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IN THE

SUPREME COURT OF VIRGINIA

SCV RECORD NO. 170586

TRIBUNAL CASE NO. 0047-16-4

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

CARROLL EDWARD GREGG, JR,

Appellee.

BRIEF OF THE APPELLEE

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS

On September 25, 2015, a jury found Mr. Gregg guilty of common law involuntary manslaughter (Count I) and statutory involuntary manslaughter under Code § 18.2-154 (Count III). (Jury Verdict Form, filed 9/25/2015). Prior to trial, the defendant moved to dismiss the indictment on double jeopardy grounds. (*See* Motion to Dismiss Amended Indictment, filed 09/11/2015, J.A. pp. 15-23). The Court, by Order, deferred ruling on this motion "until after the determination of guilt or innocence by the jury, at which time the matter may be re-addressed if necessary and a determination made by the Court." (*See* Order 9/15/2015, J.A. pp. 24-26). After the jury verdict, but before the jury sentencing, the Defendant renewed his motion to dismiss. (*See* T.T. 09/25/2015, J.A. pp. 304a-304b). The Court again indicated it would defer ruling until the jury sentencing.

After jury sentencing, on September 28, 2015, the Court denied the Defendant's motion, ruling that the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution (the "Double Jeopardy Clause") was not violated by Mr. Gregg's convictions of both common law involuntary manslaughter and statutory involuntary manslaughter under Code § 18.2-154. (*See* T.T. 09/28/2015, J.A. p. 322). The

ruling was exclusively based on the Court's conclusion that that two manslaughter convictions do not violate the test of *Blockburger v. United States,* 284 U.S. 299 (1932). *Id.* at pages 14-18. A motion to reconsider the ruling was filed before the trial Court. (*See* Defendants Motion to Reconsider, filed 11/06/2015, J.A. pp. 34-57). That motion was denied on similar grounds. (*See* T.T. 11/18/2015, J.A. p. 342). The *Blockburger* issue was not the sole question before the Court. The primary legal issue was whether the Virginia legislature had authorized dual convictions and punishment for these two charges, irrespective of whether separate prosecutions were permissible under *Blockburger*. The trial Court denied the motion without addressing this issue or the precedent underlying it. (*See* T.T. 11/18/2015, J.A. pp. 340-342)

Mr. Gregg asserts that the dual convictions and punishment violate his rights under the Double Jeopardy Clause, as common law involuntary manslaughter and statutory manslaughter under § 18.2-154 both arise from the death of a single individual resulting from a single act. A review of applicable case law and the legislative history of the relevant statutes compels the conclusion that such dual convictions and punishment cannot stand. The statutes at issue do

not evince a legislative intent in favor of dual convictions and punishment under the facts of this case. The dual punishments in this case violated Mr. Gregg's constitutional rights, and one of the two sentences must be vacated.

ASSIGNMENT OF ERROR

THE COMMONWEALTH OF VIRGINIA, APPELLANT, MAINTAINS THE COURT OF APPEALS ERRED IN FINDING GREGG'S CONVICTIONS VIOLATED THE DOUBLE JEOPARDY PROTECTION AGAINST MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE. IT IS THE APPELLANT'S CONTENTION THAT 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 WHEN DEATH RESULTS, AND, B) CONDUCTING ITS BLOCKBURGER ANALYSIS, INCLUDING THE FINDING THAT EVERY ACT OF AN UNLAWFUL SHOOTING AT AN OCCUPIED VEHICLE INVOLVES CRIMINAL NEGLIGENCE.

STATEMENT OF FACTS

On September 25, 2015, a jury found Mr. Carroll Edward Gregg, Jr. ("Defendant") guilty of common law involuntary manslaughter (Count I) and statutory involuntary manslaughter under Code § 18.2-154 (Count III). (Jury Verdict Form, filed 9/25/2015). These convictions arose out of a single shooting of a single person at a single moment in time. (*See* T.T. 09/25/2015, J.A. p. 304).

The Defendant fell behind on his truck loan payments to Dominion Management Services, Inc. dba. Cashpoint. As a result, they hired L&K Recovery to repossess the truck. On June 6, 2014, two L&K employees, Mr. Junior Sanchez ("Sanchez") and Mr. Alex Marin ("Marin"), were sent out to repossess the Defendant's truck around 10:30 p.m. Sanchez, driving a tow truck, and Marin following Sanchez in a separate vehicle, entered upon the private property of the Defendant's landlord, via the driveway, and proceeded up the same to the barn, wherein the Defendant rented a room. That is where Sanchez and Marin identified the Defendant's truck, parked next to the barn. Marin testified that they proceeded to hook the Defendant's vehicle to the tow truck. (*See* T.T. 09/22/2015, J.A. pp. 222-232). According to Marin, he used a lockout tool to open the truck's door which set off an alarm. (*See* T.T. 09/22/2015, J.A. pp. 236-237). Marin testified that after the alarm went off, he heard a voice say "you better got the fuck out of here." (*See* T.T. 09/22/2015, J.A. p. 234). Marin then told Sanchez to "start driving." Marin testified that Sanchez then drove to the bottom of the driveway and stopped. Marin said he followed Sanchez in the separate vehicle, and when he came to a stop, "I was right behind him." (*See* T.T. 09/22/2015, J.A.

p. 249). As Sanchez was making the turn out of the driveway, Marin said "…all I heard was a loud bang, and right after that I heard Junior screaming in it and I seen him throw his hands up and he just slumped over the wheel and I saw the tow truck going into the ditch." (*See* T.T. 09/22/2015, J.A. pp. 243-244). Marin testified that he only heard one shot fired (*See* T.T. 09/22/2015, J.A. p. 248).

At Trial, with reference to Marin hearing only one shot, the following exchange occurred between defense counsel and Marin:

> *Q: Okay. You know a gunshot when you hear one, don't you?*
>
> *A: Yes sir.*
>
> *Q. And this was your very dear friend?*
>
> *A: Yes sir.*
>
> *Q: So, if there were two or three shots, you certainly would have remembered them, wouldn't you?*
>
> *A: I have no reason to lie.*

(*See* T.T. 09/22/2015, J.A. p. 249).

The Commonwealth's Attorney introduced a video of the Defendant's statement made at police headquarters in the early morning hours after the shooting. That video was played for the jury

at Trial (Commonwealth's Exhibit 152, J.A. p. 384). In the statement, the Defendant stated that he was awakened by the alarm system going off on his truck and ran to a window, and that he couldn't see who was around his truck but yelled for them to leave. He said he grabbed a gun, ran outside and saw his truck being towed down the driveway. In an attempt to stop the truck, he ran down the hill around a pond and stepped into a hole, which caused him to be thrown forward to the ground. According to the Defendant, as he was falling the gun accidentally discharged. In any event, only one fatal shot was fired.

ARGUMENT

THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THERE WAS NO EVIDENCE IN THE LEGISLATIVE HISTORY OF 18.2-154 OR CASE LAW TO SUGGEST 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 18.2-154 AND COMMON LAW INVOLUNTARY MANSLAUGHTER FOR A SINGLE KILLING. THE COURT OF APPEALS WAS ALSO CORRECT IN CONCLUDING THAT PREDICATE FACTS OF AN UNLAWFUL SHOOTING AT AN OCCUPIED VEHICLE RESULTING IN DEATH WOULD ALWAYS CONSTITUTE CRIMINAL NEGLIGENCE, THEREFORE, THE PERSON COMMITTING THESE ACTS "IS GUILTY OF INVOLUNTARY MANSLAUGHTER." § 18.2-154 (EMPHASIS ADDED)

Standard of Review

"In reviewing a double jeopardy claim, or a claim based on statutory interpretation, this Court shall conduct a *de novo* review." *Davis v. Com.*, 57 Va. App. 446, 455 (2011).

Argument

A. The Double Jeopardy Clause

The Double Jeopardy Clause states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend V. The Double Jeopardy protections afforded in the Constitution of Virginia are co-extensive with those in the U.S. Constitution. *See* Va. Const. art. I, § 8; *Bennefield v. Commonwealth,* 21 Va. App. 729, 739 (1996) (citations omitted) (recognizing that "[o]ur courts have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution"). The Double Jeopardy provision guarantees protection against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Payne v. Commonwealth*, 257 Va. 216, 227 (1999).

This case invokes the Constitutional protection against imposing multiple punishments for the same offense. *See Blythe v. Commonwealth*, 222 Va. 722, 725 (1981) (analyzing whether the trial court could constitutionally impose multiple punishments for multiple convictions arising from a single trial). This Court has elaborated upon this protection, stating:

> The issue of multiple punishments actually arises in two contexts . . . First, two or more statutes may proscribe a particular course of conduct as criminal offenses . . . . Second, a defendant's conduct may constitute more than one violation of a single criminal proscription . . . . In either context, the question is what punishments are constitutionally permissible. [This question] is not different from the question of what punishment the legislature authorized. The legislature in its discretion may determine the appropriate 'unit of prosecution' and set the penalty for separate violations. The Double Jeopardy clauses prohibit the courts from exceeding the legislative authorization by imposing multiple punishments for the same offense. Where the legislature has authorized cumulative punishments, regardless of whether the offenses are the 'same,' the prosecutor may seek and the trial court may impose cumulative punishments in a single trial.

Jordan v. Commonwealth, 2 Va. App. 590, 593-94 (1986) (citing *Missouri* v. *Hunter*, 459 U.S. 360, 366-69 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 337 (1981); *Brown* v. *Ohio*, 432 U.S. 161, 165

(1977); *Bell* v. *United States*, 349 U.S. 81, 82-83 (1955); *Brown v. Commonwealth*, 230 Va. 310, 313-14 (1985); *Kelsoe* v. *Commonwealth*, 226 Va. 197, 199 (1983); *Turner* v. *Commonwealth*, 221 Va. 513, 529-30, 273 S.E.2d 36, 46-47 (1980)).

B. Holley v. Commonwealth

The Court of Appeals recently set forth the framework under which this instant question must be resolved in *Holley v. Com.*, 64 Va. App. 156 (2014). In that case, the court explained that "[i]n short, under the common law of homicide, the units of prosecution are dead bodies, not theories of aggravation. If the common-law rule remains the law of Virginia, appellant cannot be convicted of two murders for a single killing." *Id. at* 161. The court observed under Code § 1–200 that the common law remained in effect in Virginia, and cited *Herndon v. St. Mary's Hosp., Inc.,* 266 Va. 472, 476 (2003) for the principle that "[a] statutory provision will not be held to change the common law unless the legislative intent to do so is plainly manifested." *Id.* As explained in *Andrews v. Com.*, 280 Va. 231, 284 (2010):

> [W]hile *Blockburger* can provide an efficient mechanism to parse statutory language in order to determine the legislature's intent with regard to whether multiple punishments are permitted for conduct chargeable under more than one code section, it is not the sole, or in many cases, the

> primary tool of statutory construction used to determine that intent.

Holley, echoing *Andrews*, explains that the court must undergo an inquiry beyond a mere *Blockburger* analysis in answering the question posed by this case, and look to the legislature history in reaching a conclusion. That history is set forth below.

C. A History and Textual Analysis of Virginia Code § 18.2-154

Prior to 1950, the predecessor to Code § 154 was known as Va. Code § 4473. J.A. p. 44. This statute addressed the malicious shooting (and the throwing of missiles) at occupied vehicles, dwellings or other buildings. Under this statute, in the event death resulted from a malicious shooting or throwing, the accused was "deemed guilty of murder, the degree to be determined by the jury." An unlawful shooting or throwing was punished by confinement in the penitentiary for up to three years, or in jail for up to twelve months. Notably, there was no provision in the statute that addressed a death resulting from an unlawful shooting or throwing. In subsequent years, the statute was re-codified into Va. Code § 18-210, and then Va. Code § 18.1-152, without substantive change. *See id.*

1. 1975 Amendment

In 1975, Code § 154's predecessor was re-codified into Code § 18.2-154 (the "1975 Amendment"). The General Assembly severed the provisions of the statute dealing with shooting into an occupied dwelling and created a separate statute, Va. Code § 18.2-279. Additionally, the General Assembly added language to the new Code § 154 that stated: "in the event of the death of any such person, resulting from such unlawful act, the person so offending shall be deemed guilty of involuntary manslaughter" (emphasis added). The 1975 Amendment effected a substantial change in the statute because previously there had been no provision for an unlawful shooting at an occupied vehicle that resulted in death.

a. The General Assembly's use of the term "deemed" in the 1975 Amendment was rooted in the law of statutory larceny offenses

An important consideration in interpreting the statute as it existed in 1975 is the meaning and legal effect of the term "deem." There are no reported cases that address this issue in the context of Code § 154. Thus, it is appropriate to determine legislative intent in this regard by consulting other statutes that used the same phraseology at the time of the 1975 Amendment. *See Gilliam v. Commonwealth*, 21 Va. App. 519, 523 (1996). "Deem" is a term often

used in legislation to create the legal fiction that something is that which it is not, or that something is not that which it is. *Black's Law Dictionary* 425 (7th ed. 1999). The "deemed guilty" language in the 1975 Amendment was historically used in the definition of various statutory property crimes, particularly crimes that were "deemed larceny." Within this context, proof of crimes that were "deemed larceny," such as embezzlement, false pretenses, or receiving stolen property, would sustain a conviction for a larceny indictment. *See Pitsnogle v. Commonwealth*, 91 Va. 808, 810 (1895).

In the case of *Bruhn v. Commonwealth*, the Court of Appeals stated the following regarding historical usage of the term "deemed" in larceny-related crimes: *"*Throughout the 19th century, the Court interpreted statutes with similar language as permitting indictments and convictions for larceny upon proof of the elements of other property crimes*." Bruhn v. Commonwealth*, 37 Va. App. 537, 543 n.2 (2002) (internal citations omitted). This statutory construction of "deemed" persisted through the 20th century. *See Evans v. Commonwealth*, 226 Va. 292, 294 (1983) (demonstrating that, upon election, the Commonwealth could charge larceny, and then proceed at trial under an embezzlement theory); *Henderson v.*

Commonwealth, 215 Va. 811, 813 (1975) (larceny indictments sustained by proof of receipt of stolen goods); *Dove v. Peyton*, 343 F.2d 210 (4th Cir. 1965) (recognizing that, under Virginia law, the crime of receiving stolen property was indictable as larceny, and that, under a larceny indictment, an accused could be tried for receiving stolen goods).

b. The purpose of the 1975 Amendment was to provide a means for the government to convict a defendant of involuntary manslaughter without the need to prove criminal negligence

By using the term "deem" in the 1975 Amendment to Code § 154, the General Assembly intended to permit the Commonwealth to convict a defendant of common law involuntary manslaughter by proving the elements set forth in Code § 154, rather than proving the traditional elements of common law involuntary manslaughter. This approach was consistent with the long-standing practice in larceny-related cases that were "deemed larceny." From an elemental standpoint, Code § 154 did not constitute the offense of common law involuntary manslaughter. However, by the use of the term "deem," the legislature recognized the legal fiction that Code § 154, while not containing the same elements of involuntary manslaughter, was

deemed to be involuntary manslaughter, both substantively and for punishment purposes.

There is no evidence in the legislative history or case law that suggests that the General Assembly, through the 1975 Amendment, 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 § 154 and common law involuntary manslaughter for a single killing. To the contrary, the 1975 Amendment simply created a mechanism that permitted the Commonwealth to substitute proof of discrete facts in place of criminal negligence. In this way, the predicate facts (an unlawful shooting at and occupied vehicle that caused death) would always constitute criminal negligence, and therefore, involuntary manslaughter.

c. Comparisons with additional contemporary legislative developments support the notion that Code § 154 does not create an offense of involuntary manslaughter that is separate and distinct from common law involuntary manslaughter

Another action of the General Assembly in its 1975 session supports the conclusion that manslaughter under Code § 154 is not an offense that is distinct from common law manslaughter. During

the 1975 legislative session, the General Assembly enacted Va. Code § 18.2-53.1 ("Use or Display of a Firearm while Committing a Felony"). *See* J.A. p. 47. This statute banned the use, attempted use, or display in a threatening manner of a firearm during the commission of a felony. As to punishment, the statute stated: "violation of this section shall constitute a separate and distinct felony and any person found guilty thereof shall be guilty of a class 6 felony." The "separate and distinct" language was drawn from a line of Virginia Double Jeopardy cases recognizing the doctrine of "separate and distinct offenses" -- a doctrine that permits prosecution of two or more offenses growing out of the same transaction if the offenses are severable and distinct. *See Rouzie v. Commonwealth*, 215 Va. 174, 178 (1974). In contrast, the General Assembly has never introduced this language to Code § 154. Thus, the presence of this language in other legislation enacted in 1975 and its absence from the 1975 Amendment further demonstrates that the General Assembly did not intend to create a separate offense for which the Commonwealth could obtain multiple punishments.

2. Subsequent amendments to Code § 154

Section 154 was again amended in 1990, 2004 and 2005. *See* J.A. p. 47. In 1990, the General Assembly added language concerning knowingly shooting at an emergency vehicle, punishing that act with an additional mandatory minimum term of confinement of one year, which was not to be suspended in whole or in part. In the 2004 session, the suspension language of the mandatory minimum was deleted. An amendment enacted in 2005 (the "2005 Amendment"), however, made three substantive changes to the statute. First, the legislature removed the "deemed" language regarding second degree murder. Since then, an individual convicted under Code § 154 of a malicious shooting resulting in death is "guilty [of] murder in the second degree." Second, the legislature added language stating that, if a homicide under Code § 154 was willful, deliberate and premeditated, a defendant convicted thereunder is "guilty of murder in the first degree." Finally, the General Assembly removed the "deemed" language as to involuntary manslaughter in 2005.

a. The 2005 Amendment and the removal of "Deem"

The significance of this change was that an individual convicted under Code § 154 of an unlawful shooting resulting in death is no

longer “deemed” to be guilty of involuntary manslaughter, but is rather categorically guilty of that offense. By removing the term “deem” from Code § 154 in the 2005 Amendment, the General Assembly eliminated the legal fiction that a violation of the statute constituted involuntary manslaughter, but, more importantly, eliminated the *Pitsnogle*-era practice that allowed the Commonwealth to support a conviction for one offense (i.e. involuntary manslaughter) by proof of facts that were not traditionally elements of the offense.

To fully grasp the significance of the 2005 Amendment, it is helpful to further discuss the holdings of the Court of Appeals of Virginia and this Court in *Bruhn v. Commonwealth*. These two *Bruhn* opinions are incorporated by reference herein and attached, collectively, *See* J.A. p. 48. As discussed earlier, in 1994, the General Assembly amended Va. Code § 18.2-111 to delete the language that “deemed” embezzlement to be larceny, and effectively repudiated the rule set forth in *Pitsnogle v. Commonwealth* and its progeny regarding offenses “deemed” to be larceny. *Pitsnogle*, 91 Va. at 810. Both *Bruhn* courts held that the removal of “deem” from Va. Code § 111 evinced a legislative intent to change the law, so that proof of embezzlement would no longer support a charge of grand

larceny. This Court further recognized that this was a statutory change to a common law rule, and that statutes in derogation of the common law are to be strictly construed against the Commonwealth. *Bruhn*, 37 Va. App. at 544, 546. Based on other statutory changes in Va. Code § 111, the *Bruhn* courts held that the legislature intended that embezzlement be "deemed" as larceny for punishment purposes only. *Id.* at 546; *Bruhn*, 264 Va. at 602-03.

The Court of Appeals' opinion in *Bruhn* shed light on the reasoning behind the legislature's repudiation of the *Pitsnogle* rule. The Court of Appeals, citing multiple Supreme Court of Virginia opinions, as well as the Due Process Clause of the U.S. Constitution, held that proof of the elements of a crime not charged in the indictment will not support a conviction. *Bruhn*, 37 Va. App. at 541. The defendant in *Bruhn* was charged with grand larceny. The Commonwealth argued that, consistent with *Pitsnogle*, it proved embezzlement at trial, and that proof of embezzlement was sufficient to sustain a conviction for grand larceny. The court construed the 1994 amendments to Va. Code § 111 (removing "deem") as eliminating this practice. Thus, the 1994 amendments were

consistent with the Due Process requirement that criminal defendants be adequately informed of the charges against them.

The timing and the substance of the 2005 Amendment were not coincidental. There is a well-established presumption that, at the time of the 2005 amendment, the General Assembly was aware of the "deemed" language in other statutes within the Code as well as the courts' interpretations of that language. The only conclusion to be drawn from the 2005 Amendment is that, consistent with the reasoning in *Bruhn*, the General Assembly intended that the Commonwealth could no longer prove the charge of involuntary manslaughter (the "deemed offense") by establishing the elements of Code § 154. Such a practice, as noted in *Bruhn*, would violate a defendant's Due Process rights. Indeed, the entire construct of "deemed offenses," at least as explicated in *Pitsnogle*, runs afoul of modern day concepts of Due Process.

Consequently, with respect to Code § 154, the legislative solution to the Due Process issue caused by the use of "deem" was simple -- define the elements of Code § 18.2-154 (death resulting from an unlawful shooting) to actually constitute involuntary manslaughter. This was the approach adopted by the General

Assembly in 2005. Thus, as of 2005, Code § 154 is no longer a statutory legal fiction "deemed" to be involuntary manslaughter – it literally and categorically "is" involuntary manslaughter. As stated by the Court of Appeals in its opinion at p. 10,

"As the language of Code § 18.2-154 is unambiguous, "we are bound by the plain meaning of that language." *Blake* 288 Va. App 381, 764 S.E.2d 107 (quoting *Kozmina,* Va. At 349, 706 S.E.2d at 862).

b. The 2013 Amendment – addition of cumulative punishment language to the law enforcement/emergency vehicle provisions of Code § 154

In 2013, the General Assembly added language to the one year mandatory minimum provision of Code § 154 concerning law enforcement and emergency vehicles, setting forth that it is to be "served consecutively with any other sentence . . . ." This amendment is significant because it is the first (and only) time the General Assembly definitively addressed the issue of cumulative punishments within the statute. Through this amendment, the legislature has effectively carved out an aggravating circumstance (shooting at a law enforcement or emergency services vehicle) that mandates the imposition of a separate punishment. The implication

of this addition is that the General Assembly has only authorized separate or cumulative punishment (such as punishment for the identical common law offense) for the commission of an involuntary manslaughter under Code §154 in cases involving law enforcement or emergency type vehicles. As noted in *Boyd v. Com.*, 236 Va. 346, 349 (1988):

> Several established rules relating to construction of statutes in derogation of the common law should be reviewed. The common law will not be considered altered or changed by statute unless the legislative intent is plainly manifested. *Hannabass v. Ryan*, 164 Va. 519, 525, 180 S.E. 416,418 (1935). Statutory change in the common law is limited to that which is expressly stated or necessarily implied because the presumption is that no change was intended. *Strother v. Lynchburg Bank*, 155 Va. 826, 833, 156 S.E. 426, 428 (1931). When an enactment does not encompass the entire subject covered by the common law, it abrogates the common-law rule only to the extent that its terms are directly and irreconcilably opposed to the rule. *Newport News v. Commonwealth*, 165 Va. 635, 650, 183 S.E. 514, 520 (1936). And, we properly may resort to the statutory history and to the enactment process to ascertain legislative intent. *American Airlines, Inc. v. Battle*, 181 Va. 1, 8, 23 S.E.2d 796, 800 (1943).

Tharrington v. Commonwealth, 58 Va. App. 704 (2011), further illustrates this principle. In that case the defendant was charged with both grand larceny and larceny with intent to distribute. In *Tharrington,* this Court concluded that it:

> [m]ust determine the General Assembly's intent from the words contained in the statutes. *Washington v. Commonwealth*, 272 Va. 449, 455, 634 S.E.2d 310, 313 (2006); see *Burke v. Commonwealth*, 29 Va. App. 183, 188, 510 S.E.2d 743, 745–46 (1999) '[W]e presume that... the legislature 'acted with full knowledge of and in reference to the existing law upon the same subject and the construction placed upon it by the courts.'' (*quoting City of Richmond v. Sutherland*, 114 Va. 688, 693, 77 S.E. 470, 472 (1913))).

The implication of this is that the General Assembly has not authorized any other separate or cumulative punishment (such as punishment for the identical common law offense) for commission of an involuntary manslaughter under Code § 154, except for the vehicles specifically referred to in the language of the statute.

Counsel would respectfully refer this court to the recent case of *Commonwealth v. Botkin* 2017 Va. App Lexis 262, decided October 24, 2017 by the Court of Appeals of Virginia.

The Commonwealth appealed the concurrent sentence imposed by the trial court on the defendant after he plead guilty to two counts of possession of firearms by a convicted non violent felon in violation of code section 18.2-308.2 (A). The Commonwealth maintained the trial court erred by running the sentences concurrently, when under the statute the trial court was mandated to

run the sentences consecutively. The Court recognized that the issue before it was a question of statutory interpretation. Under the rules of statutory construction, the Court said:

> When a statute is unambiguous, we must apply the plain meaning of that language. *Altizer v. Commonwealth*, 63 Va. 317, 323, 757 S.E.2d 565, 568 (2014) (*quoting Brown v. Lukhard,* 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985). 'If…the intention of the legislature is perfectly clear from the language used, rules of construction are not to be applied. We are not allowed to construe that which has no need of construction.' *Temple v. City of Petersburg,* 182 Va. 418, 422-23, 295 S.E.2d 357, 358 (1944). 'In such circumstances, a court may look only to the words of the statute to determine its meaning. The intention of the legislature must be determined through those words, unless a literal construction would result is a manifest absurdity.' *Hubbard v. Henrico Ltd. P'ship* 255 Va. 335, 339, 497 S.E.2d 335, 337 (1998). '[W]e will not apply' 'an unreasonably restrictive interpretation of a statute' that would subvert the legislative intent expressed therein.' *Armstrong v. Commonwealth,* 263 Va. 573, 581, 562 S.E.2d 139, 144 (2002). (*quoting Ansell v. Commonwealth,* 219 Va. 759, 761, 250 S.E.2d 760, 761 (1979)).

The Court, in reversing the trial court's decision to run the convictions concurrently, concluded with this language in *Botkin* at page *4:

> We disagree. Multiple sentences are presumed to be served consecutively. See Code § 19.2-308. While the trial court has the discretion pursuant to Code § 19.2-308 to order multiple sentences to run

> concurrently, 'this discretionary exercise of authority may be and has been proscribed by the General Assembly when it directed that sentences for certain crimes may not be run concurrently.' *Brown* 284 Va. 542, 733 S.E.2d 640 see, e.g., Code § 18.2-53.1 (requiring sentence for use or display of a firearm in committing a felony to run consecutive with the sentence for primary felony); Code §18.2-255.2(B) (requiring 'mandatory minimum term of imprisonment of one-year to be served consecutively with any other sentence'); Code § 18.2-308.1(C) (requiring 'mandatory minimum term of imprisonment of five years to be served consecutively with any other sentence.')

In conclusion, the *Botkin* Court held that the General Assembly had directed that these mandatory minimum terms of imprisonment prescribed for violations of § 18.2-308.2 be served consecutively with any other sentence. The *Botkin* Court held (p.*6), "This plain language clearly expresses the General Assembly's intention that a sentence under Code § 18.2-308.2 must be served separately and apart from any other sentence imposed…."

In the case at bar, the plain language clearly expressed by the General Assembly in the third paragraph of 154 is that the "mandatory minimum term of imprisonment of one year to be served consecutively with any other sentence" applies only to law enforcement or emergency vehicles whether the shooting is malicious or unlawful.

The General Assembly has only authorized cumulative punishment for shooting at specific types of vehicles referred to in the clear language of the statute. In Gregg, the tow truck driver's vehicle falls outside of the language specified in the statute and thus the trial court was not authorized to permit cumulative punishment. Therefore, one of the two convictions of involuntary manslaughter must be dismissed.

3. Comparison of Code § 154 with other involuntary manslaughter statutes further suggests that the General Assembly has conspicuously abstained from imposing cumulative punishments for a violation of the involuntary manslaughter provisions of Code § 154

The lack of manifest intent on the part of the General Assembly to cumulatively punish the particular act relevant to Gregg's case under Code § 154 is corroborated by the repeated omissions from the statute of the very language that would exhibit such intent. Contrasting Code § 154 with the existence of such expressly enumerated language in Virginia's related homicide statutes highlights this important distinction.

a. Virginia Code § 18.2-53.1 has not incorporated Code § 154

The well-known use of a firearm in commission of an enumerated felony statute, Va. Code § 18.2-53.1, was enacted in

1975. This statute makes it a crime to use a firearm while committing one of several specifically enumerated felonies. While § 18.2-154 was analyzed and re-enacted by the General Assembly that same year, the General Assembly chose not to include manslaughter as a specifically named felony under Va. Code § 18.2-53.1. However, and significant to the analysis at issue, as Va. Code § 18.2-53.1 has evolved, the General Assembly on multiple occasions has expressed its intent for cumulative punishments to be imposed when a single death results from the use of a firearm and one of the specific identified felonies.

Throughout the remainder of the legislative sessions in the 1970s and 1980s, the applicability of this statute was narrowed to the use of a firearm while committing, or attempting to commit murder, rape, robbery, burglary, malicious wounding, and abduction. At no point was an act of unlawfully shooting into an occupied vehicle, resulting in death, included into Va. Code § 18.2-53.1. In legislative sessions throughout the 1990s, sex offenses, aggravated malicious wounding, and carjacking were added under Va. Code § 18.2-53.1. Thus, despite the fact that the General Assembly must have contemplated the combination of a firearm and a vehicle when

including the carjacking offense in 1994, yet again, no reference was made to the act of an unlawful shooting into an occupied vehicle.

The Court of Appeals dealt with the interplay between the malicious aspects of Code § 18.2-154 and Va. Code § 18.2-53.1 in *Willis v. Commonwealth*, 10 Va. App. 430 (1990). There, the defendant was found guilty of maliciously shooting into an occupied vehicle resulting in death under the second degree murder provisions of Code § 154. His conviction and cumulative sentences under Va. Code § 18.2-53.1 were held proper under the Double Jeopardy Clause because a murder occurred based on the malicious intent of the defendant. Murder is a specifically enumerated offense under 18.2-53.1 for which the General Assembly authorized the imposition of a cumulative punishment. Manslaughter is not.

b. The General Assembly has expressed its intent to impose cumulative punishments for violations of the involuntary manslaughter statutes set forth in Virginia Code §§ 18.2-36.1 and 18.2-36.2, but has not included similar language in Code § 154

In 1989 and 2005, the General Assembly created two additional statutory involuntary manslaughter provisions, with the former addressing deaths resulting from driving under the influence, and the latter addressing deaths resulting from boating under the influence.

See J.A. p. 52. Code § 154 must be analyzed in conjunction with Va. Code §§ 36.1 and 36.2, especially since both statutes are different forms of involuntary manslaughter and use similar language. The General Assembly addressed substantive parts of Code § 154 and Va. Code § 36.2 in the 2005 legislative session.

i. Code §§ 36.1 and 36.2 do not authorize the simultaneous prosecution of common law involuntary manslaughter

The substantive provisions of Code §§ 36.1 and 36.2 are identical. Subsection A of each statute declares that an individual who causes the unintentional death of another as a result of driving (and boating) while under the influence is "guilty of involuntary manslaughter." (This is the identical language used in the 2005 Amendment to Va. Code § 154.) Subsection B of each statute provides that if such conduct is gross, wanton, and culpable so as to show a reckless disregard for human life, a defendant is guilty of "aggravated involuntary manslaughter," punishable by a term of imprisonment of one to twenty years. Subsection C of this statute states: "The provisions of this section shall not preclude prosecution **under any other homicide statute**." (emphasis added).

When enacting these statutes, the General Assembly confirmed its intent to impose multiple punishments for a single killing only in instances where the killing violated multiple homicide statutes. The case of *Payne v. Commonwealth*, 277 Va. 531 (2009) illustrates this point. In *Payne*, this Court considered a double jeopardy challenge to convictions for aggravated involuntary manslaughter under Code § 36.1 and felony murder under Code § 18.2-33 for the same killing. The Court held that felony homicide was clearly a "homicide statute" within the meaning of subsection C of § 18.2-36.1. Therefore, the Court held that the General Assembly specifically intended for there to be multiple punishments for the same death under the facts of the case. *Id.* at 539-540. Notably, the Court's analysis turned on the determination that Code § 18.2-33 was a "homicide statute." The clear implication under the *Payne* court's reasoning, then, is that Code § 36.1 would **not** permit the prosecution of common law involuntary manslaughter, as well as prosecution under either subsection A or B of § 36.1. This rule, by implication, is a prohibition of multiple punishments for common law involuntary manslaughter and statutory involuntary manslaughter under §§ 36.1 and 36.2.

ii. The rationale for a bar on simultaneous prosecutions for common law involuntary

manslaughter and statutory manslaughter under either Code § 36.1 or 36.2 applies with equal force to Code § 154

Under the Court's rationale in *Payne*, in no instance may a defendant be convicted both of common law involuntary manslaughter and involuntary manslaughter under subsections A or B of Va. Code §§ 36.1 or 36.2. This makes sense from both a public policy perspective and a plain reading of the text of the statutes.

As far back as *King v. Commonwealth*, 217 Va. 601, 607 (1977), the Supreme Court of Virginia has required that "involuntary manslaughter arising from the operation of a motor vehicle [must] be predicated solely upon criminal negligence proximately causing death." It has been held that the purpose of Va. Code § 36.1 is to allow the Commonwealth to prove criminal negligence by substituting the violation of a different statute (driving under the influence) for direct proof of the element. *Spain v. Commonwealth*, 7 Va. App. 385, 391-92 (1988). The case of *Dalo v. Commonwealth*, 37 Va. App. 156 (2001) further supports this view. In *Dalo*, the Court of Appeals examined the legislative intent of Code § 36.1. The Court noted that the Commonwealth is required to prove criminal negligence for a common law involuntary manslaughter conviction. *Id*. at 167.

However, the Court also noted that Code § 36.1(A) has no requirement that the Commonwealth prove the element of criminal negligence. The Court then reasoned that the legislative intent behind Code § 36.1 was to "allow the Commonwealth to prove a traditional element of the offense, the mindset or intent of the accused, by substituting the violation of a different statute for direct proof of the element."

The predicate elements of § 154 (an unlawful shooting at an occupied vehicle whereby the life or lives of the occupants were put in danger and death resulted) serve the same purpose as the predicate offense of driving under the influence found in §§ 36.1 and 36.2. Both relieve the Commonwealth of having to prove criminal negligence. Given the legislative purpose of both statutes, it is logical that additional convictions for common law involuntary manslaughter should not be permitted.

The text of Va. Code § 36.1(A) (identical to the post-2005 text of § 154) states that a person who violates this section "is guilty of involuntary manslaughter." The legislative intent of both Va. Code § 36.1(A) and, by implication, Va. Code § 154 is clear: Both statutes are alternative means for the Commonwealth to obtain an involuntary

manslaughter conviction based on a specific set of facts that constitute grave dangers to public safety -- unintentional deaths caused by driving under the influence and unintentional deaths caused by the unlawful shooting at occupied vehicles. Virginia Code § 36.1, by implication, prohibits multiple prosecutions (and punishments) for common law involuntary manslaughter and statutory involuntary manslaughter under subsection A. It would be counterintuitive and nonsensical to read a contrary intent into the similar statutory regime of Va. Code § 154. In other words, in 2005, the legislature could not have intended the 2005 Amendment to *authorize* simultaneous prosecutions for common law involuntary manslaughter (and therefore cumulative punishments), while at the same time, in a closely related involuntary manslaughter statute (Va. Code § 36.2) *prohibit the same thing*. The fact that the General Assembly, in the 2005 Amendment to § 36.2, specifically authorized the prosecution of concurrent violations of other "homicide statutes" and then failed to authorize cumulative punishments in Code § 154, evinces a legislative intent to *not* authorize cumulative punishment under § 154.

If the General Assembly ever manifested an intent to cumulatively punish an unlawful shooting resulting in death under § 18.2-154, it would have done so in conjunction with the amendment of these statutes. In fact, Va. Code §§ 18.2-36.1 and 18.2-154 were reviewed and amended in the same session and Chapter of the 2004 Acts of Assembly (Ch. 461). *See* J.A. p. 55-56. In this Chapter, the suspended sentence language regarding emergency vehicles was addressed and deleted in § 18.2-154. There were minor non-substantive changes to Va. Code § 36.1. Thus, 2004 was a logical opportunity for the legislature to authorize multiple punishments under Code § 154. Instead, not only was no such language added, the following year the legislature removed "deemed" from § 18.2-154, and replaced it with "is." Had the General Assembly wanted to create an offense separate and distinct from common law manslaughter, it could have easily done so by retaining the "deemed" language for purposes of punishment only, and defined involuntary manslaughter under Code § 154 as a "separate and distinct offense" (similar to Va. Code § 18.2-53.1). The General Assembly, however, did not do so. To the contrary, its failure to act during this time period presents persuasive evidence of its intent to merge the act of an unlawful

shooting resulting in death under § 18.2-154 with common law involuntary manslaughter, making the offense one and the same. The punishment for common law manslaughter and involuntary manslaughter under 154 are the same and are provided under Code § 18.2-36

4. The Court of Appeals correctly found that the predicate facts of an unlawful shooting at an occupied vehicle resulting death would always constitute criminal negligence, and therefore, the person committing that offense, "<u>is guilty of involuntary manslaughter</u>." § 18.2-154 (*emphasis added*)

The Commonwealth suggests that the statutory offense under 154 requires neither accidental killing nor criminal negligence. (Breif.p.4) However, the Court of Appeal was correct in concluding that any act of shooting at an occupied vehicle with a deadly weapon, is an inherently dangerous act, which manifests criminal negligence.

This Court in *Noakes v. Commonwealth,* 280 Va. 338, 699, S.E.2d 284 at 52 (2010) (quoting *West v. Dir. Dep't of Corr.*, 273 Va. 56, 64, 639 S.E.2d 190, 195 (2007) Internal citations omitted, firm 280 Va. 638, 699 S.E.2d 284 (2010), p. 345, said the following with reference to common caw involuntary manslaughter at page 345:

> We have defined the common law crime of involuntary manslaughter as 'the killing of one accidentally, contrary to the intention of the parties,

> in the prosecution of some unlawful, but not felonious, act; or in the improper performance of a lawful act.' *Mundy v. Commonwealth,* 144 Va. 609, 615, 131 S.E. 242, 244 (1926); accord *Brown,* 278 Va. at 528, 685 S.E.2d at 45-46; … To convict a person for involuntary manslaughter caused by the improper performance of a lawful act, the Commonwealth must show that the improper performance of the lawful act 'amount[ed] to an unlawful performance of such lawful act, not merely a negligent performance; that is, the lawful act must have been done in a way so grossly negligent and culpable as to indicate an indifference to consequences or an absence of decent regard for human life.' *Kirk v. Commonwealth,* 186 Va. 839, 847, 44 S.E.2d 409, 413 (1947) …*West v. Director, Dep't of Corrs.,* 273 Va. 56, 64, 639 S.E.2d 190, 195 (2007);" *Cable v. Commonwealth,* 243 Va. 236, 240, 415 S.E.2d 218, 220, 8 Va. Law Rep. 2145 (1992). 'The accidental killing must be the proximate result of a lawful act performed in a manner 'so gross, wanton, and culpable as to show reckless disregard of human life,'" *Gooden v. Commonwealth,* 226 Va. 565, 571, 311 S.E.2d, 780, 784 (1984)…" "…the conduct must 'manifest criminal negligence' *West*, 273 Va. 64, 639 S.E.2d at 195…

The *Noakes* Court went on to state, on p. 346,

> In determining whether conduct rises to the level of criminal negligence, an 'objective standard' applies, and criminal negligence may be found to exist when the defendant 'either knew or should have known the probable results of his[/her] acts.' *Riley,* 277 Va. at 483-84 675 S.E.2d at 177 (internal quotation marks omitted)…

In *Mundy v. Commonwealth,* 144 Va. 609 (1926), the defendant maintained that the victim handed her his pistol with the barrel pointing towards himself and that the pistol discharged as soon as he took hold of the gun. She claimed that she did not intend to shoot the victim. The defendant was convicted of involuntary manslaughter and appealed. In *Mundy* there was no evidence that the accused was engaged in the prosecution of an unlawful act or improper performance of a lawful act. In reversing, the Supreme Court made the following observation on page 615,

> …This is not a case where one carelessly and negligently, but without malice, discharged a gun towards a person, or on a public place or street, and killed one without any intention of doing so.

In *Gooden v. Comm*onwealth, 226 Va. 565 (1984) the Supreme Court dealt with a shooting involving deer hunters, which resulted in a conviction of involuntary manslaughter. The Court found the defendant, an experienced hunter, fired a weapon capable of inflicting severe bodily harm or death in the direction of people standing on a right of way. The defendant had entered the area when he knew there were a number of people in the area and "too many hunters" along the right of way. The evidence of the distance between the defendant and victim when shots were fired varied from 636 yards to

390 yards. The victim was wearing a red hat with red bandannas pinned to the front and back of his jacket.

Citing the *Mundy* case, the *Gooden* Court held on p. 571,

> …The 'improper' performance of the lawful act, to constitute involuntary manslaughter, must amount to an unlawful commission of such lawful act, not merely a negligent performance. The negligence must be criminal negligence, *Kirk v. Commonwealth,* 186 Va. 839, 847, 44 S.E.2d 409, 413, (1947) …Stated differently, reckless conduct must amount to unlawful conduct in order to sustain a charge of involuntary manslaughter. And it is immaterial whether the unlawful act was unlawful in its inception, that is, an inherently unlawful act, such as discharging a deadly weapon into a crowded street, or became unlawful after it was begun, such as lawfully operating a vehicle in a public street but so accelerating its speed that it may cause death or serious bodily harm to persons in that street. *Kirk v. Commonwealth,* 186 Va. at 847, 44 S.E.2d at 413…"

In upholding the trial court's decision of involuntary manslaughter, the *Gooden* Court held, at P. 573,

> Accordingly, we cannot say that the trial court's finding of conduct so gross, wanton, and culpable as to show a reckless disregard of human life was plainly wrong or without evidence to support it…

Counsel would also cite the case of *Bailey v. Commonwealth,* 5 Va. App. 331 (1987) decided by the Court of Appeals. In *Bailey,* an eye witness testified the defendant was horse playing with friends,

pulled out a gun and then put it back in his pocket, the victim fell and began laughing. The defendant then pulled the gun out with the palm up and pointed it toward the victim. The gun went off and struck the victim who was between 5 to 10 feet away. The Court held that where the intentional violation of the statute, § 18.2-561(A) Reckless Handling of a Firearm, involved an inherently dangerous act that was the proximate cause of the homicide, the accidental killing was a foreseeable result of the conduct and constituted involuntary manslaughter.

The Court in affirming Bailey's convictions at p 336, said,

> Accordingly, we hold that the evidence is sufficient to establish that Bailey intentionally pointed a loaded gun at the victim who was no more than five to ten feet away and that the killing, while accidental, was a foreseeable result of Bailey's conduct. We further find that his conduct was so gross, wanton and culpable as to show a reckless disregard for human life constituting involuntary manslaughter. Alternatively, we find his conduct was an unlawful act committed with criminal negligence constituting involuntary manslaughter.

In *Ellis v. Commonwealth*, 281 Va. 499, 706 S.E.2d 849 (2011) this court affirmed a conviction of unlawfully discharging a firearm at or against an occupied building in violation of Va. Code Ann. § 18.2-279. A man, Claude, and his child exited a convenience store,

crossed Marshall Street, and proceeded through an open space between two buildings. An individual named "D.A." walked past Claude and back toward Marshall Street. Claude then saw "Ellis," who was in front of him, draw a pistol and began shooting at "D.A.". Claude estimated the distance between Ellis and "D.A." was "about 30 or 40 feet." One of the shots fired by Ellis went through a glass door of the convenience store. Defense Counsel made a motion to strike at the close of Commonwealth's case based on the Commonwealth's failure to prove Ellis intended to shoot "at or against" the convenience store building in violation of 18.2-279. The trial court took the motion under advisement but ultimately convicted the defendant.

In the Supreme Court's analysis, it traced legislative history of the statue from *Dowdy v. Commonwealth,* 220 Va. 114, 255 S.E.2d 506 (1979) through *Fleming v. Commonwealth*, 13 Va. App 349, 412 S.E.2d 180 (1991) the *Ellis* Court observed on p. 505.

In *Dowdy*, "…we held that the statute was 'a legislative declaration that human lives may be endangered when a deadly weapon is maliciously discharged at or against a building occupied by

people and that such conduct is felonious.' Id. at 117, 255 S.E.2d at 508."

The *Ellis* Court then observed on p. 505,

> The rationale of *Fleming* is consistent with the view expressed in *Dowdy* that the legislative purpose of the statue is meant to prohibit unlawful conduct, whether malicious or merely criminally reckless, which has the potential to endanger the lives of persons inside occupied buildings, without regard to the shooter's actual motive or intent via unlawfully discharging a firearm. Accordingly, applying that rationale here, we hold that to sustain conviction under Code § 18.2-279 the Commonwealth need not prove that the defendant had the specific intent to shoot at or against a particular building. Rather the evidence need only show that a defendant who unlawfully discharges a firearm knew or should have known that an occupied building or buildings were in his line of fire. (Emphasis added)

The *Ellis* Court also noted (p. 506) that the same rationale of *Fleming* could be applied to Code § 18.2-154 since the Code sections were identical except that 154 applied to occupied vehicles and 279 applied to occupied buildings. (p. 506) Citing *Armstead v. Commonwealth*, 55 Va. App. 354, 361, 685 S.E.2d 876, 879 (2009).

The Ellis Court concluded that the defendant knew or should have known that an occupied building would be in his line of fire when he unlawfully discharged his weapon, and that it at was not

necessary for the Commonwealth to prove that Ellis had the specific intent to fire at or against the convenience store.

In conclusion, the *Ellis* Court held that 18.2-279 is not a specific intent statute, therefore, the Commonwealth did not have to prove that Ellis had the specific intent to shoot at the building.

5. Two convictions of involuntary manslaughter in the same trial violates double jeopardy

In the case of *West v. Dir. of the Dep't of Corr.,* 273 Va. 56, 639 S.E.2d 190, 2007 Va. LEXIS 17 (2007) the Supreme Court of Virginia held that a defendant was entitled to habeas corpus relief for convictions of common law involuntary manslaughter and aggravated involuntary manslaughter (18.2-36.1), West claimed defense counsel had provided ineffective assistance by failing to raise the Double Jeopardy challenge to defendants convictions of both common law involuntary manslaughter and aggravated involuntary manslaughter under 18.32-36.1. This court held that involuntary manslaughter did not require proof of a fact different from those facts required for conviction of aggravated involuntary manslaughter and ruled that the defendant could not receive multiple punishments for the same offense. As in *West*, the Court of Appeals in Gregg found that the predicate facts of unlawful shooting of an occupied vehicle resulting

in death will always constitute criminal negligence and, therefore, they could not say that Code § 18.2-154 required proof a fact that is not required to prove common law involuntary manslaughter.

CONCLUSION

The Virginia General Assembly by clear, unambiguous language has only authorized multiple punishments under 18.2-154 in a shooting at an occupied vehicle, whether malicious or unlawful, in cases involving police or emergency type vehicles. There is no specific intent involved in either involuntary manslaughter under 154 (*Armstead v. Commonwealth*, 55 Va. App. 354, 361, 685 S.E.2d 876, 879 (2009)), or common law involuntary manslaughter. The punishment for involuntary manslaughter under 154 and common law involuntary manslaughter is the same as provided under Code § 18.2-36.

Any unlawful shooting at or in the direction of a vehicle occupied by one or more persons involves criminal negligence. This court has held that the legislative purpose of Code § 18.2-279:

> is meant to prohibit unlawful conduct, whether malicious or merely criminal reckless, which has the potential to endanger lives or persons inside occupied buildings, without occupied buildings, without regard to the shooter's actual motive or intent in unlawfully discharging a firearm. *Ellis*,

> supra at p. 506 (The same legislative purpose for Code § 18.2-279 would obviously apply to Code § 18.2-154.)

The Court of Appeals in *Gregg* correctly pointed out in their opinion, on p. 11:

> Because the element of shooting at an occupied vehicle in Code § 18.2-154 is simply the criminal 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. Convictions for both these offenses resulted in appellant receiving multiple punishments for the same offence, and thus, the Double Jeopardy Clause was violated.

The Court of Appeals ruling should be upheld.

CERTIFICATE OF SERVICE
IN COMPLIANCE WITH RULE 5:26(e) OF THE SUPREME COURT

The Appellee's name is Carroll Edward Gregg, Jr. His last known address is **Coffeewood Correctional Center, 12352 Coffeewood Drive, Mitchells, Virginia 22729**. The Appellant is the Commonwealth of Virginia.

Counsel for the Appellee is Blair D. Howard, Esquire.

Counsel complied with Rule 5:26(e) and filed by hand three (3) copies of the Brief of Appellee in the office of the Clerk of the Court, Supreme Court of Virginia, 109 North Eighth Street, Richmond, Virginia 22319, and emailed one (1) copy to **Virginia B. Thiesen, Senior Assistant Attorney General, Office of the Attorney General, 202 North Ninth Street, Richmond, Virginia 23219 this 27th day of December 2017.**

Counsel for Appellee is retained.

Counsel desires to present oral argument.

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