IN THE

Supreme Court of Virginia

RECORD NO. 092524

RAFAEL HERNANDEZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT

"The Virginia Constitution directs that the government function through three equal but separate branches with specific responsibilities and powers assigned to each, and that no one branch may exercise the functions or powers of another except as specifically authorized by the constitution." Taylor v. Worrell Enterprises, Inc, 242 Va. 219, 221, 409 S.E.2d 136, 138 (1991). 846. In the criminal law context, the legislature has discretion in statutory enactment; the executive, acting through the prosecutor and law enforcement agencies, has discretion in charging individuals with crimes by seeking warrants or indictments; and the judiciary has discretion in rendering judgment. See, Moreau v. Fuller, 276 Va. 127, 136, 661 S.E.2d 841, 846 (2008)(discussing the "fundamental powers in [the] three branches of government"). Discretionary power is at the essence of each branch's function and may not be abridged.

This Court has noted that an inherent judicial power "may be *regulated* by legislative enactment, provided it is not 'destroyed, or so far diminished as to be rendered ineffectual.'" Reid v. Reid, 245 Va. 409, 413-414, 429 S.E. 2d 208, 210 (1993) (quoting from Carter's

Case, 96 Va. 791, 816, 32 S.E. 780, 785 (1899), discussing the inherent power of the court of "self defense and self-preservation" by way of contempt) (emphasis added). Such regulatory action is evident by the statutes the General Assembly has passed stating that in certain situations (property crime misdemeanants, drug offenders, family or household victims, etc.) it may be appropriate to defer disposition and withhold a finding of guilt for first offenders, and dismiss the proceedings upon successful completion of probationary conditions. See VA Codes §§ 19.2-303.2, 18.2-57.3, 18.2-61, and 18.2-251. These statutes regulate the manner in which the inherent power of the court may be carried out in those specific statutes where the General Assembly has chosen to address the issue. The rules of statutory construction relied upon by the Commonwealth in their brief and the Court of Appeals of Virginia in their decision do not control here. Commonwealth's Brief at 14; Hernandez v. Commonwealth, 55 Va. App. 190, 203-204, 684 S.E.2d 852 (2009) (App. at 67-68). It is not a question of statutory construction. It is a question of regulating, but not destroying, an inherent power of the court.

The Commonwealth's Brief cites to cases addressing whether a court may suspend a sentence once judgment of guilt has been rendered. In Ex *parte* United States, 242 U.S. 27 (1916), the Supreme Court of the United States examined whether a court had the authority to permanently suspend a sentence following conviction. Similarly, In Re: Commonwealth of Virginia, 229 Va. 159, 326 S.E.2d 695 (1985), the issue involved suspending a sentence following conviction in contravention of the statute's mandatory sentence. Neither of these cases involved withholding judgment. Judgment is the discretionary power of the court.

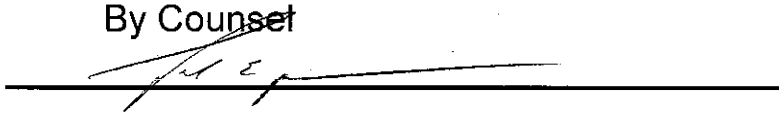
CONCLUSION

The Court of Appeals of Virginia erred in concluding that the trial court does not have inherent authority to defer judgments upon terms contemplating a future dismissal of criminal charges. The trial court erred in concluding that its authority in this matter is governed only by statute. Appellant respectfully requests that this Court reverse the erroneous rulings of the trial court, and remand the case for disposition pursuant to this Court's decision.

Respectfully Submitted,

RAFAEL HERNANDEZ

By Counsel



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CERTIFICATE OF SERVICE

1. The appellant's name is Rafael Hernandez. He has served his sentence at the Alexandria Adult Detention Center, and is now residing at 7403 Tarfside Lane, Gaithersburg, Maryland 20879. His telephone number is (240) 398-9469. The appellee is the Commonwealth of Virginia.

2. Counsel for appellant is Paul E. Pepper, Deputy Public Defender, 132 N. Royal Street, Suite 200, Alexandria, Virginia 22314,

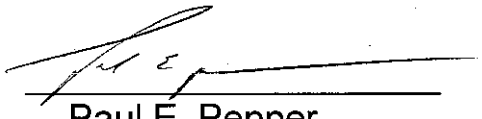
(703) 746-4477 ext. 3155. His fax number is (703) 838-6483. His email address is paul.pepper@alexandriava.gov. Counsel for appellee is Eugene Murphy, Senior Assistant Attorney General. His address is: Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219. His telephone number is (804) 786-2071.

3. Counsel filed fifteen copies (and one electronic copy) of this Reply Brief of Appellant with the Clerk of the Court, Supreme Court of Virginia, 100 North Ninth Street, Richmond, Virginia 23219, and mailed three copies (and one electronic copy) of the Reply Brief of Appellant to Eugene Murphy, Senior Assistant Attorney General. His address is: Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, this 18th day of October, 2010.

4. Counsel for the Appellant is appointed by the court.

5. Counsel does wish to present oral argument.

6. Counsel certifies that this Reply Brief of Appellant complies with the word count limit of 2,625 words, and that the actual word count is 981.



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