. This is true because "'[c]ourts cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself.'" Stevens v. Commonwealth, 46 Va. App. 234, 245, 616 S.E.2d 754, 759 (2005) (*en banc*) (quoting Jordan v. South Boston, 138 Va. 838, 844-45, 122 S.E. 265, 267 (1924)), aff'd, 272 Va. 481, 634 S.E.2d 305 (2006). No court has the inherent power "to add to a statute language which the legislature has chosen not to include." County of Amherst v. Brockman, 224 Va. 391, 397, 297 S.E.2d 805, 808 (1982). To recognize such an inherent power would violate the separation of powers, as Chief Justice Marshall wrote, quoted above, "[t]he power of punishment is vested in the legislative, not in the judicial department." [United States v.] Wiltberger, 18 U.S. (5 Wheat.) [37,] 95. [(1820)].

55 Va. App. at 203-04, 684 S.E.2d at 852. (App. 67-68).

Limitations on Power to Dismiss

The real issue here is not the power to defer which this Court settled in Moreau. Rather, the question is when a trial court can dismiss a criminal indictment or warrant where the court has found sufficient evidence to convict. As the Court of Appeals said:

> **"[A]*bsent an express statutory grant, trial courts may not dismiss criminal charges on grounds other than the legal***

> ***or factual merits***." Holden v. Commonwealth, 26 Va. App. 403, 407, 494 S.E.2d 892, 895 (1998) (emphasis supplied). No court has the sole authority to dismiss a criminal charge for any reason not based upon the legal or factual merits, unless authorized to do so by a legislature. To construe the inherent power of a court to dismiss a criminal charge on a basis other than the legal or factual merits would, by such construction, potentially authorize judicial nullification of a legislative act, in violation of separation of powers.

55 Va. App. at 201-02, 684 S.E.2d at 851. (App. 66) (emphasis in original).

Stated differently, the trial courts' power to dismiss criminal charges on grounds other than the legal or factual merits is strictly a statutory creation.

> [T]he federal courts, in interpreting Federal Rule of Civil procedure 37 which is substantially similar to Rule 4:12, have held that federal district courts may dismiss an action for a party's failure to comply with discovery even though an order compelling discovery has not been entered. However, it is the responsibility of this Court to interpret our own Rules regarding pretrial procedures for the parties in the courts of this Commonwealth. And, even though the federal courts' interpretations of their rules in some instances may be informative, those interpretations are not binding on this Court's interpretation of our Rules.
>
> Accordingly, we hold that Rule 4:12 (d), when read with the other provisions in Rule 4:12, authorizes a circuit court to dismiss a motion for judgment only when the plaintiff fails to comply with a court's order to provide or permit discovery. Therefore, the circuit court erred in dismissing the plaintiffs' motions for judgment.

Brown v. Black, 260 Va. 305, 311, 534 S.E.2d 727, 729-30 (2000).

Because of the limited power to dismiss,

> [o]nce there is a finding of guilt (or a finding of evidence sufficient to support the same), or such a finding following a continuance to take that determination under advisement, the consequences of that finding; that is, a permissible punishment a court may impose, are circumscribed and delineated by the legislature. In accord with the separation of powers, the responsibility for "fixing penalties are legislative, not judicial functions." Cook v. Commonwealth, 20 Va. App. 510, 513, 358 S.E.2d 317, 319 (1995) (quoting United States v. Evans, 333 U.S. 483, 486 (1948)).

55 Va. App. at 202, 684 S.E.2d at 851. (App. 66).

The Supreme Court of the United States has addressed the issue of whether a trial court could suspend the execution of a five-year sentence, finding no inherent judicial power for suspended sentences and suggesting that no authority for deferred findings of guilt exists either:

> [I]f it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments, and hence leave no law to be enforced.

Ex parte United States, 242 U.S. 27, 42 (1916).[2] The Court also examined Hale and Blackstone and found no common law basis for such authority. Id. at 43-45. In a later case, the Supreme Court summed up the general principle of Ex parte United States by explaining: "[T]he power to enforce does not inherently beget a discretion permanently to refuse to enforce." Ex parte United States, 287 U.S. 241, 250 (1932).

This Court has also addressed the power of the courts to refuse to enforce statutory limitations.

> As previously noted, the purpose of § 18.2-53.1 is to deter violent crimes, not to reform or rehabilitate criminals. It expressly prohibits a court from either suspending the sentence or placing a defendant on probation. The statute provides that the sentence "shall not be suspended," and we construe this language to mean that the court can neither delay imposition of the sentence nor stay its execution. See Richardson v. Commonwealth, 131 Va. 802, 808, 109 S.E. 460, 462 (1921). Here, however, the court not only "suspended" the sentence in violation of the General Assembly's clear mandate, but also, in its effort to rehabilitate Jennings, effectively placed him on probation in contravention of the statute.

In Re: Commonwealth of Virginia, 229 Va. 159, 163, 326 S.E.2d 695, 698 (1985) (citation omitted).

Granting the trial court the power to dismiss any criminal prosecution after deferral would effectively authorize judicial nullification of criminal

[2] This case was superseded by a statute granting trial courts such powers. 43 Stat. 1259.

convictions. Recognizing such a power would permit the judge in any case, no matter how serious, to defer and later dismiss the matter. In light of the above limitations on the courts' powers, particularly those limiting dismissal, such a position is unsustainable.

> If the doctrine of separation of powers requires anything in this case, it is that the Legislature be allowed to place some restrictions on the ability of the judiciary to avoid imposing legislatively-mandated penalties for crimes by indefinitely suspending sentences. See Ex Parte United States, supra; Neal v. State, 104 Ga. 509, 30 S.E. 858 (1898); Ex Parte Thornberry, 300 Mo. 661, 254 S.W. 1087 (1923); State v. Eighth Judicial Dist. Court, 85 Nev. 485, 457 P.2d 217 (1969).

State v. Mabry, 630 P.2d 269, 273 (N.M. 1981). Adopting a deferral and dismissal power for all crimes would similarly offend the separation of powers doctrine.

> [I]indisputable also is it that the authority to define and fix the punishment for crime is legislative and includes the right in advance to bring within judicial discretion, for the purpose of executing the statute, elements of consideration which would be otherwise beyond the scope of judicial authority, and that the right to relieve from the punishment, fixed by law and ascertained according to the methods by it provided, belongs to the executive department.
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> .

Ex parte United States, 242 U.S. at 42. Since this Court has recognized numerous legislative limitations on the powers of the trial court, particularly those surrounding mandatory minimum sentences, this Court should

recognize the legislature's limitation of deferral and dismissal to those crimes set out in particular statutes.

Finally, it should be pointed out here that the Commonwealth's Attorney did not agree to the disposition requested by the defendant. Arguably no member of this Court views such a deferral as appropriate absent the Commonwealth's concurrence. See Moreau, 276 Va. at 139, 661 S.E.2d at 848 (Koontz, J. concurring). Justice Koontz opined that the trial court's inherent authority allowed deferral "in appropriate cases and upon ***consent of*** the accused and ***the Commonwealth***." 276 Va. at 139, 651 Va. at 848 (emphasis added). Clearly, even if the trial court could defer and dismiss when the Commonwealth consents, the authority to do so over the Commonwealth's objection is inconsistent with the above authority.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals affirming the judgment of the Circuit Court of the City of Alexandria, finding the defendant guilty of assault and battery of a police officer should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
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CERTIFICATE OF TRANSMISSION AND SERVICE

On October 3, 2010, the required copies of this brief were hand delivered to the Clerk's Office of this Court for filing and three copies were mailed to Paul E. Pepper, Deputy Public Defender, Office of the Public Defender, 132 North Royal Street, Suite 200, Alexandria, Virginia 22314.

This brief contains 4,777 words.

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