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IN THE

# Supreme Court of Virginia

**RECORD NO. 160619**

MATTHEW FITZGERALD HACKETT,

*Appellant,*

v.

COMMONWEALTH OF VIRGINIA,

*Appellee.*

## REPLY BRIEF OF APPELLANT

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## REPLY BRIEF OF THE APPELLANT
## PRELIMINARY STATEMENT

The Brief of Appellee sidesteps the central issue in this case: that the Appellant Matthew Hackett ("Hackett") was wrongly convicted. Nothing in the Commonwealth's brief suggest that this is a problem. And nothing in the Commonwealth's brief addresses the blatant violation of Hackett's due process rights guaranteed by both the Virginia and United States Constitutions.

## ARGUMENT & AUTHORITIES

### I. The Commonwealth Cannot Maintain its Current Position in Opposition to Hackett Because That Issue Was Conceded at the Trial Court.

In its brief, the Commonwealth ignores the fact that at trial, the Commonwealth's Attorney for Franklin County agreed, "that the appropriate disposition was to take the case under advisement for an extended period of time,…[and].. [i]f the defendant successfully completed all terms and conditions, then the felony charge would be reduced to a misdemeanor." (J.A. 39). Additionally, the Commonwealth further ignores the fact that Commonwealth's Attorney for Franklin County, post-trial, joined the Appellant and requested that the trial court reduce the felony charge to a misdemeanor.

The Commonwealth's current position is in direct contradiction to its initial responsive filings in this Court to Hackett's Petition of Appeal. In the petition stage of the appeal to this Court, the Commonwealth filed a brief that not only concurred with Hackett's position, but also asserted additional assignments of error in support of Hackett's position, that this Court granted in consideration of Hackett's appeal[1]. The Commonwealth at the time said: "[t]he Commonwealth does not oppose the arguments advanced in the Petition for Appeal in support of the errors assigned by the defendant." (Brief of the Commonwealth in Response to Petition for Appeal and Assignments of Cross-Error, p.8).

For the first time, the Commonwealth now argues that the ruling of the trial court and Court of Appeals was correct, contrary to and inconsistent with its previous position at trial and before the Court of Appeals below. It justifies its position by stating that the Commonwealth is not now bound by the Commonwealth Attorney's concession at either the plea hearing, sentencing hearing, subsequent post-trial hearings, or the Court of Appeals. The Commonwealth relies upon the holding of *In re*

[1] This Court allowed this assignment of error to be considered in the appeal, in spite of the fact that it had not been previously preserved by the Appellee in the proceedings below.

*Department of Corrections*, 222 Va. 454, 281 S.E.2d 857 (1981) in an attempt to find a legal basis that will support its new position in this matter.

In that case, the Commonwealth's Attorney signed and agreed to an order of the circuit court which was entered after the court had lost jurisdiction over the matter. In that decision, the Supreme Court reasoned that:

> "The Commonwealth's Attorney, the only official legal representative of the Commonwealth in the trial court, acquiesced in the procedure that the Attorney General now attacks. Nevertheless, the Commonwealth may not be estopped from repudiating the earlier position **erroneously** taken by the Commonwealth's Attorney….
>
> *Id*. At 465, 281 S.E.2d at 863 (emphasis added).

Here, the Commonwealth's Attorney for Franklin County participated in both the plea and sentencing hearings, and joined Hackett to request that the trial court to take the matter under advisement, and to have the felony reduced to a misdemeanor. Moreover, it waived its participation at the Court of Appeals level, and later filed a response to the Hackett petition in support of his position, agreeing to Hackett's assigned error, and asserting additional assignments of error for this Court to consider on behalf of its position and Hackett's.

Unlike the Attorney General's inconsistent position taken in the matter of *In re Department of Corrections*, the Commonwealth in Hackett's case

has not acted erroneously. Instead, the Commonwealth has acted in accordance with the notions of due process and fundamental fairness. This distinction is both remarkable and significant, and was duly noted in the matter of *Kelly v. Commonwealth*, 8 Va.App. 359, 382 S.E.2d 270 (1989).

In that case, the Commonwealth's Attorney at the trial level conceded the argument that statements made by the defendant violated his Fourth Amendment right to counsel, and therefore, was a concession of a legal issue that could not be argued later by the Commonwealth on appeal. In *Kelly*, the Court of Appeals reasoned: "Unlike this case the Commonwealth's acquiescence in the court's order in *Department of Corrections* clearly did not amount to a legal point which eliminated the matter as an issue in controversy before the court." The holding in *Kelly* does not permit the Commonwealth to now assume now a position inconsistent with its earlier position taken by the Commonwealth Attorney at trial. This is true, as noted in *Kelly*, because: "…the Commonwealth in this case conceded a legal point that was at issue in a proceeding before the court to determine the matter. The concession negated the issue." *Id.*, at 367, 274.

## II. The Commonwealth has Waived its Ability to Contest Hackett's Position

Rule 5A:18 prohibits the Commonwealth on appeal from raising any legal issue it conceded at the trial level. Here, the Commonwealth never argued, nor preserved for later argument on appeal, the points and authorities it now asserts in its brief filed with this Court. In fact, the Commonwealth asserted in its brief in response to Hackett's petition that "[t]he Commonwealth does not object to the assignments of error, on the grounds that each one of them solicits this Court's assistance to furnish a remedy for the manifest and grave injustice to the defendant that occurred in this case." (Brief of the Commonwealth, p. 7).

As such, the Commonwealth's new position cannot be considered here, when it was never preserved nor even brought up by it at either the trial proceedings, at the Court of Appeals, or even in its opening response in this Court. An issue that was not in dispute below will not be considered for the first time on appeal. *See Green v. Warwick Plumbing & Heating Corp.*, 5 Va.App. 409, 412-13, 364 S.E.2d 4, 6 (1988).

It is clear from the record that despite its new position arguing against the position of Hackett, the Commonwealth has consistently conceded the legal points at issue and supported Hackett's argument for a reduction of

his felony to a misdemeanor, and subsequently has (and until now) joined his argument to reverse the trial court's erroneous ruling. Consequently, every new argument put forth now by the Commonwealth in opposition to the arguments put forth by Hackett (and those opposed to the assignments of error put forth in the Commonwealth's initial response to Hackett's petition) should not be considered by this Court.

However, assuming *arguendo*, that the Commonwealth's new position in this matter opposing Hackett's claims on appeal are to be considered now by this Court, Hackett relies upon his arguments previously asserted in his opening brief, and re-incorporates them here by reference.

## III. Assuming, *Arguendo*, that the Commonwealth's New Argument is to be Considered, Hackett's Claim of the Trial Court's Ruling denying his Motion to Reconsider/Modify Sentence as Being a Violation of Due Process Has Been Preserved for Consideration by This Court.

The Appellee now argues that Hackett cannot stand on his argument that the trial court's failure to reduce his felony conviction to a misdemeanor as promised is a violation of his constitutional right to procedural and substantive Due Process. The Commonwealth does not cite to any point in the record where such an argument was waived, and merely makes a conclusory statement without further support. In fact, Hackett raised this

issue at both the trial level of the proceedings, and before the Court of Appeals. (J.A. 24).

## IV. 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.

The Commonwealth asserted two assignments of error that were granted by the Court. Despite the Commonwealth's current attempt to abandon these errors they still should be considered by this Court, and therefore are re-stated below.

In its final order entered December 20, 2014 that denied and dismissed the defendant's request to reduce the felony conviction to a misdemeanor conviction, the trial court relied on principles set forth by this Court and applied to the unique facts in the *Starrs* and *Hernandez* cases cited above, and the *Moreau v. Fuller*, 276 Va. 127, 661 S.E.2d 841 (2008). The principles as applied to the specific facts of those cases, however are not dispositive of the issues presented in the case at bar.

In *Starrs*, this Court held that the circuit court erred by concluding that it did not have discretion and inherent authority to continue a criminal case for consideration of a future dismissal where the circuit court had not entered an order that formally adjudicated the defendant's guilt. *Starrs*, 287 Va. at 13. This Court held that before entry of an order formally adjudicating guilt, a trial court "has not yet exercised its essential function of rendering judgment." *Id*. at 14.

With respect to the judicial practice of taking cases under advisement to consider outcomes other than those provided by statute, this Court in *Starrs* restated and clarified the power of the judiciary. Until a court formally renders judgment in a case that makes a final determination of the rights of the parties in the matters properly before it, the court has not conducted and concluded the final exercise of its essential function. *Starrs*, 287 Va. at 7. (*citing Moreau v. Fuller*, 276 Va. 127, 136, 661 S.E.2d 841, 846 (2008)).

The principles this Court applied in *Starrs, Hernandez*, and *Moreau* are nonetheless subject to recognized exceptions allowing lawful actions a trial court may and sometimes must take even after entry of a formal order adjudicating a defendant's guilt. For example, it is well established that before a trial court loses jurisdiction over the defendant in a case, it may

consider a variety of motions that can and often do alter the outcome or nature of the judgment. *See* Virginia Code § 19.2-303. Upon a motion for reconsideration of a verdict or judgment while the trial court has continuing jurisdiction, a court in the sound exercise of its discretion may dismiss a charge or reduce the level of the offense or the amount of the punishment. Under Virginia Code § 8.01-428, court has power to vacate a judgment for fraud upon the court, or to correct clerical errors. A court may also vacate a judgment and order a new trial because of newly discovered evidence. And under Rule 3A:15, if a trial court sets aside a verdict for any other reason other than a motion to strike the Commonwealth's evidence, the court shall grant a new trial.

Based on the entire record in the instant case, even though the trial court entered the conviction and sentencing orders, it is clear that the trial court had not rendered a final judgment that concluded its determination of the rights and responsibilities of the defendant and the Commonwealth in this case. The trial court had not concluded the exercise of its essential function of completing the judicial acts that it ordered and contemplated taking in the case. Indeed, the trial court acknowledged that it had devised and offered to the defendant the very procedure in the case whereby the defendant could achieve his objective to reduce the felony conviction to a

misdemeanor in the continued case. It employed a method of procedure to accomplish the eventual reduction of the felony to a misdemeanor that it had in the past to reduce charges for other defendants in the past, and believed that this was proper and within its authority to do so.

Because of the ongoing judicial acts that formed the structure of this case as it continued, the trial court was not limited by the holdings that were applied to the facts in *Starrs*, *Hernandez*, or *Moreau* from rendering its judgment in making a final determination of the rights of the defendant in view of the law it established for the defendant in the case. A fair reading of *Starrs* did not require the trial court to abandon the very procedures it employed to furnish the defendant with the opportunity to receive the Court's promised final determination of his rights in the case. By denying and dismissing the motion because of perceived limitations required by *Starrs*, *Hernandez*, and *Moreau*, the trial court erroneously deprived itself from exercising its essential function of determining the rights of the defendant "as those rights presently exist." *Id* at 7.

Lastly, unlike the prosecutors involved in *Starrs*, *Hernandez*, and *Moreau*, who all opposed the requests of the defendants to defer judgment, continue the cases under advisement, and consider outcomes other than ones limited to a linear consequence of the charge, the evidence, and the

penalties prescribed by statute, the Commonwealth agreed with the defendant's request. *Cf. Maldonado-Mejia* v. *Commonwealth*, 286 Va. 49, 51, 752 S.E.2d 833, 834 (2013). Moreover, unlike the other cases, the trial court here not only approved and accepted the defendant's request for consideration of a future possible reduction of the felony to a misdemeanor, but the trial court devised and ordered implementation of the procedure whereby the defendant could achieve the result he sought.

## V. 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 properly before it in the continued case.

### A. Rule 1:1 did not prevent the trial court from rendering a final determination of the rights of the parties in this case.

In its final order the trial court did not rely on Rule 1:1 in its refusal to furnish the defendant with the fulfillment of the promise it made to him. The Court of Appeals, however, held that Rule 1:1 and cases applying it precluded the trial court from exercising its *nunc pro tunc* authority to correct the incorrectly stated orders of the trial court.

Even the trial court recognized it had not stated in its orders what actually transpired in the case. "Generally a court has the 'inherent power, based upon any competent evidence, to amend the record at any time, when "the justice and truth of the case requires it," so as to cause its acts

and proceedings to be set forth correctly.' *Netzer v. Reynolds*, 231 Va. 444, 449, 345 S.E.2d 291, 294 (1986) (quoting *Council v. Commonwealth*, 198 Va. 288, 292, 94 S.E.2d 245, 248 (1956))." *Dixon v. Pugh*, 244 Va. 539, 542, 423 S.E.2d 169, 172 (1992). And as stated previously, the trial court has employed the same process it attempted to use in the Hackett case to reduce other defendants who had come before it to reduce felony convictions to misdemeanors after final orders at both the plea and sentencing stages of those defendants' matters, and therefore it was not out of the ordinary for both the Commonwealth and Hackett to rely upon the methods employed by the trial court as it had done previously, to effectuate what both parties wanted to have happen in Hackett's case.[2]

The defendant did not request the trial court to enter "second" conviction or sentencing orders in contravention of Rule 1:1. The defendant did not request *nunc pro tunc* order to correct errors that did not exist. It is clear from the record that the orders of the trial court did not reflect what the trial court actually did. Therefore, just as the trial court had authority over the undetermined issues in the continued case, it certainly

[2] One can only imagine how many other defendants similarly situated to Hackett had their eventual convictions reduced under the same method employed by the Hackett trial court in the circuit that would have to be brought back to court to have their felony convictions re-instated if the trial court's decision in Hackett is left to stand, as is.

had the authority to correct the orders through which it had incorrectly spoken at the time these orders were drafted and entered by the trial court.

## CONCLUSION

For the reasons stated herein and pursuant to the authorities above, and those arguments and authorities put forth in his brief previously filed herein, Matthew Hackett, by counsel, asks this Honorable Court to grant relief, reverse the previous Order of the Court of Appeals of Virginia, and remand this matter to the Circuit Court for the County of Franklin for further proceedings consistent with the ruling of this Honorable Court.

Respectfully Submitted,

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## REQUIRED STATEMENTS

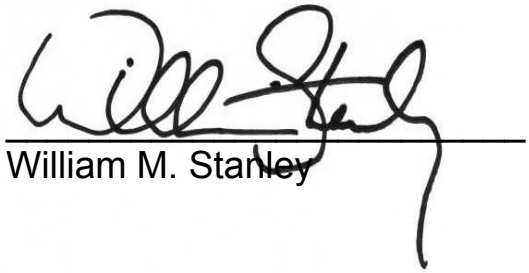
I hereby certify, pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia that:

1. Counsel for Appellant has complied with Rule 5:26 of the Rules of the Supreme Court.

2. A copy of the Reply Brief of Appellant has been mailed on the 17th day of February, 2017 to all opposing counsel of record.

## CERTIFICATE OF SERVICE

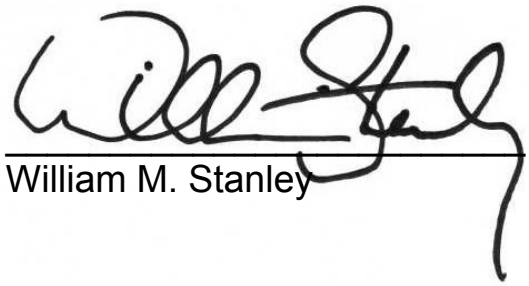
This is to certify that the original, one electronic version and ten copies of this Reply Brief have been filed with the Clerk of the Supreme Court of Virginia, and that a copy has been emailed and mailed to all counsel of record this 17th day of February, 2017, in compliance with Rule 5:26(e) of the Rules of the Supreme Court of Virginia.



William M. Stanley

## CERTIFICATE OF COMPLIANCE

I do hereby certify that the above Reply Brief and does not exceed fifteen (15) pages set by Rule 5:26(b).



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