In The

Supreme Court of Virginia

RECORD NO. 131038

DERRELL RENARD BROWN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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This is the primary issue in this appeal:

> The Sixth Amendment ensures that a criminal defendant will receive the assistance of counsel. On the eve of trial, Brown's lawyer learned that she could not continue the representation past the guilt phase. Brown asked the court to continue the case to allow a single lawyer to represent him at trial and sentencing. May the court instead require him to accept a succession of lawyers?

* * *

In its brief, the Commonwealth leans heavily on *Morris v. Slappy*, 461 U.S. 1 (1983). But it glosses over three vital distinctions between that case and this one:

First, the defendant in *Morris* first raised something akin to a continuity-of-counsel issue on the third day of trial, 11 days after the replacement lawyer was assigned. *Id*. at 12-13. Until then, his only complaint was that the second lawyer had had insufficient time to prepare – an assertion that the lawyer himself contradicted. *Id*. at 6.

Here, in contrast, Brown first learned of his appointed attorney's inability to continue when he spoke with her the previous afternoon. He brought his request to the court's

attention the next morning, at the first possible opportunity. It is understandable that a court would refuse to terminate an ongoing trial under the circumstances of *Morris*, but here, the proceedings had not begun when Brown raised the issue.

Second, the Supreme Court noted in *Morris* that the trial court could well have regarded the continuance request as "a transparent ploy for delay." *Id*. at 13. In that posture, a denial of the motion is understandable, since courts are entitled to resist litigants' efforts to game the legal system.

But the trial court never found here that Brown's request was a ploy, and the prosecution never contended that it was. Even now, on appeal, the Attorney General does not argue that Brown's request was just a stalling tactic, or that the trial court could have interpreted it as one.

Third, the *Morris* decision was based in part on the interest of the rape victim not to have to suffer the ordeal of a third trial. *Id*. at 14-15. In this case, there was no victim testimony; the only prosecution witnesses were police officers and an inmate/informant.

While Brown does not belittle the value of the officers' time, he notes that they are, by virtue of their positions, frequent court attendees; there is nothing in the record to support a conclusion that any of them would have been significantly inconvenienced by a continuance. And any "inconvenience" to a prison inmate is of doubtful legal significance.

* * *

The Commonwealth also relies on *Shifflett v. Commonwealth*, 218 Va. 25 (1977), for the premise that "in order to warrant delay by last minute change of counsel, exceptional circumstances must exist." Brief of appellee at 16. But this citation, too, has been stripped of its context:

> Defendant contends that the trial court erred in denying his motion for a continuance to enable him to retain counsel of his own choosing. The only ground assigned for the motion was that defendant needed more time in preparing his defense.
>
> The record shows that the defendant had adequate time to prepare his defense if he had cooperated with his court-appointed attorney.

218 Va. at 30.

Like the defendant in *Morris*, who refused even to speak with his attorney (461 U.S. at 8-9), Shifflett was the author of his own predicament, and sought a continuance merely for the purpose of delay. Brown, of course, did no such thing; a circumstance entirely beyond his control was thrust upon him. As noted above, even the prosecutor never contended that Brown's request was for an abusive purpose, or was not in good faith. He hinted that the convenience of his witnesses should take precedence over Brown's right to counsel of his choosing. The trial court took this bait.

* * *

The Commonwealth correctly points out an error in the brief of appellant. On page 15 of the opening brief, Brown stated that "[s]ince the indictment was dated July 5, 2011 . . . trial had to begin no later than April 5, 2012."

In footnote 2 on page 4 of its brief, the Commonwealth correctly notes that the two prior continuances in the case – one for an attorney who had a conflict, and one at the prosecution's request – are not chargeable to the

Commonwealth for speedy-trial purposes. When the intervening four months and 27 days (Sept. 28, 2011 to Feb. 24, 2012) are added, the correct speedy-trial deadline becomes September 1, 2012.

On February 24, when Brown made his first and only request to continue the trial, based on a circumstance that had arisen only the day before, the statutory deadline to try him was more than six months away. There was no exigency that demanded that the trial must proceed at once. There was no speedy-trial compulsion, and no hint of a ploy by Brown. There was only convenience.

DERRELL RENARD BROWN

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CERTIFICATE

I hereby certify that on this 19th day of August, 2014, pursuant to Rule 5:26(h), fifteen paper copies of the foregoing Reply Brief of Appellant, along with one copy on CD-Rom, have been hand-filed with the Clerk of the Supreme Court of Virginia. The required copies of the Brief, along with one copy on CD-Rom, have been served, via hand-delivery, upon:

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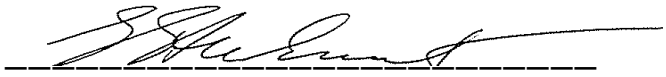

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