In The

Supreme Court of Virginia

RECORD NO. 122013

VIRGINIA BROADCASTING CORPORATION,

Appellant,

v.

COMMONWEALTH OF VIRGINIA and GEORGE HUGUELY,

Appellees.

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

Virginia Broadcasting Corporation, by counsel, pursuant to Rule 5:29 of the Rules of the Supreme Court of Virginia, respectfully submits its Reply Brief in this matter.

ARGUMENT

I. This Court Has The Authority To Review the Lower Court's Decision In This Case.

The Commonwealth asserts an unprecedented proposition in an attempt to avoid a decision by this Court. It contends that this Court lacks authority to review the trial court's application of Section 19.2-266 of the Code of Virginia. As stated in its brief,

> the Commonwealth contends that the decision not to permit televising of a judicial proceeding is not subject to review by this or any other court with regard to the claims that the statute itself was violated.

Br. of Appellee at 24. In support of this unprecedented argument, the Commonwealth relies on *Donnelly v. Donatelli & Klein, Inc.*, 258 Va. 171 (1999). *Donnelly* in no way prohibits this Court from taking cognizance of this appeal and rendering a decision. It should not escape notice that this Court actually reviewed the contracts at issue in *Donnelly*, notwithstanding the "sole discretion" language in those contracts. Moreover, this Court applied a *de novo* standard of review in analyzing those contracts. *Id*. at

180. And, assuming, *arguendo*, that the lower court had discretion in this case, there exists a plethora of decisions from this Court reviewing discretionary acts of trial judges. *See*, *e.g.*, *Landrum v. Chippenham & Johnston-Willis Hosps*., 282 Va. 346 (2011)(reviewing trial court's decision and holding that discretion does not mean that trial courts can do whatever pleases them). Indeed, this Court has reviewed the precise statutory language the Commonwealth says this Court cannot review. *Vinson v. Commonwealth*, 258 Va. 459 (1999).

This Court has the authority to review the lower court's decision in this case.

II. The Commonwealth's "Solely In Its Discretion" Argument Is Being Raised For The First Time On Appeal. This Court Should Not Consider It.

Although the Commonwealth now contends that the "may solely in its discretion" language of Section 19.2-266 controls, it did not make this claim below. Rather, the Commonwealth below asserted its speculation about witnesses to be called at sentencing and stated

> If those witnesses testify in front of a recorded videotaped proceeding that image and the words will be forever accessible in any judicial proceeding subsequently or in advance and - - and that is placing into the public domain information that the Court **for good cause** and for good reason we think should be very cautious about doing in that fashion. (emphasis added)

App. at 22. *See*, Br. of Appellee at 8 (acknowledging its "good cause" argument). The Commonwealth also suggested that the lower court could exercise its "sound discretion." App. at 21, 24. But, the Commonwealth never suggested to the trial court that it could act "solely in its discretion."

Indeed, to the contrary, the Commonwealth was consistent and clear that the "good cause shown" standard applied to the trial court's decision. During the November 7, 2011 hearing on this issue before Mr. Huguely's trial, the Commonwealth concluded its argument by saying:

> So, not only has the Commonwealth reached a conclusion that **good cause has been shown** to restrict the coverage by prohibiting live…coverage…., but a clear and present danger, we submit, to the conduct of an error free and fair trial would be introduced if we do it otherwise. (emphasis added).

Tr. November 7, 2011 motions hearing at p. 100. Thus, at no time did the Commonwealth suggest that the trial court could act "solely in its discretion." In fact, the Commonwealth's new argument is contrary to its position below. It is a basic principle of appellate review that "arguments made for the first time on appeal will not be considered." *Martin v. Ziherl*, 264 Va. 35, 39 (2005). The Commonwealth's "solely in its discretion" argument is being made for the first time on appeal and this Court should not consider it. *Id.* Similarly, a party cannot take an inconsistent position for

the first time on appeal. *See*, *Wessel, Duval & Co. v. Crozet Cooperage Co*., 143 Va. 469 (1925) (Inconsistent defense cannot be set up for first time on appeal. Defendant not permitted to shift positions on appeal). For both of these reasons, this Court should not consider the Commonwealth's new argument.

III. Even If The Commonwealth Were Not Precluded From Asserting Its "Solely In Its Discretion" Argument, It Should Not Long Detain This Court. Virginia Broadcasting Does not Ignore Any Language Of Section 19.2-266 Of The Code Of Virginia.

Instead of addressing the "good cause shown" standard in Section 19.2-266 of the Code of Virginia and the speculations relied upon by the lower court, the Commonwealth seems content to suggest that Virginia Broadcasting ignores the portion of this statute that provides that a trial judge "may solely in its discretion **permit** the taking of photographs…and the broadcasting of judicial proceedings." *Id*. (emphasis added). Br. of Appellee at 18. The Commonwealth is mistaken. Virginia Broadcasting does not ignore this language.

In fact, Virginia Broadcasting pointed out in its opening brief that Section 19.2-266 of the Code of Virginia contains two standards. The first applies when a trial court "permits" the broadcasting of judicial proceedings. The second – the "good cause shown" standard – applies when the trial court "prohibits" coverage. *Id.*; Brief of Appellant, p. 9, fn. 3. The fact that

the General Assembly used different standards in the same statute is strong evidence that the standards for permitting and prohibiting the broadcasting of trials are different.

The Commonwealth agrees with this approach to statutory interpretation. *See*, Br. of Appellee at 19. (When different terms are used they are presumed to have distinct and different meanings). But the Commonwealth knows that properly acknowledging the "prohibit" and the "good cause shown" language of the statute is fatal to its position. Thus, it focuses on the standard to be applied when a trial court "permit[s]" the broadcasting of judicial proceedings. The Commonwealth focuses on the wrong standard. In this case the trial court "prohibit[ed]" the broadcasting of Mr. Huguely's sentencing hearing.

In support of its approach to the statute, the Commonwealth relies on *Vinson v. Commonwealth*, 258 Va. 459 (1999) and *Stewart v. Commonwealth*, 254 Va. 222 (1993). Br. of Appellee at 24. Neither of these cases is helpful to the Commonwealth. Both *Vinson* and *Stewart* involved appeals by individuals convicted of crimes in which the trial courts **permitted** the use of cameras at trial. *Stewart* at 232-233; *Vinson* at 471; *accord*, *Savino v. Commonwealth*, 239 Va. 534 (1980). In the case *sub*

judice, the trial court prohibited the use of cameras. This is a dispositive distinction.

In *Vinson*, for example, this Court recognized that the trial court permitted the use of cameras at trial. This Court then applied the proper statutory standard applicable when a trial court **permits** coverage – the "solely in its discretion" standard. *Vinson* at 471; *accord*, *Stewart* at 232-233.

Until today, this Court has never considered an appeal from an order of a trial court **prohibiting** the use of a camera in a judicial proceeding. In addition to the language of the statute establishing different standards for permitting and prohibiting the broadcast of trials, Virginia Broadcasting respectfully suggests that this Court's approach to the right of access supports and informs the legislature's use of different standards.

It is well-accepted that Virginia has a long tradition of open courts. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574 (1981). There is no burden placed upon the courts or trial participants when the proceedings are truly open to everyone, for all legitimate purposes. But when restrictions are to be placed on this openness, burdens must be met. This is the structure of Section 19.2-266 of the Code of Virginia as it pertains to cameras in the courtroom. This is also the approach adopted

by this Court in *Shenandoah Publishing House, Inc. v. Fanning*, 235 Va. 253 (1988). It must be presumed that the General Assembly was aware of this Court's decision in *Shenandoah Publishing* when it permanently codified the provisions of Section 19.2-266 in 1992. *See*, *e.g.*, *Gillespie v. Commonwealth*, 272 Va. 753 (2006) (In ascertaining legislative intent this Court presumes that the General Assembly is aware of law relating to the same general subject and our decisions related thereto).

In *Perreault v. The Free Lance-Star*, 276 Va. 375 (2008), this Court explained its holding in *Shenandoah Publishing* and stated that

> When correctly interpreted, *Shenandoah Publishing* requires that a court may not base its decision to limit public access to court proceedings or records upon the conclusory assertions of the party requesting the closure. *Id*. Thus, the court must make specific factual findings only to support a decision to *restrict* public access to court records or proceedings. Because the presumption is in favor of openness, a court need not make findings of fact [to keep the proceedings open].

Id. at 390 (emphasis in original).

This is the precise approach adopted by the General Assembly in Section 19.2-266 of the Code of Virginia. If the trial court is going to "permit" the broadcast of judicial proceedings, it "may solely in its discretion" do so. But if such coverage is to be prohibited, "good cause"

must be "shown." *Id*. Properly read in this manner, the entire statute is in complete harmony.

Virginia Broadcasting acknowledges the abuse of discretion standard to be used when a trial court "permits" the broadcasting of trial proceedings but maintains that it does not apply to the present case. Here, the lower court prohibited the use of cameras at the sentencing hearing and the "good cause shown" standard applies.

IV. The Commonwealth's Reading Of Section 19.2-266 Is Untenable.

The Commonwealth's statutory arguments are untenable. The Commonwealth's statutory analysis effectively begins and ends with the word "solely." Br. of Appellee at 18-25. But, this single word cannot render meaningless other parts of this statute and it cannot render the right of appellate review a nullity, even though the Commonwealth advocates for just that result. Br. of Appellee at 24.

Under the Commonwealth's approach, appellate review of any trial court decision would not be possible, even in those cases where the trial court permitted cameras in the courtroom, and even in instances where the trial court allowed cameras in adoption proceedings, child custody proceedings or other proceedings strictly prohibited by the statute since such decisions are "not subject to review by this or any other court",

according to the Commonwealth. *Id*. The Commonwealth's argument proves too much.

If the Commonwealth is correct, this Court had no authority to decide *Vinson*, in which this Court considered the "solely in the discretion" language of this statute. And, if the Commonwealth is correct, the Court of Appeals lacked authority to decide and wrongly decided *Diehl v. Commonwealth*, 9 Va. App. 191 (1989) in which that court held that Section 19.2-266 authorizes a trial "judge to prohibit electronic media and still photography coverage for good cause shown" *Id*. at 197. Similarly, under the Commonwealth's approach, *Novak v. Commonwealth*, 20 Va. App. 373 (1995) was also wrongly decided. In *Novak*, the Court of Appeals held that the trial court did not err in allowing cameras in the courtroom since the defendant "failed to demonstrate 'good cause' to exclude the cameras…." *Id*. at 390-391. Indeed, according to the Commonwealth, every appellate court that has considered this statute lacked authority to do so and wrongly decided every case applying the "good cause shown" standard. This is nothing short of incredible.

Further, if the Commonwealth is correct, the General Assembly enacted, in large part, a meaningless amendment to the statute and one whose constitutionality is questionable. Prior to the current amendment,

trial courts had the authority to exclude anyone from the courtroom if their presence would impair the conduct of a fair trial. Va. Code Ann. Section 19.2-266. (the prior statute consisted of the first sentence of the present statute). Thus, if the amendment was designed to give trial courts absolute discretion to deny the use of cameras, it was not needed.

In construing this statute, it must be presumed that the General Assembly intended to enact a constitutional statute. But if this statute gives trial judges' absolute unfettered discretion to restrict access to public trials by use of the word "solely," it arguably stands on infirm constitutional ground. *See*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (finding Section 19.2-266 of the Code of Virginia unconstitutional as applied where trial court exercised unfettered discretion). This Court should interpret this statute in a way that avoids this result.

Finally, when construing a statute, the primary goal is "to ascertain and give effect to legislative intent as expressed by the language used in the statute." *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420 (2012) (internal quotation marks omitted). This includes consideration of the object of the statute as expressed in its title. There is nothing in the language of Section 19.2-266 that limits the "prohibit" or "good cause

shown" language temporally to a point in time after a judicial proceeding has begun and after the court has "permit[ted] cameras into the proceeding" as suggested by the Commonwealth. Br. of Appellee at 22-23. To the contrary, the statute provides that the "presiding judge shall advise the parties of such coverage **in advance of the proceedings** and shall allow the parties to object thereto. For good cause shown, the presiding judge may prohibit coverage…." *Id*. (emphasis added). It would make little sense to allow an objection only after cameras are in the proceedings; if there were ever a case in which the use of cameras was prejudicial, the harm would be done before the parties are afforded the opportunity to establish good cause to exclude the cameras. The Commonwealth's reading of this statute would lead to absurd results.

The Commonwealth's statutory argument proves too much.

V. The Commonwealth's Reliance On *Estes v. Texas* And The Judicial Conference Of the United States is Misplaced.

The Commonwealth refers to *Estes v. Texas*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) as the "seminal Supreme Court case regarding the use of cameras in courtrooms…." Br. of Appellee at 25. But *Estes* is of questionable value today. *Chandler v. Florida*, 449 U.S. 560, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981). Justice White, concurring in *Chandler* stated that *Chandler* "effectively eviscerates *Estes.*" *Id*. at 588.

And Justice Stewart concurring in *Chandler* stated that he "would now flatly overrule [Estes]" *Id*. at 583. *Estes* cannot bear the weight the Commonwealth places on it. The existing value of *Estes* is in the wisdom shown by the Court in recognizing that with advances in technology "we will have another case" and "the constitutional judgment called for now would of course be subject to reexamination…." *Id*. at 540, 595-596. The advances in technology contemplated by the Court in *Estes* have been realized.

The Commonwealth next relies on writings of the Judicial Conference of the United States that are nearly 20 years old. Br. of Appellee at 27. The Judicial Conference serves in an advisory role to the federal courts. With the exception of a few matters not relevant here, the Judicial Conference has no binding authority, even in the federal courts. *Capitol Records, Inc. v. Alaujan*, 593 F. Supp. 2d 319 (D. Mass. 2009). It has no authority of any nature in the various state courts. And, even in the federal system some courts are disregarding the Judicial Conference's recommendation and allowing the use of cameras in courtrooms. *See*, *Capitol Records* at 324 (identifying numerous district court cases in New York alone where broadcasting has been allowed despite the Judicial Conference's recommendation).

In *Hollingsworth v. Perry*, 558 U.S. 183, 130 S. Ct. 705, 175 L. Ed. 2d 657 (2010), relied on by the Commonwealth, the Court expressed no view whether federal trials should be broadcast. *Id*. at 184, 189. The Court in *Hollingsworth* did note that the Ninth Circuit Judicial Council had approved a pilot program for the limited use of cameras in the Ninth Circuit's district courts, evidencing further disregard for the recommendations of the Judicial Conference. *Id*. at 187. Importantly, the Court in *Hollingsworth* acknowledged that "[t]he arguments in favor of developing procedures and rules to allow broadcast of certain cases have considerable merit…." *Id*. at 196. Even the federal courts seem to be abandoning their antiquated rule against broadcasting federal trials.

The Commonwealth's reliance on *Estes* and the Judicial Conference is misplaced.

VI. There Was No Evidence to Support The Trial Court's Decision.

Rather than point to a single grain of evidence in the record to support the lower court's decision, the Commonwealth tries in vain to support that decision by claiming it "was premised on concerns widely recognized by courts as **potentially** arising from television coverage…." Br. of Appellee at 25 (emphasis added). The Commonwealth, like the trial court, relies on pure speculation and conclusory assertions.

But, a court "may not base its decision to limit public access to court proceedings or records upon [ ] conclusory assertions." *Perreault* at 390. *See*, *e.g.*, *Fisher v. Commonwealth*, 236 Va. 406, 410, n. 2 (1988) (""generalized objection" to cameras not sufficient); *Vinson* at 471 (rejecting defendant's "conclusory argument" that he was prejudiced by presence of cameras); *The Daily Press v. Commonwealth*, 285 Va. 447 (2013)(rejecting speculative trial court rationale unsupported by particularized factual findings). To be a proper exercise of discretion, "a circuit court's determination [ ] must be supported by evidence in the record." *Stevens v. Commonwealth*, 274 Va. 157, 162 (2007). Concern in the abstract is not sufficient to justify a restriction on public access to Virginia's Courts. There was not a scintilla of evidence in this case supporting the trial court's actions and the Commonwealth has pointed to none. Br. of Appellee at 1-36. The lower court erred.

The Commonwealth's overriding *sub silentio* argument is that cameras are bad and harmful. But cameras are not the villain. The mere presence of cameras in a courtroom does not result in an unfair hearing. "[A]bsent a showing of prejudice of constitutional dimensions, the mere

presence of cameras does not result in an unfair trial." *Novak* at 390. (quoting from *Chandler* at 582).[1]

CONCLUSION

For the reasons stated in its opening brief and for the reasons stated above, Virginia Broadcasting respectfully requests that this Court reverse the Circuit Court's August 30, 2012 Order.

Respectfully Submitted,

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[1] Cameras are ubiquitous in today's world. Everyone with a modern phone has a camera. Congress allows its sessions to be videoed as does the Virginia General Assembly. Meetings of local governing bodies throughout Virginia are often broadcast. General District Courts use video routinely for bond hearings and frequently allow cameras in their proceedings. Circuit Courts often allow the use of cameras. Rule 1:14 allows cameras to perpetuate the record. Even this Court has, upon proper request, allowed some of its proceedings to be videoed (Virginia Broadcasting learned subsequent to the hearing below that this Court has allowed some of its proceedings to be videoed).

CERTIFICATE

Pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, counsel for Virginia Broadcasting Corporation certifies that fifteen bound copies of the foregoing Reply Brief of Appellant with one electronic copy on CD, were hand-filed with the Clerk of the Supreme Court of Virginia on this 24th day of June, 2013. On this same day, three bound copies of the Reply Brief of Appellant with one electronic copy on CD, were served via U.S. Mail, postage prepaid, to counsel for the Appellees at the following addresses:

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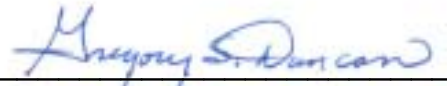
Given under my hand this 24th day of June, 2013.



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