In The
Supreme Court of Virginia

RECORD NO. 140012

SAMIR ALLEN FARHOUMAND,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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RULE

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ARGUMENT

Mindful of Rule 5:29's admonition that "[n]o reply brief is necessary if the contentions have been adequately answered in the opening brief of the appellant," Farhoumand will address only one aspect of the Commonwealth's Brief -- the cases from three jurisdictions cited by the Commonwealth in which those courts construed the word "expose" in their own statutes. In short, none of those cases concerns a statute similar to Virginia's, none confronted the same statutory construction arguments raised by Farhoumand, and in one state, there exists authority contrary to the cited case. Perhaps most important, in all the cited cases, the penis was actually exposed. That is, it was *able to be seen*.

1. <u>The Commonwealth's Cases Deal With Materially Different Statutes, Rendering Their Interpretation Of The Word "Expose" Irrelevant</u>.

The Commonwealth cites cases from three jurisdictions – Texas (*Uribe v. State*, 7 S.W.3d 294 (Texas App. 1999); *Miller v. State*, 243 S.W.2d 175 (Texas App. 1951); and *Balfour v. State*, 993 S.W.2d 765 (Texas App. 1999)), Georgia (*Clemens v. State*, 318 Ga. App. 16, 733 S.E.2d 67 (2012); *Arnold v. State*, 249 Ga.

App. 156, 545 S.E.2d 312 (2001)), and Kansas (*State v. Bryan*, 281 Kan. 157, 130 P.3d 85 (2006)).

Two of the Texas cases (*Uribe* and *Balfour*), concerned the interpretation of Texas Penal Code Section 21.11, which states, in relevant part:

> A person commits an offense if, with any child younger than 17 years and not his spouse, whether the child is of the same or opposite sex, he:
>
> * * *
>
> (2) exposes his anus or any part of his genitals, knowing the child is present, with intent to arouse or gratify the sexual desire of any person.

In *Uribe*, the children-victims did not see the defendant's genitals. The defendant was masturbating in a car next to their own car. The court ruled that the children need not actually see the defendant's genitals, since the statute had no such restriction. Rather, it was necessary to prove that the defendant exposed his genitals simply "knowing [a] child is present."

In *Balfour*, the child awoke at night and felt the defendant's penis on her. There was no evidence that the child saw the penis. Again, the defendant argued that because the child did

not see his penis, there was no proof of exposure. With minimal discussion, and citing a case from 1951 interpreting yet another statute (*Miller v. State, supra*), the court affirmed the conviction. Of course, the statute in *Balfour* only required that the conduct occur "knowing [a] child is present," which clearly was the case.

Curiously, *Balfour* chose an interpretation of "exposure" contrary to that given by another decision from a sister Texas court. In *Beasley v. State*, 906 S.W.2d 270, 272 (Tex. App. 1995), the defendant sat in his car with his pants down, with one hand on the steering wheel and one "shielding" his penis. The victim testified that because of the placement of the defendant's hand, she could not see the penis. For that reason, the court reversed his conviction for indecent exposure. *Beasley* received a "but see" signal in *Balfour*. 906 S.W.2d at 769.

Both Georgia cases cited by the Commonwealth dealt with a statute similar to the Texas statute. OCGA Section 16-6-4(a)(1) provided:

> A person commits the offense of child molestation when such person . . . [d]oes any immoral or indecent act to or in the presence of or with any child under the age

> of 16 years with the intent to arouse or satisfy the sexual desires of either the child or of the person.

In *Clemens*, the defendant was found on a bed masturbating over a sleeping child. He claimed that because the child was asleep and could not see his penis, there was no proof of exposure. In *Arnold*, the defendant approached a child, asked if she wanted to see something, and then unbuckled his pants. The child turned away and did not see the defendant's penis. He made the same claim Clemens had made. Not surprisingly, both courts held that the statute did not require that the victim see the exposed penis. "Although a strict construction of this statute requires that the perpetrator perform the immoral or indecent act in the child's presence, were are aware of no authority which requires the child to observe the entire act." *Arnold*, 249 Ga. App. at 158, 545 S.E.2d at 158.

Finally, in the Kansas case, *Bryan*, the defendant was found lying on the child's bed facing her, with his erect penis in his hands. The child was asleep and was not aware the defendant

was present. Kansas Statutes Annotated 2004 Supp. 21-3508(a)(2) provided that:

> Lewd and lascivious behavior is . . . . (2) publicly exposing a sex organ or exposing a sex organ in the presence of a person who is not the spouse of the offender and who has not consented thereto, with the intent to arouse or gratify the sexual desires of the offender or another.

Like the other courts, the Kansas court decided that exposure of the penis was sufficient, even if not seen by the child, a decision informed by the statute's use of the phrase "in the presence of a person."

2. <u>None Of The Cases Relied Upon By The Commonwealth Addresses The Issue Of Statutory Interpretation Raised Here – That Of A Separate Statute Addressing The Specific Conduct In Issue</u>.

A key issue raised by Farhoumand was never addressed by the cases cited by the Commonwealth, and presumably never raised by the parties. A good number of the cases do cite the rule that statutes are to be construed strictly and that "[t]he legislature is presumed to have expressed its intent through the language of the statutory scheme. Ordinary words are given their ordinary meanings. A statute should not be read to add

language that is not found in it or to exclude language that is found in it." *Bryan*, 281 Kan. at 158, 130 P.3d at 87.

But none of the cases address the situation like that in Virginia in which the legislature has created a separate statute that criminalizes the precise conduct at issue here – the touching of the complaining witness's intimate parts (or material covering them), or the forced touching of the accused's intimate parts (or material covering them) by the complaining witness. Code of Virginia Section 18.2-67.10. We have briefed this thoroughly at pages 14 – 24 of the Brief of Appellant. Given this, the rules of statutory construction we discuss compel the conclusion that "expose" in Section 18.2-370 requires visual, not tactile, exposure. Section 18.2-67.4:2 would have no meaning or purpose if all contact (or touching) is covered by Section 18.2-370(A)(1). Because it must be assumed the General Assembly knew what it was doing when it created Section 67.4:2, the obvious conclusion is that the statutes must have two different meanings. At the very least, there is ambiguity which must be resolved in the Defendant's favor.

3. <u>In Every Case Relied Upon By The Commonwealth, The Penis Was Actually Exposed To View</u>.

Perhaps most important, every case cited by the Commonwealth concerned a situation where the defendant's penis *was actually exposed to view*. The issue raised here – whether exposure is limited to what can be seen or whether it can include tactile exposure – was never decided. The Commonwealth's cases all concerned the issue of whether the victim actually saw the exposed (*i.e., visible*) penis. We agree that the law in Virginia is settled on that point. The victim need not actually see the exposed penis if it was reasonably likely that he would see it. Of course, we argue here that the victim did not see the defendant's penis, that it was not reasonably likely that he would be able to see it, and in any event, that it was never exposed *to view* and thus could never have been "exposed" as that term should be understood in Section 18.2-370.

CONCLUSION

For all these reasons, this Court should vacate Farhoumand's convictions and dismiss the Indictments.

Respectfully submitted,

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By Counsel

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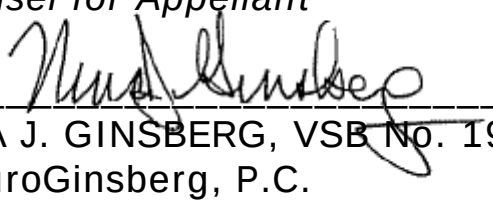

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CERTIFICATE AND REQUEST FOR ORAL ARGUMENT

I hereby certify that pursuant to Rule 5:26(h), one electronic version in PDF format on CD of the Reply Brief of Appellant, and fifteen printed copies of the same, were hand-filed with the Clerk of the Supreme Court of Virginia on August 15, 2014. On this same day, one electronic version of the Reply Brief of Appellant in PDF format, and three printed copies of the same were served, via UPS Ground Transportation on:

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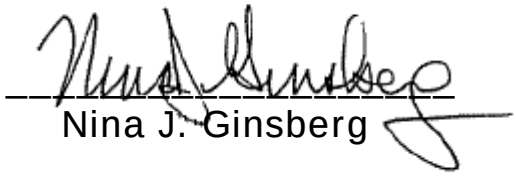
Counsel hereby request oral argument.

This Brief contains 1,412 words.



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