In the court of appeals of Virginia

Abigail Marie Tulis	)	
Sui juris	)	
	)	Case No. 0164-21-3
V.	)	
	)	
Commonwealth of Virginia	)	

Amended assignments of error

With amended brief making a

Petition for protection of right to notice

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Assignments of error

Herein briefly the facts of the case: Appellant late in the night of Dec. 21, 2019, was traveling west through Marion County on U.S. Interstate 81 in a rental car. The posted speed is 70 mph. She testified she was traveling at 69, the trooper testified 50. p. 102, ¶ 30; p. 106 ¶¶ 73-76; p. 107 ¶ 88; p. 118 ¶ 178. She was glancing at her radio dial. p. 112, ¶¶ 144, 145; pp. 113, 114 ¶ 150. Her movements within the lane are disputed. p. 102, ¶ 30; p. 107, ¶ 88; pp. 108-109 ¶¶ 99-110. In the space given on the summons to "describe charge," he wrote "reckless driving general," citing "law section 46-2-852." p. 1; he made no investigation, p. 107, ¶¶ 87, 88.

ERRORS OF COURTS BELOW

1. The district and circuit courts failed to apply the law to the undisputed fact that the officer failed to give proper notice of the factual sufficiency of the essential elements "of the nature of the violation" of reckless driving required by the uniform summons statute at VA Code Ann. § 46.2-388. The accused is unlawfully denied her due process rights protected by the

constitutions of the United States of America, Fifth Amendment, and of Virginia, article I, Section 8, where "in criminal prosecutions a man hath a right to demand the cause and nature of his accusation." The courts failed to take judicial notice of the statute and rules governing the due process and failed to dismiss the complaint in an error of law, reviewable de novo.

Record

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— Testimony from state witness gives no factual sufficiency for four essential elements of reckless driving, pp. 102-109 ¶¶ 30-110

— Trooper testimony on obeying "describe charge" requirement on summons, pp. 109-111 ¶¶ 113-140

— Trooper incompetent witness on summons, p. 115, ¶¶ 157, 158

— Defendant "baffled" by charges, p. 116 ¶ 159

Record citations on essential elements *to be alleged* and *proven*:

— **Condition of proximity of others** is an essential element: brief p. 69, ¶ 23; p. 74, ¶ 34; 75; undisputed facts record pp. 103-105 ¶¶ 40-45, 47-60 (testimony of no travelers, no pedestrians near, no accident); p. 114, ¶ 151

— **Conditions** as essential include weather, no wet roads, winds, pp. 105 ¶¶ 62-64

— **Intent or scienter** is an essential element, Tulis affidavit denied as evidence, but cited in testimony, p. 9. Also, p. 74, ¶

33; known legal duty, p. 101, ¶ 26; sober, alert, p. 107, ¶ 83-86, p. 112, ¶ 143-145.

— **Actions in car,** not jerking car, not aggressive, not wobbling or swerving, but touched white lane, p. 108, 109, ¶¶ 95-110; (trooper self-contradictory statements on swerving); 69 mph cruise control, awareness, using radio, p. 112, ¶ 144

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2. The district court denied appellant an evidentiary hearing so she could learn the "cause and nature of [the] accusation" per Article 1, section 8, of the constitution, and such denial is an error of law reviewable de novo or reviewed as an abuse of discretion.

Record

— Denial of evidentiary hearing, defendant ordered to trial, p. 99 ¶ 7, p. 100, 101, ¶¶ 21, 22

— Ambush testimony by trooper on speed, movement of car in lane, p. 102, ¶ 30; p. 106 ¶¶ 74-76; p. 107 ¶ 88; pp. 106-109 ¶¶ 95-110

— Ambush testimony by judge during sentencing on 120 mph and phantasmagoric 140 mph speeders, p. 118, ¶¶ 178, 179

3. The courts failed to take judicial notice of the statute and rules requiring due process of the complaint. Failure to dismiss a fatally flawed complaint is an

error of law, reviewable de novo. The state's witness did not have probable cause or reasonable suspicion to arrest appellant. The ambush testimony at trial of the trooper of 50 mph and the judge's ambush testimony of appellant's endangering of fictitious 120 mph felons were impossible to defend against, and reviewable as plain error.

Record

— Trooper testimony regarding summons, pp 109-111. ¶¶ 111-140; trooper's words on form, p. 110, 111, ¶ 127-139; trooper affirms right to have charges in writing, p. 111, ¶ 139, 140; appellant closing arguments, p. 115, ¶¶ 157, 158

— Appellant due process claims in circuit, defendant's statement of undisputed facts, addendum No. 1, pp. 98-119;

— motion for dismissal with prejudice as a matter of law, etc., pp. 56-97;

— motion for dismissal addendum, pp. 130-131;

— conviction and sentencing order, p. 135;

—Due process claims to right of notice, brief, p. 75-86, ¶¶ 35-55;

— Appellant declines to plea, judge denies evidentiary hearing, p. 99, ¶ 7; p. 100, 101, ¶¶ 21, 22

4. The district court failed to require the prosecution to provide competent state witness testimony to factual sufficiency of admissible evidence to three of the four essential elements of the statutory crime. The failure of the courts to demand the prosecution meet the common law burden of proof of beyond a reasonable doubt, of every element of the crime, is a violation of the U.S. Constitution, Ninth Amendment, and the Virginia Constitution, Article I,

section 17, whereby rights not enumerated are nonetheless retained and protected.

Record

— Judge orders trial, denying appellant right to examine evidence, p. 101, ¶ 22.

— Trooper testimony, admitting movement of car, pp. 103-111 ¶¶ 36-140

— Brief and motion before circuit, pp. 56-97

5. The failure to require admissible competent witness testimony to any admissible factual sufficiency of alleged ultimate facts is an error of law and an indiscretion reviewable de novo and as abuse of discretion.

Record

— Trooper testimony, admitting movement of car, pp. 103-111 ¶¶ 36-140

— Judge finds defendant guilty, pp. 116-118 ¶¶ 165-179

— Judge finds guilt based on spectral, theoretical evidence of two speeding felons he introduces on his own authority during sentencing, apart from any state testimony, pp. 117, 118 ¶¶ 171-174, 178, 179

— Circuit conviction and sentencing order, p. 135

6. The court's reduction of penalty to "improper driving" is reviewable de novo under the Fourth, Fifth and Ninth Amendments of the U.S. Constitution and the Virginia Constitution, Article I, section 17 whereby rights not enumerated are nonetheless retained and protected. The lower courts aided and abetted the prosecution in failing to meet the standard for burden of

proof.

Record

— Summons, charging reckless driving, p. 1

— Trooper testimony on reckless driving charge, admitting movement of car but no essential elements, pp. 103-111 ¶¶ 36-140

— Judge enters new charge, pp. 116, 117 ¶ 165-167, 169

— Improper driving penalty, p. 126

— Objection made to circuit on "lesser included charge" due process violation, *"tried on charge not made, convicted on charge not tried,"* pp. 86-89 ¶ 56-64

7. The courts abused discretion by introducing the reduced charge of "improper driving" without providing sufficient notice, which defect is built into the form that prohibited the defendant from receiving proper notice.

Record

— Summons, charging reckless driving, p. 1

— Circuit brief, p. 81, ¶ 71

— Trooper testimony on reckless driving charge, admitting no essential elements except movement of car, pp. 103-111 ¶¶ 36-140

— Judge enters new charge, pp. 116, 117 ¶ 165-167, 169

— Improper driving penalty provision, p. 126

— Objection made to circuit on "lesser included charge" due process violation, **"tried on charge not made, convicted on charge not tried,"** pp. 86-89 ¶ 56-64

— Defendant demands finding of improper driving penalty statute to be ruled unconstitutional absent antecedent liability statute prohibiting same, p. 96, ¶ 100(e).

8. District and circuit uphold the defective and fatally flawed Virginia uniform summons. The summons creates unconstitutional, insufficient criminal cases because it effectively forbids the officer from having space in which to write the factual sufficiency containing all the essential elements of the charge to invoke the courts' subject matter jurisdiction. If the accused simply gets the name of the charge in the space provided, as in this case, he or she is denied notice of the admissible factual sufficiency to the contents of the ultimate fact to be proved of the alleged crime, and cannot make proper defense at trial. The lower courts erred as a matter of law in not finding the uniform summons unconstitutional as pleaded for in appellant's positive defense. The unlawfulness of the uniform summons and its use against, and injury to, the defendant is an error at law, reviewable de novo.

Record

— Summons, charging reckless driving, p. 1

— Defendant seeks details of essential elements by evidentiary hearing, p. 100, 101, ¶¶ 21, 22

— Defendant opening argument on burden of proof, p.102, ¶ 28

— In testimony, state witness gives no evidence of four essential elements of reckless, pp. 102-109 ¶¶ 30-110

— Trooper testimony on obeying "describe charge" requirement on summons, pp. 109-111 ¶¶ 113-140

— Trooper witness on summons, p. 115, ¶¶ 157, 158

— Defendant "baffled" by charges, p. 116 ¶ 159

In the court of appeals in Richmond

Abigail Marie Tulis	)	
Sui juris	)	
	)	Case No. 0164-21-3
V.	)	
	)	
Commonwealth of Virginia	)	

Amended petition for protection of right to notice

I. STATEMENT OF THE CASE

1. Abigail Tulis, an aggrieved woman and citizen of state of Tennessee, was convicted by district and circuit courts in Smyth County of the charge of "improper driving." A state trooper had charged her with reckless driving and district court heard the matter Feb. 27, 2020, in Marion at the county courthouse, convicting the appellant. She vigorously asserted from the beginning her due process rights to be charged under a proper charging instrument, and to examine the instrument and evidence behind it at an evidentiary hearing.

2. The courts below accept the Virginia uniform summons, the use of which injures appellant in her right under the constitution that requires every accuser to obtain standing to prosecute. The state and its witness did not

obtain legal standing by giving a full accounting of allegations of how appellant violated the reckless driving law. This requirement for full notice cannot be waived by administrative convenience or a need to save the officer's time and trouble alongside the highway in having to write an account of his charges. But that's what happens on Virginia's highways thousands of times a year — and accused is a victim. The issue put to this honorable court is as follows: It is improper in courts below to allow the state's witness and chief accuser, the trooper or officer, merely to *name the charge* in the charging instrument — the uniform summons — and not allege the essential elements. It violates a defendant's rights to due process to receive from her accuser nothing but the name of the charge, as dictated by the summons.

3. Accused's failures to state that she objects is not fatal to this petition because the commonwealth provided no charging instrument and no evidence at trial. The trooper witness testified he had no evidence to testify to as to the essential elements of "reckless." Appellant is not required to prove anything and has no vested right in the court rules. The court rules cannot be used to deny appellant's constitutional protections.

4. A trial transcript, p. 98 ff, is in place of audiofile-based transcript as the court refused her right to have her wireless phone with a recording app in the courtroom for purposes of creating a record for appeal, p. 3, denial of reporter's request to use recording equipment; pp. 6, 7. Prosecutor Jill Lawson and other attorneys in the room were seen using wireless phones during proceedings. Appellant's contemporaneous record was sent as notice

to the commonwealth's attorney, inviting corrections, p. 151, Exhibit C, pp. 152-163. She received no reply and presumes tacit agreement. pp. 98-120.

5. In circuit the undisputed statement of facts accompanies a "motion for dismissal with prejudice as a matter of law; in the alternative, to dismiss as a matter of equity and justice and memorandum in support," denied by the court without comment. p. 135.

6. The summons failed to invoke the authority of district or circuit court judges or give subject matter jurisdiction. It fails to state a claim against appellant and is facially insufficient for the charge of reckless driving.

   — Trooper testimony regarding summons, pp 109-111. ¶¶ 111-140; trooper's words on form, p. 110, 111, ¶ 127-139; trooper affirms right to have charges in writing, p. 111, ¶ 139, 140; appellant closing arguments, p. 115, ¶¶ 157, 158

   — Appellant due process claims in circuit, defendant's statement of undisputed facts, pp. 98-119

   — motion for dismissal with prejudice as a matter of law, etc., pp. 56-97;

   — motion addendum, pp. 130-131

   — conviction and sentencing order, p. 135

   —Due process claims to right of notice, brief, p. 75-86, ¶¶ 35-55

   — Denial of right to evidentiary hearing, p. 99, ¶ 7; p. 100, 101, ¶¶ 21, 22

7. The summons appears to encourage such brevity that few, if any, people charged by officers using the form are likely to be properly apprised of the essential elements of their alleged crimes. See Article 1, section 8, of the Virginia constitution and appellant's right to demand and obtain "the cause

and nature of his accusation."

8. Appellant argues the uniform summons creates unconstitutional and void criminal actions when the witness or officer restricts the charging narrative to a **mere label** or a **mere naming** of the statute as substitute for evidentiary facts for a lawful criminal charge, as in instant case.

9. The proceedings, based on a void instrument, make it impossible for the court to be just and to act beyond a reasonable doubt as to guilt, as appellant noted at the beginning of the trial, citing Thompson v. Commonwealth at affidavit of undisputed facts, p. 101, ¶ 25.

> To convict, the Commonwealth of Virginia must prove every essential element of the offense beyond a reasonable doubt, with evidence which excludes every reasonable hypothesis of innocence and consistent only with guilt.

Thompson v. Commonwealth 27 Va . App. 720 *; 501 S.E.2d 438 **; 1998 Va . App. LEXIS 385 ***

II. CHARGING INSTRUMENT MUST NARRATE ALL ESSENTIAL ELEMENTS OF THE CRIME

A. Every Fact to be Proved Must be Alleged, and Then Proved

10. Every evidentiary fact to be proved must be alleged. The court in this case has a duty to order reversal of the conviction for the prosecution's want of proper charging instrument and want of proof of the factual sufficiency of the essential elements.

> "Due process requires the prosecution 'to prove beyond a reasonable doubt **every fact necessary to constitute the crime** charged.' *Mullaney v. Wilbur*, 421 U.S. 684, 685, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). Mullaney held that any rule which has the ultimate effect of shifting the burden of persuasion to the accused upon a critical issue is constitutionally infirm. *** Under well-settled law, 'the burden is on the Commonwealth to prove every essential element of the offense beyond a reasonable doubt.' *Bishop v. Commonwealth*, 275 Va. 9, 12, **[*352]** 654 S.E.2d 906, 908 (2008) ***. This fundamental precept has been the **bedrock of Virginia's criminal jurisprudence since the inception of this Commonwealth**. Id. 'In a criminal case, the defendant is entitled to an acquittal, unless his guilt is established beyond a reasonable doubt.' *Savage v. Commonwealth*, 84 Va. 582, 585, 5 S.E. 563, 564 (1888)."

Williams v. Commonwealth, 57 Va. App. 341, 702 S.E.2d 260, 2010 [Emphasis added]

11. The charging instrument must be the testament against the accused regarding "facts" that would lead the reasonable mind to a conclusion of the violation of an offense. The court and the accused ought not to be confined to the subjective judgment of the accuser. It is an unconstitutional demand for the accused to have to provide facts of innocence to counter a state allegation with "zero" facts to support the allegation.

> Where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment is to charge the offence in the same generic terms as in the definition; but it must state the species, it must descend to particulars. The object of the indictment is, first, to **furnish the accused with such a description of the charge**

> **against him as can enable him to make his defence, and avail himself of his conviction or acquittal for protection** against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one is to be had. **For this, facts are to be stated, not conclusions of law alone.** A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

United States v. Cruikshank, 92 U.S. 542, 548, 1876 [Emphasis added]

Escape, for example, requires three elements be proven. "In order to prove the crime of escape under § 18.2-477, the Commonwealth must establish that (1) Clemons was confined in jail or was in custody after conviction of a crime; (2) he unlawfully fled or departed from lawful custody; and (3) force or violence was used to effectuate the departure." See 7A M.J., Escape § 1." *Barney v. Commonwealth*, 69 Va. App. 604, 822 S.E.2d 368, 2019. This case shows the factual material that constitutes sufficiency in such cases.

B. Virginia Statute Requires Bill to Allege all Elements

12. The law and court rulings in Virginia protect the right to receive sufficient notice in the charging instrument and to have each element argued and proven in court. Rule 3A:6, the indictment and the information, say the instrument must "[describe] the offense charged" and also "cite the statute or ordinance that defines the offense" and shall omit nothing or make errors that "[prejudice] the accused in preparing his defense."

13. Section 19.2-220, contents of indictment in general, says the narrative of the offense "shall be a plain, concise and definite written statement" of the act, "describing the offense charged," the alleged act.

> All essential elements of an offense must be precisely stated in the indictment; inference may not supply an essential element that is lacking. In charging a statutory offense, it is unnecessary to charge guilty knowledge unless scienter is part of the statutory definition of the offense.

Wall Distributors, Inc. v. Newport News, 228 Va. 358, 323 S.E.2d 75, 1984

C. 'Descend to the Particulars' to 'Furnish the Accused'

14. If merely naming the charge is insufficient, as occurred in this case, so, too, is simply alleging the charge in terminology of the law.

> It is an elementary principle of criminal pleading, that, where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the **same generic terms as in the definition**, but it must state the species — it **must descend to particulars**. The object of the indictment is — first, to furnish the accused with such a description of the charge against him as **will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution** for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. **A crime is made up of acts and intent; and these must be set forth** in the indictment, with reasonable particularity of time, place, and circumstances.

Pine v. Commonwealth, 121 Va. 812, 820, 93 S.E. 652, 654, 1917 [Emphasis added]

15. The rules of alleging the essential elements apply not just to straightforward laws, but to complex ones with exceptions.

> "It is elementary that **every ingredient of the crime must be charged in the bill**, a general reference to the provisions of the statute being insufficient. [citations omitted] And 'if the negation of an exception in the enacting clause of a statute is essential to accurately describe the offense, **then the accusations of the indictment must show that the accused is not within the exception.**'" [citations omitted]

Hale v. United States, 89 F.2d 578, 579, 1937 [Emphasis added]

D. From **Evidentiary Facts to Ultimate Facts**

16. The process of the accusation is to bring factual sufficiency to the essential elements in the criminal charge to the judge, to give him jurisdiction over the matter, and to give the defendant notice of how to defend herself. The charging instrument, to borrow from Restat 2d of Judgments, § 27, alleges evidentiary facts to bring the accused into the "ultimate fact" (i.e., the application of law to fact).

> When considering on appeal the sufficiency of the evidence presented below, appellate courts presume the judgment of the trial court to be correct and reverse only if the trial court's decision is plainly wrong or without evidence to support it. Thus, appellate courts do not substitute their judgment for that of the trier of fact. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, **to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.**

Kelly v. Commonwealth, 41 Va. App. 250, 584 S.E.2d 444, 2003 [Emphasis added]

17. In every criminal case, there must be enough fact in evidence for the jury to consider it. For a jury to consider it, it must be alleged.

> The rules of evidence give trial judges broad discretion in evaluating whether evidence is probative, requiring only a 'plus value' to make it admissible. Wigmore, supra, § 29, at 976 (Tillers rev. 1983). Once admitted, its value or weight is determined by the jury. As Professor Wigmore characterizes that interplay, the **evidentiary fact** offered does not need to have strong, full, superlative, and probative value and does not need to involve demonstration or to produce persuasion by its sole and intrinsic force but merely needs to be worth consideration by the jury. It is for the jury to give the fact the appropriate weight in effecting persuasion.

United States v. Queen, 132 F.3d 991, 998, 1997 [Emphasis added]

18. **Allegations are not entitled to assumption of truth:**

> **A pleading that offers labels and conclusions or a formulaic recitation** of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders **naked assertions devoid of further factual enhancement.** To survive a motion to dismiss, a complaint must **contain sufficient factual matter,** accepted as true, to state a claim to relief that is plausible on its face. **A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.** The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.
>
> ***** [A]llegations *** , because they are mere conclusions, are not entitled to the assumption of truth.** While legal

> conclusions can provide the complaint's framework, they must be supported by **factual allegations**. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 2009 [Emphasis added]

E. Lack of Essential Elements Fatal to Prosecution

19. Failure to state a claim is more than just injurious to the state's case.

> It is necessary for an indictment to set forth **all of the essential elements of a crime** and if any of the elements **are omitted it is fatally defective.** *** When every fact necessary for conviction appears that is enough, and it likewise is sufficient if the facts appear by necessary implication. When an indictment pursues the language of a statute, this is generally sufficient. If every fact necessary to constitute an offense is charged or necessarily implied by following the language of the statute, an indictment will undoubtedly be sufficient. *** **An indictment must charge an offense, and if it fails to give the information necessary to enable a defendant to concert a defense,** such information may be supplied by a bill of particulars.

Hagood v. Commonwealth, 157 Va. 918, 162 S.E. 10, 1932 [Emphasis added]

20. Failure to narrate the essential elements in a charging bill is ***fatal*** to the prosecution.

F. Essential Elements in Jury Instructions Must be Beyond a Reasonable Doubt Rather Then Within Speculation

21. The burden is on the Commonwealth of Virginia to prove **every essential element** of the offense beyond a reasonable doubt. In this case, "improper

driving" came from speculation by the judge that appellant's supposed 50 mph speed was a danger to fictitious 120 mph and 140 mph felons on the road.

> Unless those elements are defined by instructions available to the members of the jury during their deliberation, they cannot properly determine whether the commonwealth has carried its burden. "The duty to give such instructions is not discharged by simple reference to the indictment, or by reading the applicable statute to the jury. It is always the duty of the court at the proper time to **instruct the jury on all principles of law applicable to the pleadings and the evidence**, and a correct statement of the law applicable to the case, when the law is stated, is one of the essentials of a fair trial."

Dowdy v. Commonwealth, 220 Va. 114, 255 S.E.2d 506, 1979 [Emphasis added]

A proper charging instrument listing essential elements is followed by the jury ruling on the essential elements, as well, and the appellate court's asking the same question.

> The critical inquiry on review of the sufficiency of the evidence *** does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have **found the essential elements** of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 309, 99 S. Ct. 2781, 2783, 1979 [Emphasis added]

G. Complaint Must 'Raise a Right To Relief Above the Speculative Level'

22. The United States Supreme Court equates the use of labels and **"formulaic recitation" of essential elements to failing to state a claim to relief** and lacking facts to "nudge [the state's] claims across the line" from conceivable to plausible.

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ibid., a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires **more than labels and conclusions,** and a **formulaic recitation of a cause of action's elements will not do**. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. Applying these general standards to a § 1 claim, **stating a claim requires a complaint with enough factual matter to suggest an agreement.** Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.
>
> **** Here, the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged **their claims across the line from conceivable to plausible**, their complaint must be dismissed.

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) [Emphasis added]

III. RECKLESS DRIVING HAS 4 ESSENTIAL ELEMENTS TO BE ALLEGED

H. Reckless driving is not supported by the charging instrument or the facts at trial.

23. The reckless driving law that creates a duty and liability on drivers of motor vehicles, subject to commercial enforcement by the Virginia state police, reads as follows:

> Section 46.2-852. Reckless driving; general rule
>
> Irrespective of the maximum speeds permitted by law, any person who drives a vehicle on any highway recklessly or at a speed or in a manner so as to endanger the life, limb, or property of any person shall be guilty of reckless driving. Va. Code Ann. Section 46.2-852

24. The courts below deny the reckless driving essential elements to be alleged and proven beyond a reasonable doubt. p. 99 ¶ 11; p. 101 ¶ 25; p. 115 ¶ 156.

i. Self-propulsion or movement on the public right of way, or being a "person who drives"
ii. Intent or scienter — "recklessly"
iii. Proximity to others ("any person")
iv. Acts ("at a speed or in a manner") that endanger "the life, limb, or property" of people nearby

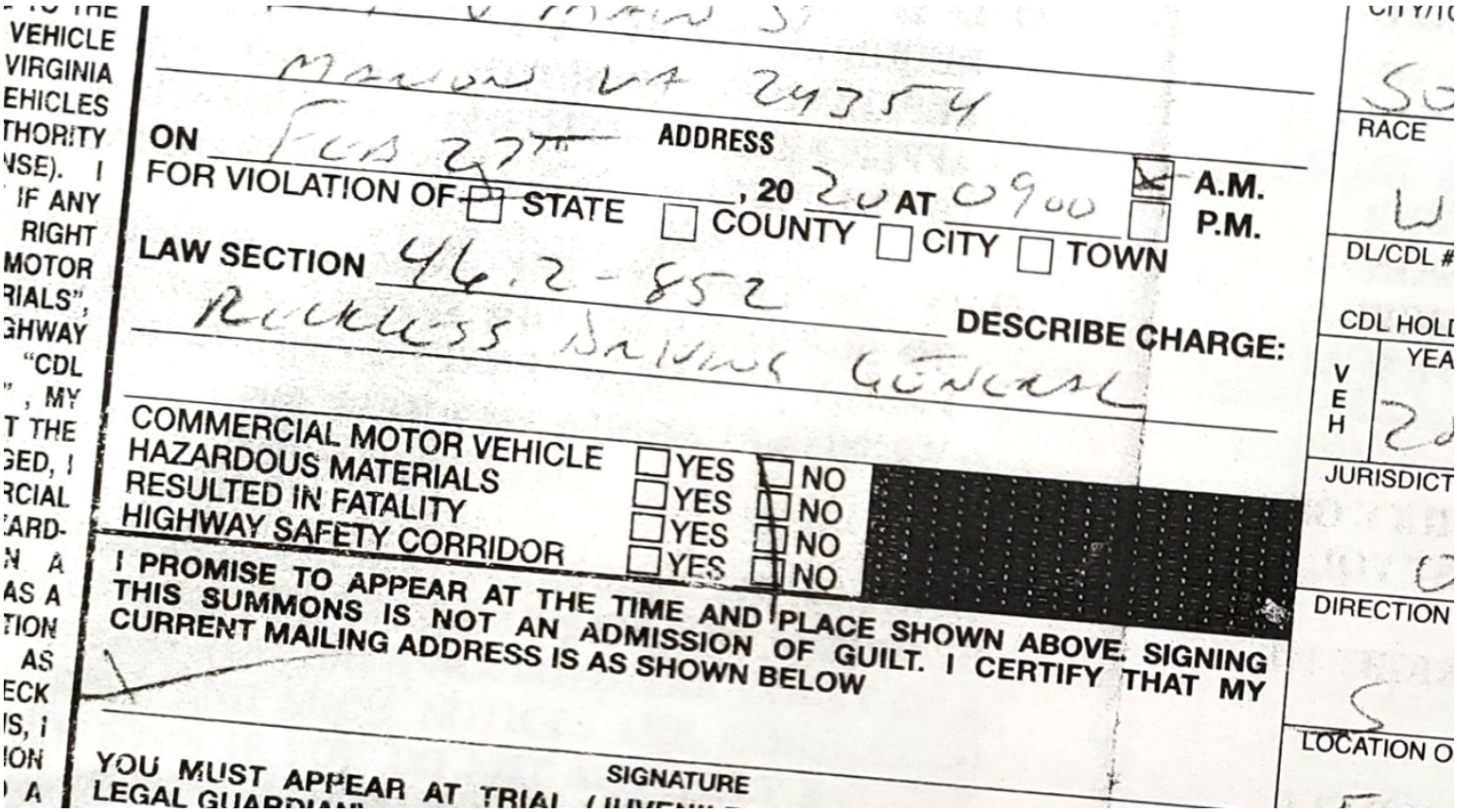
25. The trooper's duty is to know the law he is enforcing and know the essential elements of reckless driving and how to narrate the evidentiary facts of a particular traffic arrest in terms of the reckless driving law to bring the accused within the court's subject matter jurisdiction.

> [I]t is a fundamental principle that 'criminal statutes are to be "strictly construed against the Commonwealth and in favor of [a] citizen's liberty."'

King v. Commonwealth, 6 Va. App. 351, 354, 368 S.E.2d 704, 706 (1988) (citation omitted).

26. The charging instrument alleges none of the essential elements of the crime of reckless driving. Appellant, looking at the instrument, was unable to understand the charges against her, and demanded an evidentiary hearing that was denied without foundation, rationale or reason given. p. 100 ¶¶ 21, 22.

27. The trooper testified that there was nobody else on the highway or in proximity that might be in danger. p. 103 ¶¶ 40-43. He testified that there was evidence that appellant's driving abilities were *not impaired*. There was no testimony or evidence that met the necessary element of endangering life, limb or property. p. 104 ¶¶ 44, 45.



This image is a closeup of the key part of the charging instrument in Commonwealth of Virginia v. Abigail Marie Tulis at her criminal trial Feb. 27, 2020, in Smyth County district court.

28. **A review indicates numerous circumstances in the use of a car are NOT reckless driving. An accident is not even necessarily reckless driving:**

> The essence of the offense of reckless driving lies not in the act of operating a vehicle, but in the manner and circumstances of its operation. **The mere happening of an accident does not give rise to an inference of reckless driving**. However, physical factors associated with impact, including extent of damage to vehicles and property, may be considered as mute evidence of high speed." The court evaluates the totality of circumstances

> in a case. In Crest, "The drivers who survived the accident both stated that the weather was clear and they could see the traffic was very heavy ahead of them. When the traffic stopped, they, along with the deceased driver in the Mazda Miata, were able to bring their vehicles to a controlled stop without incident. Appellant crashed into the stopped vehicles and failed to control her truck. This factor, combined with the evidence of appellant's earlier aggressive driving behavior allowed the fact finder to infer that appellant was not operating her vehicle in a safe manner immediately prior to the accident.
>
> *Crest v. Commonwealth,* 40 Va. App. 165, 167, 578 S.E.2d 88, 89, 2003 [Emphasis added]

29. **An accident caused by a defect is not reckless driving**. A wreck caused by a defect one knows about is, however, ground for conviction of involuntary manslaughter**.**

> Kennedy knew, prior to the accident, that there was a problem with his steering because he had previously experienced difficulty keeping his vehicle under control. Based on his testimony and that of his wife, the trial court could have found that Kennedy **was on notice of a defect in his vehicle** that could interfere with his ability to maintain proper control, but he continued to operate his vehicle despite this defect.
>
> *Kennedy v. Commonwealth*, 1 Va. App. 469, 473, 339 S.E.2d 905, 908, 1986 [Emphasis added]

30. The testimony of the officer is that appellant was not impaired, and therefore did not consider herself impaired, p. 107 ¶¶ 83, 84. **Knowing you are**

impaired is an essential element to reckless driving:

> Appellant had testified that he had been up for 22 hours without sleep and chose to drive his vehicle. Appellant told the arresting officer that **appellant caught himself drifting four or five times, but that he would snap out of it.** The court found this evidence sufficient for the trier of fact to infer that appellant had the requisite knowledge that his behavior would probably injure another for the behavior to rise to criminal negligence. Criminal negligence was an essential element of involuntary manslaughter.

Conrad v. Commonwealth, 31 Va. App. 113, 521 S.E.2d 321, 1999 Va. App. LEXIS 652 (Court of Appeals of Virginia November 30, 1999, Decided). [Emphasis added]

31. Driving drunk is merely negligent, and not necessarily reckless.

> One who knowingly drives an automobile on a highway under the influence of intoxicants, in violation of statute, is negligent. **No case holds that one driving under the influence of an intoxicant must necessarily be driving recklessly.** Thus, while evidence of intoxication is a factor that might bear upon proof of dangerous or reckless driving in a given case, it does not, of itself, prove reckless driving. One may be both drunk and reckless. One may be reckless though not drunk; one may even be a total abstainer, and one may be **under the influence of intoxicants and yet drive carefully**. Indeed, with knowledge of the condition, a person might, for the time being, drive with extraordinary care. A person **under the influence of intoxicants** may at times conduct oneself with the utmost care and dignity, and the person might do this to an extent which will manifest that which the person hopes to conceal. A person might tread a line with an exactness which no sober person would feel called upon to attempt.

Bishop v. Commonwealth, 20 Va. App. 206, 207, 455 S.E.2d 765, 765, 1995. [Emphasis added]

32. **Knowledge of terrain and prospect of other travelers is necessary to create a known duty of care for a person traveling over the top of hill at 55 mph**.

> While it may be forcefully argued that a stranger, unaware of the intersection beyond the crown of the hill in question, and therefore unaware of potential peril, would not be guilty of reckless driving when he crossed the crest at fifty-five miles an hour, we do not think the same should be said of **one who is a constant user of the highway at the point involved and who, in the nature of common experience, might anticipate** a vehicle in the act, or on the verge, of turning into the intersection with which he was familiar. While plaintiff himself fixes the rate of speed at exactly the legal limit of fifty-five miles per hour, there can be no doubt that he crossed the crest of the hill at an **unwarranted rate of speed, under the facts** and circumstances of this case, [***14] and that the concurring, if not the proximate, cause of the accident was his violation of section 2154 (108) of the Code of Virginia.

Noland v. Fowler, 179 Va. 19, 25, 18 S.E.2d 251, 254, 1942. [Emphasis added]

33. **Complete control at all times is not a known legal duty.**

> The law does ***not impose the duty upon a driver to keep his automobile under complete control at all times.***

> Gale v. Wilber, 163 Va. 211, 221, 175 S.E. 739, 743 (1934) [Emphasis added]

34. At trial, petitioner was wrongfully denied the right to cite a Tennessee case that indicated slight movements within a lane are not probable cause for an arrest and are not reckless driving. It is the law as she has been trained to understand it and the case is evidence of her state of mind. The prosecution showed no Virginia statute to contradict it. Like that of Gale v. Wilber, the Tennessee case is significant. Appellant claims authority of this ruling, as she is one of the people of Tennessee and a citizen thereof:

> Prior to Officer Kohl's stop of the defendant, the videotape reveals that Garcia was traveling at what appears to be a safe rate of speed in the far right lane of an interstate highway. The videotape also reveals that Garcia slowly **moved his vehicle slightly within his lane of travel approximately twice over a period of approximately two minutes.** At no point does the vehicle exhibit any sharp or jerking movements. While there is a short period of time when the vehicle is not visible on the videotape, we find no testimony in the record suggesting that the defendant exhibited ***any pronounced or exaggerated swerving*** during that brief time period. Moreover, we place little weight on the fact that there was considerable traffic on the interstate on the night of the defendant's traffic stop. The videotape reveals that several cars approached the defendant from the rear and easily passed his vehicle by moving to the next lane. Additionally, the State does not contest that the defendant was driving in compliance with Tennessee Code Annotated section 55-8-123(1) (1998), which states:
>
> > Whenever any roadway has been divided into two (2) or more clearly marked lanes for traffic . [a] vehicle shall **be driven as nearly as practicable**

> **entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made safely**.
>
> Accordingly, we hold that as a matter of law there was no reasonable suspicion to stop Garcia. While the defendant's driving **may not have been perfect, we saw no evidence of weaving** on the videotape, and we reiterate that "it is the rare motorist indeed who can travel for several miles without occasionally varying speed unnecessarily, moving laterally from time to time in the motorist's own lane, nearing the center line or shoulder, or exhibiting some small imperfection in his or her driving.

State v. Garcia, 123 S.W.3d 335, 2003 [Emphasis added]

35. **Proximity of other people creates a duty that is absent if people are not present, precluding reckless driving, §46.2-852.**

> It was the duty of a driver under this section when he reached a settlement, where persons were likely to be assembled and where children were apt to be, ***to slow down*** and have his car under such control as to be able to stop if confronted by a sudden emergency. Sheckler v. Anderson, 182 Va. 701, 29 S.E.2d 867 (1964), holding that where there is a failure to comply with this section, the defendant is liable for injuries resulting from a collision, unless the plaintiff is guilty of contributory negligence.

Mayo v. Commonwealth, 218 Va. 644, 645, 238 S.E.2d 831, 831, 1977 [Emphasis added]

36. The 1995 case Bishop v. Commonwealth turns on the fact that the man behind the wheel, Bishop, was not moving and endangering people nearby

when he was charged and arrested, though he was inebriated. The case holds, too that drunkenness, per se, is not reckless driving. Bishop v. Commonwealth, 20 Va. App. 206, 207, 455 S.E.2d 765, 765, 1995 Va. App. LEXIS 354, *1 (Va. Ct. App. April 11, 1995)

37. **Speed is not reckless driving — whether fast or slow. It requires criminal conduct, by motive, scienter and action.** In instant case, disputed testimony by the state's witness is that appellant was traveling at 50 mph on an empty highway with a maximum posted speed of 70 mph.

> In Powers v. Commonwealth, 211 Va. 386, 388, 177 S.E.2d 628, 630 (1970), this Court held that 'recklessly' . . . imparts a disregard by the driver . . . for the consequences of his act and an indifference to the safety of life, limb or property' and that **speed alone does not constitute recklessness unless it endangers life, limb, or property.**

Spencer v. City of Norfolk, 271 Va. 460, 463, 628 S.E.2d 356, 358, 2006 [Emphasis added]

38. The evidence which the Commonwealth has through the trooper's testimony is that there was **no likelihood** of injury, scienter, to other users of the highway at the moment of the alleged infraction. The appellant passed no other cars, p. 105 ¶ 58-60:

> "What distinguishes a speeding violation from the misdemeanor of reckless driving, and the misdemeanor from the felony of involuntary manslaughter, is ***the likelihood of injury to other users*** of the highways. And the **degree of the hazard** posed by a speeding automobile depends upon the circumstances in each case." *Mayo v. Commonwealth*, 218 Va. 644, 645, 238

> S.E.2d 831, 831, 1977 Va. LEXIS 301, *1 (Va. November 23, 1977)
>
> "The word 'recklessly' as used in Va. Code Ann. § 46.1-189 imparts a **disregard** by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb or property. Speed alone is not a violation of § 46.1-189, but only becomes so when it endangers life, limb or property."

Powers v. Commonwealth, 211 Va. 386, 388, 177 S.E.2d 628, 630 (1970)

I. Prosecution Lacks Admissible Evidence, Fails to State Claim, No Basis for Case as Matter of Law

39. The essential elements that the Virginia uniform summons in the case fails to identify are four of the five required to be present in a criminal matter. No factually sufficient evidence of the elements is alleged in the summons, and only movement of appellant down the highway proven.

40. In his ambush the officer testified that the pretext for stopping appellant on the highway was her alleged 50 mph speed in a 70 mph zone.

41. The statute cited as the misdemeanor violation only provides for "maximum" speeds and does not provide for "*irrespective of the **minimum** speeds permitted by law"*:

> Irrespective of the **maximum** speeds permitted by law, any person who drives a vehicle on any highway recklessly or at a speed or in a manner so as to endanger the life, limb, or property of any person shall be guilty of reckless driving.

(Emphasis added) Code 1950, § 46-208; 1958, c. 541, § 46.1-189; 1983, c. 380; 1989, c. 727.

§ 46.2-852 Reckless Driving; General Rule

42. If the allegation of fact is true, it might warrant a $50 infraction, not driving-record-damaging and lucrative reckless driving or improper driving penalty violating the Article 1, section 9, ban in the bill of rights on excessive fines.

43. Nowhere in the Code of Virginia, Title 46.2. Motor Vehicles, Chapter 8., Regulation of Traffic, Article 7., Reckless Driving and Improper Driving, can we find driving 50 mph in a 70 mph zone on the list of those particular actions that qualify for reckless driving. pp. 121-126

44. The highway has no minimum speed, except if one is too slow in heavy traffic, § 46-2-877, Minimum speed limits, "No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law." There is no evidence that appellant impeded the normal and reasonable movement of traffic. On the scene, appellant testified, he made no mention of speed, only her varying position in the lane.

45. Though Mr. Frye testified that appellant was traveling at 50 mph, his claim is irrational and hardly credible. Appellant testified truthfully that she knew of her legal duty and she had set cruise control at 69 mph on a 70 mph

interstate. The officer conveniently had no evidence-gathering equipment that is normally afforded troopers in 2019. His testimony is self serving, and the idea that appellant would lengthen the time of a long journey — from New York to the Chattanooga, Tenn., area — by losing a mile of distance for every four minutes of travel is incredible. Appellant believes Mr. Frye's testimony is perjured — a display of his fidelity and faithfulness to his trade as an extortion-minded law enforcement officer, with the art of "testilying," or perjured testimony elevated to a duty serving the ostensible peace and tranquility of the commonwealth.

J. No Evidence or Testimony of the Essential Element of Knowledge, Intent or Scienter

46. There is no evidence that the accuser can offer that might show, let alone prove beyond a reasonable doubt, that there was a deliberate attempt by appellant to go anywhere over or under the speed limit. Appellant testified ¶ 174 she had set the car's equipment to travel at 69 mph according to the setting of her cruise control, and there is no accusation that she was deliberately not going somewhat near but not over the speed limit, the charging instrument is insufficient. The "element" of knowledge to intend a wrong or crime by acting into its result is not alleged or proven.

> **Knowledge necessarily is an essential element of the crime**. This does not mean that the person should have positive knowledge of the extent of the damage or injuries inflicted. It does mean that, in order to be guilty of violating the statute, "the driver must be aware that harm has been done; it must be present in his mind that there has been an injury; and then, with

that in his mind, he must deliberately go away without making himself known."

Herchenbach v. Commonwealth, 185 Va. 217 (Va. 1946) citing "5 Am. Jur. 921. See annotations in 16 A.L.R. 1425; 66 A.L.R. 1228; 101 A.L.R. 913; *People v. Graves*, 74 Cal.App. 415, 240 P. 1019; *People v. Hirsch*, 269 N.Y.S. 830; and *State v. Verrill*, 120 Me. 41, 112 A. 673." (Emphasis added)

47. Even in attempted capital murder, the prosecutor can't merely offer a bill saying the accused "attempted to kill" the defendant. There's an essential element missing.

> We conclude that omission of the "overt act" element of the offense of attempted capital murder also constituted error, as the Commonwealth concedes. We addressed this issue in *Goodson*, 22 Va. App. at 77, 467 S.E.2d at 856, in which we held that an instruction requiring **proof merely that the defendant "attempted to kill [victim]"** failed properly to apprise the jury of the essential elements of the offense because it did not require proof of **"'an overt but ineffectual act . . . in furtherance of the criminal purpose.'"** Id. (quoting *Martin v. Commonwealth*, 13 Va. App. 524, 527, 414 S.E.2d 401, 402 (1992) (en banc)). Thus, here, as in Goodson, the court's failure to instruct on the elements of an "attempt" constituted error. *** We hold that the **omission of material elements of the offense** from the attempted capital murder instruction **was error which was not harmless**.
>
> *Herbert v. Commonwealth*, 2001 Va. App. LEXIS 184, 2001 WL 345192 (Court of Appeals of Virginia April 10, 2001, Decided) [Emphasis added]

48. In a forgery case, the prosecution and **judge erred when they gave jury instructions allowing its members to believe that intent was not an essential element**.

> "'When a principle of law is vital to a defendant in a criminal case, a trial court has an affirmative duty properly to instruct a jury about the matter.' *Jimenez v. Commonwealth*, 241 Va. 244, 250, 402 S.E.2d 678, 681 (1991). That duty arises even when "trial counsel neglected to object to the instruction." *Id.* at 248, [*992] 402 S.E.2d at 679. Obviously, the proper description of the elements of the offenses is vital to a defendant. Attaining the 'ends of justice' requires correction of an instruction which allows a jury to **convict a defendant without proof of an element of a crime**. Instruction Eight was so defective that it allowed the jury to convict Campbell of forgery even if the jury concluded that Campbell lacked an intent to defraud. Intent to defraud, however, is **a necessary element** of forgery."

Campbell v. Commonwealth, 14 Va. App. 988, 421 S.E.2d 652, 1992 [Emphasis added]

K. No Evidence to Essential Element of Proximity of Others

48.1 The commonwealth offered no evidence for the record that others were proximate upon whom the alleged reckless conduct might have endangered. In Trooper Frye testimony, there was no other traffic on the highway, p. 104 ¶ 48; no pedestrians along the roadway, p. 104 ¶ 50; no other occupants or passengers in her car, p. 104 ¶ 52; no one else's property was proximate to her car, p. 104 ¶¶ 53-56; did not pass anyone, p. 105 ¶¶ 57, 58; no illegal passing of a vehicle, p. 105 ¶¶ 67, 68; not following anyone "too closely," p. 106 ¶¶ 69, 70; no evidence of leaving road into tire-changing lane or grass, p. 108 ¶¶ 95-98.

L. No Evidence of Acts That 'Endanger Life, Limb or Property' of Another

48.2. The commonwealth offered no evidence for the record of acts that endangered the life, limb or property of another as required by the Va. Code Ann. Section 46.2-852, reckless driving, general. Trooper Frye said appellant caused no injury, p. 103 ¶¶ 42, 43; did not endanger or injure the trooper, p. 104 ¶¶ 44, 45; did not endanger any pedestrians, p. 104 ¶¶ 49, 50; did not endanger any occupants or passengers in her car, p. 104 ¶¶ 51, 52; did not endanger anyone's property, p. 104 ¶¶ 53-56; did no act to endanger other motorists by passing them, p. 105 ¶¶ 57-60; did not pass anyone illegally, p. 105 ¶¶ 67, 68; did not follow anyone too closely or misuse a turn signal, pp. 105, 106 ¶¶ 69-72; did not offer testimony of endangering anyone at the disputed speed of 50 mph, p. 106 ¶ 74 ff; did not endanger anyone in the tire changing lane or grass beyond, p. 108 ¶¶ 95-98; did not "jerk the car about" or "[make] aggressive movements," not "wobbling" nor "swerving," pp. 108, 109 ¶¶ 99-102, 107-110; did not offer evidence that her tire's alleged touching the dividing line caused a threat to anyone, pp. 108, 109 ¶¶ 102-104.

48.3. The court in finding appellant guilty cited the Tulis testimony that the car had a bright display and that she was looking for a radio station, p. 117 ¶ 172, and that getting news and music from the car's standard equipment imperils the public welfare.

> 178. He ruled me guilty of improper driving, saying "it's not an easy decision." He stressed that he is convinced that I was traveling at 50 mph in a 70 mph zone and said it is "a dangerous speed." He says it is "dangerous to be below the posted limit" and that it is **"dangerous to be playing with the radio."** He said, "Some people are on the road doing 120 mph, even 140 mph, and it's extremely dangerous to be doing 50," he says.

179. Judge Lee said, “the dangerousness of this conduct” merits a $500 fine. [italics added]

M. The State’s Charging Instrument Must Include Full Notice

49. Clearly, the standard to be met by charging instruments in Virginia is one of full notice. The accused has an absolute right to have *all essential elements of an alleged crime be narrated as evidentiary facts to place her within the claim of the ultimate fact*, that of the statute.

50. Does the Virginia uniform summons serve the interests of justice in the courts of Virginia?

51. As noted in the screengrab above and in this case file, Trooper Brandon Frye writes “46-2-852” when directed to write the law section. Ordered to ***“describe charge,”*** he ***names the statute***, “reckless driving general.”

52. He is not describing the charge. He is not descending to the particulars. Does the trooper give the information necessary to enable a defendant to concert a defense? The courts below say “Yes.” Appellant demands the court to say no to merely naming the charge.

53. The trooper’s writing “46-2-852” in the line for “describe charge” denies the accused the basic evidentiary facts that accused has a right to examine ahead of trial and to defend against.

54. At trial, the officer — following custom, usage and training, and following the lead of the Virginia uniform summons — did not know the difference between "naming" and "describing." He understands the difference between naming (Abigail Marie Tulis) and describing the accused (blonde). But the executive branch employee doesn't know the difference between naming and describing the criminal charge to create legal sufficiency in his purported criminal case.

55. Evidence at trial indicates the form has trained him not to describe the charge with the essential elements, but to believe that **naming** the charge creates legal sufficiency. p. 103 ¶¶ 36-39 and pp. 109-112 ¶ 111-140.

> **36. I asked, "What is my name?"**
>
> 37. Officer Frye said, "Abigail Tulis."
>
> 38. I asked, **"Could you describe this person** for the judge?"
>
> 39. Mr. Frye read the description that he obtained from my license.
>
> ***
>
> 111. I asked trooper Frye to **state my name.**
>
> 112. "Abigail Tulis."
>
> **113. I asked, "How would you describe me?"**
>
> 114. After an objection by Ms. Lawson, he says, **"I will describe you based on your driver license." He says she has blue eyes, fair skinned and blonde.**

***

127. I asked, “Do you remember what you wrote on the form?”

128. Mr. Frye said that he wrote the code number.

129. I asked, “Please look at the form. What does it say right here?”

130. Mr. Frye says it says “describe charge.”

131. I asked, “Did you do that?”

132. Mr. Frye said that he wrote the name of the charge, “reckless driving, general.”

133. I asked, “Would you say that writing ”46-2-852, reckless driving, general” is describing the charge?”

134. Officer Frye was confused. The Commonwealth’s Attorney made an objection.

135. I asked, “When I asked you to describe me, did you say, ‘Abigail Tulis’”?

136. Mr. Frye said, “I don’t understand what you are talking about. I don’t understand.”

56. Appellant demands the court act to supervise the lower courts that arise from the commonwealth’s executive branch law enforcement activities, with localities obtaining bodies, full court dockets, jail customers, fees, fines and convictions, aiding and supporting their budgets by abusing travelers in summary proceedings.

N. No State Evidence or Witness Testimony to Judge’s Sleight of Hand of the ‘Lesser-Included Charge’

57. The Commonwealth of Virginia's slapdash treatment in giving notice of the essential elements is in evidence up to the last moment of trial. The option of a court to slip in a "lesser included" charge is beneath the claims of justice, suggesting the accuser will get some gain from his prosecution, even if a case is void, weak or lacking in evidence. The practice is a subsidiary of the enumerated error and problem highlighted in this appeal, that of false prosecution under a void instrument, followed by false arrest or citation to court and harassment for the purpose of generating revenue.

58. Appellant understands only grievances listed in the enumeration of errors "will be noticed by this court" at Rule 5A:12, petition for appeal. But she offers the following and asks the court to take judicial notice of judicial sleight of hand that lets the commonwealth win no matter what evidence might show and no matter how gap-toothed a prosecutor's criminal case may be.

59. Judge Lee convicted appellant of "improper driving," which he says is a "lesser included charge" at § 46.2-869. Improper driving; penalty. It reads:

> Notwithstanding the foregoing provisions of this article, upon the trial of any person charged with reckless driving ***where the degree of culpability is slight***, the court in its discretion may find the accused not guilty of reckless driving but guilty of improper driving. However, an attorney for the Commonwealth may reduce a charge of reckless driving to improper driving at any time prior to the court's decision and shall notify the court of such change. Improper driving shall be punishable as a traffic infraction punishable by a fine of not more than $500.

[Emphasis added]

60. No evidence exists of any improper act, as no facts to an improper act was alleged in the charging instrument. The only essential element of reckless driving established in the instrument and at trial was movement of her car. Absent a primary improper act, there is no enhancement to "reckless."

61. For the law to allow the judge to switch charges after the state closes its case is to spring a trap on appellant and convict her of a crime not alleged. The statute faces a test from the U.S. supreme court that **prohibits judicial legerdemain.**

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. *** If, as the State Supreme Court held, petitioners were charged with a violation of § 1 [of Act 193 of the 1943 Arkansas Legislature], it is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. **It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."** *De Jonge v. Oregon*, 299 U.S. 353, 362. [Emphasis added]
>
> ***[T]he State Supreme Court *** affirmed their convictions as though they had been tried and convicted of a violation of § 1 when in truth they had been tried and convicted only of a violation of a single offense charged in § 2, an offense which is distinctly and substantially different from the offense charged in

> § 1. To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court. We are constrained to hold that the petitioners have been denied safeguards guaranteed by due process of law — safeguards essential to liberty in a government dedicated to justice under law.

Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644, 1948 U.S. LEXIS 2789, 14 Lab. Cas. (CCH) P51,261, 21 L.R.R.M. 2418 (Supreme Court of the United States March 8, 1948, Decided)

62. State law § 46.2-869. Improper driving; penalty, is a penalty statute only, and one cannot violate a penalty statute. "Improver driving" penalty statute lacks an antecedent statute creating *a separate liability and legal duty* requiring "proper driving," the violation of which brings the penalty of improper driving. Improper driving has not been criminalized by statute in the state of Virginia, yet here it is penalized, and that penalty of $500 is imposed on appellant.

63. Improper driving penalty statute is unconstitutionally undefined and vague. As "improper driving" wasn't alleged, argued or proven at appellant trials, it remains hanging over her as a possible cause of action. "Slight culpability" is totally subjective. Appellant did not violate any particulars of any of the code under the sequence of Virginia, Title 46.2. Motor Vehicles, Chapter 8., Regulation of Traffic, Article 7, which spells out the particulars of what constitutes "reckless" driving. Then there can be no culpability at all.

64. There needs to be a scienter element of moral turpitude, though slight. The judge cannot ***sua sponte*** pervert the penalty statute into a charge. Changing

the penalty statute into a charge to "improper driving" was a reckless abuse of discretion since reckless driving is not supported, with there being no probable cause of any "slight" culpability with turning a radio dial. p. 112, ¶¶ 144, 145; p. 113 ¶ 150.

65. Appellant objects to this state of affairs as a matter of law, and asks the court to overturn "included lesser charges" as it is inherently unjust to use a penalty statute as a charging statute if there is not an antecedent liability statute.

66. **Abigail Marie Tulis was tried on a charge not made, and convicted on a charge not tried.** She insists such an outcome of district and circuit courts across Virginia is not lawful, violates people's rights, violates the state constitution and destroys confidence in public justice.

O. The Complaint Fails to Invoke Subject Matter Jurisdiction

67. District and circuit court lacked subject matter jurisdiction because the court's authority was not properly invoked by the accuser. The accuser failed to provide factual sufficiency to the essential elements of the crime, and thus failed to sufficiently state a claim to evoke the court's jurisdiction. Its evidence on the stand was of a piece with its charging instrument. The court's keeping of the maximum fine for the lesser charge as for the greater — $500 — demonstrates an interest in lucre, not equity or justice.

68. The Virginia uniform summons is unconstitutional in that it *facially* forbids the state's agent, the trooper or officer, from fulfilling his duty to properly

charge an accused. A **competent** officer would, to maintain the state's peace and dignity, identify for the accused **the essential elements of the alleged breach**. The charging instrument in this case, the record shows, doesn't "describe charge" as required. Rather, it states the name of the statute. It provides no narrative and alleges no evidentiary facts. It shows the officer is incompetent, made so by his form he is trained to use, the design limits of which constrain his ability to allege by limiting his number of words.

69. The essential elements of reckless driving are absent as a matter of law from the very moment Trooper Frye pressed the button activating his blue lights, and compelled to be absent by policy, "approved by the general assembly," as the district court said, affidavit of undisputed facts, p. 111 ¶ 138.

70. Like unto the form, the narrative of appellant's trial shows consistent violation of her due process rights. She was denied counsel of her choice, denied next friend aid and care in a criminal matter. She was refused a recording device notwithstanding the Virginia legislature providing the procedural right. No charging instrument. Denied an evidentiary hearing. The court repeatedly blocked her pursuit of the theory of the case. The court stymied pleading of statute and rebuffed pleadings of case law. These unenumerated wrongs appellant leaves out in the enumeration of errors, they being poisonous fruits of the primary wrong in this case — that of summary and insufficient charging instrument by custom, and the secondary wrong, denial of evidentiary hearing.

71. To find appellant guilty of a "lesser included charge" violates her constitutional rights to notice. It also highlights another lack in Virginia's

legal system — that of legal standing.There is no *corpus delecti* where complainant shows it has suffered actual physical injury, where the commonwealth, as the alleged injured party, cannot show itself harmed nor the public interest aggrieved. These are matters of evidence the appellant was denied — in keeping with the summary form that initiated the case. Appellant reminds the court she was not charged with improper driving; she was not liable under statute to "properly" drive, did not defend against that charge, and is a Tennessean unjustly and dishonorably treated by what appears as a back door or escape hatch for district judges serving counties and towns as revenue collector. The process of state-based warlordism is a clear, substantial and material wrong.

72. At trial the prosecutor did not bring up this provision nor charge appellant under it and its $30 fine according to the Rules Of Supreme Court Of Virginia, Part Three B, Traffic Infractions And Uniform Fine Schedule relating to § 46.2-877. Minimum speed limits.

73. Notwithstanding the Virginia statutes providing for driving too slowly, and a $30 infraction fee, the officer charged appellant with the Class 1 misdemeanor of reckless driving, threatening her with the penalty of up to one year in jail and a $2,500 fine. She did not know of the infraction provision for driving too slow, but is sure that the trooper and the court knew about it.

P. Judge Gave Testimony, Arbitrarily Injected *Mala Prohibita* Elements

74. The Virginia charging instrument is the mother of judicial abuse of the people, spawn of proceedings statewide of which the Feb 27, 2020, trial of Abigail Tulis is typical. The court (judiciary) and the trooper (executive) in their own imagination, repealed the necessary *mala in se* elements of "endangering life, limb or property of any person" where there was no "person" to injure. They replaced it with speculation of what might happen should conditions be different, and inject the statute with invisible ink to correct words that they imagine the General Assembly to have accidentally left out.

75. The lower courts' and trooper's subjective lawmaking violate Virginia Constitution, Article I, Section 5, Article IV, Section 1. The district court judge's offering as his own testimony of speculative evidence after the prosecution rests, acting like a tag-team prosecutor and without appellant having any adversarial process to rebut it, is an abuse of discretion and plain error.

76. Appellant asks the court to throw out the Virginia uniform summons as unconstitutional on its face, or, in the alternative, an implied directive to cause unconstitutional acts by officers. She asks the court to order the commonwealth to prohibit its use in current form immediately in the interest of justice. She asks the court to order troopers and all others to properly state all essential elements, to narrate offenses in terms of the statute, to allege evidentiary facts to give defendants sufficient legal notice. Proper notice is essential for there to be just and honorable government, and for the due process rights of the people — whether native Virginians or visitors in the

state — to be respected, and their liberties and property defended.

Q. Grave Considerations: Judicial Extortion & Oppression Racket

77. Appellant believes the main issues dispositive of her claims are above. She put the following into the record to give the court a glimpse of what happens in the judicial hinterlands, from whence few appeals come and which appear sorely to need supervision if the state doesn't wish to stand accused of brigandage and extortion approved in Richmond.

78. The sketch that is drawn by the facts of the situation, the testimony of the trooper, and the process of guilt-by-speculation, suggests justice is remote and unavailable in the Commonwealth's county courts for those who know not their rights or are too poor to defend them, and for those who vigorously defend their rights as belligerent claimants in person, such as appellant.

79. The judges in the district and circuit courts operate a kangaroo court among familiars, extracting fines for county and state. It's a widespread problem across the United States. See Mike Maciag, *"Addicted to fines[;] small towns in much of the country are dangerously dependent on punitive fines and fees,"* Governing, September 2019. https://www.governing.com/topics/finance/gov-addicted-to-fines.html.

80. Judge Lee relished the perjured nugget of "50 mph." According to the transcript, he stressed that he is convinced that appellant was traveling at 50 mph in a 70 mph zone and says it is "a dangerous speed." He says it is "dangerous to be below the posted limit" and that it is "dangerous to be

playing with the radio." "Some people are on the road doing 120 mph, even 140 mph, and it's extremely dangerous to be doing 50," he said. Judge Lee said, "the dangerousness of this conduct" merits a $500 fine. The roadway was empty, and had appellant been doing 50 mph the trooper could easily have passed her.

81. Judge Lee introduces at the last moment of trial a theoretical threat to public safety — others traveling at 120 mph or 140 mph. If such speeders were anywhere visible to state employee Frye, why was he waylaying a slowpoke at 50? The $30 penalty for driving too slow is for conditions of normal traffic. Yet Judge Lee and Trooper Frye concoct an imaginary "abnormal" traffic flow where those imaginary drivers' malevolence imposes upon appellant that status of a criminal.

III. SUMMARY

82. Petitioner asks the court to overlook her rough-hewn pleadings, as she is not practiced in the art of law and argument, and to do the following:

1. Find for appellant on assignment of error No. 1, that the lower courts erred in accepting an insufficient charging instrument that denied the accused sufficient notice as to alleged wrongs.

2. Find that in error No. 2, denial of an evidentiary hearing, district and circuit violated appellant's right to know "cause and nature" of the case against her, allowing her to be ambushed at trial.

3. Find for appellant on error No. 3, that the lower courts failed to take judicial notice of the rules governing due process and that they denied appellant the right to prepare a defense, abusing their discretion.

4. Rule in assignment of error No. 4 that even had the charging instrument being sufficient, neither district nor circuit court trials established facts sufficient for conviction, presuming Frye's evidence in circuit was consistent with that in district.

5. In assignment of error Nos. 5 and 6, the lower courts are seen holding proceedings absent subject matter jurisdiction and finding the accused guilty without evidentiary facts being presented sufficient to bring the accused within the ultimate fact of the statute. Appellant demands these errors of law and abuses of discretion be declared in appellant's favor.

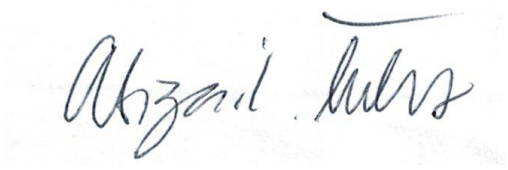
6. That assignment of errors No. 7 and 8 regarding abuse of discretion for the "reduced charge" of "improper driving" be applied to proceedings below. In error No. 7, district and circuit found appellant guilty of improper driving without having established guilt under the reckless driving law, and also denying her right to know the "cause and nature" of a new charge introduced during sentencing.

7. In light of assignment of error No. 9, overturn the support of the lower courts for the Virginia uniform summons on grounds that it is unconstitutional because it forbids in customary use the narration of

criminal charges that routinely are insufficiently developed as to the essential elements of the crime.

8. In consequence of these errors in district and circuit, appellant demands the court order the convictions against her be overturned and dismissed with prejudice as a matter of law, or, in the alternative, be dismissed as a matter of justice and equity.

Respectfully submitted,



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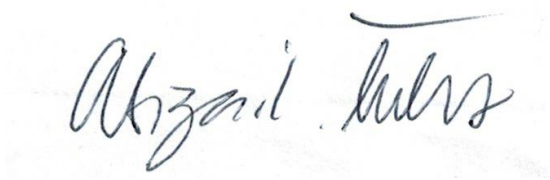
Abigail Marie Tulis
10520 Brickhill Lane
Soddy-Daisy, Tenn. 37379
Email: marie.tulis@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that the above motion was sent first-class U.S. mail to the Commonwealth Attorney for Smyth County, 109 West Main St. Suite 2098, Marion, VA 24354, OR was emailed to Commonwealth's attorney Jill Kinser Lawson at jlawson@smythcounty.org.

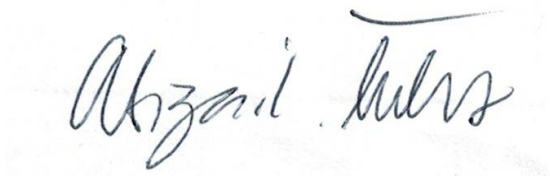


Abigail Marie Tulis

CERTIFICATES OF COMPLIANCE

For the petition
The appellant does hereby certify that this petition complies with the requirements of Rule 5A:13 of the rules of the court of appeals of Virginia, containing 11,977 words, as measured by the Google Docs document tools, exclusive of the front cover, table of contents, table of authorities and certificates.

For the response to brief in objection
The appellant does hereby certify that this petition complies with the requirements of Rule 5A:14, reply brief, of the rules of the court of appeals of Virginia, containing 2,689 words as measured by the Google Docs document tools, exclusive of certificates.



Abigail Marie Tulis