In the

SUPREME COURT OF VIRGINIA

Record No. _____

JEREMY WADE SMITH,

Petitioner-Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Respondent-Appellee.

PETITION FOR APPEAL

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OVERVIEW

This case involves Jeremy Wade Smith's ("Mr. Smith") claims for breach of contract (requesting specific performance), Virginia Constitutional due process and takings clause violations, a request for a permanent injunction, and a petition for a hearing on Mr. Smith's expungement from the sex offender registry, all related to a plea agreement between Mr. Smith and the Commonwealth dated July 8, 1999.

Through this appeal, Mr. Smith will ask this court to reverse the Circuit Court's award of summary judgment to the Commonwealth, grant Mr. Smith's motion for summary judgment, or else overrule the cross-motions for summary judgment and allow this matter to be tried.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On October 14, 2010, the Court granted the Commonwealth leave to file a late response, denied Mr. Smith's motion for default judgment, denied a demurrer, and denied a motion to amend the demurrer. [R. at 78-79].[1] By a written opinion and order dated June 21, 2012, the Court denied Mr.

[1] I.e., Record at pages 78 to 79. Citations to the Record shall be made within the text thus. Citations to the transcript of September 13, 2010 will be made in the text as follows: [Tr. 9/13/2010 at __]. Citations to the transcript of April 13, 2012 will be made in the text as follows: [Tr. 4/13/12 at __]. Citations to the Outline of Argument of Plaintiff will be made in the text as follows: [Outline at __].

Smith's motion for summary judgment and granted summary judgment to the Commonwealth. [R. at 365-87]. Mr. Smith seeks to appeal that ruling.

ASSIGNMENTS OF ERROR

I. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count I (Breach of Contract – Request for Specific Performance) and granting summary judgment to the Defendant on that Count, because the sex offender registration requirements and limitations effective in 1999 were material terms of Mr. Smith's contract with the Commonwealth that the Commonwealth breached by unilaterally imposing higher registration requirements on him in violation of the common law of Virginia. (Preserved at R. 387; see also R. 100-03, 190-191, 195-201; Tr. 4/13/12 at 6-26; Outline at 3-45).

II. The Circuit Court erred by interpreting the post-conviction legislative amendments as applicable to Mr. Smith in derogation of his vested contractual rights, in violation of Virginia Code § 1-239 and Article I, § 11 of the Virginia Constitution. (Preserved at R. 387; see also R. 101-02, 201-207; Tr. 4/13/12 at 6-30; Outline at 3-35, 46-53).

III. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Court II (Unconstitutional Taking) and granting summary judgment to the Defendant on that Count, because depriving Mr. Smith of his common law contractual rights under his plea agreement without just compensation constituted an unconstitutional taking in violation of Art I (Declaration of Rights) § 11 of the Virginia Constitution. (Preserved at R. 387; see also R. 49-51, 107-08, 207; Tr. 4/13/12 at 29-30).

IV. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Court III (Due Process Violation) and granting summary judgment to the Defendant on that Count, because depriving Mr. Smith of his common law contractual rights under his plea agreement without a hearing and depriving Mr. Smith of the benefit of his bargain constituted a deprivation of property without due process in violation of Art I (Declaration of Rights) § 11 of the

Virginia Constitution. (Preserved at R. 387; see also R. 29-30, 49-51, 107-08, 207; Tr. 4/13/12 at 29-30; Outline at 3-35, 54-58).

V. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count III (Due Process Violation) and granting summary judgment to the Defendant on that Count, because the new registration requirements impermissibly infringe upon Mr. Smith's Constitutionally protected liberty interest in raising his children. (Preserved at R. 387; see also R. 103-105, 207, 368).

VI. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count IV (Permanent Injunction) and Count V (Petition for Expungement Hearing) and granting summary judgment to the Defendant on those Counts on the basis that there was no contractual or constitutional violation, because those violations have been established. (Preserved at R. 387; see also R. 106-107, 208; Tr. 4/13/12 at 29-30; Outline at 3-65).

VII. The Court erred in granting summary judgment to the Commonwealth, impermissibly making inferences and construing the facts in favor of the Commonwealth, the moving party, even though it was in default. (Preserved at R. 387).

VIII. The Court erred in granting summary judgment to the Commonwealth, as the Commonwealth did not move the Court for summary judgment. (Preserved at R. 387).

FACTS AND PROCEDURAL HISTORY

E. The Charge and the Plea Agreement

On February 9, 1999, a grand jury indicted Plaintiff, Jeremy Wade Smith (DOB 5/26/1975) with rape. [R. at 111-16]. The Commonwealth's evidence later showed the relationship was consensual and the girl was 14 when the incident happened, on May 15, 1997. [R. at 115]. Mr. Smith fathered a child through the relationship. [R. at 111, 115].

On June 8, 1999, the Commonwealth and Mr. Smith (represented by Charles Cosby, Esq.) executed a written plea agreement. [R. at 111]. The Commonwealth reduced the charge to carnal knowledge of a minor in violation of Virginia Code § 18.2-63, and Mr. Smith agreed to plead guilty. [R. at 111]. The written agreement did not explicitly mention the sex offender registration requirements, but the law existing at the time required registration "as a part of the sentence imposed upon conviction" for both rape and carnal knowledge of a minor. Va. Code § 19.2-298.1(b) (1999 Cum. Supp.). At the plea hearing later that day, the Court agreed to the recommended sentence, which included ten years' incarceration suspended for eighteen years, though it said it was "hard pressed" not to order actual incarceration. [R. at 115-17]. The Commonwealth reminded the Court that Mr. Smith would have to register as a sex offender, and Mr. Smith's attorney stated that Mr. Smith understood this requirement. [R. at 117]. The sentencing order notes the registration requirement. [R. at 113].

F. The Registration Requirements at the Time of the Agreement

On June 8, 1999, the sex offender registration requirements were codified in relevant part in the then-existing Va. Code §§ 19.2-298.1 to -298.4 (1998 Cum. Supp.). [R. 224-27; see also Outline at 16]. Those registration requirements are briefly summarized as follows:

1. **Mr. Smith's offense not a "sexually violent offense":** Though rape was classified as a "sexually violent offense," the reduced charge of carnal knowledge of a minor was not classified as such. Va. Code § 19.2-298.1(a) (1998 Cum. Supp).

2. ***Automatic*** **expungement from registry:** Mr. Smith's name and information was to be **automatically removed** from the registry, and his registration requirements terminated, ten years following his initial registration.[2]

3. **Ten-day deadline for registration and reregistration:** Initial registration was required within ten days. Reregistration was required ten days following a change of residence, annually for non-"sexually violent offenses," and every ninety days for sexually violent offenses. Va. Code § 19.2-298.1 (1998 Cum. Supp).

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[2] Under then-existing Va. Code § 19.2-298.2 (1998 Cum. Supp.), the registration requirements continued only for ten years from the date of the initial registration, except a person convicted of a sexually violent offense had to reregister for life. Under then-existing Va. Code § 19.2-298.3(b) (1998 Cum. Supp.), "[t]he name of any person required to register under § 19.2-298.1 and all identifying information **shall be removed** from the Registry by the Department of State police . . . **at the end of the period for which the person is required to register** under § 19.2-298.2," and the person (other than one convicted of a sexually violent offense) had a right to petition the circuit court for such removal any time ten years after his initial registration.

4. **Limited registry information:** The registrant had to provide only his or her name and aliases, the date and locality of the conviction, fingerprints, a photograph, date of birth, social security number, current address, and a description of the offense or offenses. Va. Code § 19.2-298.1(d)-(e) (1998 Cum. Supp).

5. **Criminal charges for failure to reregister:** Failure to reregister was a Class 6 felony for those convicted of a sexually violent offense, and a Class 1 misdemeanor for a non-"sexually violent offense." Va. Code § 18.2-472.1 (1998 Cum. Supp).

Mr. Smith has complied perfectly with these registration requirements imposed upon him as a result of his conviction, as well as the additional registration requirements imposed on him by the Commonwealth since 2008, which are the subject of this action. Mr. Smith was released from supervised probation in 2001. [Tr. 4/13/2012 at 8]. His civil rights were restored by the Governor on August 31, 2010. [R. at 228-29]. He has also for many years been the sole custodian and sole provider for his daughter born from the relationship. [Tr. 4/13/2012 at 8, 63].

G. Alteration of Registration Requirements

After nine years of registration and Mr. Smith's compliance the other terms of his plea agreement, the Commonwealth unilaterally altered the

registration requirements, effective July 1, 2008, so as to secure federal funding for law enforcement programs. 2008 Va. Acts Ch. 877. Under the amended registration requirements:

1. **Reclassification of offense, resulting in new obligations:** Carnal knowledge of a minor is now classified retroactively as a "sexually violent offense." Va. Code § 9.1-902(e)(2). As a result, Mr. Smith is now subject to quarterly instead of annual registration requirements, subject to the registration requirements **for life**, subject to a felony (instead of a misdemeanor) for failure to reregister, and is prohibited from entering onto school or other property without special permission. Va. Code §§ 9.1-904(A), -907, -908; 18.2-370.5., -472.1.

2. ***No expungement*** **from registry:** Those convicted of sexually violent offenses, including Mr. Smith whose offense was retroactively reclassified, cannot seek expungement from the registry. Expungement is no longer automatic for any registrant, and a person convicted of a non-"sexually violent offense" must wait fifteen or twenty-five years before petitioning for expungement. Va. Code §§ 9.1-908, -910.

3. **Increased registration information required:** In addition to the registration information previously required, the registrant must also provide a DNA sample; e-mail information; instant message, chat or other Internet

communication names; palm prints; information about his place of employment; motor vehicle, watercraft, and aircraft information; and information about any institution of higher learning the person is attending. Va. Code §§ 9.1-903(b), 906

4. **Deadlines for reregistration shortened:** Reregistration deadlines are reduced from ten days to three days, and reregistration is also required after a change in employment, vehicle ownership, and within *thirty minutes* of a change in e-mail, instant messaging, chat, or Internet communication identification. Va. Code § 9.1-903(b), (e)-(g).

These amendments to the registration requirements have been enforced against Mr. Smith to his detriment. [R. 118-147; see also Outline at 27].

H. Procedural History

Mr. Smith filed this action against the Commonwealth in the City of Richmond Circuit Court on February 9, 2010. [R. 1-29]. Service was accomplished on May 20, 2010 on the Attorney General. [R. at 35-36]. The Virginia Department of State Police (not a party to this suit) filed a demurrer dated June 11, 2010 (22 days after service). [R. at 30-33]. On July 9, 2010, Plaintiff moved for default judgment against the Commonwealth. [R. at 56-58]. On September 13, 2010, Plaintiff and the Virginia Department of State

Police argued their respective motions. [Tr. 9/13/10]. The Virginia Department of State Police moved orally to amend its demurrer and moved for leave to file a late response. [Tr. 9/13/10 at 20-21, 27-28]. By order dated October 14, 2010, the Court granted the Defendant (the Commonwealth) leave to file a late response, and the remaining motions were denied or overruled. [R. at 78-79]. Defendant was directed to file its answer by October 19, 2010. [R. at 78-79]. The Virginia Department of State Police filed an answer within that time frame.

In a separate legal action, the Richmond Circuit Court on November 9, 2011, granted Mr. Smith permission to enter the City of Richmond Public Schools and a specified day care to tend to his children and participate in their activities, both pursuant to Va. Code § 18.2-370.5. [R. at 230-33].

On or about January 26, 2012, Plaintiff moved for summary judgment in this case. [R. at 92-141]. On or about February 2, 2012, the Virginia Department of State Police moved for summary judgment. [R. at 144-189]. The motions were argued on April 13, 2012. [Tr. 4/13/12]. On June 21, 2012, the Court entered it opinion and order, finding in favor of the Commonwealth on all claims, granting summary judgment to the Commonwealth, denying Plaintiff's motion for summary judgment, and dismissing Plaintiff' counts and claims with prejudice. [R. at 365-87].

STANDARD OF REVIEW

In an appeal from a grant or denial of summary judgment, this Court reviews the application of law to undisputed facts *de novo*. St. Joe Co. v. Norfolk Redevelopment & Hous. Auth., 283 Va. 403, 407; 722 S.E.2d 622, 635 (2012). Conclusions of fact based on a summary judgment record have no binding effect whatsoever in the context of appellate review. Commercial Bus. Sys. v. Halifax Corp., 253 Va. 292, 296; 484 S.E.2d 892, 894 (1997). Where facts are in dispute, they are to be taken in the light most favorable to the non-moving party. Wilby v. Gostel, 265 Va. 437, 440; 578 S.E.2d 796, 797 (2003). Summary judgment can be granted if a party is entitled to judgment as a matter of law. Va. Sup. Ct. R. 3:20.

AUTHORITIES AND ARGUMENTS

I. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count I (Breach of Contract – Request for Specific Performance) and granting summary judgment to the Defendant on that Count, because the sex offender registration requirements and limitations effective in 1999 were material terms of Mr. Smith's contract with the Commonwealth that the Commonwealth breached by unilaterally imposing higher registration requirements on him in violation of the common law of Virginia.

The Circuit Court erred in denying Smith's motion for summary judgment. Plea agreements are contracts between the criminal defendant and the Commonwealth, governed by the law of contracts as it exists in the

Commonwealth. In Virginia, plea agreements incorporate implicitly and by operation of law all related statutes existing at the time, making those laws part of the contractual terms. This was clearly established in Wright v. Commonwealth, 275 Va. 77, 81-82; 655 S.E.2d 7, 10 (2008).[3]

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[3] In Wright, a grand jury indicted Wright of capital murder, and a plea agreement reduced the charge to first degree murder with and agreed sentence of life imprisonment. The Court accepted the plea agreement but also imposed a statutorily mandated period of post-release supervision and suspended incarceration, which was not mentioned in the plea agreement. Wright challenged this and asked the court to enter a sentencing order consistent with the plea agreement. Wright, 275 Va. at 79; 655 S.E.2d at 8. This Court held that the statutes mandating the additional periods of post-release supervision and suspended incarceration "constituted a part of Wright's plea agreement as though they were incorporated therein . . . . [T]his principle of contract law applies to plea agreements." Id. at 81-82; 655 S.E.2d at 10. This Court quoted Paul v. Paul, 214 Va. 651, 653; 203 S.E.2d 123, 125 (1974), "The law effective when the contract is made is as much a part of the contract as if incorporated therein." In fact, the Court held that the trial court *followed* the plea agreement *by* imposing the additional terms, because they were implicitly part of Wright's agreement even if he did not realize it. Wright, 275 Va. at 82; 655 S.E.2d at 10.

For more Virginia cases finding that existing law is part of a contract, see, e.g., Buchanan v. Doe, 246 Va. 67, 72; 431 S.E.2d 289, 292 (1993); Marriott v. Harris, 235 Va. 199, 215; 368 S.E.2d 225, 233 (1988); Harbour Gate Owners' Ass'n, Inc. v. Berg, 232 Va. 98, 105; 348 S.E.2d 252, 257 (1986); Paul v. Paul, 214 Va. 651, 653; 203 S.E.2d 123, 125 (1974); Maxey v. Amer. Cas. Co., 180 Va. 285, 290; 23 S.E.2d 221, 223 (1942); Citizens Mut. Bldg. Ass'n v. Edwards, 167 Va. 399, 404; 189 S.E. 453, 455 (1936); S.H. Hawes & Co. v. William R. Trigg Co., 110 Va. 165, 190; 65 S.E. 538, 548 (1909), *modified on other grounds sub nom.* United States v. Ansonia Brass & Copper Co., 218 U.S. 452, 31 S. Ct. 49 (1910); Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146, 153; 26 S.E. 421, 422 (1896); Esparza v. Commonwealth, 29 Va. App. 600, 606; 513 S.E.2d 885, 888 (1999).

Thus, Mr. Smith's 1999 plea agreement implicitly incorporated the then-existing law of sex offender registration. Under this contract, therefore:

a. Mr. Smith's crime is not a "sexually violent offense";

b. Mr. Smith was required to register *only for ten years*, not for life, and the Commonwealth's agent was to remove Mr. Smith's information from the registry *automatically* ten years following his initial registration;

c. Mr. Smith is permitted to petition the circuit court for removal from the registry ten years after his initial registration;

d. Mr. Smith was required to register annually, not quarterly; and

e. Mr. Smith was required to provide only limited registry information.

In 2008, in pursuit of federal funding,[4] the Commonwealth modified and retroactively enforced the sex offender registration requirements, using the threat of a felony charge against Mr. Smith despite his prior contract

[4] In 2006 the federal government enacted the Sex Offender Registration and Notification Act, which was Title I of the Adam Walsh Child Protection and Safety Act, Pub. L. 109-248, 42 U.S.C. § 16911 et seq., providing the states with a comprehensive set of sex offender registry standards. Failure to implement such standards would result in partial loss of federal funding for state and local law enforcement programs. [R. at 147].

This conduct of the federal government at best constitutes the legal act of an independent third party that makes the prior contract between Mr. Smith and the Commonwealth unfavorable to the Commonwealth. This, however, is insufficient as a legal excuse for breaching the contract. Gunnell v. Nello L. Teer Co., 205 Va. 28, 33-34; 135 S.E.2d 104, 108 (1964) (collecting authorities). [Outline at 26].

with the Commonwealth. This enforcement of terms more stringent than the material terms of the plea agreement constitutes a material breach of the contract between Mr. Smith and the Commonwealth under common law.[5]

Moreover, Virginia Code § 1-239 and Article I, § 11 of the Virginia Constitution preclude the application of those amendments to Mr. Smith, nullifying any claim of excuse or justification based on the change of law. (See the relevant arguments in the second assignment of error, below, hereby incorporated.)

The limited registration requirements were material terms of the plea agreement, making the breach of the agreement a material breach. These provisions were within the contemplation of both the Commonwealth and

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[5] *See, e.g.* Keith v. Lulofs, 283 Va. 768, 772; 724 S.E.2d 695, 698 (Va. 2012) ("[W]ills, unlike contracts, generally are unilaterally revocable and modifiable."); Judicial Inquiry & Review Comm'n of Va. v. Elliott, 272 Va. 97, 119; 630 S.E.2d 485, 496 (2006) ("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.'" (quoting Lampkins v. Commonwealth, 44 Va. App. 709, 722, 607 S.E.2d 722, 729 (2005)); Hamm v. Scott, 258 Va. 35, 39; 515 S.E.2d 773, 775 (1999); Horton v. Horton, 254 Va. 111, 115; 487 S.E.2d 200, 204 (1997) ("A material breach is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats an essential purpose of the contract."); Prince George Sewerage & Water Co. v. Bexley Ltd. Partnership, 247 Va. 372, 377; 442 S.E.2d 654, 657 (1994); Stanley's Cafeteria, Inc. v. Abramson, 226 Va. 68, 72; 306 S.E.2d 870, 872 (1983); Carlucci v. Duck's Real Estate, Inc., 220 Va. 164, 167; 257 S.E.2d 763, 765 (1979); Louis Latour, Inc. v. Va. Alcoholic Bev. Control Bd., 49 Va. App. 758; 645 S.E.2d 318 (2007).

Mr. Smith and were among of the essential purposes of the contract. Horton v. Horton, 254 Va. 111, 115; 487 S.E.2d 200, 204 (1997).

The registration requirements were within the contemplation of the parties, even though the written plea agreement did not specifically referenced registration. Under then-exiting Virginia law, the Commonwealth required registration "as a part of the sentence imposed upon conviction" for a qualifying offense. Va. Code § 19.2-298.1(b) (1998 Cum. Supp.). Conviction for a qualifying offense, therefore, was the only precondition to required registration. The Commonwealth bargained for Mr. Smith plea of guilt to a qualifying offense (but not a sexually violent offense), securing his place on the sex offender registry for ten years *regardless of the sentence imposed by the Court.* The Commonwealth cannot claim ignorance of her own laws, regardless of her agents' state of mind. The law here imposed specific but limited registration requirements upon Mr. Smith for his conviction. Moreover, the Commonwealth raised the issue of registration at the sentencing hearing to ensure the registration requirements were noted in the Court's final judgment, and they were. [R at 113, 117].

Similarly, registration was clearly in Mr. Smith's contemplation. He was represented by an attorney, an attorney who acknowledged in Court that Mr. Smith understood the registration requirements. [R. at 112, 117].

Neither Mr. Smith nor his counsel objected to the imposition of the registration requirements and Mr. Smith complied with the registration requirements. [R. at 117]. Mr. Smith pled guilty to one felony not classified as a "sexually violent offense" and thereby avoided prosecution under another felony classified as a "sexually violent offense." [R. at 210, 219-23]. The Court found this plea to be freely, voluntarily, and knowingly made after advice of counsel. [R. 112, 114]. Though Mr. Smith received a suspended sentence, that concession was logically and legally independent of the reduced charge, because the Commonwealth could have offered the same suspended sentence for the rape charge. Mr. Smith bargained for the reduced charge because of the more favorable registration requirements.

The Circuit Court's opinion on this issue simply does not follow a proper contract analysis. In the absence of Virginia law right on point with this case, the Court looked to cases more or less similar in other states where different law may apply, rather than returning to the basic contract analysis under Virginia law. [R. at 36-87]. Thus, rather than determining *the terms* of the contract, whether there was a *breach* of the contract, and whether the breach was *material*, the Circuit Court instead argued that there was no breach because Mr. Smith "did not have a specific

inducement related to the registry that was the primary benefit of the plea." [R. at 385]. This conflates issues *contract terms*, *breach of those terms*, and *material breach*. Additionally, the "specific inducement"/"primary benefit" analysis employed by the Circuit Court is not supported by Virginia case law and sets up a disparity of obligations between the Commonwealth and the citizen. As demonstrated through Wright v. Commonwealth, the citizen will be held to every term of the plea agreement, whether implicit or explicit, while the Circuit Court would hold the Commonwealth to provide only the "primary benefit" of the plea agreement, and then only if that benefit was the "specific inducement" for the citizen to make the plea.

The Circuit Court's four-part reasoning in support of this "specific inducement/primary benefit" analysis is also grossly inadequate.

The Circuit Court first construed Mr. Smith's benefit under the contract simply as "not being charged with rape and receiving no active jail time" and therefore concluded that he "received a substantial benefit from the plea bargain by avoiding a prison sentence." [R. at 385-86]. But receiving *a* substantial benefit under a contract does not preclude a material breach of the contract. The material breach analysis in Virginia looks to the *failure* of performance and whether that failure "defeats *an* essential purpose of the contract." Horton v. Horton, 254 Va. 111, 115; 487

S.E.2d 200, 204 (1997) (emphasis added). There may be more than one essential purpose to the contract. *See* Mathews v. PHH Mortg. Corp., 283 Va. 723, 732; 724 S.E.2d 196, 200 (2012). Securing the more limited registration requirements was *an* essential purpose of the contract, logically and legally independent of the suspended sentence. Retroactive application of the statutory amendments to Mr. Smith defeats that purpose.

The Circuit Court next argued that the "registration was only collaterally related to the plea." [R. at 386]. This confuses the distinction between the *collateral consequences of the conviction* for purposes of the *ex post facto* analysis and the *contract analysis* (terms, breach, and material breach) appropriate in this case. [See Outline 39-45]. These statutory provisions existing at the time were implicitly terms of the contract, and they were indeed material terms. A breach of those terms is a material breach. Also, Roe v. Farwell, 999 F. Supp. 174 (D. Mass. 1998), which the Circuit Court relied upon, is distinct because the law being challenged in Roe (Mass. Gen. Laws ch. 6, § 178C, adopted in 1996) was not law existing at the time the plea agreement was entered into, nor was it an amendment to the relevant law that existed at the time (Mass. Gen. Laws ch. 123A, § 1 et seq., existing in 1992 when the plea agreement was executed). The law challenged was entirely extraneous to the plea

agreement. See Roe, 999 F. Supp. at 183. Thus, the "collateral consequence" analysis applies differently here, where amendments were made to a law whose prior provisions were implicitly part of the plea agreement.

Third, the Court argued that "the plea held no promise or vested right that the law would not change subsequent to his plea." [R. at 386]. But the plea agreement *did* incorporate such a right because it implicitly incorporates Va. Code § 1-239 and the Art. I, § 11 of the Virginia Constitution, and moreover these two provision preclude the Court from interpreting the amendments to the law so as to impair a vested right of the plea agreement. (See the second assignment of error, below.)

Finally, the Court argued "the only support for the Petitioner's position is his own claims that when he entered into the plea agreement he did so knowing that by operation of law they would be subject to the sex offender registry for a period of ten years and eligible for expungement thereafter." [R. at 386]. First, this misconstrues the issue. Mr. Smith's understanding of the "operation of the law" concept is irrelevant. What matters is that these *are* material terms of the contract breached by the Commonwealth. Second, it is improper for the court to draw this inference against Mr. Smith in granting summary judgment against Mr. Smith.

Under the circumstances, if the agreement is not specifically enforced, there is no adequate remedy at law, because the Commonwealth will continue to enforce all or some of the statutory requirements against Mr. Smith, in derogation of his contract terms. These statutory requirements would place Mr. Smith on the registry *for life.* There is no adequate remedy at law *inter alia* because the rights under the contract are so unique and personal to Mr. Smith as to be irreplaceable, and no sum of money will adequately compensate Mr. Smith for the continued violation of these contractual rights.

Given this Court's prior precedents, especially Wright v. Commonwealth, and the undisputed and indisputable evidence that the Commonwealth breached material terms incorporated by operation of the law into its contract with Mr. Smith, in violation of the common law of Virginia, this Court should reverse the Circuit Court's decision and grant summary judgment in favor of Mr. Smith on his Breach of Contract Claim.

II. The Circuit Court erred by interpreting the post-conviction legislative amendments as applicable to Mr. Smith in derogation of his vested contractual rights, in violation of Virginia Code § 1-239 and Article I, § 11 of the Virginia Constitution.

The Constitution of Virginia, Art. I (Declaration of Rights), § 11, provides in relevant part, "[T]he General Assembly shall not pass any law

impairing the obligation of contracts . . . ." To secure this right of the people, Virginia Code § 1-239 provides:

> No new act of the General Assembly shall be construed to repeal . . . or in any way whatever to affect . . . any right accrued, or claim arising before the new act of the General Assembly takes effect; except that the proceedings thereafter held shall conform, so far as practicable, to the laws in force at the time of such proceedings.

These provisions each prohibit the Court from interpreting statutes as applying retroactively where such an interpretation would impair a vested right of a citizen, including a contractual right.[6] A vested right is "a right so fixed, that *it is not dependent* on any future act, contingency, or decisions to make it *more secure*." Kennedy Coal Corp. v. Buckhorn Coal Corp., 140 Va. 37, 45; 124 S.E. 482, 484 (1924) (emphasis added).

Contrary the Commonwealth's assertions and the Circuit Court's opinion, there can be no doubt that Mr. Smith's implicit and explicit rights under the plea agreement, including most particularly his right to be automatically removed from the registry ten years after his initial registration, were vested rights for purposes of Virginia Code § 1-239 and Article 1, § 11. Once the court accepted Mr. Smith's plea of guilt, Mr. Smith

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[6] Kennedy Coal Corp. v. Buckhorn Coal Corp., 140 Va. 37, 124 S.E. 482 (1924); Garraghty v. Virginia, Dep't of Cors., 52 F.3d 1274, 1281 (4th Cir. 1995) (emphasis added) (internal citation omitted) (citing Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750, 753 (1984); White's Admix v. Freeman, 79 Va. 597 (1884); Mosby v.St. Louis Mut. Ins. Co., 72 Va. (31 Gratt) 629 (1879)).

had rendered substantial consideration for the substantive benefits of the plea agreement, including the limited registration requirements and the contractual right to be removed from the registry after ten years pursuant to then-existing Va. Code § 19.2-298.3. Once he had registered (within ten days of his conviction), he had completed the only other condition precedent to being automatically removed from the registry ten years later. This right to be removed simply was not dependent on a future act, contingency, or decisions to make that right *more secure*.

The Commonwealth simply misstates the law existing at the time when it asserts that Mr. Smith had to petition the Court for removal from the registry. [R. at 375]. The law commanded the Commonwealth's agent to remove Mr. Smith's information from the registry automatically ten years following his initial registration.[7]

Moreover, even if such a petition is necessary for Mr. Smith to be removed from the registry, Mr. Smith has a contractual right to file such a petition under the logic of Wright v. Commonwealth. The Commonwealth's argument to the contrary, based on Commonwealth v. Shaffer, 263 Va. 428, 432; 559 S.E.2d 623, 626 (2002), advocating that a petition for removal is a procedural remedy that can be altered at will, is unpersuasive

[7] See footnote 2, above.

for several reasons. First, in Shaffer, the "right" at issue was no right at all, but a privilege. Here, we have a true right—a contractual right. Second, this right to file the petition after ten years is a vested right, because it was not dependent on a future act, contingency, or decisions to make the right *more secure*. Certainly the abridgment of that right by statutory amendment did not make it more secure. Third, because this involves a vested right, Virginia Code §1-239 and the Virginia Constitution prohibit interpreting a later amendment as impairing that vested right. Arguing (as the Commonwealth does [R. at 151-53]) that the procedure was abolished, therefore no mechanism exists, posits an impairment of the right. Fourth, Virginia Code §1-239 addresses the situation where procedure has changed. It states the procedure used should comply with contemporary procedure "*so far as practicable*." This implies the old procedure (or some variation) must be used where the new procedure (or lack thereof) would violate the vested right. Fifth and finally, the Commonwealth cannot argue that no procedure exists. Va. Code § 9.1-910 still permits petitions for removal from the registry. In short, even if the former law required a petition for expungement from the registry to be filed, Mr. Smith has a vested right to file that petition under the procedure of the current Va. Code § 9.1-910.

The Circuit Court further suggests reclassifying Mr. Smith's conviction as a "sexually violent offense" was not impermissible because the crime has not changed, only its designation for purposes of registration. [R. at 386-87]. Reclassification, the court says, was merely an exercise of the Commonwealth's police powers. This analysis ignores Wright v. Commonwealth, Va. Code § 1-239, and the Virginia Constitution, which together preclude interpreting subsequent amendments to the law as to impair Mr. Smith's vested contractual rights. Mr. Smith's bargained-for status as having not committed a "sexually violent offense" was secured when the court accepted the plea of guilt, no matter what sentence it imposed. This right was not dependent on any act or conditions subsequent to make it *more secure.* Summary judgment should be given to Mr. Smith on this claim.

III. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Court II (Unconstitutional Taking) and granting summary judgment to the Defendant on that Count, because depriving Mr. Smith of his common law contractual rights under his plea agreement without just compensation constituted an unconstitutional taking in violation of Art I (Declaration of Rights) § 11 of the Virginia Constitution.

The Virginia Constitution, Article I, § 11, provides in relevant part, "[T]he General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just

compensation." This section is self-executing. Jenkins v. County of Shenandoah, 246 Va. 467, 436 S.E.2d 607 (1993). This provision makes no distinctions in the types of private property. Contractual rights are private property and may not be taken by the Commonwealth without just compensation. Here, the Commonwealth deprived Mr. Smith of his contractual rights, as stated above, allegedly for the benefit of the public. They did so without providing Mr. Smith compensation, thereby violating the Virginia Constitution, Article I, § 11. Summary judgment should be granted to Mr. Smith on this claim.

IV. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Court III (Due Process Violation) and granting summary judgment to the Defendant on that Count, because depriving Mr. Smith of his common law contractual rights under his plea agreement without a hearing and depriving Mr. Smith of the benefit of his bargain onstituted a deprivation of property without due process in violation of Art I (Declaration of Rights) § 11 of the Virginia Constitution.

Virginia Constitution, Article I, (Declaration of Rights) § 11, provides in relevant part, "[N]o person shall be deprived of his life, liberty, or property without due process of law . . . ." This Court has stated, "All the authorities agree that due process of law requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be passed affecting his right to liberty or property." Ward Lumber Co. v. Henderson-White Mfg. Co., 107

Va. 626, 631; 59 S.E. 476, 479 (1907) (quoting Violett v. City of Alexandria, 92 Va. 561, 567; 23 S.E. 909, 911).

The Circuit Court erred in equating this case, where the Commonwealth deprived Mr. Smith of contractual (i.e., property) rights without a hearing or consideration with McCabe v. Commonwealth, 274 Va. 558; 274 Va. 558 (2007), in which the only interest at issue was a liberty issue. [R at 371-72]. The plaintiff in McCabe had no property right. He had no contract with the Commonwealth. Mr. Smith's due process claim here is based in large part on the deprivation of his contractual, property rights. [Tr. 4/13/12 at 21, 29-30]. The Circuit Court simply failed to analyze this aspect of the Commonwealth's due process violation.

This Court has contemplated an analogous situation in Judicial Inquiry and Review Comm'n of Va. v. Elliott, 272 Va. 97, 630 S.E.2d 485 (2006). [Tr. 4/13/12 at 30]. Elliott involved a disciplinary action against a judge after the judge allegedly failed to comply with the terms of an alleged agreement related to alleged ethics violations. Through the alleged agreement, the Judicial Inquire and Review Commission agreed not to file a complaint with this Court concerning the alleged ethics violations provided the judge comply with various conditions. The judge asserted that the Commission repeatedly attempted to alter its agreement with him

unilaterally, imposing different terms that those provided in the agreement. This Court likened the agreement to a "form of immunity agreement offered by the Commonwealth to a citizen who is a potential defendant in a criminal investigation." *Id.* at 119; 630 S.E.2d at 496. It noted, "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.'" *Id.* (quoting Lampkins v. Commonwealth, 44 Va. App. 709, 722, 607 S.E.2d 722, 729 (2005)). This Court, applying basic rules of contract law and interpretation, found that there was an enforceable agreement that was not breached by the judge.

Here, Mr. Smith had an agreement with the Commonwealth incorporating the registration requirements and limitations existing at the time. The Commonwealth unilaterally altered the registration requirements and imposed them against Mr. Smith, in derogation of his contractual rights. This deprived Mr. Smith of the benefit of his bargain, without even an opportunity for a hearing. This was in violation of Article I, § 11 of the Virginia Constitution. This Court should grant summary judgment to Mr. Smith on this claim and reverse the Circuit Court's grant of summary judgment to the Commonwealth.

V. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count III (Due Process Violation) and granting summary judgment to the Defendant on that Count, because the new registration requirements impermissibly infringe upon Mr. Smith's Constitutionally protected liberty interest in raising his children.

One particular aspect of the due process violation raised by the Plaintiff was the impairment of Mr. Smith's substantive due right to raise his children free from valid state interference. [R. at 45-47, 100-03, 368]. The liberty interest at issue in this case—the interest of a parent in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interest.[8]

Mr. Smith's ability to care for and direct the education of his daughters has been seriously hampered by the Commonwealth's unilateral "renegotiation" of the terms of his plea agreement. Mr. Smith has sole legal and physical custody of his daughters, yet he is excluded from or must

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[8] *See* Wisconsin v. Yoder, et al., 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child").

seek special permission to attend events at his daughters' school. Mr. Smith cannot attend away games or functions held at other schools aside from his daughter's schools because he needs permission from each individual school. He has had to deny permission to his daughters to participate in some school activities because of his inability to properly transport and supervise them. *See* Va. Code § 18.2-370.5.

This case is distinguishable from the non-binding cases cited by the Circuit Court [R. 369-70], because the Commonwealth in this case *implicitly agreed by contract* that Mr. Smith would not be classified as having committed a "sexually violent offense," which is the precondition for these restrictions affecting Mr. Smith's care of his family. Va. Code § 18.2-370.5. As such, the contractual violation in these circumstances constitutes an "undue, adverse interference by the State." Bellotti v. Baird, 443 U.S. 622, 639 n.18 (1979).

Additionally, the authority of the non-binding cases cited by the Commonwealth is severely undermined by this Court's recent decision in Wyatt v. McDermott, 283 Va. 685; 725 S.E.2d 555 (2012), announced a week after oral arguments in this case. In Wyatt, this Court confirmed that Virginia common law recognizes the tort of tortious interference with

parental rights based in substantial part on the liberty interest protected in the due process clause. The elements of that tort are as follows:

> (1) the complaining parent has a right to establish or maintain a parental or custodial relationship with his/her minor child; (2) a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the complaining parent's parental or custodial relationship with his/her child by removing or detaining the child from returning to the complaining parent, without that parent's consent, or by otherwise preventing the complaining parent from exercising his/her parental or custodial rights; (3) the outside party's intentional interference caused harm to the complaining parent's parental or custodial relationship with his/her child; and (4) damages resulted from such interference.

Id., at 699, 725 S.E.2d at 563.

Mr. Smith's right to maintain a custodial relationship with his minor children is undisputed. The Commonwealth, by retroactively classifying his offence as a "sexually violent offense" in violation of his contract and the Commonwealth's law and Constitution, have "prevent[ed] the complaining parent from exercising his[] parental or custodial rights." This has harmed Mr. Smith in the exercise of his parental rights and caused him damages.

Given the foregoing, this Court should grant summary judgment to Mr. Smith on this claim and reverse the Circuit Court's grant of summary judgment to the Commonwealth.

VI. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count IV (Permanent Injunction) and Count V (Petition for Expungement Hearing) and granting

summary judgment to the Defendant on those Counts on the basis that there was no contractual or constitutional violation, because those violations have been established.

The Circuit Court dismissed Mr. Smith's request for a permanent injunction and his petition for an expungement hearing on the grounds that no contractual or Constitutional violation has been established. [R. at 387]. As argued herein, those violations have been clearly established. The issuance of an injunction is appropriate in this case, especially so as to prevent further violations of Mr. Smith's contractual rights through the recent or any future the amendment of law. Moreover, the petition for an expungement hearing is appropriate in light of Mr. Smith's contractual right to have such a hearing. The procedure for that hearing should be the same procedure used for Va. Code § 9.1-910 hearings. *See* Va. Code § 1-239. This Court should reverse the Circuit Court's decision on these counts and grant Mr. Smith's motion for summary judgment.

VII. The Court erred in granting summary judgment to the Commonwealth, impermissibly making inferences and construing the facts in favor of the Commonwealth, the moving party, even though it was in default.

The Court further errs in granting summary judgment to the Commonwealth, as it draws impermissible inferences against Mr. Smith to support this summary judgment. The Court effectively treated these cross-motions for summary judgment as a trial on the merits without testimony,

assuming that no further evidence could be produced through live testimony. It furthermore weighed the evidence submitted as it saw fit, rather than according weighing it in the light most favorable to the non-moving party with respect to each motion before the Court. But as this Court has said, "The filing of cross-motions for summary judgment does not, in itself, resolve the question whether material facts remain genuinely in dispute." Ashland v. Ashland Inv. Co., 235 Va. 150, 154; 366 S.E.2d 100, 103 (1988); *see also* Cen. Nat. Ins. v. Va. Farm Bur. Ins., 222 Va. 353, 356, 282 S.E.2d 4, 6 (1981).

The Circuit Court begins its discussion by stating that the parties "presented no material facts in dispute and the Court found there to be no material facts in dispute." [R. at 368]. This is not accurate. *Each* party believed the facts were sufficient to support *its* motion, but the Court improperly inferred that no material facts are in dispute. The Court drew inferences in the Commonwealth's favor to grant the Commonwealth's motion for summary judgment. Thus one finds in the opinion of the Court the following objectionable conclusions (with emphasis added):

a. "[T]he *evidence reflected* that *the registry was only tangentially mentioned during the plea process* and *amounted to a simple verbal acknowledgement that the Petitioner would be subject to registration*.

Nothing else was ever discussed with regard to the specific requirements based on the Petitioner's particular charges or duration of registration." [R. at 377].

b. "In the case at bar, the Petitioner has stated that based on the plea agreement with the Commonwealth he had a right to petition for expungement and an expectancy in the continued application of the law in effect at the time of his plea agreement. However, *the Court finds that the idea of expungement was not actually contemplated in the plea agreement*. [R. at 385].

c. *There are no indications* like there were in Molina or Arata *that the expungement was clearly considered and contemplated as an integral part of or inducement to enter into the agreement.*" [R. at 385].

d. "Like Acuna, the *Petitioner did not have a specific inducement related to the registry that was the primary benefit of the plea*. In this case, the Petitioner's benefit was in not being charged with rape and receiving no active jail time in exchange for the plea to carnal knowledge." [R. at 385-86].

e. "And lastly, akin to Doe v. Nebraska, *the only support for the Petitioner's position is his own claims that when he entered into the plea agreement he did so knowing that by operation of law they would be*

subject to the sex offender registry for a period of ten years and eligible for expungement thereafter." [R. at 386].

Regarding the foregoing conclusions of facts, the Court assumes that no further evidence could be offered concerning the negotiations, the plea process, and Mr. Smith's motivations in accepting the plea agreement—this despite the absence of any testimony from the individuals involved in those negotiations. The evidence on these issues, though, would be testimony or other materials the Court could not properly consider in a motion for summary judgment.[9] This evidence, however, could affect the findings upon which the Circuit Court based its judgment. *See* Owens v. Redd, 215 Va. 13, 205 S.E.2d 669 (1974); Kasco Mills, Inc. v. Ferebee, 197 Va. 589, 90 S.E.2d 866 (1956).

Moreover, while the Virginia Department of State Police filed an answer, the Commonwealth did not, placing it in default. Because the Commonwealth is in default, all the factual allegations stated in the complaint are deemed admitted. These include allegations that the parties

[9] In particular, Mr. Smith intends to offer the testimony of his attorney (and his own testimony) to show inter alia that the specific reason the Commonwealth reduced the charge from rape to carnal knowledge of a minor and the specific reason Mr. Smith accepted the plea agreement with the reduced charge was to avoid the higher registration requirements and to be on the registry only the statutory ten years, and that these concessions were a material inducement in agreeing to plea guilty.

to the contract were aware of the specific registration requirements existing at that time, that those registration requirements were implicit provisions of the contract, that Plaintiff never agreed to a modification of this contract but the Commonwealth did modify it unilaterally by amending the law, and that the breach has caused Plaintiff irreparable harm and any damages. [R. 1-29]. The Court's findings to the contrary violate Virginia Supreme Court Rule 3:19. *See* Funkhouser v. Million, 209 Va. 89, 161 S.E.2d 725 (1968).

Given the foregoing, summary judgment in the Commonwealth's favor was inappropriate and should be reversed.

VIII. The Court erred in granting summary judgment to the Commonwealth, as the Commonwealth did not move the Court for summary judgment.

The Court granted summary judgment to the Commonwealth, but the record shows that the Commonwealth never made an appearance in this case and never moved for summary judgment. From the beginning, the Virginia Department of the State Police (at best an agent of the Commonwealth) appeared before the Court insisting that it was the proper party, not the Commonwealth. [Tr. 9/13/10 at 28; R. at 32, 66,71, 77, 89, 142, 144, 153, 240]. Yet this suit was against the Commonwealth for breach of contract and constitutional violations. As such, the award of summary judgment to the Commonwealth was erroneous and must be

reversed. *See* Va. Sup. Ct. R. 3:20 (requiring a party to move for judgment in its favor).

Conclusion

For the foregoing reasons, Mr. Smith asks this court to reverse the Circuit Court's grant of summary judgment on all of his claims and either grant summary judgment to Mr. Smith on his claims or remand the case to the Circuit Court for further proceedings.

Respectfully Submitted,

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CERTIFICATES

I hereby certify, that pursuant to Rule 5:17(i):

We represent appellant in this matter, Jeremy Wade Smith. Our contact information is as follows:

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Mr. Charles A. Quagliato appeared as counsel for the Virginia Department of State Police in this matter, and potentially as counsel for the Commonwealth. No other counsel appeared for the Commonwealth. Mr. Quagliato's contact information is as follows:

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We certify that seven (7) printed copies of the Petition for Appeal were hand-filed with the Clerk of this Court. A true copy of the foregoing Petition for Appeal was sent via fax and U.S. Mail, first class, postage

prepaid, to Charles A. Quagliato at the address and fax number previously stated, as counsel for the Virginia Department of State Police and as agent of the Attorney General of the Commonwealth (or counsel for the Commonwealth) on September 18, 2012.

I further certify that the foregoing petition does not exceed 35 pages, as calculated pursuant to Virginia Supreme Court Rule 5:17(f), and that I have otherwise complied with Rule 5:17 of the Rules of the Virginia Supreme court and its various subparts.

Appellant desires to state orally to a panel of this Court the reasons the Petition for Appeal should be granted. Appellant desires to make such oral argument in person, by and through counsel.

JEREMY WADE SMITH

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