IN THE

Supreme Court of Virginia

RECORD No. 131747

JUSTIN SARAFIN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

David L. Heilberg (VSB 18750)
DYGERT, WRIGHT, HOBBS & HEILBERG, PLC
675 Peter Jefferson Parkway
Suite 190
Charlottesville, Virginia 22911
(434) 979-5515
(434) 295-7785 (Facsimile)
dheilberg@charlottesvillelegal.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
CASES AND AUTHORITIES	ii
ASSIGNMENTS OF ERROR	1
NATURE OF THE CASE AND OF THE PROCEEDINGS BELOW	2
MATERIAL PROCEEDINGS IN THE COURT OF APPEALS	2
STATEMENT OF FACTS	2
ARGUMENT AND STANDARDS OF REVIEW	7
1. The Virginia Court of Appeals erred by permitting the trial court to find that Justin Sarafin ("Sarafin") was in physical control of his vehicle and thereby that he was its "operator" while asleep with only his car radio playing while parked on his private property.	
a. The Virginia Court of Appeals erred by finding that these facts were sufficient to support the trial court's conviction	7
2. The Virginia Court of Appeals erred in construing Va. Code § 18.2-266 to allow conviction for "operation" on private property	14
3. The Virginia Court of Appeals erred by not requiring the trial court to give any or all of Instructions I, J, K and L offered by Sarafin that precisely and correctly defined what constituted "operation" to the jury	27
CONCLUSION	31
CERTIFICATE	33
CERTIFICATE OF COMPLIANCE	34

TABLE OF CASES AND AUTHORITIES

CASES: Page

Allman v. Comm., 43 Va. App. 104 (2004) 19

Atkinson v. State, 331 Md. 199 (1993) 14

Barson v. Comm., 284 Va. 67 (2012) 19

Brown v. Comm., 284 Va. 538 (2012) 18, 25

Case v. Comm., 753 S.E.2d 860 (2014) 11

Cooper v. Comm., 277 Va. 377 (2009) 27

E.C. v. Va. Dep't of Juvenile Justice, 283 Va. 522 (2012) 18

Enriquez v. Comm., 283 Va. 511 (2012) *passim*

Fitzgerald v. Comm., 61 Va. App. 279 (2012) 19

Gallagher v. Comm., 205 Va. 666 (1964) 8, 11, 23

Gray v. Comm., 23 Va. App. 351 (1996) 15, 21

Hart v. Comm., 18 Va. App. 77 (1994) 19

Jackson v. Virginia, 443 U. S. 307 (1979) 7

Keesee v. Comm., 32 Va. App. 262 (2000) 24

King v. Comm., 2 Va. App. 708 (1986) 19

Kozmina v. Comm., 281 Va. 347 (2011) 14

Lawlor v. Comm., 285 Va. 187 (2013) 27

Leake v. Comm., 27 Va. App. 101 (1998) 22, 24

Mitchell v. Comm., 26 Va. App. 27 (1997) 15, 21, 22

Moyer v. Comm., 33 Va. App. 8 (2000) 19

Nelson v. Comm., 281 Va. 212 (2011) 8, 24, 27

Ngomondjami v. Comm., 54 Va. App. 310 (2009) 10, 22

Nicolls v. Comm., 212 Va. 257 (1971) *passim*

Orbe v. Comm., 258 Va. 390 (1999) 27

Overbee v. Comm., 227 Va. 238 (1984) 23

People v. Cummings, 176 Ill. App. 3d 293 (1988) 14

Petersen v. Department of Public Safety, 373 N.W.2d 38 (1985) 14

Prillaman v. Comm., 199 Va. 401 (1957) 18

Propst v. Comm., 24 Va. App. 791 (1997) 8, 21, 24

Reynolds v. City of Va. Beach, 31 Va. App. 629 (2000) 15, 21, 24

Rix v. Comm., 282 Va. 1 (2011) 22

Roseborough v. Comm., 281 Va. 233 (2011) 22

Sarafin v. Comm., 62 Va. App. 385 (2013) *passim*

Simon v. Comm., 58 Va. App. 194 (2011) 15

State v. Bugger, 25 Utah 2d 404 (1971) 14

Stevenson v. City of Falls Church, 243 Va. 434 (1992) 9, 11, 13

Valentine v. County of Brunswick, 202 Va. 696 (1961) *passim*

Villareal v. Comm., 2013 Va. App. LEXIS 150 (2013) 23

Williams v. City of Petersburg, 216 Va. 297 (1975) *passim*

Young v. Comm., 57 Va. App. 731 (2011) 19

Zavala v. State, 136 Ariz. 356 (1983) 14

STATUTES:

Va. Code § 18.1-54 19

Va. Code § 18.2-53.1 25

Va. Code § 18.2-266 *passim*

Va. Code § 18.2-268.2 26

Va. Code § 18.2-268.2(A) 22, 26

Va. Code § 46.1-1(17) 19

Va. Code § 46.2-100 *Passim*

VIRGINIA MODEL JURY INSTRUCTIONS:

1-21 Virginia Model Jury Instructions - Criminal Instruction No. 21.250 (2012) 28

DICTIONARIES:

Black's Law Dictionary, Second Edition 15

[Joint Appendix pages are referenced as (J.A. #)]

ASSIGNMENTS OF ERROR

1. **The Virginia Court of Appeals erred by permitting the trial court to find that Justin Sarafin ("Sarafin") was in physical control of his vehicle and thereby that he was its "operator" while asleep with only his car radio playing while parked on his private property.**[1]

    a. **The Virginia Court of Appeals erred by finding that these facts were sufficient to support the trial court's conviction.**

2. **The Virginia Court of Appeals erred in construing Va. Code § 18.2-266 to allow conviction for "operation" on private property.**[2]

3. **The Virginia Court of Appeals erred by not requiring the trial court to give any or all of Instructions I, J, K and L offered by Sarafin that precisely and correctly defined what constituted "operation" to the jury.**[3]

---

[1] This objection was memorialized by repeated written motions and was taken under advisement by the trial court until it was overruled by Judge Peatross's letter dated September 17, 2012. (J.A. 9-16, 61-77, 108-115, and 167-184); **Sarafin v. Comm**., 62 Va. App. 385, 748 S.E.2d 641 (2013). (J.A. 121-138)

[2] This objection was briefed and argued by Sarafin to the Court of Appeals in Appellant's Opening Brief, p. 9-10 & p. 15-19, and Appellant's Reply Brief, although these arguments were ignored or not fully considered in the published opinion of the Court of Appeals.

[3] This objection was repeatedly and timely made and each of these instructions was argued, offered but marked as "Refused" by the trial court. (J.A. 29-57, 91-97); **Sarafin v. Comm**., 62 Va. App. 385, 748 S.E.2d 641 (2013) (J.A. 121-138 and 167-184).

NATURE OF THE CASE AND OF THE MATERIAL PROCEEDINGS IN THE TRIAL COURT

The proper interpretation of the definition of "operation" under Va. Code § 18.2-266 is the underlying issue in all three assignments of error. The trial court always overruled Sarafin's arguments that, without evidence that his conduct occurred on a public highway or evidence of his intent to go on a public highway, the Commonwealth did not prove he physically controlled his vehicle as required by this Court in **Enriquez v. Comm.**, 283 Va. 511, 722 S.E.2d 252 (2012).

MATERIAL PROCEEDINGS IN THE COURT OF APPEALS

The Court of Appeals agreed with the trial court's analysis of what constitutes "operation" for purposes of Va. Code § 18.2-266. See **Sarafin v. Comm**., 62 Va. App. 385, 748 S.E.2d 641 (Va. App. 2013).

STATEMENT OF FACTS[4]

On January 20, 2011, Officer K.E. McBrearty ("McBrearty"), with the Charlottesville Police Department, received a noise complaint around 3:30 a.m. Pursuant to the complaint, McBrearty arrived at Sarafin's home and discovered him asleep in the driver's seat of his Mercedes, which was parked in his driveway with the radio on. McBrearty knocked several times

[4] This is a slightly but not significantly altered statement of the facts recited in the Court of Appeals. **Sarafin v. Comm**., 62 Va. App. 385, 399-392, 748 S.E.2d 641, 642-644 (Va. App. 2013) (J.A. 121-138).

on the window of the vehicle with her flashlight in an attempt to wake Sarafin up. After Sarafin awoke, he turned the key to turn off the auxiliary power, opened the door, and stepped out of the vehicle. When Sarafin stepped out, McBrearty smelled a strong odor of alcohol coming from his person and noticed that his eyes were bloodshot and glassy.

In response to McBrearty's questions, Sarafin stated that he had consumed several beers at a pub after which he drove to the "Corner" to purchase some food. Sarafin then drove home, ate the food he had purchased, and consumed additional alcohol. At 2:30 a.m., Sarafin went out to his car to listen to the radio and fell asleep.

McBrearty then asked Sarafin to perform a series of field sobriety tests. Sarafin was unable to successfully complete the walk-and-turn test, the one-legged stand test, and the finger-to-nose test. Sarafin, however, successfully completed the alphabet test, and was cooperative with McBrearty. After the preliminary breath test, McBrearty arrested Sarafin for driving under the influence ("DUI").

On August 7, 2012, after his first trial resulted in a hung jury, but prior to his second trial, Sarafin requested the trial court to properly define the words "operate" and "operation" for the jury. Sarafin argued that based on the definition of "operation" applied in **Enriquez v. Comm.**, 283 Va. 511,

516-17, 722 S.E.2d 252, 255 (2012), he could not be convicted of driving under the influence because his vehicle was located in a private driveway and not on a public highway. The trial court took Sarafin's Motion under advisement.

On September 4, 2011, Sarafin filed a supplemental Memorandum arguing that he could not be convicted of operating under the influence because he was parked in his private driveway and did not take "an action in sequence" to operate his motor vehicle or intend to activate the motive power of the vehicle.

At his second jury trial on September 12, 2012 after the Commonwealth rested, Sarafin moved to strike the Commonwealth's evidence, which the trial court took under advisement. Sarafin then offered testimony from his housemate, Abigail Wiebe ("Wiebe"). Wiebe heard Sarafin return home around 1:45 a.m., and awoke again around 3:30 a.m. to find Sarafin and two police officers in front of the house. Wiebe stated that the stereo in the living room had a broken volume knob and confirmed that it was replaced a few months after the incident. A receipt of the repair was admitted into evidence. Kristin Cornwell ("Cornwell"), Sarafin's neighbor, also testified that she awoke around 3:00 a.m. due to the sound of music, but that she could not determine the source. Cornwell then woke

again around 3:30 a.m. to the sound of McBrearty tapping her flashlight on Sarafin's car window. She then observed Sarafin's interaction with the police officers and his performance of the field sobriety tests.

Sarafin then testified that he left the pub around 1:30 a.m. after drinking beer and vodka while socializing with co-workers for nearly four hours. Sarafin then drove to the "Corner," purchased a sandwich, and drove home. After arriving home around 1:45 a.m., Sarafin stated that he had several drinks containing vodka, and then went outside to his car around 2:30 a.m. to listen to the radio.

At the conclusion of the evidence, Sarafin renewed his Motion to Strike the evidence, which the trial court again took under advisement before overruling Sarafin's Motion in the September 17, 2012 letter opinion. (J.A. 114)

Sarafin argued for but the trial court marked as "Refused" Instructions I and Ia. in two alternative versions described below[5], J[6], K[7] and L[8] all

---

[5] **Operating** means driving a motor vehicle from one place to another; starting the engine; or engaging the machinery of a vehicle which alone or in sequence will activate the motive power of the vehicle without actually putting the vehicle in motion; or manipulating the electrical or mechanical equipment which alone or in sequence will activate the motive power of the vehicle without actually putting the vehicle in motion. Any individual who is in actual physical control of a vehicle on a public roadway is an operator. *When the engine is not running in a private driveway, the Commonwealth must prove by direct or circumstantial evidence that the defendant*

precisely defining "operation" consistent with Va. Code § 46.2-100 and instead gave the obsolete "Operation" Model Jury Instruction submitted by the Commonwealth over Sarafin's objection.

The Court of Appeals found that the trial court did not err. They rejected Sarafin's argument that the previous cases in the Court of Appeals, based on **Valentine v. County of Brunswick**, 202 Va. 696, 119 S.E.2d 486 (1961) defining "operation," were either overruled or limited when this Court approved the statutory definition of "operation" in Va. Code § 46.2-100 when applied to the DUI statute. **Enriquez v. Comm.**, 283 Va. 511, 516-517, 722 S.E.2d 252, 255 (2012) (**any individual who is in**

---

specifically intended to activate the motive power of the vehicle to enter a public roadway while under the influence of alcohol. (The Court refused both alternative versions of this instruction offered separately with and without the language italicized and underlined for emphasis). (J.A. 91-94)

[6] **Private road or driveway** means every way in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner, but not by other persons. (J.A. 95)

[7] **Operator** means every person who drives or is in actual physical control of a motor vehicle on a highway. (J.A. 96)

[8] **Highway** means the entire width between the boundary lines of every way or place open to the use of the public for purposes of vehicular travel in the Commonwealth, including the streets and alleys, and, for law-enforcement purposes, the entire width between the boundary lines of all private roads or private streets that have been specifically designated "highways" by an ordinance adopted by the governing body of the county, city, or town in which such private roads or streets are located. (J.A. 97)

physical control of a vehicle is an 'operator'..."**on a public highway**")

(emphasis added).

ARGUMENT

1. The Virginia Court of Appeals erred by permitting the trial court to find that Justin Sarafin ("Sarafin") was in physical control of his vehicle and thereby that he was its "operator" while asleep with only his car radio playing while parked on his private property.

a. The Virginia Court of Appeals erred by finding that these facts were sufficient to support the trial court's conviction.

Standard of Review: For this assignment of error whether Sarafin operated his vehicle, within the meaning of Va. Code § 18.2-266, is a mixed question of law and fact which is reviewed *de novo* on appeal. The evidence and all reasonable inferences must be viewed in the light most favorable to the Commonwealth and the judgment of the trial court is presumed to be correct and will be reversed only if it is plainly wrong or without evidence to support it. **Enriquez v. Comm.**, 283 Va. 511, 514, 722 S.E.2d 252, 254 (2012). The reviewing court, under this standard, asks whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Argument: On these unique facts, the Commonwealth did not prove beyond a reasonable doubt that Sarafin was "in actual physical control" or

that he took an action in sequence to operate his motor vehicle when asleep in the driver's seat parked at home in his private driveway with the key in the auxiliary position and only the radio turned on.

Until **Nelson v. Comm.**, 281 Va. 212, 214, 707 S.E.2d 815, 816 (2011) (radio only playing) and **Enriquez v. Comm**, 283 Va. 511, 722 S.E.2d 252 (2012) (radio only playing), most, if not all, "operation" cases involved crashes, vehicles in gear or vehicles with running engines. In this earlier case law, the mechanical equipment of the vehicle was engaged and activated when "operating" occurred. **Propst v. Comm.**, 24 Va. App. 791, 485 S.E.2d 657 (1997) (vehicle was possibly running, with dashboard lights illuminated and the manual transmission in either first or third gear); **Williams v. City of Petersburg**, 216 Va. 297, 217 S.E.2d 893 (1975) (engine running and the driver motioned toward his gear shift); **Nicolls v. Comm.**, 212 Va. 257, 184 S.E.2d 9 (1973) (operating when engine running, in gear and lights on, but inoperable because of transmission); **Gallagher v. Comm.**, 205 Va. 666, 139 S.E.2d 37 (1964) (operating when engine running with defendant accelerating, but stationary with wheels spinning).

Sarafin's facts are significantly different from those cases. **Enriquez v. Comm.**, 283 Va. 511, 516-517, 722 S.E.2d 252, 255 (2012) ("**any**

individual who is in physical control of a vehicle is an 'operator'") (emphasis added); **Nicolls v. Comm.**, 212 Va. 257, 259, 184 S.E.2d 9, 11 (1971) ("the word "operator" was defined in [the Virginia Code] ... as ... [e]very person who drives or is in actual physical control of a motor vehicle...). Merely playing the radio does not necessarily "[engage] the machinery of the vehicle which alone, or in sequence, will activate the motive power of the vehicle." **Stevenson v. City of Falls Church**, 243 Va. 434, 438, 416 S.E.2d 435, 438 (1992) (quoting **Williams v. City of Petersburg**, 216 Va. 297, 300, 217 S.E.2d 893, 896 (1975)).

Here, Sarafin was parked in his private driveway at his home at 3:30 a.m. The motor was not running and turning on the radio was not necessarily an action taken in sequence up to the point of engine activation. To allow otherwise would impermissibly remove this burden of proof from the Commonwealth. Therefore, the Commonwealth failed to exclude the obvious and most likely hypothesis of Sarafin's innocence: While slumbering, he did not consciously hear his radio, and thereby he was incapable of activating his vehicle's motive power or in physical control of it.

Clearly, Sarafin could not engage the electrical or mechanical machinery in sequence to activate the motive power of the vehicle because

he had no effect on it while sleeping. Once a vehicle's key is turned past the auxiliary setting, but not before, a mechanical process starts the engine as a prerequisite to engaging its motive power. A radio is optional electrical equipment that is not connected to the mechanical power of the car. In fact, if the radio plays long enough without the engine running, it will eventually drain the battery of sufficient energy to start it.

A correct definition for "operation" should have been fairly applied to these facts at home on private property. In other words, the definition of "operation" urged by the Commonwealth is too unfair and too broad to cover cases after driving ended at home, particularly when the engine of the vehicle is not running. If this Court does not set such limits, facts similar to this will raise disputes in the future as to whether juries can be the equivalent of equitable chancellors with the constitutional right to nullify or override the law.

The Virginia Court of Appeals repeatedly rejected imputing a mental status inference in stationary operating cases when deciding what constitutes "manipulating the electrical or mechanical equipment which alone or in sequence will activate the motive power of the vehicle" to prove physical control of a motor vehicle. **Ngomondjami v. Comm.**, 54 Va. App. 310, 318, 678 S.E.2d 281, 285 (2009) held that "it was not necessary that

the jury find [the defendant] acted 'with the purpose of putting [a car] in motion' to find he 'operated' a car within the meaning of Code § 18.2-266.". In reaching this determination, this Court noted that "[a]n 'operator' of a car is defined as any person 'who either [] drives or is in actual physical control of a motor vehicle.'" **Id.** at 317, 678 S.E.2d at 284 (quoting Code § 46.2-100). See also, **Sarafin v. Comm.**, 62 Va. App. 385, 398, 748 S.E.2d 641, 647 (2013); **Case v. Comm.**, 753 S.E.2d 860, 2014 Va. App. LEXIS 35 (Va. App. 2014) ("[The Virginia Supreme Court] treated a defendant's intent to operate a vehicle as unnecessary to a determination of guilt for driving while under the influence pursuant to Code § 18.2-266. See **Enriquez v. Comm.**, 283 Va. 511, 517, 722 S.E.2d 252, 255 (2012); **Stevenson v. City of Falls Church**, 243 Va. 434, 438, 416 S.E.2d 435, 438 (1992); **Williams v. City of Petersburg**, 216 Va. 297, 301, 217 S.E.2d 893, 896 (1975); **Nicolls v. Comm.**, 212 Va. 257, 259, 184 S.E.2d 9, 11 (1971); **Gallagher v. Comm.**, 205 Va. 666, 139 S.E.2d 37 (1964).").

Nevertheless, most recently this year in **Case**, the Virginia Court of Appeals again misinterpreted this Court's analysis in **Enriquez**.

> [T]his Court has not "established a bright line rule to determine whether a person is operating a motor vehicle as a matter of law." ***He is undoubtedly correct that we have not established a bright-line rule, so we will revisit the proper considerations in determining whether a person is operating a motor vehicle.*** In our consideration of the matter, we will turn for assistance to Code §

> 46.2-100 and to the dissenting opinion in **Stevenson**. We will also refer to our decision in **Williams**.
>
> Code § 46.2-100 provides that "'[o]perator' or 'driver' means every person who either (i) drives or is in actual physical control of a motor vehicle on a highway or (ii) is exercising control over or steering a vehicle being towed by a motor vehicle."
>
> The dissenting opinion in **Stevenson** states in part as follows: Ordinary experience tells us that one in a drunken stupor in the driver's seat of a vehicle is likely to arouse abruptly, engage the motive power of the vehicle, and roar away imperiling the lives of innocent citizens. This sequence of events easily can occur where, as here, a drunk is sitting behind the steering wheel of a motor vehicle alone, with the key already in the ignition. From a mechanical standpoint, the vehicle is capable of being immediately placed in motion to become a menace to the public, and to its drunken operator. 243 Va. at 439-40, 416 S.E.2d at 438-39. (Compton, J., dissenting) (citations and internal quotation marks omitted).

Enriquez v. Comm., 283 Va. 511, 515-516, 722 S.E.2d 252, 255 (2012) (emphasis added).

This Court again reaffirmed that there is "***no bright line rule***" as to when someone is in physical control of and thereby operating a motor vehicle. Therefore, the longer version of Sarafin's Jury Instruction I[9], discussed in more detail in the third assignment of error below, correctly stated what the law is for a person who has safely arrived and is already parked in his private driveway "***at home***".

---

[9] *When the engine is not running in a private driveway, the Commonwealth must prove by direct or circumstantial evidence that the defendant specifically intended to activate the motive power of the vehicle to enter a public roadway while under the influence of alcohol.*

> We hold, therefore, that the dissenting opinion in **Stevenson** was correct, and in discerning whether an intoxicated person seated behind the steering wheel of a motor vehicle ***on a public roadway*** with the key inserted into the ignition switch of the vehicle is in actual physical control of the vehicle, the position of the key in the ignition switch is not determinative.
>
> In **Williams**, we stated that operating a motor vehicle included "manipulating the mechanical or electrical equipment of the vehicle . . . which alone, or in sequence, will activate the motive power of the vehicle." 216 at 300, 217 S.E.2d at 896. Although operating a motor vehicle may be proven by evidence of manipulation of the mechanical or electrical equipment, it need not be proven in that manner. All that is necessary is evidence that the person is in actual physical control of the vehicle within the meaning of Code § 46.2-100.
>
> From the foregoing, we establish the rule that when an intoxicated person is seated behind the steering wheel of a motor vehicle ***on a public highway*** and the key is in the ignition switch, he is in actual physical control of the vehicle and, therefore, is guilty of operating the vehicle while under the influence of alcohol within the meaning of Code § 18.2-266.

Enriquez v. Comm., 283 Va. At 516-517, 722 S.E.2d at 255 (2012) (emphasis added).

Therefore, based on this Court's above holding in **Enriquez**, even if the mental state of Sarafin didn't matter on these facts, this Court clearly held that sleeping with only his radio playing "***at home***" on his private driveway was likewise insufficient to prove that he operated and physically controlled his motor vehicle. Therefore, even without the last sentence, the shorter version of Instruction I[10], discussed in more detail in the second and

[10] Any individual who is in actual physical control of a vehicle **on a public roadway** is an operator.

third assignments of error below, correctly stated what the law is for a person who has safely arrived and is already parked in his private driveway "***at home***".

Other jurisdictions have specifically limited "physical control of the vehicle" to exclude voluntarily sleeping off alcohol in a privately-parked vehicle.[11] Courts elsewhere recognize that pulling off a roadway to park without evidence of recent driving, should be viewed as a "laudable act."

2. The Virginia Court of Appeals erred in construing Va. Code § 18.2-266 to allow conviction for "operation" on private property.

Standard of Review: Because the issue before this Court is one of statutory interpretation, it is "a pure question of law which we review *de novo*." **Kozmina v. Comm.**, 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011).

Argument: The Court of Appeals ignored the **Enriquez** decision of this Court characterizing it as *dictum*. The Court of Appeals erred by broadly defining "operation" rather than construing that statutory term narrowly against the Commonwealth and by not invoking rules of construction for cases where words have plain and defined meanings that

---

[11] See, **Atkinson v. State**, 331 Md. 199, 215, 627 A.2d 1019, 1027 (1993); **Petersen v. Department of Public Safety**, 373 N.W.2d 38, 40 (S.D.1985); **State v. Bugger**, 25 Utah 2d 404, 483 P.2d 442 (1971); **People v. Cummings**, 176 Ill. App.3d 293, 125 Ill. Dec. 514, 517, 530 N.E.2d 672, 675 (1988); and **Zavala v. State**, 136 Ariz. 356, 666 P.2d 456 (1983).

are unambiguous *in pari materia*.[12] The Court of Appeals, relying mistakenly on **Valentine v. County of Brunswick**, 202 Va. 696, 119 S.E.2d 486 (1961), broadly construed the word "operation" in Va. Code § 18.2-266 rather than narrowly construing it as it is specifically defined in Va. Code § 46.2-100. See also **Gray v. Comm.**, 23 Va. App. 351, 477 S.E.2d 301 (1996); **Mitchell v. Comm.**, 26 Va. App. 27, 492 S.E.2d 839 (1997); **Reynolds v. City of Virginia Beach**, 31 Va. App. 629, 525 S.E.2d 65 (2000).

The Court of Appeals ignored this Court's establishment of rules in **Enriquez v. Comm.**, 283 Va. 511, 722 S.E.2d 252 (2012) that "***actual physical control***" must be proved and that the Va. Code § 46.2-100 definition of "***operation***" applies in Va. Code § 18.2-266 prosecutions. The Court of Appeals viewed this Court's pronouncement only as *dictum*:

> Contrary to appellant's assertions, the Supreme Court did not add the requirement that a vehicle be on a public roadway to the elements of the offense in Code § 18.2-266 in **Enriquez**. Rather, the references to being "on a public roadway" and Code § 46.2-100 were merely dictum as the issue in **Enriquez** was "the proper considerations in determining whether a person is operating a motor vehicle." **Id.** at 515, 722 S.E.2d at 255; see **Simon v. Comm.**, 58 Va. App. 194, 201, 708 S.E.2d 245, 248-49 (2011) (defining dictum as language that is unnecessary to the disposition of a case and therefore cannot serve as binding precedent). This conclusion is bolstered by the myriad of

[12] "Upon the same matter or subject." Statutes *in pari materia* are to be construed together. Black's Law Dictionary, Second Edition.

> Supreme Court and Court of Appeals cases cited above that unequivocally hold Code § 18.2-266 does not require that the driving or operating of the motor vehicle occur on a public highway. For example, in **Enriquez**, the Supreme Court neither mentioned nor overruled its decision in [**Valentine v. County of Brunswick**, 202 Va. 696, 119 S.E.2d 486 (1961)], where it held that when a driving under the influence statute is "silent as to the place where the offense may be committed," there is no requirement that the offense occur "on a public highway." **Valentine**, 202 Va. at 698, 119 S.E.2d at 487. In addition, the Supreme Court's use of the terminology "on a highway" in **Enriquez** was merely a recitation of the facts in that case as Enriquez was located on a highway when he was operating the vehicle. Thus, the additional language of "on a public highway" is non-binding dictum.

Sarafin v. Comm., 62 Va. App. 385, 400-401, 748 S.E.2d 641, 648 (Va. App. 2013).

This case presents matters of significant precedential value because these are first impression facts in this Court involving radio operation only in a private driveway and because the Court of Appeals found this Court's establishment of a rule in **Enriquez** to be *dictum*.

This Court must clarify that, despite the Court of Appeals' contrary interpretation, the disapproved but conflicting language in **Enriquez** is clearly the law in Virginia. **Enriquez v. Comm.**, 283 Va. 511, 516-517, 722 S.E.2d 252, 255 (2012) ("We take this opportunity to state that the statutory definition of 'operator' is controlling and that **any individual who is in physical control of a vehicle is an 'operator'**... [W]e establish the rule that when an intoxicated person is seated behind the steering wheel of a

motor vehicle **on a public highway** and the key is in the ignition switch, he is in actual physical control of the vehicle and, therefore is guilty of operating...") (emphasis added). Contrary to the **Valentine** line of cases in the Court of Appeals, **Enriquez** held that "the statutory definition of 'operator' is controlling" **Id.**

The General Assembly, when enacting Va. Code § 18.2-266, did not modify the meaning of "drive" and "operate" as those terms are defined in Va. Code § 46.2-100. Thus, the legislature did not expand the application of Va. Code § 18.2-266 to include operating motor vehicles off public highways. It added a qualifier, "when operated on highways," to the inclusion of mopeds as motor vehicles for purposes of DUI enforcement because mopeds were otherwise excluded from the ordinary definition of "motor vehicles."[13]

To extend the application of Va. Code § 18.2-266 to the operation of all other motor vehicles on private property, the General Assembly should have simply added "*For purposes of this article, the terms "drive" or "operate" include motor vehicles when located on private property.*"

---

[13] "For the purposes of this title, any device herein defined as a bicycle, electric personal assistive mobility device, electric power-assisted bicycle, or **moped shall be deemed not to be a motor vehicle**." Va. Code § 46.2-100 (emphasis added).

Without such express language, these words must be consistently defined *in pari materia* within the Virginia Code because the General Assembly ***"knows how to include such language"*** if it wishes to broaden the meaning of these unambiguous words. **Brown v. Comm.**, 284 Va. 538, 544-545, 733 S.E.2d 638, 641 (2012)[14] (emphasis added).

Seemingly ignoring the *in pari materia* rule of statutory construction, the Court of Appeals rejected Sarafin's argument that the word "operation" should be read as defined in Va. Code § 46.2-100 for prosecution under Va. Code § 18.2-266. In **E.C. v. Va. Dep't of Juvenile Justice**, 283 Va. 522, 537-538, 722 S.E.2d 827, 835 (2012), this Court explained this rule:

> Under the rule of statutory construction of statutes *in pari materia*, statutes are not to be considered as isolated fragments of law. . . . [T]hey should be so construed as to harmonize the general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation, unless a different purpose is shown plainly or with irresistible clearness.

Id. (quoting **Prillaman v. Comm.**, 199 Va. 401, 405, 100 S.E.2d 4, 10 (1957)).

> In the construction of statutes, the courts have but one object, to which all rules of construction are subservient, and that is to ascertain the will of the legislature, the true intent and meaning of the statute, which are to be gathered by giving to all the words used their plain meaning, and construing all statutes *in pari materia* in such manner

[14] Although this recent relevant decision in this Court was argued by both parties in their Court of Appeals briefs, the published decision did not cite or analyze its impact in this case.

> as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation." [citations omitted]. Furthermore, "'[w]e . . . presume that the legislature chose, with care, the words it used when it enacted the relevant statute.' [internal citations omitted].

Fitzgerald v. Comm., 61 Va. App. 279, 284-285, 734 S.E.2d 708, 710-711 (2012); See also, **Young v. Comm.**, 57 Va. App. 731, 738, 706 S.E.2d 53, 57 (2011).

This rule is consistent with the "single body of law" doctrine that requires identical language found in one place within the Virginia Code to be defined the same in other parts of the Code:

> [I]n interpreting a statute, """the Code of Virginia constitutes a single body of law, and other sections can be looked to where the same phraseology is employed." '" **Moyer v. Comm.**, 33 Va. App. 8, 35, 531 S.E. 2d 580, 593 (2000) (en banc) (quoting **Hart v. Comm.**, 18 Va. App. 77, 79, 441 S.E. 2d 706, 707, 10 Va. Law Rep. 1091 (1994) (quoting **King v. Comm.**, 2 Va. App. 708, 710, 347 S.E. 2d 530, 531, 3 Va. Law Rep. 287 (1986))).

Allman v. Comm., 43 Va. App. 104, 109, 596 S.E. 2d 531, 534 (2004); **Barson v. Comm.**, 284 Va. 67, 72-73, 726 S.E.2d 292, 295 (2012).

In affirming Sarafin's conviction in this case, the Court of Appeals also ignored at least two decisions in which this Court defined "operation" by adopting the Motor Vehicle Code statutory definition of "operation" with approval. See **Nicolls v. Comm.**, 212 Va. 257, 259, 184 S.E.2d 9, 11 (1971) ("the word "operate" was not defined in Va. Code § 18.1-54, but that the word "operator" was defined in Va. Code § 46.1-1(17), ***in part***, as "Every person who derives or is in actual physical control of a motor

vehicle..." We approved this definition for the purpose of determining whether one "operates" a motor vehicle within the meaning of § 18.1-54.") (emphasis added); **Enriquez v. Comm.**, 283 Va. 511, 516-517, 722 S.E.2d 252, 255 (2012) ("**on a public highway**") (emphasis added).

The principle of *in pari materia* was never raised in this context until Sarafin's case. Instead, the Virginia Court of Appeals, prior to **Enriquez** repeatedly prohibited operation of a motor vehicle while intoxicated on private property based on an old Brunswick County ordinance which did not regulate the highways of Virginia and took its *dictum* to extend this offense to any private property. **Valentine v. County of Brunswick**, 202 Va. 696, 698, 119 S.E.2d 486, 487 (1961) ("an ordinance or statute which provides that no person shall drive or operate a motor vehicle while under the influence of intoxicants, and is silent as to the place where the offense may be committed, does not require as an element of the offense that the driving or operating shall be on a public highway.").

In **Valentine**, the Brunswick County ordinance at issue was not a state "highway regulation" because the Defendant there drove on a local farm road. **Valentine v. County of Brunswick**, 202 Va. at 698, 119 S.E.2d at 487 (1961) ("We are not dealing here with a case of one driving a motor vehicle on private property while his license to drive on a public highway ...

has been suspended ..., but with the violation of a county ordinance prohibiting one from driving or operating a motor vehicle anywhere in Brunswick County, whether it be on a highway or private property, while under the influence of intoxicants. **The [local] ordinance is not a highway regulation and cannot be construed as part of the general codification of the State motor vehicle laws**.") (emphasis added).

Reynolds v. City of Virginia Beach, 31 Va. App. 629, 525 S.E.2d 65 (2000), like **Valentine**, was a prosecution involving a local (City) ordinance, not a Virginia statute. Therefore, Sarafin asks this Court to correct the Court of Appeals' error and limit or overrule the **Valentine** decision and its progeny[15] based on the later clear definition of "operation" in **Enriquez**.

Furthermore, the language in **Enriquez**, 283 Va. 511, 516-517, 722 S.E.2d 252, 255 (2012) ("**on a public highway**") (emphasis added) arguably overruled or limited **Valentine** and Court of Appeals' cases relying on it. Otherwise, any person sitting intoxicated in any vehicle anywhere in Virginia with a key in the ignition, even if no motive equipment or machinery is engaged, could be found guilty of operating a motor vehicle in violation of Va. Code § 18.2-266. **Enriquez v. Comm.**, **Id.** applied the Va. Code § 46.2-100 definition of "operation" to Va. Code §18.2-266. In fact, case law

[15] See, e. g., **Gray v. Comm.**, 23 Va. App. 351, 477 S.E.2d 301 (1996); **Mitchell v. Comm.**, 26 Va. App. 27, 492 S.E.2d 839 (1997).

already consistently used Va. Code § 46.2-100 to define pertinent terms in conjunction with DUI charges under Va. Code § 18.2-266. See **Propst v. Comm.**, 24 Va. App. 791, 485 S.E.2d 657 (1997); **Leake v. Comm.**, 27 Va. App. 101, 497 S.E.2d 522 (1998); **Rix v. Comm.**, 282 Va. 1, 3, 714 S.E.2d 561, 562 (2011); **Roseborough v. Comm.**, 281 Va. 233, 238, 704 S.E.2d 414, 416 (2011). Additionally, the implied consent law specifically uses Va. Code § 46.2-100 to define "highway." See Va. Code § 18.2-268.2(A) and **Mitchell v. Comm.**, 26 Va. App. 27, 29-30, 492 S.E.2d 839, 840 (1997); **Roseborough**, 281 Va. at 238, 704 S.E.2d at 416.

In cases where "operation" arguably occurred on private property, courts never addressed this issue because these offenses did not occur at personal homes and there were no decisions as to whether these were private driveways as defined by Va. Code § 46.2-100. **Williams v. City of Petersburg**, 216 Va. 297, 298, 217 S.E.2d 893, 894-895 (1975) ("The evidence does not establish whether the parking lot was publicly or privately owned, but because the city ordinance .... proscribes the prohibited conduct "in the city," ownership of the parking lot is not relevant in this case. See **Valentine** [internal citation omitted]."); **Mitchell v. Comm.**, 26 Va. App. 27, 492 S.E.2d 839 (1997) (road through a privately-owned mobile home complex); **Ngomondjami v. Comm.**, 54 Va. App. 310,

316, 678 S.E.2d 281, 284 (2009) (school parking lot); **Roseborough v. Comm.**, 281 Va. 233, 239, 704 S.E.2d 414, 417 (2011) (beside a private road in a gated, guarded residential complex).

Except for the **Valentine** line of cases relied upon by the Court of Appeals, case law upheld convictions for operating motor vehicles in violation of Va. Code § 18.2-266 only on highways and never in a private driveway.[16] Consequently, the statutory definition of "highway" is included in the definition of "operate" in Va. Code § 18.2-266.

There is not a single known case where a Defendant was found to be in stationary operation of a vehicle while parked in any private driveway. See **Gallagher v. Comm.**, 205 Va. 666, 668-70, 139 S.E.2d 37, 37-40 (1964) (stuck in a ditch with wheels spinning); **Nicolls v. Comm.**, 212 Va. 257, 258-259, 184 S.E.2d 9, 11 (1971) (engine running on the hard surface of the highway); **Williams v. City of Petersburg**, 216 Va. 297, 300-01, 217 S.E.2d 893, 896 (1975) (engine running at city intersection); **Overbee v.**

---

[16] Although the Court of Appeals most recent decision before **Sarafin** was unpublished and not of precedential value, it again confirmed this statutory definition of "operation" in a driving suspended case without deciding whether this extended, after **Enriquez**, to DUI cases under Va. Code § 18.2-266. **Villareal v. Comm.**, 2013 Va. App. LEXIS 150 (Record No. 0764-12-2; May 14, 2013) (backing out of a marked parking space in the parking area of a strip mall parking lot at a restaurant did not constitute driving on a "highway" within the meaning of Va. Code § 46.2-100, but rather occurred in a "private road or driveway.").

Comm., 227 Va. 238, 242-43, 315 S.E.2d 242, 244 (1984) (emergency lane of I-95 with hood up and engine running); **Propst v. Comm.**, 24 Va. App. 791, 793-95, 485 S.E.2d 657, 658-659 (1997) (dash lights on in an intersection); **Leake v. Comm.**, 27 Va. App. 101, 105-09, 497 S.E.2d 522, 524-526 (1998) (travel lane on an entrance ramp); **Reynolds v. City of Virginia Beach**, 31 Va. App. 629, 630-632, 525 S.E.2d 65, 65-66 (2000) (car stuck in a ditch off the traveled portion of the public highway); **Keesee v. Comm.**, 32 Va. App. 263, 265-68, 527 S.E.2d 473, 474-476 (2000) (vehicle on its side on the highway); **Nelson v. Comm.**, 281 Va. 212, 214, 707 S.E.2d 815, 816 (2011) (radio only playing in a residential cul-de-sac); **Enriquez v. Comm**, 283 Va. 511, 722 S.E.2d 252 (2012) (radio only playing while auto was illegally parked at a bus stop on a public road).

Furthermore, after **Valentine**, every case in this Court, involving the definition of motor vehicle "operation" for Va. Code § 18.2-266, adopted the specific definition of "operate" set forth in Va. Code § 46.2-100. **Nicolls v. Comm.**, 212 Va. 257, 259, 184 S.E.2d 9, 11 (1971); **Nelson v. Comm.**, 281 Va. 212, 214, 707 S.E.2d 815, 816 (2011); **Enriquez v. Comm**, 283 Va. 511, 722 S.E.2d 252 (2012).

The General Assembly, because it did not expressly modify the meaning of drive and operate as defined by statute, did not expand the

application of Va. Code § 18.2-266 to include driving or operating motor vehicles off public highways. Instead, in a separate sentence after the long paragraph proscribing what was unlawful under this statute, it simply defined mopeds as motor vehicles "when operated on highways" only for purposes of DUI enforcement because mopeds were otherwise expressly excluded from the ordinary definition of motor vehicles. "For the purposes of this title, any device herein defined as a bicycle, electric personal assistive mobility device, electric power-assisted bicycle, or **moped shall be deemed not to be a motor vehicle**." Va. Code § 46.2-100 (emphasis added).

To extend operation of all other motor vehicles to private property, the General Assembly should have added "*For purposes of this article, the terms "drive" or "operate" include motor vehicles when located on private property.*" Without such language, these words must be consistently defined *in pari materia* within the Virginia Code because the General Assembly ***"knows how" to include such language"*** if it wishes to broaden the meaning of these unambiguous words. **Brown v. Comm.**, 284 Va. 538, 544-545, 733 S.E.2d 638, 641 (2012) (emphasis added) ("If it desired, the legislature could have stated that sentences imposed pursuant to Code § 18.2-53.1 may not be run concurrently with any other

punishment, but it did not. It must be presumed that the legislature acted deliberately in using different language in similar statutes, and that judgment should be respected by the courts.")

Consequently, Va. Code § 18.2-266 regulates any "motor vehicle" as defined in Va. Code § 46.2-100 plus mopeds operated on public highways.

Finally, the scope of where the implied consent law applies, as expressed in Va. Code § 18.2-268.2, confirms that this entire integrated statutory scheme regulates motor vehicles only on highways. If you operate a motor vehicle on Virginia highways, you must consent to BAC chemical testing as a condition of exercising this privilege. Furthermore, just as the General Assembly did not change the definitions of drive or operate in Va. Code § 18.2-266, it did not extend application of the implied consent and DUI laws beyond public highways. The inclusive language in Va. Code § 18.2-268.2.A[17] does not signify a different legislative intent for what constitutes "operation". This language is synonymous with "drive or operate" in Va. Code § 18.2-266.

---

[17] Any person, whether licensed by Virginia or not, who operates a motor vehicle upon a highway, as defined in § 46.2-100, in the Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have samples of his blood, breath, or both blood and breath taken....

The General Assembly surely did not intend to give people using motor vehicles on public highways more rights to avoid DUI charges, to defend with scientific evidence and to document their innocence than people using motor vehicles on private property. If the General Assembly intended to extend DUI prosecution to private property, it would have co-extended the implied consent law.

3. The Virginia Court of Appeals erred by not requiring the trial court to give any or all of Instructions I, J, K and L offered by Sarafin that precisely and correctly defined what constituted "operation" to the jury.

Standard of Review: "'[J]ury instructions are proper only if supported by the evidence,' and more than a scintilla of evidence is required." **Lawlor v. Comm.**, 285 Va. 187, 228, 738 S.E.2d 847, 870-71 (2013) (quoting **Orbe v. Comm.**, 258 Va. 390, 398, 519 S.E.2d 808, 813 (1999)). "A reviewing court's responsibility in reviewing jury instructions is 'to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises.'" **Id.** at 228 and at 870 (quoting **Cooper v. Comm.**, 277 Va. 377, 381, 673 S.E.2d 185, 187 (2009).

Argument: Sarafin objected to the Instruction defining "operation" as given by the Court (J.A. 89) as being vague, confusing and no longer an accurate statement of Virginia law after the decisions in **Nelson v. Comm.**,

281 Va. 212, 707 S.E.2d 815 (2011) and **Enriquez v. Comm.**, 283 Va. 511, 514, 722 S.E.2d 252 (2012). The Court of Appeals explained:

> In the present case, the trial court properly refused appellant's proffered jury instructions as they were not an accurate statement of the law. Nothing in the plain language of the statute requires that a motor vehicle other than a moped be located on a public highway in order to constitute a violation of the statute proscribing operating a motor vehicle while intoxicated. Nor does the statute require that an individual intends to drive the vehicle. In addition, case law establishes that being on a public highway is not a required element of Code § 18.2-266.
>
> Appellant's proffered "operating" instruction improperly stated that "[a]ny individual who is in actual physical control of a vehicle on a public roadway is an operator." ... Appellant's "operator" instruction also improperly stated that "[o]perator means every person who drives or is in actual physical control of a motor vehicle on a highway." Accordingly, we hold that the trial court did not err in refusing to grant appellant's proffered jury instructions as they inaccurately stated the law.[18] [internal footnote included below]
>
> Furthermore, appellant's argument that the given instruction was vague and confusing is inaccurate. The instruction accurately stated the law, as set forth above, and gave appropriate examples of how an individual operates a motor vehicle for purposes of Code § 18.2-266. Accordingly, we hold that the trial court did not err because the "operation" instruction was accurate and was not vague and confusing.

Sarafin v. Comm., 62 Va. App. 385, 402-403, 748 S.E.2d 641, 649 (2013).

---

[18] "Although the 'operating' model jury instruction was modified to incorporate 'on a public roadway' after the conclusion of appellant's trial, see 1-21 Va. Model Jury Instructions: Criminal Instruction No. 21.250 (2012), the language of that instruction is not binding on this Court and is at odds with our determination that the additional language in **Enriquez** is dicta."

The Court of Appeals' interpretation of legislative intent is absurd. Although Sarafin's Instructions I, J, K and L were taken verbatim from the General Assembly's precise statutory definitions enacted in Va. Code § 46.2-100, the Court of Appeals ignored these definitions. Likewise, although this Court specified that "*we establish the rule*" quoted above in **Enriquez**, the Court of Appeals inconsistently decided that this was nevertheless only *dictum*. Moreover, the Model Jury Instruction defining "operation" was later amended to conform with the **Enriquez** holding that approved this statutory definition in Va. Code § 46.2-100.

The jury was confused by the vague and ambiguous language of the obsolete Model Jury Instruction given to the jury over Sarafin's objections. Sarafin argued before and during the trial that Instructions I, J, K and L correctly stated Virginia law. Nevertheless, the Court erroneously refused to give these instructions as later upheld in the Court of Appeals.

The longer version of Instruction I offered by Sarafin (J.A. 92) was more favorable to the Commonwealth than the shorter version of this instruction (J.A. 91) that directed acquittal for radio-only operation of Sarafin's vehicle in his private driveway.

> "**Private road or driveway**" means every way in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner, but not by other persons. (Emphasis added)

Va. Code § 46.2-100.

Sarafin's driveway was indisputably "private." Virginia Code § 46.2-100 defines the term "operator" or "driver" to mean:

> "every person who either (i) Drives or is in **actual physical control of a motor vehicle on a highway** or (ii) is exercising control over or steering a vehicle being towed by a motor vehicle" (emphasis added).

Operation is the action of an "operator" under Va. Code § 46.2-100. Accordingly, an "operator" must be in "actual physical control of a motor vehicle on a highway." Virginia Code §46.2-100 defines "highway" to mean:

> "The entire width between the boundary lines of **every way or place open to the use of the public for purposes of vehicular travel in the Commonwealth**, including the streets and alleys, and, for law-enforcement purposes, (i) the entire width between the boundary lines of all private roads or private streets that have been specifically designated "highways" by an ordinance adopted by the governing body of the county, city, or town in which such private roads or streets are located ...." (emphasis added).

After Sarafin's trial, the Model Jury Instructions were modified to incorporate these changes.[19] The Practice Commentary confirms that this

[19] **Operating** a motor vehicle means [driving the vehicle from one place to another; starting the engine; manipulating the electrical or mechanical equipment of the vehicle without actually putting the vehicle in motion; engaging the machinery of the vehicle which alone or in sequence will activate the motive power of the vehicle; sitting behind the steering wheel of a motor vehicle **on a public roadway** with the key inserted into the ignition switch of the vehicle].

change is the correct statement of current Virginia law after **Enriquez**[20]. Nevertheless, the Court of Appeals, in its footnote 3 (**Supra.**, f. n. 19) of its **Sarafin** opinion, held that this language was non-binding on their decision because those words in **Enriquez** were *dicta*.

CONCLUSION

WHEREFORE, the Appellant, Justin Sarafin, respectfully requests this Honorable Court to reverse the judgment below on the errors assigned

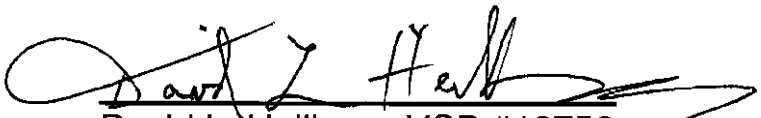
---

1-21 Virginia Model Jury Instructions - Criminal Instruction No. 21.250. (emphasis added)

[20] ... [other commentary omitted]...The Supreme Court, after noting the many cases in which it had considered the question of whether an intoxicated accused had driven or operated a motor vehicle, established the rule in **Enriquez** that when an intoxicated person is seated behind the steering wheel of a motor vehicle on a public highway and the key is in the ignition switch, he is in actual physical control of the vehicle and, therefore, is guilty of operating the vehicle while under the influence of alcohol within the meaning of Va. Code § 18.2-266. **Enriquez**, 283 Va. at 517, 722 S.E.2d at 255. The Court took the opportunity to state that the statutory definition of "operator" found in Va. Code § 46.2-100 is controlling and any individual who is in actual physical control of a vehicle is an "operator." Va. Code § 46.2-100 provides that "every person who either (i) drives or is in actual physical control of a motor vehicle on a highway or (ii) is exercising control over or steering a vehicle being towed by a motor vehicle" is an operator. The Court held that in discerning whether an intoxicated person seated behind the steering wheel of a motor vehicle on a public roadway with the key inserted into the ignition switch of the vehicle is in actual physical control of the vehicle, the position of the key in the ignition switch is not determinative. **Enriquez**, 283 Va. at 516, 722 S.E.2d at 255.

and remand this matter directing the Charlottesville Circuit Court to vacate his conviction and dismiss the warrant with prejudice.

Respectfully submitted,
JUSTIN SARAFIN
By Counsel



David L. Heilberg, VSB #18750
Dygert, Wright, Hobbs & Heilberg, PLC
675 Peter Jefferson Parkway, Suite 190
Tel. (434) 979-5515
Fax. (434) 295-7785
Email: dheilberg@charlottesvillelegal.com
Counsel for Appellant

CERTIFICATE

NAME OF APPELLANT: Justin Sarafin

NAME OF APPELLEE: Commonwealth of Virginia

COUNSEL FOR APPELLANT:

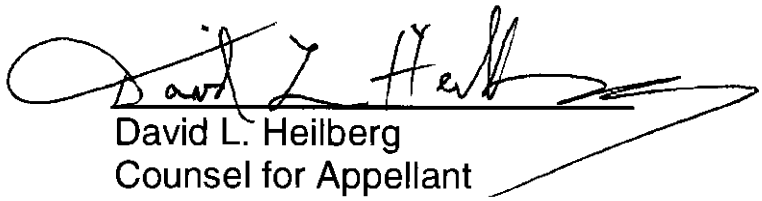
David L. Heilberg, VSB #18750
Dygert, Wright, Hobbs, and Heilberg, PLC
675 Peter Jefferson Parkway, Suite 190
Charlottesville, VA 22911
Phone: (434) 979-5515
Fax: (434) 295-7785
Email: dheilberg@charlottesvillelegal.com

COUNSEL FOR APPELLEE:

Virginia B. Theisen, VSB #23782
Office of Attorney General
900 E. Main Street
Richmond, VA 23219
Telephone: (804) 786-2071
Facsimile: (804) 371-0151
Email: oagcriminallitigation@oag.state.va.us

Counsel is privately retained.

I do ask for oral argument before a panel of this Court.



David L. Heilberg
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Opening Brief of Appellant, and one electronic copy (via email or CD) have been filed with the Clerk of the Supreme Court of Virginia and three (3) copies, and one electronic copy have been mailed postage prepaid and/or hand delivered to Virginia B. Theisen, VSB #23782, Office of Attorney General, 900 E. Main Street, Richmond, VA 23219 on this 28th day of March, 2014.

I also certify compliance with the word count in that this brief contains 6, 789 words, exclusive of those parts that by rule do not count toward the word limit, as counted in the Microsoft Word version of word processing and is thirty-two (32) pages long.

David L. Heilberg
Counsel for Appellant