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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 161804

JACK EUGENE TURNER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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TABLE OF CONTENTS

PAGE

INTRODUCTION 1

STATEMENT OF THE CASE 1

ASSIGNMENTS OF ERROR 2

STATEMENT OF FACTS 3

MATERIAL PROCEEDINGS BELOW 11

STANDARD OF REVIEW 16

ARGUMENT 16

I. Turner's actions constitute a true threat, and true threats are not protected by the First Amendment. 16

A. Like Virginia's cross-burning statute, Virginia's noose statute criminalizes true threats. 17

1. States are permitted to ban threats, such as cross burning, that are intended to intimidate people by placing them in fear of bodily harm. 18

2. States are permitted to ban the display of a noose as a form of intimidation because, like cross burning, it constitutes a true threat. 22

B. True threats can be prohibited anywhere—even on private property. 28

1. In this Court, Turner seems to concede that he can be convicted for threatening people on private property. 28

2. To the extent that Turner is still arguing that he had an absolute right to threaten people on his private property, that argument fails. 31

II. Turner violated Virginia's noose statute because he hung a noose in a "public place"—in his front yard in plain view of people passing by. 33

A. A "public place" encompasses more than "public property." 34

B. This Court should define "public place" in terms that further the legislature's intent in prohibiting threatening noose displays, and Turner's front yard clearly constitutes a "public place" under any such definition..... 36

CONCLUSION 44

CERTIFICATE OF TRANSMISSION AND SERVICE..... 46

ADDENDUM 47

TABLE OF AUTHORITIES

CASES

Armstrong v. Commonwealth,
263 Va. 573, 562 S.E.2d 139 (2002) 42

Barnes v. Commonwealth,
61 Va. App. 495, 737 S.E.2d 919 (2013) ..... passim

Cartwright v. Commonwealth,
223 Va. 368, 288 S.E.2d 491 (1982) 37

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 19

City of Richmond v. Va. Elec. & Power Co.,
292 Va. 70, 787 S.E.2d 161 (2016) 34

Commonwealth v. Zamani,
256 Va. 391, 507 S.E.2d 608 (1998) 37

Crislip v. Commonwealth,
37 Va. App. 66, 554 S.E.2d 96 (2001) 42

Elliott v. Commonwealth,
267 Va. 464, 593 S.E.2d 263 (2004) 18

Elonis v. United States,
135 S. Ct. 2001 (2015) 19

Esteban v. Commonwealth,
266 Va. 605, 587 S.E.2d 523 (2003) 37

Fitzgerald v. Loudoun Cty. Sheriff's Office,
289 Va. 499, 771 S.E.2d 858 (2015) 37

Hackney v. Commonwealth,
186 Va. 888, 45 S.E.2d 241 (1947) ..... passim

Kiser v. A.W. Chesterton Co.,
285 Va. 12, 736 S.E.2d 910 (2013) 34

Kondaurov v. Kerdasha,
271 Va. 646, 629 S.E.2d 181 (2006) 28

Lawlor v. Commonwealth,
285 Va. 187, 738 S.E.2d 847 (2013) 16

Madsen v. Women's Health Ctr.,
512 U.S. 753 (1994) 31

McCalden v. Cal. Library Ass'n,
955 F.2d 1214 (9th Cir. 1992)..... 32

MicroStrategy Inc. v. Li,
268 Va. 249, 601 S.E.2d 580 (2004)..... 28

Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.,
312 U.S. 287 (1941) 19

People v. Legel,
321 N.E.2d 164 (Ill. 1974) 42

Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists,
290 F.3d 1058 (9th Cir. 2002) (en banc)..... 31, 32

Prieto v. Commonwealth,
278 Va. 366, 682 S.E.2d 910 (2009)..... 30

R. A. V. v. St. Paul,
505 U.S. 377 (1992) 19, 39

Robinson v. Commonwealth,
273 Va. 26, 639 S.E.2d 217 (2007)..... 28

Teleguz v. Commonwealth,
273 Va. 458, 643 S.E.2d 708 (2007)..... 31

Turner v. Commonwealth,
67 Va. App. 46, 792 S.E.2d 299 (2016)..... passim

United States v. Crawford,
665 F. App'x 539 (7th Cir. 2016)..... 31

United States v. Jeffries,
692 F.3d 473 (6th Cir. 2012)..... 19

Virginia v. Black,
538 U.S. 343 (2003) ..... passim

Virginia Vermiculite, Ltd. v. W.R. Grace & Co.- Conn.,
108 F. Supp. 2d 549 (W.D. Va. 2000) 28

Watts v. United States,
394 U.S. 705 (1969) 19, 30

Weideman v. State,
890 N.E.2d 28 (Ind. Ct. App. 2008) 44

Wilkins v. Commonwealth,
292 Va. 2, 786 S.E.2d 156 (2016) 16

Windham v. City of Fairhope,
20 F. Supp. 3d 1323 (S.D. Ala. 2014) 41

Zinone v. Lee's Crossing Homeowners Ass'n,
282 Va. 330, 714 S.E.2d 922 (2011) 34, 35

CONSTITUTIONAL PROVISIONS

U.S. Const. amend I ..... passim

STATUTES

Cal. Penal Code § 11411
(Deering, Lexis Advance 2017) 24, 25

Conn. Gen. Stat. § 46a-58(d)
(Lexis Advance 2017) 24

D.C. Code § 22-3312.02(a)
(Lexis Advance 2017) 24

La. Rev. Stat. Ann. § 14:40.5
(Lexis Advance 2017) 24

N.C. Gen. Stat. § 14-12.13
(Lexis Advance 2017) 24

N.Y. Penal Law § 240.31(5)
(Lexis Advance 2017) 24

Va. Code Ann. § 4.1-100 42

Va. Code Ann. § 18.2-423 ..... 18, 25, 26

Va. Code Ann. § 18.2-423.2 ..... passim

RULES

Va. Sup. Ct. R. 5:27 30

Va. Sup. Ct. R. 5A:20 ..... 2, 14, 29

OTHER AUTHORITIES

James Elbert Cutler,
Lynch-law: An Investigation Into the History of Lynching in the United States (1905) 23

Lu-in Wang,
The Complexities of "Hate", 60 Ohio St. L.J. 799 (1999) 23, 24

INTRODUCTION

Expressive conduct is generally protected by the First Amendment, but expressive conduct that communicates a "true threat" is not. Intimidation constitutes a "true threat" when it is designed to place people in fear of death or bodily harm. Here, Turner hung a black-faced dummy in a noose from a tree in his front yard to intimidate his African American neighbors, with whom he had been feuding. The display had its intended effect—causing Turner's neighbors to fear that Turner might harm them or their children. This appeal asks whether Turner had a constitutional right to threaten his neighbors in this manner and whether he had a statutory right to threaten them on his private property.

STATEMENT OF THE CASE

After a bench trial, the Franklin County Circuit Court convicted Jack Eugene Turner of one count of displaying a noose with the intent to intimidate, in violation of Virginia Code § 18.2-423.2.[1] The trial court denied Turner's motion to reconsider and sentenced him to an active sentence of six months' incarceration.[2] Turner appealed to the Court of Appeals of Virginia, which affirmed his conviction on November 22, 2016.[3] Turner now appeals that decision.

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[1] App. 3, 133-34, 161-62, 165.

[2] App. 166-73, 184-85, 212-13, 215, 217, 219.

[3] *Turner v. Commonwealth*, 67 Va. App. 46, 792 S.E.2d 299 (2016).

ASSIGNMENTS OF ERROR

1. The Court of Appeals and the trial court erred in holding that the appellant did not have a Constitutional right to express his freedom of speech by displaying a noose on his own property.

2. The Court of Appeals erred in upholding the trial court's denial of the [sic] Mr. Turner's Motion to Dismiss by failing to find that the displaying of the noose on private property was Constitutionally protected free speech.

3. The Court of Appeals and the trial court erred in holding Mr. Turner did not have a Constitutional right to express his freedom of speech by displaying a noose on his own property.

4. The Court of Appeals erred in upholding the trial court's finding of guilt under Virginia Code § 18.2-423.2 for displaying a noose on private property.

5. The Court of Appeals erred in its finding that the definition of a public place endorsed in Hackney is correct to define the phrase in Virginia Code § 18.2-423.2.

6. The Court of Appeals erred in finding Mr. Turner procedurally defaulted by failing to comply with provisions of Rule 5A:20(e) with regards to his assignment of error in which he argues he has an absolute right under the First Amendment to use symbolic or offensive conduct however reprehensible or offensive and with the intent to intimidate if he did so upon his own property.

STATEMENT OF FACTS

On June 17, 2015, at approximately 5:00 p.m., Traze Witcher was driving home on Lindsey Lane, a gravel road located in Franklin County, Virginia, when she passed Turner's double-wide trailer and saw something hanging from a tree in Turner's yard.[4] Witcher lived with her husband at the end of Lindsey Lane, in the last house on the left.[5] Witcher's sister, Keena Mitchell, also lived on Lindsey Lane, in the first house on the right, with her husband, John Mitchell, and their two boys.[6] Turner lived in the second house on the right, next to the Mitchells.[7]

Approximately eleven families lived on Lindsey Lane, and several of the families had children.[8] Lindsey Lane has "one way in [and] one way out," so the school bus does not drive down the street to pick up the children.[9] Instead, every morning the children walk to the intersection at the street's entrance to meet the

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[4] App. 45-48, 50, 58-59, 61, 89-90, 105, 122.

[5] App. 45-47, 50, 89-90.

[6] App. 45-46, 49, 74, 101.

[7] App. 48-49, 101, 116.

[8] App. 46-47.

[9] App. 50.

bus.[10] The Witchers and the Mitchells were the only African American families living on the street.[11] Everyone else was white.[12]

As Witcher drove past Turner's house on June 17, she saw what she "perceive[d] to be a black man hanging from a tree" in Turner's front yard.[13] The figure was hanging from a noose made out of rope.[14] It was hanging only ten to fifteen feet from the street, and it was "very, very visible" to anyone driving on the road.[15]

When Witcher saw the hanging figure, she "became very, very fearful" and "very scared."[16] She immediately turned around, drove back to her sister's house, and blew the horn to get her and her husband to come outside.[17] When the Mitchells came out, they saw that Witcher was "nervous and frantic."[18] Witcher told the Mitchells to get in the car and come with her because she needed to show them

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[10] App. 50.
[11] App. 88, 195, 197.
[12] App. 88, 197.
[13] App. 61, 63.
[14] App. 59, 61, 63.
[15] App. 59, 62, 64, 69, 89.
[16] App. 59.
[17] *Id.*
[18] App. 106.

something.[19] The Mitchells got in the car, and Witcher drove toward Turner's house.[20]

As they approached, Keena Mitchell spotted the "big black life-size figure like a human hanging from a tree with a rope around its neck."[21] Shocked by what she saw, Keena exclaimed, "I can't believe this."[22] She also became "upset and angry" and worried what Turner might do next—either to her or to her two boys—if any of them went outside.[23]

John Mitchell also saw the figure, which he described as "a man, a dummy hanging in a tree."[24] John became "very upset" and "couldn't believe it."[25] The figure was "in plain sight hanging in a tree" about fifteen feet from the edge of Turner's driveway and fifteen feet from the road.[26] According to John, there was "no way you could drive by and not see [it]," and you "couldn't miss it if you tried."[27]

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[19] App. 59-60, 105-06.
[20] App. 60.
[21] App. 106-07.
[22] App. 86, 107.
[23] App. 107.
[24] App. 86, 89-91.
[25] App. 86-87.
[26] App. 89.
[27] App. 89, 91.

John asked Witcher to slow down so he could take pictures for the sheriff's department, but Witcher was afraid because she did not know where Turner was.[28] Seeing the figure hanging from the noose made John fearful for his own safety and for his family's safety.[29] So when John got back to his house, he checked to make sure his family was safe.[30] The Mitchells' two boys were eighteen and thirteen,[31] and John knew that they often walked down Lindsey Lane to visit Witcher.[32] After checking on his family, John drove to the sheriff's department to report what he had seen.[33] The noose display was still hanging in the tree later that night when John drove home.[34]

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[28] App. 60, 87. At trial, Witcher testified that she was "petrified" and that she did not sleep that night because she was so scared. App. 66. Witcher further testified that her sister, Keena, was "terrified," that Keena's sons were "very fearful," and that Witcher had told Keena to lock her doors and to call her and 911 if she heard anything suspicious. App. 67.

[29] App. 94.

[30] *Id.*

[31] The Mitchells' boys were eighteen and thirteen at the time of trial, which took place about three months after the crime. App. 33, 94-95.

[32] App. 94.

[33] App. 87.

[34] App. 87-88.

The next morning, Captain Paul Caldwell with the Franklin County Sheriff's Office drove to Turner's house to investigate.[35] When Captain Caldwell pulled up to the home, Turner was standing outside with his elderly mother, and Caldwell asked him about the dummy, which was still hanging from the tree.[36] Turner initially told the officer that it was a "scarecrow."[37] But when Caldwell pointed out that Turner did not have a garden, Turner replied, "[W]ell maybe [I] implied it to scare people away."[38] Turner added that he was a "raciest,"[39] and that he "did like blacks but did not like niggers."[40]

Captain Caldwell told Turner that the object in the tree constituted a "violation," and that it would be seized after Caldwell spoke with the Commonwealth's Attorney.[41] Turner said he might just put up another one, and

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[35] App. 113-14.

[36] App. 114-15, 123.

[37] App. 115.

[38] *Id.*

[39] It appears from the record that this spelling is consistent with Turner's pronunciation of the word. App. 115-16, 131.

[40] App. 115.

[41] App. 115-16.

Caldwell told him that would not be a good idea.[42] At this point the conversation ended because Turner had to take his elderly mother to an appointment.[43]

After Turner left, Captain Caldwell and another officer photographed the dummy as it hung in the tree.[44] Duct tape had been wrapped around the dummy's neck, and rope had been tied around its neck and around one of its arms and then tied to branches in the tree.[45] The dummy's feet were hanging several feet off the ground.[46] And the dummy was "clearly visible" from Lindsey Lane.[47]

At trial, Witcher testified about her prior experiences with Turner before the events in question. Witcher said that in April of 2015, Turner stuck his middle finger up at her as she was driving past him.[48] Witcher stopped the vehicle and asked Turner if he had a problem with her, and, "in an outrage," Turner responded, "You

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[42] App. 116.

[43] App. 114, 116.

[44] App. 117, 119, 139-40; Add. at 43-44. Two color photographs of the noose and dummy hanging in the tree were admitted at trial as Commonwealth's Exhibit 1, but the copies in the appendix are black-and-white and difficult to make out. App. 139-40. For the Court's convenience, the Commonwealth has included color versions of these photographs as an addendum to this brief. Add. at 43-44.

[45] App. 117-18, 139-40, 154-56.

[46] App. 118.

[47] App. 119.

[48] App. 52-53.

people are nothing but ignorant."[49] When Witcher protested, Turner called her "a stupid B," and told her that no one who lived on the road liked her, that she had "no business" being there, and that she needed to slow down.[50]

The Mitchells also had had negative interactions with Turner before the noose appeared. In December 2013, Turner sent them a letter apologizing for the type of person he was and for not giving the Mitchells a chance to let him find out what kind of neighbors they were.[51] Turner also called the police several times to report that the Mitchells were "playing some kind of humming noise that he was very agitated about."[52] As a result, the police repeatedly responded to the Mitchells' home to investigate the alleged noise.[53] Subsequently, Turner stopped by the Mitchells' house to complain about the noise, and Keena told him that she did not know where it was coming from.[54] Turner told her to keep listening for it, and then started complaining about people speeding on the road.[55] When Keena mentioned that the police had come by to ask about the humming noise, Turner told her, "Well I admit I

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[49] App. 53.
[50] App. 53-54.
[51] App. 76-77, 107.
[52] App. 110.
[53] App. 110-11.
[54] App. 111.
[55] *Id.*

called the cops, again I apologize because I'm not giving you all a chance to find out what kind of neighbors you are."[56]

Finally, in January or February 2015, Turner sent the Mitchells a notecard that contained the handwritten message, "Here is the day and time of the wrestling programs so you can start the Goddam humming noise," and listed the dates and times for three programs.[57] Turner added that the "[n]ext step" was to contact their landlords, and the Mitchells needed to "[b]e careful."[58]

John Mitchell also testified about his persistent fear for his and his family's safety after Turner hung the noose.[59] John would not allow his son to walk past Turner's house because he was uncertain what Turner was capable of doing.[60] "If he can hang a noose I don't know what he's going to do," John told the trial court.[61] John stated that before he left for work each morning, he checked to make sure no one was standing in his yard.[62] John worried that someone might be waiting to shoot him in the back, and that it might not be safe to leave his sons at

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[56] *Id.*

[57] App. 103-04, 153.

[58] App. 104, 153.

[59] App. 94-96.

[60] App. 94.

[61] *Id.*

[62] App. 95.

home without him.[63] When John returned home from work each evening, he wondered whether he was going to have something thrown at his house, and whether he was going to find a message spray-painted on his home.[64]

MATERIAL PROCEEDINGS BELOW

Before trial, Turner filed a motion to dismiss, arguing that he could not be convicted under Code § 18.2-423.2 because the statute does not prohibit hanging a noose on private property.[65] Turner further argued that prohibiting him from hanging a noose on his private property violated his First Amendment right to free speech.[66] At a pre-trial hearing, defense counsel clarified that he was "not arguing the statute is unconstitutional," only that arresting Turner for violating the statute was unconstitutional because the noose had been located on Turner's property.[67] The trial court took the motion under advisement.[68]

At trial, Turner moved to strike at the close of the Commonwealth's evidence.[69] Relevant to this appeal, defense counsel argued that Turner had not

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[63] *Id.*

[64] *Id.*

[65] App. 9.

[66] App. 6, 9-10.

[67] App. 29.

[68] App. 11, 30.

[69] App. 125.

displayed the noose "on a highway or other public place" because he had displayed it in his yard, and "[a] yard is a private place."[70] The trial court denied the motion to strike and found Turner guilty as charged.[71] The trial court made a factual finding that Turner had hung the noose "up in a tree so that you can see it very visibly from the road," and thus the court concluded that Turner had hung the noose in a "public place" within the ambit of the statute.[72] The trial court also denied Turner's pending motion to dismiss on constitutional grounds, finding that Turner had hung the noose with the intent "to scare people," and that such conduct was properly prohibited.[73]

Turner then filed a motion to reconsider in which he raised the same constitutional and statutory interpretation arguments he had raised at trial.[74] Before sentencing, the trial court heard argument and denied the motion.[75] The trial court held that "[w]hen you put an object way up in the air near a road[,] that's public."[76] Moreover, the trial court explicitly found that Turner had hung the

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[70] App. 126-27.
[71] App. 132-33, 161-62.
[72] App. 133.
[73] App. 134, 165.
[74] App. 166-73.
[75] App. 177-85, 215.
[76] App. 184.

noose "way up in the air so it could be seen by the public," and that he had hung it there "to intimidate."[77]

Turner appealed to the Court of Appeals, arguing that he had "an absolute right under the First Amendment of the United States Constitution, however reprehensible or offensive, to burn a cross, fly any flag or to hang a noose in/on [his] own private property."[78] The Court of Appeals agreed that "the First Amendment protects Turner's right to be a racist and even to convey his racist beliefs to others."[79] But the Court added that "the protections of our Constitution do not permit [Turner] to threaten or intimidate others who do not share his views."[80] "Therefore," the Court held, "when [Turner's] 'speech' took the form of actions intended to threaten, intimidate, or place others in reasonable fear of bodily harm, his symbolic 'speech' was not entitled to constitutional protection."[81]

The Court of Appeals further held that Turner had defaulted his second assignment of error, in which he had argued that he had "an absolute right under the First Amendment to use symbolic or offensive conduct however reprehensible

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[77] App. 185.

[78] *Turner*, 67 Va. App. at 56-57, 792 S.E.2d at 304.

[79] *Id.* at 61, 792 S.E.2d at 306.

[80] *Id.*

[81] *Id.*

or offensive *and with the intent to intimidate* if he did so upon his own property."[82] Because Turner had "failed to cite any authority whatsoever in support of his argument that the First Amendment offers blanket protection for threats made on his private property," Turner had "failed to comply with the provisions of Rule 5A:20(e)."[83] The Court also noted that it could think of "no principled constitutional reason" why typically unprotected speech should be protected merely because the speaker happened to own the property where he spoke, "and Turner [had] offered none."[84]

Finally, the Court of Appeals rejected Turner's statutory argument that he had not hung the noose in a "public place" under Code § 18.2-423.2(B) because the tree was located on his private property.[85] The Court noted that the General Assembly had used the word "property" in subsection (A), but the word "place" in subsection (B).[86] So the Court was required to "presume" that "the General

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[82] *Id.* (emphasis added).

[83] *Id.*

[84] *Id.* at 61-62, 792 S.E.2d at 306.

[85] *Id.* at 62, 792 S.E.2d at 306.

[86] *Id.* at 62, 792 S.E.2d at 307.

Assembly meant something other than public *property* when it proscribed the displaying of a noose in a 'public *place*' in subsection (B)."[87]

Recognizing that "the General Assembly's purpose in enacting the noose statute [was] to prohibit people from displaying nooses to communicate 'true threats' as defined in [*Virginia v. Black*, 538 U.S. 343 (2003)] ," the Court of Appeals adopted the same definition for "public place" that this Court endorsed in *Hackney v. Commonwealth*, 186 Va. 888, 45 S.E.2d 241 (1947).[88] "Extrapolating from the language in *Hackney*," the Court held that "the use of offensive language by use of a symbol on one's own premises constitutes a violation of the law when that symbol is used as a means to communicate it to the public, and thus disturbs persons who are within the viewpoint of the communication, display, or message."[89] Holding that it "is without doubt that the location of the noose and dummy in Turner's front yard—where it was 'clearly visible' from the street—qualifies as a 'public place' under the definition in *Hackney*," the Court of Appeals affirmed.[90]

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[87] *Id.* at 63, 792 S.E.2d at 307.

[88] *Id.* at 64-65, 792 S.E.2d at 308.

[89] *Id.* at 64, 792 S.E.2d at 307-08.

[90] *Id.* at 65-66, 792 S.E.2d at 308.

STANDARD OF REVIEW

"Under well-settled principles of appellate review," this Court will "consider the evidence presented at trial in the light most favorable to the Commonwealth, the prevailing party below."[91] "Constitutional questions are questions of law, which the Court reviews de novo."[92] Likewise, defining the elements of an offense presents questions of law reviewed de novo.[93] "But the factual findings of the circuit court are not to be disturbed unless they are plainly wrong or are without evidence to support them."[94]

ARGUMENT

I. Turner's actions constitute a true threat, and true threats are not protected by the First Amendment.

Enacted in 2009, Virginia Code § 18.2-423.2 provides as follows:

> (A) Any person who, with the intent of intimidating any person or group of persons, displays a noose on the private property of another without permission is guilty of a Class 6 felony.
>
> (B) Any person who, with the intent of intimidating any person or group of persons, displays a noose on a highway or other public place in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury is guilty of a Class 6 felony.[95]

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[91] *Wilkins v. Commonwealth*, 292 Va. 2, 6, 786 S.E.2d 156, 159 (2016).

[92] *Id.* at 7, 786 S.E.2d at 159.

[93] *Lawlor v. Commonwealth*, 285 Va. 187, 223-24, 738 S.E.2d 847, 868 (2013).

[94] *Wilkins*, 292 Va. at 7, 786 S.E.2d at 159.

[95] VA. CODE ANN. § 18.2-423.2(A)-(B) (2014).

Turner was convicted of violating subsection (B).

In the portion of his brief relating to his first three assignments of error, Turner argues that his conviction should be reversed because he had "an *absolute right* under the *First Amendment of the United States Constitution*, however reprehensible or offensive, to burn a cross, fly any flag or to hang a noose in/on [his] own private property."[96] Not so. Freedom of speech is not absolute, and it does not protect true threats. Just as the First Amendment does *not* protect the threatening act of cross burning—contrary to Turner's assertion—it does not entitle Turner to threaten his African American neighbors by displaying in public view a noose strangling a black-faced dummy made to look like "a black man hanging from a tree."[97] Accordingly, Turner's conviction does not run afoul of the Constitution, and it should be affirmed.

A. Like Virginia's cross-burning statute, Virginia's noose statute criminalizes true threats.

Virginia's noose statute is substantially similar to Virginia's cross-burning statute, which the United States Supreme Court upheld against a First Amendment challenge in 2003 after three defendants were convicted under provisions similar to

[96] Opening Br. at 12 (first emphasis added).

[97] App. 61, 63.

those in the noose statute.[98] The cross-burning statute makes it a Class 6 felony "for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place."[99] The Supreme Court's holding in *Black* that Virginia "may ban cross burning carried out with the intent to intimidate" without violating the First Amendment,[100] compels the same conclusion here: Virginia may permissibly ban displaying a noose with the intent to intimidate, as the General Assembly has done in Code § 18.2-423.2.[101]

1. States are permitted to ban threats, such as cross burning, that are intended to intimidate people by placing them in fear of bodily harm.

In *Black*, the Supreme Court made clear that the "protections afforded by the First Amendment" are "not absolute," noting that the Court has "long recognized

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[98] *Black*, 538 U.S. at 347-48.

[99] *Id.* at 348; VA. CODE ANN. § 18.2-423 (2014).

[100] 538 U.S. at 347, 363.

[101] Unlike the noose statute, the cross-burning statute also provided that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." *Black*, 538 U.S. at 348; VA. CODE ANN. §§ 18.2-423, 18.2-423.2. A plurality of the Court struck down that provision holding that it "renders the statute unconstitutional in its current form," *id.* at 347-48, 367, and this Court held on remand that the offending provision could be severed, *Elliott v. Commonwealth*, 267 Va. 464, 470-72, 593 S.E.2d 263, 266-68 (2004). Virginia's noose statute contains no such prima-facie-evidence provision, so the plurality portion of the Supreme Court's decision is not relevant to this appeal.

that the government may regulate certain categories of expression consistent with the Constitution."[102] True threats are one example, which a State can ban without violating the First Amendment.[103]

As the Supreme Court explained, "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[104] Even where the speaker does not "actually intend to carry out the threat," a "prohibition on true threats 'protects individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"[105]

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[102] *Black*, 538 U.S. at 358.

[103] *Id.* at 359. *See also Watts v. United States*, 394 U.S. 705, 707 (1969) ("What is a threat must be distinguished from what is constitutionally protected speech."); *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941) ("[U]tterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.").

[104] *Black*, 538 U.S. at 359.

[105] *Id.* at 360 (quoting *R. A. V. v. St. Paul*, 505 U.S. 377, 408 (1992)). *See also Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) ("True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation.") (Alito, J., concurring in part, dissenting in part); *United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012) (noting that "true threats 'by their very utterance inflict injury' on the recipient") (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

Importantly, intimidation in the "constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[106]

Applying this analysis in the context of cross burning, the Supreme Court had no problem concluding that cross burning constituted a true threat, given its potency as a "message of intimidation."[107] Indeed, the Court observed, "[t]he history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence."[108] "Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan,"[109] which burned crosses as "potent symbols of shared group identity and ideology."[110] But the Klan also burned crosses to convey threats. "Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence."[111] "These cross burnings embodied threats to

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[106] *Black*, 538 U.S. at 360.

[107] *Id.* at 352-57.

[108] *Id.* at 360.

[109] *Id.* at 352.

[110] *Id.* at 356.

[111] *Id.* at 354.

people whom the Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence."[112]

While cross burning "sometimes carries no intimidating message," many times "the intimidating message is the *only* message conveyed."[113] "For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm."[114] What is more, "the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical."[115] To the contrary, the "person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan."[116]

The U.S. Supreme Court reversed this Court's ruling that Virginia's "cross-burning statute is unconstitutional because it discriminates on the basis of content

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[112] *Id.* at 355.
[113] *Id.* at 357.
[114] *Id.*
[115] *Id.*
[116] *Id.*

and viewpoint."[117] On the contrary, the First Amendment permits a state to "prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm."[118] In light of its "long and pernicious history as a signal of impending violence," cross burning "is a particularly virulent form of intimidation."[119] So Virginia can "outlaw cross burnings done with the intent to intimidate" even if it chooses not to prohibit other intimidating messages.[120]

2. States are permitted to ban the display of a noose as a form of intimidation because, like cross burning, it constitutes a true threat.

The U.S. Supreme Court's analysis and ultimate holding in *Black* control the outcome here. Under the Court's reasoning in *Black*, hanging a noose in the manner the statute proscribes constitutes a "true threat," and such displays are equally unworthy of First Amendment protection.

Like burning crosses, hanging nooses and the barbaric practices they evoke share a "long and pernicious history as a signal of impending violence." *Black*, 538 U.S. at 363. To our shame, "[i]t has been said that our country's national

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[117] *Id.* at 360.

[118] *Id.* at 363.

[119] *Id.*

[120] *Id.*

crime is lynching."[121] Indeed, the "practice whereby mobs capture individuals suspected of crime, or take them from the officers of the law, and execute them without any process at law, or break open jails and hang convicted criminals, with impunity, is to be found in no other country of a high degree of civilization."[122]

"During this country's 'lynching era'—the five decades between the end of Reconstruction and the beginning of the Great Depression, between 1880 and 1930—at least 2,462 African American men, women, and children died at the hands of southern mobs."[123] "Almost all of their killers were white."[124] Mobs inflicted deaths "of extraordinary, sadistic cruelty."[125] Victims were often tortured before being executed, sometimes "by being slowly roasted over a fire," other times "by having limbs or sexual organs amputated."[126] After an execution, members of the mob might distribute "pieces of the charred remains . . . as souvenirs to the mob whose members desired a keepsake as a remembrance of the

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[121] James Elbert Cutler, *Lynch-law: An Investigation Into the History of Lynching in the United States* 1 (1905).

[122] *Id.*

[123] Lu-in Wang, *The Complexities of "Hate"*, 60 Ohio St. L.J. 799, 833 (1999).

[124] *Id.*

[125] *Id.* at 834.

[126] *Id.*

notable happening."[127] "In short, the phenomenon of lynching exhibited American society in its most ferocious and inhuman manifestation."[128]

Like cross burning, "lynching had a powerful terroristic effect on the target population," which extended far beyond those who witnessed the violence firsthand.[129] "The use of violence was aimed not just at the individual victim but at the black community generally, and the gruesome details of each event were publicized widely through the press and word of mouth."[130] "As a result, southern blacks lived with the knowledge that any one of them could be a victim at any time."[131]

It is against this historical backdrop that Virginia enacted its noose statute.[132] Other States, too, have criminalized hanging a noose in a place where it is likely to be seen by others with the intent to intimidate, threaten, or terrorize.[133] These

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[127] *Id.*

[128] *Id.*

[129] *Id.* at 835.

[130] *Id.* at 835-36.

[131] *Id.* at 836.

[132] VA. CODE ANN. § 18.2-423.2 (2014).

[133] *See* CAL. PENAL CODE § 11411(a) (Deering, Lexis Advance 2017); CONN. GEN. STAT. § 46a-58(d) (Lexis Advance 2017) D.C. CODE § 22-3312.02(a) (Lexis Advance 2017); LA. REV. STAT. ANN. § 14:40.5 (Lexis Advance 2017); N.Y. PENAL LAW § 240.31(5) (Lexis Advance 2017); N.C. GEN. STAT. § 14-12.13 (Lexis Advance 2017).

statutes reflect the States' recognition that nooses have been used throughout our nation's history as effective tools of intimidation. For instance, when California prohibited noose hanging in 2009, its legislature noted that "[h]anging a noose is directly correlated with America's history of racial hatred and murder, representing not only a threat to African American life and safety, but causing further psychological and emotional trauma as well, and noose hanging is still happening now."[134] "Given this history," the legislature concluded, "to a reasonable person, the display of a noose at a school, park, place of employment, or other public venue amounts to a direct and immediate threat of force that would intimidate persons based on racial characteristics."[135]

In prohibiting such intimidating conduct, Virginia's noose statute is narrowly tailored to only proscribe conduct that qualifies as a "true threat." The statute contains the same "intent of intimidating any person or group of persons" element that makes Virginia's cross-burning statute permissible under the First Amendment.[136] And the noose statute does *not* include any prima-facie-evidence

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[134] CAL. PENAL CODE § 11411 (note following summaries of the amendments).

[135] *Id. Cf. Black*, 538 U.S. at 388 (Thomas, J., dissenting) (noting that, "[i]n every culture, certain things acquire meaning well beyond what outsiders can comprehend").

[136] *See Black*, 538 U.S. at 363; *compare* VA. CODE ANN. § 18.2-423.2, *with* VA. CODE ANN. § 18.2-423.

provision analogous to the cross-burning statute's provision that the plurality in *Black* concluded was unconstitutional.[137]

Moreover, the noose statute contains an additional element not found in the cross-burning statute that further insulates the noose statute from First Amendment vulnerability. To convict a defendant for hanging a noose under subsection (B), the Commonwealth has to prove that the noose was displayed "in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury."[138] This additional element demonstrates the legislature's intent to ensure that Code § 18.2-423 only criminalizes noose displays that constitute "true threats," as the Supreme Court has defined that term.[139]

In *Black*, the Supreme Court held that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim *in fear*

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[137] 538 U.S. at 347-48, 367.

[138] VA. CODE ANN. § 18.2-423.2 (B).

[139] *See Black*, 538 U.S. at 359-60, 363. For this reason, Turner's assertion that his "conduct was more akin to a display in a haunted house" falls apart. Opening Br. at 10. Haunted-house displays do not have a "direct tendency to place another person in reasonable fear or apprehension of death or bodily injury." VA. CODE ANN. § 18.2-423.2(B). Turner's noose display, on the other hand, had exactly that effect. App. 59, 66-67, 106, 86-87, 94-96, 107. Accordingly, Turner's Halloween-in-June defense fails.

of bodily harm or death."[140] And the Court ultimately held that a state may prohibit "those forms of intimidation that are most likely to inspire *fear of bodily harm*."[141] By proscribing only the display of a noose with the intent to intimidate in cases where the noose is displayed "on the private property of another without permission," or "on a highway or other public place in a manner having a direct tendency to place another person *in reasonable fear or apprehension of death or bodily injury*," the General Assembly ensured that the Commonwealth is required to prove a "true threat" to establish a violation, thereby ensuring that constitutionally protected speech is not enjoined.[142]

As the trial court found, Turner hung a noose and a dummy in a tree in his yard with the intent to intimidate people and in a manner having a direct tendency to place people in reasonable fear or apprehension of death or bodily harm.[143] And while Turner generally denies that the noose and dummy constitute a "true threat," he has not challenged the sufficiency of the evidence to prove that he hung the display with the intent to intimidate people and in a manner that had a "direct tendency to place another person in reasonable fear or apprehension of death or

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[140] *Black*, 538 U.S. at 360 (emphasis added).

[141] *Id.* at 363 (emphasis added).

[142] VA. CODE ANN. § 18.2-423.2 (emphasis added).

[143] App. 133, 185.

bodily injury."[144] Accordingly, it cannot be disputed that the display constituted a "true threat" as that term was defined in *Black*, and the First Amendment offers Turner no protection from the penalty that his threatening conduct rightly deserves.

B. True threats can be prohibited anywhere—even on private property.

1. In this Court, Turner seems to concede that he can be convicted for threatening people on private property.

Turner claims that he has "an absolute right" under the First Amendment to hang a noose on his "own private property," which he asserts "is protected to allow, however reprehensible or offensive, such actions."[145] But Turner has not cited any caselaw to support the theory that the First Amendment gives him a right to threaten people passing his home so long as he stays on his property. In fact,

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[144] VA. CODE ANN. § 18.2-423.2(B). Moreover, Turner cannot challenge the sufficiency of the evidence to prove those two elements for the first time in his appeal to this Court because he failed to do so in the Court of Appeals. "[A] legal decision made at one [stage] of the litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time." *Kondaurov v. Kerdasha*, 271 Va. 646, 658, 629 S.E.2d 181, 188 (2006) (quoting *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.- Conn.*, 108 F. Supp. 2d 549, 609 (W.D. Va. 2000)). *See also Robinson v. Commonwealth*, 273 Va. 26, 38, 639 S.E.2d 217 (2007) (accepting a trial court's factual finding as true because the appellants did not assign error to it); *MicroStrategy Inc. v. Li*, 268 Va. 249, 265, 601 S.E.2d 580 (2004) (refusing to address the sufficiency of the evidence to support certain factual findings because the appellant did not assign error to them).

[145] Opening Br. at 12.

Turner appears to concede that the Commonwealth may prohibit speech that "states a direct threat to a certain individual that constitutes a true threat," even when "the public does not have unlimited access" to the place where the speech occurs.[146] Thus, while Turner asserts that he has "an absolute right" to hang a noose on his private property, it is not clear that he means it.[147]

Perhaps this explains why Turner failed to cite any authority in the Court of Appeals to support his "second assignment of error in which he argue[d] that he had *an absolute right* under the First Amendment to use symbolic or offensive conduct however reprehensible or offensive and *with the intent to intimidate* if he did so upon his own property."[148] Noting that Turner had "failed to cite any authority whatsoever in support of his argument that the First Amendment offers blanket protection for threats made on his private property," the Court of Appeals correctly refused to consider the merits of Turner's second assignment of error because Turner had "failed to comply with the provisions of Rule 5A:20(e)."[149]

In his appeal to this Court, Turner claims that he complied with Rule 5A:20 in the Court of Appeals by citing "numerous citations including the First

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[146] *Id.* at 15.

[147] *Id.* at 12, 15.

[148] *Turner*, 67 Va. App. at 61, 792 S.E.2d at 306 (emphasis added).

[149] *Id.*

Amendment of the United States Constitution, Black, and Watts."[150] But Turner further claims that he argued below "that *because his conduct did not constitute a true threat* the protection of the First Amendment applied to him," and therefore the "Court of Appeals erred in concluding that [he] procedurally defaulted" his second assignment of error.[151] Apparently Turner did not mean to be taken literally when he argued in the Court of Appeals that he had an absolute right to hang a noose on his private property with the intent to intimidate people.[152] Accordingly, the Court of Appeals correctly declined to decide the issue.

But even if Turner intended to argue for such an absolute right in the Court of Appeals, he has forfeited that argument in this Court by failing to include an absolute-right assignment of error, by failing to cite any caselaw to support such a theory, and by conceding that the Commonwealth can prohibit speech on non-public property where the speech "states a direct threat to a certain individual that constitutes a true threat."[153]

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[150] Opening Br. at 18.

[151] *Id.* (emphasis added).

[152] *Turner*, 67 Va. App. at 61, 792 S.E.2d at 306.

[153] Opening Br. at 15. *See* Rules 5:27(c)-(d) (stating that the appellant's opening brief must contain assignments of error and "authorities relating to each assignment of error"); *Prieto v. Commonwealth*, 278 Va. 366, 381, 682 S.E.2d 910, 917 (2009) (holding that Prieto had waived certain assignments of error by failing to cite any authority to support them); *Teleguz v. Commonwealth*, 273 Va. 458,

2. To the extent that Turner is still arguing that he had an absolute right to threaten people on his private property, that argument fails.

Even assuming the issue is properly before this Court, however, Turner's ownership of the property where he hung the noose does not change the constitutional analysis. Indeed, "true threats are *never* protected speech."[154] Accordingly, "threats to [others], *however communicated*, are proscribable under the First Amendment."[155] The Constitution would not shield Turner from prosecution if he stood at the edge of his property and brandished a gun at his African American neighbors as they drove by his home. Likewise, hanging a noose with the effigy of a black person—calculated and intended to inflict racial terror—should not receive any constitutional protection. It defies logic to think that the First Amendment could be construed in such a way. And, in any event, such a construction cannot be squared with the Supreme Court's holding in *Black*.

473, 643 S.E.2d 708, 718 (2007) (holding that Teleguz had abandoned an assignment of error by failing to include "any substantive argument" to support "the grounds on which the error was assigned").

[154] *United States v. Crawford*, 665 F. App'x 539, 542 (7th Cir. 2016) (emphasis added).

[155] *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 773 (1994) (emphasis added). *See also Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1076 n.11 (9th Cir. 2002) (en banc) ("Threats, *in whatever forum*, may be independently proscribed without implicating the First Amendment.") (second emphasis added).

In fact, in the few cases where courts have considered whether it should matter—for constitutional purposes—whether a threat was uttered in public or in private, the judges who have advocated for such a distinction tend to assert that threats made in private should receive *less* constitutional protection, not more.[156]

Plainly Turner's threat—which he communicated to his neighbors in the form of a black-faced dummy made to look like "a black man hanging from a tree"—was not entitled to constitutional protection merely because he owned the property where he hung the noose.[157] What matters for constitutional purposes is Turner's intent to intimidate his neighbors—which he readily confessed to Captain Caldwell—and the overwhelming and undisputed evidence that he succeeded.[158] Turner is correct that "[p]oor and distasteful speech must still be protected."[159] But

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[156] *See McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1222 (9th Cir. 1992) (distinguishing cases involving "public speeches advocating violence" from "privately communicated threats of violence"); *Planned Parenthood*, 290 F.3d at 1099 (Kozinski, J., dissenting) (arguing that "[c]oercive speech that is part of public discourse enjoys far greater protection than identical speech made in a purely private context" because "[p]rivate speech is aimed only at its target," while public speech "seeks to move public opinion and to encourage those of like mind").

[157] App. 61, 63.

[158] App. 66-67, 86-87, 94-96, 107, 115. *Black*, 538 U.S. at 360.

[159] Opening Br. at 20.

a "constitutional limit to that allowance has been reached when an idea becomes a threat that causes reasonable people to fear leaving their homes."[160]

II. Turner violated Virginia's noose statute because he hung a noose in a "public place"—in his front yard in plain view of people passing by.

In his fourth and fifth assignments of error, Turner argues that he should not have been convicted for violating Virginia's noose statute because the tree in his front yard where he hung the noose is not a "public place" under Code § 18.2-423.2(B).[161] Turner insists that because subsection (A) only criminalizes displaying a noose with the intent to intimidate "on the private property of another *without* permission," it must be permissible to display a noose on private property *with* permission even if the display is visible to the public.[162] Essentially, Turner argues that because he could not have been convicted under subsection (A), he could not have been convicted under subsection (B) either.[163] But that conclusion does not follow from a plain reading of the statute.

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[160] *Turner*, 67 Va. App. at 65, 792 S.E.2d at 308.

[161] Opening Br. at 6-7, 12-17.

[162] *Id.* at 13-15 (emphasis added).

[163] App. 127.

A. A "public place" encompasses more than "public property."

Virginia's noose statute does not prohibit displaying a noose "on a highway or other public *property*," as Turner's argument seems to assume.[164] Instead, it prohibits displaying a noose "on a highway or other public *place*."[165]

"When interpreting and applying a statute, [courts] assume that the General Assembly chose, with care, the words it used in enacting the statute."[166] "Moreover, when the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code," a reviewing court "must presume that the difference in the choice of language was intentional."[167]

Here, the General Assembly used the word "property" in subsection (A), but "place" in subsection (B).[168] This Court "must presume" that the legislature meant something other than public *property* when it proscribed displaying a noose in a

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[164] Opening Br. at 14-15.

[165] VA. CODE ANN. § 18.2-423.2(B) (emphasis added).

[166] *City of Richmond v. Va. Elec. & Power Co.*, 292 Va. 70, 75, 787 S.E.2d 161, 163 (2016) (quoting *Kiser v. A.W. Chesterton Co.*, 285 Va. 12, 19 n.2, 736 S.E.2d 910, 915 n.2 (2013)).

[167] *Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337, 714 S.E.2d 922, 925 (2011).

[168] VA. CODE ANN. § 18.2-423.2.

"public *place*."[169] Accordingly, the Court should reject Turner's insinuation that the General Assembly meant to use the word "property" when it used the word "place" instead.[170]

This Court also should reject Turner's argument that because Code § 18.2-423.2(A) prohibits displaying a noose with the intent to intimidate "on the private property of another without permission," it *authorizes* displaying a noose on private property if the property owner consents to that display—regardless of whether the noose is visible to the public.[171] In other words, Turner asks the Court to hold that his "consent" to the placement of a publicly visible noose on his private property insulates him from criminal liability under either subsection of the statute.

But Turner misreads the statute. Under a plain reading of the statutory text, an individual who displays a noose on the private property of another with the property owner's permission could not be convicted under subsection (A), but he still could be convicted under subsection (B) if the noose is displayed in a "public place." So the fact that Turner could not have been convicted under subsection (A) does not establish whether he properly was convicted under subsection (B). To answer that

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[169] *Zinone*, 282 Va. at 337, 714 S.E.2d at 925; VA. CODE ANN. § 18.2-423.2(B) (emphasis added).

[170] Opening Br. at 14-15.

[171] *Id.* at 13-15, 19 (emphasis added).

question, this Court must determine whether the tree in Turner's front yard where he hung the noose qualifies as a "public place" within the ambit of subsection (B).

B. This Court should define "public place" in terms that further the legislature's intent in prohibiting threatening noose displays, and Turner's front yard clearly constitutes a "public place" under any such definition.

The Court of Appeals' decision in *Barnes v. Commonwealth*[172] exemplifies how courts should define statutory phrases like "public place" in terms that promote the legislative intent. In *Barnes*, the defendant argued that his convictions for indecent exposure and sexual display should be reversed because he was not "in public" or "in any public place" as defined by the relevant statutes at the time of the alleged offenses.[173] Since neither Code section nor the chapter provided a definition for the term "public place," the Court of Appeals had to define the statutory phrase as a matter of first impression.[174]

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[172] 61 Va. App. 495, 737 S.E.2d 919 (2013).

[173] *Id.* at 496-97, 737 S.E.2d at 920. Barnes was convicted for standing "up at the bars" at the front of his jail cell and masturbating while a female employee walked by. *Id.* at 497, 737 S.E.2d at 920. "At least eight other inmates were present in the cells behind her." *Id.*

[174] *Id.* at 499, 737 S.E.2d at 921.

To guide its analysis, the Court noted that the "primary objective of statutory construction is to ascertain and give effect to legislative intent."[175] Moreover, reviewing courts "construe a statute 'with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it.'"[176] Finally, a statute's "provisions should receive a construction that will render it harmonious with that purpose rather than one which will defeat it."[177]

Next, the Court of Appeals noted that courts in other jurisdictions had addressed the issue by focusing on the "open and notorious" nature of the act or the "reasonable foreseeability of public witnesses."[178] Following the lead of these jurisdictions, the Court held that the term "public place," as used in Virginia's indecent-exposure and sexual-display statutes, "comprises places and circumstances

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[175] *Id.* at 498, 737 S.E.2d at 921 (quoting *Commonwealth v. Zamani*, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998)).

[176] *Id.* (quoting *Esteban v. Commonwealth*, 266 Va. 605, 609, 587 S.E.2d 523, 526 (2003)).

[177] *Id. See also Fitzgerald v. Loudoun Cty. Sheriff's Office*, 289 Va. 499, 508 n.3, 771 S.E.2d 858, 862 n.3 (2015) (noting that the "rule of lenity serves only to resolve genuine ambiguities and 'does not abrogate the well recognized canon that a statute . . . should be read and applied so as to accord with the purpose intended and attain the objects desired if that may be accomplished without doing harm to its language'") (quoting *Cartwright v. Commonwealth*, 223 Va. 368, 372, 288 S.E.2d 491, 493 (1982)).

[178] *Barnes*, 61 Va. App. at 499, 737 S.E.2d at 921.

where the offender does not have a reasonable expectation of privacy, because of the foreseeability of non-consenting public witnesses."[179]

This definition, the Court reasoned, is consistent with the legislature's purpose in enacting the indecent-exposure and sexual-display statutes, which was "to protect individuals from witnessing the offensive conduct."[180] And since the defendant had exposed himself while "[s]tanding by the bars at the front of his cell in first floor lockup, [he] was in open view to staff, other inmates, and to members of the public with authorized access."[181] "Under the circumstances," the Court of Appeals held, "it was probable that a non-consenting witness would observe his conduct."[182] "Therefore, [the defendant] did not have a reasonable expectation of privacy and the facts were sufficient to support the finding that his behavior occurred in a public place."[183]

Similarly here, the General Assembly's purpose in enacting the noose statute is manifest: to prohibit people from displaying a noose in a manner that communicates a "true threat" as defined in *Black*. A "prohibition on true threats 'protects

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[179] *Id.* at 500, 737 S.E.2d at 921.
[180] *Id.* at 500, 737 S.E.2d at 921-22.
[181] *Id.* at 500, 737 S.E.2d at 922.
[182] *Id.*
[183] *Id.*

individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"[184] Thus, this Court should adopt a definition for the term "public place" that "give[s] effect to [this] legislative intent."[185]

Applying the definition adopted by the Court of Appeals in *Barnes* produces the desired result. Like the statutes in *Barnes*, Virginia's noose statute is designed "to protect individuals from witnessing the offensive conduct."[186] Traze Witcher, John Mitchell, and Captain Caldwell testified that the noose and dummy were "very visible" and "clearly visible" to them from the street, hanging in "plain sight" where you "couldn't miss [them] if you tried."[187] Accordingly, under the definition adopted in *Barnes*, Turner's conviction should be upheld because he hung a noose and dummy in a place and under circumstances "where [he] [did] not have a reasonable expectation of privacy, because of the foreseeability of non-consenting public witnesses."[188] Turner admitted as much when he told Captain Caldwell that the

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[184] *Black*, 538 U.S. at 360 (quoting *R. A. V.*, 505 U.S. at 408).

[185] *Barnes*, 61 Va. App. at 498, 737 S.E.2d at 921.

[186] *Id.* at 500, 737 S.E.2d at 921-22.

[187] App. 59, 89, 119.

[188] *Barnes*, 61 Va. App. at 500, 737 S.E.2d at 921.

dummy was a "scarecrow," meant not to scare birds away from a garden, but rather to "scare *people* away."[189]

This Court's decision in *Hackney v. Commonwealth*[190] bolsters the conclusion that the tree in Turner's front yard where he hung the noose display constitutes a "public place" under Virginia's noose statute. In *Hackney*, the Court upheld the disorderly-conduct conviction of a man who had verbally harassed a passerby from his front porch.[191] And the dictionary entries that the Court cited in *Hackney* to define "public place" apply equally well here.

First, the Court cited the second edition of Webster's International Dictionary, which defines the word "public" to mean "open to the knowledge or view of all; generally seen, known, or heard; without privacy, concealment, etc.," and "place" to mean "any particular spot or locality."[192] Second, the Court noted that according to another source, "[a] place so near and so open that persons traveling the highway can

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[189] App. 115 (emphasis added).

[190] 186 Va. 888, 45 S.E.2d 241 (1947).

[191] Turner claims *Hackney* is distinguishable because "Hackney is a case based on conduct, not symbolic speech." Opening Br. at 17. Turner is mistaken. The "conduct" at issue in *Hackney* was "vile and abusive *language* uttered by a man standing on his porch to a person passing along the public highway within thirty feet of the speaker." 186 Va. at 889-90, 45 S.E.2d at 241-42 (emphasis added).

[192] *Id.* at 891-92, 45 S.E.2d at 242-43.

see card or dice playing thereat is abstractly and per se a public place."[193] Finally, this Court noted that Bouvier's Law Dictionary defines "public place" as "[a]ny place so situated that what passes there can be seen by any considerable number of persons, if they happen to look."[194]

"[T]he dominant purpose of [the] enactment" of Virginia's disorderly conduct statute "was to preserve peace and good order."[195] Virginia's noose statute serves similar ends.[196] It follows, then, that adopting the definitions for "public place" cited in *Hackney* would further the legislative intent behind Virginia's noose statute. And it is equally apparent that the location of the noose displayed in Turner's front yard—where it was "clearly visible" from the street—qualifies as a "public place" under the definitions cited in *Hackney*.[197]

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[193] *Id.* at 892, 45 S.E.2d at 243.

[194] *Id.*

[195] *Id.*

[196] *See Black*, 538 U.S. at 360.

[197] App. 59, 89, 119. *See also Windham v. City of Fairhope*, 20 F. Supp. 3d 1323, 1338 (S.D. Ala. 2014) (holding that the plaintiff's "misconduct transpired in a public place because, regardless of precisely where [her] feet were planted, her actions and speech could be readily observed and overheard by persons outside of her property").

Under these circumstances, this Court should reject the cramped constructions of "public place" that Turner advocates,[198] which would result in an "unreasonably restrictive interpretation of the statute that would subvert the legislative intent expressed therein."[199] Interpreting Virginia's noose statute to authorize Turner's conduct would subvert the legislative intent behind that statute as surely as it would subvert the legislative intent behind Virginia's indecent-exposure statute to interpret it to allow a person to stand at the edge of his property and expose himself to passing motorists.[200]

Turner plainly displayed a noose in a place that was "open to the knowledge or view of all," "generally seen, known, or heard," "without privacy [or] concealment," "so near and so open that persons traveling the highway [could] see [it]," and "so situated that what passe[d] there [could] be seen by any considerable number of

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[198] Turner primarily relies on definitions from Black's Law Dictionary and a definition for "public place" contained in Code § 4.1-100. But those dictionary definitions "alone do not provide much guidance." *Turner*, 67 Va. App. at 63, 792 S.E.2d at 307. Moreover, "Code § 4.1-100 limits its definitions of terms, including 'public place,' to Title 4.1, applying the provisions of the Alcoholic Beverage Control Act." *Id.* at 62 n.8, 792 S.E.2d at 306 n.8 (quoting *Crislip v. Commonwealth*, 37 Va. App. 66, 70, 554 S.E.2d 96, 98 (2001)).

[199] *Barnes*, 61 Va. App. at 498, 737 S.E.2d at 921 (quoting *Armstrong v. Commonwealth*, 263 Va. 573, 581, 562 S.E.2d 139, 144 (2002)).

[200] *Cf. People v. Legel*, 321 N.E.2d 164, 167 (Ill. 1974) (treating the defendant's dining room as a "public place" because he exposed himself from behind "unveiled glass doors, with a light overhead, in plain view of the casual observer in the neighbor's living room" and "made no attempt to conceal his activities").

persons, if they happen[ed] to look."[201] Accordingly, the trial court and the Court of Appeals correctly concluded that Turner properly was convicted under Code § 18.2-423.2(B) for displaying a noose with the intent to intimidate in a "public place."

Finally, *Hackney* supports an alternative approach to resolving the statutory-construction question that focuses on where the prohibited conduct was felt—not on where it occurred. In *Hackney*, this Court reasoned that it would be "absurd to hold that a person, who stood in his own yard thirty feet from the highway and threw rocks at pedestrians passing by, was not a violator of the [disorderly-conduct] statute."[202] "It would be equally absurd to hold that a person was not a violator of the statute who, at night, stood in his own yard thirty or more feet from the highway and deliberately used a searchlight to blind passing motorists on the highway."[203]

To avoid such absurd results, this Court held that the "statute, strictly construed, does not require the person, charged with its violation, to be physically present in the highway or other public place."[204] Instead, a person commits disorderly conduct "in any street, highway, public building, or any other public place" when he

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[201] *Hackney*, 186 Va. at 891-92, 45 S.E.2d at 242-43.
[202] *Id.* at 892, 45 S.E.2d at 243.
[203] *Id.* at 893, 45 S.E.2d at 243.
[204] *Id.* at 892, 45 S.E.2d at 243.

"sets in motion an agency that tends to corrupt public morals or outrage the sense of decency of others using the highway in a peaceful and lawful manner."[205] Such a person commits a crime "in a highway or other public place" because "his acts or words [are] seen or heard by others lawfully using the highway."[206]

Under this alternative theory, Turner's conviction should be affirmed even if the Court assumes that the noose display was not physically located in a "public place" because it was clearly visible to Turner's neighbors traveling past Turner's front yard "on a highway or other public place."[207] Under either theory, Turner's conviction should be affirmed.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals affirming the judgment of the Franklin County Circuit Court convicting Jack Eugene Turner of displaying a noose with the intent to intimidate.

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[205] *Id.* at 890, 892, 45 S.E.2d at 242, 243.

[206] *Id.*

[207] VA. CODE ANN. § 18.2-423.2(B). *See also Weideman v. State*, 890 N.E.2d 28, 32 (Ind. Ct. App. 2008) (holding that Indiana's "public nudity statute prohibit[ing] knowingly or intentionally being visibly nude to persons in a public place . . . would include being nude in your front yard or your neighbor's front yard if you are visible to a sidewalk or road").

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein

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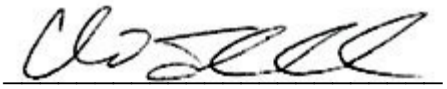

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CERTIFICATE OF TRANSMISSION AND SERVICE

On November 6, 2017, an electronic version of this brief was filed electronically with this Court, and the required copies were subsequently hand-delivered to the clerk's office in compliance with Rule 5:26(e). A copy was emailed to C. Holland Perdue III, counsel for the appellant, at cperduelaw@jetbroadband.com. In accordance with Rule 5:26(h), the undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities, certificate, and addendum contains 9,762 words and is within the page limit allowed under Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.

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Courtesy copies: The Honorable A. J. Dudley
The Honorable A. Joseph Canada, Jr.

ADDENDUM

PENGAD 800-631-6989
COMMONWEALTH'S
EXHIBIT
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