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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 160619

MATTHEW FITZGERALD HACKETT,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

Following Matthew William Hackett's guilty plea, the Circuit Court of Franklin County convicted him of one count of felony possession with intent to distribute marijuana by written order dated January 20, 2009. (App. 6-9, 39-40). There was "no written plea agreement." (App. 40).

The trial court sentenced Hackett to serve three years in prison, two years and three months of which the court suspended, on April 28, 2009. (App. 12-15). Despite entry of the final order on that date, the trial court held a number of post-

trial hearings and kept the case under advisement, anticipating the possibility of reducing Hackett's conviction to a misdemeanor. (App. 105-63). During this time, Hackett served his nine-month active sentence, was on supervised probation, and performed community service under a jail "work" program. (App. 16-20, 40, 108).

Citing intervening changes in case law, however, the circuit court refused to reduce Hackett's conviction to a misdemeanor when asked to do so in late 2014. (App. 29-33, 40). Hackett appealed this decision to the Court of Appeals of Virginia, which refused his petition for appeal and petition for rehearing on September 14, 2015 and December 15, 2015, respectively. (App. 77-82, 94).

This Court granted Hackett's petition for appeal on November 29, 2016.

ASSIGNMENTS OF ERROR

I. The Court of Appeals erred when it failed to find that the trial court erroneously entered a conviction order that failed to take the case under advisement for a potential reduction of the felony offense to a misdemeanor and to subsequently modify the conviction order.

II. The Court of Appeals erred when it failed to find that the trial court committed reversible error when it entered an order of conviction and final sentencing order and continued the case and ordered Hackett to continue under quasi-probation status with the promise of a particular disposition at a later date, in violation of Hackett's constitutionally protected due process rights, and right to a fundamentally fair sentencing proceeding.

III. The Court of Appeals erred when it failed to find that the trial court erred when it denied Hackett's motion for modification of

sentence and correct the order to reflect the court's intended disposition in the matter, *nunc pro tunc*.

IV. The Court of Appeals erred when it found that the trial court's conviction and sentencing orders are not void *ab initio*.

APPELLEE'S ASSIGNMENTS OF CROSS-ERROR[1]

I. The trial court and the Court of Appeals of Virginia erred in concluding that the trial court was precluded by language in this Court's holdings in *Starrs v. Commonwealth*, *Hernandez v. Commonwealth*, and *Moreau v. Fuller* from reducing the felony conviction to a misdemeanor conviction where the trial court ordered the conditions of the continued case without rendering a final judgment that determined the rights of the parties.

II. The Court of Appeals of Virginia erred in concluding that Rule 1:1 precluded the trial court from rendering its final determination of the rights of the defendant and the Commonwealth in the matters properly before it in the continued case.

STATEMENT OF FACTS

Following Hackett's April 2009 sentencing,[2] the first post-trial hearing occurred approximately eight months later, on December 21, 2009. Hackett told

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[1] The Commonwealth's Attorney conceded error in his brief in opposition filed in this Court on July 13, 2015. But that concession is not binding on the Commonwealth or the Court. *See Tuggle v. Commonwealth*, 230 Va. 99, 111, n.5, 334 S.E.2d 838, 846, n.5 (1985) (Court not required to accept party's concession of law); *In re Commonwealth*, *Dep't of Corrections*, 222 Va. 454, 465, 281 S.E.2d 857, 863 (1981) (Attorney General not bound by earlier legal concession of Commonwealth's Attorney).

[2] Apparently due to the court reporter's inability to retrieve records, there is no transcript of the guilty plea or sentencing proceedings before this Court, but the circuit court entered an agreed statement of facts which addresses the proceedings at those hearings. (App. 39-40, 122).

the trial judge that he had served his entire nine-month active sentence, having been released under his "full sentence of eighty-five percent." (App. 105-08). Hackett's counsel reminded the trial judge that at sentencing the defendant had asked the court to consider reducing Hackett's sentence "from a felony to a misdemeanor." (App. 108). Hackett's counsel then summarized Hackett's exemplary work as a jail trustee and the trial judge commented that he had seen Hackett "fairly frequently around here" and that [Hackett] had done "extremely well and everybody appreciates how [Hackett has] done." (App. 109-11). The court "released" Hackett and "suspend[ed] all the time on the condition that [Hackett remain] on probation" for twelve months. (App. 110-11).

The trial judge stated that after twelve months, Hackett's counsel could ask that Hackett's conviction "be reduced." The trial judge stated that after that twelve months he would either "reduce" Hackett's charge or "extend [Hackett's] probation" for twelve more months, then consider whether to "reduce" Hackett's conviction at that time. The court stated that if Hackett remained of "good behavior" that he would be "home free from the felony." (App. 112). The trial court continued Hackett's case to December 17, 2010.

Hackett appeared at the December 2010 hearing and the court found that he was "in full compliance with the terms and conditions of his supervised probation and other terms placed upon him by the Court." (App. 40). It also determined that

Hackett was "gainfully employed and had no further violations of law since his release from incarceration." (App. 40). Accordingly, the court continued the case for twelve months "for further review of [Hackett's] case for consideration of reduction of his felony conviction." (App. 40).

At a review hearing on August 20, 2013,[3] the trial judge stated that due to unspecified intervening case law from this Court, he did not believe that he could "change the conviction" unless he had done so within 21 days of entry of the "conviction" in 2009.[4] The court continued the matter to October 8, 2013 so that counsel could review the applicable case law. (App. 121-31).

At the October hearing, Hackett's counsel argued that the written sentencing order merely contained a "scrivener's error" because it did not retain jurisdiction for the court to consider reducing the charge. But the trial judge stated, "[I]t's not a scrivener's error." He said the written order stated "exactly what was agreed to be done and what was supposed to be done and what [the trial judge] did." (App. 138-39). The trial court then continued the case to December 17, 2014. (App. 40, 143).

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[3] Despite the "twelve-month" continuance in December 2010, this was apparently the next hearing in the case.

[4] The trial judge noted that he had drafted orders similar to those in this case "many times out of trying to help kids like [Hackett]." (App. 130). He later noted that he would need to "change [his] way of doing it." (App. 137). Nonetheless, he said that in other cases, unlike the instant case, a plea agreement existed which formed a "contract." (App. 150).

At that hearing, Hackett's counsel again asked the trial judge to reduce Hackett's conviction to a misdemeanor. (App. 146-48). The trial judge noted that "the problem" with modifying Hackett's conviction or sentence was that he had been "found guilty." The trial judge added, "compounding that, not only was he found guilty [but] he was sentenced and compounding it more so is the fact that he actually served the jail sentence." (App. 149-50). The trial judge noted that there was no "plea agreement" in the case and declined to enter a "*nunc pro tunc*" order incorporating a plea agreement because no such agreement was "actually done at the time" Hackett pleaded guilty. (App. 150-51). And he said that any "oral agreement" between the parties was irrelevant because "you can't have an oral agreement to a felony." (App. 152).

Thus, the trial judge said that while he would reduce the conviction "if he could," that "this is a court of law . . . [and] I've got to follow the law." (App. 153). He concluded that the parties were asking him to "[change] a [f]inal [o]rder after a sentence has been imposed and after . . . a jail sentence has been served and after several years later." (App. 158-59).[5]

After considering the matter for several days, the trial judge entered a written order citing this Court's opinions in *Starrs v. Commonwealth*, 287 Va. 1, 752 S.E.2d 812 (2014) and *Hernandez v. Commonwealth*, 281 Va. 222, 707 S.E.2d

[5] He noted, however, that there "are all kinds of equities in this case." (App. 159).

273 (2011). The trial judge ruled that once he had entered a written felony conviction order in January 2009, he had no authority to "make any disposition other than impose the punishment prescribed by the legislature after entering a written order finding defendant guilty **AND** a written order setting his punishment." (App. 33). Hence, he denied Hackett's motion for reconsideration. (App. 33).

ARGUMENT

I. Standard of Review

"The question of whether a particular order is a final judgment is a question of law that [an appellate court] review[s] *de novo*." *Carrithers v. Harrah*, 60 Va. App. 69, 73, 723 S.E.2d 638, 639 (2012). The Court reviews the application of statutes or rules of court *de novo*. *Commonwealth v. Herring*, 288 Va. 59, 66, 758 S.E.2d 225, 228 (2014). The Court does not disturb a trial court's factual findings unless they are plainly wrong. *Velasquez-Lopez v. Clarke*, 290 Va. 443, 448, 778 S.E.2d 504, 507 (2015).

II. Applying this Court's binding precedent, the trial judge correctly refused to reduce Hackett's felony conviction for possession with intent to distribute marijuana to a misdemeanor after he had earlier entered a written order in January 2009 finding Hackett guilty of the felony charge.

In January 2009, Hackett entered a guilty plea to felony possession of marijuana with intent to distribute. (App. 39). In a guilty plea form he executed at that time, Hackett acknowledged that he was pleading guilty to this charge, that he understood that he faced a maximum sentence of ten years in prison, and that no one had "made any promises" to him "concerning [his] plea of guilty." (App. 7). Hackett's counsel also signed this form. (App. 8). The trial court accepted the guilty plea and found Hackett "guilty of" the felony charge by written order dated January 20, 2009. The order did not state that the trial court contemplated the possibility of reducing the charge at some later point, but merely continued the matter for sentencing. (App 9-10).

The written statement of facts filed in this case states that "[w]hile there was no written plea agreement, both the Commonwealth and the defense agreed that the appropriate disposition was to take the case under advisement for an extended period of time, under any terms and conditions imposed by the Court." (App. 39). The parties agreed that the court would "fashion" these terms. Then, "[i]f the defendant successfully completed all terms and conditions, then the felony charge

would be reduced to a misdemeanor." (App. 39).[6] In the trial court's order denying Hackett's motion for reconsideration, the court found that "[n]othing was mentioned [at the January 2009] hearing about any type of plea agreement."[7] (App. 30).

This Court's holding in *Hernandez* governs this case under these facts. After the trial court entered a written order finding Hackett "guilty" of the felony offense in January 2009, it no longer had authority to reduce the charge. "[O]nce a court has entered a [written] judgment of conviction of a crime, the question of the penalty to be imposed is entirely within the province of the legislature, and the court has no inherent authority to depart from the range of punishment legislatively prescribed." *Hernandez*, 281 Va. at 225, 707 S.E.2d at 275; *see also Starrs*, 287 Va. at 13, 752 S.E.2d at 819 (although court accepted guilty plea, it retained

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[6] The record is silent regarding any comments the trial judge may have made regarding this "agreement."

[7] This was a point the trial court repeatedly mentioned during the post-trial proceedings. (App. 127, 145-46, 150-51, 160). In his order denying the motion for reconsideration, the trial judge stated that during the later sentencing hearing, in April 2009, that "even though there was no plea agreement, the Commonwealth's Attorney agreed" that the court take the matter under advisement and "if [Hackett] complied with all terms and conditions imposed by the court, that the felony be reduced to a misdemeanor." (App. 30). "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution." *Commonwealth v. Sandy*, 257 Va. 87, 91, 509 S.E.2d 492, 494 (1999).

inherent authority to consider reducing charge when it specifically "withheld a finding of guilt" in the associated written order).[8]

The Court of Appeals did not err in denying Hackett's petition for appeal.

III. Even if the trial court's entry of a written order in January 2009 convicting Hackett of the felony charge does not preclude the relief he seeks, Hackett's sentencing order was final 21 days after it was entered on April 28, 2009. Any authority the circuit court may have had to reduce his conviction from a felony to a misdemeanor expired at that time.

Under Rule 1:1,

> All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error. The date of entry of any final judgment, order, or decree shall be the date it is signed by the judge either on paper or by electronic means in accord with Rule 1:17.

As the Court of Appeals correctly found, the circuit court entered a final order sentencing Hackett to serve three years in prison, two years and three months of which it suspended on the felony charge, on April 28, 2009. (App. 12-15, 79-80). Moreover, the written order did not even suggest that the court had retained

[8] Hackett has not asked the Court to overrule *Starrs* or *Hernandez* via assignment of error, so that issue is not before the Court. *See* Rule 5:17 (c)(1).

jurisdiction over the case for any purpose. (App. 12-15). A criminal order that adjudicates guilt and imposes a sentence is a final, appealable order.[9] *See Burrell v. Commonwealth*, 283 Va. 474, 478, 722 S.E.2d 272, 274 (2012); *Oliver v. Commonwealth*, 35 Va. App. 286, 291-94, 544 S.E.2d 870, 873-74 (2001).

"Rule 1:1 and long standing case law applying that rule preclude a trial court from entering a second sentencing order altering an original sentencing order that has become final." *Commonwealth v. Morris*, 281 Va. 70, 77, 705 S.E.2d 503, 506 (2011) (citation omitted); *see also Conner v. Commonwealth*, 207 Va. 455, 457, 150 S.E.2d 478, 479 (1966) (trial court did not have "right or power" to modify sentences to make them run concurrently nine months after entry of final order). Absent a legislative exception to Rule 1:1, a trial court has no authority or discretion to enter a second sentencing order altering the original sentencing order once it becomes final. *See Charles v. Commonwealth*, 270 Va. 14, 19, 613 S.E.2d 432, 434 (2005).[10] Thus, any actions the circuit court took after May 19, 2009

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[9] During the April 2009 hearing, "the [trial] [c]ourt gave [Hackett] a choice, either he could walk out of the courtroom with no incarceration and a felony conviction, or he could choose to 'go the extra mile' and submit to the Court's requirements." (App. 40). Hackett "immediately chose to go the 'extra mile.'" (App. 40). Although the "extra mile" term is not described in the statement of facts, it appears from other portions of the record that the parties generally used this term to suggest that if Hackett complied with certain conditions, his felony charge would be reduced to a misdemeanor. (App. 146-47).

[10] Hackett does not rely on Code § 19.2-303 nor would such an argument be well-taken. Although the circuit court may have had discretion under that statute to

were "void for want of jurisdiction." *Super Fresh Food Markets v. Ruffin*, 263 Va. 555, 563, 561 S.E.2d 734, 739 (2002). Consequently, all of Hackett's motions for reconsideration were filed after the circuit court had been divested of jurisdiction and the trial court did not err by denying his request.

IV. The trial court did not err in denying Hackett's motion to amend the court's 2009 orders *nunc pro tunc* to retain jurisdiction to consider reducing the felony charge to a misdemeanor when the court specifically found that the orders contained no "scrivener's error."

"A court has power to make an entry *nunc pro tunc*, in the exercise of its discretion, to correct the court's records so that they speak the truth." *Jefferson v. Commonwealth*, 269 Va. 136, 140, 607 S.E.2d 107, 110 (2005) (citations omitted). But "[t]he power to amend should not be confounded with the power to create. While the power is inherent in the court, it is restricted to placing upon the record evidence of judicial action which has actually been taken, and presupposes action taken at the proper time." *Davis v. Mullins*, 251 Va. 141, 149, 466 S.E.2d 90, 94 (1996). This power "is restricted to placing upon the record evidence of judicial action which has actually been taken, and presupposes action taken at the proper time." *Id*. (citation omitted). A trial court may not enter a *nunc pro tunc* order

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modify Hackett's ***sentence*** because he was never transferred to the Department of Corrections, it does not provide authority to amend the ***offense*** for which he was convicted once the order becomes final. *See Epps v. Commonwealth*, 59 Va. App. 71, 76-85, 717 S.E.2d 151, 153-57 (2011).

absent "clear and convincing evidence" of a clerical error. *Council v. Commonwealth*, 198 Va. 288, 293, 94 S.E.2d 245, 248 (1956).

Hackett essentially argues that the trial court erred in refusing to enter a *nunc pro tunc* order in 2014 correcting alleged clerical errors in its 2009 orders so it could consider his motion to reduce his felony conviction to a misdemeanor. (Def. Br. 10-14). The trial judge, however, said that his 2009 orders did not contain any "scrivener's error" and read "exactly" as he had intended them to read. (App. 138-39). This factual finding was not plainly wrong based on the record before this Court. In fact, a trial judge may "interpret [his] own orders" and this Court will not reverse that construction unless it was "unreasonable." *Roe v. Commonwealth*, 271 Va. 453, 457-58, 628 S.E.2d 526, 528 (2006). While his argument in this Court is not so clear on this point, Hackett has previously acknowledged that he wanted the trial court, via *nunc pro tunc* order, to "create" the fiction that the April 2009 final order was not "entered . . . in the first place." (App. 91, petition for rehearing in Court of Appeals).

At the outset, it is important to note that in order for this Court to grant Hackett any meaningful relief based on the *nunc pro tunc* issue, it is not enough for the Court to find that the trial judge intended to consider a later motion to modify at the time he entered the final sentencing order in April 2009. Instead, Hackett

must also show that the trial court agreed ***at that time*** to enter an order retaining jurisdiction to do so.

> Neither the filing of post-trial or post-judgment motions, *see Harvey v. Telephone Company*, 198 Va. 213, 218, 93 S.E.2d 309, 313 (1956), nor the court's taking such motions under consideration, *see Lyle and Allen v. Ekleberry*, 209 Va. 349, 350-51, 164 S.E.2d 586, 587 (1968), nor the pendency of such motions on the twenty-first day after final judgment, *see Smith v. Commonwealth*, 207 Va. 459, 466-67, 150 S.E.2d 545, 549-50 (1966), is sufficient to toll or extend the running of the 21-day period prescribed by Rule 1:1.

School Bd. of Lynchburg v. Caudill Rowlett Scott, 237 Va. 550, 556, 379 S.E.2d 319, 323 (1989).

The record before this Court does not establish by clear and convincing evidence that the circuit court agreed to enter an order retaining jurisdiction within the twenty-one days it had to do so. The court's written order regarding the April 24, 2009 hearing and subsequent written order memorializing the court's ruling is silent on this point (App. 30), as is the agreed statement of facts before this Court on appeal (App. 40). Finally, the circuit court has already rejected Hackett's claim that there was any scrivener's error in the 2009 orders. (App. 138-39). The Court of Appeals correctly ruled that the circuit court was divested of jurisdiction twenty-one days after entry of the April 2009 sentencing order, and thus that Court properly denied Hackett's petition for appeal. (App. 80).

V. The circuit court's 2009 orders are not void *ab initio*, as even Hackett admits that the circuit court had both personal jurisdiction over Hackett and subject matter jurisdiction over his felony case.

Hackett argues that the Court should find that the circuit court's two written orders entered in 2009 were void *ab initio* because they did not effect the parties' intent to take his case under advisement, contemplating "a misdemeanor conviction at the conclusion of the matter." (Def. Br. 18). He also contends that there was an "enforceable contract" between the parties and the trial court, which the trial court "breach[ed]" when it, "on its own," "entered a written order finding Hackett guilty of the felony charged in the indictment, because the Court 'was under the mistaken impression that it had the discretion to reduce the charge, as requested,' even after it entered both [the January 2009 conviction] Order and a subsequent Sentencing Order [in April 2009]." (Def. Br. 17-18).[11]

There are several flaws in Hackett's argument. First, he ignores the "distinction between a court lacking jurisdiction to act upon a matter and the court, while properly having jurisdiction, nonetheless erring in its judgment." *Kelley v.*

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[11] To the extent Hackett's brief implies that as a criminal defendant, he was powerless to control the content of the order in a criminal case, that suggestion is without merit. While circuit courts routinely enter their own orders in criminal cases, Rule 1:1 is still applicable to criminal orders. Moreover, nothing in that rule of court, or any other, precludes a criminal defendant from drafting an appropriate order allowing the circuit court to retain jurisdiction and asking the court to enter it in a timely fashion. In addition, Hackett could have filed a timely objection to that order as well as a motion to suspend, modify, or vacate it. *See infra* at 16-17.

Stamos, 285 Va. 68, 75, 737 S.E.2d 218, 221-22 (2013) (internal quotations and citation omitted). Even assuming *arguendo* that the written orders erroneously omitted language taking Hackett's case "under advisement," that error, at most, rendered the orders "voidable." *See also Morrison v. Bestler*, 239 Va. 166, 170, 387 S.E.2d 753, 756 (1990) ("One consequence of the non-waivable nature of the requirement of subject matter jurisdiction is that attempts are sometimes made to mischaracterize other serious procedural errors as defects in subject matter jurisdiction to gain an opportunity for review of matters not otherwise preserved."). As the Court of Appeals has already held, "[t]he failure to include" a provision in the order allowing the circuit court to reduce the charge later "did not render the final sentencing order void *ab initio* because the trial court had jurisdiction over the criminal matter, over appellant when he entered his guilty plea, and it had the power to impose a sentence." (App. 81). Moreover, "[t]here is no evidence of a defect in the procedure used by the trial court when it accepted [Hackett's] guilty plea and imposed a sentence, which was within the range set by the legislature." (App. 81-82).

Second, if the 2009 orders were erroneous or incomplete, it was ***Hackett's*** duty to apprise the court of this problem. *Cf. Stamper v. Commonwealth*, 220 Va. 260, 281-281, 257 S.E.2d 808 (1979) ("In the absence of objection, [this Court] deem[s] the order of the trial court to contain an accurate statement of what

transpired. If it contained an incorrect statement of fact [or law], counsel for [Hackett] had 21 days after its entry on [April 28, 2009] to have it corrected."). Courts rely "chiefly on *the parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006).

Finally, Hackett's claim that the trial judge breached a "contract" it had with him by simply following the law is without merit. This Court has long recognized that a trial court does not enter into "contractual" arrangements to extend "mercy," such as reducing a felony to a misdemeanor, with criminal defendants. *See Richardson v. Commonwealth*, 131 Va. 802, 810, 109 S.E. 460, 462 (1921).

Hackett's argument that "due process" or fundamental fairness require this Court to reverse his convictions is equally unavailing. (Def. Br. 18-20). First, he did not advance this constitutional argument below, so it is defaulted under Rule 5:25. *See Baker v. Commonwealth*, 278 Va. 656, 660 n.2, 685 S.E.2d 661, 663 n.2 (2009) (Rule 5:25 applies to due process claims raised for first time on appeal). Second, his argument presupposes that the Commonwealth or the trial court reneged on some promise made to him.[12] But it was Hackett's responsibility to

[12] The record also establishes that Hackett represented to the trial court at the time he entered his plea to the felony charge that no one had made any promises to Hackett concerning his plea and that he understood that he could receive a maximum sentence of ten years in prison. (App. 7-8). This fully supports the trial court's later finding that there was no plea agreement. (App. 30).

ensure that the written orders accurately reflected the intent of the trial court and the parties. Despite his efforts to shift this responsibility onto others to develop a "due process" claim, his argument is without merit. In fact, the Commonwealth's Attorney has consistently acknowledged that he agreed to allow Hackett to request that his felony charge be reduced to a misdemeanor, both in the trial court and on appeal. (App. 39, 150-53; Commonwealth's Brief in Opposition, filed in this Court on July 13, 2016).

The law applying Rule 1:1 and requiring the Court to clearly and expressly retain jurisdiction over the case existed well before the April 2009 order was entered. In fact, in 2002, this Court admonished the bar as follows:

> [W]e take this opportunity to emphasize that the provisions of Rule 1:1 are mandatory in order to assure the certainty and stability that the finality of judgments brings. Once a final judgment has been entered and the twenty-one day time period of Rule 1:1 has expired, the trial court is thereafter without jurisdiction in the case. Thus, only an order within the twenty-one day time period that clearly and expressly modifies, vacates, or suspends the final judgment will interrupt or extend the running of that time period so as to permit the trial court to retain jurisdiction in the case.

Super Fresh Food Markets, 263 Va. at 563-64, 561 S.E.2d at 739.

And this Court, a day prior to filing of this brief, has reiterated the significance of the finality principles embodied in Rule 1:1. After a detailed analysis of the rule, the Court concluded that it has "recognized few exceptions to

Rule 1:1" and that the Court "appl[ies] it rigorously . . . in both criminal and civil cases." *Jones v. Commonwealth*, ___ Va. ____, ____ S.E.2d ____, Record No. 131385, slip op. at 15-18 & n.20 (Feb. 2, 2017).

CONCLUSION

The trial court found Hackett guilty of the felony charge in a written order entered in January 2009 and no plea agreement was presented to or accepted by the court at that time. Thereafter, under this Court's decisions in *Starrs* and *Hernandez*, the court had no authority to reduce his felony conviction to a misdemeanor. Moreover, the court entered a final sentencing order in April 2009 convicting Hackett of the felony and sentencing him. The court did not modify, vacate, or suspend that order within twenty-one days of entry. For either reason, the Court of Appeals did not err, and the Commonwealth asks that this Court affirm the judgment below.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On February 3, 2017, the required copies of this brief were filed electronically with this Court and hand delivered to the Clerk's Office in compliance with Rule 5:26(e). A copy was emailed to William M. Stanley, Esquire and Aaron B. Houchens, counsel for appellant, at bstanley@shg-law.com and ahouchens@shg-law.com. In accordance with Rule 5:26(h), I certify that this document contains 4,886 words, in compliance with Rules 5:26(b) and 5:26(e).

The Commonwealth desires to present oral argument in this case.

By: S/_____
Donald E. Jeffrey, III
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