In The

# Supreme Court of Virginia

**Record No. _____**

In re PARISA DEHGHANI-TAFTI,

*Petitioner.*

## MEMORANDUM IN SUPPORT OF VERIFIED PETITION FOR WRIT OF PROHIBITION


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August 14, 2020

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Attorneys for the Commonwealth of Virginia who prosecute criminal matters constantly weigh decisions about which cases to prosecute, including when to amend, prosecute, or terminate those charges. This is one of the core functions of the office. Before March 4, 2020, Commonwealth's Attorneys for Arlington County performing these duties to amend indictments, enter *nolle prosequi*, dismiss charges, or make sentencing recommendations could do so upon oral motion to the court, providing as much or as little rationale as the Commonwealth's Attorney deemed appropriate in her discretion. Historically, the Circuit Court for 17th Judicial Circuit Court of Virginia[1] ("Circuit Court") routinely permitted such oral motions. On March 4, 2020, that changed, when the Circuit Court entered an order (the "Order") requiring that Commonwealth's Attorneys in Arlington justify all such decisions in writing and in more detail than is required by Virginia law.[2]

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1 The 17th Judicial District embraces Arlington County and the City of Falls Church.

2 While the Order formally changed the Court's long-standing custom of granting *nolle prosequi* upon oral motion, in practice the Court imposed the burdens of the Order on the Office of the Commonwealth's Attorney just days into 2020. *See infra,* n.3.

The Order was entered just two months after the new Commonwealth's Attorney of Arlington County and the City of Falls Church assumed office. The Order creates new limitations and obligations for Commonwealth's Attorneys in Arlington, running afoul of Virginia's Constitution, its statutes, and its precedential case law. The Circuit Court should be prohibited from enforcing the invalid Order.

## I. Facts

Petitioner Parisa Dehghani-Tafti, on behalf of the Office of the Commonwealth's Attorney for Arlington County and the City of Falls Church ("Office of the Commonwealth's Attorney"), was elected to the Office of the Commonwealth's Attorney on November 3, 2019. She was sworn in on December 16, 2019, and assumed office on January 1, 2020.[3]

Sixty-three days later, on March 4, 2020, the Circuit Court for Arlington County—*sua sponte*—issued a blanket order curtailing the

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[3] *See* Va. Code § 24.2-217 (providing that all constitutional officers, including "an attorney for the Commonwealth" shall start their terms "beginning the January 1 next succeeding their election"); Blue Virginia, *Video: Parisa Dehghani-Tafti Sworn In as New Commonwealth's Attorney for Arlington and City of Falls Church*, https://bluevirginia.us/2019/12/parisa-dehghani-tafti-sworn-in-as-new-commonwealths-attorney-for-arlington-and-city-of-falls-church.

Constitutional authority of the Office of the Commonwealth's Attorney by imposing the following burdens:

1) All Commonwealth's Attorney motions to amend an indictment pretrial shall be in writing, and "shall provide in detail all factual and not purely conclusory bases in support thereof" and "shall be signed by Counsel to the best of counsel's belief after reasonable inquiry and warranted by existing law" and then must be filed with Clerk of Court with a courtesy copy in paper form submitted to Judges' Chambers;
2) All Commonwealth's Attorney motions to enter a *nolle prosequi* shall be in writing, and "shall provide in detail all factual and not purely conclusory bases in support thereof" and "shall be signed by Counsel to the best of counsel's belief after reasonable inquiry and warranted by existing law" and then must be filed with Clerk of Court with a courtesy copy in paper form submitted to Judges' Chambers;
3) All Commonwealth's Attorney motions to dismiss a case shall be in writing, and "shall provide in detail all factual and not purely conclusory bases in support thereof" and "shall be signed by

Counsel to the best of counsel's belief after reasonable inquiry and warranted by existing law" and then must be filed with Clerk of Court with a courtesy copy in paper form submitted to Judges' Chambers; and

4) "[a]ll sentencing guidelines, and justification for all recommended departures therefrom, must "be in writing and filed with Clerk of Court, with a courtesy copy in paper form submitted to Judges' Chambers . . . as well as all written plea agreements."

*See* Mar. 4, 2020 Order ("Order"), Ex. 1 hereto.[4]

This Order is a significant and marked departure from existing Virginia law and prior practice. Local Rule 2.3(A)(i) provides that "[a]ll motions" with limited and inapplicable exceptions,[5] "shall be in

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[4] While the court published the Order 63 days after the Commonwealth's Attorney assumed office, the practice of the Court reversed course almost immediately. *See, e.g., Commonwealth v, Kelly*, CR-19-1103 (the Court granting the Commonwealth's 2019 oral motion for *nolle prosequi* of a defendant's felony possession charges, but then, on January 7, 2020, insisting on a written motion to *nolle prosequi* the same defendant's misdemeanor possession charge), compilation Ex. 2 hereto.

[5] The excepted motions are those provided for in 17th Cir. R. P. 2.1(D) (iii), (iv), and (v), which address procedure to advance a trial for disposition, procedure to continue a plea, and procedure to continue a sentencing or post-sentencing hearing by consent.

writing." 17th Cir. R. P. 2.3(A)(i). This written requirement, however, was not observed or enforced by the Court with respect to motions to amend indictments, enter *nolle prosequi*, dismiss charges, or make sentencing recommendations. Indeed, as recently as September 2019, in *Commonwealth v. Berhane*, Chief Judge Newman not only did not require a written motion, but also rejected defense counsel's demand for a mere proffer of good cause for the Commonwealth's Attorney's motion for *nolle prosequi*, and reiterated the well-known practice of the Court:

> MR. HAYWOOD: I'm just asking for a proffer of good cause.
>
> THE COURT: Well, they don't have to give a proffer for good cause unless it's about -
>
> - you're seeking dismissal.

Case No. CR17000434-37, CR17000699-706 (Sept. 18, 2019) (J. Newman), Status Hr'g. Tr. 3:19 – 4:1, Ex. 3 hereto. And to be sure, *Berhane* is not the exception, but the rule—a survey of motions for *nolle prosequi* from 2017 to 2019 (all of which were granted) reveals that almost three-quarters of such motions were exclusively oral, and of the

non-oral motions, fully half provided no explanation and ***none*** provided a "detailed" account of "all factual...bases" and legal analysis thereof.[6] Moreover, in stark contrast to the Order's demand for a "detail[ed]" account of "*all* factual and not purely conclusory bases in support" of the motions[7] (Order, at 1 (emphasis added)), Local Rule 2.3(A)(i) does not require *any* detail for those motions that are submitted in writing beyond the "nature of the pending charges, date of trial or disposition (if applicable), and a *brief and concise* statement of the bases for the motion and the relief requested." (Emphasis added). Quite the opposite, the Rule recognizes the role of attorney discretion in merely permitting counsel to submit an accompanying memorandum of law "[i]f

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[6] These results are from a survey of cases from 2017-2019, finding that of 51 motions for *nolle prosequi*, 37 were oral motions, and of the non-oral motions only seven provided an explanation for the motion.

For the Court's reference, attached hereto as Ex. 4 is a compilation exhibit of representative exemplars of a typical *nolle prosequi* colloquy prior to 2020—with the unsupported oral motion granted immediately without objection, and so ordered via a form order. The compilation includes exemplars from every judge on the Arlington Circuit Court.

[7] As noted above, the Order purports to require this level of detail with respect to motions to amend indictments, enter *nolle prosequi*, and dismiss charges; for recommendations for sentencing the Order demands "all justification" for recommended variations be in writing. (Order, at 1).

counsel believes it would aid the Court." 17th Cir. R. Civ. P. 2.3(A)(i). The Order removes this discretion entirely.

## II. Legal Standard

The law concerning a writ of prohibition is well-established. *Oxenham v. J.S.M.*, 256 Va. 180, 183, 501 S.E.2d 765, 767 (1998). "A writ of prohibition is an extraordinary remedy employed 'to redress the grievance growing out of an encroachment of jurisdiction.'" *Elliott v. Great Atlantic Mgmt. Co., Inc.*, 236 Va. 334, 338, 374 S.E.2d 27, 29 (1988) (*quoting James v. Stokes*, 77 Va. 225, 229 (1883)). The writ does not lie to correct error but only to prevent exercise of the jurisdiction of the court by the judge to whom it is directed when the judge either has no jurisdiction or is exceeding his/her jurisdiction. *In re Dep't of Corrections*, 222 Va. 454, 461, 281 S.E.2d 857, 861 (1981); *Grief v. Kegley*, 115 Va. 552, 557, 79 S.E. 1062, 1064 (1913).

Jurisdiction is "the power to adjudicate a case upon the merits and dispose of it as justice may require." *County Sch. Bd. of Tazewell Cty. v. Snead*, 198 Va. 100, 104–05, 92 S.E.2d 497, 501 (1956) (*quoting Southern Sand and Gravel Co., Inc. v. Massaponax Sand and Gravel Corp.*, 145 Va. 317, 331–32, 133 S.E. 812, 816 (1926) (Burks, J.,

concurring)). Prohibition will lie if the court or judge's entry of an order exceeds their jurisdictional authority. *See Grief*, 115 Va. at 557, 79 S.E. at 1064.

## III. Argument

### A. The Order Exceeds the Circuit Court's Authority

The Order exceeds the authority granted to Virginia courts. Virginia Code Section 8.01-4 provides that "[t]he . . . circuit courts may, from time to time, prescribe rules for their respective districts and circuits." This authority, however, is not without limit:

> Such rules shall be limited to those rules necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks' offices. No rule of any such court shall be prescribed or enforced which is inconsistent with this statute or any other statutory provision or the Rules of Supreme Court or contrary to the decided cases, or which has the effect of ***abridging substantive rights of persons before such court.*** Any rule of court which violates the provisions of this section ***shall be invalid.***

*Id.* (emphases added). The 17th Judicial Circuit of Virginia Local Rules and Preferred Practices are "issued pursuant to and strictly subject to Virginia Code Section 8.01-4." 17th Cir. R. P. A(III). In addition to being subordinate to Virginia statutes and the Rules and precedent of this Court, the Circuit Court's Local Rules recognize their

subordination to the U.S. and Virginia Constitutions, and opinions of the Supreme Court and Court of Appeals of Virginia. *Id.*

Here, the Order goes well beyond addressing "order[,] decorum[, or] the efficient and safe use of" the courthouse. It affects (and, as discussed below, violates) the fundamental constitutional principle of separation of powers, and the substantive rights and obligations provided to all Commonwealth's Attorneys by both the Constitution and the legislature. As such, it exceeds the Circuit Court's judicial authority and is necessarily invalid. *See* Va. Code § 8.01-4. A writ of prohibition is warranted to constrain this judicial overreach.

### B. The Order Violates Virginia's Constitutionally Mandated Separation of Powers.

The Order violates the constitutionally mandated separation of powers between the judicial and executive branch. Article III, Section 1 of the Virginia Constitution provides that "[t]he legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time." In Virginia, "[i]t is well established that the choice of offenses for which a criminal defendant will be charged is within the discretion of the

Commonwealth's Attorney."[8] *In re Horan*, 271 Va. 258, 264, 634 S.E.2d 675, 679 (2006) (citations and internal quotation marks omitted); *see also* Va. Code § 15.2-1627(B) ("The attorney for the Commonwealth . . . shall be a part of the department of law enforcement of the county or city in which he is elected or appointed, and shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or information[] charging a felony."). "So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Moore v. Commonwealth*, 59 Va. App. 795, 813, 722 S.E.2d 668, 677 (2012) (citations and internal quotation marks omitted).

The discretionary power of the prosecutor lies firmly in the Executive Branch, and "[a]bsent an unconstitutional abuse of that discretion, Virginia judges have no authority to substitute their

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[8] The Commonwealth's Attorney is "an agent and attorney for the Executive... is responsible to [her] principal. [T]he courts have no power over the exercise of [her] discretion or [her] motives as they relate to the execution of [her] duty." *Newman v. United States*, 382 F.2d 479, 481 (D.C. Cir. 1967).

judgment for the prosecutor's on such matters." *Taylor v. Commonwealth*, 58 Va. App. 435, 442, 710 S.E.2d 518, 522 (2011) (citations and quotations omitted); *see also Commonwealth of Virginia v. Williams*, No. 0849-19-2, 2019 WL 5556270, at *4 n.5 (Va. Ct. App. Oct. 29, 2019) Ultimately, the Commonwealth is "permitted to decide whether to proceed to trial" because under the principle of separation of powers, "the judicial branch should not infringe upon the executive branch's decision (exercised by the Commonwealth's Attorney) of whether even to take a prosecution to trial." *Id.*

While the judiciary's duties include serving as a check on and balance to the executive's exercise of its power, both the Virginia legislature and courts have defined the contours of an unconstitutional abuse of prosecutorial discretion in the instance of decisions for *nolle prosequi*. Section 19.2-265.3 of the Virginia Code provides the courts with the discretion to enter *nolle prosequi* if the Commonwealth provides "good cause" for such a motion. But Virginia courts have interpreted this Section to grant rather narrow discretionary authority to the courts, finding it serves only to ensure that a prosecutor's decision to terminate a case is not motivated by "bad faith" or done in

furtherance of "oppressive and unfair trial tactics" against the defendant. *Harris v. Commonwealth*, 258 Va. 576, 584, 520 S.E.2d 825, 829 (1999). "Absent such mischief, . . . courts defer to the public prosecutor given his constitutionally recognized prerogatives." *Duggins v. Commonwealth*, 59 Va. App. 785, 790–91, 722 S.E.2d 663, 666 (2012) (citing "vindictive intent," "oppressive and unfair trial tactics," or conduct "clearly contrary to manifest public interest").

This deference flows from the axiomatic principle that "[t]he Executive remains the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of whether a pending prosecution should be terminated." *Id.* (quoting 4 Wayne R. LaFave, *Criminal Procedure* § 13.3(c), at 162-63 (3d ed. 2007) (quoting *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975) as the "leading" case)). Thus, "[i]n reviewing the Commonwealth's decision to move for *nolle prosequi* of an indictment and given the inter-branch deference required by the separation of powers doctrine, a court should not interfere with the Commonwealth's decision . . . unless the court determines that the exercise of such discretion is clearly contrary to public interest." *Moore,* 59 Va. App. at 812, 722 S.E.2d at 676. And this

axiomatic principle is based on universally-valued ideals of individual liberty—indeed, then-Judge Kavanaugh recognized that one of the "greatest *unilateral* powers [the Executive] possesses under the Constitution. . . is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior—more precisely, the power either not to seek charges against violators of federal law or to pardon violators of federal law." *In re Aiken City*, 725 F.3d 255, 264 (D.C. Cir. 2013).

Here, the Circuit Court's attempt to require *blanket* written "detail[ed]" factual accounts and "not purely conclusory bases" of any prosecutorial decision to "(1) amend an indictment pretrial, (2) enter a *nolle prosequi*, or (3) dismiss a case" as well as recommended sentencing runs directly contrary to this body of case law and the Constitutional doctrines those cases interpret and apply.[9] For instance, in *Harris*, the

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[9] Section 19.2-231 of the Virginia Code gives trial courts discretion to permit amendment of indictments to correct "any defect in form" or to adjust for "variance between the allegations therein and the evidence offered in proof thereof . . . at any time before the jury returns a verdict or the court finds the accused guilty or not guilty, provided the amendment does not change the nature or character of the offense charged." But, as with *nolle prosequi* requests, the courts have interpreted this Section too as intending that courts should "liberally" grant amendment so long as fair notice to the defendant is not

Supreme Court of Virginia held that deference to the prosecutor was proper where the Commonwealth failed to prepare its case but there was no indication of bad faith. 258 Va. at 584, 520 S.E.2d at 829. In *Moore*, the Virginia Court of Appeals found that *nolle prosequi* was properly entered even where the prosecutor provided no reason at all for the determination but the record demonstrated that it was undertaken for "good cause." 59 Va. App. at 813, 722 S.E.2d at 677.

The court in *Moore* was careful to note that the decision should be interpreted as neither requiring a court to deny *nolle prosequi* where no reason is given nor creating "carte blanche" to request *nolle prosequi* without any rationale. *Moore*, 59 Va. App. at 812 n.9, 722 S.E.2d at 676 n.9. Instead, *Moore* stands for the principle that such decisions cannot be made in a sweeping fashion, as the amount of information required to determine whether a prosecutor is acting with good cause will vary case to case. *See id.*

This is precisely why the Circuit Court's blanket Order is unconstitutional. The Circuit Court is requiring—in whole categories of

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impacted. *Livingston v. Commonwealth*, 184 Va. 830, 835, 36 S.E.2d 561, 564 (1946) (interpreting the predecessor statute); *see also Cantwell v. Commonwealth*, 2 Va. App. 606, 608, 347 S.E.2d 523, 524 (1986).

cases that constitute the core areas of discretion exercised by the Office of the Commonwealth's Attorney—more information than is necessary for it to exercise its judicial authority, and attempting to force the prosecutor to provide more information than is appropriate in the exercise of her constitutionally prescribed executive authority for future prosecution of that or other cases. Indeed, *Cowan*—which *Moore* extensively relied on—specifically provided that even if a motion to dismiss is denied, the prosecution:

> would still have discretion to decline to move the case for trial; in which event, the court would be without power to issue mandamus or other order to compel prosecution since such direction would violate the traditional Separation of Powers Doctrine. The result is that although the court is authorized to deny the motion to dismiss in the public interest, it is nevertheless constitutionally powerless to compel the government to proceed.

*Cowan*, 524 F.2d at 511. Thus, the full extent of the Circuit Court's authority to deny such motions arises only where *the record before it* supports "bad faith" on the part of the prosecutor or the use of "oppressive and unfair trial tactics," *Harris*, 258 Va. at 584, 520 S.E.2d at 829; it has no more authority to force the creation of a record than it does to force the prosecution of the case, *see Cowan*, 524 F.2d at 511. And because the Order seeks to impose blanket requirements on

prosecutors in every single case to provide further written detail into the record than the prosecutor may deem appropriate—regardless of the underlying record before the Circuit Court—it is constitutionally invalid, and the Circuit Court should be prevented from attempting to enforce it. *See* Va. Code § 8.01-4.

### C. The Order Infringes on the Prosecutor's Substantive Rights.

The Order's requirement that the Office of the Commonwealth's Attorney provide "all factual bases" and legal analysis thereof to support decisions to amend charges or decide not to prosecute charges, changes the substantive law and violates rights afforded to prosecutors in the Commonwealth. Such a demand exceeds the Circuit Court's judicial authority. To be clear, this Petition does not seek this Court's intervention in *how* the Circuit Court should exercise its discretion to rule upon the procedural devices at issue in the Order. Instead, the issue here is what showing—how much information and what level of detail—is required to satisfy the well-established legal standards addressed by the Order. Because the Order fundamentally alters the required showing in a manner that infringes upon the prosecutor's substantive rights, it cannot be enforced.

"When statutory language is clear and unambiguous, a court is bound by the plain meaning of that language." *Virginia Dep't of Health v. NRV Real Estate, LLC*, 278 Va. 181, 187, 677 S.E.2d 276, 279 (2009). As discussed above, Section 8.01-4 of the Virginia Code does not permit a court to "prescribe[] or enforce[]" a rule that "has the effect of abridging substantive rights of persons before such court." This Court has held that "[s]ubstantive rights . . . are included within that part of the law dealing with creation of duties, rights, and obligations, as opposed to procedural or remedial law, which prescribes methods of obtaining redress or enforcement of rights." *Shiflet v. Eller*, 228 Va. 115, 120, 319 S.E.2d 750, 754 (1984). Section 15.2-1627(B) of the Virginia Code sets forth the "duties" and "powers" of prosecutors in the Commonwealth, to include "the duty of prosecuting all warrants, indictments or informations charging a felony."

Here, the Office of the Commonwealth's Attorney derives substantive rights and obligations from Section 15.2-1627(B), which grants prosecutors discretion to bring and defend actions, among other duties. *See* Va. Code § 15.2-1627(B); *Shiflet*, 228 Va. at 120, 319 S.E.2d at 753; *see also* R. Sup. Ct. Va. 2:614 (regarding a court's authority to

question witnesses); *Cowan*, 524 F.2d at 511 (discussing prosecutorial discretion). Section 8.01-4 of the Virginia Code is unambiguous—the Circuit Court is prohibited from "abridging" those substantive rights in any way.[10] As such, the Circuit Court' may not enter or enforce any order that, in any manner, infringes upon, curtails, or "abridge[es]" the Office of the Commonwealth's Attorney's rights in prosecuting charges.

The Office of the Commonwealth's Attorney's substantive rights, as examined above, include the constitutionally protected right to prosecutorial discretion: deciding when to prosecute and when not to prosecute. *See Bradshaw v. Commonwealth*, 228 Va. 484, 492, 323 S.E.2d 567, 572 (1984). Also, as examined above, well-established precedent in Virginia directs that the standard for reviewing such requests is "good cause"—which necessarily varies from case-to-case,

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[10] To be sure, these substantive rights are not issued only to parties to a litigation, but all persons. Had the legislature intended to limit the application of this Section to parties, it certainly would have used the term "parties," but it instead used the broad term "persons." Va. Code § 8.01-4. Unquestionably, the Office of the Commonwealth's Attorney is represented by a "person[]" who appears "before [the] court" when she seeks to amend indictments, enter a *nolle prosequi*, dismiss charges in pending cases, or make sentencing recommendations. Indeed, the legislature of Virginia dedicates the entire next chapter of Title 8.01 to identifying the rights of "parties" to a litigation. Va. Code. Ann. §§ 8.01-5 – 8.01-24.

and any departure from that standard risks violating the constitutional separation of power. *See Moore*, 59 Va. App. at 812, 722 S.E.2d at 676. But this *sua sponte* Order is not prompted by or connected to any particular case in which the particular facts and circumstances may contribute to a determination of good cause. It is a blanket requirement, set forth in advance of, and independent from, any determination not to prosecute.

Moreover, the Order's requirement for the "detail" of "all factual and not purely conclusory bases" and legal analysis thereof explicitly imposes an obligation that runs contrary to well-established precedent. Virginia courts have found good cause for *nolle prosequi* where no reason was provided at all. *See Moore*, 59 Va. App. at 813, 722 S.E.2d at 677. They have also found good cause on the conclusory and undetailed basis of "failure to prepare the case." *See Harris*, 258 Va. at 584, 520 S.E.2d at 829-30. To suddenly reverse course just 63 days after the current Commonwealth's Attorney took office and, for the first time in the Court's history, demand a detailed factual and legal rationale for every request—*every request*—to amend an indictment, enter a *nolle prosequi*, dismiss a case, or recommend particular

sentences, not only curtails the prosecutor's constitutional and statutory substantive right to prosecutorial discretion, but also ignores precedential caselaw. The Order violates Section 8.01-4 of the Virginia Code, and the Circuit Court should be prevented from attempting to enforce it.

### D. The Order Does Not Promote Order, Decorum, or The Efficient or Safe Use of Facilities.

Section 8.01-4 prohibits the Circuit Court from issuing or enforcing any rules that are not "necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks' offices." Not only is the Order not necessary to accomplish any of these goals, it actually impedes them and substantially jeopardizes their realization.

> Th[e] broad discretion [vested in a prosecutor] rests largely on the recognition that ***the decision to prosecute is particularly ill-suited to judicial review.*** Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails ***systemic costs*** of particular concern. Examining the basis of a prosecution ***delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may***

> ***undermine prosecutorial effectiveness*** by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

*Wayte v. U.S.*, 470 U.S. 598, 607-08 (1985) (emphasis added). Indeed, a prosecutor is guided by a host of factors and professional standards when managing decisions about what, when, and how to prosecute cases.

For instance, the ABA Criminal Justice Standards for the Prosecution Function (the "ABA Standards") provide that the prosecutor "is not obliged to maintain all criminal charges that the evidence might support."[11] The ABA Standards list several factors the prosecutor may properly consider in exercising discretion to dismiss a criminal charge, including: "the impact of prosecution or non-prosecution on the public welfare," "changes in law or policy," and "the fair and efficient distribution of limited prosecutorial resources."[12]

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11 CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION NO. 3-4.4(A) (AM. BAR ASS'N, 4TH ED. 2017), *available at https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/*.

12 *Id.* at No. 3-4.4(a).

Preparation of detailed written briefs and motions—even short motions—is no small task for any lawyer: it is time-consuming, labor-intensive, and incurs opportunity costs. As such, the Order's requirements erect several obstacles antithetical to the goals of Section 8.01-4. First, where previously these matters were handled orally in open court (*see supra,* pp. 4-6 and n.6), the time and resources that must now be devoted to such detailed, written work product necessarily draw already-limited resources from other endeavors. *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 862 (1995) (citing "the need for prosecutors to shepherd limited resources" as one of the "three most commonly cited reasons" for prosecutorial discretion). The Office of the Commonwealth's Attorney has both finite time and resources, and an obligation to be a wise steward of those taxpayer-provided resources. Preparing written and detailed filings simply to rationalize ***discretionary*** decisions to the Circuit Court deprives her—and the taxpayers—of those limited

resources required for the prosecution of cases of greater service to the public interest.[13]

Second, the time and money required to prepare written work product, file it, process such filings through the clerk's office, and have it reviewed, is not insignificant. *See* William Ortman, *Second-Best Criminal Justice*, 96 Wash. U. L. Rev. 1061 (2019) ("Drafting and responding to dispositive motions is time-consuming and expensive."). This new workflow through the court system will needlessly slow down cases and dockets, especially where the Office of the Commonwealth's Attorney has no intent on prosecuting a charge should a motion for *nolle prosequi* or motion to dismiss be denied and thus any denial needlessly delays the inevitable. *See Cowan*, 524 F.2d at 511 (noting that courts cannot constitutionally "compel prosecution").

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[13] The cost borne by the Office of the Commonwealth's Attorney was realized immediately upon the Court's policy reversal. For example, in *Commonwealth v. Kelly*, *discussed supra n.4*, the Court granted a motion for *nolle prosequi* of a defendant's felony possession charges upon oral motion in 2019. But on January 7, 2020, the same Court forced the Office of the Commonwealth's Attorney to submit a written motion, set a briefing schedule, and eventually heard oral argument ***six months*** later on June 26, in order to grant the motion for *nolle prosequi* of the misdemeanor possession charge against the same defendant. *See* Ex. 2.

Indeed, over the course of the past several months, the Circuit Court has created needless delays by questioning prosecutors for extended periods of time over demands for facts not in evidence—including information that should not properly be in evidence before the Court, such as hearsay in police reports—in order to force the embellishment of the record before it when ruling on such motions. *See* Bruce A. Green et al., *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 Ohio St. J. Crim. L. 143 (2016) Because they are officers of law enforcement, "prosecutors have greater access to the facts relevant to charging decisions," and therefore judicial fact-finding would be time-consuming and duplicative, and would potentially intrude on the confidentiality of particular criminal investigations and the general workings of the prosecutor's office". *Id.*

These added delays and demands may pose an imposition on defendants' substantive rights, and in the instances where dismissal is in the interest of justice for the accused, any such delay violates the revered adage of Virginia jurisprudence that justice delayed is justice denied. *See Aventis Pharma Deutschland GmbH v. Lupin*, Ltd., 403 F.

Supp. 2d 484, 491 (E.D. Va. Dec. 2, 2005) ("This Court is of the firm belief that justice delayed is justice denied.")

Third, placing the Office of the Commonwealth's Attorney's decision-making process under such a microscope chills the exercise of her executive authority. The timing of the Order reveals it to be a political act *intended* to chill the Commonwealth's Attorney's discretion. This intent is further demonstrated by the antithetical nature of the Order compared to standard Court policy of just a few months ago when, for example, in September 2019, Chief Judge Newman reaffirmed the well-known practice of the Court regarding motions for *nolle prosequi* stating "[the Commonwealth's Attorneys] don't have to give a proffer for good cause...." *Commonwealth v. Berhane*, Case No. CR17000434-37, CR17000699-706 (Sept. 18, 2019) (J. Newman), Status Hr'g. Tr. 3:19 – 4:1. And, as noted at pp. 5-6, *supra*, almost three-quarters of such motions were oral and ***none*** provided a "detailed" account of "all factual...bases" and legal analysis thereof.

But we need not infer from the timing and nature of the Order. The Court has recently stated that it considers itself a gatekeeper to the exercise of executive authority by the Office of the Commonwealth's

Attorney—not only to check executive overreach ***but to compel its use***. The Court conflates the judiciary's obligation to preclude "an executive effort to extend the law beyond its meaning" with "an executive [that] wishes a court to dismiss a criminal charge believing it should not be enforced on public policy grounds." This is wrong. In the first instance, the Court properly exercises the judicial power by checking executive overreach if attempting "to extend the law beyond its meaning." *See* Ex. 2B, *Kelly* Mem. Op. at 8-9. But in the latter instance, it is the judiciary ***compelling*** the use of executive power, *de facto* exercising the executive authority itself. Ex. 2B, *Kelly* Mem. Op. at 8-9. Such exercise is prohibited by the Constitution. Va. Const. art. VI, § 1 ("The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others....").

Nonetheless, even if some other purpose for the Order could be proffered, the *effect* of the Order remains unchanged: by imposing burdens on a purely discretionary act, the Order necessarily chills and restricts the exercise of that act. There are good reasons for prosecutors to keep the rationale for some decisions confidential, such as when a

defendant becomes a witness in another on-going investigation. *See, e.g.,* Wayne R. LaFave, *The Prosecutor's Discretion in the United States,* 18 AM. J. COMP. L. 532 (1970) (identifying a key explanation for a prosecutor's "considerable discretion in deciding whether or not to prosecute" is for instances "[w]hen the offender, if not prosecuted, will likely aid in achieving other enforcement goals."). This Order threatens the Office of the Commonwealth's Attorney's ability to judge what information is more beneficial to the public interest when it is known and what is more beneficial when it is not known, which necessarily impacts public safety and law enforcement in and beyond the courthouse.

In sum, the Order limits the Office of the Commonwealth's Attorney's ability to weigh the factors and resources necessary to do her job effectively and efficiently. As a result, the Order interferes with the Office of the Commonwealth's Attorney's discretion to enforce the law pursuant to the rights conferred by the Constitution and legislature. This interference tramples what has long been the rule in American courts: "[T]he prosecutor's decision whether or not to initiate prosecution has historically been subject to little or no judicial scrutiny

and is not readily amenable to evaluation by courts. The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute." *Gray v. Bell*, 712 F.2d 490, 513-14 (D.C. Cir. 1983) (*quoting Smith v. United States*, 375 F.2d 243, 247 (5th Cir. 1967)). To promote safety and the orderly and efficient use of judicial resources, the Commonwealth's Attorney must have the discretion to determine what level of detail is necessary to meet the well-established threshold requirement of "good cause," and if the Circuit Court disagrees in a particular case that such threshold is met, it may simply deny the motion or request appropriate additional details in that particular case.

Because the Order is not necessary to promote any of the requirements of Section 8.01-4 of the Virginia Code, it is invalid. Granting this petition will not only restore the Office of the Commonwealth's Attorney's ability to manage her caseload effectively and to make determinations about how to appropriately use prosecutorial resources, it will also ensure that the court systems remain orderly, efficient, and safe going forward.

## IV. Conclusion

For all these reasons, the Office of the Commonwealth's Attorney respectfully submits that the Order is invalid because it exceeds the Circuit Court's judicial authority, because it violates the Virginia Constitution's doctrine of separation of powers, infringes upon her substantive rights, and impedes the ordered and efficient use of the courthouse facilities and clerk's offices. The Office of the Commonwealth's Attorney respectfully requests that this Court grant this petition for a writ of prohibition and prohibit the Circuit Court from enforcing the legally invalid Order.

Dated: August 14, 2020

Respectfully Submitted,

Parisa Dehghani-Tafti
Commonwealth Attorney
Arlington County and the City of
Falls Church, Virginia

By Counsel

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*Counsel for Petitioner*

# EXHIBIT 1

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR ARLINGTON COUNTY**

| | | |
|---|---|---|
| IN RE: CRIMINAL DOCKETS BEGINNING MARCH 10, 2020 | ) | Misc. No. CM20000239-00 |

**ORDER GOVERNING CRIMINAL DOCKET PROCEDURES**

THIS MATTER came before the Court *sua sponte* concerning motions in criminal cases for compliance with the Court's previously established procedures for motions, as provided in the 17th Judicial Circuit Local Rules and Preferred Practices, adopted on July 1, 2014 and amended effective August 1, 2016.

UPON CONSIDERATION WHEREOF, it appearing to the Court for the efficient administration of justice; for the Court to properly consider the issues presented and the representations being made to the Court; for the Court to make all required statutorily required findings; to facilitate full consideration of parties' substantive rights; to permit parties the opportunity to present their positions on pending matters; and for clarity of the record; it is hereby,

ORDERED that all motions to: (1) amend an indictment pretrial, (2) enter a *nolle prosequi* or (3) dismiss a case shall be in writing; said motion shall provide in detail all factual and not purely conclusory bases in support thereof; said motion shall be signed by Counsel to the best of counsel's belief after reasonable inquiry and warranted by existing law; and it shall be filed with the Clerk of Court, with a courtesy copy in paper form submitted to Judges' Chambers, consistent with 17th Cir. R. P. 2.3(A)(iv)(b); and it is further,

ORDERED, for continuity of established practices and consistent with 17th Cir. R. P., that all sentencing guidelines and justification for upward or downward departures of any applicable sentencing guidelines supporting a recommended sentence shall be in writing and filed with the Clerk of Court, with a courtesy copy in paper form submitted to Judges' Chambers no later than 3:30 p.m. preceding the hearing date, as well as all written plea agreements.

ENTERED THIS 4th Day of March 2020.

William T. Newman, Chief Judge
Arlington County Circuit Court

Daniel S. Fiore, II, Judge
Arlington County Circuit Court

Louise M. DiMatteo, Judge
Arlington County Circuit Court

Judith L. Wheat, Judge
Arlington County Circuit Court

# EXHIBIT 2A

V I R G I N I A:

**IN THE CIRCUIT COURT OF ARLINGTON COUNTY**

| | | |
|---|---|---|
| **COMMONWEALTH OF VIRGINIA** | ) | |
| | ) | |
| **v.** | ) | **CR19-1102, 1103** |
| | ) | |
| **ERIC D. KELLEY, JR.** | ) | |
| | ) | **NEXT DATE: 3/20/20** |
| **Defendant.** | ) | |

**MEMORANDUM OF LAW IN SUPPORT OF THE COMMONWEALTH'S MOTION FOR NOLLE PROSEQUI PURSUANT TO §19.2-265.3**

PRELIMINARY STATEMENT

The Commonwealth, by her Commonwealth's Attorney, now gives notice that on January 27, 2020 it will move pursuant to Va. Code §19.2-265.3 for a *nolle prosequi* of the charge against the defendant. The Commonwealth has good cause for this motion because, 1) under both ancient common law tradition and modern judicial precedent, it is within the prosecutor's discretion to terminate a case and courts will not disturb that discretion unless the prosecutor abuses that discretion to harass the defendant; 2) the Commonwealth's decision to terminate this case does not rise to the level of an unlawful executive suspension of laws; 3) the efficient allocation of limited resources, the uncertain current state of forensic testing, the lack of public safety risk, and the likely imminent change in marijuana criminalization laws all counsel against prioritizing prosecution of simple marijuana possession; and 4) an assessment of the individual facts of the present case, including that the defendant has a validly issued medical marijuana card from another jurisdiction, indicate that it is not in the public interest to prosecute the defendant.

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**PROCEDURAL HISTORY/BACKGROUND**

The case had been set for a jury trial on January 9, 2020 in the Circuit Court of Arlington County on appeal from conviction in the General District Court for a charge of violation of Va. Code §18.2-250.1, Possession of Marijuana. On January 8, 2020, the

Commonwealth moved orally for a *nolle prosequi* pursuant to Va. Code §19.2-265.3. By order of January 10, 2020, the Honorable William T. Newman of the Circuit Court of Arlington County directed that the motion be made in writing, stating the good cause therefor no later than January 27, 2020.

## ARGUMENT

### I. THE COMMON LAW HISTORY OF THE *NOLLE PROSEQUI* AND BINDING CASE LAW PRECEDENT FOLLOWING STATUTORY ENACTMENT AS VA. CODE §19.2-265.3 PROVIDE THAT A PROSECUTOR'S BROAD DISCRETION TO TERMINATE A CASE IS ONLY DISTURBED TO PROTECT A DEFENDANT FROM PROSECUTORIAL ABUSE

Section 19.2-265.3 of the Virginia Code states that "Nolle prosequi shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown." Good cause is shown when the prosecutor's decision to terminate a case is not driven by "vindictive intent" that results in "oppressive and unfair trial tactics" against the defendant.

While its codification in §19.2-265.3 dates from 1979, the doctrine of *nolle prosequi* has been rooted in common law for at least 300 years. *Duggins v. Commonwealth*, 59 Va. App. 785 (2012). In 2012, the Court of Appeals of Virginia issued two decisions on the same day that conclusively settled the meaning of *nolle prosequi* under Va. Code §19.2-265.3: *Duggins* and *Moore v. Commonwealth*, 59 Va. App. 795 (2012). Read together, these decisions stand for two key principles: First, historically, the prosecutor has long been "the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of whether a pending prosecution should be terminated." *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975). Second, the role of the court is to ensure the defendant's rights are protected – that there is no "vindictive intent" or bad faith on the part of the prosecutor that result in

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"oppressive and unfair trial tactics" against the defendant. *See, Battle v. Commonwealth*, 12 Va. App. 624, 630 (1991); *Commonwealth v. Harris* 258 Va. 576, 584 (1999).

The history of prosecutorial discretion to terminate a case is long-standing, as The Court of Appeals explained:

> A concept dating from the late 1600s, *nolle prosequi* means "unwilling to prosecute" in Latin. Under English common law, the public prosecutor could generally "enter a *nolle prosequi* in his discretion" without obtaining the trial court's permission. Advisory Committee Notes to Fed.R.Crim.P. 48(a); *see generally* 4 Wayne R. LaFave, *Criminal Procedure* § 13.3(c), at 159 n. 36 (3d ed.2007). Some common law jurists, however, including Lord Chief Justice Mansfield, reserved the power to overrule a *nolle prosequi* when wielded as a weapon of "mischief or oppression" against an accused. *King v. Webb*, 1 Black. Rep's 460, 461, 96 Eng. Rep. 265, 266 (K.B.1764) (cited in 2 William Hawkins, *Treatise of the Pleas of the Crown* 355 n. 1 (1824) ("the court will see that no mischief or oppression ensues")).
>
> Following Lord Mansfield's approach, Virginia jurists as early as 1803 likewise conditioned the *nolle prosequi* power upon receiving "the consent" of the trial court. *Anonymous*, 3 Va. (1 Va. Cas.) 139, 139 (1803). In 1979, the General Assembly codified this tradition in Code § 19.2–265.3. *See* 1979 Va. Acts ch. 641. Under this statute, a trial court has the discretion to refuse a *nolle prosequi* if the prosecutor fails to show "good cause." *Id.*

*Duggins* at 790.

Turning to the standard of judicial review of the exercise of prosecutorial discretion, the Court of Appeals also made clear:

> Consistent with the common law background of Code § 19.2–265.3, Virginia trial courts properly refuse a *nolle prosequi* when the circumstances "manifest a vindictive intent," *Battle v. Commonwealth*, 12 Va.App. 624, 630, 406 S.E.2d 195, 198 (1991), resulting in "oppressive and unfair trial tactics" or other prosecutorial misconduct, *Harris*, 258 Va. At 584, 520 S.E.2d at 829. Absent such mischief, however, courts defer to the public prosecutor given his constitutionally recognized prerogatives:
>
> The Executive remains the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of

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> whether a pending prosecution should be terminated. The exercise of its discretion with respect to the termination of pending prosecutions should not be judicially disturbed unless clearly contrary to manifest public interest. In this way, the essential function of each branch is synchronized to achieve a balance that serves both practical and constitutional values. LaFave, *supra* § 13.3(c), at 162–63 (quoting, as the "leading case" on the subject, *United States v. Cowan,* 524 F.2d 504, 513 (5th Cir.1975)).

*Duggins* at 790-91.

In short, under both three hundred years of common law tradition and pursuant to modern judicial precedent, courts will only disturb the longstanding discretion of the prosecutor to *nolle prosequi* a case when there is evidence of a violation of a defendant's rights. *See Moore* at 808.

For example, the Court of Appeals vacated a conviction where the Commonwealth sought and received a *nolle prosequi* following suppression of its evidence. *Battle v. Commonwealth*, 12 Va. App. 624 (1991). The defendant had been faced with a Hobson's choice of withdrawing his objection to the evidence on which he had just received a favorable ruling to suppress or choosing to exercise his constitutional right but accept a *nolle prosequi* motion by the Commonwealth and a new indictment on more serious charges. *Id.* at 627-28. In other words, the *nolle prosequi* was sought in order to deprive the defendant of the favorable evidentiary ruling and to impose more serious charges. The Court of Appeals focused on the protection of the defendant's constitutional rights, restating the established proposition that, "the imposition of a penalty upon the defendant for having successfully pursued a statutory right... or collateral remedy would be ... a violation of due process of law." *Id.* at 628 (citation omitted).

Finding that the *nolle prosequi* could not be used as a sword against the defendant, the Court of Appeals held that the timing of the Commonwealth's actions combined with their express statements "manifest a vindictive intent." *Id.* at 630. Ultimately, the Commonwealth was barred from retrying the defendant on anything except the original indictment charges owing to their improper use of the *nolle prosequi*.

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In contrast, when a motion for *nolle prosequi* shows no vindictive intent, courts defer to the prosecutor's discretion. For example, in *Arnold v. Commonwealth*, 18 Va. App. 218, 222 (1994), the court reasoned that a motion to *nolle prosequi* made on the basis of difficulty in securing witnesses for trial while preserving its ability to pursue a serious charge, "suggests no oppressiveness or unfair trial tactic." *Id.*

Similarly, in *Harris v. Commonwealth*, 258 Va. 576 (1999), the Supreme Court of Virginia made clear that the focus of a trial court should be on instances of prosecutorial misconduct affecting a defendant's constitutional rights. The Court held that a motion to *nolle prosequi* following a denied request for a continuance in order to secure additional evidence, "does not demonstrate bad faith on the Commonwealth's part. Nor does [it]...rise to the level of oppressive tactics amounting to prosecutorial misconduct..." *Harris* at 581 (finding that "bad faith," "oppressive trial tactics," and "prosecutorial misconduct" support finding of no good cause). The power of the trial court derived from its duty to protect the defendant's rights.

Indeed, the Court of Appeals in *Moore* made this point explicitly, stating, "the power to require 'good cause' is generally exercised with great caution," and "[t]he terms 'bad faith' and 'oppressive tactics' used in *Harris* provide the best summary of situations in which 'good cause' does not exist." *Moore* at 809.

Ultimately in *Moore*, the Court of Appeals adopted the language of *Harris* to "provide[] the proper construct for evaluation of the degree to which the judicial branch should defer to the executive on the question of 'good cause.'" *Id.* at 812, quoting *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975).[1] The *Moore* court went on to hold that, "given the inter-branch deference required by the separation of powers doctrine, a court should not interfere with the Commonwealth's decision to seek a *nolle prosequi* unless the court determined that the exercise of such discretion is clearly contrary to public interest." *Id.* In

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[1] In *Cowan* the issue was similar to the one presented by the instant motion under the Federal Rules' analogous Rule 48(a) requiring a motion to dismiss indictment by the U.S. Attorney, "by leave of court."

other words, according to *Harris* and *Moore*, a court's "good cause" inquiry into prosecutorial discretion to dismiss a case should focus on abuse of that discretion in the form of "vindictiveness," "oppressive trial tactics," and "prosecutorial misconduct," and not on whether the court agrees that good faith decisions are "contrary to public interest."[2] Indeed, *Moore* is unambiguous that the trial court's overarching concern in protecting the "public interest" is as a bulwark on behalf of the defendant against prosecutorial procedural abuses. *Moore* at 809.

Thus, while "fair" and "evenhanded" administration of criminal justice is relevant to the judiciary's function in an analysis of good cause, good cause is primarily concerned with judicial oversight for prosecutorial misconduct and protection of a defendant's due process rights.

This is why, traditionally, there has been little to virtually no inquiry previously as to the Commonwealth's "good cause" for a motion to *nolle prosequi*, and frequently no inquiry when such motions are made without objection and the clearly intended result is the full termination of the prosecution of the defendant. Indeed, this Court acknowledged that established discretion in *Commonwealth v. Berhane*, No. CR17-0434-37 and CR17-0699-706 (Va. Cir. 2019), when the Commonwealth moved to *nolle prosequi* a 61 count indictment and the Court explained, "they don't have to proffer good cause" absent an objection. *See* Appendix C, *Berhane* 9/18/19 Tr. at 3-4.

Neither concern is implicated here. The *nolle prosequi* motion is not being used as a tool to bring harsher charges, or to punish a defendant for exercising his right to due process,

[2]The *Cowan* court had a number of relevant observations about the separation of powers doctrine, which have been implicitly adopted by *Moore*, including that, "few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." *Cowan* at 512 (citations omitted). *Cowan* also correctly points out that the separation of powers doctrine presents an additional consideration in that even if the motion is denied, the prosecution, "would still have the discretion to decline to move the case for trial; in which event the court would be without power to issue mandamus or other order to compel prosecution since such direction would violate the traditional Separation of Powers Doctrine. The result is that although the court is authorized to deny the motion to dismiss in the public interest, it is nevertheless constitutionally powerless to compel the government to proceed." *Id.* at 511. In Virginia, this concern would be implicated by the statutory combination of Va. Code §15.2-1627 and Supreme Court Rule 2:614.

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a speedy trial, or any other right. The defendant here needs no protection from vindictiveness or bad faith. And the public interest is served by the traditional and ethically mandated exercise of discretion on a case by case basis by the executive. *Cf. Howell v. McAuliffe*, 292 Va. 320 (2016) (holding that an executive order restoring the rights of formerly incarcerated people as a group was a novel and improper use of executive authority and a suspension of the laws).

## II. The Commonwealth's Motion Pursuant to Va. Code §19.2-265.3 Does Not Rise to the Level of an Unlawful Executive Suspension of Laws Pursuant to *Howell v. McAuliffe*

In *McAuliffe,* the Virginia Supreme Court ruled unconstitutional an executive order that restored the voting rights of 206,000 unnamed individuals on the grounds that it was so broad and so novel that it amounted to an unlawful executive suspension of laws. While the Court conceded there was no precise definition of a suspension of laws, it identified two broad characteristics that would trigger a possibility of judicial review: (1) "when an executive sets aside a generally applicable rule of law based solely upon his disagreement with it." *Id.* at 347; or (2) when the executive action is expansive in "scope and generality." *Id.* at 348. Neither characteristic is present here.

First, here, the Commonwealth has moved for a *nolle prosequi* as to one defendant charged with a single offense. It has done so based on a factual and policy background that informs its discretion to make such motions on a case-by-case basis. Second, unlike the executive order at issue in *McAuliffe*, the Commonwealth is not acting in any generalized way on behalf of an unnamed class. Moreover, the *McAuliffe* Court went on to note that, "[a]ll agree that the Governor can use his clemency powers to mitigate a general rule of law on a case-by-case basis." *Id.* at 349. Unlike the Governor, the Commonwealth's Attorney *only* asserts its power on a case-by-case basis thereby obviating the utility of any *McAuliffe* analysis of its actions. More importantly, however, the Commonwealth has in fact exercised

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judgment on a case-by-case basis and has looked at each individual case and weighed the public safety value of the case.

Significantly, following the decision in *McAuliffe*, the Governor modified the approach taken to restoration of voting rights from the blanket order to signing orders for named individuals mailed directly to them – even absent a petition from them. An attempt to hold him in contempt was summarily dismissed without an opinion: that method was sufficient individuation of cases.[3]

In any event, at the heart of the *McAuliffe* Court's reasoning was the concern that the power claimed by the executive order to issue blanket restoration of voting rights to an unnamed class of individuals had never been previously been claimed – and had even been expressly rejected by other governors. *McAuliffe* at 338-39. Here, it is established both in the common law history of the *nolle prosequi* and its subsequent codification in §19.2-265.3 that such motions have an established practice within the executive's sphere of power.

But not only is there a history of *nolle prosequi* actions to look to locally (like *Berhane*), but also the *Moore*, *Harris* and *Cowan* line of cases that provide a binding legal framework for judicial review of the Commonwealth's motion. And beyond this legal framework – all of which establish that the judiciary's role in these circumstances is a protective one primarily to ensure the rights of a defendant in the face of tremendous governmental power – additional guidance informs the role of the Commonwealth's Attorney from sources such as The American Bar Association (ABA)'s Criminal Justice Standards for the Prosecution Function. Those emphasize that the prosecutor "is not obliged to maintain all criminal charges that the evidence might support,"[4] and lists some factors that the prosecutor may properly consider in exercising discretion to dismiss a criminal charge. Those factors include, but are not limited to:

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[3] Laura Vozzella, *Va. Supreme Court finds McAuliffe not in contempt on felon voting actions*. Virginia Politics (September 15, 2016), Available at: https://www.washingtonpost.com/local/virginia-politics/va-supreme-court-finds-mcauliffe-not-in-contempt-on-felon-voting-actions/2016/09/15/9dcfb504-7b7a-11e6-ac8e-cf8e0dd91dc7_story.html

[4] CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION NO. 3-4.4(a) (AM. BAR ASS'N 2017).

- "the strength of a case;"[5]
- "the prosecutor's doubt that the accused is in fact guilty;"[6]
- "the extent or absence of harm caused by the offense;"[7]
- "the impact of prosecution or non-prosecution on the public welfare;"[8]
- "the background characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;"[9]
- "whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;"[10]
- "any improper conduct by law enforcement;"[11]
- "the possible influence of any cultural, ethnic, socioeconomic, or improper biases;"[12]
- "changes in law or policy;"[13] and
- "the fair and efficient distribution of limited prosecutorial resources."[14]

Far from exercising a novel power on a theory rejected by other executives, the Commonwealth's role is precisely to make judgments about which cases to prosecute and which cases to decline prosecution. It is the Commonwealth's role and ethical obligation, as an elected official accountable to the public, to consider factors such as these in determining the trajectory of a case as a matter of public policy. Once that trajectory is determined, it is the Commonwealth's Attorney's duty to ensure that the mechanisms it employs are part of the existing legal framework whether by ensuring a full and fair trial or, making an appropriate plea offer, or as in the case of the instant motion, to seek a *nolle prosequi*.

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[5] *Id.* at No. 3-4.4(a)(i).
[6] *Id.* at No. 3-4.4(a)(ii).
[7] *Id.* at No. 3-4.4(a)(iii).
[8] *Id.* at No. 3-4.4(a)(iv).
[9] *Id.* at No. 3-4.4(a)(v).
[10] *Id.* at No. 3-4.4(a)(vi).
[11] *Id.* at No. 3-4.4(a)(viii).
[12] *Id.* at No. 3-4.4(a)(xii).
[13] *Id.* at No. 3-4.4(a)(xiii).
[14] *Id.* at No. 3-4.4(a)(xiv).

## IV. Above and Beyond The Commonwealth's Longstanding and Broad *Nolle prosequi* Discretion, there is Good Cause to Terminate the Present case Because the efficient allocation of limited resources, the uncertain current state of forensic testing, the lack of public safety risk, and the likely imminent change in marijuana criminalization laws all counsel against prioritizing prosecution of simple marijuana possession

The Commonwealth's decision to terminate prosecution of this case is driven by four factors: prosecuting simple marijuana possession is not an efficient use of the Commonwealth's limited resources; the current state of backlog, capacity, and policy of the Department of Forensic Science (DFS) to conduct forensic analysis of marijuana leads the Commonwealth to believe that it is unlikely to meet the requisite burden of proof in cases of simple marijuana possession; the Commonwealth is aware of no credible evidence that would indicate simple possession of marijuana poses a safety risk in and of itself, absent such aggravating factors as proximity to children, public use, sales, and driving under the influence; and the law in this area is in flux such that there is a strong likelihood that this offense will no longer be a criminal offense in the near future.

Whether considered separately or taken together, these factors show good cause because none of them manifest a vindictive intent, result in "oppressive and unfair trial tactics", or prosecutorial misconduct.

### *A. Prosecution of Simple Marijuana Possession is not an Efficient Use of Limited Resources*

As a matter of allocation of scarce public resources, estimates of the amount of resources expended on simple marijuana possession can vary widely, but are nonetheless significant proportions for a jurisdiction. For example, a rough analysis from 2018 shows that simple marijuana possession accounted for about 14% of the arrests made by the

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Arlington County Police[15] and roughly 10% of the caseload closed or otherwise disposed of by the Commonwealth's Attorney's Office and of the criminal caseload of the General District Court and Circuit Court in 2018.[16] This figure, and the resources it consumes within the office, amounts to about one full-time prosecutor's entire yearly workload. In a world of limited resources, those resources should be directed towards more serious felony offenses, towards offenses against people and their property, and towards investment in programs that demonstrably reduce recidivism.

### B. *The Current State of Forensic Testing Significantly Hampers the Commonwealth's Ability to Prosecute Cases of Simple Marijuana Possession*

Additionally, the Commonwealth is informed by the current state of forensic analysis of marijuana and its effect on the ability to proceed with prosecution. Traditionally, in prosecutions for violations under Va. Code §18.2-250.1, the method of proving that the substance possessed was in fact marijuana had been to rely on Va. Code §19.2-188.1, which permits a law-enforcement officer to "testify as to the results of any marijuana field test approved as accurate and reliable by the Department of Forensic Science…" As detailed in a DFS Policy change, dated May 23, 2019, owing to recent changes in both Virginia and Federal law, the *cannabis sativa* that is tested for in the DFS-approved field tests is present in both illegal marijuana and now-legal industrial hemp.[17]

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[15] Arrest Data for Simple Marijuana Possession from ACPD Marijuana Arrests (1/1/13-5/2/19), Available At: https://arlingtonva.s3.amazonaws.com/wp-content/uploads/sites/11/2019/05/Marijuana-Arrests-2013-2019YTD.pdf; Arrest data from Virginia State Police, available at: https://www.vsp.virginia.gov/downloads/Crime_in_Virginia/Crime_in_Virginia_2018.pdf

[16] Calculation arrived at from an internal analysis using a compilation of internal data and publicly available data from the Virginia State Police Arrest Data and collected court case information.

[17] *See* Notice Regarding Marijuana Field Tests And Changes To The Department's Analytical And Reporting Scheme For Marijuana And Marijuana By Products, Available at: https://www.dfs.virginia.gov/wp-content/uploads/2019/05/DFS-Notice-Regarding-Marijuana-Field-Tests-and-Marijuana-Analysis-and-Reporting.pdf ("5/23/19 Notice"). The specific Virginia changes were the enactment of Va. Code §§ 18.-247(D) and 3.2-4113. Those essentially exempted industrial hemp from the definition of marijuana and created an affirmative defense for growers, dealers, processors and their agents.

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Per DFS's 5/23/19 Notice, "[t]he only mechanism to distinguish hemp plant material from marijuana plant material is to conduct a quantitative analysis to determine the tetrahydrocannabinol (THC) concentration of the plant material… thus, the current marijuana field tests cannot distinguish marijuana from industrial hemp." *See* 5/23/19 Notice, 1-2.

In November 2019, DFS announced a second field test, the 4-AP or "Swiss" Test, was made available for law enforcement agencies. However, on information and belief and as outlined in their announcement of the availability of the new test, it too cannot distinguish between illegal marijuana and legal hemp or cannabis, but rather serves as a presumptive guide for determining whether a substance is appropriate for submission to DFS for further analysis.[18]

Simply put, at this time the Commonwealth is unable to proceed with prosecutions that rely solely on field test testimony pursuant to Va. Code §19.2-188.1 The state agency charged with promulgating the regulations for identification of controlled substances has indicated that the statutory method set out by Va. Code §19.2-188.1 is currently inconclusive for this purpose. The Commonwealth interprets their guidance as reasonable doubt as a matter of law. A certificate of analysis would be required in each case at this time in order to proceed with prosecution. However, until January 24, 2020, DFS would not accept submissions for testing in simple marijuana possession cases except by court order.[19] On information and belief, when court orders came in for testing in simple marijuana possession cases, those cases effectively jumped the backlog of felony possession and distribution cases of more serious drugs like cocaine, fentanyl and opiates in order to comply with the court's order.

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[18] *See* Distribution of 4-AP Field Test Kits to Assist in the Differentiation of Marijuana and Industrial Hemp, Available at: https://www.dfs.virginia.gov/wp-content/uploads/2019/11/DOC-2019-11-12T133005.682.pdf

[19] *See* Revised Marijuana Submission Policy – Plant Material Will Not Be Accepted in Simple Possession Cases Without Court Order for Analysis, Available at: https://www.dfs.virginia.gov/wp-content/uploads/2014/10/Policy-Notice-Marijuana-Submissions.pdf ("10/22/14 Notice")

On information and belief, the Department of Forensic Science is presently operating on an approximately 9-month backlog of controlled substances testing, which includes cases of felony possession of Schedule I/II substances such as opiates, fentanyl and cocaine, among others, as well as all cases involving sale or distribution. Until January 24, 2020, the practical effect of the testing regime and the DFS policies was that non-marijuana drug cases implicating a more direct public safety concerns remain in the backlog for months – precisely because they did not become a priority in the absence of a court order. Based on the newly-enacted policy, it is likely marijuana cases will become a part of – and add to – the 9-month backlog since they will be submitted absent a court order.

But, even if the burden on DFS could be eliminated and more serious cases removed from the backlog, there remain additional evidentiary and resource concerns even with a Certificate of Analysis. For all certificates of analysis between the 5/23/19 Notice and the 1/24/2020 Notice, "DFS's current analytical scheme for the testing of suspected marijuana plant material... does not include a quantitation of the amount of THC present." 5/23/19 Notice at 2. Without such quantitation, it is unclear whether a substance is illegal marijuana or a possibly legal substance, namely, hemp, which can be readily purchased in various forms – including what appear to be traditional marijuana cigarettes or "blunts" in smoke shops. Moreover, the 5/23/19 Notice indicated that the quantitative analysis that would be required was not within DFS's capabilities at that time.

DFS's 1/24/2020 Notice clarifies a number of issues about their testing capabilities.[20] First, the new policy rescinds the previous requirement of a court order for submission of substances for testing, the effect of which is discussed above. Second, it

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[20] *See* Implementation of Semi-Quantitative Method for *Cannabis Sativa* Plant Material and Rescission of DFS Policy Requiring Court Order for Analysis in Simple Possession of Marijuana Cases, Available at: https://www.dfs.virginia.gov/wp-content/uploads/2020/01/Policy-Notice.MJ-Semi-Quant.pdf

outlines a new reporting scheme that will be reflected in certificates of analysis going forward to reflect the semi-quantitative's capacity to more readily distinguish between illegal marijuana and other *cannabis* substances.

Despite this capacity going forward, the present caseload involving substances tested prior to this recent policy change will still involve Certificates of Analysis that reflect the old reporting method – the one in which no concentration had been determined, and thus no determination had been made beyond a reasonable doubt as to whether the substances were in fact illegal marijuana. To the extent that retesting of these substances were possible, a cost-benefit analysis weighs against proceeding in this fashion at this time, given the present testing backlog, except on a case-by-case basis about whether in any specific case the resources needed to go forward are best spent on such prosecutions.

DFS's new capability, and the attendant change in reporting on certificates of analysis supports the contention that the previous certificates were insufficient to constitute proof beyond a reasonable doubt for violations of Va. Code §18.2-250.1 following the legislative changes that prompted the initial change.

Moreover, according to both the 5/23/19 Notice and the 1/24/20 Notice, DFS still has no validated semi-quantitative test for edibles and other extracts, making consistent enforcement of any single form of THC concerning. The 1/24/20 Notice equally indicates that a full quantitative method is still in development, but "will be time consuming and cost-intensive for DFS." In addition, given the daily occurrence of these cases, the required testimony from the DFS analyst would necessitate almost daily appearances in court at a time when those analysts ought to be, and arguably need to be, working on their caseloads that more directly implicate public safety concerns.

Further, the 5/23/19 Notice claims that once the quantitative method has been implemented, it will only be used in cases where, "the defendant raises the affirmative defense and the prosecution requires such proof for the case…" 5/23/19 Notice at 2. The

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1/24/20 Notice similarly advises that this method will be available essentially upon request once validated. The Commonwealth views this issue as a fundamental element that is part of our burden of proof: to prove that a substance is what we say it is.

This situation implicates directly Rule 3.8(b) of the Virginia Rules of Professional Conduct, Additional Responsibilities of a Prosecutor, that a prosecutor shall, "not knowingly take advantage of an unrepresented defendant." The current testing regime places the Commonwealth in the untenable position of proceeding against *pro se* defendants who might not be aware of this "affirmative defense" whereas those defendants represented by attorneys would be, and in a position to request the appropriate testing. This is a result that the Commonwealth cannot idly permit.

### C. *There Exists No Credible Evidence that, Absent Aggravating Factors, Simple Marijuana Possession Poses a Public Safety Risk*

As a matter of safety, the Commonwealth is aware of no credible evidence that would indicate simple possession of marijuana poses a safety risk in and of itself, absent such aggravating factors as proximity to or use by children, public use, sales, and driving under the influence. This case has been individually assessed and does not implicate any of these concerns.

Furthermore, the public safety concern that marijuana usage could be a "gateway drug" to other illicit substances is unsound.[21] Marijuana usage is likely co-extensive with other substances such as alcohol and tobacco use as an indicator of future substance use,[22] and "the majority of people who use marijuana do not go on to use other 'harder' substances."[23] Among those who use marijuana, use tends to decline towards the end of

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[21] "The Marijuana Gateway Fallacy," Waltermaurer, Benjamin, Mancini, The Benjamin Center for Public Policy Initiatives, SUNY New Paltz, Summer 2017, available at https://www.newpaltz.edu/media/the-benjamin-center/db_18_the_marijuana_gateway_fallacy.pdf

[22] Prioritizing Alcohol Prevention: Establishing Alcohol as the Gateway Drug and Linking Age of First Drink with Elicit Drug Use, Barry et al, Journal of School Health, December 8, 2015, available at https://www.ncbi.nlm.nih.gov/pubmed/26645418

[23] Marijuana, National Institute of Drug Abuse, September 2019, p. 21, available at https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-gateway-drug

young adulthood.[24] In jurisdictions where medical marijuana has been available, early findings indicate that marijuana may in fact lead to less use and abuse of opioids and other prescription drugs.[25] And most importantly, no deterrent effect has been observed as there has been no attendant decrease in marijuana use despite the increase in arrests.[26]

D. *Public Policy Counsels in Favor of De-Prioritizing Prosecution of Simple Marijuana Possession While the Legislature Is Considering Changes in the Law*

The law in this area is in flux such that there is a strong likelihood that this offense will no longer be a criminal offense in the near future. Virginia's Attorney General has explicitly advocated for legalization or decriminalization of simple possession of marijuana for personal use,[27] and has recently announced his public support for several of the leading bills pending in this legislative session.[28] Virginia's Governor has similarly called for

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[24] *See* "Predictors of Marijuana Use Among Married Couples: The Influence of One's Spouse," Homish et al, Drug Alcohol Dependency, 2007, 91; available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2128711/pdf/nihms33182.pdf

[25] *See* "Rationale for Cannabis-based interventions in the opioid overdose crisis," Philippe Lucas, Harm Reduction Journal, 2017, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5563007/pdf/12954_2017_Article_183.pdf; See also "Substitution of medical cannabis for pharmaceutical agents for pain, anxiety, and sleep." Piper et al, Journal of Psychopharmacology, April 4, 2017, available at https://journals.sagepub.com/doi/10.1177/0269881117699616

[26] Racial Disparities in Marijuana Arrests in Virginia (2003-2013), Jon Gettman, Drug Policy Alliance, Available at: http://www.drugpolicy.org/sites/default/files/Racial_Disparities_in_Marijuana_Arrests_in_Virginia_2003-2013.pdf

[27] *See Generally*, Attorney General Mark Herring Expresses Support for Legalizing Recreational Marijuana, WHSV 3, October 2, 2019, Available at: https://www.whsv.com/content/news/Attorney-General-Mark-Herring-expresses-support-for-legalizing-recreational-marijuana-562029711.html (last visited January 1, 2020); Mark Herring OpEd: Virginia Must Begin to Decriminalize Marijuana, Daily Press, June 15, 2019, Available at: https://www.dailypress.com/opinion/dp-edt-oped-herring-decriminalize-marijuana-0616-story.html (last visited January 1, 2020); AG Herring even convened a summit to advance decriminalization of marijuana. AG Herring Hosting Cannabis Summit to Advance Decriminalization in Virginia, ABC 13 News, December 4, 2019, Available at: https://wset.com/news/at-the-capitol/ag-herring-hosting-cannabis-summit-to-advance-decriminalization-in-virginia (last visited January 1, 2020.

[28] HB1507 is one of nine bills introduced this session regarding the possession of marijuana. Specifically, HB1507 proposes the legalization of marijuana and would invalidate existing laws prohibiting its possession. Other proposed legislation such as Senate Bill 2, would decriminalize marijuana, imposing civil penalties such as fines rather than criminal prosecution. Virginia Attorney General Mark Herring has recently committed to supporting HB1507 and legalization, saying that "Justice demands it, Virginians are demanding it, and I'm going to make sure we get it done." Emma Gauthier, *Marijuana reform advocates split on legalization, Local* (Jan. 15, 2020), https://www.washingtonpost.com/local/marijuana-reform-advocates-split-on-legalization/2020/01/15/e2c45392-37f9-11ea-a1ff-c48c1d59a4a1_story.html

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decriminalization this legislative session and making simple possession a civil penalty.[29] Moreover, several bills addressing decriminalization or legalization have already been introduced in the House of Delegates and a number of legislators, now in the majority, have publicly made it known that they support these efforts.

Indeed, the question whether to continue criminalizing simple possession was at the heart of recent General Assembly and local campaigns in 2019. The results of these elections show that a significant majority of voters in the Commonwealth, including voters in Arlington County and the City of Falls Church, reasonably believe the public interest is best served either by decriminalization or legalization or, as a bare minimum, by the cessation or deprioritization of such prosecutions in the absence of aggravating factors.

While no single election result or poll determines the outcome of any single case, they do, broadly speaking, have a role in the constellation of factors to be considered by elected officials as a reflection of the public interest in how their resources should be expended: "The Executive and Legislative Branches are *directly accountable* to the electorate, and it is in those political venues that public policy should be shaped." *McAuliffe* at 326 (emphasis added).

## V. Viewed Against the Broader Background of Prosecutorial Discretion and what Constitutes Good Cause, an Assessment of The Facts and Circumstances of The Individual Case Indicates that it is not in the Public Interest to Continue Prosecuting the Defendant

On November 29, 2018, Officer Staley of the Arlington County Police Department was on routine patrol in the area of N. Quinn Street and Wilson Blvd. At that time, he observed a vehicle stopped at that intersection at a steady red traffic signal which had a "No Turn on Red" sign posted. He observed the vehicle in front of me make a right turn onto Wilson Blvd. and immediately initiated a traffic stop.

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[29] Governor Northam Unveils Bold Criminal Justice Reform Agenda, Available at: https://www.governor.virginia.gov/newsroom/all-releases/2020/january/headline-850450-en.html

Upon approaching the vehicle, Officer Staley observed the odor of marijuana coming from the vehicle. The defendant admitted there was marijuana in the vehicle and told the officer it was located in the center console. A substance was recovered and additionally a pill bottle was found containing what appeared to be Acetaminophen/Oxycodone. The substances were submitted to the Department of Forensic Science which determined that it was 4.48 grams of marijuana of an unknown concentration and the pills contained Oxycodone.

Subsequently, the defendant provided a valid prescription for the oxycodone that was recovered and that charge was nolle prossed on January 7th, 2019 on motion of the Commonwealth. The marijuana possession charge was continued for submission of this written motion.

On information and belief, the defendant has a valid medical marijuana card from the state of Maryland. *See* Appendix D. Additionally, given that the observed driving behavior does not appear to have been impacted by any consumption of marijuana, the defendant's possession of a valid prescription for one of the substances and a good-faith legal basis for possessing the substance at issue on the remaining charge, and given the Commonwealth's previously discussed limitations in proceeding with the certificate of analysis at present, the Commonwealth submits there is good cause to grant a *nolle prossequi* under Va. Code §19.2-265.3

CONCLUSION

For the foregoing reasons, the Commonwealth moves to *nolle prosequi* or dismiss with prejudice the charges in the above-styled case.

Respectfully submitted:

/s/
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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that February 6th, 2020 a copy of the foregoing notice and motion was emailed to Shalev Ben-Avraham, counsel for the Defendant, at sben-avraham@vadefenders.org

_____/s/_____
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# EXHIBIT 2B

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR ARLINGTON COUNTY**

| | | |
|---|---|---|
| Commonwealth of Virginia | ) | |
| | ) | |
| v. | ) | CR 19-1103 (00) |
| | ) | |
| Eric Dewayne Kelly, Jr., | ) | |
| Defendant. | ) | |

**MEMORANDUM OPINION**

The issues presented address whether the Court should grant the Commonwealth's motion to *nolle prosequi* the criminal charge in this case of possession of marijuana, second or subsequent offense.

On September 30, 2019, a grand jury empaneled by the Court returned an indictment, charging that on November 29, 2018, in the County of Arlington, Defendant Eric Dewayne Kelly, Jr. "knowingly or intentionally possessed marijuana after having been previously convicted of violating Virginia Code § 18.2-250.1.". Indictment ¶ 1. A trial by jury was set for January 8, 2020, to hear the charge of possession of marijuana, second or subsequent offense. Before then, the Commonwealth's Attorney requested the Court to advance the matter to January 7, 2020.

On January 7, 2020, when the case was called, the Commonwealth's Attorney made a motion for the Court to enter an order *nolle prosequi* pursuant to Va. Code § 19.2-265.3, that provides: "*Nolle prosequi* shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown." (Emphasis added). Once good cause is shown, the Court can then exercise its discretion. On January 7, the Court inquired of the "good cause" as the motion was being considered. The Commonwealth could not articulate the good cause, so the Court took the motion under advisement, instead of denying the motion for failure to then

show good cause. The Defendant's attorney neither suggested a basis for the Court to find good cause nor requested the Court to dismiss the charge with prejudice. The Court then required the Commonwealth to file a memorandum in support of good cause and a briefing schedule order was subsequently entered. The Court has reviewed and fully considered the Commonwealth's pleadings, the filing by Defendant and the entire record, and the Court heard and considered oral argument on June 26, 2020.

The Court interprets the term "good cause" as substantial grounds for the relief requested, as determined on a case-by-case basis, upon the record then established. 5 Shirelle Phelps & Jeffrey Lehman, *West's Encyclopedia of American Law*, 113 (2d ed. 2005); *Good Cause*, *Black's Law Dictionary* (11th ed. 2019). Once a prosecution is initiated and placed under the Court's jurisdiction, it is the Court, not the Commonwealth's Attorney, that must determine whether the pending charge should be dismissed. Va. Code § 19.2-265.3; Va. Code § 19.2-265.6; Va. Sup. Ct. R. 3A:8(c). This is a long-established rule of law of the Commonwealth of Virginia—over 200 years of established law. According to the Court of Appeals in Virginia, the prosecutor does not have "carte blanche to request a *nolle prosequi* without providing a trial court with a rationale amounting to 'good cause' for doing so." *Moore v. Commonwealth*, 59 Va. App. 795, 812–13 n.9, 722 S.E.2d 668, 676–77 n.9 (2012).

The Supreme Court of Virginia again recited this principle as recently as last year in *In re: Gregory Underwood, Commonwealth's Attorney for the City of Norfolk, Petitioner*, Record Nos. 19049798 and 190498 (May 2, 2019), a petition for a writ of mandamus against the Circuit Court for Norfolk that sought to compel entry of a dismissal order in a marijuana possession case. There the Supreme Court, in denying the petition, provided:

> For over 200 years, Virginia has required the Commonwealth to obtain judicial consent to the dismissal of a charge by *nolle prosequi*. *See Duggins v.*

> *Commonwealth*, 59 Va. App. 785, 790-91 (2012) *citing Anonymous*, 3 Va. (1 Va. Cas.) 139, 139 (1803). The advent of Code § 19.2-265.3 in 1979 codified that requirement and added that a Commonwealth's Attorney must establish "good cause" before a court may grant a "*nolle prosequi.*" *See id. Citing* (1979 Va. Acts ch. 641). These requirements are presumptively constitutional, and we have found no support for the contention that they permit the judiciary to improperly invade a Commonwealth's Attorney's constitutional or statutory authority to exercise prosecutorial discretion. *See Etheridge v. Medical Ctr. Hosp.*, 237 Va. 87, 94 (1989) (statutes are presumed constitutional). As we have explained, the constitutional requirement that the "great departments of the government" remain "separate and distinct from each other" is not an "absolute and unqualified . . . maxim." *In re Phillips*, 265 Va. 81, 86-87 (2003). To the contrary, it permits "that either department may exercise the powers of another to a limited extent" so long as "the whole power of one of these departments should not be exercised by the hands which possess the whole power of either of the departments." *Id.* Judicial oversight of a Commonwealth's Attorney's ability to dismiss a pending charge certainly does not occupy the whole of the executive power to exercise prosecutorial discretion regarding the timing and selection of charges.

*In re Underwood*, No. 190497-98 (Va. May 2, 2019).

In this case, the Commonwealth's Attorney submitted the bases upon which she relies for good cause. The Court has fully considered the Commonwealth's rationale and the entire record of this case to now make a finding as to whether good cause exists, and whether in the Court's discretion an order granting a *nolle prosequi* should be entered. Based on the rationale provided, analysis requires the Court to consider whether a court has the authority to dismiss a case upon a prosecutor's determination that a law passed by the Virginia legislature is not worthy of prosecution upon public policy grounds.

The Commonwealth's Attorney, in her filing, first argues interpretation of legal principles and then provides four distinct factual bases for the Court to find good cause to grant the motion to *nolle prosequi*: (1) prosecution of simple marijuana possession is not an efficient use of limited resources; (2) the current state of forensic testing significantly hampers the Commonwealth's ability to prosecute cases of simple marijuana possession; (3) there is no credible evidence that, absent aggravating factors, simple marijuana possession poses a public

safety risk; and (4) the Virginia Legislature was considering changes to the marijuana related statutes, expecting the decriminalization of simple possession. Mem. Supp. Commw.'s Mot. Nolle Prosequi 10.

The Commonwealth's first and third arguments are rejected by the Court on constitutional grounds. The Court will not enter an order that is inconsistent with the provisions of the Virginia Constitution. Essentially, the Commonwealth argues public policy as the reason to disregard a criminal statute that was fully considered, voted on and passed by both chambers of the Virginia General Assembly and as the reason the Court should grant a motion to *nolle prosequi*. As determined by the legislative branch of Virginia, it was unlawful for a person to knowingly or intentionally illegally possess marijuana within the Commonwealth of Virginia after having been so convicted.

The Constitution of Virginia, Art. III, § 1 provides in relevant part: "The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others . . . ." A public policy basis for a *nolle prosequi* requested of a court by the executive branch is nothing less than a fundamental disagreement with the criminalization of marijuana, thus, it invades the determination by the legislative branch. When the Virginia General Assembly granted any prosecutor the option to request a court of law to dismiss without prejudice—*nolle prosequi*—a criminal charge pending before the Court, it conditioned that opportunity with judicial determination of good cause, consistent with centuries of proper checks and balances. Here, the Court finds that the decision by the executive branch to effectively nullify a statute passed by members of the Virginia General Assembly, who were duly elected by the citizens, fails to constitute good cause. A court should not do that which is impermissible under the law. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("[The judiciary]

must of necessity expound and interpret that rule [of law]."). *Marbury* is the bedrock of American jurisprudence.

It is the province of the legislature to decide public policy and pass laws, the obligation of the executive to enforce the law, and the responsibility of the judiciary to interpret the law. Va. Const., art. IV, §§ 1, 14; *id.* art. V, § 7; *id.* art. VI, § 1; *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) ("Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'). In *Allen v. Wright*, 468 U.S. 737, 761 (1984) the United States Supreme Court, addressing separation of powers, expressed that "[T]he Executive Branch . . . [has] the duty to 'take Care that the Laws be faithfully executed."

A keystone principle of our constitutional form of government is that only the legislative branch shall decide and pass laws for the public good. *In re Phillips*, 265 Va. 81, 86, 574 S.E.2d 270, 272 (2003) ("Any judgment concerning the wisdom or propriety of a statute remains solely a legislative function . . . ."); *Bryce v. Gillespie*, 160 Va. 137, 146, 168 S.E. 653, 656 (1933) ("The legislative department has the power to determine . . . what public convenience and public welfare require."); 16A Am. Jur., 2d Constitutional Law § 238 ("The principle of the separation of powers distributes the power to make law to the legislature, the power to execute law to the executive, and the power to interpret law to the judiciary.").

Any prosecutor, elected by a proper percentage of a voting community, may support partisan enforcement of the laws of the Commonwealth, as opposed to enforcing all criminal laws of the Commonwealth. The Court will take no role in that process. James Madison, in *The Federalist Papers, No. XLVII*, observed "[W]here the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamentals of a free constitution are subverted." *The Federalist No. 47*, at 246–47 (James

Madison) (Ian Shapiro ed., 2009). Mr. Madison cited to the Virginia Constitution, *supra*. Subsequently, in *Federalist Papers, No. XLVIII*, Mr. Madison observed that the three branches of government, again citing to Virginia's Constitution, "ought not to be intermixed" and that "no one could transcend their legal limits, without being effectively checked and restrained by the others." *The Federalist No. 48*, at 253–54 (James Madison) (Ian Shapiro ed., 2009). These principles underpin the long-standing rule of law that the Court must determine if good cause exists to dismiss a pending charge. By its very nature, the decision that a law passed by the Virginia Legislature never should have been passed, and therefore should not be enforced because it achieves nothing (*See* Mem. Supp. Commw's Mot. Nolle Prosequi 15-16), is anathema to the founding principles of the Virginia Constitution. Furthermore, the Court should not adopt a legal stance based on partisan policy concerns because avoiding external partisan influence is central to judicial independence, integrity, and impartiality.

According to Canons of Judicial Conduct 3(B)(2), "[a] judge shall not be swayed by partisan interests, public clamor, or fear of criticism." Va. Sup. Ct. R. pt. 6, § III, Canon 3(B)(2). This prohibition is meant to further the central mission of the Canons, which is to "uphold the integrity and independence of the judiciary." Va. Sup. Ct. R. pt. 6, § III, Canon 1. A judge therefore has a duty to avoid the inappropriate outside influence of partisanship and public opinion. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446–447 (2015); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 120–121 (2015) (Thomas, J. concurring).

Discourse on judicial independence highlights the importance of avoiding external influence, especially from political organizations and the public. *See* Va. Sup. Ct. R. pt. 6, § III, Canon 1, Comment.; Alfini et al., supra, § 1.02. Judicial independence is defined in Judicial Conduct and Ethics as "a judge's capacity to decide cases according to the facts and law without

interference from the other branches of government, special interests, the general public, or the parties themselves." Alfini et al., supra, § 1.02. This sentiment is further reflected in the actual commentary to the Canons, which states that "[t]he integrity and independence of judges depends in turn upon their acting without fear or favor." Va. Sup. Ct. R. pt. 6, § III, Canon 1, Comment.

In discussing the proper methods of judicial decision-making, the courts have promoted the exclusion of external influences, especially the partisan and political. *See Williams-Yulee*, 575 U.S at 446–447; *Perez*, 575 U.S. at 120-121 (2015) (Thomas, J. concurring); *Republican Party v. White*, 536 U.S. 765, 806 (2002) (Ginsburg, J. dissenting) ("Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties . . . they must strive to do what is legally right, all the more so when the result is not the one 'the home crowd' wants."); *Commodity Futures Trading Com v. Schor*, 478 U.S. 833, 860 (1986) (Brennan, J. dissenting) ("[A] principal benefit of the separation of . . . powers [is] the protection of individual litigants from decision makers susceptible to majoritarian pressures."); *see also Chisom v. Roemer*, 501 U.S. 380, 400 (1991) ("[P]ublic opinion should be irrelevant to the judge's role"); *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J. concurring) ("[T]he independence of the judiciary is jeopardized when courts . . . assume primary responsibility in choosing between competing political, economic, and social pressures."); *Judiciary Inquiry & Review Comm'n v. Shull*, 274 Va. 657, 674, 651 S.E.2d 648, 658 (2007) ("[J]udicial decisions must be based on the evidence and pertinent law"); *Ex parte Bouldin*, 33 Va. 639, 661 (1836) (Scott, J. concurring) ("[I]ndependence, which will lift [judges] above the prejudices and passions of the day . . . [is] the only safe guaranty for an honest and fearless administration of the laws."). The Court will not sanction an executive's opinion that a law

passed by the Virginia legislature is an ineffectual law, for in doing so the Court would be partisan and thus violate the Judicial Canon prohibiting partisan consideration when rendering an opinion or judgment of the Court.

A judge's disregard of partisanship and public opinion is critical to maintain public confidence in the integrity, impartiality and independence of the judiciary. *See Williams-Yulee*, 575 U.S. at 446–447. In *Williams-Yulee* the United States Supreme Court evaluated Florida's rule prohibiting judges from personally soliciting campaign funds. *Id.* at 439. The Court described the importance of separating political and partisan influence from the judicial sphere: "Judges are not politicians . . . Politicians are expected to be appropriately responsive to the preferences of their supporters . . . A judge must instead 'observe the utmost fairness,' striving to be 'perfectly and completely independent . . . .'" *Id.* The United States Supreme Court determined that the potential vulnerability of judges to external influence was a significant threat to the integrity and impartiality of the judiciary. *Id.* at 447. Avoiding the influence of partisanship is also central to judicial independence, as described in Justice Thomas's concurring opinion in *Perez*, 575 U.S. at 120–121 (Thomas, J. concurring). "Independent judgment require[s] judges to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them through . . . the political branches, the public, or other interested parties." *Id.*

It is this separation from partisan pressure that distinguishes the judiciary from the executive and legislative branches: "The Legislature and Executive may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law. But the Judiciary, insulated from both internal and external sources of bias, is dutybound to exercise independent judgment in applying the law." *Id.* at 123. This is especially important when the partisan

interpretation and the written law conflict; "If a case involved an executive effort to extend the law beyond its meaning, judges would have a duty to adhere to the law that had been properly promulgated under the Constitution." *Id.* The same axiom applies when an executive wishes a court to dismiss a criminal charge believing it should not be enforced on public policy grounds.

The Court should not adopt an interpretation of the law based on partisan ideas because doing so would undermine judicial independence, integrity, and impartiality. The Canons of Judicial Conduct, relevant legal commentary, and applicable caselaw all demonstrate a duty to avoid external partisan influence, and to instead rely solely on evidence and relevant law. *See Williams-Yulee*, 575 U.S. at 446–447; *Perez*, 575 U.S. at 120-121; Va. Sup. Ct. R. pt. 6, § III, Canon 1, Canon 3(B)(2); Alfini et al., supra, § 1.02. Intentionally adopting a partisan position, especially when that position directly conflicts with the law, would undermine these fundamental principles. Therefore, in order to conform to current ethical and legal standards of judicial conduct, the Court should avoid partisan influence, and should not be swayed by any prosecutor's opinion of the ineffectiveness of a criminal statute as a basis to dismiss an indicted crime pending before the Court.

Having rejected the first and third bases submitted by the Commonwealth's Attorney for a court order granting a *nolle prosequi* of the grand jury indictment, the Court turns to the Commonwealth's second basis. This involves the question of whether there is sufficient evidence to prosecute the indicted crime.

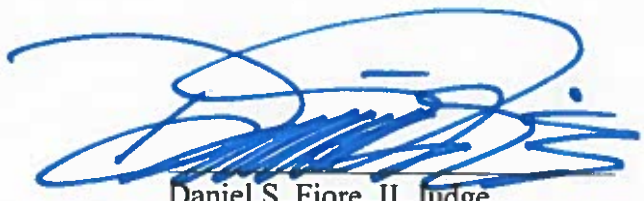
In her filing, the Commonwealth's Attorney represented that the current state of forensic testing significantly hampers the Commonwealth's ability to prosecute cases of simple marijuana possession. When this motion was argued before the Court on June 26, 2020, the Commonwealth represented that at the time this case would have proceeded to trial, the Commonwealth would

only have been able to proceed with a field test of the suspected marijuana as permissible under Va. Code Sec. 19.2-188.1, and that such a field test does not distinguish between marijuana and legal hemp. The Commonwealth's Attorney then represented that she did not have a forensic lab test result, which could have been sufficient evidence to prove the confiscated substance was marijuana. Proceeding with only a field test result could very well be a hurdle to proving the alleged offense beyond a reasonable doubt.

The Commonwealth is vested with the determination of the evidence to proceed at trial since the Commonwealth carries the burden of proof for each required element of a crime beyond a reasonable doubt. The Court accepts the Commonwealth's representation of insufficiency of the evidence, not because the current state of forensics impairs the Commonwealth's burden of proof, but because the Commonwealth only had a field test result and according to the Commonwealth's Attorney that would be insufficient for a conviction at trial. For this reason and since the Defendant has not moved for a dismissal with prejudice upon the Commonwealth's acknowledgment of insufficiency of the evidence, the Court finds good cause to grant the motion for *nolle prosequi*, without having to consider the fourth and final basis for the motion.

An appropriate order incorporating by reference the Court's opinion will follow.

July 10, 2020



Daniel S. Fiore, II, Judge
17th Judicial Circuit Court

# EXHIBIT 2C

**V I R G I N I A:**

**IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON**

| | | |
|---|---|---|
| **COMMONWEALTH OF VIRGINIA** | : | |
| | : | |
| **v.** | : | **CR19-1103** |
| | : | |
| **ERIC DEWAYNE KELLEY, JR.** | : | |
| **Defendant** | : | |

**NOTICE AND MOTION TO *NUNC PRO TUNC* CORRECT THE FINAL ORDER**

PLEASE TAKE NOTICE that on July 31, 2020 at 9:30 a.m. or as soon as counsel may be heard, the Commonwealth, by her attorney, will move this Honorable Court to correct the final order *nunc pro tunc* filed in the above-styled case pursuant to Va. Code § 8.01-428(B) and other legal authorities. In support of the motion, the Commonwealth states the following:

1. This case was before the Court for a hearing on June 26, 2020, on the Commonwealth's motion pursuant to Va. Code §19.2-265.3 for entry of a *nolle prosequi* for a misdemeanor charge of Possession of Marijuana under Va. Code §18.2-250.1. This Court ordered written motions and briefing by the parties on January 7, 2020 on this charge, CR19-1103, after having granted the Commonwealth's motion to *nolle prosequi* a felony charge of Possession of a Schedule I/II Controlled Substance under Va. Code §18.2-250, CR19-1102.
2. On July 10, 2020, the Court entered a final order (hereinafter "Order") granting the Commonwealth's entry of a *nolle prosequi* and incorporating a memorandum opinion (hereinafter "Memorandum Opinion") issued the same

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day.

3. That Order and Memorandum Opinion were not received by either of the parties until July 15, 2020 – a five day delay.
4. In reviewing the Order, Memorandum Opinion, the transcripts of the January 7th (Attached as "Exhibit 1") and June 26th hearings, and the written submissions of both parties, it became apparent that there are several factual errors regarding the Commonwealth's factual representations and arguments.
5. This motion is proper pursuant to Va. Code §8.01-428(B) and the Court's, "inherent power, independent of the statute, upon any competent evidence, to make the record 'speak the truth.'" *Davis v. Mullins*, 251 Va. 141, 149, 466 S.E.2d 90, 94 (1996). Indeed, the full scope of the power of the court to act *nunc pro tunc* is," to correct mistakes of the clerk or other court officials, or to settle defects or omissions in the record so as to make the record show what actually took place." *Council v. Commonwealth*, 198 Va. 288. 292, 94 S.E.2d 245, 248 (1956).
6. As officers of the court, the Commonwealth believes it is our obligation to help "make the record speak the truth" with references to the record of the correct facts. The Commonwealth requests correction of the Order and its incorporated Memorandum Opinion with respect to the following items, based on a review of the written submissions and the January 7th, 2020 and June 26th, 2020 transcripts:

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## FACTUAL ERRORS

7. The incorporated Memorandum Opinion states on page nine:

> legal hemp. The Commonwealth's Attorney then represented that she did not have a forensic lab test result, which could have been sufficient evidence to prove the confiscated substance was marijuana. Proceeding with only a field test result could very well be a hurdle to proving the

And,

> beyond a reasonable doubt. The Court accepts the Commonwealth's representation of insufficiency of the evidence, not because the current state of forensics impairs the Commonwealth's burden of proof, but because the Commonwealth only had a field test result and according to the Commonwealth's Attorney that would be insufficient for a conviction at trial. For this reason and since the Defendant has not moved for a dismissal with prejudice upon

The transcripts of the June 26, 2020 hearing (Attached as "Exhibit 2") reflect that the Commonwealth referred three times to the Department of Forensic Science (DFS) testing and the specific Certificate of Analysis in this case in direct response to an inquiry by the Court:

> And they have, so that testing regime happened during the, it was in place during the time that this material was tested. And so when the COA came out on September 6th, 2019, and it was tested over the summer, it was after the guidance from the DFS that said we can't quantify THC so we can't actually tell the difference between simple marijuana, or marijuana and

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MS. DEHGHANI-TAFTI: Well, the level set federally is 0.3 percent THC. But again, we can't quantify below two percent.

So, at this point DFS is testing, they can test and they can say it's at the threshold of two percent or more or they can say it's below two percent. And they're calling below two percent nonconclusive for marijuana and above two percent marijuana.

THE COURT: And the result in this case was?

MS. DEHGHANI-TAFTI: The results in this case was under the old testing regime where they can't quantify what it is.

THE COURT: Okay. All right. Okay, very well. Anything further?

6/26/20 Tr., p. 11 & 13

The Commonwealth additionally noted the same in its original memorandum:

possessing the substance at issue on the remaining charge, and given the Commonwealth's previously discussed limitations in proceeding with the certificate of analysis at present, the Commonwealth submits there is good cause to grant a *nolle prossequi* under Va. Code §19.2-265.3

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8. The incorporated Memorandum Opinion states on page nine:

possession. When this motion was argued before the Court on June 26, 2020, the Commonwealth represented that at the time this case would have proceeded to trial, the Commonwealth would

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only have been able to proceed with a field test of the suspected marijuana as permissible under

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This statement is inaccurate. The Commonwealth never made such a representation, and the term "field test" does not appear in the June 26th transcript. Rather, in briefing and during the June 26, 2020, hearing the Commonwealth argued *neither* the field test *nor* the Certificate of Analysis was sufficient evidence. Regarding the Certificate of Analysis, the Commonwealth's Memorandum of Law argued,

> But, even if the burden on DFS could be eliminated and more serious cases removed from the backlog, there remain additional evidentiary and resource concerns even with a Certificate of Analysis. For all certificates of analysis between the 5/23/19 Notice and the 1/24/2020 Notice, "DFS's current analytical scheme for the testing of suspected marijuana plant material… does not include a quantitation of the amount of THC present." 5/23/19 Notice at 2. Without such quantitation, it is unclear whether a substance is illegal marijuana or a possibly legal substance, namely, hemp, which can be readily purchased in various forms – including what appear to be traditional marijuana cigarettes or "blunts" in smoke shops. Moreover, the 5/23/19 Notice indicated that the quantitative analysis that would be required was not within DFS's capabilities at that time.

Mem. Supp. Commw. Mot. Nolle Prossequi 13

And the Commonwealth stated, during the June 26, 2020, hearing,

THE COURT: All right. The evidentiary issue, would you just enlighten me on that just a little more?





The, couldn't prove that the substance was marijuana. What was the difficulty with that?

MS. DEHGANI-TAFTI: So the difficulty is that until January of 2020 the Department of Forensic Science could not quantify the THC in the plant substance. And that became an issue in May of 2019 because the definitions of industrial hemp and marijuana sort of required there to be a quantitative analysis.

And so, from the point that until there was a quantitative analysis, DFS couldn't say is something industrial hemp, which would simply be called cannabis, or would it be marijuana, which is illegal.

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**CHARACTERIZATIONS OF THE COMMONWEALTH'S ARGUMENTS**

9. The incorporated Memorandum Opinion states on page three that the issue presented is:

> discretion an order granting a *nolle prosequi* should be entered. Based on the rationale provided, analysis requires the Court to consider whether a court has the authority to dismiss a case upon a prosecutor's determination that a law passed by the Virginia legislature is not worthy of prosecution upon public policy grounds.

The Order, and incorporated Memorandum Opinion, should reflect that the Commonwealth's argument was as follows:

> **MEMORANDUM OF LAW IN SUPPORT OF THE COMMONWEALTH'S MOTION FOR NOLLE PROSEQUI PURSUANT TO §19.2-265.3**
>
> PRELIMINARY STATEMENT
>
> The Commonwealth, by her Commonwealth's Attorney, now gives notice that on January 27, 2020 it will move pursuant to Va. Code §19.2-265.3 for a *nolle prosequi* of the charge against the defendant. The Commonwealth has good cause for this motion because, 1) under both ancient common law tradition and modern judicial precedent, it is within the prosecutor's discretion to terminate a case and courts will not disturb that discretion unless the prosecutor abuses that discretion to harass the defendant; 2) the Commonwealth's decision to terminate this case does not rise to the level of an unlawful executive suspension of laws; 3) the efficient allocation of limited resources, the uncertain current state of forensic testing, the lack of public safety risk, and the likely imminent change in marijuana criminalization laws all counsel against prioritizing prosecution of simple marijuana possession; and 4) an assessment of the individual facts of the present case, including that the defendant has a validly issued medical marijuana card from another jurisdiction, indicate that it is not in the public interest to prosecute the defendant.

Mem. Supp. Commw. Mot. Nolle Prossequi 1

10. The incorporated Memorandum Opinion states on page four:

> of the Virginia Constitution. Essentially, the Commonwealth argues public policy as the reason to disregard a criminal statute that was fully considered, voted on and passed by both chambers of the Virginia General Assembly and as the reason the Court should grant a motion to *nolle prosequi*. As determined by the legislative branch of Virginia, it was unlawful for a person to

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The Commonwealth's argument was primarily focused on the current state of the binding caselaw regarding *nolle prosequi*:

**ARGUMENT**

**I. THE COMMON LAW HISTORY OF THE *NOLLE PROSEQUI* AND BINDING CASE LAW PRECEDENT FOLLOWING STATUTORY ENACTMENT AS VA. CODE §19.2-265.3 PROVIDE THAT A PROSECUTOR'S BROAD DISCRETION TO TERMINATE A CASE IS ONLY DISTURBED TO PROTECT A DEFENDANT FROM PROSECUTORIAL ABUSE**

Section 19.2-265.3 of the Virginia Code states that "Nolle prosequi shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown." Good cause is shown when the prosecutor's decision to terminate a case is not driven by "vindictive intent" that results in "oppressive and unfair trial tactics" against the defendant.

Mem. Supp. Commw. Mot. Nolle Prossequi 2

Additionally, the Commonwealth's primary argument stated,

Indeed, the Court of Appeals in *Moore* made this point explicitly, stating, "the power to require 'good cause' is generally exercised with great caution," and "[t]he terms 'bad faith' and 'oppressive tactics' used in *Harris* provide the best summary of situations in which 'good cause' does not exist." *Moore* at 809.

Ultimately in *Moore*, the Court of Appeals adopted the language of *Harris* to "provide[] the proper construct for evaluation of the degree to which the judicial branch should defer to the executive on the question of 'good cause.'" *Id.* at 812, quoting *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975).[1] The *Moore* court went on to hold that, "given the inter-branch deference required by the separation of powers doctrine, a court should not interfere with the Commonwealth's decision to seek a *nolle prosequi* unless the court determined that the exercise of such discretion is clearly contrary to public interest." *Id.* In

[1] In *Cowan* the issue was similar to the one presented by the instant motion under the Federal Rules' analogous Rule 48(a) requiring a motion to dismiss indictment by the U.S. Attorney, "by leave of court."

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other words, according to *Harris* and *Moore*, a court's "good cause" inquiry into prosecutorial discretion to dismiss a case should focus on abuse of that discretion in the form of "vindictiveness," "oppressive trial tactics," and "prosecutorial misconduct," and not on whether the court agrees that good faith decisions are "contrary to public interest."[2] Indeed, *Moore* is unambiguous that the trial court's overarching concern in protecting the "public interest" is as a bulwark on behalf of the defendant against prosecutorial procedural abuses. *Moore* at 809.

Thus, while "fair" and "evenhanded" administration of criminal justice is relevant to the judiciary's function in an analysis of good cause, good cause is primarily concerned with judicial oversight for prosecutorial misconduct and protection of a defendant's due process rights.

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Additionally, to the extent that arguments were made regarding public policy, those arguments were guided by current caselaw such as *Howell v. McAuliffe*, 292 Va. 320 (2016), regarding the separation of powers between government branches, national guidance in the form of the American Bar Association Criminal Justice Standards for the Prosecution Function 3-4.4(a), and the high likelihood of an impending change of law (which was voted on within weeks of the Commonwealth's submissions and enacted recently). Mem. Supp. Commw. Mot. Nolle Prossequi 7-9; 16-17.

11. The incorporated Memorandum Opinion cites on page six the Commonwealth as stating:

> exists to dismiss a pending charge. By its very nature, the decision that a law passed by the Virginia Legislature never should have been passed, and therefore should not be enforced because it achieves nothing (*See* Mem. Supp. Commw's Mot. Nolle Prosequi 15-16), is anathema to the founding principles of the Virginia Constitution. Furthermore, the Court should

The Commonwealth's argument on this point, as part of a 19-page filing, was as follows:

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C. *There Exists No Credible Evidence that, Absent Aggravating Factors, Simple Marijuana Possession Poses a Public Safety Risk*

As a matter of safety, the Commonwealth is aware of no credible evidence that would indicate simple possession of marijuana poses a safety risk in and of itself, absent such aggravating factors as proximity to or use by children, public use, sales, and driving under the influence. This case has been individually assessed and does not implicate any of these concerns.

Furthermore, the public safety concern that marijuana usage could be a "gateway drug" to other illicit substances is unsound.[21] Marijuana usage is likely co-extensive with other substances such as alcohol and tobacco use as an indicator of future substance use,[22] and "the majority of people who use marijuana do not go on to use other 'harder' substances."[23] Among those who use marijuana, use tends to decline towards the end of

[21] "The Marijuana Gateway Fallacy," Waltermaurer, Benjamin, Mancini, The Benjamin Center for Public Policy Initiatives, SUNY New Paltz, Summer 2017, available at https://www.newpaltz.edu/media/the-benjamin-center/db_18_the_marijuana_gateway_fallacy.pdf
[22] Prioritizing Alcohol Prevention: Establishing Alcohol as the Gateway Drug and Linking Age of First Drink with Elicit Drug Use, Barry et al, Journal of School Health, December 8, 2015, available at https://www.ncbi.nlm.nih.gov/pubmed/26645418
[23] Marijuana, National Institute of Drug Abuse, September 2019, p. 21, available at https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-gateway-drug

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young adulthood.[24] In jurisdictions where medical marijuana has been available, early findings indicate that marijuana may in fact lead to less use and abuse of opioids and other prescription drugs.[25] And most importantly, no deterrent effect has been observed as there has been no attendant decrease in marijuana use despite the increase in arrests.[26]

12. The Commonwealth submits that the above corrections are a proper exercise of the authority conferred on the Court by Va. Code §8.01-428(B) and *Davis v. Mullins*, and the Court should issue a final order *nunc pro tunc* incorporating an amended memorandum opinion to accurately reflect the factual record.

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Respectfully submitted this 28th day of July, 2020.

_____/s/_____
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 28th day of July, 2020, a copy of the foregoing Notice and Motion was delivered via email to counsel for the Defendant Bradley Haywood at bhaywood@vadefenders.org.

_____/s/_____
Parisa Dehghani-Tafti

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# EXHIBIT 2D

COURT OF **Arlington County, Virginia**

PROCESSING STANDARDS CODE: **013**

COMMONWEALTH OF VIRGINIA

VS.

CR19-1103

CR19001103-00

0

ERICK DEWAYNE KELLEY, JR.

WHEREUPON the Court reviewed and fully considered the Commonwealth's motion that essentially disagreed with certain of Court's findings when it granted the nolle prosequi in this case.

UPON CONSIDERATION WHEREOF, the Court considered and applied the proper weight to be given to proffers made; the Court considered the entire the record; and the Court's findings are supported by the record and all reasonable inferences drawn therefrom.

IT IS HEREBY ordered that the Commonwealth's motion be and is hereby denied.

ENTERED this 7th Day of August 2020.

**Judge Daniel S. Fiore, II**

# EXHIBIT 3

VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

+ + + + +

| | | |
|---|---|---|
| IN THE MATTER OF: | : | CR17000434, -435, -436, -437 |
| COMMONWEALTH OF VIRGINIA | : | |
| VS. | : | CR17000699, -700, -701, -702, -703, -704, -705, -706 |
| ADIAM BERHANE | : | |
| DEFENDANT. | : | |

Wednesday,

September 18, 2019

Arlington, Virginia

The status hearing commenced at 9:30 a.m.

BEFORE:

THE HONORABLE WILLIAM T. NEWMAN, JR., JUDGE

APPEARANCES:

ON BEHALF OF THE COMMONWEALTH OF VIRGINIA:

MARGARET L. EASTMAN, ESQ.
Deputy Commonwealth's Attorney
LISA B. TINGLE, ESQ.
Assistant Commonwealth's Attorney
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ON BEHALF OF DEFENDANT BERHANE:

BRADLEY HAYWOOD, ESQ
Chief Public Defender
Office of the Public Defender
One Courthouse Metro
2200 Wilson Boulevard
Suite 510
Arlington, VA 22201
(703) 875-1111

P-R-O-C-E-E-D-I-N-G-S

9:45 a.m.

THE COURT: Good morning. Good morning.

MR. HAYWOOD: Good morning, Your Honor.

MS. EASTMAN: Good morning, Your Honor.

MS. TINGLE: Good morning, Your Honor.

THE COURT: All right. In the case of Commonwealth versus Berhane, I just wanted to see where we are. Status. And then also let you all know a couple of scheduling things.

MS. EASTMAN: Sure. Well, I guess where we're at, Judge, is I'd like the Court to accept my motion to nolle pros all charges.

MR. HAYWOOD: Would the Commonwealth proffer the good cause?

THE COURT: Well, we can --

MS. EASTMAN: (INTERPOSING) Is there an objection to my motion?

MR. HAYWOOD: I'm just asking for a proffer of good cause.

THE COURT: Well, they don't have to give a proffer for good cause unless it's about -

- you're seeking dismissal.

MR. HAYWOOD: No, I think that they do, I'm just asking. I don't know why I've been told this.

MS. EASTMAN: Okay. If there is an objection, I am happy to elaborate. But unless there is an objection to my motion, I'd ask the Court to accept it.

THE COURT: Is there an objection to the motion?

MR. HAYWOOD: Can the Court pass the matter? Really, literally the first I've heard of this so I don't know if I need to object or not. Would have loved some notice.

THE COURT: What are you asking for?

MR. HAYWOOD: To pass the case for maybe half an hour so we can talk about it. This has been going on for three years and we just found out 30 seconds ago.

I don't know the legal implication of not objecting or objecting to a nolle pros. That, candidly, is my issue right now so I would

just like to talk with Counsel for a minute so we can see that we're not making a mistake.

THE COURT: All right. Well, let me just say, Commonwealth, have anything further they wish to say at this time?

MS. EASTMAN: Not at this time.

THE COURT: All right, I'll give you a brief continuance. I have another matter that I can hear in the interim that may take a couple of hours, but if you want to do that, that's fine.

MR. HAYWOOD: Sure. We're just probably going to make a quick phone call and talk amongst ourselves and then we can look for them.

THE COURT: All right. All right.

MS. TINGLE: Judge, what time would the Court like us back?

(OFF MICROPHONE COMMENTS.)

THE COURT: Well, let me just see. My civil matter, I know they say a couple of hours. Why don't we say noon.

MS. EASTMAN: Thank you, Your Honor.

THE COURT: All right.

(A SHORT RECESS WAS TAKEN.)

THE COURT: Yes, sir?

MR. HAYWOOD: Your Honor, just to be clear, my concerns were some procedural issues and then also Ms. Berhane's bond.

I did have a conversation with Ms. Tingle. I'm informed that this case is not going to be brought back in state court.

And we did also receive a target letter from the federal prosecutor stating Ms. Berhane is subject to a grand jury investigation there.

But based on what I was informed, that and my conversation with Ms. Tingle, we're not going to object to the nolle pros.

THE COURT: All right, this case will be nolle prosequi.

MS. EASTMAN: Thank you, sir.

MS. TINGLE: Thank you, Your Honor.

THE COURT: Thank you.

MS. TINGLE: May we be excused?

THE COURT: Yes, ma'am.

(WHEREUPON, AT 12:02 O'CLOCK P.M., THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE CONCLUDED.)

A
a.m 1:17 3:2
ABOVE-ENTITLED 7:4
accept 3:13 4:8
ADIAM 1:7
ago 4:19
APPEARANCES 2:1
Arlington 1:2,14 2:6,12
asking 3:19 4:3,15
Assistant 2:5
Attorney 2:4,5

B
B 2:4
back 5:18 6:10
based 6:15
BEHALF 2:2,8
Berhane 1:7 2:8 3:8 6:13
Berhane's 6:7
bond 6:7
Boulevard 2:11
BRADLEY 2:9
brief 5:8
brought 6:10

C
call 5:13
candidly 4:22
case 3:7 4:16 6:9,18
cause 3:15,20,22
charges 3:13
Chief 2:10
CIRCUIT 1:1
civil 5:21
clear 6:6
commenced 1:17
COMMENTS 5:19
Commonwealth 1:5 2:2 3:8,14 5:4
Commonwealth's 2:4,5
concerns 6:6
CONCLUDED 7:5
continuance 5:8
conversation 6:8,16
Counsel 5:1
COUNTY 1:1
couple 3:10 5:9,21
court 1:1 3:3,7,12,16,21 4:8,9,11,15 5:3,7,16 5:18,20 6:2,4,10,18 6:22 7:2
Courthouse 2:5,11
CR17000434 1:4
CR17000699 1:6

D
DEFENDANT 1:8 2:8
Defender 2:10,10
Deputy 2:4
dismissal 4:1

E
EASTMAN 2:3 3:5,11 3:17 4:5 5:6 6:1,20
elaborate 4:6
ESQ 2:3,4,9
excused 7:1

F
federal 6:12
fine 5:11
first 4:12
found 4:19
further 5:4

G
give 3:22 5:7
grand 6:13
guess 3:11

H
half 4:17
happy 4:6
HAYWOOD 2:9 3:4,14 3:19 4:2,11,16 5:12 6:5
hear 5:9
heard 4:12
hearing 1:17
Honor 3:4,5,6 6:1,5,21
HONORABLE 1:22
hour 4:17
hours 5:10,21

I
implication 4:20
informed 6:9,15
interim 5:9
INTERPOSING 3:17
investigation 6:13
issue 4:22
issues 6:6

J
JR 1:22
Judge 1:22 3:12 5:17
jury 6:13

K

L
L 2:3
legal 4:20
letter 6:12
LISA 2:4
literally 4:12
look 5:14
loved 4:14

M
ma'am 7:2
making 5:2
MARGARET 2:3
matter 1:4 4:12 5:8,21 7:4
Metro 2:11
MICROPHONE 5:19
minute 5:1
mistake 5:2
morning 3:3,3,4,5,6
motion 3:13,18 4:7,10

N
N 2:5
need 4:13
NEWMAN 1:22
nolle 3:13 4:21 6:17,19
noon 5:22
notice 4:14

O
O'CLOCK 7:3
object 4:13 6:17
objecting 4:21,21
objection 3:18 4:6,7,9
Office 2:10

P
P-R-O-C-E-E-D-I-N-G-S 3:1
P.M 7:3
pass 4:11,16
phone 5:13
probably 5:13
procedural 6:6
PROCEEDINGS 7:4
proffer 3:15,20,22
pros 3:13 4:21 6:17
prosecutor 6:12
prosequi 6:19
Public 2:10,10

Q
quick 5:13

R
receive 6:11
RECESS 6:3
Road 2:5

S
scheduling 3:10
seconds 4:19
seeking 4:1
September 1:12
SHORT 6:3
sir 6:4,20
state 6:10
stating 6:12
status 1:17 3:9
subject 6:13
Suite 2:6,12

T
T 1:22
TAKEN 6:3
talk 4:17 5:1,14
target 6:11
Thank 6:1,20,21,22
things 3:10
three 4:18
Tingle 2:4 3:6 5:17 6:9 6:16,21 7:1
told 4:4

U

V
VA 2:6,12
versus 3:8
Virginia 1:1,5,14 2:2
VS 1:6

W
wanted 3:8
Wednesday 1:11
WILLIAM 1:22
Wilson 2:11
wish 5:5

X

Y
years 4:18

Z

0

1
12:02 7:3
1425 2:5
18 1:12

2
2019 1:12
2200 2:11
22201 2:6,12
228-4410 2:7

3

**30** 4:19

4

**435** 1:4
**436** 1:5
**437** 1:5

5

**510** 2:12
**5200** 2:6

6

7

**700** 1:6
**701** 1:6
**702** 1:6
**703** 1:6 2:7,13
**704** 1:7
**705** 1:7
**706** 1:7

8

**875-1111** 2:13

9

**9:30** 1:17
**9:45** 3:2

# C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Virginia v Adiam Berhane

Before: The Honorable William T. Newman, Jr., Judge

Date: 09-18-19

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R Gross

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Court Reporter

# EXHIBIT 4A

VIRGINIA: IN THE CIRCUIT COURT OF **Arlington County, Virginia**
FEDERAL INFORMATION PROCESSING STANDARDS CODE: **013**

COMMONWEALTH OF VIRGINIA

VS. CR14-2121

**MARIO BEE BUCHANAN**

THE 16th day of August 2019 came the Commonwealth of Virginia by its Attorney, John Lynch the Defendant pursuant to his own recognizance, and his Public Defender, Susannah Loumiet.

WHEREUPON this case came before the Court for a status on the Defendant's competency to stand trial.

BE IT REMEMBERED the Defendant was ordered to receive treatment to restore him to competency through the Arlington County Forensic Jail Team.

IT APPEARING to the Court that Dr. Brandie Bartlett, Psy.D., has determined the Defendant unrestorable, pursuant to the Department of Human Services report dated August 14, 2019.

WHEREUPON the Commonwealth of Virginia informed the Court that it had investigated the facts in this case and wished to enter a **nolle prosequi**, without objection of the Defendant.

THEREUPON the Court determined that said motion should be granted and directed that the **nolle prosequi** by the Attorney for the Commonwealth of Virginia be entered in the record.

IT IS HEREBY ordered that the **Defendant** be and he hereby is **discharged** as to this case and the same is stricken from the Court's docket.

IT IS FURTHER ORDERED by the Court that Susannah Loumiet, Esquire, who was heretofore appointed as counsel for the Defendant be paid a fee in accordance with the policy of the Supreme Court of Virginia, up to a maximum of **$445.00** for services in this case, same to be paid by the Commonwealth of Virginia as provided in Va. Code Ann. §19.2-163 (1950), as amended.

IT IS FURTHER ORDERED that the appearance bond herein be and it hereby is released and the surety thereon relieved from further liability thereon, and the Clerk is hereby directed to so indicate in his records, referring to this order for his authority.

ENTERED.

William T Newman Jr

09/11/2019

WILLIAM T. NEWMAN, JR.
JUDGE
17390

VIRGINIA: IN THE CIRCUIT COURT OF **Arlington County, Virginia**
FEDERAL INFORMATION PROCESSING STANDARDS CODE: **013**

COMMONWEALTH OF VIRGINIA

VS. CR14-2122

**MARIO BEE BUCHANAN**

THE 16th day of August 2019 came the Commonwealth of Virginia by its Attorney, John Lynch the Defendant pursuant to his own recognizance, and his Public Defender, Susannah Loumiet.

WHEREUPON this case came before the Court for a status on the Defendant's competency to stand trial.

BE IT REMEMBERED the Defendant was ordered to receive treatment to restore him to competency through the Arlington County Forensic Jail Team.

IT APPEARING to the Court that Dr. Brandie Bartlett, Psy.D., has determined the Defendant unrestorable, pursuant to the Department of Human Services report dated August 14, 2019.

WHEREUPON the Commonwealth of Virginia informed the Court that it had investigated the facts in this case and wished to enter a **nolle prosequi**, without objection of the Defendant.

THEREUPON the Court determined that said motion should be granted and directed that the **nolle prosequi** by the Attorney for the Commonwealth of Virginia be entered in the record.

IT IS HEREBY ordered that the **Defendant** be and he hereby is **discharged** as to this case and the same is stricken from the Court's docket.

IT IS FURTHER ORDERED by the Court that Susannah Loumiet, Esquire, who was heretofore appointed as counsel for the Defendant be paid a fee in accordance with the policy of the Supreme Court of Virginia, up to a maximum of **$158.00** for services in this case, same to be paid by the Commonwealth of Virginia as provided in Va. Code Ann. §19.2-163 (1950), as amended.

IT IS FURTHER ORDERED that the appearance bond herein be and it hereby is released and the surety thereon relieved from further liability thereon, and the Clerk is hereby directed to so indicate in his records, referring to this order for his authority.

ENTERED.

William T Newman Jr

09/11/2019

WILLIAM T. NEWMAN, JR.
JUDGE
17390

VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

+ + + + +

| | | |
|---|---|---|
| IN THE MATTER OF: | : | |
| COMMONWEALTH OF VIRGINIA | : | CR14002121-00 |
| | : | CR14002122-00 |
| VS. | : | |
| MARIO BUCHANAN | : | |
| DEFENDANT. | : | |

Friday,

August 16, 2019

Arlington, Virginia

The hearing re motion to nolle pros commenced at 9:47 a.m.

BEFORE:

THE HONORABLE WILLIAM T. NEWMAN, JR., JUDGE

APPEARANCES:

ON BEHALF OF THE COMMONWEALTH OF VIRGINIA:

JOHN C. LYNCH, ESQ.
Assistant Commonwealth's Attorney
1425 N. Courthouse Road
Suite 5200
Arlington, VA 22201
(703) 228-4410

ON BEHALF OF DEFENDANT BUCHANAN:

SUSANNAH C. LOUMIET, ESQ.
Office of the Public Defender
One Courthouse Metro
2200 Wilson Boulevard
Suite 510
Arlington, VA 22201
(703) 875-1111

P-R-O-C-E-E-D-I-N-G-S

(9:47 a.m.)

THE CLERK: Mario Buchanan.

MS. LOUMIET: Good morning, Your Honor.

THE COURT: Good morning, good morning.

MS. LOUMIET: Susannah Loumiet on behalf of Mario Buchanan.

THE COURT: Yes, ma'am. It's good to see.

MS. LOUMIET: Good to see you. Did Your Honor receive the most recent report from Dr. Bartlett?

MR. LYNCH: Your Honor, let me save everybody some time.

THE COURT: Yes.

MR. LYNCH: I talked to my boss about this case yesterday.

THE COURT: I'm listening.

MR. LYNCH: She said, "John, we're pulling the plug on this one." That's a quote.

So we're moving to nolle pros the charges.

THE COURT: All right.

MS. LOUMIET: Wonderful.

THE COURT: Ms. Loumiet, you have no objection?

MS. LOUMIET: No objection whatsoever.

THE COURT: All right. Yes, indeed.

MS. LOUMIET: Thank you.

MR. LYNCH: If I had known which public defender had it, I would have sent you an email.

MS. LOUMIET: I'm happy either way. So thank you.

THE COURT: Well, that was good to see, Ms. Loumiet. I don't say it too often.

MR. LYNCH: Take care.

MS. ROYAL-KIRBY: Your Honor, is this dismissed or nolle prosed?

MR. LYNCH: Nolle pros.

THE COURT: Nolle pros.

THE DEFENDANT: Thank you.

THE COURT: Nolle pros, yes in deed.

MS. LOUMIET: Thank you.

THE COURT: Yes, ma'am.

(WHEREUPON, AT 9:48 O'CLOCK A.M., THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE CONCLUDED.)

A
a.m 1:17 3:2 5:3
ABOVE-ENTITLED 5:4
APPEARANCES 2:1
Arlington 1:2,13 2:5,11
Assistant 2:4
Attorney 2:4
August 1:11

B
Bartlett 3:14
behalf 2:2,7 3:9
boss 3:18
Boulevard 2:10
Buchanan 1:7 2:7 3:3,9

C
C 2:3,8
care 4:16
case 3:19
charges 4:1
CIRCUIT 1:1
CLERK 3:3
commenced 1:17
COMMONWEALTH 1:5 2:2
Commonwealth's 2:4
CONCLUDED 5:5
COUNTY 1:1
COURT 1:1 3:6,10,17 3:20 4:2,4,7,14,20,22 5:2
Courthouse 2:4,9
CR14002121-00 1:5
CR14002122-00 1:6

D
deed 4:22
DEFENDANT 1:8 2:7 4:21
defender 2:9 4:10
dismissed 4:18
Dr 3:14

E
either 4:12
email 4:11
ESQ 2:3,8
everybody 3:16

F
Friday 1:10

G

H
happy 4:12
hearing 1:16
Honor 3:5,13,15 4:17
HONORABLE 1:22

I

J
John 2:3 3:21
JR 1:22
JUDGE 1:22

K
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L
listening 3:20
Loumiet 2:8 3:4,8,8,12 4:3,4,6,8,12,15 5:1
LYNCH 2:3 3:15,18,21 4:9,16,19

M
ma'am 3:10 5:2
Mario 1:7 3:3,9
MATTER 1:4 5:4
Metro 2:9
morning 3:4,6,7
motion 1:16
moving 4:1

N
N 2:4
NEWMAN 1:22
nolle 1:16 4:1,18,19,20 4:22

O
O'CLOCK 5:3
objection 4:5,6
Office 2:9

P
P-R-O-C-E-E-D-I-N-G-S 3:1
plug 3:22
PROCEEDINGS 5:4
pros 1:16 4:1,19,20,22
prosed 4:18
public 2:9 4:10
pulling 3:22

Q
quote 3:22

R
receive 3:13
report 3:13
Road 2:4
ROYAL-KIRBY 4:17

S
save 3:15
sent 4:10
Suite 2:5,10
Susannah 2:8 3:8

T
T 1:22
talked 3:18
thank 4:8,13,21 5:1

U

V
VA 2:5,11
Virginia 1:1,5,13 2:2
VS 1:6

W
way 4:12
whatsoever 4:6
WILLIAM 1:22
Wilson 2:10
Wonderful 4:3

X

Y
yesterday 3:19

Z

0

1
1425 2:4
16 1:11

2
2019 1:11
2200 2:10
22201 2:5,11
228-4410 2:6

3

4

5
510 2:10
5200 2:5

6

7
703 2:6,11

8
875-1111 2:11

9
9:47 1:17 3:2
9:48 5:3

C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Virginia v Mario Buchanan

Before: The Honorable William T. Newman, Jr., Judge

Date: 08-16-19

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R Gross

Court Reporter

# EXHIBIT 4B

VIRGINIA: IN THE CIRCUIT COURT OF **Arlington County, Virginia**
FEDERAL INFORMATION PROCESSING STANDARDS CODE: **013**

COMMONWEALTH OF VIRGINIA

VS. CR17-1789

**MIRANDA DORSEY**

THE 17th day of June 2019 came the Commonwealth of Virginia by its Attorney, Theophani Stamos, the Defendant's Court-Appointed Attorney, Denman Rucker, and the Defendant came not.

WHEREUPON the Commonwealth of Virginia informed the Court that it had investigated the facts in this case and wished to enter a **nolle prosequi**, without objection of the Defendant.

THEREUPON the Court determined that said motion should be granted and directed that the **nolle prosequi** by the Attorney for the Commonwealth of Virginia be entered in the record.

IT IS HEREBY ordered that the **Defendant** be and he hereby is **discharged** as to this case and the same is stricken from the Court's docket.

IT IS FURTHER ORDERED by the Court that Denman Rucker, Esquire, who was heretofore appointed as counsel for the Defendant be paid a fee in accordance with the policy of the Supreme Court of Virginia, up to a maximum of **$445.00** for services in this case, same to be paid by the Commonwealth of Virginia as provided in Va. Code Ann. §19.2-163 (1950), as amended.

IT IS FURTHER ORDERED that the appearance bond herein be and it hereby is released and the surety thereon relieved from further liability thereon, and the Clerk is hereby directed to so indicate in his records, referring to this order for his authority.

ENTERED.

William T Newman Jr

07/17/2019

WILLIAM T. NEWMAN, JR.
JUDGE
17390

VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

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| | | |
|---|---|---|
| IN THE MATTER OF: | : | |
| COMMONWEALTH OF VIRGINIA | : | CR17001789-00 |
| VS. | : | |
| MIRANDA DORSEY | : | |
| DEFENDANT. | : | |

Monday,

June 17, 2019

Arlington, Virginia

The hearing re motion to nolle pros commenced at 9:51 a.m.

BEFORE:

THE HONORABLE WILLIAM T. NEWMAN, JR., JUDGE

APPEARANCES:

ON BEHALF OF THE COMMONWEALTH OF VIRGINIA:

THEOPHANI K. STAMOS, ESQ.
Commonwealth's Attorney
1425 N. Courthouse Road
Suite 5200
Arlington, VA 22201
(703) 228-4410

ON BEHALF OF DEFENDANT DORSEY:

DENMAN RUCKER, ESQ.
Rucker & Rucker, P.C.
2111 Wilson Boulevard
Suite 700
Arlington, VA 22201
(703) 351-5050

P-R-O-C-E-E-D-I-N-G-S

(9:51 a.m.)

THE CLERK: Miranda Dorsey.

THE COURT: Good morning, Mr. Rucker.

MR. RUCKER: Your Honor.

THE COURT: This matter's on for status.

MR. RUCKER: Yeah, I don't know exactly what the -- why the clerk put this on the --

MS. STAMOS: I think it's for a motion to nolle pros.

MR. RUCKER: I certainly don't object to that.

THE COURT: All right. Nolle prosed without objection.

MR. RUCKER: Thank you.

THE COURT: Yes, sir.

(WHEREUPON, AT 9:51 O'CLOCK A.M., THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE CONCLUDED.)

A
a.m 1:17 3:2,19
ABOVE-ENTITLED 3:20
APPEARANCES 2:1
Arlington 1:2,13 2:5,11
Attorney 2:4

B
BEHALF 2:2,7
Boulevard 2:10

C
certainly 3:13
CIRCUIT 1:1
clerk 3:3,9
commenced 1:17
COMMONWEALTH 1:5 2:2
Commonwealth's 2:4
CONCLUDED 3:21
COUNTY 1:1
COURT 1:1 3:4,6,15,18
Courthouse 2:4
CR17001789-00 1:5

D
DEFENDANT 1:8 2:7
DENMAN 2:9
Dorsey 1:7 2:7 3:3

E
ESQ 2:3,9
exactly 3:9

F

G

H
hearing 1:16
Honor 3:5
HONORABLE 1:22

I

J
JR 1:22
JUDGE 1:22
June 1:11

K
K 2:3

L

M
MATTER 1:4 3:20
matter's 3:6
Miranda 1:7 3:3
Monday 1:10
morning 3:4
motion 1:16 3:11

N
N 2:4
NEWMAN 1:22
nolle 1:16 3:12,15

O
O'CLOCK 3:19
object 3:13
objection 3:16

P
P-R-O-C-E-E-D-I-N-G-S 3:1
P.C 2:9
PROCEEDINGS 3:20
pros 1:16 3:12
prosed 3:15
put 3:9

Q

R
Road 2:4
Rucker 2:9,9,9 3:4,5,8 3:13,17

S
sir 3:18
STAMOS 2:3 3:11
status 3:7
Suite 2:5,10

T
T 1:22
Thank 3:17
THEOPHANI 2:3

U

V
VA 2:5,11
Virginia 1:1,5,13 2:2
VS 1:6

W
WILLIAM 1:22
Wilson 2:10

X

Y

Z

0

1
1425 2:4
17 1:11

2
2019 1:11
2111 2:10
22201 2:5,11
228-4410 2:6

3
351-5050 2:11

4

5
5200 2:5

6

7
700 2:10
703 2:6,11

8

9
9:51 1:17 3:2,19

C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Virginia v Miranda Dorsey

Before: The Honorable William T. Newman, Jr., Judge

Date: 06-17-19

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R. Gross

Court Reporter

# EXHIBIT 4C

VIRGINIA: IN THE CIRCUIT COURT OF **Arlington County, Virginia**
FEDERAL INFORMATION PROCESSING STANDARDS CODE: **013**

COMMONWEALTH OF VIRGINIA

VS. CR17-2307

**JEFFRY ARMANDO FLORES**

THE 8th day of April 2019 came the Commonwealth of Virginia by its Attorney, Theophani Stamos, the Defendant in the custody of the Sheriff, and his Retained Attorney, Damon Colbert.

WHEREUPON this case came before the Court on the Defendant's motion for bond.

THEREUPON the Commonwealth of Virginia informed the Court that it had investigated the facts in this case and wished to enter a **nolle prosequi** in this case.

THEREUPON the Court directed that the **nolle prosequi** by the Attorney for the Commonwealth of Virginia be entered in the record.

IN CONSIDERATION THEREOF it is ordered that the **Defendant** be **discharged** as to this case and same stricken from the docket.

IT IS FURTHER ORDERED by the Court that the appearance bond of the Defendant be **released** and the surety thereon relieved and released from further liability thereon and the Clerk is hereby directed to so indicate in his records, referring to this order for his authority.

ENTERED.

04/25/2019
DANIEL S. FIORE, II
JUDGE

VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

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|---|---|---|
| IN THE MATTER OF: | : | |
| COMMONWEALTH OF VIRGINIA | : | CR17002307-00 |
| VS. | : | |
| JEFFRY ARMANDO FLORES | : | |
| DEFENDANT. | : | |

Monday,

April 8, 2019

Arlington, Virginia

The motion to nolle pros commenced at 10:06 a.m.

BEFORE:

THE HONORABLE DANIEL S. FIORE, JUDGE

APPEARANCES:

ON BEHALF OF THE COMMONWEALTH OF VIRGINIA:

THEOPHANI K. STAMOS, ESQ.
Commonwealth's Attorney
1425 N. Courthouse Road
Suite 5200
Arlington, VA 22201
(703) 228-4410

ON BEHALF OF DEFENDANT FLORES:

DAMON D. COLBERT, ESQ.
Law Office of Damon D. Colbert
1180 Cameron Street
Alexandria, VA 22314
(571) 250-0000

P-R-O-C-E-E-D-I-N-G-S

10:12 A.M.

THE CLERK: Jeffry Flores.

MR. COLBERT: Good morning, your Honor. Damon Colbert on behalf of Mr. Flores who's in custody. Your Honor, this matter is before the Court for two reasons. I think the Commonwealth's motion will obviate the need for the bond motion.

MS. STAMOS: That's right, Judge.

THE COURT: Okay.

MR. COLBERT: Your Honor, we're just waiting for him to come out.

THE COURT: Yes, sir.

MS. STAMOS: Judge, we're moving to nolle pros the charge and appeal the charge of possession of marijuana.

MR. COLBERT: No objection.

THE COURT: Without objection, it's granted.

(WHEREUPON, AT 10:14 O'CLOCK A.M., THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE CONCLUDED.)

A
a.m 1:17 3:2,20
ABOVE-ENTITLED 3:21
Alexandria 2:11
appeal 3:15
APPEARANCES 2:1
April 1:11
Arlington 1:2,13 2:6
ARMANDO 1:7
Attorney 2:5

B
behalf 2:3,8 3:5
bond 3:8

C
Cameron 2:10
charge 3:15,15
CIRCUIT 1:1
CLERK 3:3
Colbert 2:9,10 3:4,5,11 3:17
come 3:12
commenced 1:16
COMMONWEALTH 1:5 2:3
Commonwealth's 2:5 3:7
CONCLUDED 3:22
COUNTY 1:1
Court 1:1 3:7,10,13,18
Courthouse 2:5
CR17002307-00 1:5
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D 2:9,10
Damon 2:9,10 3:5
DANIEL 1:22
DEFENDANT 1:8 2:8

E
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F
FIORE 1:22
Flores 1:7 2:8 3:3,5

G
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H
Honor 3:4,6,11
HONORABLE 1:22

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J
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Judge 1:22 3:9,14

K
K 2:4

L
Law 2:10

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motion 1:16 3:8,8
moving 3:14

N
N 2:5
need 3:8
nolle 1:16 3:15

O
O'CLOCK 3:20
objection 3:17,18
obviate 3:8
Office 2:10

P
P-R-O-C-E-E-D-I-N-G-S 3:1
possession 3:16
PROCEEDINGS 3:21
pros 1:16 3:15

Q

R
reasons 3:7
Road 2:5

S
S 1:22
sir 3:13
STAMOS 2:4 3:9,14
Street 2:10
Suite 2:6

T
THEOPHANI 2:4
two 3:7

U

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VA 2:6,11
Virginia 1:1,5,13 2:3
VS 1:6

W
waiting 3:12

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Y

Z

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1
10:06 1:17
10:12 3:2
10:14 3:20
1180 2:10
1425 2:5

2
2019 1:11
22201 2:6
22314 2:11
228-4410 2:7
250-0000 2:11

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5200 2:6
571 2:11

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703 2:7

8
8 1:11

C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Virginia v Jeffrey Flores

Before: The Honorable Daniel S. Fiore II, Judge

Date: 04-18-19

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R. Gross

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Court Reporter

# EXHIBIT 4D

CR16002438-00

FILED by Arlington County Circuit Court
05/04/2017

COURT OF **Arlington County, Virginia**
PROCESSING STANDARDS CODE: **013**

COMMONWEALTH OF VIRGINIA

CR16002438-00

VS.

CR16-2438

fo

**Garrett Paul McGahan**

THE 16th day of February, 2017 came the Commonwealth of Virginia by its Attorney, Carri Steele, the Defendant in the pursuant to his own recognizance, and his Public Defender, Jennifer Carroll Foy.

WHEREUPON this case came before the Court on a motion to suppress hearing.

WHEREUPON the Commonwealth of Virginia informed the Court that it had investigated the facts in this case and wished to enter a **nolle prosequi**, without objection of the Defendant.

THEREUPON the Court determined that said motion should be granted and directed that the **nolle prosequi** by the Attorney for the Commonwealth of Virginia be entered in the record.

IT IS HEREBY ordered that the **Defendant** be and he/she hereby is **discharged** as to this case and the same is stricken from the Court's docket.

IT IS FURTHER ORDERED by the Court that Jennifer Carroll Foy Esquire, who was heretofore appointed as counsel for the Defendant be paid a fee in accordance with the policy of the Supreme Court of Virginia, up to a maximum of $445.00 for services in this case, same to be paid by the Commonwealth of Virginia as provided in Va. Code Ann. §19.2-163 (1950), as amended.

IT IS FURTHER ORDERED that the appearance bond herein be and it hereby is released and the surety thereon relieved from further liability thereon, and the Clerk is hereby directed to so indicate in his records, referring to this order for his authority

ENTERED this 4th day of May, 2017.

**Judge Daniel S. Fiore, II**

CR16002466-00

FILED by Arlington County Circuit Court
05/11/2017

COURT OF **Arlington County, Virginia**
PROCESSING STANDARDS CODE: **013**

COMMONWEALTH OF VIRGINIA

CR16002466-00

VS. CR16-2466

fo

**Garrett Paul McGahan**

THE 16th day of February, 2017 came the Commonwealth of Virginia by its Attorney, Carri Steele, the Defendant in the pursuant to his own recognizance, and his Public Defender, Jennifer Carroll Foy.

WHEREUPON this case came before the Court on a motion to suppress hearing.

WHEREUPON the Commonwealth of Virginia informed the Court that it had investigated the facts in this case and wished to enter a **nolle prosequi**, without objection of the Defendant.

THEREUPON the Court determined that said motion should be granted and directed that the **nolle prosequi** by the Attorney for the Commonwealth of Virginia be entered in the record.

IT IS HEREBY ordered that the **Defendant** be and he/she hereby is **discharged** as to this case and the same is stricken from the Court's docket.

IT IS FURTHER ORDERED by the Court that Jennifer Carroll Foy Esquire, who was heretofore appointed as counsel for the Defendant be paid a fee in accordance with the policy of the Supreme Court of Virginia, up to a maximum of $445.00 for services in this case, same to be paid by the Commonwealth of Virginia as provided in Va. Code Ann. §19.2-163 (1950), as amended.

IT IS FURTHER ORDERED that the appearance bond herein be and it hereby is released and the surety thereon relieved from further liability thereon, and the Clerk is hereby directed to so indicate in his records, referring to this order for his authority

ENTERED this 17th day of May, 2017.

**Judge Daniel S. Fiore, II**

VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

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| | | |
|---|---|---|
| IN THE MATTER OF: | : | |
| COMMONWEALTH OF VIRGINIA | : | CR16002438-00 |
| | : | CR16002466-00 |
| VS. | : | |
| GARRETT PAUL MCGAHAN | : | |
| DEFENDANT. | : | |

Thursday,

February 16, 2017

Arlington, Virginia

The hearing re motion to nolle pros commenced at 9:29 a.m.

BEFORE:

THE HONORABLE LOUISE M. DIMATTEO, JUDGE

APPEARANCES:

ON BEHALF OF THE COMMONWEALTH OF VIRGINIA:

CARI M. STEELE, ESQ.
1425 N. Courthouse Road
Suite 5200
Arlington, VA 22201
(703) 228-4410

ON BEHALF OF DEFENDANT MCGAHAN:

JENNIFER CARROLL-FOY, ESQ.
Office of the Public Defender
2300 Clarendon Boulevard
Suite 201
Arlington, VA 22201
(703) 875-1111

P-R-O-C-E-E-D-I-N-G-S

(9:32 a.m.)

THE COURT: Let's take care of McGahan please.

THE CLERK: Garrett McGahan.

THE COURT: Yes, ma'am.

MS. STEELE: Very brief, Your Honor.

THE COURT: Yes.

MS. STEELE: The Commonwealth is moving to nolle pros both charges.

THE COURT: And there's no objection to that?

MS. CARROLL-FOY: No, Judge.

THE COURT: Without objection, that's granted, nolle pros, it's done.

MS. CARROLL-FOY: Thank you, Your Honor.

THE COURT: Thank you.

MS. STEELE: Thank you.

(WHEREUPON, AT 9:32 O'CLOCK A.M., THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE CONCLUDED.)

A
a.m 1:17 3:2,20
ABOVE-ENTITLED 3:21
APPEARANCES 2:1
Arlington 1:2,13 2:5,10

B
BEHALF 2:2,7
Boulevard 2:9
brief 3:7

C
care 3:3
CARI 2:3
CARROLL-FOY 2:8 3:13,16
charges 3:10
CIRCUIT 1:1
Clarendon 2:9
CLERK 3:5
commenced 1:17
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COUNTY 1:1
COURT 1:1 3:3,6,8,11 3:14,18
Courthouse 2:4
CR16002438-00 1:5
CR16002466-00 1:6

D
DEFENDANT 1:8 2:7
Defender 2:8
DIMATTEO 1:22

E
ESQ 2:3,8

F
February 1:11

G
Garrett 1:7 3:5
granted 3:15

H
hearing 1:16
Honor 3:7,17
HONORABLE 1:22

I

J
JENNIFER 2:8
Judge 1:22 3:13

K

L
Let's 3:3
LOUISE 1:22

M
M 1:22 2:3
ma'am 3:6
MATTER 1:4 3:21
McGahan 1:7 2:7 3:3,5
motion 1:16
moving 3:10

N
N 2:4
nolle 1:16 3:10,15

O
O'CLOCK 3:20
objection 3:11,14
Office 2:8

P
P-R-O-C-E-E-D-I-N-G-S 3:1
PAUL 1:7
please 3:4
PROCEEDINGS 3:21
pros 1:16 3:10,15
Public 2:8

Q

R
Road 2:4

S
STEELE 2:3 3:7,9,19
Suite 2:4,9

T
Thank 3:16,18,19
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U

V
VA 2:5,10
Virginia 1:1,5,13 2:2
VS 1:6

W

X

Y

Z

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1
1425 2:4
16 1:11

2
201 2:9
2017 1:11
22201 2:5,10
228-4410 2:5
2300 2:9

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5200 2:4

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703 2:5,10

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875-1111 2:10

9
9:29 1:17
9:32 3:2,20

C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Virginia v Garrett McGahan

Before: The Honorable Louise M. DiMatteo, Judge

Date: 02-16-17

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R Gross

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Court Reporter

# EXHIBIT 4E

VIRGINIA: IN THE CIRCUIT COURT OF **Arlington County, Virginia**
FEDERAL INFORMATION PROCESSING STANDARDS CODE: **013**

COMMONWEALTH OF VIRGINIA

VS. CR19-1053

**PERCY WILLIAM JONES**

THE 14th day of November 2019 came the Commonwealth of Virginia by its Attorney, Abhi Mehta, the Defendant pursuant to his own recognizance and appearing pro se.

WHEREUPON the Commonwealth of Virginia informed the Court that it had investigated the facts in this case and wished to enter a **nolle prosequi**, without objection of the Defendant.

THEREUPON the Court determined that said motion should be granted and directed that the **nolle prosequi** by the Attorney for the Commonwealth of Virginia be entered in the record.

IT IS HEREBY ordered that the **Defendant** be and he hereby is **discharged** as to this case and the same is stricken from the Court's docket.

IT IS FURTHER ORDERED that the appearance bond herein be and it hereby is released and the surety thereon relieved from further liability thereon, and the Clerk is hereby directed to so indicate in his records, referring to this order for his authority.

ENTERED.

12/11/2019

JUDITH L. WHEAT
JUDGE

VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

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| | | |
|---|---|---|
| IN THE MATTER OF: | : | |
| COMMONWEALTH OF VIRGINIA | : | CR19001053-00 |
| VS. | : | |
| PERCY WILLIAM JONES | : | |
| DEFENDANT. | : | |

Thursday,
November 14, 2019

Arlington, Virginia

The hearing re motion to nolle pros commenced at 10:29 a.m.

BEFORE:

THE HONORABLE JUDITH L. WHEAT, JUDGE

APPEARANCES:

ON BEHALF OF THE COMMONWEALTH OF VIRGINIA:

ABHI MEHTA, ESQ.
Assistant Commonwealth's Attorney
1425 N. Courthouse Road
Suite 5200
Arlington, VA 22201
(703) 228-4410

ON BEHALF OF DEFENDANT JONES:

PERCY WILLIAM JONES, pro se

P-R-O-C-E-E-D-I-N-G-S

(10:29 a.m.)

THE CLERK: Percy Jones.

THE COURT: Good morning. Good morning, Mr. Jones.

THE DEFENDANT: Good morning, how are you?

MR. MEHTA: Good morning, Your Honor, Abhi Mehta for the Commonwealth. Judge, it's now past -- now it's 10:30, Detective Ames was subpoenaed at 9:30. He was served in person. I shot him an email as well. He's obviously not here in the courtroom. So the Commonwealth will move to nolle pros this charge.

THE COURT: Mr. Jones, do you have any objection? The Commonwealth is basically saying that they're not going to proceed with this prosecution, do you have any objection to that?

THE DEFENDANT: No.

THE COURT: Okay, the Commonwealth's motion will be granted.

(WHEREUPON, AT 10:30 O'CLOCK A.M., THE

PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE CONCLUDED.)

A
**a.m** 1:16 3:2,22
**Abhi** 2:3 3:9
**ABOVE-ENTITLED** 4:1
**Ames** 3:10
**APPEARANCES** 2:1
**Arlington** 1:2,12 2:5
**Assistant** 2:4
**Attorney** 2:4

B
**basically** 3:16
**BEHALF** 2:2,8

C
**charge** 3:14
**CIRCUIT** 1:1
**CLERK** 3:3
**commenced** 1:16
**Commonwealth** 1:5 2:2 3:9,13,16
**Commonwealth's** 2:4 3:20
**CONCLUDED** 4:2
**COUNTY** 1:1
**COURT** 1:1 3:4,15,20
**Courthouse** 2:4
**courtroom** 3:13
**CR19001053-00** 1:5

D
**DEFENDANT** 1:8 2:8 3:6,19
**Detective** 3:10

E
**email** 3:12
**ESQ** 2:3

F

G
**granted** 3:21

H
**hearing** 1:15
**Honor** 3:8
**HONORABLE** 1:21

I

J
**Jones** 1:7 2:8,9 3:3,5 3:15
**Judge** 1:21 3:9
**JUDITH** 1:21

K

L
**L** 1:21

M
**MATTER** 1:4 4:1
**Mehta** 2:3 3:8,9
**morning** 3:4,5,6,8
**motion** 1:15 3:21
**move** 3:14

N
**N** 2:4
**nolle** 1:15 3:14
**November** 1:10

O
**O'CLOCK** 3:22
**objection** 3:16,18
**obviously** 3:12

P
**P-R-O-C-E-E-D-I-N-G-S** 3:1
**Percy** 1:7 2:9 3:3
**person** 3:11
**pro** 2:9
**proceed** 3:17
**PROCEEDINGS** 4:1
**pros** 1:15 3:14
**prosecution** 3:18

Q

R
**Road** 2:4

S
**saying** 3:16
**se** 2:9
**served** 3:11
**shot** 3:12
**subpoenaed** 3:11
**Suite** 2:5

T
**Thursday** 1:10

U

V
**VA** 2:5
**Virginia** 1:1,5,12 2:2
**VS** 1:6

W
**WHEAT** 1:21
**WILLIAM** 1:7 2:9

X

Y

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1
**10:29** 1:16 3:2
**10:30** 3:10,22
**14** 1:10
**1425** 2:4

2
**2019** 1:10
**22201** 2:5
**228-4410** 2:6

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**5200** 2:5

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**703** 2:6

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**9:30** 3:11

C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Virginia v Percy Jones

Before: The Honorable Judith L. Wheat, Judge

Date: 11-14-19

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R Gross

Court Reporter

# EXHIBIT 4F

CR16002042-00

FILED by Arlington County Circuit Court
03/08/2017

COURT OF **Arlington County, Virginia**
PROCESSING STANDARDS CODE: **013**

COMMONWEALTH OF VIRGINIA

VS. CR16-2042

**CEDRIC MURREL MILTON**

THE 6th day of March 2017 came the Commonwealth of Virginia by its Attorney, Margaret Eastman, the Defendant in the custody of the Sheriff, and his Public Defender, Helen Randolph.

WHEREUPON the Commonwealth of Virginia informed the Court that it had investigated the facts in this case and wished to enter a **nolle prosequi** in this case.

THEREUPON the Court directed that the **nolle prosequi** by the Attorney for the Commonwealth of Virginia be entered in the record.

IN CONSIDERATION THEREOF it is ordered that the **Defendant** be **discharged** as to this case and same stricken from the docket.

IT IS FURTHER ORDERED by the Court that Helen Randolph, Esquire, who was heretofore appointed as counsel for the Defendant be paid a fee in accordance with the policy of the Supreme Court of Virginia, up to a maximum of **$445.00** for services in this case, same to be paid by the Commonwealth of Virginia as provided in Title 19.2-163 of the 1950 Code of Virginia, as amended.

IT IS FURTHER ORDERED by the Court that the appearance bond of the Defendant be **released** and the surety thereon relieved and released from further liability thereon and the Clerk is hereby directed to so indicate in his records, referring to this order for his authority.

ENTERED

**Judge Louise M. DiMatteo** 03/08/2017

LOUISE M. DIMATTEO
JUDGE

VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

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| | | |
|---|---|---|
| IN THE MATTER OF: | : | |
| COMMONWEALTH OF VIRGINIA | : | CR16002042-00 |
| | : | CR16002043-00 |
| VS. | : | |
| CEDRIC MURREL MILTON | : | |
| DEFENDANT. | : | |

Monday,

March 6, 2017

Arlington, Virginia

The hearing re motion to nolle pros commenced at 11:32 a.m.

BEFORE:

THE HONORABLE LOUISE M. DIMATTEO, JUDGE

APPEARANCES:

ON BEHALF OF THE COMMONWEALTH OF VIRGINIA:

MARGARET L. EASTMAN, ESQ.
Deputy Commonwealth's Attorney
1425 N. Courthouse Road
Suite 5200
Arlington, VA 22201
(703) 228-4410

ON BEHALF OF DEFENDANT MILTON:

HELEN RANDOLPH, ESQ.
Office of the Public Defender
2300 Clarendon Boulevard
Suite 201
Arlington, VA 22201
(703) 875-1111

P-R-O-C-E-E-D-I-N-G-S

(11:32 a.m.)

THE CLERK: Cedric Milton.

THE COURT: And I need to have -- or I need to have the case so I can look at it. All right, so what are we doing today, ladies?

MS. EASTMAN: Judge, we move to nolle pros.

THE COURT: All right, but there's two charges here, right?

MS. EASTMAN: Yes.

THE COURT: All right, without objection, I take it? No objection, those matters are nolle prosed, Mr. Milton. That means they're dismissed, okay?

MS. RANDOLPH: Your Honor?

THE COURT: Yes.

MS. RANDOLPH: Mr. Milton came here from Henrico County.

THE COURT: I see that.

MS. RANDOLPH: And he's hoping that Your Honor, if it's possible, I don't know if you

have any authority to order him back there as soon as possible. He has a program that he would like to attend.

THE COURT: I don't think there's any reason to keep him, so I'm assuming that the deputies will be very happy to arrange for his immediate transport. But I'm kind of done with my authority at this point because the cases have been dismissed, okay? So there's no reason to hold him here, so I can't imagine he'd be held. Thank you, Deputy Gann.

MS. RANDOLPH: Thank you very much.

THE DEFENDANT: Thank you.

(WHEREUPON, AT 11:35 O'CLOCK A.M., THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE CONCLUDED.)

A
a.m 1:17 3:2 4:14
ABOVE-ENTITLED 4:15
APPEARANCES 2:1
Arlington 1:2,13 2:5,10
arrange 4:6
assuming 4:5
attend 4:3
Attorney 2:4
authority 4:1,8

B
back 4:1
BEHALF 2:2,7
Boulevard 2:9

C
case 3:5
cases 4:8
Cedric 1:7 3:3
charges 3:10
CIRCUIT 1:1
Clarendon 2:9
CLERK 3:3
commenced 1:17
COMMONWEALTH 1:5 2:2
Commonwealth's 2:4
CONCLUDED 4:16
County 1:1 3:19
COURT 1:1 3:4,9,12,17 3:20 4:4
Courthouse 2:4
CR16002042-00 1:5
CR16002043-00 1:6

D
DEFENDANT 1:8 2:7 4:13
Defender 2:9
deputies 4:6
Deputy 2:4 4:11
DIMATTEO 1:22
dismissed 3:15 4:9
doing 3:6

E
EASTMAN 2:3 3:7,11
ESQ 2:3,8

F

G
Gann 4:11

H
happy 4:6
hearing 1:16
held 4:10
HELEN 2:8
Henrico 3:19
hold 4:10
Honor 3:16,22
HONORABLE 1:22
hoping 3:21

I
imagine 4:10
immediate 4:7

J
Judge 1:22 3:7

K
keep 4:5

L
L 2:3
ladies 3:6
look 3:5
LOUISE 1:22

M
M 1:22
March 1:11
MARGARET 2:3
MATTER 1:4 4:15
matters 3:14
means 3:14
Milton 1:7 2:7 3:3,14,18
Monday 1:10
motion 1:16
move 3:7
MURREL 1:7

N
N 2:4
need 3:4,5
nolle 1:16 3:7,14

O
O'CLOCK 4:14
objection 3:13,13
Office 2:9
order 4:1

P
P-R-O-C-E-E-D-I-N-G-S 3:1
point 4:8
possible 3:22 4:2
PROCEEDINGS 4:15
program 4:2
pros 1:16 3:8
prosed 3:14
Public 2:9

Q

R
RANDOLPH 2:8 3:16 3:18,21 4:12
reason 4:5,9
Road 2:4

S
soon 4:2
Suite 2:5,10

T
Thank 4:11,12,13
today 3:6
transport 4:7
two 3:9

U

V
VA 2:5,10
Virginia 1:1,5,13 2:2
VS 1:6

W

X

Y

Z

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1
11:32 1:17 3:2
11:35 4:14
1425 2:4

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201 2:10
2017 1:11
22201 2:5,10
228-4410 2:6
2300 2:9

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5200 2:5

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6 1:11

7
703 2:6,11

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875-1111 2:11

C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Virginia v Cedric Milton

Before: The Honorable Louise M. DiMatteo, Judge

Date: 03-06-18

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R Gross

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Court Reporter