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May 19, 2021

Danielle Brown
9256 Mosby Street, Suite 104
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Re: Commonwealth v. Harwinder Sangha, MI 2020-565

Dear Ms. Brown:

In my letter opinion of March 29, 2021, at page 5, I stated that there was:

no statutory authority for the court to request the Commonwealth Attorney to appear in a case involving a violation of Code § 18.2-272(C). While Code § 46.2-385 authorizes a judge to request the Commonwealth Attorney to appear on behalf of the Commonwealth "in any contested criminal case wherein a resulting conviction is required to be reported to the Department under § 46.2-383," a conviction of a violation of Code § 18.2-272(C) is not required to be so reported because Code § 46.2-383(A) only requires reporting of the "convict[ion] of a charge described in subdivision 1 or 2 of § 46.2-382 or § 46.2-382.1."

It has been brought to my attention that the statement that "a conviction of a violation of Code § 18.2-272(C) is not required to be" reported is incorrect; a conviction of a violation of Code § 18.2-272(C) would be required to be reported pursuant to Code § 46.2-383(A) because it is "a charge described in subdivision 1 or 2 of § 46.2-382" in that it is "a violation of any law of the Commonwealth pertaining to the operator or operation of a motor vehicle . . . ." Accordingly, contrary to my conclusion that Code § 46.2-385<sup>1</sup> would not apply to a prosecution of Code § 18.2-272(C), Code § 46.2-385, if viewed in

<sup>1</sup> "If requested by the judge trying the case, attorneys for the Commonwealth . . . shall appear on behalf of the Commonwealth . . . in any contested criminal case wherein a resulting conviction is required to be reported to the Department under § 46.2-383. The failure of the attorney to appear shall, in no case, affect the validity of any conviction." (Emphasis added).

isolation, would require the Commonwealth Attorney to appear, if requested by the court, in a case involving a prosecution of Code § 18.2-272(C).

The decision reached in my opinion letter, however, is not affected by this error as Code § 46.2-385 cannot be viewed in isolation. See e.g., *L.F. v. Breit*, 285 Va. 163, 180 (2013) ("we do not read statutes in isolation") and *Seaboard Fin. Corp. v. Commonwealth*, 185 Va. 280, 286 (1946) ("It is a cardinal rule of construction that statutes dealing with a specific subject must be construed together in order to arrive at the object sought to be accomplished."). Rather, Code § 46.2-385 must be considered in conjunction with the primary statute at issue in the case at bar, Code § 15.2-1627(B), which provides:

The attorney for the Commonwealth and assistant attorney for the Commonwealth shall be a part of the department of law enforcement of the county or city in which he is elected or appointed, and shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging a felony, and **he may in his discretion, prosecute Class 1, 2 and 3 misdemeanors**, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of \$500 or more, or both such confinement and fine. (Emphasis added).

Thus, as applied to a prosecution for a violation of Code § 18.2-272(C), Code § 46.2-385 and Code § 15.2-1627(B) are in conflict because Code § 46.2-385 requires the appearance of the Commonwealth Attorney (if requested by the court) whereas Code § 15.2-1627(B) makes prosecution by the Commonwealth Attorney discretionary.

This conflict is resolved by the rule of statutory construction that, "where there is a clear conflict between statutes, the more specific enactment prevails over the more general." *Eastlack v. Commonwealth*, 282 Va. 120, 126 (2011). Code § 15.2-1627(B) prevails as it is the "more specific" statute in that it specifically addresses the classes of crimes which the Commonwealth Attorney is required to prosecute and those which he has discretion to prosecute, whereas Code § 46.2-385 speaks generally of "any contested criminal case wherein a resulting conviction is required to be reported to the Department under § 46.2-383 . . . ."

Further, in view of *Jamborsky v. Baskins*, 247 Va. 506, 511 (1994) ("the use of 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent") and the fact that "the prosecution is the first and, presumptively, best judge of where the public interest lies, and the trial court should not merely substitute its judgment for that of the prosecution" (*Moore v. Commonwealth*, 59 Va. App. 795, 810 (2012)), the Commonwealth Attorney's duty under Code § 46.2-385 is directory, not mandatory.

Sincerely yours



Richard E. Gardiner  
Judge

cc: Steve T. Descano  
Commonwealth Attorney

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