Appendix A

COURT OF APPEALS OF VIRGINIA

Record No. 2081-16-4

From the Circuit Court of Prince William County,
Nos. CR05050490-01, CR05050703-01
and CR12003736-00

JUSTIN MICHAEL WOLFE,

Appellant,

against

COMMONWEALTH OF VIRGINIA,

Appellee.

September 20, 2019

OPINION

Per Curiam[1]

This case returns to our Court upon remand from the Supreme Court of Virginia following a remand from the Supreme Court of the United States for us to reconsider our earlier decision in light of *Class v. United States*, 138 S. Ct. 798 (2018). We directed the parties to submit supplemental briefing on the effect of *Class* in this case. Upon consideration of the case in light of *Class* and the parties' supplemental briefing, the petition for appeal has been reviewed by a judge of

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[1] The Honorable Mary Grace O'Brien took no part in the consideration of this petition for appeal.

this Court, to whom it was referred pursuant to Code § 17.1-407(c), and is denied.

Appellant originally was indicted for and convicted in 2002 of capital murder for hire, use of a firearm in the commission of murder, and conspiracy to distribute marijuana. *Wolfe v. Commonwealth*, 265 Va. 193, 198 (2003). He was sentenced to death for the murder and thirty-three years' imprisonment for the remaining offenses. *Id.* In 2012, the United States Court of Appeals for the Fourth Circuit affirmed an award of federal habeas corpus relief because the Commonwealth had not met its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and noted that "the Commonwealth [was] free to retry [appellant] on the murder, firearm, and drug conspiracy charges." *Wolfe v. Clarke*, 691 F.3d 410, 426 (4th Cir. 2012).

Following the grant of federal habeas corpus relief, the trial court appointed a special prosecutor,[2] who secured six additional indictments against appellant,[3] charging: capital murder in aid of a continuing criminal enterprise, use of a firearm in the commission of murder, two counts of acting as a principal of a continuing criminal enterprise, felony murder in the course of robbery, and use of a firearm in the commission of robbery. Appellant moved to

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[2] Appellant moved to disqualify the special prosecutor or vacate his appointment. Following a hearing on the record, the trial court denied both motions by orders entered on November 5, 2012.

[3] Appellant argues that the special prosecutor "reindicted" him on the three original charges. However, the record does not support that contention; the record demonstrates that the Commonwealth proceeded on the three original indictments.

dismiss those indictments, arguing that they had been "vindictively brought against [him] in retaliation for the exercise of his constitutional rights to petition for and receive federal habeas corpus relief." Appellant alleged that the 2012 indictments violated his due process rights because they increased the number of charges and the potential quantum of punishment. He argued that he could not be tried on new charges that arose out of the same facts that existed when he originally was indicted.

At the hearing on the motion on December 11, 2012, the Commonwealth argued[4] that the issue before the court was whether there was a presumption of vindictiveness under the circumstances; it asked for a separate evidentiary hearing if the trial court found that the presumption had been satisfied and the burden had shifted to the Commonwealth to show that there was not actual vindictiveness. Appellant's counsel presented testimony that the original indictments against him charged three offenses and that the special prosecutor brought six additional charges. There had been no additional investigation of the case between appellant's 2002 trial and the federal court's remand order. The Commonwealth presented testimony that the special prosecutor had no involvement in the original prosecution.

Appellant argued that considering the posture of the case, bringing the new charges raised the presumption of vindictiveness. Appellant asserted that the federal court rulings meant that it would be

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[4] The record suggests that the Commonwealth filed a written response, but it is not part of the record on appeal.

"difficult, if not impossible" for the Commonwealth to present a successful case on the original charges. Appellant stated that he was not arguing that the special prosecutors "are actually vindictive," only that bringing additional charges with "harsher" punishments implicated a presumption of vindictiveness. He noted that the same sovereign was pursuing the prosecution, so it did not matter that a special prosecutor had been appointed. Appellant asked the trial court to find a presumption of vindictiveness and to rule that "the Commonwealth have the burden of moving forward."

The Commonwealth argued that there was no presumption of vindictiveness in this case. It noted appellant's efforts to have the special prosecutor removed because, appellant had asserted, the special prosecutor would not exercise his independent judgment in prosecuting the case. The Commonwealth argued that the new charges reflected the special prosecutor's exercise of his independent judgment in this case and "that's the only thing the record supports." The Commonwealth also argued that, on their face, the new charges were not "more severe" than the original charges because appellant previously had faced a sentence of death. Thus, there was no additional sentencing exposure.

After considering the evidence and argument, the trial court denied appellant's motion.[5] The trial court noted that *Blackledge v. Perry*, 417 U.S. 21, 30 (1974), and *Barrett v. Commonwealth*, 41 Va. App. 377, 393

[5] The trial court entered an order memorializing its ruling on September 24, 2014.

(2003), were helpful in addressing appellant's claim. Considering all the circumstances, the trial court held that there had not been a *prima facie* showing of prosecutorial vindictiveness. The trial court found that it was not appropriate to analyze the apparent strength of the Commonwealth's case; instead it looked to the charges. The trial court found that although the Commonwealth had brought additional charges, it had not brought enhanced charges. The trial court found that, under the circumstances, appellant had not satisfied "the prosecutorial vindictiveness threshold showing which would require the Commonwealth to rebut that presumption." Appellant then stated that he wished to present evidence to establish actual vindictiveness, and the trial court set the matter for a hearing on that evidence for December 18, 2012. At the December 18, 2012 hearing, however, appellant advised the trial court that he would rest on his brief and would refile the motion if he felt it was appropriate to do so.

In October 2014, appellant filed a motion for reconsideration of his motion to dismiss the 2012 indictments based on prosecutorial vindictiveness. Appellant argued in his motion for reconsideration that he had established a *prima facie* case of vindictive prosecution, which violated his due process rights. He asserted that the Commonwealth was obliged to "articulate a legitimate reason" for bringing the new indictments "after a successful appeal." Appellant asserted that the trial court had not applied the correct legal standard and that, under the circumstances, the burden was on the Commonwealth to justify the new charges. Appellant argued for the first time that the presumption of vindictiveness

applied because the new charges raised the *minimum* quantum of punishment he would face upon conviction.

The Commonwealth filed a written response, arguing that neither the special prosecutor nor his staff "had any involvement in [appellant's] previous trial or appeals." "After independent review of the case, the [s]pecial [p]rosecutor presented the case" to a grand jury, which issued the challenged indictments. The Commonwealth argued that the special prosecutor had "independently formulated his own theories of [appellant's] guilt based on the investigation and evidence." According to the Commonwealth, appellant had not established vindictiveness because any animus on behalf of the original prosecutors could not be imputed to the special prosecutor. The Commonwealth further argued that there was not a presumption of vindictiveness solely based on indictment of additional charges because the new charges did not increase the minimum sentencing exposure that applied for the original charges because the minimum sentence for capital murder is imprisonment for life. *See* Code §§ 18.2-10(a) and 18.2-31.

The motion to reconsider was set for a hearing on December 17, 2014; however, at the hearing, appellant stated that he wished to defer argument on the motion. The trial court granted appellant's request to defer consideration of the motion to reconsider. Although there were several subsequent hearings, appellant never reset the matter for argument.

On March 22, and March 24, 2016, appellant executed written plea agreements with the

Commonwealth. Under the agreements, appellant agreed to plead guilty to: first-degree murder (2012 indictment), use of a firearm in the commission of a felony (2005 indictment), and conspiracy to distribute more than five pounds of marijuana (2005 indictment). Appellant also submitted a four-page written statement outlining his role in the murder. In exchange for appellant's guilty pleas, the Commonwealth agreed to *nolle prosequi* the remaining charges. The parties also agreed that appellant's active sentence would be "not less than 29 years nor more than 41 years for all the charges to which [appellant was] pleading guilty."

The trial court conducted a careful colloquy with appellant and appellant's counsel, and considered the Commonwealth's proffer of evidence. The trial court also separately inquired regarding appellant's waiver of his right to a jury trial. The trial court found that appellant's guilty pleas and jury waiver were "voluntarily and intelligently" made and that appellant understood the nature and consequences of the charges. The trial court then accepted the plea agreements, convicted appellant of the three charges, and granted the Commonwealth's motion to *nolle prosequi* the remaining charges. Appellant entered his guilty pleas without securing a ruling from the trial court on his argument that the presumption of vindictiveness applied because the new charges increased the minimum punishment he faced.

At the subsequent sentencing hearing, consistent with the terms of the written plea agreements, the trial court sentenced appellant to eighty-three years' imprisonment with forty-two years suspended by final

order entered August 4, 2016. As one of the conditions of appellant's suspended sentence, the trial court ordered him to pay court costs of $870,277.11.

Appellant appealed to this Court; he presented three assignments of error:

> I. The circuit court erred when it accepted [appellant's] guilty plea as voluntary where [he] was the target of vindictive prosecution that subjected [him] to increased mandatory minimum sentences after successful post-conviction proceedings.
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> II. The circuit court erred when it accepted [appellant's] guilty plea as voluntary when [his] guilty plea was the product of prosecutorial misconduct that deprived [him] of exculpatory evidence in the form of Owen Barber's testimony.
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> III. The circuit court erred when it ordered [appellant] to pay the costs of his prosecution because it was the Commonwealth's actions, and not [appellant's], that necessitated the re-trial of his charges.

By order entered May 10, 2017, this Court denied appellant's petition for appeal. We found that appellant had defaulted his challenges to the voluntariness of his guilty pleas under Rule 5A:18 because the record established that his pleas were knowing and voluntary. *See* Order of May 10, 2017. We rejected appellant's challenge to the assessment of court costs because we determined that the assessment was statutorily authorized. *See id.* The

Supreme Court of Virginia refused appellant's further petition for appeal. *See Wolfe v. Commonwealth*, Record No. 170780 (Feb. 5, 2018).

On February 21, 2018, the Supreme Court of the United States rendered its decision in *Class*. In *Class* the Supreme Court held a guilty plea, standing alone, does not bar a defendant "from challenging the constitutionality of the statute of conviction on direct appeal." 138 S. Ct. at 803. A federal grand jury indicted *Class* "for possessing firearms in his locked jeep, which was parked in a lot on the grounds of the United States Capitol in Washington, D.C. *See* 40 U.S.C. § 5104(e)(1) ('An individual . . . may not carry . . . on the Grounds or in any of the Capitol Buildings a firearm')." *Id.* at 802. Class moved to dismiss the indictment, alleging "that the statute, § 5104(e), violate[d] the Second Amendment" and the Due Process Clause because it did not provide adequate notice of the proscribed conduct. *Id.* The district court denied both motions after a hearing. *Id.* Class subsequently pleaded guilty to "Possession of a Firearm on U.S. Capitol Grounds," in exchange for which the government dropped related charges. *Id.*

Although there was a detailed written plea agreement between Class and the government, the agreement "said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional." *Id.* The district court accepted Class's plea, convicted him of the offense, and sentenced him to twenty-four days' imprisonment and twelve months of supervised release. *Id.* Class then appealed his conviction, again claiming that "the statute violate[d] the Second Amendment and the Due

Process Clause because it fails to give fair notice of which areas fall within the Capitol Grounds where firearms are banned." *Id.* The Court of Appeals for the District of Columbia Circuit "held that Class could not raise his constitutional claims because, by pleading guilty, he had waived them." *Id.* at 802-03. The Supreme Court reversed, holding that "a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute." *Id.* at 803-04 (quoting *Menna v. New York*, 423 U.S. 61, 63 & n.2 (1975)). The Supreme Court explained that "a guilty plea by itself" does not bar claims that: challenge the constitutional validity of the statute of conviction, assert prosecutorial vindictiveness, or allege a double jeopardy violation because those types of claims "call into question the Government's power to 'constitutionally prosecute'" a defendant. *Id.* at 805 (quoting *United States v. Broce*, 488 U.S. 563, 575 (1989)).

After the Supreme Court of Virginia refused appellant's appeal, he sought certiorari in the Supreme Court of the United States. The question appellant presented to the Supreme Court of the United States was: "[w]hether, in light of *Class*, a guilty plea in state court waives the right to raise on appeal the constitutional authority of the State to prosecute based on a claim of vindictive prosecution." *Wolfe v. Virginia*, 2018 WL 4035534, at *i (U.S.). On January 7, 2019, the Supreme Court granted appellant's petition for a writ of certiorari. The Supreme Court's order states:

> On petition for writ of certiorari to the Supreme Court of Virginia. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Virginia for further consideration in light of *Class v. United States*, 583 U.S. ___, 138 S. Ct. 798 (2018).

Wolfe v. Virginia, 139 S. Ct. 790 (2019). By order of February 15, 2019, the Supreme Court of Virginia remanded the case to this Court "to reconsider its decision of May 10, 2017." As noted above, we directed the parties to provide supplemental briefing. The supplemental briefs address only the vindictive prosecution claim. We turn to that claim now.

I. Appellant argues that the trial court erred in accepting his guilty pleas because he "was the target of vindictive prosecution that subjected [him] to increased mandatory minimum punishments after successful post-conviction proceedings."[6] In his supplemental petition for appeal, appellant argues that the United States Supreme Court's remand requires us to grant his petition and consider his claim on the merits. We disagree.

Citing Supreme Court precedent, we have recognized that imposing "a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy" violates due

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[6] "Only assignments of error assigned in the petition for appeal will be noticed by this Court." Rule 5A:12(c)(1)(i); *see also Maldonado v. Commonwealth*, 70 Va. App. 554 (2019) (applying Rule 5A:12(c)(1)(i) to limit issues considered on appeal). *Cf. Sarafin v. Commonwealth*, 288 Va. 320, 323 (2014) (applying corresponding Rule 5:17(c) to limit issues considered on appeal).

process of law. *Barrett*, 41 Va. App. at 393. And that we must "reverse a conviction that is the result of a vindictive prosecution where the facts show an actual vindictiveness or a sufficient likelihood of vindictiveness to warrant such a presumption." *Id.* at 396 (quoting *United States v. Lanoue*, 137 F.3d 656, 664 (1st Cir. 1998)). But here, unlike the defendant in *Class*, appellant presents a claim that the trial court never addressed: that the presumption of vindictiveness arose because the new charges the special prosecutor brought increased the *minimum* punishment to which he could have been subjected upon conviction.

"No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice." Rule 5A:18. "[W]e have repeatedly held that even constitutional claims can be barred by Rule 5A:18." *Le v. Commonwealth*, 65 Va. App. 66, 75 (2015) (rejecting due process challenge to sufficiency of evidence). "The purpose of this contemporaneous objection requirement is to allow the trial court a fair opportunity to resolve the issue at trial, thereby preventing unnecessary appeals and retrials." *Creamer v. Commonwealth*, 64 Va. App. 185, 195 (2015). Virginia's '[p]rocedural-default principles require that the argument asserted on appeal be the same as the contemporaneous argument" presented to the trial court. *Bethea v. Commonwealth*, ___ Va. ___ , ___ (Aug. 28, 2019). "[A]n appellate court may not reverse a judgment of the trial court based upon an alleged error in a decision that was not made or upon

an issue that was not presented." *McDonald v. Commonwealth*, 274 Va. 249, 255 (2007); *see also Floyd v. Commonwealth*, 219 Va. 575, 584 (1978) (holding that appellate courts will not consider an argument that differs from the specific argument presented to the trial court even if it relates to the same general issue).

Consequently, the Supreme Court of Virginia has declined to consider a "claim of facial invalidity of Code § 18.2-361(A)" because the claim was never presented to the trial court. *McDonald*, 274 Va. at 255. Similarly, we have refused to consider a double jeopardy claim because "the trial court was never asked to rule on the issue of double jeopardy." *West v. Commonwealth*, 43 Va. App. 327, 340 (2004). *Cf. Teleguz v. Commonwealth*, 273 Va. 458, 471 (2007) (declining to consider a claim that the trial court in a capital case erred in not granting a continuance to investigate new information because the trial court "never ruled on the continuance request, and Teleguz did not seek a ruling on his motion for a continuance"), *cert. denied*, 552 U.S. 1191 (2008); *Lenz v. Commonwealth*, 261 Va. 451, 463 (holding in a capital case that challenge concerning motion to poll jurors regarding which aggravating factor each had found was waived because defendant failed to request a ruling from the trial court), *cert. denied*, 534 U.S. 1003 (2001); *Hoke v. Commonwealth*, 237 Va. 303, 306 (holding in a capital case that claim challenging denial of motion for a change of venue because defendant did not renew his motion after acquiescing in attempt to seat a jury), *cert. denied*, 491 U.S. 910 (1989). Upon review of these precedents, we conclude that the

waiver under Rule 5A:18 is more expansive than the waiver occasioned by a defendant's guilty plea.

Appellant did not ask the trial court to rule on his motion to reconsider the prosecutorial vindictiveness claim arguing that the correct analysis focused on the greater *minimum* sentence he would face. Under these circumstances, Rule 5A:18 bars our consideration of appellant's prosecutorial vindictiveness claim. Although there are exceptions to Rule 5A:18, appellant has not invoked them, notwithstanding our prior ruling applying Rule 5A:18 and the Commonwealth's express reliance on the Rule in its supplemental briefing.[7] This Court does not apply the exceptions to Rule 5A:18 *sua sponte*. *Edwards v. Commonwealth*, 41 Va. App. 752, 761 (2003) (*en banc*). Accordingly, Rule 5A:18 bars our consideration of this assignment of error on appeal.

In sum, we hold that appellant may present his claim to this Court notwithstanding his guilty plea. *See Garza v. Idaho*, 139 S. Ct. 738 (2019); *Trevathan v. Commonwealth*, ___ Va. ___ (Aug. 23, 2019); *Miles v. Sheriff of Va. Beach City Jail*, 266 Va. 110, 116 (2003). We further hold that appellant's guilty plea, standing alone, does not waive his right to present a claim of prosecutorial vindictiveness on appeal. *Class*, 138 S. Ct. at 804-05. Finally, we hold that although appellant may present his claim, Rule 5A:18 bars our consideration of the claim because the trial court did not rule on the claim appellant presents on appeal. *McDonald*, 274 Va. at 255; *West*, 43 Va. App. at 340.

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[7] We granted appellant leave to file a reply brief. *See* Order of March 7, 2019.

See also United States v. Rios-Rivera, 913 F.3d 38, 42 (1st Cir.) (holding that "even after *Class*," appellant's decision not to press arguments challenging the constitutionality of the prosecution before the district court "effects a forfeiture" of the claim), *cert. denied*, 139 S. Ct. 2647 (2019).

II. To the extent the remand order contemplated that we reconsider appellant's second assignment of error, we find that under Class, appellant's guilty plea waived his claim of prosecutorial misconduct.

Following the federal court remand, appellant also moved to dismiss the indictments "for prosecutorial misconduct." He argued that no remedy short of dismissal could cure the constitutional violations that underpinned the habeas corpus relief the federal court had granted and that the original trial prosecutors had tampered with a key witness before recusing themselves. Appellant contended that the witness' (Owen Barber) invocation of his Fifth Amendment privilege prejudiced his defense. The trial court denied the motion in a letter opinion of November 4, 2013. The trial court found that appellant had not met his burden of showing that Barber's invocation of his Fifth Amendment rights was due to prosecutorial misconduct, considering the many varying statements, "many diametrically opposed to each other," he had given and that attorneys and investigators representing both appellant and the Commonwealth had visited Barber while he was incarcerated. The trial court further found that given the many statements, it was "uncertain which testimony" Barber would offer if he did testify. Thus, appellant had not established that

Barber's testimony "would have been favorable to his case."

In his original petition, appellant argued that the (original) prosecutor's asserted misconduct "had an effect on" his decision to plead guilty because "it deprived him of the sole witness who could contradict the government's allegations." *Class*, however, reaffirmed "that a guilty plea bars appeal of many claims, including some '"antecedent constitutional violations'" related to events . . . that had '"occurred prior to the entry of the guilty plea."'" 138 S. Ct. at 803 (quoting *Blackledge*, 417 U.S. at 30). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Thus, a guilty plea renders "case-related constitutional defects," like the one asserted here, "irrelevant" "[b]ecause the defendant has admitted the charges against him." *Class*, 138 S. Ct. at 804-05 (quoting first *Blackledge*, 417 U.S. at 30, and then quoting *Haring v. Prosise*, 462 U.S. 306, 321 (1983)).

Appellant's *Brady* claim was available to him before he entered his guilty pleas and it is within the class of errors that could be cured by a new trial, as the Fourth Circuit recognized in appellant's federal case. "Put succinctly, the constitutional claims for which [appellant] was awarded habeas corpus relief are readily capable of being remedied in a new trial." *Wolfe v. Clarke*, 718 F.3d 277, 290 (4th Cir. 2013). Accordingly, we find that to the extent this claim was

not abandoned in the Supreme Court of the United States, it was waived by appellant's guilty plea. *Tollett*, 411 U.S. at 267.

III. To the extent that the remand order contemplated that we reconsider appellant's third assignment of error, we find no abuse of discretion in the trial court's judgment.

In his original petition for appeal, appellant argued that the trial court "erred when it ordered [him] to pay nearly $900,000 in costs as a special condition of his suspended sentence because [his] re-trial was necessitated by prosecutorial misconduct, the costs were driven up by the Commonwealth's vindictive charging decision . . . , and it is punitive to hang the specter of 43 years in jail over [him] if he cannot pay" the costs within the time the trial court set.

As we found previously, under Code § 19.2-336 "[i]n every criminal case the clerk of the circuit court in which the accused is found guilty . . . shall . . . make up a statement of all the expenses incident to the prosecution, . . . and execution for the amount of such expenses shall be issued and proceeded with." Moreover, "[i]f a defendant is placed on probation, or imposition or execution of sentence is suspended, or both, the court may make payment of any fine, or costs, or fine and costs, either on a certain date or on an installment basis, a condition of probation or suspension of sentence." Code § 19.2-356

"The statutory grant of power to the trial court to order payment of fines, forfeitures, penalties, restitution and costs in deferred payments or installments according to the defendant's ability to

pay implies that the trial judge will act with sound judicial discretion." *Ohree v. Commonwealth*, 26 Va. App. 299, 311 (1998). Additionally, if the defendant later "defaults in payment and is ordered to show cause pursuant to Code § 19.2-358, he or she has the opportunity to present evidence concerning his or her ability to pay and obtain either temporary or permanent relief from the obligation to pay costs." *Id.* In this manner, "Virginia's statutory scheme works to enforce the duty of paying costs 'only against those who actually become able to meet [the responsibility] without hardship.'" *Id.* (alteration in original) (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)).

"Criminal sentencing decisions are among the most difficult judgment calls trial judges face." *Du v. Commonwealth*, 292 Va. 555, 563 (2016). "Because this task is so difficult, it must rest heavily on judges closest to the facts of the case—those hearing and seeing the witnesses, taking into account their verbal and nonverbal communication, and placing all of it in the context of the entire case." *Id.* Upon review of the record in this case, we find no abuse of discretion in the trial court's sentence.

For the reasons stated above, the petition for appeal is denied.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The trial court shall allow Meredith M. Ralls, Esquire, court-appointed counsel for the appellant, the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

This Court's records reflect that Meredith M. Ralls, Esquire, and Marvin D. Miller, Esquire, are counsel of record for appellant in this matter.

Costs due the Commonwealth by appellant in Court of Appeals of Virginia:

Attorney's fee $400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Marty K P. Ring

Deputy Clerk