IN THE

Supreme Court of Virginia

RECORD NO. 092524

RAFAEL HERNANDEZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF *AMICUS CURIAE*
VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

Rafael Hernandez,
Appellant,

v. Record No. 092524

Commonwealth of Virginia,
Appellee.

BRIEF OF *AMICUS CURIAE* VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Pursuant to Rule 5:30, Rules of the Supreme Court of Virginia, the Virginia Association of Criminal Defense Lawyers (hereinafter, "VACDL") respectfully files this brief *amicus curiae* in support of Appellant's position.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

The *amicus curiae* adopts Appellant's Statement of Material Proceedings.

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in upholding the erroneous rulings of the trial court in finding Mr. Hernandez guilty of assault and battery on a law enforcement officer because, after arousing him from sleep, he was in a

confused state and did not know, or have reason to know, that Matthew Parker was a law enforcement officer engaged in the performance of his public duties.

2. The Court of Appeals erred in concluding that the trial court does not have the inherent authority to defer judgment upon terms contemplating a future dismissal of criminal charges and may then rule that the case be dismissed.

QUESTIONS PRESENTED

1. With respect to Assignment of Error #1, whether the Court of Appeals erred in upholding the erroneous rulings of the trial court in finding Mr. Hernandez guilty of assault and battery of a law enforcement officer because, after arousing him from sleep, he was in a confused state and did not know, or have reason to know, that Matthew Parker was a law enforcement officer engaged in the performance of his public duties.

2. With respect to Assignment of Error #2, whether the Court of Appeals erred in concluding that the trial court does not defer judgment upon terms contemplating a future dismissal of criminal charges and then rule that the case be dismissed.

STATEMENT OF FACTS

The *amicus curiae* adopts Appellant's Statement of Facts.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITY

This brief *amicus curiae* addresses only the 2nd Assignment of Error and the 2nd Question Presented, namely whether the trial court had the inherent authority to defer judgment upon terms contemplating future dismissal of criminal charges.

Although the Petition for Appeal and the brief in opposition thereto address this question in terms of a constitutional argument over the separation of powers, namely whether the legislature may direct the judiciary how to judge a particular case, or whether the judiciary has the inherent power to defer dispositions in cases other than those specifically authorized by the legislature, it appears that it is possible to resolve this inquiry on non-constitutional grounds.

The analysis should focus on 3 questions:

1. Does a court have the authority to continue, or adjourn, a case?

2. Must a court decide a case immediately upon the conclusion of the evidence?

3. When the case is reviewed by the court, can it be required to make a

particular decision?

Authority to Continue or Adjourn

The answer to this question is clearly "yes." Although there is neither a statute nor a rule of court that specifically confers on a trial court the power to continue a case, this Court has found such power to exist. For example, in *Singleton v. Commonwealth*, 278 Va. 542, 685 S.E.2d 688 (2009), this Court held that trial courts have the inherent authority to administer cases on their dockets (*Yarbrough v. Commonwealth*, 258 Va. 347, 519 S.E.2d 602 (1999)), and that the decision whether to grant a continuance rests within the sound discretion of the trial court (*Cardwell v. Commonwealth*, 248 Va. 501, 450 S.E.2d 146 (1994)).

Brown v. Commonwealth, 278 Va. 92, 677 S.E.2d 220 (2009), is a decision in which two cases were consolidated on appeal. While that opinion principally addressed the availability of expungement under Virginia Code §19.2-392.2(A), each of the cases with respect to which the accused sought expungement was a case that had been taken under advisement and ultimately dismissed because the accused had complied with the agreed-upon conditions under which the cases were taken under advisement. This Court upheld the applicability of the expungement statute to the accuseds'

respective cases without any assertion that there was any defect in the case because the trial courts had taken the cases under advisement, set terms and conditions, and then dismissed the charges.

Ability to Delay Deciding a Case

In contrast to the foregoing, the answer to the second question is "no." A court is not required to decide a case immediately at the conclusion of the evidence. The cases in which decisions are delayed are legion and may be for a multitude of reasons, such as the court's desire to do research on the matters about which it has received evidence.

An example is *Buchanan v. Commonwealth*, Court of Appeals Record No. 0960-88-3 (Unpub., May 8, 1990). In that case, the trial court heard evidence against the accused, who was charged with being an accessory before the fact to a first degree murder committed by her husband. The trial court heard the evidence against her and found her guilty of being an accessory, but did not make a finding of whether she was an accessory before the fact to first degree murder, or whether she was a principal in the second degree. Instead, the trial court took its decision under advisement and continued her case until after it had presided over the jury trial of her co-defendant husband, who was convicted of capital murder and was sentenced

to the death penalty. Clearly, the trial court was not required to enter a finding of guilt immediately – or even promptly – after the conclusion of the evidence.

Can the Trial Court be Compelled to Make a Particular Decision?

Clearly, the answer to this question is also "no." Even though *Moreau v. Fuller*, 276 Va. 127, 661 S.E.2d 841 (2008) avoided answering the question about authority to defer disposition in cases not specifically authorized by the General Assembly, the cases cited therein clearly establish the proposition that the making of a particular decision based on the evidence is the essence of judicial activity. *See, also, In Re Commonwealth's Attorney*, 265 Va. 313, 576 S.E.2d 458 (2003).

The fact that the General Assembly has made provision for deferred dismissal under such statutes as Virginia Code §18.2-251 is not controlling. That statute is an example of the Assembly's preference and requires that there be a finding of sufficient evidence to convict so that there can be no expungement of the charge at a later date. That is not a prohibition against a trial court's taking a case under advisement, setting terms and conditions, setting it for hearing on a future date and, on that date, making a decision to dismiss the case. Trial courts already have the authority to make each of

those rulings. This authority is not new.

CONCLUSION

WHEREFORE, the Virginia Association of Criminal Defense Lawyers respectfully submits this brief *amicus curiae.* Counsel for VACDL on this brief *amicus curiae* respectfully requests oral argument in person.

Respectfully submitted,

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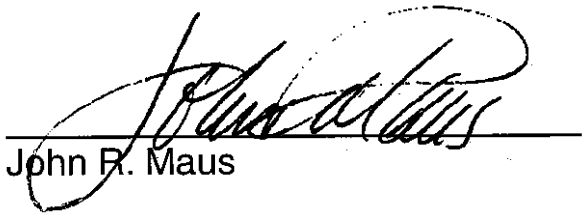
Certificate

I hereby certify, pursuant to Rule 5:26(e) that three copies of the foregoing Brief of *Amicus Curiae* were sent by first class mail, postage prepaid to Kenneth T. Cuccinelli, Attorney General of Virginia, 900 East Main Street, Richmond, Virginia 23219 and to Paul E. Pepper, Office of the Public Defender, 132 North Royal Street, Suite 200, Alexandria, Virginia 22314, all on the 3RD day of September, 2010. An electronic copy was also filed via email with the Supreme Court of Virginia and on counsel for each party this same day.



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