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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 170586

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

CARROLL EDWARD GREGG, JR.,

Appellee.

OPENING BRIEF OF THE COMMONWEALTH

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PRELIMINARY STATEMENT

The issue before the Court in this appeal concerns whether one can be convicted and punished in a single trial for a common law offense and a statutory offense where the elements of the two offenses, when viewed in the abstract, are not *always* the same and the legislature has not indicated an intent to prohibit prosecution and punishment for both offenses.

The Double Jeopardy Clause is not offended by the conviction and punishment in a single trial for common law involuntary manslaughter and the

statutory offense of unlawful shooting at an occupied vehicle where death results. The trial court therefore reached the right result and its judgment should be reinstated.

STATEMENT OF THE CASE

Carroll Edward Gregg, Jr. was tried by a jury in the Circuit Court of Fauquier County on an indictment charging murder, use of a firearm in the commission of murder, and maliciously shooting at an occupied vehicle whereby the life of an occupant "was put in peril, and which caused the death of such person." (App. 13-14). The jury convicted Gregg of common law involuntary manslaughter and of "unlawfully shooting at an occupied vehicle wherein death resulted, involuntary manslaughter, as charged in the indictment," but acquitted him of use of a firearm in the commission of murder. (App. 31-32). The jury fixed Gregg's punishment at 10 years in prison for each conviction, and the trial court subsequently sentenced him in accordance with the jury's verdict. (App. 32, 67-70).

The Court of Appeals of Virginia granted Gregg's appeal and in a published opinion issued February 28, 2017, a panel of that Court reversed the circuit court judgment as violative of double jeopardy protections. See Gregg v. Commonwealth, 67 Va. App. 375, 796 S.E.2d 447 (2017). (App. 416-27). The Court remanded the case for a "new penalty-determination proceeding" at which

"the circuit court shall require the Commonwealth to elect between" the two convictions. Id. at 388, 796 S.E.2d at 454. (App. 427). The Court of Appeals refused the Commonwealth's petition for rehearing en banc. (App. 428). By order of October 20, 2017, this Court granted the Commonwealth's petition for appeal.

ASSIGNMENT OF ERROR

> The Court of Appeals erred in finding that Gregg's convictions violated the Double Jeopardy protection against multiple punishments for the same offense. The Court erred: (a) in concluding that the General Assembly did not authorize conviction and punishment in a single trial for common law involuntary manslaughter and unlawfully shooting at a vehicle where death results; and (b) in conducting its Blockburger analysis, including the finding that every act of unlawfully shooting at an occupied vehicle involves criminal negligence.
>
> (Preserved in the Commonwealth's Petition for Rehearing en banc in the Court of Appeals of Virginia at 3, 12-15, 15-18; see also the Commonwealth's merits brief in the Court of Appeals at 15-22, 22-25).

STATEMENT OF FACTS

A. The Offenses

Late at night on June 5, 2014, Junior Montero Sanchez drove a tow truck for L and K Recovery, accompanied by Alex Marin in a separate car, to Gregg's home on Conde Road in Fauquier County, to repossess Gregg's truck. (App. 242, 248, 249). Sanchez hooked Gregg's vehicle up to the tow truck. (App. 251). Marin heard a man yell out the window of the home that they had "better get the F out of

here" and per Marin's instruction, Sanchez drove the tow truck down the driveway with Marin following behind him in the car. (App. 253, 255, 259). As the tow truck was stopped at the end of the driveway, Gregg twice fired a rifle. (App. 115, 140, 159, 259). A single gunshot struck Sanchez in the back and he died from the resulting injury to his lung and heart. (App. 122, 220, 221, 273, 390-93).

Sergeant Darrell Shores of the Fauquier County Sheriff's Department responded to Gregg's home. (App. 113). Gregg advised Shores that he owned the vehicle in tow and told Shores he had accidentally shot the tow truck driver. (App. 114, 155). Gregg said that he shot, fell, and shot again. (App. 115, 140). He also said that "[t]hey shouldn't be allowed to do this in the middle of the night." (App. 115).

B. Material Proceedings

1. Pre-trial matters

An indictment issued on June 25, 2014, expressly charged Gregg with first-degree murder (Count 1), use of a firearm in the commission of first-degree murder (Count 2), and first-degree murder by shooting at an occupied motor vehicle, with malice and premeditation, whereby the life of the occupant was put in peril, in violation of Code § 18.2-154 (Count 3). (App. 1-2). On February 2, 2015, Gregg filed a motion to dismiss the indictment, alleging a double jeopardy violation. (App. 3-8).

At a hearing held February 6, 2015, the Commonwealth moved to amend the indictment and the defense moved to continue the trial. (App. 74-79). The motion to amend the indictment was granted without objection and the amended indictment was issued *nunc pro tunc*. (App. 11-12, 81). Count 1 of the amended indictment charged murder, without express designation of degree, and Count 2 charged use of a firearm in the commission of murder. (App. 13). Count 3 charged that Gregg "feloniously, with malice, did shoot at a motor vehicle when such vehicle was occupied by one or more persons, whereby the life of such person was put in peril, and which caused the death of such person, to-wit, Junior M. Sanchez, in violation of Virginia Code Section 18.2-154." (App. 14).

Gregg thereafter filed a motion to dismiss the amended indictment, or in the alternative a motion *in limine*, arguing that conviction of both homicide offenses violated the Double Jeopardy Clause. (App. 15-23). By order entered September 15, 2015, the court recited that it had heard argument on the motion on September 14, 2015, and "for the reasons stated to the record and with no objection by the defendant" the ruling on the motion was "withheld until after the determination of guilt or innocence by the jury." (App. 24-26).

2. Trial

Gregg was tried by a jury on September 21-25, 2015. The jury was instructed in Instruction 15 on the elements of the offense of "maliciously shooting at an occupied vehicle with death resulting." (App. 27). The instruction provided for conviction of second-degree murder if the jury found the Commonwealth had proved the following elements:

1. That the defendant shot at a vehicle; and
2. That such vehicle was occupied by one or more persons; and
3. That, as a result, the life of a person in such vehicle may have been put in peril; and
4. That the act was done with malice; and
5. That the death resulted from such malicious shooting.

(App. 27).

The instruction further provided that if the jury found that the Commonwealth had proved the first three elements, but found "that the act was done unlawfully and not maliciously, and, further that death resulted from such unlawful shooting," then the jury should find the defendant guilty of "unlawfully shooting at an occupied vehicle wherein death resulted, involuntary manslaughter." (App. 27).

Instruction 20 instructed the jury on the elements of the common law offenses of first-degree murder, second-degree murder, and involuntary manslaughter. (App. 29-30). The instruction directed that if the jury found that the Commonwealth had established that the killing "although unintended, was the direct result of the negligence of the defendant, and so gross, wanton and culpable as to show a callous disregard of human life," it should find Gregg guilty of involuntary manslaughter. (App. 29-30).

The jury found Gregg guilty of common law involuntary manslaughter, not guilty of use of a firearm in the commission of murder, and guilty of "unlawfully shooting at an occupied vehicle wherein death resulted, involuntary manslaughter." (App. 31-33, 323).

3. Post-trial matters

At a hearing held September 28, 2015, Gregg argued *inter alia* that while Code § 18.2-154 did not use the term "criminal negligence," in every case where the elements of § 18.2-154 are satisfied "you always have criminal negligence," so every violation of § 18.2-154 will also be a violation of common law involuntary manslaughter. (App. 334).

The prosecutor countered that the elements of the two crimes were different under Blockburger v. United States, 284 U.S. 299 (1932), noting that common law involuntary manslaughter was an accidental killing committed with criminal

negligence, while under § 18.2-154, there was no requirement to prove such negligence. (App. 336). And, he argued, under the shooting-at-a-vehicle statute, the Commonwealth must prove a shooting at a vehicle. (App. 336). In sum, the prosecutor argued that each crime for which Gregg stood convicted contained an element of proof that the other did not. (App. 339).

In determining whether the legislature intended to authorize two punishments for the offenses, the court considered that the crimes were not subsections of the same statute, but in fact were contained in two different statutes, and different punishments were "initially authorized" by each of the statutes. (App. 339-40). The court noted that in looking at the statutes one could "almost argue" that the intent of the legislature was to have different punishments for the two crimes, and where one cannot determine the intent of the legislature because it is not explicitly stated, "you go to the Blockburger test." (App. 341). The court stated, "I don't think there can be any argument that there are different elements." (App. 341). The court denied the motion to dismiss. (App. 34, 342-43).

The court heard argument on Gregg's motion for reconsideration of the double jeopardy ruling on November 18, 2015. Gregg argued that under Holley v. Commonwealth, 64 Va. App. 156, 765 S.E.2d 873 (2014) (en banc), the two homicide convictions could not stand. He argued *inter alia* that under the common law "unitary prosecution" theory, where there is one victim and one death, there is

only one offense, and thus only one punishment can be imposed. (App. 350). Gregg also argued that the legislative history of Code § 18.2-154 demonstrated that the General Assembly did not intend for cumulative punishments under Code § 18.2-154 and common law involuntary manslaughter. (App. 351-58).

The prosecutor argued that Holley was not controlling, as that case involved separate provisions of a single statute, Code § 18.2-32, and that that Code section adopted common law homicide offenses and thus implicated the common law unitary theory of homicide. (App. 358-59). The prosecutor noted that the Court of Appeals recognized in Holley, that statutory offenses, such as those included in the capital murder statute, Code § 18.2-31, permitted multiple punishments. (App. 360). He argued that the two crimes here involved different elements and thus punishments for each offense were permissible. (App. 360-61).

The court found that Holley was distinguishable, and, relying on Bomber v. Commonwealth, No. 2451-11-3 Unp., 2013 Va. App. LEXIS 75 (Mar. 5, 2013), aff'd, No. 130572 Unp., 2014 Va. Unpub LEXIS 11 (Feb. 27, 2014), cert. denied, 135 S. Ct. 240 (2014), denied the motion. (App. 66, 363).

ARGUMENT

Gregg's convictions and sentences for common law involuntary manslaughter and the statutory offense of unlawfully shooting at an occupied vehicle where death results did not violate the Double Jeopardy Clause.

A. Standard of Review

This Court reviews de novo "'claims that multiple punishments have been imposed for the same offense in violation of the double jeopardy clause.'" Johnson v. Commonwealth, 292 Va. 738, 741, 793 S.E.2d 321, 322 (2016) (quoting Lawlor v. Commonwealth, 285 Va. 187, 227, 738 S.E.2d 847, 870 (2013)).

B. The Offenses in this Case

Involuntary manslaughter, which was included within Count 1 of the amended indictment, is a common law offense. Code § 18.2-36 sets forth the punishment for that offense. The crime is defined by case law as an accidental killing, "contrary to the intention of the parties, during the prosecution of an unlawful, but not felonious act, or during the improper performance of some lawful act." Cable v. Commonwealth, 243 Va. 236, 240, 415 S.E.2d 218, 220 (1992) (citation omitted). Accord Noakes v. Commonwealth, 280 Va. 338, 345, 699 S.E.2d 284, 288 (2010).

The two separate theories of involuntary manslaughter have survived in Virginia. The Court of Appeals of Virginia, however, in Darnell v. Commonwealth, 6 Va. App. 485, 370 S.E.2d 717 (1988), held that criminal negligence is an essential element of either theory of involuntary manslaughter. Id. at 491, 492-93, 370 S.E.2d at 720, 721. Accord Brown v. Commonwealth, 68 Va. App. 44, 51-52, 802 S.E.2d 190, 193-94 (2017).[1]

It does not appear that this Court has addressed Darnell in the years since the opinion was issued. But while the trial court in this case was bound by the holding in Darnell,[2] this Court is not bound by an opinion of the Court of Appeals of Virginia.

In contrast to common law involuntary manslaughter, Code § 18.2-154 establishes a separate statutory offense, which provided in pertinent part as follows at the time of Gregg's crimes:

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[1] In Brown, the Court of Appeals of Virginia acknowledged that in Darnell, it had "held for the first time that criminal negligence must be proven under both theories of common law manslaughter." Id. at 51, 802 S.E.2d at 194. That approach is consistent with the "modern tendency" to abandon "the whole concept of involuntary manslaughter based upon unlawful conduct alone, leaving the field occupied solely by involuntary manslaughter based upon criminal negligence or recklessness." 2 Wayne R. LaFave, *Substantive Criminal Law* §15.5(e), at 541 (2d ed. 2003).

[2] Jury Instruction 20, consistent with Virginia Model Jury Instruction G33.600, required the jury to find criminal negligence in order to convict of common law involuntary manslaughter. (App. 29-30).

> Any person who maliciously shoots at, or maliciously throws any missile at or against, any train or cars on any railroad or other transportation company or any vessel or other watercraft, or any motor vehicle or other vehicles when occupied by one or more persons, whereby the life of any person on such train, car, vessel, or other watercraft, or in such motor vehicle or other vehicle, may be put in peril, is guilty of a Class 4 felony. . . .
>
> If any such act is committed unlawfully, but not maliciously, the person so offending is guilty of a Class 6 felony and, in the event of the death of any such person, resulting from such unlawful act, the person so offending is guilty of involuntary manslaughter.

The statutory offense requires neither accidental killing nor criminal negligence.[3] The statute requires only the commission of the *felony* offense of unlawful shooting at an occupied vehicle, where lives may be put in peril, and a resulting death. Common law involuntary manslaughter on the other hand need not involve shooting or throwing a missile; nor must a vehicle be involved.

C. Double jeopardy analysis in a single-trial case.

"In a case where both of the defendant's convictions occurred in a single trial, the only relevant constitutional guarantee is protection against multiple punishments for the same offense." Payne v. Commonwealth, 277 Va. 531, 540,

[3] Nor does it provide that one can commit the offense where death results from an unlawful, but not felonious, act.

674 S.E.2d 835, 839 (2009).[4] In that scenario, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'" Stephens v. Commonwealth, 263 Va. 58, 63, 557 S.E.2d 227, 230 (2002) (quoting Missouri v. Hunter, 459 U.S. 359, 366 (1983)).

Where, as here, the legislative intent is not expressly stated, however, the appellate courts must rely on the Blockburger test to discern the intent. See United States v. Martin, 523 F.3d 281, 291, 292 (4th Cir. 2008). Indeed, in Gaddie v. Commonwealth, 1155-09-1 Unp., 2010 Va. App. LEXIS 247 (June 22, 2010), the Court of Appeals, in affirming the defendant's convictions and sentences in a single trial for first-degree murder and lynching by a mob, held that the Blockburger test "is just the right 'rule of statutory construction' to discern legislative intent in the absence of an express declaration." Id. at *8 (citation omitted).[5]

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[4] In Payne, the defendant was convicted of statutory aggravated involuntary manslaughter under Code § 18.2-36.1(B) and felony homicide, under Code § 18.2-33, arising from the death of a single pedestrian. This Court noted that the legislative intent was "clear" on the face of the statutes and that these were "the two distinct offenses." Payne, 277 Va. at 540, 674 S.E.2d at 839. The Court, however, also conducted a Blockburger analysis in that case. See id. at 540-41, 674 S.E.2d at 839-40.

[5] While unpublished opinions have no precedential weight, they may be cited as informative. See Rules 5:1(f); 5A:1(f).

1. Virginia's legislature has not indicated that a conviction for both offenses is prohibited.

The Court of Appeals determined below that

> There is no evidence in the legislative history of Code § 18.2-154 or case law that suggests that the General Assembly intended to create an offense separate and distinct from common law involuntary manslaughter, or to permit the Commonwealth to obtain multiple convictions and punishments under Code § 18.2-154 and common law involuntary manslaughter for a single killing.

Gregg, 67 Va. App. at 386, 796 S.E.2d at 453. (App. 425).

Despite the lack of specialized language in Code § 18.2-154 as is found in, for example, Code § 18.2-53.1 (use of a firearm in the commission of certain felonies) or § 18.2-108.01 (grand larceny with intent to sell), other factors demonstrate that the legislature did not intend to prohibit multiple punishments upon convictions for common law involuntary manslaughter and unlawfully shooting at an occupied vehicle resulting in death. The failure of the legislature to include specific language indicating that prosecution of both offenses is permissible "does not control" the double jeopardy analysis. Dalo v. Commonwealth, 37 Va. App. 156, 164 n. 4, 554 S.E.2d 705, 709 n.4 (2001), aff'd, 264 Va. 431, 570 S.E.2d 840 (2002).

Significantly, the statutes at issue in this case are located in different chapters of Title 18.2 of the Code and the aim of the two statutes is decidedly different. Chapter 4, where Code § 18.2-36 is located, is entitled, "Crimes Against

the Person." Section 18.2-154 is found in Chapter 5, which is entitled, "Crimes Against Property." Furthermore, Code § 18.2-154 does not recognize any circumstances under which one can be convicted of *voluntary* manslaughter as a result of shooting at an occupied vehicle. The statutory manslaughter offense under § 18.2-154 is an offense distinct from common law involuntary manslaughter.

In Bomber, the Court of Appeals affirmed convictions and sentences in a single trial for aggravated malicious wounding in violation of Code § 18.2-51.2, a statutory offense, and second-degree murder, a common law offense, the punishment for which is found in Code § 18.2-32.[6] Bomber complained that one criminal act of stabbing resulted in multiple punishments in violation of the constitutional protection against double jeopardy. The Court of Appeals held that appellate courts must "first consider whether 'the legislative intent is clear from the face of the statute or the legislative history. . . .'" Bomber, 2013 Va. App. LEXIS 75, at *3 (quoting Andrews v. Commonwealth, 280 Va. 231, 284, 699 S.E.2d 237, 267 (2010) (additional citation omitted, alteration in original)).

[6] This Court affirmed without opinion the judgment of the Court of Appeals. See Bomber v. Commonwealth, No. 130572 Unp., 2014 Va. Unpub. LEXIS 11 (Feb. 27, 2014), cert. denied, 135 S. Ct. 240 (2014).

The Court of Appeals in Bomber discussed Andrews at length and distinguished that case. Bomber, at *4-6.[7] The Court in Bomber determined that it could not readily discern the legislative intent regarding multiple punishments for aggravated malicious wounding and second-degree murder. The Court held as follows:

> We agree there is no *explicit* legislative authorization. Likewise, however, there is no explicit or implicit legislative prohibition on imposing multiple punishments in, or applicable to, either statute. They are separate statutes, not subsections of the same statute as in Andrews, and they authorize different degrees of punishment. We cannot ascertain the legislative intent as to the double jeopardy issue before us by a plain reading of the statutes or by the legislative history. Therefore, we must apply the Blockburger test and compare the elements of proof for each offense.

Id. at *7.

The Court of Appeals in Bomber, conducted a Blockburger analysis and determined that the two offenses, when viewed in the abstract, had separate and distinct elements and thus concluded the legislature had "authorized separate punishments for these acts." Id. at *9.

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[7] In Andrews, the defendant was convicted and sentenced for four separate counts of capital murder for the killing of two victims. He was prosecuted under Code §§ 18.2-31(7) and 18.2-31(8), both of which address the capital predicate of the killing of multiple persons. This Court vacated the four death sentences and remanded the case for a new penalty determination. See Andrews, 280 Va. at 281, 287-88, 699 S.E.2d at 266, 269-70.

Here, as in Bomber, there is no explicit or implicit prohibition of multiple punishments. The Court of Appeals erred in concluding that the legislature had not intended to authorize conviction and punishment for both offenses in a single trial.

2. The two offenses contain separate elements under a proper application of the Blockburger test.

In applying the Blockburger test, an appellate court must "look at the offenses charged ***in the abstract, without referring to the particular facts of the case under review***." Coleman v. Commonwealth, 261 Va. 196, 200, 539 S.E.2d 732, 734 (2001) (emphasis added). "'[U]nder the Blockburger test, whether two offenses are the same depends on the elements of the crimes and not the similarity of the underlying facts.'" Martin, 523 F.3d at 292 (citation omitted).

Put simply, if the offenses do not always require proof of the same elements, then there is no double jeopardy violation under Blockburger. See United States v. Terry, 86 F.3d 353, 356 (4th Cir. 1996); see also Schwartz v. Commonwealth, 45 Va. App. 407, 443, 611 S.E.2d 631, 649 (2005) (even if one offense is committed in some cases of the commission of the other offense, it is not necessarily a lesser included offense of the other). The Court of Appeals erred in its Blockburger analysis in the instant case.

In Coleman, the defendant was convicted of attempted murder, a common law offense, and malicious wounding, a statutory offense, as a result of the

defendant's shooting of the victim. See Coleman, 261 Va. at 200, 539 S.E.2d at 734. This Court, applying the Blockburger test to the elements of those two crimes *in the abstract*, concluded that these were distinct crimes and affirmed Coleman's convictions and sentences for both offenses. See id. at 202, 539 S.E.2d at 735.[8]

In this case, Gregg was convicted and sentenced for common law involuntary manslaughter. In order to prove Gregg's guilt of that offense, the Commonwealth had to prove that Gregg unintentionally killed another person as a result of criminal negligence.[9] Common law involuntary manslaughter may be committed in any number of ways. It is not necessary that one shoot or throw any missile at the victim. It is not necessary that the victim of such a crime be located in any type of vehicle, train, or watercraft.

On the other hand, to be convicted of an unlawful shooting at a vehicle which results in death under Code § 18.2-154, there must be a *felonious* shooting or throwing of a missile at a vehicle occupied by one or more individuals, such that life may be put in peril, and as a result of that conduct a death occurs. The statute

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[8] In Payne v. Commonwealth, 257 Va. 216, 509 S.E.2d 293 (1999), this Court affirmed the imposition of four death sentences, for the murders of two victims, where the killing of one victim occurred during the commission of both rape and robbery, and the killing of the other victim occurred during an attempted rape and an object sexual penetration. See id. at 228-29, 509 S.E.2d at 300-01.

[9] As noted above, it is arguable that this Court's jurisprudence includes a definition of involuntary manslaughter that requires only an unlawful but not felonious act resulting in death.

does not require proof of criminal negligence, which is the "'gross, wanton, and culpable'" conduct "demonstrating a 'reckless disregard for human life.'" Jones v. Commonwealth, 272 Va. 692, 701, 636 S.E.2d 403, 408 (2006) (citation omitted). Moreover, while the killing committed in a common law involuntary manslaughter is unintended, no such requirement is found in Code § 18.2-154, which Code section does not include any offense labeled *voluntary* manslaughter. The shooting simply must be "unlawful," but not malicious.

The Court of Appeals stated in this case that "[b]ecause the element of shooting at an occupied vehicle in Code § 18.2-154 is simply the criminally negligent act which renders the accused guilty of involuntary manslaughter, we cannot say that Code § 18.2-154 requires proof of a fact that is not required to prove the common law crime of involuntary manslaughter." Gregg, 67 Va. App. at 387, 796 S.E.2d at 453. (App. 426). The Court erred by finding that criminal negligence is always involved in an unlawful shooting at an occupied vehicle that results in death.

One certainly could unlawfully shoot at an occupied vehicle in a manner exhibiting criminal negligence. Critically, however, one could commit the felony statutory offense unlawfully, but not with criminal negligence. Unlawful actions include, but are not limited to those involving criminal negligence. See Code

§ 18.2-51 (unlawful wounding).[10] One could, for example, shoot at an occupied vehicle, not out of anger or with intent to seriously harm an occupant, but merely to stop the vehicle in an effort to retrieve property stolen from the shooter by an occupant of the vehicle. The shooter could aim at the car and successfully strike the car's windshield. The car could suffer a collision on account of the shattered windshield. The shooting would be an intentional act. The unlawful goal of the shooter was only to stop the progress of the vehicle. If an occupant were to die in the crash, the death would be the result of an unlawful shooting, but not one committed with criminal negligence.

CONCLUSION

The Virginia General Assembly has not indicated that multiple punishments in a single trial for the two offenses for which Gregg was convicted and sentenced are prohibited. The offenses, moreover, are not the same offense under a proper application of the Blockburger test. Thus, the trial court correctly sentenced Gregg for both crimes. The Commonwealth prays that this Court reverse the judgment of

[10] In Bryant v. Commonwealth, 67 Va. App. 798 S.E.2d 459 (2017), the Court of Appeals addressed the elements of Code § 18.2-279, unlawful discharge of a firearm within a building or dwelling house. The Court held that the term "unlawful" traditionally meant criminal negligence. See id. at 576-77, 798 S.E.2d at 462-63. But in addressing the fact-bound issues involved in jury instructions, the Court of Appeals held that "unlawful" shooting required *at least* criminal negligence. Id. at 582, 798 S.E.2d at 465. This Court has granted an appeal in Bryant. See Record No. 170712.

the Court of Appeals of Virginia, and reinstate the judgment of the Circuit Court of Fauquier County.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellant herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On November 29, 2017, this brief and the joint appendix were filed electronically with this Court and the required paper copies of each were hand-delivered to the Clerk's Office in compliance with Rule 5:26. A copy of the brief was emailed to Blair D. Howard, Esq., at bdh@hchlawva.com, and T. Brooke Howard, Esq., tbh@hchlawva.com, counsel for the appellee. Due to the size of the joint appendix, it is being sent, on a disc, by UPS Overnight Delivery to counsel for the appellee at 7 Hotel Street, Warrenton, Virginia 20186.

This brief complies with the page limit of Rule 5:26(b), and, excluding the cover page, table of contents, table of authorities and certificate, contains 4,600 words, in compliance with Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.

/s/_____
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