

V I R G I N I A :

IN THE GENERAL DISTRICT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	:	Case No(s):	GC22027489-00
	:		GC22027492-00
v.	:		GC22006569-00
	:		GC22006570-00
JACKSON, HARRY RANDALL	:		
	:	Motion:	04/8/2022
	:		

DEFENDANT’S OBJECTION TO *NOLLE PROSEQUI*

On September 22, 2021, Jorge Torrico swore out a Criminal Complaint before a Fairfax County Magistrate and obtained two criminal Summons against Harry R. Jackson.¹

As argued previously in *Commonwealth v. Chastain*, Fairfax County Circuit Court Case No. MI-2020-961, *Memorandum in Support of Motion to Dismiss*, Filed December 28, 2020, it is a violation of a defendant’s due process rights to be prosecuted by a citizen without a Commonwealth’s Attorney. See Exhibit A, Argument, *Section II*. As such, the Commonwealth’s Attorney’s obligations to the defendant, to the Complainant, and to the public, began once the defendant was served with the Summons.

Five months later, on February 23, 2022, Harry Jackson appeared in court to seek a dismissal of the charges.² Instead of moving for a *nolle prosequi* or agreeing to dismiss the criminal case, the Commonwealth sought to continue the case to “investigate.” It appears that the

¹ This September date is a correction to the October date previously used by the Commonwealth and by the undersigned counsel.

² At the February hearing, Mr. Jackson was represented by an attorney whom he later substituted for undersigned counsel in March of 2022.

Commonwealth's Attorney had done nothing during the five months that this case was pending and needed more time. The Commonwealth's continuance request was granted over Defendant's objection.

About three weeks had passed after the court date — and the Commonwealth's Attorney's Office had still not done anything with this case. This is evidenced by the fact that on March 14, 2022, the Complainant sought two additional Summons from the Fairfax County Magistrate's Office, on identical grounds, without the Commonwealth's Attorney's knowledge.

On April 1, 2022, Defendant filed a Motion to Dismiss all charges against him on constitutional grounds and set the motion for a hearing on April 8, 2022, allowing the government sufficient time to review the significance of the Defense pleading and to respond accordingly.

Instead of responding to the consequential constitutional arguments laid out by undersigned counsel, the Commonwealth's Attorney's Office decided to avoid taking a position on the stifling of free speech by an unconstitutional statute, and instead, on the day before the hearing on Defendant's Motion to Dismiss, has asked to *nolle prosequi* the case on the grounds that there is insufficient evidence to prosecute the Defendant.

The government's request is a constitutional copout. By seeking to *nolle prosequi* instead of joining Defendant in his Motion to Dismiss and securing dismissal on constitutional grounds, the Commonwealth's Attorney's Office is opening the door to continued harassment of Harry Jackson and any other individual whom the Complainant and others like him find offensive.

Indeed, Officer Park of the Fairfax County Police Department has alerted the Defense that individuals, not party to this case, have claimed offense at words in an opinion editorial that

Harry Jackson had published in the *Fairfax Times* and sought criminal enforcement against his speech, citing the unconstitutional 18.2-417 Virginia Code section.

Pursuant to Va. Code § 19.2-265.3, “nolle prosequi shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown.” *Nolle prosequi* is a special legal maneuver by the Commonwealth to preserve its ability to relitigate the charges against free speech, the ones currently pending before this court, at a later time. The essence of the Commonwealth’s request is a punishment of the defendant for raising his constitutional rights as a defense — this is patently unconstitutional. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is ‘patently unconstitutional’”).

The Commonwealth has failed to show good cause why their motion should be granted. Instead, the Defendant has shown good cause for why the motion should *not* be granted.

The Commonwealth’s request to *nolle prosequi* precludes fair adjudication, on the merits, of the First Amendment, Fifth Amendment and Fourteenth Amendment issues raised by the Defense and opens the door to continued victimization of the Defendant and others like him. The Commonwealth’s request serves to preserve an opportunity to re-charge the defendant for the same conduct, under the same unconstitutional statute, at a later time. Therefore, the Defense strongly objects to the *nolle prosequi*.

The Defendant is seeking enforcement of his constitutional right to free speech. The Defendant is seeking **dismissal with prejudice**, a true closure in a criminal case.

Date: April 7, 2022

Respectfully submitted,
By Counsel:

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2022, a true and accurate copy of the foregoing pleading was sent via electronic mail to the assigned attorney at the Commonwealth's Attorney's Office at Paul.Vitale@fairfaxcounty.gov.

Marina Medvin, Esq.

EXHIBIT A

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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CRIMINAL
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COMMONWEALTH OF VIRGINIA

v.

SHERRELL D. CHASTAIN,

Defendant.

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CASE NO.: MI - 2020 - 961

BENCH TRIAL: January 7, 2021

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The defendant moves for dismissal of the single count of misdemeanor Assault pending before this court, and submits this Memorandum in support of his Motion to Dismiss.

BACKGROUND

On August 24, 2020, Mr. John H. Karau swore out a Criminal Complaint against Mr. Sherrell D. Chastain, for an incident that occurred earlier that day, for Assault under Va. Code § 18.2-57, a class 1 misdemeanor offense. The Magistrate issued a Warrant of Arrest for Mr. Chastain based on Mr. Karau's allegations. Mr. Chastain was arrested and is now before this Court facing a maximum penalty of 12 months in jail and up to a \$2,500.00 fine.

When a Fairfax County Police officer responded to the scene of the alleged Assault, the officer declined to make an arrest, despite having authority to do so under Va. Code § 19.2-81(G)(iii), and declined to swear out a warrant for the same. The officer did not collect any evidence. Indeed, no contact occurred between the two individuals, and Mr. Chastain's statement to law enforcement contradicted Mr. Karau's statement. Mr. Karau's Complaint alleged contact of Mr.

Chastain's hand with his vehicle, not his person, resulting in no damages. The entirety of the case against Mr. Chastain is Mr. Karau's testimony.

The Commonwealth's attorney has also declined to prosecute this matter and has made no appearance on this criminal case.

The criminal case before this court is being prosecuted by a private citizen, in his private capacity. This is in violation of Mr. Chastain's due process rights. Therefore, Mr. Chastain is asking for this case to be dismissed.

ARGUMENT

I. Private Criminal Prosecution is Not Authorized Under Virginia Law, This Case Lacks Standing

Under Virginia law, criminal law enforcement is statutorily restricted to three government agencies: the prosecutor's office, the sheriff's office, and the police department. Va. Code § 15.2-836 (The department of law enforcement consists of "the attorney for the Commonwealth, chief of police, and sheriff, together with their assistants, police officers, deputies and employees"); Va. Code § 15.2-528 ("The department of law enforcement, attorney for the Commonwealth, and sheriff shall be charged with the enforcement of all criminal laws throughout the county"). Criminal prosecution is a duty that is delegated to the Commonwealth's attorney. See Virginia Constitution, Article VII, § 4; Va. Code §§ 19.2-201, 15.2-1627. There is no authority for private criminal prosecution. A private individual lacks standing to enforce criminal law in his private capacity.

The Supreme Court of Virginia has described the duties of a Commonwealth's attorney as "primarily charged with enforcing criminal laws within his jurisdiction." *Daniels v. Mobley*, 285 Va. 402 (2013). The prosecutor is also empowered with discretion to decide whether to institute criminal charges. *Bradshaw v. Commonwealth*, 228 Va. 484 (1984). If charges are brought, a Commonwealth's attorney "has duties to conduct 'the impartial prosecution' of the accused and to ensure that the accused receives a fair trial." *Price v. Commonwealth*, Virginia Court of Appeals, Record No. 0343-20-1, Decided November 4, 2020. The Commonwealth's attorney "must remain in continuous control of the case." *Cantrell v. Commonwealth*, 229 Va. 387 (1985).

Criminal prosecution is a public function that is carried out by a public official who answers to, and legally represents, the Commonwealth of Virginia. As such, a private prosecutor "may not initiate a prosecution." *Cantrell v. Commonwealth*, 229 Va. 387 (1985). The Supreme Court of the United States has affirmed that the decision to prosecute an individual rests with the county prosecutor to prevent "individual and institutional abuse." *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). Consistent with *Bordenkircher v. Hayes*, Virginia's Commonwealth's attorneys are entrusted to protect a defendant's rights and to decide whether or not to prosecute individuals for particular criminal offenses. *Lux v. Commonwealth*, 24 Va. App. 561 (1997); see also Va. Code § 15.2-1627(B) (giving a Commonwealth's attorney discretion not to prosecute misdemeanor offenses).

Quite simply, a prosecutor can prosecute a criminal case; a private citizen cannot. Prosecutors are public officials with expressly delegated authority to engage in criminal law enforcement, who are overseen by the public, the courts, and the State Bar; private citizens are not. Private citizens have no legislative or constitutional authority to engage in criminal

prosecution — and hence incur the resulting responsibility of oversight of a defendant’s rights in a criminal case.

Prosecutors are held to professional ethical standards under the Virginia State Bar Rules of Professional Conduct as a means to support criminal justice. Comment [1] to Rule 3.8 of the Virginia State Bar Rules of Professional Conduct states: “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” An individual advocating on his own behalf, however, is unable to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence; the individual is entirely biased in his own favor. Nor is a private individual a “minister of justice.”

An individual prosecuting for his own benefit and without the participation of a Commonwealth’s attorney is engaging in unrestricted, unsupervised, and unauthorized criminal prosecution of a defendant, engaging in what the Supreme Court expressly labeled as individual abuse in *Bordenkircher v. Hayes*. Compare this to when a Commonwealth’s attorney or a private prosecutor has a conflict of interest or cannot objectively prosecute a criminal matter — the result is the court would disqualify the prosecutor from prosecuting the defendant on due process grounds. *Cantrell*, 229 Va. at 394; *Lux*, 24 Va. App. at 568. Impartiality in a criminal prosecution is a requirement, after all. See *Adkins v. Commonwealth*, 26 Va. App. 14 (1997) (citing *Berger v. United States*, 295 U.S. 78 (1935)). A private citizen, with only his own interests at heart and in mind, cannot remain in control of the prosecutorial decisions of a defendant when a third party would be readily excluded on due process grounds for exhibiting less bias. See *Ganger v. Peyton*,

379 F.2d 709 (4th Cir. 1967) (holding that a prosecutor's conflict of interest in the case amounted to constitutional error, reversing an Assault conviction).

A prosecutor, after all, does not represent the victim in a criminal case. A prosecutor “is the representative of the public.” *Adkins*, 26 Va. App. at 14. A Wyoming court said it best when it described the responsibilities of a prosecutor:

The prosecutor, however, enters a courtroom to speak for the People and not just some of the People. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of "The People" includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name.

Lindsey v. State, 725 P.2d 649, 660 (Wyo. 1986).

Surely, a victim cannot fill the shoes of a prosecutor in his own case, and cannot fulfill the duties a prosecutor owes to the people. Virginia Constitution, Article VII, § 4, gave Virginia voters the power to choose their prosecutor. Virginia voters did not choose Mr. Karau.

Virginia legislature did not delegate any authority for private criminal prosecution by citizens without prosecutorial supervision, nor created a mode of private criminal law enforcement. An alleged victim is not entitled to powers of a prosecutor under any Virginia law; instead, he is only entitled to rights under Article I, § 8-A of the Virginia Constitution, and to

rights enumerated in Va. Code §§ 19.2-11.01 and 19.2-11.2. Victim rights are limited, and none of the rights include the takeover of criminal prosecution.¹

Boiling this down, a private individual simply has no standing to bring a criminal case on behalf of the Commonwealth. See *Moreau v. Fuller*, 276 Va. 127 (2008) (deciding whether a Commonwealth’s attorney has standing to bring a civil action on behalf of the Commonwealth); *Cherrie v. Virginia Health Services*, 292 Va. 309 (2016) (“When a statute is silent ... we have no authority to infer a statutory private right of action without demonstrable evidence that the statutory scheme necessarily implies it ... we do not infer a private right of action when the General Assembly expressly provides for a different method of judicial enforcement”).

Private prosecution thus amounts to the usurpation of powers of a public prosecutor by a private citizen. See, e.g., *Yoder v. Givens*, 179 Va. 229, 235 (1942) (“The courts have not the power to interfere by injunction with the performance of a ministerial act of a public officer ... the effect of such interference would be to render a valid statute null and void -- a contradiction of reason and a usurpation of power.”). Of course the usurpation is also favorably selective to the victim — as the private prosecution does not contemporaneously seek to obtain the *duties* of a prosecutor to a defendant, such as compliance with due process and the rules of discovery; nor does a private citizen suddenly obtain the authority to run criminal history reports of himself and

¹ Confusion as to a victim’s right to hold a misdemeanor trial without a Commonwealth’s attorney present is due in large part to assumptions arising from a single code section: Va. Code § 19.2-265.5. This code section does not grant the victim power to prosecute a criminal case; instead, it discusses only a possibility of victim remaining present in a courtroom when both counselors are absent. It was written in 1987 and never revised since, has not been referenced in any Virginia Supreme Court or Court of Appeals decision. It states in relevant part, “whenever in a misdemeanor case *neither* an attorney for the Commonwealth *nor* any other attorney for the prosecution is present, the complaining witness may be allowed to remain in court throughout the entire trial if necessary for the orderly presentation of witnesses for the prosecution.” (Emphasis added.) This statute refers to a very narrow instance when *both* the defendant’s lawyer *and* the Commonwealth’s attorney are absent from the courtroom (“*neither ... nor*”) and is particularized to the administration of the rule on exclusion of witnesses at a trial. This code section is a singular reference in the Code of Virginia to the administration of a trial without a prosecutor present, and it does not discuss whether the prosecutor was present in controlling the initial prosecution — only discussing a scenario of prosecutorial absence mid-trial. Further discussion of this code section can be found in Section III, pp.14-16, *infra*.

his witnesses, and provide the reports to the defendant, for example. Private prosecution is simply irremediable.

In the present case, every statutorily empowered member of the “department of law enforcement” under Va. Code § 15.2-528, who had legislative authority to pursue charges or prosecute this criminal case, had declined to pursue or prosecute this case. Instead, before this Court is a case brought by a private individual, in his personal capacity, acting on behalf of the Commonwealth, practicing unauthorized criminal law enforcement in the courtroom, a power delegated only to the Commonwealth’s attorney under the law.

The police officer responding to this incident had declined to arrest the defendant and declined to obtain a warrant of arrest for this defendant. The private citizen swore out his own warrant. The Commonwealth’s attorney, who is “primarily charged with enforcing criminal laws within his jurisdiction,” has declined to prosecute this matter. The entire party on the caption of this case, “the Commonwealth,” has declined to prosecute this matter. Instead, a private citizen, an individual, is attempting to prosecute this matter on behalf of the Commonwealth. While an individual may, under Virginia law, *swear out* his own criminal complaint, he has no authority to later *prosecute* that complaint in court. See Va. Code § 19.2-72 (authorizing a magistrate to issue a misdemeanor warrant upon finding probable cause in a written complainant by an individual who is not a law-enforcement officer). The two functions are entirely distinguishable. While swearing out a complaint conveys upon the victim limited rights under Article I, § 8-A of the Virginia Constitution and under Va. Code §§ 19.2-11.01 and 19.2-11.2, the warrant does not convey prosecutorial powers upon the self-alleged victim. Our laws grant those powers only to

the Commonwealth's attorney, the only public official with standing to prosecute a criminal case in a court of law.

The Virginia legislature expressly delegated criminal law enforcement to police on the street and to prosecutors in the courtroom. Private prosecution of criminal law is not authorized under Virginia law. An individual bringing a criminal case on behalf of the Commonwealth lacks standing.

II. Private Criminal Prosecution Violates Due Process, Fundamental Fairness and Ordered Liberty

Private prosecution of criminal law, without a prosecutor, results in an inexorable violation of a defendant's due process rights and in the abdication of fundamental fairness and ordered liberty.

The due process clause assures "the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365 (1986). As such, a defendant is entitled to review, before trial, any evidence that is favorable to him and that is material either to guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). Evidence to which a defendant would be entitled under *Brady* includes prior inconsistent statements by a witness and evidence that would impeach a witness. See *Strickler v. Greene*, 527 U.S. 263 (1999); *Smith v. Cain*, 565 U.S. ___, No. 10-8145, slip op. (2012) (prior inconsistent statements of sole eyewitness withheld from defendant).

Only objectivity can guarantee the preservation of a defendant's due process rights. This is why our Courts have consistently held that defendants are entitled to "the fair-minded exercise of the Commonwealth's Attorney's discretion." *Lux v. Commonwealth*, 24 Va. App. 561 (1997).

A prosecutor has a broader obligation still: to disclose to the defense evidence that is material and exculpatory, *even* in the absence of a specific request by the defendant for that evidence. *United States v. Agurs*, 427 US 97 (1976). A prosecutor is professionally trained to seek out exculpatory evidence and to determine materiality, and a prosecutor is aware of his legal obligation to turn over that evidence to the defense. A prosecutor is entrusted with this duty to the court and corresponding ethical requirements and can be penalized by the Court, and by his State Bar, for failure to abide by this requirement.

On top of that, a public prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419 (1995). This is yet another "constitutional duty" of a prosecutor to a defendant arising under the due process clause that is overseen by the Courts and the State Bar. *Id.*

Putting these constitutional duties together, the prosecutor is entrusted with the paramount obligation of supplying a defendant with the evidence to which he is entitled, evidence that protects a defendant's right to put forward a complete defense. A prosecutor's role in the justice system is thus to ensure that a defendant receive "constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U. S. 858 (1982). "Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our

criminal justice system.” *California v. Trombetta*, 467 U.S. 479 (1984). And, thereby, affording the defendant a “meaningful opportunity to present a complete defense.” *Id.*

A self-prosecuting private citizen is inherently untrustworthy in all matters relating to due process and a prosecutor’s duties to the defendant. How can someone not trained as a prosecutor be expected to recognize materiality and the exculpatory nature of evidence? He can’t. How could the alleged victim/prosecutor be trusted to hand over evidence that would diminish his own case and strengthen the case of the individual he claims has injured him criminally? He can’t. That is why even third parties, prosecutors with a conflict of interest, are disqualified from prosecuting a criminal defendant — to ensure that due process is entrusted only in the hands of *objective* public servants. See *Cantrell*, 229 Va. at 394; *Lux*, 24 Va. App. at 568; *Ganger v. Peyton*, 379 F. 2d at 715 (finding an assault conviction violated “the requirement of fundamental fairness assured by the due process clause of the Fourteenth Amendment” because the prosecuting attorney had a conflict of interest in the case). In all regards, a prosecutor’s duties to a defendant under *California v. Trombetta* are entirely unique to the skills and training of a professional prosecutor and cannot be delegated to an unobjective and unqualified citizen in a private prosecution.

Yet, even before a case begins, objectivity is necessary. The decision whether or not to prosecute a case in the first place “rests entirely” in the prosecutor’s discretion. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). The Supreme Court’s decision in *Bordenkircher v. Hayes* precludes

prosecution by anyone other than a prosecutor.² “At common law, a prosecuting attorney ‘is the representative of the public in whom is lodged a discretion ... which is not to be controlled by the courts or by an interested individual.’” *Ganger v. Peyton*, 379 F.2d at 713. After all, frivolous prosecutions for minuscule matters are not in the public interest and prosecutions with insufficient evidence are violation of due process.

Private prosecution is irreparably riddled with due process problems. On top of the due process issues raised, when a private citizen initiates a criminal prosecution after both law enforcement and the prosecutor’s office declined to prosecute, how does the action not run afoul of the “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions”? See *Twining v. New Jersey*, 211 U.S. 78 (1908). How does opaque private criminal prosecution not conflict with concept of ordered liberty? See *Palko v. Connecticut*, 302 U.S. 319 (1937). Moreover, how would a defendant’s rights not to be prosecuted based on his “race, religion, or other arbitrary classification” be protected in a private criminal prosecution? See *Oyler v. Boles*, 368 U.S. 448 (1962).³ They can’t. There is simply no means available to a Judge to ensure the protection of a defendant’s due process rights in a private criminal

² *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) also precludes prosecution by a Court continuing to prosecute a defendant after a prosecutor has declined to prosecute. See also *California v. Trombetta*, 467 U.S. 479 (1984); *Ganger v. Peyton*, 379 F.2d 709, 713 (4th Cir. 1967) (“[prosecutorial discretion] is not to be controlled by the courts”). The mere fact that a Court in past cases has permitted the prosecution of defendants without a prosecutor and in violation of the Due process clause does not create justification *ex post facto* as some kind of authority through precedent for continued violation. See, e.g., *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

³ Just recently in a Letter Opinion dated December 20, 2020 in *Commonwealth v. Terrance Shipp, Jr.*, Case No. FE-2020-8, a felony case still pending before the Fairfax County Circuit Court, Judge David Bernhard made it clear that combating racism is of such monumental importance for this Court that even the perceived appearance of racism in portraits depicting retired white Judges is sufficient basis for a black defendant to claim his jury trial would be prejudiced in that courtroom. In addition to a Judge, it is also a prosecutor’s duty to protect a defendant’s right not to be prosecuted based on “race, religion, or other arbitrary classification” under *Oyler v. Boles*. Allowing a criminal case to proceed to trial without a prosecutor’s review of potential biased intentions of a private citizen is an even greater violation of fairness than paintings on a wall — it amounts to allowing racist private citizens to force citizens of a race they dislike to defend themselves in court against false accusations without intervention or screening by the Commonwealth’s attorney elected to perform that duty.

prosecution, something that due process *requires*. See *Trombetta*, 467 U.S. 479 (stating that criminal prosecutions “must comport” with prevailing notions of fundamental fairness under the due process clause of the Fourteenth Amendment); Constitution of Virginia, Article I, Section 11 (“no person shall be deprived of his life, liberty, or property without due process of law”); Constitution of Virginia, Article I, Section 15 (“no free government, nor the blessings of liberty, can be preserved to any people, but by a firm adherence to justice”).

There is absolutely no precedent for private citizens incurring the responsibility of oversight of a defendant’s Constitutional rights, and there is no way to enforce the various prosecutorial constitutional duties arising under the due process clause in a private prosecution. There is no conceivable way to protect a defendant’s due process rights in a private prosecution of criminal charges. A private prosecution is inherently unfair and in direct violation of the standards of fundamental fairness that are required by *Trombetta*. In a private prosecution, without the participation of a public prosecutor, there is no constitutionally-sound mechanism to protect an innocent defendant from erroneous conviction, and no conceivable way to ensure the integrity of our criminal justice system — a direct conflict with *Trombetta* and every right a defendant has under the due process clause of the Fourteenth Amendment.

Quite simply: private enforcement of criminal law is inherently unjust and violative of the due process clause. A criminal prosecution by a private party is thus barred on Constitutional grounds.

III. Trial In The Absence of a Prosecutor in Circuit Court Violates Due Process

A Circuit Court cannot prosecute a defendant in a criminal case in the absence of a Commonwealth's attorney without violating the due process clause. The due process clause and Virginia procedure necessitate the presence of a prosecutor in Circuit Court. When the Commonwealth's attorney fails to appear on behalf of the Commonwealth in any part of the prosecution, a Circuit Court cannot try the defendant, nor impose a penalty. Instead, the Court must dismiss the charges pending.

The Commonwealth's attorney represents the Commonwealth of Virginia in each criminal case styled as Commonwealth v. [Defendant]. See *Cantrell v. Commonwealth*, 229 Va. 387 (1985) (noting that the Commonwealth's attorney "must remain in continuous control of the case"); *Adkins v. Commonwealth*, 26 Va. App. 14 (1997); *Bradshaw v. Commonwealth*, 228 Va. 484 (1984).

The *Rules of the Supreme Court of Virginia* do not contemplate prosecution without a prosecutor in the Circuit Court.⁴ There is no procedure outlined under such circumstances. In fact, the Rules indicate that a Commonwealth's attorney is necessary for the administration of a criminal trial. For example, there is no procedural allowance for a defendant to waive a jury trial

⁴ General District Courts ("GDC"), unlike Circuit Courts, have Discovery procedure outlined for cases prosecuted without a Commonwealth's attorney under Va. Sup. Ct. R. 7C:5(b)(2). The applicability of this allowance is restricted by Va. Sup. Ct. R. 7C:1 to GDC courts; this rule has no bearing on misdemeanors tried in Circuit Courts per Va. Sup. Ct. R. 3A:1. GDC courts also do not comport with other constitutional requirements, such as right to trial by jury in a class 1 misdemeanor case where potential incarceration can exceed six months. See *Baldwin v. New York*, 399 U.S. 66 (1970) (holding that a defendant is entitled to a jury trial whenever the offense charged is punishable by imprisonment of more than six months). To be constitutionally-compliant, Va. Code § 16.1-132 provides an "appeal of right" for a trial *de novo* in Circuit Court for all GDC convictions, thereby distinguishing GDC courts from Circuit Courts and placing all constitutional compliance burdens on the Circuit Courts as official trial courts of record. See also *Ludwig v. Massachusetts*, 427 U.S. 618 (1976) (holding that a two-tier criminal court system in which the defendant was deprived of a constitutional right to a jury trial in the district court, but which also entitled the defendant to a trial *de novo* with a jury in the superior court, was compliant with constitutional requirements because the second court system furnished the defendant with his required constitutional rights). Therefore, procedural missteps in GDC should not bear any weight on Circuit Court procedure.

in Circuit Court without a prosecutor under Va. Sup. Ct. R. 3A:13, *Trial by Jury or by Court*, and no procedural recourse for the court to try a defendant when there is no Commonwealth's attorney on record. Va. Sup. Ct. R. 3A:13(b) requires for the court of record to seek the concurrence of a Commonwealth's attorney before waiving trial by jury, and requires the Commonwealth's concurrence for the record. ("the court may, *with the concurrence of the Commonwealth's attorney*, try the case without a jury ... and *the concurrence of the court and the Commonwealth's attorney* shall be entered of record." (Emphasis added)).

In fact, all of defendant's rights in Circuit Court *require* a prosecutor's compliance. For example, under Va. Sup. Ct. R. 3A:11, "a court *shall order the Commonwealth's attorney* to permit the accused to inspect and copy" discovery. (Emphasis added). When there is no Commonwealth's attorney noting an appearance on the case, there is no way for a Circuit Court to effectuate a defendant's rights under Rule 3A:11. One way to think of this is to say that a Commonwealth's attorney's failure to note an appearance in a criminal case is an immediate *failure to comply with discovery* and a *breach of duty to disclose* under Rule 3A:11(g), requiring a judge to dismiss the matters pending against the defendant.⁵

⁵ While these arguments are specific to Circuit Courts, and GDC courts have fewer procedural and constitutional restrictions, this does not mean that the practice in GDC does not run afoul of the Constitution of Virginia. For example, it can be argued that Va. Const. Art. 1 § 5 ("the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct") and Va. Const. Art. 3 § 1 ("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") prevent a GDC judge from prosecuting a case without a Commonwealth's attorney because in doing so the judge exceeds the scope of his grant of authority and violates separation of powers. GDC judges may also run into an appearance of impropriety in what the public sees as prosecuting from the bench, in violation of Canon 2 of the Canons of Judicial Conduct for the State of Virginia ("A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All the Judge's Activities"). See *Davis v. Commonwealth*, 21 Va. App. 587 (1996) ("The requirement of this Canon is clear; a judge must diligently avoid not only impropriety but a reasonable appearance of impropriety as well. Exactly when a judge's impartiality might reasonably be called into question is a determination to be made by that judge in the exercise of his or her sound discretion.")

Confusion as to a court's right to hold a misdemeanor trial without a Commonwealth's attorney present is due in large part to assumptions arising from a single code section: Va. Code § 19.2-265.5. This code section, written in 1987 and never revised since, has not been referenced in any Virginia Supreme Court or Court of Appeals decision. It states in relevant part, "whenever in a misdemeanor case *neither* an attorney for the Commonwealth *nor* any other attorney for the prosecution is present, the complaining witness may be allowed to remain in court throughout the entire trial if necessary for the orderly presentation of witnesses for the prosecution." (Emphasis added.) This statute refers to a very narrow instance when *both* the defendant's lawyer *and* the Commonwealth's attorney are absent from the courtroom ("neither ... nor") and is particularized to the administration of the rule on exclusion of witnesses at a trial. This code section is a singular reference in the Code of Virginia to the administration of a trial without a prosecutor present. It does not discuss whether the prosecutor was present in controlling the initial prosecution and only discusses a scenario of prosecutorial absence mid-trial. Regardless of what the legislature had in mind in writing this law, the due process clause cannot be statutorily superseded; and, in Circuit Court, due process remains applicable in all cases where a punishment may be imposed on a defendant. Due process analysis prevents a Circuit Court judge from being able to conduct a trial in the manner described by Code § 19.2-265.5 in cases where the court may impose a punishment.

A defendant in a criminal prosecution, even when the case is a misdemeanor as contemplated by Code § 19.2-265.5, is entitled to due process. Some constitutional rights are limited to certain types of cases. For example, in *Scott v. Illinois*, the Supreme Court held that the applicability of the Sixth Amendment, through the Fourteenth Amendment, is limited to cases

where jail time is imposed. *Scott v. Illinois*, 440 U.S. 367 (1979). However, there is no Supreme Court decision restricting the applicability of the due process clause to cases where jail time is not sought. Indeed, *Brady* and its progeny do not distinguish between jailable and non-jailable offenses, and instead apply the due process clause to “punishment.” See *Brady v. Maryland*, 373 U. S. 83 (1963); *California v. Trombetta*, 467 US 479 (1984); *United States v. Bagley*, 473 US 667 (1985). Thus, it is the duty of the court in any criminal case where punishment may be imposed, to safeguard a defendant’s due process rights.

When a defendant is subject to punishment by a court, the due process clause entitles the defendant to material exculpatory evidence, impeachment evidence, evidence of conflicting statements of witnesses, evidence of improper attempts by a witness to influence another witness, disclosure of agreements made by prosecution witnesses in exchanging value, history of a witness’ untruthfulness, evidence questioning the credibility of a witness’ identification of defendant, etc. — and, a prosecutor is required to turn this evidence over to the defendant even if the defendant fails to request it. The defendant is entitled to “constitutionally guaranteed access to evidence.” *United States v. Valenzuela-Bernal*, 458 U. S. 858 (1982). This includes evidence averse to the interests of the government’s main witnesses, the investigating police officer and victim in the case. The method by which these due process rights are safeguarded is through a prosecutor.

How, then, can Code § 19.2-265.5 comport with the requirement of due process if it contemplates a situation in which a prosecutor does not participate at trial? How can a judge authorize the absence of a prosecutor mid-trial without opening the door to a due process violation? Realistically, compliance with due process requires a prosecutor to remain present

throughout the trial for the possibility that he may have to hand over evidence to the defendant mid-trial, after realizing that a Commonwealth's witness is presenting testimony contrary to a statement made before trial. A fair trial under Code § 19.2-265.5, for a case where punishment may be imposed, is likely an impossibility. The defendant is entitled to due process, which means fair prosecution *at all stages of the prosecution*, by an unbiased prosecutor. See *Berger v. United States*, 295 U.S. 78 (1935); *Adkins v. Commonwealth*, 26 Va. App. 14 (1997). A defendant is entitled to a fair trial and a public prosecutor has "a duty ... to see that the accused receives a fair and impartial *trial*." *Adkins*, 26 Va. App. 14. If a prosecutor is absent from any part of the trial, let alone the prosecution in entirety, due process runs afoul and a court cannot proceed to trial in overt violation of due process and a defendant's right to a fair trial.⁶

In the present case, Mr. Chastain is facing a punishment of up to 12 months in jail and up to a \$2,500.00 fine. Mr. Chastain is entitled to due process and a constitutionally-sound trial. Without the participation of a prosecutor in the prosecution, Mr. Chastain has no ability to obtain a fair trial where he receives due process of law. Aside from the fact that this Court has no method to ensure that Mr. Chastain receive discovery under the *Rules of the Supreme Court of Virginia*, the Court cannot ensure *Brady and its progeny* discovery without the participation and case review of a prosecutor. Ms. Chastain has no ability to obtain his constitutionally guaranteed access to evidence. A trial cannot proceed where the chief witnesses in a criminal case can provide testimony that will remain entirely unchecked by the Commonwealth for inconsistency, and where the exculpatory evidence that may contradict the evidence presented against the

⁶ Moreover, the due process clause of the Fourteenth Amendment is not limited to the guarantees spelled out in the Bill of Rights; instead, it expands protections against State practices and policies which may fall short of fundamental fairness. See *In re Winship*, 397 U.S. 358 (1970) (holding that the absence of a specific constitutional provision requiring proof beyond a reasonable doubt in criminal cases does not preclude proof beyond a reasonable doubt from being a due process requirement).

defendant is allowed to remain obscured from the defendant. Mr. Chastain has a right to be able to put forward a complete defense, to review evidence that can protect him from erroneous conviction, amongst other rights guaranteed by the due process clause. *California v. Trombetta*, 467 U.S. 479 (1984). This Court has the duty to ensure the integrity of our criminal justice system. *Id.* Mr. Chastain is entitled to a fair trial. This Court cannot conduct a fair trial under Code § 19.2-265.5 without violating Mr. Chastain's due process rights.

IV. Alternative Remedy Available

While a private citizen is not authorized by Virginia's legislature to enforce criminal law, and doing so violates the due process clause, private citizens are nonetheless given civil recourse for redress of perceived wrongs under the Code of Virginia and through common law.

Assault, for example, has a civil cause of action for a plaintiff to pursue. See *Clark v. Commonwealth*, 279 Va. 636 (2010). Many misdemeanors, which a prosecutor has discretion to not prosecute under Va. Code § 15.2-1627(B), have similar tort law causes of action. Thus, aggrieved private citizens have standing to pursue civil remedy, at their own expense, if they wish to redress an alleged wrong.

When private citizens pursue criminal actions against defendants, they do so at the cost of public funds. When public servants placed in charge of discretion for enforcement of criminal law, and hence discretion on use of public funds, elect not to pursue a particular criminal prosecution, the effect is that the individual private citizens bringing the criminal case is deciding unilaterally and without public accountability, how to spend public dollars. An unsupervised


private citizen, for example, forces the County to incur the unnecessary cost of a public defender for an indigent defendant.

Criminal prosecution at the expense of the County should happen only under the supervision of county officials accountable for their work to the public. Individuals seeking to redress a private wrong that was declined criminal prosecution by department of law enforcement may seek redress privately, at their own cost, through a civil action.

CONCLUSION

The matter before this Court is private prosecution, a private citizen's attempt to enforce criminal law without statutory authority to do so, and in violation of defendant's due process rights. The allowance of private prosecution violates the due process clause and our criminal justice system's requirements of fundamental fairness and ordered liberty. This matter must be dismissed.


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CERTIFICATE OF SERVICE

Pursuant to Rule 3A:21(a), copies of written motions and notices must be served on each counsel of record. Since there is no counsel of record, and the victim in a criminal case who is individually pursuing a prosecution is not a party in a criminal case, counsel has not served anyone.



Marina Medvin, Esq.