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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 161489

JOSEPH BOYD RICKMAN,

Appellant/Cross-Appellee,

v.

COMMONWEALTH OF VIRGINIA,

Appellee/Cross-Appellant.

BRIEF OF APPELLEE/CROSS-APPELLANT

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NATURE OF THE CASE

This is an appeal from a judgment of civil commitment under the Virginia Civil Commitment of Sexually Violent Predators Act, Virginia Code § 37.2-900 *et seq*. (the "Act"). Joseph Rickman stipulated that he is a sexually violent predator. Rickman was diagnosed with pedophilic disorder after sexually offending four minor victims. The Circuit Court for the County of Chesterfield found Rickman inappropriate for conditional release under Virginia Code § 37.2-912(A) and civilly committed him to the custody of the Department of Behavioral Health and Developmental Services ("DBHDS").

On appeal, Rickman argues that the trial court should have dismissed his case and released him because the trial court clerk set the probable cause hearing for a date more than 90 days after the filing of the petition. The Court should reject Rickman's argument because Rickman acquiesced to the date chosen by failing to make a proper objection despite having every opportunity to do so. In addition, good cause existed to set the hearing outside of the 90-day timeframe. Thus, the requirements of the Act were met.

Moreover, as asserted on cross-error, dismissal is inappropriate regardless whether setting the hearing outside of the 90-day timeframe was error, because the

timeframe set forth in Virginia Code § 37.2-906(A) is merely procedural and not mandatory.

For these reasons, the Court should affirm the trial court's decision not to dismiss the case, but also find that the trial court erred in interpreting the statutory timeframe in Virginia Code § 37.2-906(A) as mandatory, rather than procedural.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS BELOW

The Commonwealth filed a petition seeking to have Rickman declared a sexually violent predator in the Circuit Court for the County of Chesterfield on August 28, 2015. (Appendix [hereinafter "App."] at 10-23). On September 15, 2015, the trial court appointed Miriam Airington, Esq., to represent Rickman. (App. at 31). On September 15, 2015, Ms. Airington requested that the Commonwealth provide dates when counsel for the Commonwealth and the Commonwealth's expert witness, Dr. Evan Nelson, were available for a probable cause hearing. (App. at 77). The next day, the Commonwealth sent to Ms. Airington seven dates within the 90-day period when both the Commonwealth and Dr. Nelson were available and willing to proceed with the hearing, which included October 23, 2015. (App. at 78).

Ms. Airington selected three of those seven dates and provided them to the trial court's clerk. (App. at 79). The clerk informed counsel that the trial court was not available on the three dates Ms. Airington provided the court, but that the

trial court was available on October 23, 2015. (App. at 85). Subsequent email exchanges by counsel and the trial court clerk revealed that no date within the 90-day timeframe of Virginia Code § 37.2-906(A) would work for the trial court and all parties. (App. at 85-95).

The first date available to the parties and the court was January 8, 2016. Ms. Airington emailed the trial court clerk and counsel for the Commonwealth on September 22, 2015, stating: "For scheduling purposes, I am available on 12/23 and 1/8. However, I am not in a position to waive the 90-day rule on my client[']s behalf so if a hearing is set beyond that date, I will need to note an objection." (App. at 87). The trial court clerk responded that there were dates available to the court prior to the end of the 90-day period. (App. at 89).

On September 28, 2015, the trial court clerk requested confirmation from counsel that both were available on January 8, 2016 and that the case would be set for that date. (App. at 92). Ms. Airington responded the same day, stating: "This will confirm receipt of the [January 8] date. Please note that I cannot agree to waive the statutory time limit and I will be filing a motion to dismiss. I will leave to the court[']s discretion whether the judge wants to set that motion on the same date or on an earlier date." (App. at 93). The trial court clerk replied that she was not in a position to discuss that with the trial judge and explained that if Ms. Airington required a hearing on any motion she could send available dates. (App.

at 94). No hearing became necessary because Ms. Airington never filed a motion objecting to proceeding on January 8, 2016.

On October 6, 2015, Rickman retained Steve Armstrong, Esq., to represent him. (App. at 45; *see also* Br. of Appellant at 5). Mr. Armstrong also did not file a motion to dismiss or any other objection on Rickman's behalf within the 90-day timeframe. Moreover, he did not offer any alternative dates within the 90-day period that would work for his schedule (and might have also worked for the other impacted schedules) to set the probable cause hearing. In fact, Mr. Armstrong did not inform the Commonwealth, the trial court, or even Ms. Airington, that he had been retained until December 3, 2015, when his assistant called the Commonwealth. Upon receiving that telephone call, the Commonwealth contacted Ms. Airington by email, who replied that she had no knowledge of that fact. (App. at 96-97).

On December 8, 2015, Mr. Armstrong filed a motion to substitute counsel and a draft order granting substitution, as well as a motion to dismiss based on the setting of the probable cause hearing after the 90-day window. (App. at 41-50). The trial court entered the order of substitution on December 11, 2015. (App. at 52). The Commonwealth filed its Opposition to Respondent's Motion to Dismiss on December 31, 2015. (App. at 68-97). The trial court heard argument on the motion to dismiss on January 8, 2016. (App. at 98-136). Judge Johnson initially

granted the motion to dismiss on the ground that the 90-day timeframe was mandatory and not procedural. (App. at 130-34). The Commonwealth filed a motion for reconsideration and a motion to stay entry of the final order. (App. 169-76; 141-48). The trial court granted the motion to stay on January 21, 2016. (App. at 275-86).

The Commonwealth argued in its motion for reconsideration that the scheduling requirement for a probable cause hearing under the Act is directory and procedural, rather than mandatory and jurisdictional, and that, in any event, the parties had agreed and good cause existed to set the probable cause hearing outside of the 90-day timeframe in Virginia Code § 37.2-906(A). (App. at 169-76). The trial court heard argument on the motion for reconsideration on January 21, 2016. (App. at 200-22). The trial court took the matter under advisement and issued a written opinion on January 27, 2016, granting the Commonwealth's motion to reconsider and denying Rickman's motion to dismiss. (App. at 277-86). The trial court found the timeframe in Virginia Code § 37.2-906(A) is mandatory, but determined that the requirements of the statute had been met because Rickman acquiesced to the January 8, 2016 date by failing to make a proper objection. (*Id.*). The trial court found that Ms. Airington's email to the clerk suggesting her intention to file an objection did not present the issue to the trial court for a ruling.

(*Id.*). An order memorializing the trial court's opinion was entered February 5, 2016. (App. at 339-40).

A probable cause hearing was held on February 5, 2016, and the trial court found that probable cause existed to conclude that Rickman is a sexually violent predator. (App. at 291-22; 348-49). On May 27, 2016, Rickman stipulated that he met the criteria as a sexually violent predator.[1] (App. at 388-99). The trial court accepted Rickman's stipulation and ordered the preparation of a proposed conditional release plan. (App. at 400-02; 406-09; 423-25).

On July 29, 2016, the trial court conducted the disposition hearing to consider Rickman's proposed conditional release plan. (App. at 499-550). At the conclusion of that hearing, the trial court ruled that Rickman did not meet three of the four factors required to be placed on conditional release, and civilly committed him to the custody of DBHDS. (App. at 553-555).

[1] Rickman states in his brief that a trial was conducted over his counsel's objection. That is incorrect. Rickman waived his right to a trial and stipulated that he met the criteria as a sexually violent predator. (App. at 393-96; 406-09).

ASSIGNMENT OF ERROR

Rickman's assignment of error is as follows:

I. The trial court erred when it reversed itself in dismissing the petition of probable cause hearing on a motion to re-hear.[2]

(Br. of Appellant at 9).

ASSIGNMENT OF CROSS-ERROR

I. The trial court erred in holding that the 90-day timeframe in Virginia Code § 37.2-906(A) is mandatory rather than procedural, and therefore, dismissal was appropriate absent an agreement of the parties or good cause. (Preserved at App. at 169-76; 339-40).

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[2] Rickman claims to have preserved this assignment of error in the entire transcript of the January 8, 2016 hearing on his motion to dismiss, the entire transcript of the January 21, 2016 hearing on the Commonwealth's motion to reconsider, and in the trial court's 10-page written opinion. (Br. of Appellant at 9 (citing "Ap. Vol. I, 100-135; Ap. Vol. I, 202-221; Ap. Vol. I, 277-286")). This is inadequate because Rule 5:27(c) requires that an Appellant point to "a clear and exact reference . . . where the alleged error has been preserved." The burden is on the appellant "to lay his finger on the error . . . and not invite an appellate court to delve into the record and winnow the chaff from the wheat." *Findlay v. Commonwealth*, 287 Va. 111, 115-16 (2014) (internal citations omitted).

STANDARDS OF REVIEW[3]

Rickman's Assignment of Error is governed by a *de novo* standard of review to the extent it involves an interpretation of Virginia Code § 37.2-906(A)'s requirements, but the trial court's finding of fact that Rickman acquiesced to setting the date outside of 90 days will not be disturbed unless plainly wrong or without supporting evidence. *Chamberlain v. Marshall Auto & Truck Ctr.*, 2017 Va. LEXIS 57, at *4-5.

The Commonwealth's Assignment of Cross-Error is reviewed *de novo* because it involves a question of law. *Hilton v. Martin*, 275 Va. 176, 180 (2008).

ARGUMENT

I. The trial court's conducting the probable cause hearing outside of the 90-day timeframe of Virginia Code § 37.2-906(A) was not error.

Virginia Code § 37.2-906(A) states that "[u]pon the filing of a petition alleging that the respondent is a sexually violent predator, the circuit court shall ... (ii) schedule a hearing within 90 days to determine whether probable cause exists to believe that the respondent is a sexually violent predator." Va. Code Ann.

[3] Rickman's brief violates Rule 5:27(d) by failing to include the standard of review applicable to his Assignment of Error. While he has included a subsection titled "Standard of Review," in it Rickman merely cited Virginia Code § 37.2-906, the probable cause section of the Act, and provided no authority, argument or analysis regarding the applicable standard of review this Court should apply. (Br. of Appellant at 9).

§ 37.2-906(A) (emphasis added). The statute allows a continuance of the probable cause hearing beyond the 90 days "upon good cause shown or by agreement of the parties." *Id.*

A. Good cause existed to set the probable cause hearing outside of the 90-day timeframe.

Good cause existed to set the probable cause hearing outside the 90-day timeframe, because no date within the 90-day timeframe was available to the parties and the trial court. When counsel and the trial court conferred in mid-September, the first mutually available date for the hearing was not until January. The Commonwealth proposed October 23, 2015, which was within the 90-day timeframe and was available to the Commonwealth and the trial court, but Rickman's then-counsel was unwilling or unable to attend a hearing on that date. Three other dates during the 90-day period were available for both parties but not the trial court. Given these circumstances, the practical result was to set the probable cause hearing on a date available to the trial court and both parties, even though it fell outside of the 90-day timeframe. *See Hood v. Commonwealth*, 280 Va. 526, 536 (2010) ("Determining what is required of the government to satisfy due process depends upon the particular situation at issue and the interests involved; it is not a technical conception with a fixed content unrelated to time,

place and circumstances, but involves intensely practical matters."(internal citations and quotations omitted)).

B. The trial court's setting the probable cause hearing outside the 90-day timeframe was with agreement of the parties, and Rickman's counsel did not make a proper objection.

Rickman's first counsel indicated to the trial court clerk that she would file an objection to the January 8, 2016 hearing date, but she never did. Accordingly, the trial court set the hearing by agreement. *See* Rule 1:20 ("Counsel of record may agree to a trial date and may secure approval of the court by telephone call or other electronic communication to the designated court official."). Counsel for Rickman did not request a phone conference, status hearing, or by any other method ask the trial court to set the hearing on a date within the 90-day timeframe.

As he did in the trial court, Rickman asks this Court to determine that his first counsel's emails to the trial court clerk indicating her intention to file an objection constituted a proper objection. As the trial court explained, "[i]t acts on properly filed motions; it does not act on emails . . . . [T]he facts embodied in the emails do not support Respondent's contention that an objection was noted." (App. at 285). Analogizing the circumstances to a criminal defendant's ability to waive his right to a speedy trial by failing to object to a trial date, the trial court determined that "Respondent's failure to raise an objection constitutes his

acquiescence to the probable cause hearing date of January 8, 2016." (App. at 285-86).

Rickman retained new counsel on October 6, 2015, but his new counsel took no action on the case for nearly two months. As the trial court noted, at the time he was retained, 53 days still remained in the 90-day timeframe. Thus, Rickman had the benefit of two attorneys, either of whom could have filed a proper objection, or offered additional dates to set the probable cause hearing prior to the 90 days expiring. Instead, they sat on Rickman's rights. It is a long-established principle that "equity aids only the vigilant. It will not assist one who has slept too long on his rights." *Puckett v. Jessee*, 195 Va. 919, 930 (1954).

Accordingly, the trial court was correct to deny Rickman's motion to dismiss. As the next Section demonstrates, however, the trial court erred in its interpretation of what Virginia Code § 37.2-906(A) requires, and so this Court should affirm on different grounds.

II. On cross-error, the trial court erred in finding that the 90-day timeframe set forth in Virginia Code § 37.2-906(A) is mandatory rather than procedural.

The trial court held that the requirement in Virginia Code § 37.2-906(A) for the circuit court to "schedule a hearing within 90 days to determine whether probable cause exists to believe that the respondent is a sexually violent predator" was mandatory and jurisdictional. (App at 284). Analogous Supreme Court and

Court of Appeals precedent and other sections of the Act demonstrate that the requirement to schedule a probable cause hearing within 90 days is merely procedural. Virginia Code § 37.2-906(A) is not mandatory or jurisdictional, because it does not expressly prohibit the trial court's holding a probable cause hearing after the 90-day timeframe or state that the case shall be dismissed if the probable cause hearing is not held in the 90-day timeframe.

A. A statute directing a court is directory unless it contains express prohibiting or limiting language.

Virginia Code § 37.2-906(A) establishes the mode of proceeding regarding the setting of the probable cause hearing. "'A statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute.'" *Commonwealth v. Rafferty*, 241 Va. 319, 324 (1991) (quoting *Nelms v. Vaughn*, 84 Va. 696, 699 (1888)).

Virginia appellate courts have held that statutes governing the timing of court proceedings and the actions of courts are similarly directory and procedural. *See Marrison v. Dep't of Family Servs.*, 59 Va. App. 61, 69-70 (2011); *Jamborsky v. Baskins*, 247 Va. 506, 508 (1994) (holding that Code § 16.1-269(E), which provided that the circuit court "shall" take certain actions in cases referred to it from the Juvenile and Domestic Relations District Court within 21 days after

receipt of the case, was directory and procedural); *Turner v. Commonwealth*, 216 Va. 666, 667, 669 (1976) (accord); *Harris v. Commonwealth*, 52 Va. App. 735, 743-44 (2008) (accord); *Boatright v. Wise Cty. Dept. of Soc. Servs.*, 64 Va. App. 71, 79-80, 86 (2014) (accord); *Tran v. Bd. of Zoning Appeals*, 260 Va. 654, 657-59 (2000) (holding that Code § 15.2-2312, which provides that the Board "shall" make a decision within 90 days of the filing of an application for an appeal, is directory rather than mandatory, even where the countys zoning ordinance permits continuances beyond the 90-day deadline only when "mutually agreed to by the appellant and BZA," and where the parties did not agree). The Court should apply the rationale set forth in those cases and determine that Virginia Code § 37.2-906(A)'s direction that the trial court schedule a hearing within 90 days is merely procedural.

B. The statute does not "manifest a contrary intent" to its being given a directory or procedural interpretation.

A statute "manifests a contrary intent" to its being directory or procedural when the statute contains "prohibitory or limiting language." *Jamborsky*, 247 Va. at 511. For statutory language to be "prohibitory or limiting," it must expressly prohibit taking an action after the deadline or state that the case shall be dismissed for failure to follow the requirement in the statute. For example, as Rickman and the trial court used by way of analogy, Virginia Code § 19.2-243 mandates that

> if no trial is commenced in the circuit court within five months from the date such probable cause was found by the district court; and if the accused is not held in custody but has been recognized for his appearance in the circuit court to answer for such offense, he shall be forever discharged from prosecution therefor if no trial is commenced in the circuit court within nine months from the date such probable cause was found.

Va. Code Ann. § 19.2-243 (emphasis added). As this Court noted in *Jamborsky:*

> [A]n example of language specifically limiting the authority of a circuit court to act within a stated time period is found in Rule 1:1, which states, in part, that "[a]ll final judgments, orders and decrees ... shall remain under the control of the trial court and subject to be modified, vacated, or suspended, for twenty-one days after the entry, *and no longer.*"

Jamborsky, 247 Va. at 512, n. *.

In cases dealing with court timelines like this one, Virginia appellate courts have noted the absence of prohibitory language in the statutes. *See, e.g.*, *Marrison*, 59 Va. App. at 70 ("Because Code § 16.1-251(B) does not expressly prohibit the J&DR court from conducting a preliminary removal hearing beyond the five-business-day period, is not prohibitive or limiting, and does not contain any manifestation of a contrary intent, we hold that Code § 16.1-251(B) is procedural and directory, rather than mandatory and jurisdictional."); *Harris*, 52 Va. App. at 744-45 (language in Virginia Code § 16.1-277.1(B) requiring an adjudicatory or transfer hearing within 120 days "imparts no substantive right . . . the statute does

not expressly prohibit the court from conducting the transfer or adjudicatory hearing beyond the 120 days absent good cause").

The language in Virginia Code § 37.2-906(A) allowing for a continuance is not "prohibitory or limiting language" that makes the statute mandatory. This language does not expressly preclude the trial court from conducting a probable cause hearing beyond the 90-day period. Likewise, the statutory language does not expressly state that the trial court loses jurisdiction if the probable cause hearing is not scheduled within 90 days.

Moreover, the fact that the Act provides for continuances at various stages demonstrates the legislature's intent that the court does not lose jurisdiction if a hearing is not set within the specified number of days. For example, Virginia Code § 37.2-908(D), governing trials under the Act, states, "[i]f the court or jury finds the respondent to be a sexually violent predator, the court shall then determine that the respondent shall be committed or continue the trial for not less than 45 days nor more than 60 days pursuant to subsection E." Va. Code Ann. § 37.2-908(D). That Section's next sentence contains the same continuance language as in Virginia Code § 37.2-906(A), the probable cause section of the Act: "A continuance extending the case beyond the 60 days may be granted to either the Attorney General or the respondent upon good cause shown or by agreement of the parties." Va. Code Ann. § 37.2-908(D). Certainly the legislature did not intend that the trial

court would lose jurisdiction in that situation, where a trial court or jury has determined that a respondent is a sexually violent predator but the final determination of commitment or conditional release remains pending. Requiring a dismissal mid-trial would be an absurd result—yet that would be the result if Rickman were correct. Moreover, nearly identical language can be found in other sections of the Act and would be subject to similar interpretations. *See, e.g.*, Virginia Code § 37.2-908(A) and -910 (dealing with the initial setting of merits trial and annual review hearings, respectively).

Thus, the language in Virginia Code § 37.2-906(A) allowing the Attorney General or the respondent to seek or agree to a continuance of the probable cause hearing does not manifest a contrary legislative intent. Rather, as courts have held in the cases cited above, the statute is mandatory only if it expressly prohibits taking an action after the deadline or states that the case shall be dismissed for failure to follow the requirement in the statute.[4] If the General Assembly intended for the continuance language in Virginia Code § 37.2-906(A) to have different

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[4] The trial court opined that the requirement in Virginia Code § 37.2-906(A) to schedule a probable cause hearing within 90 days is not procedural, because it is not identified in Virginia Code § 37.2-905.1 as one of the requirements in the Act that are not mandatory. (App. at 204). As this Court recognized in *Hood*, 280 Va. at 542, however, directions to the court set forth in the Act can have a discretionary, rather than mandatory, application even though they are not among the specifically identified sections in Virginia Code § 37.2-905.1.

jurisdictional significance than the identical continuance language in Virginia Code § 37.2-908(D), it knew how to craft language to that effect and would have done so.

C. The trial court's reliance on dicta in a case involving a former version of the Act is misplaced.

The trial court relied on dicta—not a holding—in *McCloud v. Commonwealth*, 269 Va. 242 (2005), in concluding that the timeframes of the Act are mandatory. In *McCloud*, the Court outlined the provisions of the now-repealed 2004 version of the Act and repeatedly used the word "must" in paraphrasing the Act's various procedures. But whether the timeframes contained in the Act were mandatory or procedural was not a question that was at issue, let alone decided, in *McCloud*. Thus, the trial court erred in relying on that dicta. *See Gibson v. Commonwealth*, 287 Va. 311, 320 n.2 (2014) (rejecting the Commonwealth's reliance on dicta).

Moreover, the trial court relied on *McCloud* based on the mistaken understanding that the language in Virginia Code § 37.1-70.7[5] of the 2004 version of the Act "is identical to the language of [current] § 37.2-906(A), with the exception that it states the probable cause hearing 'shall' be scheduled within 60

[5] In its letter opinion dated January 27, 2016, the trial court inadvertently referred to Virginia Code § 37.1-70 instead of § 37.1-70.7 as the probable cause section of the 2004 version of the Act. (App. at 280-81).

days, not 90 days." (App. at 280-81). But contrary to the trial court's understanding, the 2004 version of Virginia Code § 37.1-70.7 differs from the current version of the Act in a dispositive respect: the prior version made no provision for setting or continuing the probable cause hearing beyond the 60-day timeframe by agreement of the parties or upon good cause shown. That distinction further demonstrates why the trial court's reliance on the *McCloud* dicta was misplaced.

D. Rickman alleged no harm or prejudice, nor did any exist, preventing the trial court from allowing the case to proceed.

The failure to follow a procedural requirement will not prevent a court from exercising its subject-matter jurisdiction unless a party can show "some harm or prejudice caused by the failure" to follow the procedural requirement. *Carter v. Ancel*, 28 Va. App. 76, 79 (1998); *Marrison*, 59 Va. App. at 68-71 (affirming trial court's denial of a motion to dismiss and finding the respondent had alleged no such harm or prejudice before the trial court or on appeal). "An assessment of whether an individual has 'suffered prejudice constituting a denial of due process must be made on a case-by-case basis.'" *Tran*, 260 Va. at 658 (quoting *Commonwealth v. Wilks*, 260 Va. 194, 201 (2000)).

Rickman failed to allege, or present any evidence of, harm or prejudice. In fact, none exists. Rickman's detention by the Department of Corrections does not

constitute harm or prejudice, because the Hold Order was properly in place. The General Assembly, in crafting the Act, contemplated that a respondent would be held for the duration of the pendency of a case, which includes 90 days or more for a probable cause hearing, 120 days or more for a trial, and potentially 45 to 60 days or more for the preparation of a conditional release plan. *See* Va. Code Ann. §§ 37.2-906(A), -908(A), and -908(D). Thus, Rickman could not reasonably have expected to be released during the period between 90 days after filing of the Petition and the probable cause hearing. Furthermore, Rickman himself caused or contributed to the delay of which he complains, by not agreeing to a proposed hearing date within the 90-day timeframe that was available to the trial court, the Commonwealth, and the Commonwealth's expert witness.

CONCLUSION

The Court should affirm the trial court's decision denying Rickman's motion to dismiss, because Rickman consented to the date set for the probable cause hearing and did not note an objection. The Court should further find that the trial court erred in its interpretation of Virginia Code § 37.2-906(A) and find that the statutory language providing for a 90-day timeframe for the probable cause hearing under the Act is procedural, not mandatory, because the statute does not contain prohibitory or limiting language.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

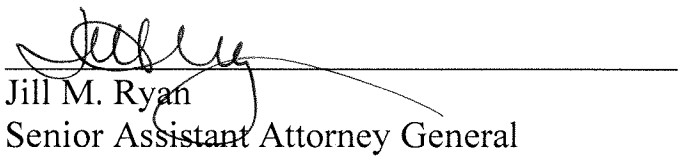
Pursuant to Rule 5:26 of the Rules of the Supreme Court of Virginia, counsel for the Appellant certifies as follows:

(a) The requirements of Rules 5:6, 5:26, and 5:28 have been complied with.

(b) On May 8th, 2017, an electronic version of this Brief of Appellee was filed with Clerk of the Supreme Court of Virginia via VACES, and served on counsel for Appellee: Stephen K. Armstrong, Esq. at steve@reedarmstronglaw.com.

(c) On May 8th, 2017, 3 printed copies of this Brief of Appellee were hand-delivered to the Clerk of the Supreme Court of Virginia.

(d) This brief does not exceed the longer of 50 pages or 8,750 words.



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