# In the
# Supreme Court of Virginia

## Record No. 121579

## JEREMY WADE SMITH,

**Appellant,**

**v.**

## COMMONWEALTH OF VIRGINIA,

**Appellee.**

## APPELLANT'S REPLY BRIEF

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## ARGUMENT

### I. The sex offender registration laws were incorporated into Mr. Smith's plea agreement by operation of the law.

Mr. Smith argues, per Wright v. Commonwealth, 275 Va. 77, 655 S.E.2d 7 (2008), the sex offender registration laws existing on July 8, 1999, were incorporated into his plea agreement of that date by operation of law. The Commonwealth disputes this, arguing (a) registration lies outside the plea agreement process, (b) the plea agreement did not contain terms regarding registration, and (c) the Commonwealth has completed its plea agreement obligations. Each argument advances an unprecedented narrow view of contracts' incorporation of statutes and should be rejected.

#### A. *The "plea agreement process" does not determine what statutes are incorporated into a contract.*

To circumvent Wright, the Commonwealth first argues that contracts, or at least plea agreements, incorporate only statutory terms that are contractually negotiable. (Appellee's Brief at 6). As sex offender registration is a nonnegotiable "collateral consequence of [the] conviction," it is "outside the scope of the plea agreement process." (Appellee's Brief at 8).

This proffered rule is simply unprecedented. The Commonwealth cites no authority stating that only negotiable statutory terms are incorporated into contracts. The reverse is the well-established law of

Virginia. Looking at plea agreements specifically, Wright notes that the additional terms the trial court imposed were statutorily *mandated* (thereby being nonnegotiable) *and* were incorporated into the plea agreement. Wright, 275 Va. at 80, 655 S.E.2d at 9. Looking to contract in general, nonnegotiable statutory terms are often deemed part of contracts.[1]

Second, collateral civil consequences of a conviction are not "outside the scope of the plea agreement process." The prosecutor has discretion to reduce or dismiss a charge so as to avoid negative collateral civil consequences. See McDonald v. Commonwealth, 274 Va. 249, 259, 645 S.E.2d 918, 923 (2007). This makes the collateral consequences an indirect but very real part of the plea agreement process. In this case, for instance, Mr. Smith was charged with rape, a "sexually violent offence." Through the plea agreement process, the Commonwealth reduced the charge to carnal knowledge of a minor, a non-"sexually violent offence." This effectively reduced Mr. Smith's registration obligations. Had Mr. Smith secured a dismissal of the charges through the plea agreement process, he

[1] See, e.g., Maxey v. American Casualty Co., 180 Va. 285, 23 S.E.2d 221 (1942) (finding an insurance contract to contain a provision required by law but absent from the contract); Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146, 153, 26 S.E. 421, 422 (1896) ("[L]aws in existence are necessarily referred to in all contracts made under such laws, and . . . no waiver of the parties nor stipulations in the contract can change the law."); Code §§ 8.1A-302, -304 (describing nonnegotiable obligations implicit in UCC contracts); Code § 11-4.3 (limiting acceleration of payments).

would have avoided registration altogether. Clearly, collateral consequences are not outside the scope of the plea agreement process.

### B. *The plea agreement need not contain any terms regarding sex offender registry for pertinent statutes to be incorporated into the contract.*

The Commonwealth next argues that contracts incorporate statutes only where the contract includes some specific term touching on the subject of the statute. (Appellee's Brief at 9-11). This amounts to an unprecedented, "magic words" theory of statutory incorporation. Here, the Commonwealth argues that no terms in the written plea agreement specifically concerned registration, and therefore the registration laws are not incorporated into this plea agreement. (Appellee's Brief at 9-11).

The Commonwealth elsewhere concedes, however, that Mr. Smith's conviction is "the only fact relevant to [the] registration and classification determination." (Appellee's Brief at 7). Thus, the plea agreement and the registration obligations are clearly related to each other. Specifically, the plea agreement secured the one condition precedent to the obligation to register—i.e., a plea of guilt to a qualifying offense. The Commonwealth, however, demands something more in the plea agreement explicitly before the registration laws are incorporated therein. It wants a specific, explicit reference to *registration*.

The Commonwealth cites no case in which any court—much less a Virginia court—required such an explicit reference in the contract as a precondition to statutory incorporation. In fact, Harbour Gate Owners' Assoc. v. Berg, 232 Va. 98, 106, 348 S.E.2d 252, 257 (1986), states the opposite. "Where a written contract *is silent* on a matter controlled by statute, the statutory requirement becomes an unwritten term of the contract implied in law." Id. (emphasis added) (citing Atlantic Coast Line R. Co. v. Va. Mfg. Co., 119 Va. 5, 8, 89 S.E. 103, 104 (1916)).

In order to support its unprecedented position, the Commonwealth simply argues this new rule is not inconsistent with Wright and Paul v Paul, 214 Va. 651, 653, 203 S.E.2d 123, 125 (1974). In Wright, the Commonwealth says, the plea agreement referenced incarceration, so statutes imposing *additional* incarceration were part of the contract.[2] (Appellee's Brief at 9-10). In Paul, the Commonwealth argues, a reference to "child support" was sufficient to incorporate the existing laws concerning emancipation. (Appellee's Brief at 10-11).

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[2] The Commonwealth errs in asserting that the criminal defendant in Wright was attempting to withdraw his plea. (Appellee's Brief at 9). See Wright v. Commonwealth, 49 Va. App. 58, 61, 636 S.E.2d 489, 490 (2006).

Regarding the Commonwealth's claim that "the additional terms [in Wright] were incorporated therein to 'insure the defendant what is reasonably due him,'" (Appellants Brief at 10), Mr. Smith is reasonably due the benefit of his bargain.

The Commonwealth's reliance on Wright and Paul is unpersuasive. First, the Commonwealth's proposed rule is not part of the Court's rationale in either Wright or Paul. In Wright, the Court specifically notes that the plea agreement "fails to address the mandatory [incarceration] requirements" and elsewhere notes that the plea agreement was "otherwise silent on the subject." 275 Va. at 80-81, 655 S.E.2d at 9-10. The Court simply found that the law existing at the time was part of the plea agreement. Id. In Paul, 214 Va. at 653, 203 S.E.2d at 125, the Court similarly found that laws existing at the time the contract were part of the contract, such that a change in the law would not affect the obligations of the parties under the contract. It also cited Code § 1-16 (now Code § 1-239) and the manifest intent of the parties to reach its conclusion that the contract should be interpreted by reference to the law existing when the contract was made. Id. at 653-54, 203 S.E.2d at 125-26.

Next, Commonwealth's proposed rule is result-oriented and is neither clear nor easily applied. This rule would create ambiguity in contracts, not certainty, as the courts would have to determine whether a pertinent statute not explicitly referenced in the contract is or is not part of the contract. What degree of specificity is required in the contract under the Commonwealth's unprecedented proposed rule? Why isn't the reference to carnal knowledge

of a minor sufficient in this case, where a reference to incarceration is sufficient in Wright? The proposed rule will harm, not help, the law of contracts in Virginia, and the Court should not adopt this rule.

The Commonwealth also attempts to distinguish this case from Wright by arguing that Wright dealt with penal[3] consequences of the criminal defendant's conviction, not collateral civil consequences of the criminal defendant's conviction. (Appellee's Brief at 9-10). The Commonwealth does not explain why this distinction actually makes a difference on the question of statutory incorporation. It cites to no authority indicating that plea agreements incorporate only the penal consequences of a conviction, especially when the civil consequences are the necessary and direct result of the conviction.

[3] The Commonwealth erroneously uses the term "material" rather than "penal" in reference to the criminal consequences of a conviction (Appellee's Brief at 9). The civil consequences of a conviction are not immaterial to the plea agreement or to the criminal defendant entering the plea agreement. Rather, the civil consequences of the conviction are *collateral* merely to the *penal consequences* of the conviction. "Collateral" is not synonymous with "indirect" or "immaterial." Rather, it means "parallel." Under the *ex post facto* analysis, these parallel civil consequences are irrelevant, because the *ex post facto* analysis concerns only the penal consequences. To assume, however, that parallel civil consequences are irrelevant in *this* analysis of what statutes a plea agreement incorporates, is to assume the result the Commonwealth seeks to prove. In other words, asserting that the penal consequences are "material" as compared with the "collateral" civil consequences begs the question and constitutes circular reasoning.

Concerning the last argument of the Commonwealth (Appellee's Brief at 11), Mr. Smith does not "fail to acknowledge" the integration clause in the plea agreement, but this integration clause only states that there are no other oral or written agreements on the topic. (JA at 196). This integration clause, however, cannot and does not impair the operation of the law, by which existing laws are as much a part of the contract as if stated therein.

### C. *The Commonwealth has not completed its obligations under the plea agreement.*

The Commonwealth's final attempt to avoid statutory incorporation misconstrues Rule 3A:8(c)(1)(B). It assumes, without authority, that because Rule 3A:8(c)(1)(B) requires the Commonwealth to recommend an agreed-upon sentence, making such a recommendation exhausts the Commonwealth's obligations under the plea agreement. (Appellee's Brief at 12). Rule 3A:8(c)(1), however, merely defines three classes of plea agreements (Rule 3A:8(c)(1)(A), (B), and (C)) so as to establish class-specific procedures (Rule 3A:8(c)(2), (4)). The definitions of the classes do not limit the Commonwealth's obligations under plea agreements it enters or allow the Commonwealth to escape the operation of law.

Similarly, the Commonwealth asserts without authority that Mr. Smith's only recourse for a breach of the plea agreement is to withdraw the plea, and therefore it is "illogical" that the Commonwealth's obligations

continue after recommending the agreed-upon sentence. (Appellee's Brief at 12-13). Rule 3A:8 does not limit the recourses available to the criminal defendant for the breach of a plea agreement. Rather, the rule *authorizes* an *additional form* of relief—withdrawing the plea if the Commonwealth fails to comply with the plea agreement.[4]

## II. The Commonwealth is not permitted to alter plea agreements to secure continued federal funding.

The Commonwealth next attempts to avoid the plain meaning of Article I (Declaration of Rights), § 11 of the Virginia Constitution and Code § 1-239 by asserting a privilege to alter its own contracts through the exercise of the its police power. (Appellee's Brief at 13-15). This is an

[4] The Commonwealth's argument appears circular at this point. The Commonwealth seeks to prove that it has no obligation other than making a recommendation. As such, it reads Rule 3A:8(c)(2), allowing the criminal defendant to withdraw his plea if Commonwealth fails to comply with the plea agreement, as only relevant if the Commonwealth fails to make the agreed-upon recommendation. (Appellee's Brief at 12-13). Based solely on this reading of the Rule, it concludes that withdrawal of the plea is the only way the Commonwealth could breach its plea agreement with the criminal defendant. (Appellee's Brief at 12). The fact, though, that the rule speaks broadly of the Commonwealth "fail[ing] to perform its part of the agreement," Rule 3A:8(c)(2), rather than narrowly about "[m]ak[ing] a recommendation," Rule 3A:8(c)(1)(B), suggests that there are other ways the Commonwealth could breach its agreement than merely by failing to make the appropriate recommendation. As the criminal defendant may only withdraw his plea within twenty-one days after the final order in the case, Lilly v. Commonwealth, 218 Va. 960, 963, 243 S.E.2d 208, 210 (1978), other recourses must remain available to the criminal defendant for the Commonwealth's breach of the plea agreement after that time.

argument raised for the first time here in the Commonwealth's brief, and discussed only briefly therein.

The Commonwealth's power to impair the obligations of contracts is certainly not absolute. Working Waterman's Ass'n. v. Seafood Harvesters, Inc., 227 Va. 101, 110, 314 S.E.2d 159, 164 (1984); Etheredge v. City of Norfolk, 148 Va. 795, 139 S.E. 508 (1927); Kennedy Coal Corp. v. Buckhorn Coal Corp., 140 Va. 37, 124 S.E. 482 (1924). If it were, the Constitutional prohibition on impairing contractual obligations would be meaningless. The Virginia Supreme Court has stated, "[L]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." Seafood Harvesters, 227 Va. at 110, 314 S.E.2d at 164 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977)); see also Treigle v. Acme Homestead Assoc., 297 U.S. 189, 197 (1936) (articulating a similar rule).

Mr. Smith notes that this test may raise some factual questions to be resolved by the trial court. Taking the records as it stands, however, this Court may well determine that these requirements have not been met. As to the true purpose of the statutory amendment at issues, the Court must weigh seriously the Commonwealth's concession that the registration laws

were amended to avoid a partial loss of federal funding for state programs. (JA at 188). As to the reason for the amendment now proffered by the Commonwealth, namely the purpose stated in Va. Code § 9.1-900, the Commonwealth concedes that this provision was not amended to justify the higher registration requirements. (Appellee's Brief at 14). The true reason for the amendment at issue was to avoid partial loss of federal funding.

The questions, then, under Seafood Harvesters are: first, whether alteration of a plea agreement is an *appropriate means* of avoiding the partial loss of federal funding, and second whether the alteration was *accompanied by reasonable conditions*.

Addressing the character of the alteration, this is not an appropriate means. A citizen's surrender of fundamental Constitutional and civil rights in entering a plea agreement makes an alteration of these agreements by the exercise of police power inappropriate, no matter what end the state is pursuing. Fairness to the criminal defendant is essential to the plea agreement process. Santobello v. New York, 404 U.S. 257, 261 (1971).

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Id. at 262. Where, as here, the amendment to the registration requirements impaired a significant, implicit term of the plea agreement after nine years of Mr. Smith's compliance with the plea agreement, the Court should find the Constitutional considerations of due process and fairness to the criminal defendant make alterations to the plea agreement an inappropriate means of pursuing federal funding. Nothing, however, precludes this Court from interpreting the new legislation as applying both prospectively from the date of its enactment and retrospectively to all individuals convicted of the qualifying offenses except those with plea agreements.

Addressing, next, the conditions of the alteration, the issue is very simple. This alteration of Mr. Smith's contract with the Commonwealth was accompanied by no conditions, much less the reasonable conditions required. As such, this alteration was improper. Cf. Citizens Mut. Bldg. Ass'n v. Edwards, 167 Va. 399, 407-08, 189 S.E. 453, 456-57 (1936).

Moreover, the foregoing arguments assume that Code § 1-239 is to be read identical to Article I (Declaration of Rights), § 11. Whereas the Commonwealth could have the inherent Constitutional power to alter plea agreements, Code § 1-239 should be read as the General Assembly's direction to the courts *not* to interpret legislative acts as doing so. Accordingly, interpreting the alterations to the statute as impairing the

Commonwealth's obligations under the plea agreement, even if Constitutionally permissible under Article I (Declaration of Rights), § 11, is an interpretation violating Code § 1-239.

## III. Mr. Smith has vested contractual rights.

The Commonwealth's arguments that Mr. Smith has no vested rights were substantially anticipated and addressed in Mr. Smith's opening brief (Appellants' Brief at 40-42) and will not be completely reiterated here.

Mr. Smith does note, however, that the Commonwealth misconstrues Paul in an attempt to overcome Code § 1-239. Paul, 214 Va. at 653, 203 S.E.2d at 125, reiterates that laws are presumed to apply prospectively, and that the predecessor to Code § 1-239 embodies this principle. The Commonwealth argues from this dicta that express retroactive application of an amendment overrides Code § 1-239. (Appellee's Brief at 16-17). Retroactive laws, however, do not inherently impair the obligations of contracts, and Code § 1-239 directs courts not to construe statues (even those saying they apply retroactively) as impairing vested rights. In other words, Paul stops far short of the Commonwealth's position.

The Commonwealth also misapplies Morency, using it to give artificial support to a non sequitur. (Appellee's Brief at 16-18). Morency requires the courts, once they establish that vested rights exist, to look carefully at "what

are these vested rights that are secured against legislative invasion." Morency v. Commonwealth, 274 Va. 569, 574-75, 649 S.E.2d 682, 684 (2007) (quoting Town of Danville v. Pace, 66 Va. (25 Gratt.) 1, 11 (1874)). The Commonwealth, however, does not look at Mr. Smith's vested rights, but rather asserts that Mr. Smith has no right to rely on the continued existence of *civil statutes*, citing Allen v. Mottley Constr. Co., 160 Va. 875, 888, 170 S.E. 412, 417 (1933). Allen, however, only establishes that a person cannot rely on the continued existence of *civil remedies*, id., an assertion that is somewhat narrowed by the language of Code § 1-239, which would permit a remedy conforming "so far as practicable" with the existing civil practice if necessary to avoid the impairment of a vested contractual right. Ultimately, (a) Mr. Smith is not relying on the continued existence of a civil remedy to secure his *automatic* removal from the registry, (b) expungement from the registry has not been abolished as a remedy, and (c) even if it were, Code § 1-239 would require the revival of the expungement procedure so as to avoid the impairment of a vested right. (Appellant's Brief at 41-42).

## IV. The Constitutional violations have been established.

The Commonwealth argues, without citing any authority, that because the impairment of Mr. Smith's contractual rights, if any, arises from

the Commonwealth's exercise of police power, there is no due process or takings issue. The police powers are not so absolute, and they are expressly limited by the provisions of Article I (Declaration of Rights), § 11 of the Virginia Constitution—i.e., the due process and takings clauses.

Addressing the takings issue, the Commonwealth's argument would concede that Commonwealth deprived Mr. Smith of his contract rights in the Commonwealth's efforts to achieve a public good. This is the essence of a taking, and takings without just compensation are prohibited under Virginia Constitution Article I (Declaration of Rights), § 11.

Addressing the due process claim, this Court has stated, "When the Commonwealth offers a citizen immunity from prosecution in exchange for his cooperation and the citizen abides by the terms of the agreement, 'due process requires that the government provide him with the benefit of his bargain.'" Judicial Inquiry & Review Comm'n of Va. v. Elliott, 272 Va. 97, 119, 630 S.E.2d 485, 496 (2006) (quoting Lampkins v. Commonwealth, 44 Va. App. 709, 722, 607 S.E.2d 722, 729 (2005)). Exchanging immunity for cooperation is not substantially different from exchanging a reduced sentence and other benefits for a plea of guilt. Mr. Smith is entitled to the benefit of his bargain under the due process clause.

## CONCLUSION

For the reasons stated above, Mr. Smith asks this Court to reverse the Circuit Court's grant of summary judgment to the Commonwealth, and direct the Circuit Court to grant summary judgment to Mr. Smith on these claims, specific performance of the contract, a permanent injunction, expungement from the registry, and monetary damages, to permit any further proceedings necessary on this matter, and all such further and additional relief that may be appropriate.

**Respectfully Submitted,**

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## CERTIFICATE

In compliance with Rule 5:26(h), I certify that fifteen bound copies of the foregoing Reply Brief of Appellantswere hand-filed with the Clerk of the Supreme Court of Virginia on this the 6th day of March, 2013. On the same day, with one electronic copy of the brief was emailed tto svbriefs@courts.state.va.us in PDF format. Additionally, on the same date three bound copies of the Reply Brief of Appellants, with one electronic copy on CD, were served, via U.S. Mail, first class, postage prepaid, to counsel for Appellee at the following address.

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I further certify that I have complied with all of the requirements of Rule 5:26 and of Reply Briefs.

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