In the
SUPREME COURT OF VIRGINIA

RECORD NO. 122013

VIRGINIA BROADCASTING CORPORATION,

Appellant,

v.

COMMONWEALTH OF VIRGINIA and
GEORGE HUGUELY,

Appellees.

BRIEF OF COMMONWEALTH OF VIRGINIA

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The Commonwealth of Virginia, respectfully submits this Brief of Appellee in response to the Brief of Appellant filed by the requesting Intervenor under Code § 19.2-266, the Virginia Broadcasting Corporation, which trades as NBC29/WVIR-TV ("the TV Station").

The Commonwealth asks this Court to affirm the decision of the Circuit Court for the City of Charlottesville that denied the TV Station's request to bring a video camera into that courtroom on August 30, 2012 to televise the sentencing proceeding of Appellee-Defendant George Huguely.[1] Code § 19.2-266 vests in the circuit court the "sole[] . . . discretion" to determine whether electronic media—television broadcasting—or still photography—should be permitted in a courtroom for a particular proceeding. The statute in doing so does not implicate any constitutional "right of access." Because the circuit court did not abuse its broad discretion in denying this mode of media coverage of the proceeding, the circuit court's decision should be affirmed.

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[1] NBC 29.com, *George Huguely Sentenced to 23 Years* (Aug. 30, 2012), http://www.nbc29.com/story/19418141/george-huguely-sentencing (reporting the result of that hearing). Although the date of requested coverage has passed, the Commonwealth agrees that the matter is not moot. *See Daily Press, Inc.* v. *Commonwealth*, 285 Va. 447, 451-54, 739 S.E.2d 636, 638-40 (2013).

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

In this appeal, a television station makes the extraordinary claim that, under Code § 19.2-266, video cameras are presumptively permitted in judicial proceedings—here a sentencing hearing in an infamous murder trial in Charlottesville, Virginia—even if the public and press are permitted free entry. And that television station asks this Court to engage in a de novo review of whether the circuit court had before it "good cause" to exclude video cameras from the courtroom. Claiming that the prosecution and defense made no such showing in this case, the TV Station argues that the trial court's exclusion of cameras from this hearing is both *ultra vires* and unconstitutional. Because this appeal turns on the interpretation, application, and constitutionality of Code § 19.2-266, a review of its text and some relevant history is necessary to put these claims in context. *See New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.) (noting that, in matters of statutory interpretation, "a page of history is worth a volume of logic").

Prior to 1978, the Code of Virginia did "not permit the taking of photographs in the courtroom during the progress of judicial proceedings or the broadcasting of judicial proceedings by radio or television." In that year courts were first given authority to "authorize the use of electronic or

photographic means" in court, but only "for the perpetuation of the record or parts thereof." 1978 Va. Acts 685 (Chapter 477, amending and reenacting Code § 19.2-266); *see* Rule 1:14. At that time, the law was plainly that "the televising and broadcasting of [a criminal] trial" may well deprive a criminal defendant of his or her "right under the Fourteenth Amendment to due process." *Estes* v. *Texas*, 381 U.S. 532, 534-35, 544 (1965). And only in 1980 did the Supreme Court establish that "the right of the public and press *to attend* criminal trials is guaranteed under the United States Constitution" in the case of *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 558 (1980) (emphasis added). That case dealt with a trial court's application of the first portion of Code § 19.2-266, which read then, as now, that "[i]n the trial of all criminal cases, . . . the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated." Code § 19.2-266.

After the Supreme Court had confirmed that there was no "constitutional rule that all photographic or broadcast coverage of criminal trials is inherently a denial of due process," *Chandler* v. *Florida,* 449 U.S. 560, 574, 581 (1981), the Virginia General Assembly in 1987 created an "experimental program" to introduce, on a limited scale, the use of

photography and television and radio broadcasting of judicial proceedings into the Commonwealth's courts. 1987 Va. Acts 932-34 (Chapter 580). This program ran for five years, at which point the Assembly made permanent the provisions authorizing courts to permit coverage, but left whether and to what extent to permit coverage to their discretion on a case-by-case basis. *See* 1992 Va. Acts 710 (Chapter 557); *cf.* Teresa D. Keller, *Cameras in Virginia Courtrooms*, 26 U. Rich. L. Rev. 921, 921-22, 926-28 (1992) (recounting this legislative history in greater detail). Specifically, Chapter 557 of the 1992 Acts of Assembly amended the Code's former prohibition, ("[a] court *shall not* permit" photography and broadcasting of judicial proceedings), to become a grant of authority: "[a] court *may solely in its discretion* permit" photography and broadcasting. The amendment left in place the rules that had guided the courts that were part of the experimental program. 1992 Va. Acts 710 (emphases added). Over twenty years later, Code § 19.2-266 still provides that

> A court may *solely in its discretion* permit the taking of photographs in the courtroom during the progress of judicial proceedings and the broadcasting of judicial proceedings by radio or television . . . , but only in accordance with the rules set forth hereunder.

(Emphasis added.) That statute also provides a "good cause" standard for "prohibit[ing] coverage" as one of the "rules" governing cameras in courts,

Va. Code Ann. § 19.2-266, a standard the TV Station contends applies whenever a Virginia trial court is determining whether to permit cameras into the courtroom.

This "good cause" standard is located among the other rules under the "Coverage Allowed" subheading:

> The presiding judge shall at all times have authority to prohibit, interrupt or terminate electronic media and still photography coverage of public judicial proceedings. 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 in any case and may restrict coverage as he deems appropriate to meet the ends of justice.

Va. Code Ann. § 19.2-266.

Recognizing the potential disruption attendant upon television coverage, that statute also provides a number of restrictions on the movement and "[l]ocation of [e]quipment and [p]ersonnel," the type and number of cameras and personnel that are permitted, and the subsequent use of the "film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding." *Id.* § 19.2-266(i) - (iii) (providing that this "[m]edia [m]aterial" shall not be admissible "in the proceeding out of which it arose," "in any proceeding subsequent and collateral thereto," or "upon any retrial or appeal of such proceedings"). Finally, the statute provides a mechanism for seeking

media coverage and resolving disputes between providers. *Id.*, § 19.2-266(5) ("Official Representatives of the Media") & ("Equipment and Personnel").

In this case, the TV Station filed a Request for Electronic Media And/Or Still Photography Coverage of Judicial Proceedings in the Circuit Court for the City of Charlottesville in the case of *Commonwealth v. George Huguely*, No. CR11-102, "for the August 30th sentencing of Mr. Huguely." (J.A. 8, 11.) The circuit court then held a hearing with counsel for the TV Station, the Defendant, and the Commonwealth, to decide "a still camera request . . . from [T]he [Daily] Progress," a Charlottesville newspaper, "and a video camera request from WVIR." (J.A. 10, 20.) Counsel were permitted to argue, as was a representative from "[T]he Daily Progress" who was the designated "cameras in the courtroom coordinator for Virginia Press Association."[2] (J.A. 17-19); *see* Va. Code Ann. § 19.2-266 ("Official Representatives of the Media").

At the hearing, the TV Station maintained that it was "just interested in covering what the Court does with regard to the jury's sentencing" of Huguely, and argued that, with the jury removed from the proceeding, the danger of tainting the jury pool was "no longer [an] issue[]," even though "a

[2] The Daily Progress' request is not before the Court on this appeal.

civil case [was] pending—with a jury request and a motion to transfer venue because of the media saturation coverage." (J.A. 12.) The TV Station argued that "[t]he burden is on the party opposing media coverage to introduce evidence that rise to the constitutional level and absen[t] such an overriding interest articulated in findings by th[e] Court," the circuit court could "not issue any form of prior restraint on media coverage." (J.A. 13-14.) It was also argued that the court must make a finding that denial is based upon "good cause" and "in the interests of justice," before it could restrict broadcasting of any criminal or civil trial. In its view, no such cause was shown. (J.A. 15-16.)

The Commonwealth's Attorney for the City of Charlottesville responded that whether to grant or deny the request to add television cameras to the media coverage was a matter vested in the circuit court's discretion, and not controlled by the Constitution. (J.A. 21.) Arguing against permitting the cameras, the Commonwealth noted that sentencing "is a critical stage of the proceeding constitutionally" for the rights of the Defendant, cited the pending civil proceeding, and noted that "[t]here are other potential proceedings that take place after the sentencing." (J.A. 21.) The Commonwealth explained that it intended to offer "a minimum of three witnesses . . . who will describe specific events involving the defendant on

occasions before the murder of Yeardley Love." (J.A. 22.) "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 . . . and that is placing into the public domain information that the Court for good cause and good reason . . . should be very cautious about doing," argued the Commonwealth. (J.A. 22.) For permitting video recording would make those proceedings more readily available to "jurors or family members of jurors or others who might be participants in any subsequent proceeding or case," and could "affect their participation." (J.A. 22). And the Commonwealth's Attorney argued that the potential prejudice to these proceedings is enhanced by the likelihood that the proceedings, including witness testimony, will be "accessible after[wards] from the internet," including by handheld devices. (J.A. 21, 22.)

With regard to the effect on witnesses, the Commonwealth cited the fact that these were "lay witnesses," and that the presence of a television camera broadcasting their statements and expressions regarding Defendant Huguely raised additional "hurdles to their participation." These included increasing the "anxiety" of "speaking publicly" with the knowledge that their remarks will be "widely publicized," which may "make[] them not willing to participate" and, should they participate, not able "to focus on

what's being asked of them and what they want to say about that." (J.A. 22-23.) Noting that the sentencing hearing was "an open hearing for everyone to attend and see," the Commonwealth urged the Court not to "place on the future [proceedings] and . . . place on the participants the burden" of broadcasting the proceeding, a "burden that might frustrate the ability to have the most careful, considered, deliberate and appropriate sentencing process." (J.A. 24.)

The Defendant "concur[red] with the Commonwealth's position," and highlighted the additional "problems created by the Internet" with regard to tainting the jury pool. (J.A. 24.) Arguing that "[t]here are all kinds of things down the line, including the sentencing hearing," the Defendant asserted his "right to cross examine witnesses and to make sure that their testimony is uninfluenced by anything," (J.A. 25), and his "right to have a fair trial . . . should not be infringed in any way by images, videotape, audiotape, or what that's out there on the internet . . . ." (J.A. 26.) The Defendant stressed that "we're not operating in an environment anymore where responsible individual reporters and media come into this Court, report the proceedings and then people see them on television," but "a . . . vastly differently environment" that "can be a very poisonous environment if the Court does not take steps to protect Mr. Huguely's rights." (J.A. 26.)

Finally, the Defendant noted that "our courtrooms just aren't very well configured to deal with that type of request." (J.A. 27.)

With regard to the constitutionality of denying the request for a video camera, the Defendant cited the fact that "[t]his was an open proceeding" to both the public and the media and that "[t]he Court took extraordinary measures to make sure that anyone who wanted to be here could," which enabled near "real time access to everything that was going on in the courthouse." (J.A. 25, 27-28.) Thus, for the Defendant, "it really isn't the case that if the Court doesn't allow for the presence of the media here in the way . . . it's being proposed . . . that the media or the public will somehow be deprived . . . of their constitutional right of access[;] that's just . . . not the case." (J.A. 25, 27-28.)

The TV Station countered that they only sought "one camera, one cameraman," that they would operate the camera within the limitations imposed by the Court, and "[i]f the Court feels it's . . . not proper to cover witnesses, they won't be covered." (J.A. 28-29.) The TV Station argued a video camera must be permitted where there is not "something more" to suggest that it would prejudice the proceeding. (J.A. 29.) And the TV Station contended that "[n]either the Commonwealth nor the [D]efendant

have put forth evidence of prejudice or that establish good cause." (J.A. 29-30.)

The circuit court orally announced its ruling at the close of the hearing, (J.A. 30-33, 35-36), explaining that introducing cameras in the case for the first time would affect the witnesses, which are "almost exclusively from a younger set"—"either in college or soon to be out of college"—especially given "the intensity of the media coverage." (J.A. 30-31.) The circuit court concluded that cameras would reduce "their willingness to come forward," and increase "their sense of fear or otherwise of being in front of a camera . . . or being exposed to . . . worldwide coverage over the internet," and so affect their testimony. (J.A. 31-32.)

The circuit court also cited that it had reviewed the file "of a civil case that's been filed against Mr. Huguely, personally by . . . Mrs. Love and its going to be based on exactly the same facts . . . as we have in this particular case. And there's a motion in there . . . either to change venue or bring in . . . jurors from out of the area because of the . . . notoriety the case has achieved." (J.A. 31.) In sum, broadcasting the sentencing would only "enhance the notoriety through graphic images of what goes on in the courtroom," and "in light of the fact that . . . there is full access" to the public and media through other means, "on balance my concern is that

photographic coverage of the case has great potential to sabotage any jury selection of the civil case." (J.A. 31-32.) Thus, the circuit held that granting the request was not "in the interest of justice," but that limiting media coverage still satisfied "the [First Amendment] rights of the press and the public" while insuring that the parties to the "criminal proceeding" would have the opportunity "to present fully and fairly all the evidence they have." (J.A. 33.) The circuit court then entered an order denying the TV Station's request "[f]or the reasons stated" at the hearing. (J.A. 38.)

The TV Station filed a Motion for Reconsideration of the circuit court's order denying the Station's "request for electronic media coverage," arguing that the Station enjoys "First Amendment protection," and that "[t]he Court cannot, consistent with constitutional principles, treat print and broadcast media differently." (J.A. 40.) The TV Station asserted that the Commonwealth and the Defendant failed "to establish that Intervenor's coverage of the sentencing would result in a constitutionally unfair or prejudicial hearing." (J.A. 40.) With regard to the statute, the TV Station claimed that the Commonwealth and the Defendant had the burden, but had presented no evidence "to establish that 'good cause' existed to prohibit cameras in the courtroom," and concluded that both the Constitution and Code § 19.2-266 required that coverage be permitted.

(J.A. 41-43.) The circuit court had denied the Motion for Reconsideration "without the necessity of a hearing." (J.A. 44.) The TV Station then timely appealed and this Court granted its Petition for Appeal.

STATEMENT OF FACTS

The relevant facts are few. A local television station desired to broadcast the sentencing hearing of Defendant George Huguely V, who had been found guilty of the second-degree murder of Ms. Yeardley Love. (J.A. 8) The TV Station had earlier sought to broadcast the trial itself to permit the public to "witness it for themselves unfiltered in a gavel-to-gavel live coverage of these proceedings." (Nov. 7, 2011 Tr. 76-77, 87; J.A. 3, 11.) At the hearing on that application it was proffered that "both youth witnesses and experts" had "declined to voluntarily offer testimony" because of the intensity of media coverage. (Nov. 7, 2011 Tr. 93.) For similar reasons as those recited above as well as concerns regarding video recording of the jurors and disruption of the trial, the circuit court had denied the earlier request to broadcast the trial. (Nov. 7, 2011 Tr. 104-05.)

By the time the criminal sentencing request was decided, there was a pending civil suit against the Defendant in the Circuit Court for the City of Charlottesville that was premised "on exactly the same facts" that were adjudicated in the Defendant's criminal prosecution. (J.A. 31.) The

intensity of media coverage of the trial and likely taint of the potential venire had already been asserted in that case through a motion to transfer venue, or in the alternative, to bring jurors in from outside the circuit. (J.A. 12, 21, 31.) And there was evidence that the Commonwealth intended to present at least three lay witnesses at the criminal sentencing hearing who would "describe specific events involving the defendant on occasions before the murder of Yeardley Love." (J.A. 22.) Finally, both the prosecution and defense objected to broadcasting the judicial proceedings, (J.A. 24, 33), and the court found that the requested coverage of the case "has great potential to sabotage any jury selection of the civil case," and discourage witnesses from appearing and testifying clearly at sentencing. (J.A. 32.)

There is no evidence that the circuit court in any manner restricted the right of the public or the press to attend, observe, and report their observations regarding these proceedings, both at the trial stage and for purposes of sentencing. (J.A. 14, 16-17, 20-21, 24, 25, 32.) And, as the TV Station concedes, the "media was free" to attend and "to use the primary tools of its trade, its pens, pencils, notepads, etc. . . , to facilitate its in-court reporting activities." (Opening Br. at 6, 35.) It is beyond any

disagreement that national[3] and local media, including the TV Station,[4] reported extensively on the trial and sentencing of Defendant Huguely.[5] (J.A. 11) (claiming that, as a result, "[e]verybody within 50 square miles knows the outcome" of the trial, the conviction of the Defendant for second-degree murder); (Opening Br. at 2).

STANDARDS OF REVIEW
(Assignments of Error 1 through 4)

Whether Code § 19.2-266 commits to the circuit court's sole discretion the decision to permit television broadcasting of judicial proceedings constitutes a question of statutory interpretation (Assignment of Error 1). And whether the United States or Virginia Constitutions

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[3] *See, e.g.*, Mary Pat Flaherty, et al., *George Huguely Guilty of Second-Degree Murder*, WASHINGTON POST (Feb. 22, 2012), online at http://articles.washingtonpost.com/2012-02-22/local/35442900_1_rhonda-quagliana-judge-edward-l-hogshire-sharon-love; Erik Brady, *Jury finds George Huguely Guilty of Second-Degree Murder*, USA TODAY (Feb. 23, 2012), http://usatoday30.usatoday.com/sports/college/lacrosse/story/2012-02-22/virginia-lacrosse-trial-verdict-second-degree-murder/53211778/1; Associated Press, *Jury: 26 Years for Ex-UVA Lax Player*, ESPN (Feb. 23, 2012), http://espn.go.com/college-sports/story/_/id/7604266/ex-virginia-cavaliers-lacrosse-player-george-huguely-found-guilty-murder-yeardley-love-death.

[4] *See* NBC 29.com, *NBC 29 In Depth: Full Archive: The Huguely Trial* (Apr. 26, 2013), http://www.nbc29.com/category/186826/nbc29-in-depth-the-huguely-trial.

[5] *See* Twitter.com, *NBC29 Huguely Trial*, http://twitter.com/NBC29Huguely (reporting minute-by-minute updates from the August 30, 2012 hearing).

protects the right of television broadcasters to transmit coverage of criminal proceedings constitutes a matter of constitutional interpretation (Assignment of Error 4). Both of those questions are reviewed *de novo* by this Court. *See Gallagher* v. *Commonwealth*, 284 Va. 444, 449, 732 S.E.2d 22, 24 (2012). Assuming that judicial review of a court's decision on a matter committed "solely to its discretion" may be had, the court would review under an abuse of discretion standard whether the trial court wrongly refused televising the criminal sentencing hearing in question (Assignments of Error 2 & 3). *See Nolte* v. *MT Tech Enters., LLC*, 284 Va. 80, 90, 726 S.E.2d 339, 344-45 (2012); *Vinson* v. *Commonwealth*, 258 Va. 459, 471, 522 S.E.2d 170, 178 (1999) (noting that, "[b]y statute, the trial court "may solely in its discretion" allow cameras in the courtroom, and holding that "[t]here was no abuse of that discretion in this case"); *Savino* v. *Commonwealth*, 239 Va. 534, 547 n.4, 391 S.E.2d 276, 283 n.4 (1990) ("conclud[ing] that the trial court did not abuse its discretion in refusing to exclude cameras from the courtroom").

ARGUMENT

In removing the prohibition on introduction of cameras into the courts of the Commonwealth, the General Assembly did not force cameras on courts. Rather, the Assembly committed the question whether to "permit

the taking of photographs in the courtroom during the progress of judicial proceedings and the broadcasting of judicial proceedings by radio or television," in the first instance, to each court's judgment. And, under that statute, a court may permit or deny this form of media coverage "solely in its discretion." The circuit court in this case exercised its judgment not to allow this coverage and, to the extent an appellate court may review a question committed "solely" to a court's discretion, it cannot be said that the court abused the wide discretion granted it. Finally, and for good reason, neither the Constitution of the United States nor the Constitution of Virginia have been interpreted to afford the public or the press a right to introduce cameras in judicial proceedings. Accordingly, the decision of the circuit court should be affirmed.

I. The Circuit Court Properly Interpreted Code § 19.2-266 as Committing to its Broad Discretion Whether To Allow the Televising of Defendant's Criminal Sentencing. (Assignments of Error 1 & 2)

The TV Station contends that the circuit court was obliged to find "good cause" before denying the request to permit the photographing and broadcasting of the criminal sentencing of Defendant Huguely, that the circuit court failed to apply that standard, and that, even if it did apply it, no evidence was presented to support a finding of "good cause." The TV Station concludes that, under these circumstances, the trial court abused

its discretion in not granting the request. (Opening Br. 1, 8-23.) However, the TV Station's interpretation fails to account for the provision vesting the decision whether to permit cameras in the courtroom "solely to [a court's] discretion." By ignoring this language, the TV Station implausibly interprets Code § 19.2-266's requirements to render the statute a "disharmonious dichotomy," (Br. Amicus Curiae, Va. Ass'n of Broadcasters 3), a result courts are duty bound to eschew. *Bd. of Supvrs. of Loudon Cnty.* v. *Town of Purcellville*, 276 Va. 419, 441, 666 S.E.2d 512, 523 (2008).

A few principles guide and, when properly applied, resolve this matter of interpretation. First, "[a]s with any question of statutory interpretation, [the] primary objective is to ascertain and give effect to legislative intent, as expressed by the language used in the statute." *Riverside Owner, L.L.C.* v. *City of Richmond*, 282 Va. 62, 69, 711 S.E.2d 533, 537 (2011) (quotation marks and citations omitted). In doing so, courts "consider[] the entire statute . . . to place its terms in context to ascertain their plain meaning," and thereby "'interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal.'" *Cuccinelli* v. *Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Eberhardt* v. *Fairfax Cnty. Emps. Ret. Sys. Bd. of Trs.*, 283 Va. 190, 194-95, 721 S.E.2d 524, 526 (2012)). Furthermore, in

ascertaining that meaning in the absence of a definition, courts are to be "guided by the context in which [the word or phrase] is used," which includes the "historical context," the "predecessor statute," and the "interrelationship of the words being considered." *Protestant Episcopal Church* v. *Truro Church*, 280 Va. 6, 21-22, 694 S.E.2d 555, 563 (2010) (quotation marks and citation omitted).

Courts interpreting statutory text must take special note of instances "when the General Assembly opts to invoke two different terms within the same act" because "'those terms are presumed to have distinct and different meanings.'" *Cuccinelli*, 283 Va. at 429, 722 S.E.2d at 631 (quoting *Indus. Dev. Auth. of Roanoke* v. *Bd. of Supvrs. of Montgomery Cnty.*, 263 Va. 349, 353, 559 S.E.2d 621, 623 (2002)). Also drawing on the premise that the Assembly has "chosen with care" the text of its enactments, *Riverside Owner*, 282 Va. at 69, 711 S.E.2d at 537, courts will construe them "so as to give reasonable effect to every word." *Doss* v. *Jamco, Inc.*, 254 Va. 362, 371, 492 S.E.2d 441, 446 (1997) (quoting *Jones* v. *Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984)).

Applying these principles to Code § 19.2-266, it is plain that the initial determination of whether to "permit the taking of photographs" and "radio or television" "broadcasting of judicial proceedings" lies "solely in [the court's]

discretion." The use of the term "solely" must be given its "ordinary meaning" and "reasonable effect," *Doss*, 254 Va. at 371, 492 S.E.2d at 446, which is that the court *alone* decides, without being required to hear from others, apply any particular standard, or make any particular findings. *See The American Heritage College Dictionary* 1295 (3d ed. 1997) (defining "solely" as "[a]lone; singly" or "[e]ntirely; exclusively"); *see also Marshall* v. *N. Va. Transp. Auth.*, 275 Va. 419, 432, 657 S.E.2d 71, 78 (2008) (recognizing that a law that grants a "decision solely to" another governmental actor would exclude even the General Assembly from interposing in the exercise of the actor's "sole discretion"). By using the phrase "solely in its discretion" in Code § 19.2-266, one without counterpart in the Virginia Code, the General Assembly confirmed that great deference was due the court's determination.

The remainder of Code § 19.2-266 confirms this interpretation. The provision governing when a court may exclude "persons whose presence would impair the conduct of a fair trial" directs that "the court may, *in its discretion*, exclude" such persons. (Emphasis added.) By adding "solely" to describe the extent of the court's discretion regarding cameras in the courtroom, the General Assembly contrasted that grant of authority with the grant given to trial courts to exclude members of the public from a criminal

trial, and affirmed the General Assembly's intention to vest greater discretion with regard to excluding cameras from judicial proceedings. *Cf. Richmond Newspapers, Inc.* v. *Commonwealth*, 222 Va. 574, 589-90, 281 S.E.2d 915, 923-24 (1981) (outlining the constitutional standard to be applied by trial courts in deciding whether to close hearings to the press and public, requiring that a hearing should be afforded "interested members of the public" prior to closure, and directing that findings be articulated and supported by evidence).

This interpretation of Code § 19.2-266 not only harmonizes its provisions and gives effect to every word, but also accords with the historical context of that Section's enactment. The General Assembly in 1987 modified its absolute rule of no cameras in courts, except to perpetuate the record, to conduct an "experimental program" in which this Court, the Court of Appeals of Virginia, and a handful of circuit courts and general district courts selected by this Court were directed to introduce broadcast media and photography to their proceedings. 1987 Va. Acts 933; *see also* 1989 Va. Acts 870 (Chapter 582) & 1990 Va. Acts 336 (Chapter 243) (modifying and extending the program in ways not relevant here). For all courts not participating in the program, the prohibition remained in place. But for courts in the "experimental program," courts in

which there was "Coverage Allowed," certain rules applied, including the "good cause" standard. When the "program" was made permanent, the General Assembly left intact these rules regarding how broadcasting of judicial proceedings could occur, 1992 Va. Acts 710, rules that plainly had operated to limit a court's exercise of discretion *once cameras had been granted entrance* under the experimental program. It now, just as plainly, limits judicial exclusion of cameras, but only *once cameras have been granted entrance* by the court.

Following the general provision of "sole[] . . . discretion" over cameras in the courtroom, the first sentence of the first paragraph of the statutory rules preserves the court's authority to interpose "at all times" and "prohibit, interrupt or terminate electronic media and still photography of public judicial proceedings." *Compare* 1987 Va. Acts 933, *with* Code § 19.2-266. The second sentence, recognizing that many courts were not part of the experimental program and, as relevant now, do not make the initial determination to permit cameras, requires the court to "advise the parties of such coverage in advance of the proceedings and . . . allow the parties to object thereto." *Compare* 1987 Va. Acts 933, *with* Code § 19.2-266. This sentence contemplates the courts initially exercising their "sole[] . . . discretion" without the benefit of parties presenting evidence or objections.

Finally, the third sentence provides to the court that has exercised its "sole[] . . . discretion" to permit cameras into the proceeding a standard by which it may subsequently exercise its authority under the first sentence and resolve those objections to electronic media and still photography contemplated in the second sentence: "[f]or good cause shown, the presiding judge may prohibit coverage in any case and may restrict coverage as he deems appropriate to meet the ends of justice." *Id.*

These provisions, when read in light of the whole text and context of Code § 19.2-266, do not apply to the circuit court's initial determination not to permit the TV Station to introduce a video camera to broadcast the judicial proceedings in question. Nor can it be maintained that it was "the legislative goal" to force cameras upon the courts of the Commonwealth except in cases where the court articulated a "good cause" for excluding them. *See Cuccinelli*, 283 Va. at 425, 722 S.E.2d at 629 (quotation marks and citations omitted). Accordingly, even assuming that the circuit court did not apply the "good cause" standard or refused the TV Station's request when "good cause" was not shown, that fact has no bearing on whether the circuit court committed reversible error in refusing to permit Defendant's sentencing hearing to be broadcast by the TV Station. That conclusion comports with this Court's case law, which has eschewed "good cause"

review of the decision to permit cameras into judicial proceedings. *See, e.g.*, *Vinson*, 258 Va. at 471, 522 S.E.2d at 178 (noting that, "[b]y statute, the trial court "may solely in its discretion" allow cameras in the courtroom, and holding that "[t]here was no abuse of that discretion in this case."); *Stewart* v. *Commonwealth*, 245 Va. 222, 232-33, 427 S.E.2d 394, 401-02 (1993) (holding that "the trial court did not *abuse its discretion* in failing to exclude the use of video cameras from the trial." (emphasis added)).

Because Code § 19.2-266 provides that "[a] court may solely in its discretion permit . . . the broadcasting of judicial proceedings by . . . television," 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 claims that the statute itself was violated. *Donnelly* v. *Donatelli & Klein, Inc.*, 258 Va. 171, 175, 186, 519 S.E.2d 133, 135, 142 (1999) (interpreting a contract that granted one party to a partnership contract the authority to decide a disputed matter "in its sole discretion" as dispositive of a challenge to that party's authority to do certain acts on behalf of the partnership created by the contract); *see* *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988) (citing the absence of any "substantive standards on which a court could base its review," as well as the structure of an Act, to conclude that Congress "meant to commit"

certain decisions to an agency head's "discretion" and thereby "preclude[d] judicial review of these decisions" for non-constitutional claims).

II. Even if the Circuit Court's Exercise of Its Sole Discretion Is Subject to Review, the Circuit Court Did Not Abuse that Discretion in Denying the TV Station's Request Because the Court Reasonably Concluded That Coverage Might Chill Witness Testimony and Prejudice Future Proceedings. (Assignments of Error 2, 3 & 4)

Even assuming that review is permitted of the initial decision under the statute, Code § 19.2-266 must be read as significantly limiting that review—one less searching than ordinary abuse of discretion review—in determining whether a circuit court's decision to refuse cameras in the courtroom was error. *See Webster*, 486 U.S. at 603-04. Because the circuit court's decision to deny the TV Station's request to televise the criminal sentencing proceeding was premised on concerns widely recognized by courts as potentially arising from television coverage, and no constitutional rights were implicated by that decision, *see* Part III, *infra*, that decision was an appropriate exercise of the court's broad discretion.

The seminal Supreme Court case regarding the use of cameras in courtrooms catalogued the sources of "actual unfairness" that may be visited upon a proceeding by the presence of cameras, noting that the effects can be "so subtle as to defy detection by the accused or control by the judge," *Estes*, 381 U.S. at 545, and expressing no concern about the

want of record proof of prejudice: "[t]here is little wonder that the defendant cannot 'prove' the existence of such factors." *Id.* at 547. The dangers include: "[t]he potential impact . . . on the jurors," including jurors in subsequent proceedings who viewed the earlier proceeding; *id.* at 545, the effect on witnesses, both the "quality of the testimony" and on their willingness "to appear," which could "impede . . . the discovery of the truth," *id.* at 547; the addition of "responsibilities [that] the presence of television places on the trial judge," including additional hearings and orders, *id.* at 548; and "the impact of courtroom television on the defendant." *Id.* at 549. Rejecting the contention that these concerns "are for psychologists because they are purely hypothetical," the Court in *Estes* concluded that these effects "may, and in some combination almost certainly will, exist in any case in which television is injected." *Id.* at 550.

It certainly is true, as the TV Station notes, that a "state may provide for radio, television, and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused," without violating the defendant's right to a fair trial in all cases. *Chandler*, 449 U.S. at 562, 573-74, 583; *see, e.g.*, *Stewart*, 245 Va. at 233, 427 S.E.2d at 402. But even if no constitutional violation would follow by permitting cameras, Virginia courts still enjoy wide latitude "'to minimize the effects of . . .

publicity'" to preserve the order, decorum, and fairness of the criminal process. *Richmond Newspapers*, 222 Va. at 585, 281 S.E.2d at 921 (quoting *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 378 (1979)); (J.A. 34). There is no statutory, or constitutional, presumption in favor of cameramen in the courts, regardless of what the TV Station might prefer. (Opening Br. 30-32.)

It certainly may be debated whether the concerns of the *Estes* Court, and of many courts before and since, are borne out or whether the presence of cameras in the courtroom, in any particular case, substantially undermines the efficiency and aims of judicial proceedings. Some may point to the technological improvements in video recording technology over the last few decades and conclude that such concerns have become less weighty or might be mitigated by less restrictive means. And others, like the Judicial Conference of the United States, may conclude that, despite these changes, "'the intimidating effect of cameras on some witnesses and jurors [is] cause for concern,'" and continue to oppose generally "the public broadcast of court proceedings." *Hollingsworth* v. *Perry*, 558 U.S. 183, 193 (2010) (per curiam) (quoting Report of the Proceedings of the Judicial Conference of the United States 47 (Sept. 20, 1994) and citing *Estes* for the proposition that "[t]his Court has recognized that witness testimony may

be chilled if broadcast"). Consistent with the latter approach, neither this Court nor the Supreme Court of the United States permits proceedings before them to be televised, as the circuit court in this case observed, (J.A. 13), and as the TV Station acknowledged below. (J.A. 28.)

In any case, it is beyond debate that Code § 19.2-266 does not embrace the televising of judicial proceedings as an unmitigated good, but commits the determination of whether or not to permit television cameras to the individual court's "sole[] . . . discretion" to be decided on a case-by-case basis. It is also plain that the circuit court considered the traditionally identified factors that weigh for and against televising judicial proceedings, and denied the TV Station's request upon determining that the requested coverage did not "enhance the judicial proceeding or . . . ensure that there is fundamental fairness," but "has great potential to sabotage any jury selection of [a] civil case" against the Defendant, as well as to discourage witnesses from appearing or to distract and intimidate them while testifying. (J.A. 30, 32; Nov. 7, 2011 Tr. 93.) And the circuit court, in deciding an issue committed to its "sole[] . . . discretion," was not required to try the issue, but could rely upon facts judicially known and psychological influences widely recognized. *See Hollingsworth*, 558 U.S. at 195-96 (noting that "[t]here are qualitative differences between making public

appearances regarding an issue and having one's testimony broadcast throughout the country," recognizing that "[i]t is difficult to demonstrate or analyze whether a witness would have testified differently if his or her testimony had not been broadcast," and observing that "witnesses subject to harassment as a result of broadcast of their testimony might be less likely to cooperate in any future proceedings"). Therefore, the circuit court properly exercised its discretion to deny the TV Station's request.

III. The Circuit Court Properly Concluded That the U.S. and Virginia Constitutions Afford Television Broadcasters No Right to Televise Criminal Proceedings. (Assignment of Error 4)

The TV Station concedes, as it must, that its argument that the press's "right of access" to criminal proceedings includes even a qualified constitutional right to televise those proceedings contradicts all binding authority interpreting the United States Constitution, and lacks any support in this Court's interpretations of the Virginia Constitution. (Opening Br. 24.)

As the Supreme Court in *Chandler* recognized, "'there is no constitutional right to have [live witness] testimony recorded and broadcast." 449 U.S. at 569 (quoting *Nixon* v. *Warner Commc'ns, Inc.*, 435 U.S. 589, 610 (1978)). And "'[t]he requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.'" *Id.* (quoting *Nixon*, 435 U.S. at

610); *see Globe Newspaper Co.* v. *Commonwealth*, 264 Va. 622, 570 S.E.2d 809, 812-13 (2002) (noting that "[t]he right of access is not limited to attendance at criminal proceedings," that "[u]nder certain circumstances and with qualifications, it extends to inspection of documents filed in connection with such proceedings," but concluding it goes no further: "newspapers have no right under the First Amendment or Article I, Section 12 of the Constitution of Virginia to obtain the biological material in question and subject it to re-testing"). Because there is no question that the "members of the public and the press" both had "the opportunity . . . to attend the [hearing] and to report what they . . . observed," and availed themselves of that opportunity, *see* Footnote 5 *supra*, no federal and no Virginia constitutional issue is presented here. *See Daily Press*, 285 Va. at 454 n.7, 739 S.E.2d at 640 n.7 (making "no distinction between" a newspaper's claim of a "constitutional right of access under the First Amendment of the Constitution of the United States" and under "Article I, § 12 of the Constitution of Virginia," noting that "[t]hese provisions are virtually identical, citing *Black* v. *Commonwealth*, 262 Va. 764, 785, 553 S.E.2d 738, 750 (2001) (Hassell, C.J., dissenting)); *Elliott* v. *Commonwealth*, 267 Va. 464, 473-74, 593 S.E.2d 263, 269 (2004) ("We take this opportunity to declare that Article I, § 12 of the Constitution of

Virginia is coextensive with the free speech provisions of the federal First Amendment."); *see, e.g.*, *Finney* v. *Hawkins*, 189 Va. 878, 885, 54 S.E.2d 872, 876 (1949) (holding that Va. Const. art. I, "section 12, protecting free speech, is [not] infringed by the statute in question, for the same reasons that it does not collide with the similar provisions of the Federal Constitution").

The TV Station also advances the claim, rejected in *Estes*, "that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television." 381 U.S. at 539. As was said in *Estes*, and re-affirmed in *Chandler*, "[t]his is a misconception of the rights of the press." *Estes*, 381 U.S. at 539; *Chandler*, 449 U.S. at 569. "Nor can the courts be said to discriminate where they permit the newspaper reporter access to the courtroom," but bar the camera, for "[t]he television and radio reporter has the same privilege. All are entitled to the same rights as the general public." *Estes*, 381 U.S. at 540; *Chandler*, 449 U.S. at 569. The corollary to this rule has been affirmed time and again: the press is not entitled to any rights not enjoyed by the public. *Globe Newspaper*, 264 Va. at 628, 570 S.E.2d at 812 ("The press does not have a right of access greater than the public at large under the First

Amendment, or under Article I, Section 12 of the Constitution of Virginia." (citation omitted)); *see Citizens United* v. *FEC*, 558 U.S. 310, 352 (2010) ("'We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.'" (quoting *Austin* v. *Mich. Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)); *cf. Daily Press*, 285 Va. at 454-55, 739 S.E.2d at 640-41 (repeatedly referring to a newspaper's claim of a constitutional right to access, there to "inspect[] documents filed in [criminal] proceedings," as one asserting "[t]he public's constitutional right of access").

The claimed right to bring cameras into a criminal proceeding "has not been historically extended to the press and general public." *Globe Newspaper*, 264 Va. at 629-30, 570 S.E.2d at 813; *see Estes*, 381 U.S. at 544 (noting that, as of 1965, "[f]orty-eight of our States and the Federal Rules have deemed the use of television improper in the courtroom"). As recently as 1987, cameras of any type, whether from the press or the public, were not permitted in Virginia Courts under any circumstances. 1987 Va. Acts 932-34. While it can be rationally contended that permitting the press, under certain circumstances, to televise parts of a criminal proceeding plays some "'positive role in the functioning' of the judicial process," *Globe Newspaper*, 264 Va. at 630, 570 S.E.2d at 813, no one

has expressed a belief that policy arguments render it a right enjoyed by the public at large.

Instead of suffering from discrimination, then, the TV Station is actually claiming a special privilege as a constitutional right, one that no court ever has or safely could extend to the public. And even if this Court were inclined to abandon the principle of equal First Amendment rights and make a distinction in law between the public and the press, it is doubtful that the distinction could be maintained in practice, *see Citizens United*, 558 U.S. at 352 (noting that "[w]ith the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others [has] become[] far more blurred"), rendering such a change all the more inappropriate. *See Globe Newspaper*, 264 Va. at 630, 570 S.E.2d at 813.

In sum, the circuit court faithfully exercised the discretion committed to it by the General Assembly under Code § 19.2-266, discretion that is not restricted in any degree by the First Amendment to the U.S. Constitution or Article I, § 12 of the Virginia Constitution, and thus did not err in refusing the TV Station's request to broadcast Defendant Huguely's sentencing proceeding.

CONCLUSION

For all the foregoing reasons, the decision of the Circuit Court for the City of Charlottesville should be affirmed.

Respectfully Submitted,

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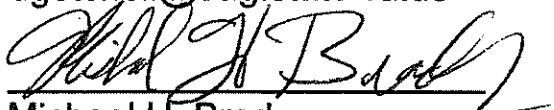

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 5:26(h), counsel certifies that the foregoing BRIEF OF COMMONWEALTH OF VIRGINIA does not exceed 50 pages, complies with the requirements of Rules 5:6, 5:26, and 5:28, as applicable, and that, on June 11, 2013, fifteen copies of the same have been filed with the Office of the Clerk of the Supreme Court of Virginia, an electronic version in Adobe Acrobat Portable document format has been emailed to scvbriefs@courts.state.va.us and opposing counsel, and three copies have been posted, first class mail, postage pre-paid to counsel for Appellant, all in compliance with the requirements of Rule 5:26(e), as applicable.

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CERTIFICATE OF SERVICE

On this 11th day of June, 2013, a copy of the foregoing Brief of Commonwealth of Virginia was sent by e-mail, facsimile and first class postage-prepaid mail to counsel of record listed below.

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