NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 20, 2018

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Re: *Commonwealth of Virginia v. Milton Ernesto Varela Ayala*
Case No. FE-2018-541

Dear Counsel:

The issue before the Court is whether a criminal defendant may knowingly plead guilty to a crime that he factually did not commit, and whether the Court can convict him based on such a plea. This Court refers to such pleas as "legal fiction pleas," and holds that a defendant may enter such a plea as part of a plea agreement to avoid a potential conviction of a more serious crime or imposition of a worse sentence. As long as a defendant fully understands that he could not otherwise be convicted of the lesser crime and asserts that he is entering the plea nonetheless for his own perceived benefit, courts should accept such pleas.

A Grand Jury indicted Milton Ernesto Varela Ayala ("Mr. Ayala") with Possession of a Firearm While in Possession of Schedule I or II Drugs in violation of Virginia Code § 18.2-308.4(A) on August 15, 2017. On May 7, 2018, the Court amended the Indictment to a more serious version of this statute on the Commonwealth's unopposed motion, Virginia Code § 18.2-

OPINION LETTER

308.4(B). The amended charge has the added element of a firearm being "about [the defendant's] person." Unlike the original charge, which did not carry a mandatory minimum sentence, the amended charge contains a two-year mandatory minimum sentence for violations.[1] Mr. Ayala pled guilty to the amended charge, the Court accepted his guilty plea, and the case was continued for sentencing.

Virginia Code § 18.2-308.4 features a third form of the crime. Under Sec. C, it is illegal to, *inter alia*, possess with the intent to distribute more than a pound of marijuana while also possessing a firearm in a threatening manner. The punishment for this violation includes a five-year mandatory minimum sentence. The Commonwealth never sought to indict Mr. Ayala of that crime. However, the prosecutor proffered to the Court facts alleging that offense -- that Mr. Ayala possessed a firearm while in possession of marijuana -- as the factual basis for the plea. Thus, the most serious crime in the statute is most factually applicable. There was no allegation that Mr. Ayala possessed Schedule I or II drugs. He allegedly possessed marijuana, which is on neither drug schedule.[2]

Counsel for the parties transparently told the Court that they were engaging in a legal fiction to reach a plea agreement favorable to Mr. Ayala. The Commonwealth believed that she could win a conviction under Sec. C with a five-year mandatory minimum sentence based on the marijuana. However, she was willing to engage in a legal fiction and let Mr. Ayala plead to the lesser offense in Sec. B with the two-year mandatory minimum even though he possessed marijuana, and not a Schedule I or II drug. But for this agreement, the Commonwealth could not convict him of the lesser offense, and would be required to seek the higher one.

Prosecutors and defense attorneys commonly engage in similar legal fictions to reach mutually desired dispositions.[3] However, there is no controlling legal authority for or against this practice, nor is there any Virginia persuasive authority. This Court invited the parties to offer any authority, and they were unable to do so.

"[A] voluntary and intelligent plea of guilty by an accused is, in reality, a self-supplied conviction authorizing imposition of the punishment fixed by law. It is a waiver of all defenses other than those jurisdictional[.]" *Peyton v. King*, 210 Va. 194, 196 (1969). In addition to

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[1] In both of these sections the defendant must possess the firearm with knowledge and intent.

[2] Tetrahydrocannabinols are Schedule I drugs *except* as present in marijuana. Virginia Code § 54.1-3446(3).

[3] One might otherwise be surprised to learn of the problem Fairfax County has of people "sleeping on highways" in violation of Virginia Code § 46.2-830.1, or "driving animals" in violation of Virginia Code § 46.2-808(A)(5). Both of these traffic infractions (or their County Ordinance cousins) are free of Department of Motor Vehicles demerit points. This makes them attractive targets of plea agreements in Speeding cases brought under Virginia Code § 46.2-870, which do result in points upon conviction. While there appear to be few cots on I-66 or laden donkeys on the Capital Beltway, defendants plead guilty to infractions they did not commit to avoid worse consequences stemming from the act they really did do. Prosecutors agree to such agreements for reasons of proof problems, lenity, or lack of resources to contest every case.

jurisdiction, it does not waive the defense that no offense is charged. *Arey v. Peyton*, 209 Va. 370, 376 (1968).

Virginia does not ordinarily require the introduction of evidence to sustain a conviction based upon a plea of guilty. *Jones v. Commonwealth*, 29 Va. App. 503, 511 (1999).[4] Unlike in the United States federal courts[5] and some other states, such as West Virginia,[6] there is no requirement that a court receive evidence or a proffer of facts of what the Commonwealth would have proven had the case gone to trial. However, such practice is common among Virginia Circuit Courts. Arguably, it could be necessary in order to ensure that the guilty plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea. Va. Sup. Ct. R. 3A:8(b).

When aware of the facts, a Circuit Court may not entirely ignore the impossibility of a crime during a guilty plea proceeding. In *Justus v. Commonwealth*, the trial court accepted a defendant's guilty plea to Breaking and Entering.[7] 274 Va. 143, 148-49 (2007). Later, before sentencing, the defendant moved to withdraw her guilty plea pursuant to Virginia Code § 19.2-296. *Id.* at 149. The court denied her motion and proceeded to sentence her. *Id.* at 151. The defendant argued on appeal that she was found guilty of breaking into her own home, a legal impossibility. *Id.* at 155. While she didn't contest the issue during the guilty plea colloquy, the Commonwealth's evidence did establish that she broke into her own home. *Id.* The Supreme Court of Virginia reversed the Circuit Court and permitted her to withdraw her guilty plea. *Id.* at 155-56. It reasoned that her motion to withdraw her plea was made in good faith and premised upon a reasonable basis for substantive, and not merely dilatory or formal, defenses to the charges. *Id.*

A court should grant a timely motion to withdraw a guilty plea if there is good cause to believe that "'it was entered by mistake or under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; was made involuntarily for any reason; or even where it was entered inadvisedly, if any reasonable ground is offered for going to the jury." *Bottoms v. Commonwealth*, 281 Va. 23, 34 (2011) (internal quotations, citations, and emphasis omitted). So, a defendant who pleads guilty to a factually impossible crime can seemingly withdraw his guilty plea prior to sentencing. Logically, under the *Bottoms* standard, he could withdraw even if he entered his plea inadvisedly. This suggests that a Court should not accept a legal fiction plea under circumstances where it knows that the defendant could withdraw the plea. Mistakenly pleading to a crime that one factually did not commit is certainly in that category.

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[4] As the *Jones* opinion states, an *Alford* plea is an exception where such evidence is necessary.

[5] Fed. R. Crim. P. 11.

[6] *Myers v. Frazier*, 173 W. Va. 658, 666 (1984).

[7] She also pled guilty to Malicious Wounding, but that count is not relevant to this Court's analysis.

However, what if the defendant enters his plea advisedly, fully understanding that he is pleading guilty to a legal fiction for his own benefit, fully understanding the effect, and does so voluntarily without fear, fraud, or official misrepresentation? Can a defendant plead guilty to a crime that he factually could not have committed with his eyes wide open to take advantage of a favorable disposition? This Court concludes that a defendant may plead guilty to a crime he never committed under these circumstances.

This conclusion is unsurprising when one considers a similar, counterintuitive form of a guilty plea – the *Alford* Plea. This guilty plea permits one to plead guilty while simultaneously maintaining innocence. *North Carolina v. Alford*, 400 U.S. 25 (1970). Unlike with a general guilty plea, a court must find a factual basis to support guilt prior to accepting an *Alford* plea of guilty. *Jones v. Commonwealth*, 29 Va. App. 503 (1999). One can easily distinguish between an *Alford* plea of guilty where the accused maintains his innocence and a general guilty plea to a crime without any factual basis because of the defendant's self-supplied admission. *See Peyton v. King,* 209 Va. at 196 (a guilty plea is a self-supplied conviction). In an *Alford* plea of guilty the defendant is denying guilt; in a general plea of guilty he is admitting guilt. So it makes sense that in the former category the court must determine that there is factual support sufficient to overcome the defendant's assertion of innocence. In the latter category, the defendant is not asserting innocence, he is admitting guilt. The fact finding in that category is, therefore, less important.

Some other states that have considered this issue have determined that courts should permit one to enter a legal fiction plea.[8] *See Rivera v. State*, 180 Md. App. 693, 715-21 (2008).[9] They allow a defendant to plead guilty to a crime he factually could not have committed in order to obtain an ancillary benefit he desires, such as a conviction of a lesser charge in the context of a plea agreement.

> A defendant may, as part of a plea bargain, agree to plead guilty to a crime for which he has been indicted, but of which he is not guilty . . . [F]or example, we held that an individual could plead guilty to voluntary manslaughter under an indictment charging him with murder, even though the facts would not support such a lesser charge.

Rollison v. State, 346 S.C. 506, 510-11 (2001). The Supreme Court of South Carolina found the existence of a plea agreement to be paramount. *Id.* It viewed plea agreements as a contract governed by contract principles with the defendant having the freedom to negotiate an agreement such as this. *Id.* Virginia also views court-approved plea agreements under contract principles to a degree. *See Miller v. Commonwealth*, 29 Va. App. 47, 51 (1999).

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[8] These courts don't refer to them as "legal fiction pleas."

[9] *Rivera* cites and quotes examples from other states, such as Wisconsin, Washington, South Carolina, and Delaware. 180 Md. App. at 717-19.

Some states take this principle a step further and not only permit a defendant to plead guilty to a crime that he factually never committed, but permits him to plead guilty to a crime that factually doesn't exist. *Spencer v. State*, 24 Kan. App. 2d 125 (1997). This Court will refer to such pleas as "nonexistent crime pleas." Kansas permits nonexistent crime pleas on the theory that a person should be able to take advantage of a beneficial plea agreement that he knowingly enters so long as he is initially before the court on an indictment to a valid law. *Id.* at 129.[10] *See also People v. Foster*, 19 N.Y.2d 150, 153 (1967) (permitting a guilty plea to the nonexistent crime of "Attempted Manslaughter in the Second Degree" while recognizing that no jury could convict one of such a "crime" on any factual basis).

This Court finds the rationale behind *Spencer* and *Foster* unpersuasive. It rejects the concept of nonexistent crime pleas. Only the legislature can create a statutory crime or abrogate a common law crime. Prosecutors and defendants cannot create one by themselves. It is a matter of public policy to both create a statutory crime and to decline to create one. There may be good reasons why the legislature has not created a particular crime. It would frustrate its prerogatives to permit a prosecutor to create a new crime *de facto* on a case by case basis with the consent of defendants. For example, assume that the legislature never criminalized the possession of a specific drug. It would undermine the legislature if the prosecutor used the plea agreement process to effectively put the weight of government behind the apparent criminalization of the possession of that drug. Declaring that a person committed a specific crime inherently means that the government disapproves of the underlying conduct. To permit a defendant to voluntarily plead guilty to a crime that the legislature never enacted would send a message that the conduct in the nonexistent crime plea was wrong. This would improperly elevate the prosecutor's policy choices over that of the legislature.[11]

However, legal fiction pleas are different than nonexistent crime pleas. The above cases from South Carolina and Maryland, holding that a defendant may plead guilty to an otherwise valid crime that he factually did not commit in order to obtain a benefit to himself, are persuasive. Unlike with nonexistent crime pleas, the legislature's policy choices are unaffected by a legal fiction plea. In such pleas, the prosecutor and defendant are simply agreeing that the defendant is being convicted of a crime that the legislature already criminalized. The fact that the defendant is willingly doing so to obtain a benefit makes such a decision rational.

One might argue that legal fiction pleas trespass on legislative prerogatives by permitting a court to convict a defendant of a crime different than what the legislature intended for specific conduct. A court cannot depart from the legislature's sentencing range. *Hernandez v. Commonwealth*, 281 Va. 222, 225 (2011). To permit a defendant to plead guilty to a crime he didn't commit with a mandatory minimum of two-years instead of the crime he allegedly did

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[10] The Kansas Supreme Court, hearing this case on appeal, held that the defendant had pled guilty to a real crime after all, arguably making the Court of Appeal's core holding *dicta*. *Spencer v. State*, 264 Kan. 4 (1998). It is presented here just to show divergence of thought on this issue.

[11] By analogy, a court may not create a criminal law either. *Gottlieb v. Commonwealth*, 126 Va. 807, 811 (1920).

commit with a mandatory minimum of five-years could be seen as a backdoor way to depart from the legislature's penalty choices. However, that argument would be persuasive only in a world where a prosecutor could prove every crime he indicts, and messy issues such as witness problems or weight of the evidence are not at issue. Of course, that world does not exist. Prosecutors regularly permit one to plead guilty to a lesser offense of a crime -- or drop a case entirely -- for reasons that could include uncertainty of proof or lenity. Few would argue that a prosecutor should never let a shoplifter plead guilty to misdemeanor Petit Larceny if he factually stole more than $500 and, thus, factually committed felony Grand Larceny.[12] It is true that a lesser charge plea is different than a legal fiction plea. The lesser charge plea involves bad conduct a person factually did do and, in fact, may have exceeded. The legal fiction plea involves entirely fictitious actions conjured up to fit into a desired criminal statute. However, the parties in neither instance challenge the legislature's policy choices. In both instances the legislature creates the crimes and punishments.

A legal fiction plea, like an *Alford* plea or a lesser offense plea, is a tool parties in a criminal case may use as part of a compromise and should be permitted.[13] They do not abrogate legislative policy as a nonexistent crime plea would. In order for it to be proper, a defendant must enter a legal fiction plea knowingly pursuant to a plea agreement. A defendant must understand, embrace, and own his fiction. With such an understanding on the record, his legal fiction plea would be different than the misunderstanding plea of *Justus*, where the defendant didn't realize that she was pleading guilty to a crime that she didn't factually commit.

As with an *Alford* plea and a *nolo contendere* plea, this form of plea should be explored with a defendant during the plea colloquy. Before taking an *Alford* plea, many courts ask: "Are you pleading guilty because this is the Commonwealth's evidence, and you do not wish to take the risk that you will be found guilty beyond a reasonable doubt?" They then determine if there is substantial evidence against the defendant. Virginia Criminal Benchbook for Judges and Lawyers, § App.05(8) (2016-17). Before taking a *nolo contendere* plea, many courts ask: "Do you understand that when you plead nolo contendere, the effect of your plea is the same as a plea of guilty?" *Id.*[14]

Before taking a legal fiction plea, a court should consider asking as part of a full colloquy: "Do you realize you are pleading guilty to a crime that you factually did not commit

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[12] The difference between Grand Larceny and Petit Larceny is the value of the amount stolen. Larceny of more than $500 (or $5 from a person) makes the crime Grand Larceny. Virginia Code §18.2-95.

[13] One might inquire if courts should participate in engaging in such a legal fiction, which they do by accepting those types of plea agreements. When possible, it would be advisable for a prosecutor who is reducing a charge for the purposes of a plea agreement to do so to a charge that could be factually supported on a proffer. However, as the Virginia Code is finite, this is not possible in every case. Thus, it is of this Court's belief that if legal fiction pleas are permissible in instances where there are no factually supported lesser offenses, so too should they be permitted in instances where factually comparable statutes do exist.

[14] Most courts take the further step of taking evidence or obtaining a proffer of facts.

and that, absent your guilty plea, you could not otherwise be convicted of it? Are you doing this because you do not want to take the risk that you will be found guilty beyond a reasonable doubt of a worse crime?"

This Court holds that a defendant may plead guilty to a crime he didn't commit if the court is satisfied during a plea colloquy that he fully understands that he could not otherwise be convicted of that crime and asserts that he is doing so for his own perceived benefit. So, it will accept Mr. Ayala's plea if it is assured of these circumstances.

The Court will make further inquiries of Mr. Ayala before deciding whether to maintain or reject his guilty plea and this Court's finding of guilt. After such inquiries, if it is satisfied that he still wants to enter a legal fiction plea to a crime he factually did not commit, it will permit him to do so and will sentence him. An Order reflecting this opinion is attached.

Kind regards,

[redacted]

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

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Commonwealth of Virginia,	)	
	)	
	)	**FE-2018-541**
v.	)	
	)	
	)	
Milton Ernesto Varela Ayala,	)	
Defendant.	)	

ORDER

THIS MATTER CAME BEFORE THE COURT for sentencing; and

IT APPEARING THAT the Court accepted the defendant's guilty plea without finding that he was intentionally asking the Court to permit him to plead guilty to a crime that he factually did not commit and that, absent his guilty plea, he could not otherwise be convicted; and;

IT APPEARING THAT the Court accepted the defendant's guilty plea without finding that he was entering a legal fiction plea of guilty because he did not want to take the risk that he could be found guilty beyond a reasonable doubt of a worse crime; and

FOR REASONS CONSISTENT WITH the accompanying Letter Opinion issued this day; it is

ORDERED, ADJUDGED, and DECREED that this Court vacates its acceptance of the defendant's plea of guilty. He has leave to withdraw his plea of guilty. Should he choose to maintain his plea, the Court will make the required inquiries prior to accepting his plea. This matter is CONTINUED to August 3, 2018 for status, which may include entry of a plea.

Entered this 20th day of July 2018.

[redacted]

David A. Oblon
Judge, Fairfax County Circuit Court

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 VIRIGINIA.