NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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February 22, 2019

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Re: ***Commonwealth of Virginia v. Kenneth Gregg a.k.a. Kamryn Gregg***[1]
Case No. FE–2017–288

Dear Counsel:

This case concerns a defendant's statutory right to a speedy trial under Virginia Code § 19.2-243. As a general rule, the running of the speedy trial "clock" tolls after a defendant fails to appear in court for an agreed-upon hearing date. The issue before the Court is whether the clock recommences when the defendant is subsequently taken into Virginia custody and continuously held for an unrelated reason. This Court holds a tolled speedy trial clock resumes running once a defendant is subsequently taken into custody and incarcerated in Virginia, regardless the reason for the detention.

So long as Virginia incarcerates and maintains custody of a defendant, no principled distinction differentiates detentions resulting from an arrest on a bench warrant for failure to

[1] Gregg identifies her gender as female and refers to herself using feminine pronouns, a usage the Court adopts here.

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appear from detentions on unrelated charges or convictions. In both instances, "Virginia" has custody and control over the defendant and can bring her to trial. As a single sovereign, one arm of the Commonwealth may not plead ignorance as to what another knows. Circumstances like those presented in this case do not excuse the Office of the Commonwealth's Attorney from appreciating that the Virginia Department of Corrections, or a particular locality's sheriff's office, holds a defendant who is readily available for trial.

Here, because Defendant Kamryn Gregg ("Gregg") was held in a Virginia correctional institution well after the five or nine months during which the Commonwealth was obligated to try her as prescribed by Virginia Code § 19.2-243, the Court grants her Motion to Dismiss and dismisses the indictments against her. The Court announced and explained this ruling in open court on February 8, 2018. It now amplifies and expounds on the reasons delivered from the bench because, absent changes in current correctional operations and procedure, this precise issue is likely to replicate.

The Court's adjudication of Gregg's Motion requires reconciliation of a split of authority existing in this Commonwealth. *Knott v. Commonwealth*, 215 Va. 531 (1975) and its progeny suggest that the Commonwealth violated Gregg's right to a speedy trial because she was continuously held in Virginia's correctional facilities following indictment for more than five months. Incongruously, *McCray v. Commonwealth*, 44 Va. App. 334 (2004) suggests Gregg's failure to appear in court tolled the speedy trial clock until her arrest on the bench warrant issued for that failure to appear. Neither precedent squarely addresses the facts presented here: a defendant failed to appear in court, a bench warrant for her arrest issued, the defendant was later taken into custody in Virginia for unrelated reasons and continuously held but was not timely served with the bench warrant or brought to trial.

I. BACKGROUND

As of November 4, 2015, Gregg was in the custody of the Virginia Department of Corrections. Prior to her commitment, the Arlington Circuit Court convicted her of felonies unrelated to her indictments before this Court. In due course, the Spotsylvania and Prince William Circuit Courts convicted her of additional, unrelated felonies. From November 4, 2015 through January 20, 2017, Gregg was held in various local jails.[2] On January 20, 2017, the Department of Corrections transferred her to the Nottoway Correctional Center, and on February 10, 2017 to the Greensville Correctional Center; both state prisons.

On December 1, 2016, an officer of the Fairfax County Police Department executed two felony warrants for Gregg's arrest. Thereafter, on March 20, 2017, a grand jury indicted her on two felony counts: (1) feloniously taking a credit card without the cardholder's consent in violation of Virginia Code § 18.2-192 and (2) felony credit card fraud in violation of Virginia

[2] In Virginia, colloquial "jails" are officially called "local correctional facilities." *See* VA. CODE §§ 53.1-68 through -133.10. Similarly, colloquial "prisons" are officially called "state correctional facilit[ies]." *See* VA. CODE §§ 53.1-1, -18 through -67.8.

Code § 18.2-195. Prior to her indictment, on March 8, 2017, Gregg waived her right to a preliminary hearing and—by joint consent of the parties—scheduled a hearing to enter a guilty plea for April 28, 2017.

On April 28, 2017, however, Gregg failed to appear as agreed. Consequently, this Court issued a bench warrant for her arrest. At the hearing, counsel for Gregg informed the Court Gregg was incarcerated in a facility in Pennsylvania. Indeed, stipulated records showed she transferred to an "out of state jail" on April 5, 2017 and returned to Greenville on June 9, 2017; such time period encompassing the April 28 court date.

Following her June 9, 2017 return, Gregg remained detained in Virginia prison until her release on January 16, 2019. Despite Gregg's return to the custody of the Virginia Department of Corrections and continuous detention through January 16, 2019, she was not served with this Court's bench warrant until December 18, 2018.[3]

With no trial or plea hearing scheduled, Gregg filed a motion to dismiss pursuant to Virginia Code § 19.2-243.[4] Gregg contends the Commonwealth had five months from March 20, 2017 to commence trial against her. Gregg urges this Court to adopt a "single sovereign" theory, under which all parts of the executive branch of government tacitly knew she was in Virginia custody. Imperfect or deficient communication between Virginia's correctional institutions and the Office of the Commonwealth's Attorney, Gregg reasons, does not relieve the Commonwealth of her duty to try Gregg within the statutory time period. On this basis, Gregg asks the Court to dismiss the indictments.

The Commonwealth counters the speedy trial clock has not run. In support, the Commonwealth contends the period between March 27, 2017 and April 26, 2017 should not be counted because both dates were options for the plea hearing and Gregg chose the latter of the two. Additionally, the Commonwealth asserts Gregg's counsel knew of her return to the Commonwealth in June 2017 but did not inform the Office of the Commonwealth's Attorney, and therefore the delay from April 26, 2017, the day she failed to appear in court, through December 18, 2018, when the Commonwealth executed the bench warrant on her, should be attributed to Gregg pursuant to Virginia Code § 19.2-243(4). Finally, the Commonwealth alleges Gregg's present motion is complex, and any delay caused by this Court's deliberation thereupon ought not be counted.

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[3] This bench warrant was later recalled and destroyed by order dated December 21, 2018. Upon Gregg's release from incarceration on January 16, 2019, a second bench warrant issued for Gregg's failure to appear was served on Gregg that same day.

[4] Gregg orally moved to dismiss the indictments on the same ground at her arraignment for the failure to appear on January 22, 2019, but another judge of this Court refused to hear the motion at that time.

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II. ANALYSIS

Virginia Code § 19.2-243 "is the statutory implementation of the constitutional guarantee of the right to a speedy trial." *Knott*, 215 Va. at 532 (citation omitted) (interpreting precursor statute to Virginia Code § 19.2-243). This "Speedy Trial Statute" provides, in pertinent part:

> Where a district court has found that there is probable cause to believe that an adult has committed a felony, the accused, if he is held continuously in custody thereafter, shall be forever discharged from prosecution for such offense if no trial is commenced in the circuit court within five months from the date such probable cause was found by the district court and if the accused is not held in custody but has been recognized for his appearance in the circuit court to answer for such offense, he shall be forever discharged from prosecution therefor if no trial is commenced in the circuit court within nine months from the date such probable cause was found.
>
> If the[] preliminary hearing in the district court . . . was waived by the accused, the commencement of the running of the five and nine months periods, respectively, . . . shall be from the date an indictment [] is found against the accused.
>
> The provisions of this section shall not apply to such period of time as the failure to try the accused was caused:
>
>> 4. By continuance granted on the motion of the accused or his counsel, or by concurrence of the accused or his counsel in such a motion by the attorney for the Commonwealth, . . . [or] by reason of [the accused's] . . . failing to appear according to his recognizance.

VA. CODE § 19.2-243.

Effectively, Virginia Code § 19.2-243 "is a legislative pardon for the offense if the trial is not had within the time prescribed by the statute." *Flanary v. Commonwealth*, 184 Va. 204, 208 (1945). It "affords protection against two very grave wrongs; unnecessary imprisonment and unnecessary delay in bringing the accused to trial, whether in custody or not." *Butts v. Commonwealth*, 145 Va. 800, 807 (1926).

The Speedy Trial Statute sets forth two time periods during which a defendant must be brought to trial: a nine-month period and a five-month period. The Commonwealth must bring a defendant "held continuously in custody" to trial within five months from the date of her indictment—that is, 152 days plus "a fraction" of a day." *See, e.g.*, *Herrington v. Commonwealth*, 291 Va. 181, 186 n.6 (2016) (citation omitted). The Commonwealth has nine months to bring a defendant to trial if she is at liberty between indictment and commencement of trial—that is, 273 days. *See Johnson v. Commonwealth*, 252 Va. 425, 428 (1996); *see also McCray*, 44 Va. App. at 342. Thus, where a defendant is released from incarceration prior to the

date of the trial, the nine-month period attaches. *See, e.g.*, *Robb v. Commonwealth*, 252 Va. 433, 436 (1996). No matter which period applies, if the Commonwealth fails to timely try a defendant, she is "forever discharged from prosecution" for the crime charged unless the Commonwealth is able "to explain the delay." *Godfrey v. Commonwealth*, 227 Va. 460, 463 (1984) (citations omitted).

Here, Gregg was released from custody on January 16, 2019. At that time, she was no longer "continuously in the custody" of this Commonwealth. Due to the break in custody, the nine-month period, and not the five-month period, applies to Gregg.

"[W]hen a defendant challenges the delay as unreasonable, the burden devolves upon the Commonwealth to show, first, what delay was attributable to the defendant and not to be counted against the Commonwealth and, second, what part of any delay attributable to the prosecution was justifiable." *Fowlkes v. Commonwealth*, 218 Va. 763, 766–67 (1978). Underlying the Commonwealth's burden is the principle that:

> it is the prosecution which has the responsibility of vindicating society's interests in swift and certain justice; it is the prosecution which has the duty of implementing the constitutional guarantee of a speedy trial; it is the prosecution which has ready access to the data concerning delay attributable to law enforcement personnel and court administrators; and when delay is attributable to the defendant, proof of that fact poses little problem for the prosecution.

Id. (footnote omitted). Furthermore, "[i]t is the duty of officers charged with the responsibility of enforcing the criminal laws of the Commonwealth to prepare for and obtain a trial of an accused within the [time period] specified." *Flanary*, 184 Va. at 210–11.

"If the delay in the commencement of trial is attributable to a defendant, there is no violation of his constitutional right to a speedy trial." *O'Dell v. Commonwealth*, 234 Va. 672, 681 (1988) (citations omitted). Here, the Commonwealth argues Gregg delayed the trial by her initial failure to appear in court and by her and her lawyer's subsequent silence concerning her return to Virginia custody. The Commonwealth's proffered justification is one "in *pari ratione*" with the "fourth exception" to the Speedy Trial Statute.[5]

The Supreme Court of Virginia concluded the fourth exception is "grounded on some positive act of the accused tending to delay the trial." *Flanary*, 184 Va. at 210. In other words, "[p]roof that the accused remained silent or that he did not demand a trial is not sufficient to

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[5] "[T]he exceptions stated in the statute are not meant to be all-inclusive, and other exceptions of a similar nature are implied." *Hudson v. Commonwealth*, 267 Va. 36, 41 (2004) (citations omitted). "The truth is the statute never meant by its enumeration of exceptions, or excuses for failure to try, to exclude others of a similar nature or in *pari ratione*. . . ." *Stephens v. Commonwealth*, 225 Va. 224, 230 (1983) (citation omitted). "Other circumstances are in *pari ratione* when they are of 'similar nature' or 'fairly implicable [*sic*] by the Courts from the reason and spirit of the law.'" *Commonwealth v. Hill*, 39 Va. Cir. 532, 1 (Fredericksburg 1996) (quoting *Commonwealth v. Adcock*, 49 Va. 661, 681 (1851)) (citation omitted).

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overcome the *prima facie* case made by the accused." *Id.* "[I]f the legislature had intended for the silence of the accused, or his failure to object to a continuance of his case, to be a waiver of his right, it could, and doubtless would, have used appropriate language to convey that intention." *Id.* at 211.

The Supreme Court of Virginia also recognized there may be circumstances where

> [n]othing in the record indicates that the Commonwealth intentionally delayed prosecution "to gain some tactical advantage over (defendant) or to harass (him)." Yet, while simple negligence on the part of the Commonwealth may be a "more neutral reason" than deliberate procrastination, administrative derelictions "nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."

Fowlkes, 218 Va. at 768 (citations omitted).

Gregg's circumstances stand in the confluence of two incongruous applications of Virginia Code § 19.2-243, both applications being binding precedent on this Court. The first holds that while a defendant is in the custody of the Commonwealth, the speedy trial clock continues to tick. *See Knott v. Commonwealth,* 215 Va. 531 (1975). Neither *Knott* nor its progeny, however, contemplate a scenario in which a defendant fails to appear and a bench warrant issues. The second holds that when a defendant fails to appear and a *capias* or bench warrant issues, the speedy trial clock pauses until the defendant is arrested for her failure to appear. *See McCray v. Commonwealth*, 44 Va. App. 334 (2004). Of course, *McCray* does not contemplate a situation where a bench warrant issues and a defendant is returned to the custody of the Virginia Department of Corrections for unrelated reasons but is not served with the bench warrant for her failure to appear upon her return.

Resolution of this case is not a matter of course. On one hand, Gregg's circumstances present a clear case of inexcusable administrative dereliction by the Commonwealth in bringing Gregg to trial. On the other, this almost two-year delay in the trial ultimately attributes back to Gregg's failure to appear on April 26, 2017. This Court must bring cohesion to the conflicting applications of Virginia Code § 19.2-243 in *Knott* and *McCray*.

A. The *Knott* Application: The Speedy Trial Clock Runs Upon Continuous Penal Custody.

In *Knott*, a defendant was arrested for escaping a correctional facility, indicted for felony escape, and continuously incarcerated up to his trial more than a year after the indictment. 215 Va. at 531. On appeal, the court held:

> Since, at all times subsequent to his indictment for the escape felony defendant was held by the Commonwealth in her penal institutions and was available for trial in the court in which the case was pending, we are of opinion that he was being 'held

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> . . . for trial' within the meaning of the speedy trial statute and was entitled to claim its protection.

Id. at 533. The court rationalized, "[a]t any time after the indictment was found, the trial court could have issued process and defendant could have been transferred from the jail to the penitentiary for ready access. What could have been done to grant a speedy trial should have been done." *Id.*

Since *Knott*, the Court of Appeals has tackled the issue. In *Ford v. Commonwealth*, 33 Va. App. 682, 689 (2000), the Court of Appeals of Virginia held "the phrase 'continuously in custody' contained in the first paragraph of [Virginia] Code § 19.2-243 can only refer to 'custody' when the court has control, authority and rights over the accused." Thus, the court ruled a defendant previously in the custody of federal authorities was only "continuously in custody" as contemplated by Virginia Code § 19.2-243 from the date he was transferred to Albemarle County authorities. *Id.* at 694–95; *see also Williamson v. Commonwealth*, 13 Va. App. 655, 656 (1992) (holding defendant was not in custody until the defendant was delivered from North Carolina authorities to the custody of the Virginia authorities).

Similarly, in *Funk v. Commonwealth*, 16 Va. App. 694, 696 (1993), the court reversed a defendant's conviction and dismissed the charges against him. It noted that, following the defendant's arrest in Hanover County Jail, he

> was continuously held in custody until his trial, more than five months later. At any time during that period, Fauquier County could have obtained the defendant and brought him to trial. The defendant's trial had to commence within five months of his arrest. It did not, and he must, therefore, be discharged from prosecution.

Id. at 695–96.

Justice D. Arthur Kelsey (then a circuit court judge) also adjudicated this issue, holding "the speedy trial statute does not include any express exception . . . for cases where one prosecutor cannot obtain an accused for trial because another prosecutor in a neighboring jurisdiction has the man before a different court that very day." *Commonwealth v. Norton*, 55 Va. Cir. 55, 2001 WL 243906, 4 (Isle of Wight 2001). The court opined, "[i]t makes no difference that a defendant is simultaneously in custody on charges other than the one subject to the speedy trial objection, so long as he is truly in custody on that charge as well." *Id.* at 5 n.7. A delay is not justified, the court rationalized, "when the excuse given is simply the Commonwealth's failure to make the necessary arrangements to ensure an incarcerated defendant's presence at trial." *Id.* at 6.

In *Norton*, a continuously-incarcerated defendant's ultimate trial date was set for a date more than five months after his preliminary hearing. *Id.* at 2. At a prior scheduled trial date, the incarcerated defendant failed to appear because he was in another locality's circuit court on that date causing the case to be continued to the ultimate trial date. *Id.* Before the ultimate trial date,

the defendant moved to dismiss the indictments for violation of Virginia Code § 19.2-243. *Id.* at 3. Ruling in favor of the defendant, the court explained:

> In this case, the fortuity of Norton being haled before two different courts of the Commonwealth on the same day hardly engenders sympathy for the prosecution . . . No effort was made to coordinate the Isle of Wight trial date with the Hampton trial date. It appears clear that no communication at all took place on this subject.
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> To make matters worse, . . . [o]perating under [a] false sense of security, the Commonwealth did not [timely] reschedule the trial . . . because of the Commonwealth's desire to try Norton on February 14, the same day as the trial of a related defendant.
>
> These circumstances compel the conclusion that the Commonwealth's failure to bring Norton's case to trial within the statutory period cannot be excused based on any express statutory exception or any *pari ratione* implied exception. The Commonwealth disagrees . . . [and her] argument[ ] might be compelling were it not for the fact that (i) the Commonwealth had Norton in custody under its complete dominion and control, and (ii) Norton was "overbooked" because . . . neither [Commonwealth's Attorney] coordinat[ed] his efforts with the other. Though Commonwealth's Attorneys are separate constitutional officers, they serve the same sovereign. It seems little more than blame-shifting for that sovereign to fault a defendant for the anomaly of being prosecuted in two different jurisdictions on the same day.

Id. at 6.

The *Knott* line of cases is not without its own anomaly. Where Virginia relinquishes custody over a defendant because she is incarcerated elsewhere, the speedy trial clock tolls during the time the defendant is outside Virginia's control. In *Jiron-Garcia v. Commonwealth*, 48 Va. App. 638, 643 (2006), federal authorities "borrowed" a defendant pursuant to an *ad prosequendum* writ but failed to return him per agreement with local Virginia authorities. Due to the nature of an *ad prosequendum* writ,[6] the Court of Appeals of Virginia ruled the defendant remained within the legal custody of the Commonwealth for purposes of Virginia Code § 19.2-

[6] As the Court of Appeals adeptly explained,

> A writ of habeas corpus *ad prosequendum* "is a court order requesting" an incarcerated accused's "appearance to answer charges in the summoning jurisdiction." Unlike detainers, "writs of habeas corpus *ad prosequendum* are immediately executed." "The [federal *ad prosequendum*] writ swiftly runs its course, and is no longer operative after the date upon which the [incarcerated accused] is summoned to appear." Principles of comity require that when the federal *ad prosequendum* writ is satisfied, the receiving federal jurisdiction return the incarcerated accused to the sending sovereign.

Jiron-Garcia, 48 Va. App. at 647–48 (citations omitted).

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243 at the time of the loan. *Id.* at 648–49. "However," the court caveated, the "provisions of [Virginia] Code § 19.2-243 implicitly reflect that the statutory clock may be tolled due to the non-availability of the accused . . . not attributable to either the accused or the Commonwealth." *Id.* at 649. Thus, the court further ruled the time period for a speedy trial tolled during the period the defendant was in the custody of the federal authorities. *Id.* at 650.

Synthesizing *Knott* and its progeny, the Commonwealth has a duty to timely try a defendant held continuously in the custody of one of her correctional institutions. *See Knott*, 214 Va. at 533; *Funk*, 16 Va. App. at 695–96. Administrative impediments to timely try a defendant do not toll the running of the clock where the Commonwealth has control, authority, and rights over the defendant. *See Ford*, 33 Va. App. at 689; *Norton*, 55 Va. Cir. at 6. Scant or no communication between different parts of the executive branch constitutes administrative dereliction and cannot justify a delay in bringing a defendant to trial. *See Fowlkes*, 218 Va. at 768; *Norton*, 55 Va. Cir. at 6. An exception to the *Knott* application arises where a defendant is being held outside of the Commonwealth's control. *See Jiron-Garcia*, 48 Va. App. at 649–50. Inexorably, the cardinal admonition of *Knott* controls: "[w]hat could have been done to grant a speedy trial should have been done." *Knott*, 214 Va. at 533.

B. The *McCray* Application: The Speedy Trial Clock Tolls Upon Defendant's Failure to Appear.

Construing the federal statutory counterpart to Virginia Code § 19.2-243, the Supreme Court of the United States remarked that a defendant's failure to appear constitutes "culpable conduct" that is "certainly relevant" in a court's inquiry as to whether the speedy trial period should be tolled. *United States v. Taylor*, 487 U.S. 326, 339–40 (1988). In consonance, when a defendant fails to appear, *McCray v. Commonwealth*, 44 Va. App. 334 (2004) applies Virginia Code § 19.2-243 to toll the speedy trial clock during the time in which a *capias* or bench warrant is issued and the execution of an arrest thereupon.

In *McCray*, a defendant was arrested and incarcerated on a grand jury indictment. *Id.* at 338. Following release on his own recognizance, the defendant failed to appear at his ensuing plea hearing. *Id.* Consequently, the court issued a *capias* to show cause for his failure to appear. *Id.* Unknown to the Commonwealth or defense counsel, the defendant was arrested on the *capias* 114 days after it issued and inconspicuously remained in custody until a probation officer informed the Commonwealth's attorney's office the defendant was being held in custody four months later. *Id.* at 338–39. Upon learning the defendant was in custody, counsel set trial for the following month. *Id.* at 339.

Prior to trial, the court denied defendant's motion to dismiss for failure to provide a speedy trial. *Id.* at 339–40. On appeal, the Court of Appeals of Virginia ruled that because the *capias* issued due to the defendant's failure to appear, "[t]he statute remained tolled [from the issuance of the *capias*] until at least the time of his arrest on the capias on February 19, 2003." *Id.*; *see also Robbs v. Commonwealth*, 252 Va. 433, 435, 437 (1996) (Carrico, C.J., concurring in part and dissenting in part) ("Upon Robbs's failure to appear on the trial date, a capias was issued for his arrest . . . [and] 26 days later, Robbs was arrested. . . . [T]he Commonwealth was

entitled to have excluded not only the twenty-six day period following Robbs' failure to appear."); *Jefferson v. Commonwealth*, 33 Va. App. 230, 236–37 (2000) (holding delay caused by defendant's counsel's failure to appear was chargeable to the defendant and tolled the speedy trial time period).

The *McCray* application holds that the speedy trial clock stops when a defendant fails to appear as agreed and tolls until she sets a trial date if the Commonwealth shows that the defendant caused the delay for an unjustified reason. 44 Va. App. at 342–43.

C. Virginia is a Single Sovereign and Is Responsible for Timely Trying Defendants in Its Custody.

Counsel for Gregg takes the position the Commonwealth's Attorney and the Virginia Department of Corrections comprise the same sovereign. It is the Commonwealth at large, Gregg's counsel advances, who is responsible for ensuring adherence to the speedy trial rights of a defendant. Thus, Gregg's counsel postulates whenever a defendant is in the custody of the Commonwealth, the speedy trial clock should continue to tick. This Court agrees.

A Commonwealth's attorney is an official elected by the voters of a locality.[7] VA. CODE § 15.2-1626. Thus, "[t]he attorney for the Commonwealth . . . [is] 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 information charging a felony." VA. CODE § 15.2-1627(B). Likewise, a sheriff is an official elected by the voters of a city or county. VA. CODE § 15.2-1609. A sheriff is tasked with "assist[ing] in the judicial process . . . and [is] charged with the custody, feeding and care of all prisoners confined in the county or city jail." VA. CODE § 15.2-1609.

Indeed, both a sheriff and a Commonwealth's attorney, though locally elected, are constitutional officers of the Commonwealth at large. *See* VA. CONST. art. 7, § 4.

> [C]onstitutional officers, including sheriffs [and Commonwealth's attorneys], are creations of the constitution itself. VA. CONST. art. VII, § 4. . . . Their offices and powers exist independent from the local government and they do not derive their existence or their power from it. Their compensation and duties are subject to legislative control, but only by state statute and not local ordinance.
>
> Consequently, "[w]hile constitutional officers may perform certain functions in conjunction with" local government, they are neither agents of nor subordinate to local government. The local government has no control over their work performance.

[7] In this Commonwealth, a "locality" is generally "construed to mean a county, city, or town as the context may require." VA. CODE § 15.2-102.

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Roop v. Whitt, 289 Va. 274, 280 (2015) (citations omitted).

This leaves the Virginia Department of Corrections. "There shall be in the executive department a Department of Corrections responsible to the Governor." VA. CODE § 53.1-8. Of course, the governor is a constitutional officer vested with the chief executive power of the Commonwealth. VA. CONST. art. 5, § 1. Very clearly, the department is a component of the sovereignty of this Commonwealth. The department is managed by a director, charged with the duty "[t]o supervise and manage the Department and its system of state correctional facilities." VA. CODE § 53.1-10.

Returning to the chief issue before the Court, as the Fourth Circuit observed, a defendant's right to a speedy trial is protected against "the conduct by the government in its single sovereign capacity, regardless of the number and character of the executive departments that participate in the prosecution." *United States v. MacDonald*, 632 F.2d 258, 261 (4th Cir. 1980), *rev'd on other grounds*, 456 U.S. 1 (1982).

As a single sovereign, it is the Commonwealth as a whole, not any single Commonwealth's Attorney's Office, that assumes the constitutional and statutory obligation to its citizenry to timely bring a defendant to trial. Thus, this Court holds that so long as a defendant is in the custody of the Virginia Department of Corrections following an arrest and grand jury indictment, the speedy trial clock under Virginia Code § 19.2-243 shall continue to tick. Under circumstances such as Gregg's, the *Knott* application takes precedent over the *McCray* application, as the underlying purpose of *McCray* is obviated when a defendant is in the custody of the Virginia Department of Corrections. Though this Court recognizes the continuing validity of *McCray*, that application is inapplicable "when the excuse given is simply the Commonwealth's failure to make the necessary arrangements to ensure an incarcerated defendant's presence at trial." *Norton*, 55 Va. Cir. at 6.

A *capias* issues following a felony indictment if the accused is "not in custody." VA. CODE § 19.2-232. Any judge of a circuit court may issue a bench warrant for a defendant's failure to appear. *See* VA. CODE § 19.2-71; *see also* VA. CODE § 19.2-128 (criminalizing willful failure to appear). Manifestly, the primary purpose of a *capias* or a bench warrant in these instances is to secure the presence of a defendant at the proceedings against her.

Both a *capias* and a bench warrant in this context are simply a means to an end—potent tools in a court's kit to bring a defendant under its authority and control. However, as *Knott* and its progeny hold, when a defendant is in the custody of the Virginia Department of Corrections, a court already has control, authority, and rights over that defendant for purposes of a Virginia Code § 19.2–243 speedy trial analysis. *Knott*, 215 Va. at 533; *Ford*, 33 Va. App. at 689. Applied here, the end was accomplished upon Gregg's June 9, 2017 return when her rights were subjugated to the Virginia Department of Corrections on June 9, 2017, thereby defeating purpose of the means (*i.e.*, the Court's bench warrant).

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This Court issued a bench warrant on April 26, 2017. No doubt, "[a] law-enforcement officer *may* execute within his jurisdiction a warrant, capias or summons issued anywhere in the Commonwealth. A jail officer . . . *may* execute upon a person being held in his jail a warrant." VA. CODE § 19.2-76 (emphasis added). "May" as used in this Code section is likely permissive. The General Assembly, however, "did not intend [for] bench warrants to be treated as empty paper symbols." *People v. Bolden*, 613 N.E.2d 145, 154 (N.Y. 1993). Accordingly, this Court concludes, such permissive statutory authority to arrest cannot override a defendant's right to a speedy trial as provided for in Virginia Code § 19.2-243. Put differently, the lack of an affirmative obligation for a law enforcement or jail officer to execute a warrant does not supersede a defendant's rights under Virginia Code § 19.2-243, "the statutory implementation of the constitutional guarantee of the right to a speedy trial." *Knott*, 215 Va. at 532 (citation omitted).

At the time Gregg filed her Motion to Dismiss, she had still not been brought to trial. "The [Commonwealth's] attorney['s office] offered no explanation whatever of the delay of [nearly two] year[s] in prosecuting [Gregg] . . . and [the delay] could not have been justified by the mere fact that [Gregg] was imprisoned already by the same sovereign now charging him with another offense." *United States v. Quillen*, 468 F. Supp. 480, 481 (E.D. Tenn. 1978).

The record shows counsel for Gregg requested a transportation order for the March 8, 2017 hearing but neglected to do the same for the April 26, 2017 hearing. However, defense counsel is under no affirmative obligation to seek a transportation order. "Upon request of, and receipt of all necessary information from, the attorney for the Commonwealth or counsel for the defendant, the court shall issue all necessary transportation orders for the transport of any defendant incarcerated in a state or local correctional facility to the court." VA. CODE § 19.2-240. While this Code section permits either the Commonwealth or the counsel for defendant to request a transportation order for an incarcerated defendant, it imposes no affirmative duty on the defendant's counsel to so request. In the absence of a legislatively-prescribed affirmative duty upon Gregg or her counsel to request a transportation order, the mere failure to request a transportation order cannot be ascribed to Gregg as a waiver of her right to a speedy trial under Virginia Code § 19.2-243.[8] Finding no justifiable excuse, the Court holds the issuance of the bench warrant for Gregg's failure to appear, in and of itself, did not toll the speedy trial period under Virginia Code § 19.2-243.

"[I]t is hardly an absurd result from the judiciary's perspective . . . to adopt a construction requiring the [Commonwealth] to make reasonable efforts to enforce the warrants issued by the [] Judges of this State." *Bolden*, 613 N.E.2d at 155. "When, as here, a defendant's location is known, the [Commonwealth] must exert [some sort of] due diligence in obtaining [a defendant's] presence for trial." *See State v. Coleman*, No. 05–05–00480–CR, 2006 WL 226046, 2 (Tex. Ct. App. Jan. 31, 2006). "[T]he circumstance that one is convicted and imprisoned by a given

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[8] Similarly, this Court's local procedure requires defense counsel to timely advise the court of a defendant's location. THE FAIRFAX BAR ASSOCIATION FAIRFAX CIRCUIT COURT PRACTICE MANUAL ¶ C.1.17 (2018). However, a local practice rule cannot supersede a statutory or constitutional requirement.

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[locality in this Commonwealth] does not alter the degree of diligence required of the prosecuting officials of [another locality] in giving him a speedy trial upon any subsequent criminal charge." *Ex parte Schectel*, 82 P.2d 762, 764 (Colo. 1938), *overruled on other grounds*, *Watson v. People*, 700 P.2d 544 (Colo. 1985).

The Commonwealth takes particular umbrage with the fact counsel for Gregg knew she returned to the custody of the Virginia Department of Corrections but opted not to inform the Commonwealth's Attorney's Office of her return. The Commonwealth argues Gregg's failure to appear at the April 26, 2017 hearing should be attributable to her. The Commonwealth's position effectively mandates Gregg or her lawyer to inform the prosecutor of her location in Virginia custody, thereby shifting the impetus to Gregg to bring herself to trial. Yet, the law on this point is clear: "A defendant does not waive his right to a speedy trial merely because he remains silent or does not demand that a trial date be set within the prescribed period." *Knott*, 215 Va. at 533. The Commonwealth suggests no compelling reason why this peremptory rule should not apply to Gregg's circumstances.

Although the Office of the Commonwealth's Attorney, a locality's sheriff's department, and the Virginia Department of Corrections all answer to a different constitutional officer, they all serve the same sovereign. What could have been done here should have been done. At any point after Gregg's return in June 2017, the bench warrant could have been executed and Gregg could have been brought to trial. Alas, nothing was done. Accordingly, this Court holds the failure of Gregg or her counsel to inform the Commonwealth of Gregg's return on June 9, 2017 did not constitute a waiver of Gregg's statutory right to a speedy trial.

D. Gregg's Speedy Trial Clock Expired on March 8, 2018.

A grand jury indicted Gregg on March 20, 2017. As aforementioned, she has not been continuously in custody during the period from the date of the indictment to yet (as no trial date was ever set). Thus, the nine-month period under Virginia Code § 19.2-243 applies. Monday, December 18, 2017 was the 273rd day after March 20, 2017. Accordingly, Gregg's nine-month period, without tolling, expired on Monday, December 18, 2017.

"[W]hen a defendant requests, agrees to, or acquiesces in an order that effectively continues a case, the [] speedy trial period of [Virginia] Code § 19.2-243 is tolled during the time reasonably specified by the court to carry out the terms of its order." *Commonwealth v. Gregory*, 263 Va. 134, 144 (2002) (citation omitted). Here, both parties jointly consented to the April 26, 2017 plea hearing date. Since this was an agreement effectively continuing the case, Gregg's speedy trial clock tolled from March 20, 2017 to April 26, 2017, a period of 37 days. The 37th day after December 18, 2017 was Wednesday, January 24, 2018.

For any period where a defendant is being held in a jurisdiction other than the Commonwealth and is therefore outside of the authority of this state and the control of its courts, the speedy trial period under Virginia Code § 19.2-243 tolls. *See Jiron-Garcia*, 48 Va. App. at 649–50. The parties stipulated Gregg was in the custody of Pennsylvania authorities from April

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5, 2017 to June 9, 2017. The Court has already tolled the speedy trial clock from March 20, 2017 to April 26, 2017. So, for purposes of calculating the tolling period for Gregg's time in Pennsylvania custody, the clock tolled from April 27, 2017 to June 9, 2017, a period of 43 days. The 43rd day following January 24, 2018 was Thursday, March 8, 2018.

In this case, the Commonwealth successfully bore its burden of showing the two-year delay was attributable to Gregg, as she failed to appear at the April 26, 2017 hearing. *Fowlkes*, 218 Va. at 766–67. The reason for that delay was because Gregg was in the custody of Pennsylvania authorities. Despite the Commonwealth successfully attributing the delay to Gregg, the Commonwealth failed her burden to justify the delay in promptly bringing Gregg to trial upon her return to the custody of the Virginia Department of Corrections. Instead, administrative dereliction and simple negligence of the Commonwealth *as a state* carried the day and continued to do so for 609 days until February 8, 2019, when this Court granted Gregg's Motion to Dismiss.

Strictly applying the tolling provisions of Virginia Code § 19.2-243, Gregg's nine-month period to be brought to trial expired on March 8, 2018. Even if this Court were to grant some leniency to the Commonwealth and permit additional tolling after Gregg's return in order to schedule a mutually agreeable date, such leniency surely would not absolve the more than 609-day delay existing in this case.

III. CONCLUSION

For the reasons stated herein, the Court finds the Commonwealth violated Gregg's right to a speedy trial pursuant to Virginia Code § 19.2-243. In so finding, the Court holds that once the Virginia Department of Corrections took custody of Gregg, the speedy trial clock continued to tick while she was incarcerated, even during the period when there was an outstanding bench warrant for her failure to appear. The Commonwealth, as a single sovereign, knew exactly where Gregg was located at all times she was in custody—the Commonwealth was her *jailor*.

The Court also rules the failures of Gregg's counsel to request a transportation order for the April 26, 2017 hearing and to inform the Commonwealth's Attorney's Office of Gregg's return to the Virginia Department of Corrections on June 9, 2017 did not constitute waivers of Gregg's statutory right to a speedy trial. That is, while the Commonwealth attributed the delay to Gregg, the Commonwealth failed to justify the delay.

Computing the tolling periods for the consensual scheduling of a plea hearing date and for Gregg's time outside of the custody of the Virginia Department of Corrections, the Court rules Gregg's nine-month period for a speedy trial under Virginia Code § 19.2-243 expired on March 8, 2018. Since Gregg was not tried before that date, the Court grants her Motion to Dismiss and dismisses the indictments.

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An appropriate Order is attached.

Kind regards,

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,	)	
Plaintiff,	)	
v.	)	FE–2017–288
KENNETH GREGG a.k.a. KAMRYN GREGG,	)	
Defendant.	)	

ORDER

THIS MATTER comes before the Court on Defendant's Motion to Dismiss for Lapse of Time After Finding of Probable Cause Pursuant to Virginia Code § 19.2-243; and

UPON CONSIDERATION of Defendant's Motion and the Commonwealth's Response to Defendant's Motion to Dismiss; and

UPON HEARING oral argument by counsel on February 8, 2019; it is hereby

ADJUDGED Defendant was not provided a speedy trial within the time period provided for in Virginia Code § 19.2-243;

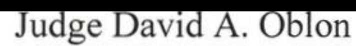
ORDERED and DECREED the Defendant's Motion is GRANTED;

FURTHER ORDERED and DECREED the indictments against Defendant are DISMISSED; and

FURTHER ORDERED and DECREED the Opinion Letter issued by this Court dated February 22, 2019 in this matter is hereby adopted by reference into this Order as though it were fully restated herein.

FEB 22 2019

Dated



Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.