SCV: Submitted on 09-13-2017 14:16:41 EDT for filing on 09-13-2017

IN THE

# SUPREME COURT OF VIRGINIA

No. 161527

**Brian Wendall Jordan**,

*Appellant,*

v.

**Commonwealth of Virginia**,

*Appellee.*

# REPLY BRIEF OF APPELLANT

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## REPLY BRIEF OF APPELLANT

The Commonwealth asks this Court to interpret and apply Code § 8.01-217(D) in a manner that would prevent any incarcerated individual from changing his name. The rationale offered by the Commonwealth is refuted by the simple fact that Jordan does not have the possibility of parole. Jordan's requested name change does not frustrate any legitimate law-enforcement purpose, the trial court erred in refusing to grant Jordan's requested name change, and this Court should reverse the trial court and grant Jordan's requested name change.

### I. The General Assembly's Use of the Word "Legitimate" Demonstrates Why the Commonwealth's Suggested Interpretation and Application of Code § 8.01-217(D) is Incorrect

The General Assembly has created a two-step process that a trial court must employ to determine whether an incarcerated individual like Jordan may legally change his name. First, the trial court must determine whether good cause exists to consider the application for a name change. Code § 8.01-217(D) (". . . unless the court finds that good cause exists for consideration of such application under the reasons alleged in the application for the requested change of name."). Second, the trial court then must notify the appropriate attorney for the Commonwealth and conduct a hearing to determine whether the requested name change "(i) would not frustrate a legitimate law-enforcement purpose, (ii) is not sought for a fraudulent

purpose, and (iii) would not otherwise infringe upon the rights of others." Code § 8.01-217(D).

In Jordan's case, the Commonwealth recognizes that the trial court found good cause for Jordan's name change application, thus satisfying the first step of Code § 8.01-217(D). Commonwealth Br. at 2 ("No party in this case disputes that Jordan had good cause for seeking the name change for religious purposes."). With regard to the second step, the Commonwealth grudgingly concedes that the trial court held that Jordan's name change application was not sought for a fraudulent purpose and would not otherwise infringe upon the rights of others. Commonwealth Br. at 11, n.40 & 21-23. In asking this Court to affirm the trial court, however, the Commonwealth asks this Court to adopt an interpretation and application of "legitimate law-enforcement purpose" that would prevent any incarcerated individual from changing his name.

This General Assembly did not provide a definition of "legitimate law-enforcement purpose" in the Code of Virginia, and this Court has not interpreted or defined the phrase "legitimate law-enforcement purpose."[1] The Commonwealth asks this Court to define this phrase as "the genuine, valid, or lawful object or goal

[1] It does not appear that any other State has defined the phrase "legitimate law-enforcement purpose" in the context of a name change statute regarding incarcerated individuals. The phrase "legitimate penological interest" has been used in the First Amendment context, but the phrase does not appear to be defined with particularity. *See, e.g., Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

of detecting and punishing criminal violations." Commonwealth Br. at 16. Such a definition provides no limiting principle. As evidenced by the Commonwealth's use of this definition to support affirmance of the judgment below, this definition also would revert Code § 8.01-217 for all practical purposes back into the treatment of incarcerated individuals that was found to be unconstitutional in *Barrett v. Virginia*, 689 F.2d 498 (4th Cir. 1982) – at least those like Jordan who have an undisputedly valid religious purpose for seeking a name change.

Essentially, under the Commonwealth's definition of "legitimate law-enforcement purpose," punishing criminal violations now also includes the inability to obtain a name change, even for undisputedly valid religious purposes, even for incarcerated individuals who are not eligible for parole by virtue of Code § 53.1-165.1, and even where the Virginia Department of Corrections has indicated that it has the capability to track inmates by multiple names. This was not the meaning or effect the General Assembly intended when it used the phrase "legitimate law-enforcement purposes."

Instead, the phrase should be interpreted and applied to prohibit attempts by an incarcerated individual to obtain a name change to evade post-release probation, supervision, or other reporting/monitoring requirements. For individuals like Jordan, who have been arrested, tried, convicted, and who are not eligible for parole, the justifications offered by the Commonwealth in this appeal illustrate that

no incarcerated individual will ever be able to obtain a name change – regardless of the good cause supporting the application. There was no evidence below that Jordan's name change request would "frustrate a legitimate law-enforcement purpose." Jordan respectfully asks this Court to reverse the judgment of the trial court and grant his name change.

## II. The Trial Court's Findings and Judgment Below Prevents this Court from Affirming as Suggested by the Commonwealth and Requires Reversal

As an alternative to its limitless definition of "legitimate law-enforcement purposes," the Commonwealth asks this Court to affirm the judgment below using the "right result for the wrong reason" doctrine. The Commonwealth relies on *Perry v. Commonwealth*, 280 Va. 572 (2010), in support of its request to affirm the judgment below based on the trial court's "concerns about Jordan's victims and their families." Commonwealth Br. at 21. These concerns, according to the Commonwealth, indicate that the trial court's judgment was right for the wrong reason because the trial court basically found that Jordan's name change request "would infringe upon the rights of others." Commonwealth Br. at 22 (quoting Code § 8.01-217(D)). This doctrine does not apply here, and the Commonwealth's request contradicts this Court's precedent, the language of Code § 8.01-217(D), and the trial court's own findings and conclusions below.

As outlined in *Perry*, the "right result for the wrong reason" doctrine should only be employed where the record supports the right reason. 280 Va. at 578-581. But, the right reason alleged by the Commonwealth, the so-called "infringement" of the rights of others – namely, the victims of Jordan's crimes and their families, has no support in the text of Code § 8.01-217(D). Under the Commonwealth's interpretation and application of "infringe," any victim or victim's family could assert an infringement of their rights and block any name change request, even one for undisputedly valid religious purposes. The text of Code § 8.01-217(D) does not support such a broad construction.

Moreover, the Commonwealth asks the Court to employ the right result for the wrong reason doctrine in a novel manner. Rather than assign error, or cross-error, to the trial court's conclusion that Jordan's name change request would *not* "infringe upon the rights of others," the Commonwealth instead now asks this Court to employ the doctrine as a vehicle to affirm the judgment below. The Court should not allow the right result for the wrong reason doctrine to be used in such a manner. To do so would invite appellees to engage in similar tactics and would frustrate the clear requirements of Rule 5:17 and Rule 5:18, and this Court's respective precedent regarding assignments of error and assignments of cross-error. The trial court below clearly held that Jordan's name change request was *not* "sought for a fraudulent purpose" and "would *not* otherwise infringe upon the

rights of others." Code § 8.01-217(D) (emphases added). *See also* J.A. 55. This conclusion should not be disturbed in the manner now suggested by the Commonwealth. To the extent it failed to assign error or cross-error to the judgment below, the judgment of the trial court should be considered the law of the case.

## III. Conclusion

For these reasons, and those in his Opening Brief, Jordan respectfully asks this Court to reverse the judgment of the trial court and grant his request to change his name to Abdul-Wakeel Mutawakkil Jordan. Alternatively, this Court should reverse, remand, and direct the trial court to consider Jordan's name change request in light of the fact that all elements of Code § 8.01-217 have been met.

Dated: September 13, 2017 Respectfully submitted,

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## CERTIFICATE

The undersigned hereby certifies that the foregoing complies with Rules 5:26 and 5:29, and further certifies as follows:

(1) The Appellant/Petitioner is Brian Wendall Jordan.

(2) Counsel for the Appellant/Petitioner are:

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(5) On this 13th day of September, 2017:

a) Three copies of the foregoing Reply Brief of Appellant were hand delivered to the Clerk's Office of the Supreme Court of Virginia for filing.

b) An electronic copy of the foregoing Reply Brief of the Appellant was delivered via the VACES portal to the Clerk's Office of the Supreme Court of Virginia.

*Anne Hampton Andrews /s/*
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