

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DANJUAN ANTONIO MCBRIDE – PETITIONER

v.

COMMONWEALTH OF VIRGINIA – REPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,
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QUESTIONS PRESENTED

Whether the Virginia Supreme Court erred when it held that Petitioner's Fifth Amendment right not to be put twice in Jeopardy was not violated when the trial court directed a verdict in his favor, then "reversed" itself, and allowed the Commonwealth to reopen her case and present additional evidence. Under Virginia law, the grant of a motion to strike required the trial court to enter a judgment of acquittal. Regardless, after such a ruling, the trial court sent the charges to the jury, and Mr. McBride was convicted.

LIST OF PARTIES AND RELATED CASES

All parties appear in the caption of the case on the cover page.

Cases that are directly related to the case in this Court:

- *Commonwealth v. McBride*, Record No. Record No. 220715, Supreme Court of Virginia. Judgment entered Oct. 19, 2023.
- *McBride v. Commonwealth*, Record No. 1354-21-4, Court of Appeals of Virginia. Judgment entered October 4, 2022.
- *Commonwealth v. McBride*, Case Nos. FE-2018-0001018, FE-2018-0001019, FE-2018-0001020. Judgement entered March 8, 2019.

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Danjuan McBride, by and through his counsel, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the Commonwealth of Virginia (“Virginia Supreme Court”).

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is published at *Comm. v. McBride*, 893 S.E.2d 391 (2023) and attached hereto as App. A.

The opinion of the Court of Appeals of Virginia (“Virginia Court of Appeals”) is published at *McBride v. Comm.*, 75 Va. App. 556 (2022) and attached hereto as App. B.

JURISDICTION

The Virginia Supreme Court entered its Opinion on October 19, 2023. The deadline for filing a petition for writ of certiorari is January 17, 2024. This Court has jurisdiction under Supreme Court Rule 10 to review the Virginia Supreme Court’s decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Fifth Amendment to the U.S. Constitution, which prohibits subsequent prosecutions for the same offense. The Double Jeopardy Clause of the Fifth Amendment states that “[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V.

STATEMENT OF THE CASE

Danjuan G. McBride was charged with allegedly possessing with intent to distribute illegal drugs after having been convicted twice previously.

Mr. McBride was tried by jury on November 27-28, 2018, and presided over by the Honorable Conrad Gardner of the Circuit Court of Fairfax County, in Fairfax, Virginia. After the prosecution rested its case in chief, the defense moved to strike the Commonwealth's evidence,¹ which the court granted as to the "third or subsequent" offense. After the motion was granted, the prosecution objected. Following an hour of further argument, the court "reversed" itself, and denied the motion. Over the defense's strenuous objection, the court allowed the prosecution to reopen its case and present additional evidence. Subsequently, the jury found Mr. McBride guilty of both counts presented: count one (possession with intent to distribute cocaine, after having been previously convicted of the same offense on two prior occasions, in violation of Va. Code Ann. § 18.2-248(c)); and count two (possession with intent to distribute heroin and furanyl fentanyl, after having been previously convicted of the same offense on two prior occasions, in violation of Va. Code An. § 18.2-248(c)). On March 1, 2018,² the court sentenced Mr. McBride to the mandatory minimum for each count, ten years' incarceration, to run

¹ A motion to strike the evidence is Virginia's version of a motion for a directed verdict.

² The first Sentencing Order was dated March 8, 2019, and a second Sentencing Order was issued May 10, 2019.

consecutively to each other, and three years' post release supervision on each count, to run concurrent to each other. (Sentencing Orders, dated March 8, 2019, and May 10, 2019, attached hereto as App. C.)

Mr. McBride filed a timely notice of appeal on April 5, 2019. The transcripts were not timely prepared and the appeal was dismissed. The Virginia Court of Appeals granted a delayed appeal. On June 24, 2021, a second timely notice of appeal was filed. The issue presented to the Virginia Court of Appeals for review was whether the Fairfax Circuit Court's reversal of its granting of a motion to strike violated the Fifth Amendment of the U.S. Constitution, the Virginia Constitution, and/or the Rules of the Virginia Supreme Court.

The case was fully briefed and argued. On October 4, 2022, a panel of the Virginia Court of Appeals overturned Mr. McBride's convictions. *McBride*, 75 Va. App. 556, attached hereto as App. B. The Virginia Court of Appeals reversed the convictions on the basis of Virginia Supreme Court Rule 3A:15(c), and did not reach the question of whether the error violated the Fifth Amendment of the U.S. Constitution or the Virginia Constitution. ("Because we conclude that Rule 3A:15(c) prohibited the trial court from reopening the record and not entering an order of acquittal on these facts, we need not reach the harder question of whether the double jeopardy clauses of either the United States or Virginia Constitutions would also require reversal here." *McBride*, 75 Va. App. 556, attached hereto as App. B. The Attorney General for the

Commonwealth of Virginia appealed to the Virginia Supreme Court, which in its discretion accepted the case.

On October 19, 2023, the Virginia Supreme Court reversed the judgment of the Virginia Court of Appeals and reinstated the convictions. *McBride*, 893 S.E.2d at 393, attached hereto as App. A. The Court found that “[a]s for the Double Jeopardy Clauses, it certainly imposes some limitations on a trial court’s authority to reconsider a motion to strike. Those limitations, however, do not apply here.” (*Id.*) The Virginia Supreme Court found that “[i]n the present case, the trial court promptly reconsidered its granting of a motion to strike, and it did so before the defendant presented any evidence or altered his strategy by, for example, releasing witnesses. Consequently, the defendant suffered no Double Jeopardy violation.” (*Id.* at 10.)

Mr. McBride now seeks review of whether the Fairfax Circuit Court violated Mr. McBride’s constitutional rights when it granted a motion to strike and then “reversed” itself and allowed the Commonwealth to reopen its case and submit further evidence.

REASONS FOR GRANTING THE PETITION

Summary

Certiorari is warranted to consider the exceptionally important question of whether a court can grant a motion to strike thereby granting an acquittal, then reverse itself and allow the prosecution to reopen its case and present further evidence, and allow the jury to consider the previously stricken

charges. In its decision, the Virginia Supreme Court has resolved this question in a way that conflicts with the U.S. Constitution and previous decisions of this Court and other jurisdictions, creating a conflict among the highest courts of the land. Beyond its importance in the abstract, this case presents an important opportunity for this Court to set forth in detail a clear, comprehensive, and consistent standard regarding whether and how a defendant's constitutional rights should be protected.

Petitioner's challenge rests on the principle of double jeopardy. Here, the trial court granted Mr. McBride's motion to strike the evidence, thereby acquitting him of two counts of possession with intent to distribute after having been convicted of the charge twice previously. Thereafter, the Commonwealth argued that the decision was wrong, and the Circuit Court "reverse[d]" its decision, allowed the Commonwealth to reopen its case and put on new evidence, and sent the charges to the jury, which convicted Mr. McBride of previously stricken charges. This violated Mr. McBride's protections against Double Jeopardy, thus violating his Constitutionally protected rights under the Fifth Amendment to the U.S. Constitution. The Virginia Supreme Court found that the Circuit Court could "reconsider[] its granting of a motion to strike" because "it did so before the defendant presented any evidence or altered his strategy." *McBride*, 893 S.E.2d, at 10, attached hereto as App. A.

This decision defies precedent in this Court and other courts, mistakes the facts, misapplies the law, and defies logic. As such, the law in the Virginia

has evolved and been interpreted to conflict with this Court's precedent. The compelling reasons for this Court to grant certiorari are that the Virginia Supreme Court's decision conflicts with many other jurisdictions' highest courts, and misinterprets and misapplies this Court's precedent. This Court should have an opportunity to correct this Opinion and Judgment's catastrophic effect.

The Virginia Supreme Court's Decision Violates the Fifth Amendment of the U.S. Constitution, Ignores this Court's Precedent, and Conflicts with the Decisions of Other Courts

Mr. McBride was denied protection against double jeopardy when, despite the Circuit Court's granting of a motion to strike, which under Virginia law must lead to an acquittal, the Circuit Court purported to "reverse" itself. The Circuit Court granted Mr. McBride's motion to strike the evidence on an element essential to both charges with which Mr. McBride was charged. When the Commonwealth objected to the Circuit Court's decision, and complained that the decision was incorrect, the Circuit Court reversed its decision, and allowed the Commonwealth to reopen its case in chief and introduce additional evidence. The jury later found Mr. McBride guilty of both counts. This violated Mr. McBride's constitutional right not to twice be put in jeopardy.

I. The Applicable Law

The Fifth Amendment of the U.S. Constitution guarantees that "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

“The Double Jeopardy Clause ‘protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.’” *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221 (1977); *see also North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Payne v. Commonwealth*, 277 Va. 531, 540, 674 S.E.2d 835, 839 (2009) (quotations omitted) (“This constitutional provision guarantees protection against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.”). “This protection provides finality for the defendant and ‘protects the accused from attempts to relitigate the facts underlying a prior acquittal.’” *Trent v. Commonwealth*, No. 0350-17-3, 2017 Va. App. LEXIS 332, at *13 (Va. Ct. App. Dec. 19, 2017) (quotations omitted). “A verdict of acquittal … [can]not be reviewed … without putting [the defendant] twice in jeopardy, and thereby violating the Constitution.” *Sanabria v. United States*, 437 U.S. 54, 64, 98 S. Ct. 2170 (1978) (*quotations omitted*). This is true whether the acquittal is by the jury or a court-decreed acquittal. *Smith v. Massachusetts*, 543 U.S. 462, 467 (2005) (“The Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict. This is so whether the judge’s ruling of acquittal comes in a bench trial or… in a trial by jury.”) This principle is “[p]erhaps the most

fundamental rule in the history of double jeopardy.” *Martinez v. Illinois*, 572 U.S. 833, 841 (2014) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977)).

The Rules of the Supreme Court of Virginia at the time of Mr. McBride’s trial stated that “[t]he court shall enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction.”³ Va. Sup. Ct. R. 3A:15(c) (emphasis added). “Under Rule 3A:15(c), a successful motion [to strike] must result in an acquittal.” *Commonwealth v. Flythe*, No. 0592-15-4, 2015 Va. App. LEXIS 251, at *9 (Va. Ct. App. Sept. 1, 2015)). This Court has held that “our cases have defined an acquittal to encompass any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense.” *Evans v. Michigan*, 568 U.S. 313, 318 (2013). There is no leeway or discretion for a court to do anything other than enter a judgment of acquittal after a court grants a motion to strike.

Further, “it is well established that a motion to strike can challenge only the sufficiency of the evidence.” *Id.*; *see also McCary v. Commonwealth*, 548 S.E.2d 239, 245 (Va. Ct. App. 2001) (emphasis in original); *Poole v. Commonwealth*, 211 Va. 258, 160, 176 S.E.2d 821, 823 (1970) (“The office of a

³ After Mr. McBride’s trial, the Virginia Supreme Court amended a number of its rules, including Rule 3A:15, replacing the word “shall” with the word “must” to clarify the meaning, but was not intended to alter the meaning of the rules. *Comm. v. McBride*, 893 S.E.2d 391, 394 n.2 (2023), attached hereto as App. A.

motion to strike the evidence, made at the conclusion of the Commonwealth's case, is to challenge the sufficiency, not the admissibility, of the evidence.") Where it is clear that a motion to strike was granted, this means that the trial court has found that there was insufficient evidence. *Flythe*, 2015 Va. App. LEXIS 251, at *11. The motion to strike is based on the insufficiency of the evidence and immediately results in an acquittal. *See Flythe*, 2015 Va. App. LEXIS 251, at *9. Double jeopardy attaches and the defendant cannot be tried again on the same offense. *Id.* ("There is no question that double jeopardy bars a second prosecution for the same offense after an acquittal."); *see also Payne*, 277 Va. at 540.

II. The Decision of the Virginia Supreme Court

The Virginia Supreme Court's opinion held that "the Double Jeopardy Clause ... certainly imposes some limitations on a trial court's authority to reconsider a motion to strike. Those limitations however, do not apply here." *McBride*, 893 S.E.2d at 396-97, attached hereto as App. A. The Virginia Supreme Court vacated the decision of the Virginia Court of Appeals which had vacated Mr. McBride's convictions, and entered final judgment for the Commonwealth of Virginia.

The Virginia Supreme Court held that, although the Double Jeopardy Clause places restrictions on a court's authority to reconsider a motion to strike, the restrictions do not impact Mr. McBride's case.⁴ The Virginia

⁴ Although the Virginia Supreme Court stated that "[b]oth the United States Constitution and the Constitution of Virginia contain a Double Jeopardy

Supreme Court considered this Court’s decision in *Smith*, 543 U.S. 462. The Virginia Supreme Court noted that this Court has previously found that an acquittal could be reconsidered without violating the Double Jeopardy Clause in several instances: (1) where “state law … prescribe[s] that a judge’s midtrial determination of the sufficiency of the State’s proof can be reconsidered”; (2) where the defendant has not suffered the possibility of prejudice; (3) where the acquittal was “on one or more but fewer than all counts of an indictment”; and (4) where a “State … provide[s] for such reconsideration … by legislation or by judicial rule, common-law decision, or exercise of supervisory power.” *McBride*, 893 S.E.2d at 396-97, attached hereto as App. A.

The Virginia Supreme Court held that:

Virginia law allows a trial court to reconsider a previously granted motion to strike. Under Virginia law, the circuit court’s verbal pronouncement to grant the motion to strike was not final. The circuit court retained the authority to revisit its earlier ruling, so long as doing so did not offend Double Jeopardy. Moreover, the prosecution here did what the prosecution in *Smith* had not done, which is to immediately object to the trial court’s decision to grant the motion to strike. In this case, the trial court promptly reversed itself, before the defendant presented any evidence or released any of its witnesses, further distinguishing this case from *Smith*. The double jeopardy bar does not apply here.

McBride, 893 S.E.2d at 397, attached hereto as App. A. The Virginia Supreme Court did not say why it stated that a grant of the motion to strike is not final

Clause,” the Virginia Supreme Court addressed only the U.S. Constitution, noting that “[t]he scope of the Double Jeopardy provision of the Constitution of Virginia is not at issue in this case.” *McBride*, 893 S.E.2d at 396 n.4, attached hereto as App. A).

under Virginia law, nor why it stated that the circuit court retained the authority to revisit its earlier ruling, nor why it held that “[t]he double jeopardy bar does not apply here.” *McBride*, 893 S.E.2d at 397, attached hereto as App.

A. None of these holdings appear previously in Virginia’s precedent.

III. This Court Should Grant Certiorari to Consider This Important Question

Applying all the legal principles set out above, it is clear that the convictions of Mr. McBride for possession with intent to distribute after previously having been convicted twice violated the Double Jeopardy Clause of the U.S. Constitution. The Fairfax Circuit Court erred when it granted the defense’s motion to strike and then reversed its decision and allowed the Commonwealth to reopen its case and present more evidence, leading to Mr. McBride’s convictions.

The Circuit Court clearly granted the defense’s motion to strike evidence of Mr. McBride’s previous convictions. The Circuit Court announced that it was “going to grant the motion to strike in part and deny it in part. I’m going to grant it as to the Commonwealth having proven that the Defendant has two prior convictions.” (Tr. 11/28/18, 12-13.) There can be no question that this was a decision granting a motion to strike. Upon such a holding, Virginia law requires the Circuit Court to enter a judgment of acquittal pertaining to the previous convictions. Va. Sup. Ct. R. 3A:15(c) (“The court *shall* enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because

the evidence is insufficient as a matter of law to sustain a conviction.”)
(emphasis added). It was error for the Fairfax Circuit Court not to do so.

None of the instances wherein limitations have been placed on Double Jeopardy apply here. Virginia does not prescribe that a midtrial grant of a motion to strike can be reconsidered. There simply is nothing so stating in the Virginia Rules, and there was no precedent so stating until this case. There is nothing at all until this case suggesting that a trial court could revisit its grant of a motion to strike, by legislation, judicial rule, precedent, or supervisory power. In fact, on its face the Virginia Rules does the opposite – it requires the court to enter an acquittal. The wording of Virginia Supreme Court Rule 3A:15 creates a unique situation wherein the court *must* enter an acquittal and leaves no leeway to reconsider the decision. This is due to the unique character of acquittals.

Certainly, in *Smith*, this Court stated that there are ways that the Court’s decision could have been different. This Court stated that the prosecutor could have sought a continuance prior to the announcement of the ruling, the local court’s jurisprudence could have adopted a rule of nonfinality of midtrial acquittals, the state could have “craft[ed] procedural rules that allow trial judges ‘the maximum opportunity to consider with care a pending acquittal motion,’” the state could have given judges “the option of deferring consideration until after the verdict,” or the prosecutor could have sought “to persuade the court to correct its legal error before it rules” – none of which

occurred in Mr. McBride's case. All these alternatives have one thing in common – they all occur before a decision is final. Here, the trial court granted the motion to strike, and under Virginia law that decision is final.

To be sure, in *Smith* this Court also said that the prosecutor could have sought to persuade the court to correct its error before the proceedings moved forward. This scenario is not applicable here. In support of that statement, this Court cited to *Price v. Vincent*, 538 U.S. 634 (2003), which held that that court's decision could be modified because it was not a final decision. That is in contrast to here, where the decision was a final decision. Furthermore, *Smith* does not state that an acquittal can be reversed, simply that in certain very prescribed situations – most of which are before the ruling is actually final – the court can reconsider a planned decision. *Id.*

None of these scenarios are applicable here. There are no Virginia rules that suggest that the trial court's ruling was not final; in fact, the only applicable rule states that the ruling was, in fact, final and an acquittal. *See* Va. Sup. Ct. R. 3A:15(c) ("The court *must* enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction.") (emphasis added). There was no suggestion by the trial court that the ruling was not final. Thus the ruling was final and an acquittal. After an acquittal is final the decision cannot be reconsidered – to do so violates the Double Jeopardy Clause of the

U.S. Constitution. That is what happened here, violating Mr. McBride's constitutional rights.

The Virginia Supreme Court's decision is in conflict with *Smith*, 543 U.S. 462. This Court should grant certiorari to reconcile this direct conflict and to correct Virginia's jurisprudence. The issue of finality is expected to occur again and again, and as it now stands Virginia will rule using precedence that directly conflicts with this Court's precedence. This Court needs to address and correct this grave injustice.

CONCLUSION

This Court should grant certiorari in order to bring Virginia's decision into concert with the U.S. Constitution and the law as stated by this Court. The Court should grant certiorari to protect the petitioner's constitutional right not to be subject to double jeopardy. The Court should grant certiorari in order to avoid a grave injustice wrought by the Virginia Supreme Court. For all these reasons and any other that may appear to the Court, the petitioner respectfully requests that the Court grant his petition for writ of certiorari.

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Appendix A: *Commonwealth v. McBride*, 893 S.E.2d 391 (2023)

Appendix B: *McBride v. Commonwealth*, 75 Va. App. 556 (2002)

APPENDIX A

Document: Commonwealth v. McBride, 893 S.E.2d 391

Commonwealth v. McBride, 893 S.E.2d 391

Copy Citation

Supreme Court of Virginia

October 19, 2023, Decided

Record No. 220715

Reporter

893 S.E.2d 391 * | 2023 Va. LEXIS 43 **

COMMONWEALTH OF VIRGINIA v. **DANJUAN** ANTONIO McBRIDE

Prior History: [\[**1\]](#) FROM THE COURT OF APPEALS OF VIRGINIA.

[McBride v. Commonwealth, 75 Va. App. 556, 878 S.E.2d 44, 2022 Va. App. LEXIS 479 \(Oct. 4, 2022\)](#)

Disposition: Reversed and final judgment.

Core Terms

reconsider, records, motion to strike, grant a motion, trial court, double jeopardy, convictions, circuit court, final judgment, introduce, revisit

Case Summary

Overview

HOLDINGS: [1]-[Va. Sup. Ct. R. 3A:15](#) did not preclude the court from reconsidering a motion to strike that was erroneously granted as a verbal announcement from the bench granting a motion to

strike was not a final judgment. Thus, the trial court could have exercised its discretion to permit the Commonwealth to introduce additional evidence concerning another state's court records; [2]- Although the Double Jeopardy Clause imposed limitations on a trial court's authority to reconsider a motion to strike, those limitations did not apply as Virginia law allowed a trial court to reconsider a previously granted motion to strike, the prosecution immediately objected to the trial court's decision to grant the motion to strike, and the trial court promptly reversed itself before defendant presented any evidence or released any of its witnesses.

Outcome

Judgment reversed; final judgment entered for Commonwealth.

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Criminal Law & Procedure > [Trials](#) ▼ > [Motions to Strike Testimony](#) ▼

HN1 [Procedural Due Process, Double Jeopardy](#)

Va. Sup. Ct. R. 3A:15 does not preclude the court from reconsidering a motion to strike that was erroneously granted. As for the Double Jeopardy Clause, it certainly imposes some limitations on a trial court's authority to reconsider a motion to strike. [More like this Headnote](#)

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HN2 [De Novo Review, Conclusions of Law](#)

Review of lower courts' interpretation of the Supreme Court of Virginia Rules is de novo. [More like this Headnote](#)

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HN3 [Legislation, Interpretation](#)

Courts commonly consider background principles when interpreting rules or statutes, even if those principles are not mentioned in the rule or statute. To cite but a few examples, courts rely on the rule of lenity when interpreting a criminal statute, even though the statute does not mention the rule. Courts presume that the legislature did not repeal a statute by implication. Courts also presume that a statute is not to be given retroactive effect unless a contrary legislative intent is manifest. And courts examine a local government's powers to enact an ordinance through the lens of Dillon's Rule.  [More like this Headnote](#)

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HN4 [Courts, Authority to Adjudicate](#)

One of the background principles when interpreting rules or statutes is the recognized authority of a court to reconsider an erroneous or flawed decision. The power to reconsider is often described as an inherent power of a court. The United States Supreme Court has observed that it is a power inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process. The power to decide carries with it the power to reconsider as a necessary adjunct. That power, of course, can be constrained by rules or statutes that limit its timing or scope.  [More like this Headnote](#)

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HN5 [Courts, Rule Application & Interpretation](#)

Rules of evidence and procedure commonly instruct a court that it must do something. Those rules are almost always silent about a court's ability to reconsider. The power to reconsider nevertheless remains present, even if it is not mentioned in the text of the rule.  [More like this Headnote](#)

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Criminal Law & Procedure > [Trials](#) ▾ > [Motions to Strike Testimony](#) ▾

HN6 [Trials, Motions for Acquittal](#)

Va. Sup. Ct. R. 3A:15 is typical of the Supreme Court of Virginia's rules in that it instructs a court to take a particular action without expressly addressing the power of a court to reconsider. The language of [Rule 3A:15](#), which provides that a court must enter a judgment of acquittal if it strikes the evidence, presupposes a final decision granting a motion to strike, not an initial ruling that the court then reconsiderers. A court may misspeak, or it may misapprehend the law or the evidence, and on that basis render a flawed ruling on a motion to strike. When a court has concluded that its earlier ruling on a motion to strike was erroneous or flawed, it may timely reconsider its decision to grant (or deny) a motion to strike, just as it may reconsider other decisions.  [More like this Headnote](#)

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HN7 [Double Jeopardy Protection, Acquittals](#)

The language of [Va. Sup. Ct. R. 3A:15](#) requiring a court to enter an order of acquittal flows from principles of double jeopardy. In pleading double jeopardy, the burden is on the defendant to establish the identity of the offenses. Ordinarily, a defendant will meet this burden by producing the record or transcript of the initial trial. Transcripts are not always prepared, particularly if the defendant pleads guilty. Orders of the court, however, are preserved. [Va. Code Ann. §§ 17.1-124](#) and [16.1-69.55](#). The requirement of [Rule 3A:15](#) that a court shall enter a judgment of acquittal if it strikes the evidence reflecting the judgment of acquittal ensures an accurate record and thus protects a defendant from future jeopardy. It is not meant to cabin the discretion of a judge to promptly reconsider an erroneously granted motion to strike. [More like this Headnote](#)

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HN8 [Appellate Jurisdiction, Final Judgment Rule](#)

It is settled law in Virginia that an order is final when it disposes of the entire action and leaves nothing to be done except the ministerial superintendence of execution of the judgment. A verbal pronouncement from the bench granting a motion to strike is not a final judgement under this longstanding definition. [More like this Headnote](#)

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HN9 [Appellate Jurisdiction, Final Judgment Rule](#)

If a trial court can modify, within time limits, a final order per [Va. Sup. Ct. R. 1.1\(a\)](#), a fortiori it can modify a non-final verbal pronouncement from the bench. [More like this Headnote](#)

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HN10 [Appellate Jurisdiction, Final Judgment Rule](#)

In short, [Va. Sup. Ct. R. 3A:15](#) does not preclude a trial court from timely reconsidering a motion to strike. [More like this Headnote](#)

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[Double Jeopardy](#) ▾

HN11  **Procedural Due Process, Double Jeopardy**

Unlike [Va. Sup. Ct. R. 3A:15](#), the Double Jeopardy Clause does impose restrictions on a court's authority to revisit a granted motion to strike.  [More like this Headnote](#)

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Criminal Law & Procedure > ... > [Double Jeopardy](#) ▾ > [Double Jeopardy Protection](#) ▾ > 

[Multiple Punishments](#) ▾

Criminal Law & Procedure > ... > [Double Jeopardy](#) ▾ > [Double Jeopardy Protection](#) ▾ >

[Convictions](#) ▾

HN12  **Procedural Due Process, Double Jeopardy**

Both the United States Constitution and the Constitution of Virginia contain a Double Jeopardy Clause. [U.S. Const., amend. V](#); [Va. Const., art. I, § 8](#). The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal; it protects against a second prosecution for the same offense after conviction; and it protects against multiple punishments for the same offense. The Clause prevents the State with all its resources and power from making repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.  [More like this Headnote](#)

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[Double Jeopardy](#) ▾

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HN13  **Procedural Due Process, Double Jeopardy**

The Double Jeopardy Clause forecloses reconsideration of a motion for acquittal when the defendant has suffered the possibility of prejudice.  [More like this Headnote](#)

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[Double Jeopardy](#) ▾

HN14  **Procedural Due Process, Double Jeopardy**

The Double Jeopardy Clause does not bar the States from allowing trial judges to reconsider a midtrial grant of a motion to acquit on one or more but fewer than all counts of an indictment. A State may provide for such reconsideration by legislation or by judicial rule, common-law decision, or exercise of supervisory power.  [More like this Headnote](#)

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Criminal Law & Procedure > [Trials](#) ▾ >  [Motions for Acquittal](#) ▾

HN15  **Procedural Due Process, Double Jeopardy**

Once a court enters a judgment of acquittal, even on a flawed legal basis, the defendant cannot be retried under the Double Jeopardy Clause.  [More like this Headnote](#)

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Counsel: For COMMONWEALTH OF VIRGINIA, Appellant: ADELFI, [KATHERINE QUINLAN](#) ▾, (ESQ.), MIYARES, JASON S., (ESQ.).

For MCBRIDE, [DANJUAN](#) ANTONIO, Appellee: BIDERMAN, [DONNA L.](#) ▾, (ESQ.).

Judges: OPINION BY JUSTICE [STEPHEN R. McCULLOUGH](#) ▾.

Opinion by: [STEPHEN R. McCULLOUGH](#) ▾

Opinion

[*392] PRESENT: All the Justices

[*393] OPINION BY JUSTICE [STEPHEN R. McCULLOUGH](#) ▾

This appeal presents the question of whether [Rule 3A:15](#) or the [Double Jeopardy Clause](#) restricts a trial court's authority to reconsider a motion to strike that the court erroneously granted. **HN1**  We conclude that [Rule 3A:15](#) does not preclude the court from reconsidering a motion to strike that was erroneously granted. As for the [Double Jeopardy Clause](#), it certainly imposes some limitations on a trial court's authority to reconsider a motion to strike. Those limitations, however, do not apply here. Consequently, we reverse the judgment of the Court of Appeals.

BACKGROUND

Danjuan Antonio McBride was indicted for possession of cocaine with the intent to distribute, third or subsequent offense, and possession of heroin and Furanyl fentanyl  with the intent to distribute, third

or subsequent offense. Before trial, the Commonwealth filed a motion disclosing its intention to introduce into evidence prior [**2] convictions from Baltimore, Maryland. It sought a pretrial ruling that these convictions were admissible.

At a hearing on the motion, the Commonwealth explained that it requested records from Maryland to establish the defendant's prior convictions, and, in response, it received a disc with approximately 250 pages. The disc was certified by the Maryland State Archives. Defense counsel objected on a number of grounds. The circuit court ruled that the documents were admissible, concluding that they were properly authenticated under Virginia law. The Commonwealth observed that "I just want to make sure that I can introduce additional documents to the jury if there's a question about this being a different person." The circuit court responded, "I guess we will see what comes up."

At a jury trial, the Commonwealth introduced the records into evidence. After the Commonwealth rested, McBride made a motion to strike the evidence, arguing among other things that the Commonwealth failed to establish qualifying prior offenses because the evidence did not prove that the defendant was the person listed on the Maryland records. Defense counsel pointed out that the records were not consistent on a birth [**3] date, and in places listed a different name. The records sometimes list "Tony Brown" as an alias for **Danjuan** McBride, while another record identifies Tony Brown as the defendant. Some records list McBride's birthdate as March 7, 1979, whereas other records list a birthdate of March 7, 1980. The Commonwealth responded that the defendant's name was somewhat unique and that the records contained additional identifiers that linked them to the defendant. In addition, the Commonwealth contended that the discrepancy on the birthdate in the records appeared to be a typographical error, and that the defendant's use of an alias did not change the fact that he was the person identified by the Maryland records.

The circuit court stated that it would grant the motion to strike with respect to whether the Commonwealth had established the defendant's two prior convictions. The Commonwealth immediately responded that it had a "strong exception to that ruling." It argued that it had relied on the trial court's pre-trial ruling that connected the Maryland records to the defendant, that the admissibility of the records was an issue for the court rather than the jury, and that the records would not be [**4] admissible into evidence unless they were sufficient to raise a jury question about the defendant's identity as the person who was convicted of the prior offenses in Maryland. The Commonwealth noted that it could not introduce McBride's entire criminal record, but that additional records would further establish that McBride was the person identified in the Maryland records. The court then stated that it would allow the prosecution to reopen its case to address the issue. Defense counsel objected.

The Commonwealth proceeded to introduce an additional court record — a recognizance form from Fairfax County that contained the same address as the address listed on the Maryland records. The prosecution [*394] then rested. The circuit court explained that there appeared to be a "genuine misunderstanding" about the prior records. The court then stated that it was reversing itself on the motion to strike, reasoning that there was sufficient evidence in the Maryland records for the jury to conclude that the defendant was the person listed in those records. At that point, the defendant had not presented any evidence or taken any other steps such as releasing witnesses.

The jury found the defendant guilty [**5] of both charges.

McBride appealed to the Court of Appeals. By published opinion, a panel of that court reversed the convictions. The Court of Appeals concluded that, once a court grants a motion to strike, [Rule 3A:15](#) requires the court to enter an order of acquittal and the court is foreclosed from reconsidering its decision. *McBride v. Commonwealth*, 75 Va. App. 556, 572-77, 878 S.E.2d 44 (2022). We awarded the Commonwealth an appeal from this decision.

ANALYSIS

I. [RULE 3A:15](#) DOES NOT PREVENT A COURT FROM RECONSIDERING ITS RULING ON A MOTION TO STRIKE.

HN2 We review the Court of Appeals' interpretation of the rules of this Court *de novo*. *LaCava v. Commonwealth*, 283 Va. 465, 471, 722 S.E.2d 838 (2012). At the time of McBride's trial, [Rule 3A:15](#) provided in relevant part:

Motion to Strike Evidence. — After the Commonwealth has rested its case or at the conclusion of all the evidence, the court on motion of the accused *may* strike the

Commonwealth's evidence if the evidence is insufficient as a matter of law to sustain a conviction

. . .

Judgment of Acquittal or New Trial. — The court shall enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. The court shall grant a new trial if it sets aside the verdict for any other reason. 

HN3 In construing [\[**6\]](#) this rule, we note that courts commonly consider background principles when interpreting rules or statutes, even if those principles are not mentioned in the rule or statute. To cite but a few examples, we rely on the rule of lenity when interpreting a criminal statute, even though the statute does not mention the rule. *Morgan v. Commonwealth*, 301 Va. 476, 483, 881 S.E.2d 795 (2022). We presume that the legislature did not repeal a statute by implication. *Sexton v. Cornett*, 271 Va. 251, 257, 623 S.E.2d 898 (2006). We also presume that a statute is not to be given retroactive effect "unless a contrary legislative intent is manifest." *Berner v. Mills*, 265 Va. 408, 413, 579 S.E.2d 159 (2003). And we examine a local government's powers to enact an ordinance through the lens of Dillon's Rule. *City of Richmond v. Confrere Club of Richmond, Virginia, Inc.*, 239 Va. 77, 79-80, 387 S.E.2d 471, 6 Va. Law Rep. 1020 (1990).

HN4 One of these background principles is the recognized authority of a court to reconsider an erroneous or flawed decision. *Lewis v. Commonwealth*, 295 Va. 454, 467 n.3, 813 S.E.2d 732 (2018) (trial court may reconsider its judgment of conviction "as it may reconsider any ruling" provided that it does so within the time permitted by the rules); see also *Everett v. Tawes*, 298 Va. 25, 35, 833 S.E.2d 876 (2019) (noting the power of a court to correct interlocutory orders). The power to reconsider is often described as an inherent power of a court. The United States Supreme Court has observed that "[i]t is a power inherent in every court of justice so long as it retains control of the subject-matter [\[**7\]](#) and of the parties, to correct that which has been wrongfully done by virtue of its process." *United States v. Morgan*, 307 U.S. 183, 197, 59 S. Ct. 795, 83 L. Ed. 1211 (1939) (cleaned up).  The power to decide [\[*395\]](#) carries with it the power to reconsider as a necessary adjunct. That power, of course, can be constrained by rules or statutes that limit its timing or scope.

HN5 Rules of evidence and procedure commonly instruct a court that it must do something. Those rules are almost always silent about a court's ability to reconsider. The power to reconsider nevertheless remains present, even if it is not mentioned in the text of the rule.

HN6 [Rule 3A:15](#) is typical of our rules in that it instructs a court to take a particular action without expressly addressing the power of a court to reconsider. The language of [Rule 3A:15](#), which provides that a court "must enter a judgment of acquittal if it strikes the evidence," presupposes a final decision granting a motion to strike, not an initial ruling that the court then reconsider. A court may misspeak, or it may misapprehend the law or the evidence, and on that basis render a flawed ruling on a motion to strike. When a court has concluded that its earlier ruling on a motion to strike was erroneous or flawed, it may timely reconsider its decision [\[**8\]](#) to grant (or deny) a motion to strike, just as it may reconsider other decisions.

HN7 The language of the Rule requiring a court to enter an order of acquittal flows from principles of Double Jeopardy. "[I]n pleading double jeopardy, the burden is on the defendant to establish the identity of the offenses." *Low v. Commonwealth*, 11 Va. App. 48, 50, 396 S.E.2d 383 (1990). Ordinarily, a defendant will meet this burden by producing "the record or transcript of the initial trial." *Id.* Transcripts are not always prepared, particularly if the defendant pleads guilty. Orders of the court, however, are preserved. See [Code § 17.1-124](#) (addressing circuit court order books); [Code § 16.1-69.55](#) (addressing general district court retention of records). The requirement of [Rule 3A:15](#) that a court "shall enter a judgment of acquittal if it strikes the evidence reflecting the judgment of acquittal" ensures an accurate record and thus protects a defendant from future jeopardy. It is not meant to cabin the discretion of a judge to promptly reconsider an erroneously granted motion to strike.

HN8 It is settled law in Virginia that an order is final when it "disposes of the entire action and leaves nothing to be done except the ministerial superintendence of execution of the judgment." *Super Fresh Food Mkts. of Va. Inc. v. Ruffin*, 263 Va. 555, 560, 561 S.E.2d 734 (2002); see also [Rule 1:1\(b\)](#) ("Unless otherwise [\[**9\]](#) provided by rule or statute, a judgment, order, or decree is final if it disposes of the entire matter before the court, including all claim(s) and all cause(s) of action against all parties, gives all the relief contemplated, and leaves nothing to be done by the court except the ministerial execution of the court's judgment, order, or decree."). A verbal pronouncement from the bench granting a motion to strike is not a final judgement under this longstanding definition. Moreover, under [Rule 1:1\(a\)](#):

All final judgments, orders, and decrees, irrespective of terms of court, remain under the control of the trial court and may be modified, vacated, or suspended for twenty-one days

after the date of entry, and no longer The date of entry of any final judgment, order, or decree is the date it is signed by the judge either on paper or by electronic means in accord with [Rule 1:17](#).

HN9 If a trial court can modify, within time limits, a final order, *a fortiori* it can modify a non-final verbal pronouncement from the bench.

[*396] HN10 In short, [Rule 3A:15](#) does not preclude a trial court from timely reconsidering a motion to strike. Furthermore, here the trial court could exercise its discretion to permit the Commonwealth to introduce [\[**10\]](#) additional evidence concerning the Maryland court records. See, e.g., *Hargraves v. Commonwealth*, 219 Va. 604, 608, 248 S.E.2d 814 (1978).

HN11 Unlike [Rule 3A:15](#), however, the **Double Jeopardy Clause** does impose restrictions on a court's authority to revisit a granted motion to strike. We turn to that question next.

II. THE DOUBLE JEOPARDY CLAUSE RESTRICTS A COURT'S AUTHORITY TO RECONSIDER A MOTION TO STRIKE BUT THOSE STRICTURES ARE NOT IMPLICATED HERE.

HN12 Both the United States Constitution and the Constitution of Virginia contain a **Double Jeopardy Clause**. [U.S. Const., amend. V](#); [Va. Const., art. I, § 8.](#)  The **Double Jeopardy Clause** "protects against a second prosecution for the same offense after acquittal; it protects against a second prosecution for the same offense after conviction; and it protects against multiple punishments for the same offense." *Stephens v. Commonwealth*, 263 Va. 58, 62, 557 S.E.2d 227 (2002) (cleaned up and citations omitted). The Clause prevents "the State with all its resources and power" from making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 188, 78 S. Ct. 221, 2 L. Ed. 2d 199, 77 Ohio Law Abs. 202 (1957).

The United States Supreme Court addressed the question of a court's power to revisit an earlier decision to acquit in *Smith v. Massachusetts*, 543 U.S. 462, 125 S. Ct. 1129, 160 L. Ed. 2d 914 (2005). In *Smith*, after the prosecution had [\[**11\]](#) presented its evidence, a Massachusetts court originally granted a motion for an acquittal on one particular charge. *Id. at 465*. At that point, "[t]he prosecutor did not make or reserve a motion for reconsideration, or seek a continuance that would allow him to provide the court with favorable authority." *Id. at 470*. The defense then presented its case on the defendant's other charges and rested. *Id. at 465*. Afterwards, during a recess that occurred before closing arguments, the prosecution presented the court with additional authority showing that the court had erred in granting the motion for acquittal on the particular charge that had been dismissed. *Id.* The trial court reversed its judgment of acquittal on that charge and the jury convicted the defendant on that charge. *Id.*

In determining whether the trial court's reconsideration of its earlier acquittal violated the prohibition against double jeopardy, the Supreme Court concluded that, under Massachusetts law, the court's ruling granting the motion for acquittal was final, i.e., the trial court could not, as a matter of state law, reconsider its decision to grant the motion for acquittal. *Id. at 470*. The Court acknowledged that "state law may prescribe that a judge's [\[**12\]](#) midtrial determination of the sufficiency of the State's proof can be reconsidered." *Id.* **HN13** The Court further explained that the **Double Jeopardy Clause** forecloses reconsideration of a motion for acquittal when the defendant has suffered the possibility of prejudice. *Id. at 471-72*. The possibility of prejudice existed in *Smith* because the defendant had presented his evidence. *Id.*

The Supreme Court in *Smith* was closely divided. A four Justice dissent, authored by Justice Ginsburg, argued that the defendant's double jeopardy rights were not violated by the trial court's decision to reconsider. *Id. at 475-80*. Regardless of this disagreement, however, as the dissent noted, the majority and the dissent unanimously agreed that **HN14** the **Double Jeopardy Clause** does not "bar the States from allowing trial judges to reconsider a midtrial grant of a motion to acquit on one or more but fewer than all counts of an indictment." *Id. at* **[*397]** 475. There was also no dispute between the majority and the dissent that "[a] State may provide for such reconsideration . . . by legislation or by judicial rule, common-law decision, or exercise of supervisory power." *Id.*

In this instance, Virginia law allows a trial court to reconsider a previously granted motion to strike. Under Virginia law, the circuit court's [\[**13\]](#) verbal pronouncement to grant the motion to strike was not final. The circuit court retained the authority to revisit its earlier ruling, so long as doing so did not offend

Double Jeopardy. Moreover, the prosecution here did what the prosecution in *Smith* had not done, which is to immediately object to the trial court's decision to grant the motion to strike. In this case, the trial court promptly reversed itself, before the defendant presented any evidence or released any of its witnesses, further distinguishing this case from *Smith*. The double jeopardy bar does not apply here.

Evans v. Michigan, 568 U.S. 313, 133 S. Ct. 1069, 185 L. Ed. 2d 124 (2013), cited by the defendant, does not compel a different outcome. The issue in that case was "whether retrial is barred when a trial court grants an acquittal because the prosecution had failed to prove an 'element' of the offense that, in actuality, it did not have to prove." *Id.* at 317. **HN15** The United States Supreme Court answered that question in the affirmative, holding that once a court enters a judgment of acquittal, even on a flawed legal basis, the defendant cannot be retried. *Id.* at 330. The Court explained that its decision was rooted in existing precedent. The Court expressly declined the invitation to revisit past precedent, including [**14] its prior decision in *Smith v. Massachusetts*. See *Evans*, 568 U.S. at 318, 327-28. In the case before us, the defendant is not being subjected to a retrial. Rather, the issue before us involves the power of a trial court, as a matter of state law, to revisit an erroneous resolution of a motion to strike and at what point such a reconsidered ruling might offend Double Jeopardy. *Evans* does not purport to address that issue because it was not before the Court. Instead, *Smith v. Massachusetts* provides the rule of decision on the double jeopardy aspect of this case.

In the present case, the trial court promptly reconsidered its granting of a motion to strike, and it did so before the defendant presented any evidence or altered his strategy by, for example, releasing witnesses. Consequently, the defendant suffered no Double Jeopardy violation. **5**

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals is reversed, and final judgment is entered for the Commonwealth.

Reversed and final judgment.

Footnotes

1

Furanylfentanyl is a derivative of the synthetic opioid, Fentanyl. Fentanyl is 80 to 100 times more potent than morphine, and Furanylfentanyl is slightly less potent than Fentanyl.

Commonwealth v. Mulkin, 2020 PA Super 30, 228 A.3d 913, 915 n.5 (Pa. Super. Ct. 2020).

2

After McBride's trial, this Court amended a number of rules, including **Rule 3A:15**, to replace the word "shall" with the word "must" as part of an effort to clarify the use of the word "shall." The change was intended as a clarifying amendment and does not alter the meaning of the rules.

3

State courts have echoed this view of judicial power. See, e.g., *Steele v. Stonington*, 225 Conn. 217, 622 A.2d 551, 553 n.4 (Conn. 1993) ("[I]t is the inherent authority of every court, as long as it retains jurisdiction, to reconsider a prior ruling If a court is not convinced that its initial ruling is correct, then in the interests of justice it should reconsider the order, provided it retains jurisdiction over the subject matter and the parties."); *People v. Mink*, 141 Ill. 2d 163, 565 N.E.2d 975, 978, 152 Ill. Dec. 293 (Ill. 1990) ("A court in a criminal case has inherent power to reconsider and correct its own rulings, even in the absence of a statute or rule granting it such authority."); *Melnick v. State Farm Mut. Auto. Ins. Co.*, 1988- NMSC 012, 106 N.M. 726, 749

P.2d 1105, 1107 (N.M. 1988) (a trial court "has the inherent authority to reconsider its interlocutory orders, and it is not the duty of the trial court to perpetuate error when it realizes it has mistakenly ruled"); *State v. Davis*, 407 Wis. 2d 783, 991 N.W.2d 491, 498 (Wis. 2023) ("[I]t is firmly established in Wisconsin law that a circuit court has the inherent authority to reconsider its own rulings during ongoing proceedings.").

4

The scope of the Double Jeopardy provision of the Constitution of Virginia is not at issue in this case.

5

Other courts have reached this conclusion. See *United States v. Hill*, 643 F.3d 807, 865-67 (11th Cir. 2011) (holding that jeopardy did not attach when the district court orally granted a motion for judgment of acquittal and then reversed its ruling after a lunch break); *Quintanilla v. State*, 496 S.W.3d 861, 867 (Tex. Ct. App. 2016) ("Because the trial court reconsidered its oral ruling and denied the motion for directed verdict before any further trial proceedings took place, we conclude that no double-jeopardy violation occurred.").

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APPENDIX B

Document: McBride v. Commonwealth, 75 Va. App. 556

McBride v. Commonwealth, 75 Va. App. 556

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Court of Appeals of Virginia

October 4, 2022, Decided

Record No. 1354-21-4

Reporter

75 Va. App. 556 * | 878 S.E.2d 44 ** | 2022 Va. App. LEXIS 479 ***

DANJUAN ANTONIO MCBRIDE v. COMMONWEALTH OF VIRGINIA

Subsequent History: Decision reached on appeal by [Commonwealth v. McBride, 2023 Va. LEXIS 7 \(Va., Feb. 21, 2023\)](#)

Reversed by [Commonwealth v. McBride, 2023 Va. LEXIS 43 \(Va., Oct. 19, 2023\)](#)

Prior History: [\[***1\]](#) FROM THE CIRCUIT COURT OF FAIRFAX COUNTY. [Richard E. Gardiner](#) ▾, Judge.

Disposition: Reversed and remanded.

Core Terms

trial court, grant a motion, motion to strike, documents, additional evidence, records, reopen, present evidence, case-in-chief, deny a motion, prior conviction, written order, convicted, enter a judgment, introduce, parties, discretion of the trial court, reduce to writing, circuit court, birth date, authentic, objected, offenses

Case Summary

Overview

HOLDINGS: [1]-Defendant preserved his arguments for appeal by objecting to the court's decision to allow the Commonwealth to put on additional evidence after granting the motion to strike; [2]-Under [Va. Sup. Ct. R. 3A:15\(c\)](#), the trial court erred by not entering a judgment of acquittal after it struck the Commonwealth's evidence where, after hearing argument from the parties and ruling that the evidence was insufficient, [Rule 3A:15\(c\)](#) required the court to enter a corresponding judgment of acquittal; [3]-That the judgment granting defendant's motion to strike was not reduced to writing did not change the outcome.

Outcome

Judgment reversed and remanded.

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Criminal Law & Procedure > [Trials](#) ▾ > [Motions to Strike Testimony](#) ▾

HN1 [Trials, Judicial Discretion](#)

Under [Va. Sup. Ct. R. 3A:15](#) and prior caselaw, a trial judge has broad discretion over whether to grant a defendant's motion to strike. But once a court grants such a motion, ruling that the evidence presented was insufficient, the court may not then allow additional evidence to be presented and change its ruling based on that added evidence.  [More like this Headnote](#)

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HN2 [Intent to Distribute, Elements](#)

A charge of possessing a controlled substance with the intent to distribute, third offense, carries significant mandatory penalties under [Va. Code Ann. § 18.2-248](#).  [More like this Headnote](#)

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HN3 [Standards of Review, Abuse of Discretion](#)

In reviewing these errors, the appellate court applies an abuse of discretion standard. The admissibility of evidence is within the discretion of the trial court, and an appellate court will not reject such decision absent an abuse of discretion. This general principle covers not only what is admitted into evidence, but also when something is admitted into evidence. It has long been the rule that the order of proof is a matter within the sound discretion of the trial court and not reversible unless this discretion has been abused. By definition, however, a trial court abuses its discretion when it makes an error of law. As a question of law, the lower court's interpretation of [Va. Sup. Ct. R. 3A:15](#) requires de novo review.  [More like this Headnote](#)

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HN4 [Procedural Matters, Briefs](#)

[Va. Sup. Ct. R. 5A:18](#) provides that no ruling of the trial court will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the appellate court to attain the ends of justice. But [Rule 5A:18](#) does not prohibit reliance on statutes or cases not presented to the trial court to support, on appeal, a position otherwise adequately presented at trial. Nor does [Rule 5A:18](#) prevent the appellate court, on its own initiative, from relying on statutory or judicial authority that was not presented to the trial court or referred to in the briefs submitted by the parties.  [More like this Headnote](#)

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[Presumption of Innocence](#) ▾

HN5 [Particular Instructions, Presumption of Innocence](#)

The presumption of innocence is a presumption so strong that not only is an accused entitled to the benefit of it, but if the case be a doubtful one, this presumption is always sufficient to turn the scale in his favor. Girded with this presumption, the Constitution protects a defendant from conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt. The Supreme Court explained that a meaningful opportunity to defend, if not the right to a trial itself, presumes that a total want of evidence to support a charge will conclude the case in favor of the accused.  [More like this Headnote](#)

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HN6 [Burdens of Proof, Prosecution](#)

Because the prosecution bears the burden of proving the elements of an offense beyond a reasonable doubt, the vast majority of jurisdictions have not chosen to force the defendant to await

review of the sufficiency of the evidence until after the jury reaches its decision. That any judicial system should encourage litigants to raise objections at the earliest rather than the latest possible time seems self-evident.  [More like this Headnote](#)

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Trials, Motions for Acquittal

In Virginia, a defendant tests the sufficiency of the evidence to sustain a conviction by making a motion to strike. After the Commonwealth has rested its case or at the conclusion of all the evidence, the court on motion of the accused may strike the Commonwealth's evidence if the evidence is insufficient as a matter of law to sustain a conviction. Judgment of Acquittal or New Trial. The court shall enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. The court shall grant a new trial if it sets aside the verdict for any other reason, [Va. Sup. Ct. R. 3A:15\(a\), \(c\)](#).  [More like this Headnote](#)

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Trials, Motions for Acquittal

Thus, the newly amended [Va. Sup. Ct. R. 3A:15\(c\)](#) merely clarifies what was already the law. A court has discretion over whether to grant a motion to strike—the court on motion of the accused may strike the Commonwealth's evidence if the evidence is insufficient. But upon granting the motion, a court has to enter a judgment of acquittal—the court must enter a judgment of acquittal if it strikes the evidence. The appellate court presumes that the difference in language was intentional, where one subsection of a statute uses the word shall, and a different subsection of the statute uses may. The same commonsense principle applies in interpreting the Rules of Court.  [More like this Headnote](#)

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Trials, Judicial Discretion

Many cases affirm the broad discretion trial courts have over both the presentation of evidence at trial and whether it is appropriate, under all the circumstances, to grant a defendant's motion to

strike because the evidence presented was insufficient. The Virginia Supreme Court has repeatedly rejected the argument that evidence presented on rebuttal was improper because it belonged in the case-in-chief, instead holding that the order in which proof is introduced is a matter largely in the discretion of the trial court. This discretion extends to whether a trial court allows a defendant to introduce additional evidence after the defense had rested its case. When all the testimony in the trial of a case has been concluded and the witnesses for the respective parties have been excused from their attendance upon court, whether the court will allow the introduction of other testimony is a question addressed to the sound discretion of the trial judge. Likewise, a trial court has the discretion to permit the Commonwealth to reopen its case-in-chief and present additional evidence.

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HN10 [Trials, Judicial Discretion](#)

Hargraves reinforces a trial court's discretion not only to allow for additional evidence to be presented after a case is otherwise closed, but also to deny a motion to strike even when the court believes the evidence may be insufficient.  [More like this Headnote](#)

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HN11 [Trials, Motions to Strike Testimony](#)

Va. Sup. Ct. R. 3A:15(a) permits a court to deny a motion to strike—even if the court believes the evidence to be insufficient. A trial court needs discretion on how to manage a trial. But there is a limit to this discretion. Rule 3A:15(c) draws a line in the sand when a trial court, in its vast discretion, decides to rule that the evidence is insufficient by granting a motion to strike. The language of the rule is clear: The court must enter a judgment of acquittal if it strikes the evidence.

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HN12 [Double Jeopardy Protection, Acquittals](#)

That a court must enter a written judgment of acquittal after ruling the evidence is insufficient is not only required by Va. Sup. Ct. R. 3A:15(c), but also necessarily follows from the nature of a judgment of acquittal—apart from whatever written order may follow. The Supreme Court has defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense. Once the court has made a factual finding that necessarily establishes the criminal defendant's lack of criminal culpability the defendant has been acquitted. Likewise, an acquittal includes a ruling by the court that the evidence is insufficient to convict. This is true even if the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles that affect the accuracy of that determination. Once a court has announced that a defendant is acquitted based on the evidence before it, entry of the judgment of acquittal is merely the evidence of the same. The rendition of a judgment must be distinguished from its entry on the court records.  [More like this Headnote](#)

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HN13  [Trials, Motions to Strike Testimony](#)

Va. Sup. Ct. R. 3A:15(c)'s bright-line rule is unsurprising in a criminal case given the constitutional implications at play.  [More like this Headnote](#)

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HN14  [Courts, Authority to Adjudicate](#)

Indeed, a judgment is the determination by a court of the rights of the parties, as those rights presently exist, upon matters submitted to it in an action or proceeding and a written order or decree endorsed by the judge is but evidence of what the court has decided.  [More like this Headnote](#)

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HN15  [Sentencing, Multiple Convictions](#)

The Virginia Supreme Court has observed that in the trial of a case the court gives many orders and commands which are not reduced to writing and that such orders are lawful orders and directions of the court. For this reason, a defendant who was tried for two separate offenses of assault and battery during a bifurcated trial on the same day could be convicted under a repeat offender statute during the second trial. The conviction for the first offense, stated orally by the judge, was a final judgment that established a predicate offense during the second trial. Likewise, a trial court that orally pronounces a defendant guilty loses the authority to later defer that disposition, even if it has not yet entered a written conviction order.  [More like this Headnote](#)

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HN16  [Appellate Jurisdiction, Final Judgment Rule](#)

Just as an oral judgment of guilt is final upon the pronouncement, an oral judgment of acquittal is final when a court holds the evidence is insufficient to sustain a conviction.  [More like this Headnote](#)

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HN17  [Trials, Motions to Strike Testimony](#)

When a defendant moves to strike the evidence as insufficient, a trial court has significant discretion about how to proceed. Even if the court agrees the evidence is insufficient, [Va. Sup. Ct. R. 3A:15\(a\)](#) does not require the court to grant the motion. The court can take a recess to consider the evidence, the court can take the motion under advisement, the court can opine that the evidence is thin, or the court can allow the Commonwealth to put on additional evidence. What the court cannot do under [Rule 3A:15\(c\)](#) is grant the motion to strike, ruling that the evidence is insufficient, then allow additional evidence to be presented and enter a different ruling based on that added evidence.

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Criminal Law & Procedure > [Counsel](#) ▾ > [Prosecutors](#) ▾

HN18  [Particular Instructions, Lesser Included Offenses](#)

When an appellant successfully challenges the sufficiency of the evidence on some (but not all) aspects of his conviction, the appellate court must determine if the proven elements of the original charge qualify as a lesser-included offense. If so, the appropriate remedy on appeal is a reversal of the conviction on the greater charge and a remand of the lesser charge for retrial—assuming the Commonwealth, in its prosecutorial discretion, chooses to go forward on the lesser charge.  [More like this Headnote](#)

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Counsel: [Donna L. Biderman](#) ▾ (Law Office of Donna L. Biderman, PLLC, on briefs), for appellant.

[Katherine Quinlan Adelfio](#) ▾, Assistant Attorney General (Jason S. Miyares, Attorney General, on brief), for appellee.

Judges: Present: Judges O'Brien, [Lorish](#) ▾ and Senior Judge [Annunziata](#) ▾. OPINION BY JUDGE [LISA M. LORISH](#) ▾.

Opinion by: [LISA M. LORISH](#) ▾

Opinion

[\[**46\]](#) [\[*562\]](#) OPINION BY JUDGE [LISA M. LORISH](#) ▾

After granting [Danjuan](#) McBride's motion to strike—ruling that the evidence presented in the Commonwealth's case-in-chief [\[**47\]](#) was insufficient—the trial court allowed the Commonwealth to reopen its case and submit additional evidence. Based on that added evidence, the court "reversed" itself

and ruled that the cumulative evidence was now sufficient and overruled McBride's motion to strike. Only this later order was reduced to writing. We find the trial court erred under **Rule 3A:15(c)** by not entering an order of acquittal after the **[*563]** court elected to grant the motion to strike based on the evidence presented in the Commonwealth's case-in-chief. **HN1** Under **Rule 3A:15** and our prior caselaw, a trial judge has broad discretion over whether to grant a defendant's motion to strike. But once a court grants **[***2]** such a motion, ruling that the evidence presented was insufficient, the court may not then allow additional evidence to be presented and change its ruling based on that added evidence.

BACKGROUND

McBride was tried by jury in the Circuit Court of Fairfax County on two counts of possessing a controlled substance with the intent to distribute ("PWID") under **Code § 18.2-248**. The indictment alleged that McBride was previously convicted of a substantially similar offense on two prior occasions. **HN2** A charge of PWID, third offense, carries significant mandatory penalties under **Code § 18.2-248**.

Before trial, the Commonwealth filed a motion *in limine* asking the court to "[p]ermit the admission of two certified prior convictions from Baltimore City Circuit Court for possession with intent to distribute . . . cocaine." The court took up this motion *in limine* the morning of trial and confirmed that the Commonwealth was asking for "some kind of decision or declaration now that these [documents related to the prior convictions] are admissible." The Commonwealth agreed, adding that "this is not an issue for the Jury," and explaining that the court should decide the issue before voir dire and opening arguments because if the documents **[***3]** were "not admitted, then the charge is not a third or subsequent [distribution] and that shouldn't be mentioned" to the jury.

McBride objected to the admissibility of the documents, arguing that they were not "certified or . . . authentic cop[ies] of an order or of a conviction," and instead appeared to be from a later probation violation. The Commonwealth argued that the document was a sentencing order and admissible **[*564]** under **Code §§ 8.01-389** and **8.01-390**. **1** As the argument progressed, the court noted differences in names and aliases on some of the documents. McBride also pointed out a discrepancy in birth years, as well as a lack of case numbers tying the various records together. **2**

The court took two recesses during this pretrial hearing, considering additional records offered by the Commonwealth as well as the Maryland code sections pertaining to the drug offenses. During this lengthy hearing, the Commonwealth voiced its concern that it was "not comfortable starting trial and having jeopardy attached if there's an issue with these priors."

Ultimately, the court ruled that it would admit the documents because they were authentic and admissible as records of a judicial proceeding under **Code § 8.01-389**. The court explained, "I'm **[***4]** satisfied that these documents are what they purport to be, and are **[**48]** therefore probative." After detailing the documents for the record, the court explained again that the documents were "probative of whether the Defendant has been previously convicted."

After the ruling, the Commonwealth said:

[*565] [I]f there is a question about the date of birth that's list[ed] on here, I have the Defendant's criminal record, but there are also those documents in the file. I just want to make sure that I can introduce additional documents to the Jury if there's a question about this being a different person. I don't know if that's going to be raised to the Jury or if that was just an argument for Court in this . . . pre-trial motion.

The court responded, "I guess we will see what comes up."

During the trial, the Commonwealth presented evidence about the stop and arrest of McBride from several police officers, who testified that they found McBride in possession of individually packaged vials of cocaine and heroin containing furanyl fentanyl. The Commonwealth also called as a witness the lab technician who tested the recovered drugs. Finally, the Commonwealth introduced the documents from Maryland that the court **[***5]** had ruled were admissible in the motion *in limine* hearing earlier that day. Then the Commonwealth rested, and the jury was dismissed for the evening.

The next morning, outside the presence of the jury, McBride moved to strike the Commonwealth's evidence as insufficient to establish that the two prior convictions were, in fact, McBride's. McBride argued the Commonwealth had thus failed to establish a necessary element of either PWID, third offense. In support, McBride pointed to the fact that the records were from a Maryland court, for someone (sometimes) identified as "McBride" (but also as Tony Brown) who had a Maryland address, but

that there had been no evidence that McBride had any connection to Maryland at all—let alone that he had ever lived there and was the same "McBride"/"Tony Brown." McBride noted that none of the Commonwealth's testimonial or documentary evidence tied the McBride on trial to the person referenced in the Maryland documents through a birth date, social security number, DMV records, photos, fingerprints, or any other identifying information.

The Commonwealth responded that there was no question "that this is the same individual in these priors" and expressed [***6] concern "about the argument being raised" because "it's an [*566] appropriate argument for the Court," but not "an appropriate argument for the jury." The Commonwealth continued that the "Court is the gatekeeper of his priors, and his priors would not be admissible if it wasn't the same Defendant," and the records involved someone with the same "somewhat unique name." The Commonwealth also proffered that McBride had the same date of birth as the person in the Maryland records  and that McBride did, in fact, live in Baltimore. The court then ruled:

I'm going to grant the motion to strike in part and deny it in part. I'm going to grant it as to the Commonwealth having proven that the Defendant has two prior convictions. I agree with [McBride's counsel] that there would have to be some more evidence on the record tying this Defendant, other than by the same name. We had no evidence, as [McBride's counsel] points out, as to the date of birth, photograph, mug shot, fingerprint, something tying them together. So I'll grant the motion to strike with regard to the two priors. 

The Commonwealth immediately noted an exception to the ruling and argued that "the Commonwealth relied on the Court's pretrial [***7] ruling that these [records are] connected to the Defendant," which is why it had not "put on any evidence about the Defendant's identity[] [b]ecause this is an issue for the trial [**49] court and not for the jury [and] [i]t is the Commonwealth's understanding that this is a legal issue and not a factual issue." The court responded, "I admitted them because I found them to be authentic. And they appeared to be tied to this Defendant. But I think the burden was on the Commonwealth to then tie them to the Defendant . . . by showing some kind of identification for this gentleman that this was him." The Commonwealth replied that it thought the court had ruled [*567] that "these were admissible as Mr. McBride's priors[] [a]nd that the jury was being informed that these were the Defendant's priors." (Emphasis added).

The court then said, "I concluded that they were authentic, and they appeared to be related to this Defendant. But I think the burden is on you now. Do you still have the officers here?" After the Commonwealth confirmed a detective was still there, the court concluded, "Well, since it was a misunderstanding I'm going to allow you to reopen to call one witness."

McBride's counsel immediately [***8] objected, arguing that:

I wouldn't have made the whole argument that I made if I had known that [the Commonwealth] could call somebody afterwards. That's what the motion to strike is This isn't even a jurisdictional, or venue, or something like that. This is one of the elements of [the] offense, and now I've told [the Commonwealth] how it is that [it] failed to do [prove] of the elements of [the] offense, and then [the Commonwealth] gets a chance to come up and correct it.

The Commonwealth again responded that "in introducing certified priors . . . it's a legal determination from the Court that these are authentic, that they apply to the Defendant, and that's an issue for the Court to decide; not for the jury." The Commonwealth further argued it was "prejudiced by this misunderstanding of the Court's ruling."

The parties and court continued to debate what additional evidence the Commonwealth could introduce to solve the problem, with McBride's counsel objecting to each suggestion. McBride's counsel argued that "I object because that's what the motion to strike, that's what you do. You do a motion to strike, *if the Judge says, 'Okay. Yes. I grant the motion to strike,'* that it [***9] was then improper for the court to allow the Commonwealth to "call different witnesses and put in different evidence" to correct the error. (Emphasis added). The court agreed McBride was "ordinarily right" but found that "there was apparently a genuine misunderstanding, and I'm going to give the Commonwealth the benefit of that."

[*568] Ultimately, the Commonwealth proposed introducing as a party opponent statement the bail recognizance form McBride had signed after his arrest for the offenses he was currently on trial for. This form listed McBride's current address as the same address in Maryland that was listed on the paperwork from the Commonwealth's prior conviction exhibits. Over McBride's continuing objection, the court admitted the recognizance form **5** and then held:

[W]ith regard to my earlier decision on the motion to strike, I'm going to reverse myself with regard to granting the motion to strike in part on the basis that looking at the evidence in the light most favorable to the Commonwealth, there is evidence in the record from which a reasonable jury could determine that these prior commitment records are for this Defendant. And so the motion to strike is denied in whole.

The court **[***10]** also confirmed that McBride could argue to the jury that he was not the person identified in the Maryland documents.

The jury ultimately found McBride guilty of both counts of PWID, third offense, **6** and recommended a sentence at the mandatory minimum of ten years imprisonment for each of the two counts. After trial, the court entered **[**50]** a signed order summarizing the second day of trial and the jury's verdicts, which included: "Counsel for the Defendant moved the Court to strike the evidence presented by the Commonwealth. The Court, after hearing argument, denied the motion."

The court sentenced McBride to two consecutive terms of ten years of imprisonment, for a total of twenty years, the statutory mandatory minimum required for two PWID offenses, third conviction.

[*569] ANALYSIS

McBride raises two overlapping issues in this appeal. First, he argues that the circuit court erred by reversing its ruling on the motion to strike and allowing the Commonwealth to reopen its case-in-chief and introduce additional evidence. Second, he argues that the circuit court erred by failing to enter a judgment of acquittal after granting his motion.

HN3 In reviewing these errors, we apply an abuse of discretion standard. **[***11]** The "'admissibility of evidence is within the discretion of the trial court,' and an appellate court will not reject such decision absent an 'abuse of discretion.'" *Williams v. Commonwealth*, 71 Va. App. 462, 487, 837 S.E.2d 91 (2020) (quoting *Tirado v. Commonwealth*, 296 Va. 15, 26, 817 S.E.2d 309 (2018)). This general principle covers not only *what* is admitted into evidence, but also *when* something is admitted into evidence. It has long been the rule that "the order of proof is a matter within the sound discretion of the trial court" and not reversible unless "this discretion has been abused." *Hargraves v. Commonwealth*, 219 Va. 604, 608, 248 S.E.2d 814 (1978). "[B]y definition,' however, a trial court 'abuses its discretion when it makes an error of law.'" *Williams*, 71 Va. App. at 487 (alteration in original) (quoting *Coffman v. Commonwealth*, 67 Va. App. 163, 166, 795 S.E.2d 178 (2017)). As a question of law, the lower court's interpretation of Rule 3A:15 requires *de novo* review. See *Brown v. Commonwealth*, 279 Va. 210, 217, 688 S.E.2d 185 (2010).

A. McBride preserved his arguments for appeal by objecting to the court's decision to allow the Commonwealth to put on additional evidence after granting the motion to strike.

McBride relies on many sources to support his argument that the court erred by reopening the Commonwealth's case-in-chief after granting his motion to strike, including the *Double Jeopardy Clause of the United States Constitution*, Rule 3A:15, and various caselaw. The Commonwealth alleges McBride procedurally defaulted any argument about the constitutional **[*570]** implications of the court's actions **[***12]** or the proper application of Rule 3A:15(c) because McBride did not cite those precise sources of law in support of his objections before the trial court.

HN4 Rule 5A:18 provides that "[n]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." But Rule 5A:18 "does not prohibit reliance on statutes or cases not presented to the trial court to support, on appeal, a position otherwise adequately presented at trial." *Lash v. County of Henrico*, 14 Va. App. 926, 929, 421 S.E.2d 851, 9 Va.

Law Rep. 48 (1992). "Nor does [Rule 5A:18] prevent this Court, on its own initiative, from relying on statutory or judicial authority that was not presented to the trial court or referred to in the briefs submitted by the parties." *Id.*

After the court granted the motion to strike but then ruled that the Commonwealth could put on additional evidence, McBride objected no fewer than four separate times. McBride immediately argued that the court's decision to reopen the case was improper because "[t]hat's what the motion to strike is . . . This isn't even a jurisdictional, or venue, or something like that" but instead went to the Commonwealth's failure to [***13] prove "one of the elements of [the] offense." Thus, the Commonwealth shouldn't "get[] a chance to come up and correct it" after the motion was granted. Later, McBride argued that "if the Judge says, 'Okay. Yes. I grant the motion to strike,' then it is improper for the court to allow the Commonwealth to "call [**51] different witnesses and put in different evidence" to correct the error. (Emphasis added). As the parties and court continued to discuss the issue and how the Commonwealth might remedy the problem, McBride repeated his objection at each proposal on how the Commonwealth might fix the omission. [7] Thus, it is "abundantly clear" that McBride "brought the [*571] error he complains of on appeal to the attention of the trial court." *Byrd v. Commonwealth*, 50 Va. App. 542, 550, 651 S.E.2d 414 (2007).

B. **Rule 3A:15** required entry of a judgment of acquittal, precluding the court from re-opening the case to admit additional evidence.

HN5 The presumption of innocence is "a presumption so strong that not only is an accused entitled to the benefit of it, but if the case be a doubtful one, this presumption is always sufficient to turn the scale in his favor." *Widgeon v. Commonwealth*, 142 Va. 658, 666, 128 S.E. 459 (1925). Girded with this presumption, the Constitution protects a defendant from conviction "except upon evidence that is sufficient [***14] fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 313-14, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (emphasis added). The Supreme Court explained that "[a] meaningful opportunity to defend, if not the right to a trial itself, presumes . . . that a total want of evidence to support a charge will conclude the case in favor of the accused." *Id.*

HN6 Because the prosecution bears the burden of proving the elements of an offense beyond a reasonable doubt, "[t]he vast majority of jurisdictions have not chosen to force the defendant to await review of the sufficiency of the evidence until after the jury reaches its decision." 6 Wayne R. LaFave et al., *Criminal Procedure* § 24.6(b) (4th ed. 2021) (covering motions for directed acquittal). "That any judicial system should encourage litigants to raise objections at the earliest rather than the latest possible time seems self-evident." *United States v. Tateo*, 377 U.S. 463, 468 n.4, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964).

[*572] HN7 In Virginia, a defendant tests the sufficiency of the evidence to sustain a conviction by making a motion to strike. See, e.g., *Wells v. Commonwealth*, 65 Va. App. 722, 729-30, 781 S.E.2d 362 (2016). At the time of McBride's trial, the Rules of Court provided:

Motion to Strike Evidence. After the Commonwealth has rested its case or at the conclusion of all the evidence, the [***15] court on motion of the accused *may* strike the Commonwealth's evidence if the evidence is insufficient as a matter of law to sustain a conviction

. . . .

Judgment of Acquittal or New Trial. The court *shall* enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. The court shall grant a new trial if it sets aside the verdict for any other reason.

Rule 3A:15(a), (c) (emphasis added).

Effective March 1, 2021, many Rules—including this one—were amended to replace the word "shall" with the word "must." In the preamble to these amendments, the Supreme Court explained that "[t]he purpose of these amendments is to clarify the meaning of the word 'shall' formerly appearing in these Rules and not to change existing law." Order Amending the Rules of the Supreme Court of Virginia (Nov. 23, 2020), https://www.vacourts.gov/courts/scv/amendments/rule_1_1_et_seq.pdf. Before this clarification, the rule was already that "shall is mandatory and *may* is permissive." *Wal-Mart Stores East*,

LP v. State Corp. Comm'n, 299 Va. 57, 70 n.5, 844 S.E.2d 676 (2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012)).

HN8 Thus, the newly amended [Rule 3A:15\(c\)](#) merely clarifies [***16] what was already the law. A court has discretion over whether to grant a motion to strike—"the court on [**52] motion of the accused *may* strike the Commonwealth's evidence if the evidence is insufficient." But upon granting the motion, a court has to enter a judgment of acquittal—"the court *must* enter a judgment of acquittal if it strikes the evidence." We presume [*573] that "the difference in language was intentional," where one subsection of a statute uses the word "shall," and a different subsection of the statute uses "may." *Wal-Mart Stores East, LP*, 299 Va. at 70-71 (quoting *Jordan v. Commonwealth*, 295 Va. 70, 75, 809 S.E.2d 622 (2018)). The same commonsense principle applies in interpreting the Rules of Court. See, e.g., *Muse Const. Grp. v. Commonwealth Bd. for Contractors*, 60 Va. App. 92, 96-97, 724 S.E.2d 216 (2012).

HN9 Many cases affirm the broad discretion trial courts have over both the presentation of evidence at trial and whether it is appropriate, under all the circumstances, to grant a defendant's motion to strike because the evidence presented was insufficient. Our Supreme Court has repeatedly rejected the argument that evidence presented on rebuttal was improper because it belonged in the case-in-chief, instead holding that "the order in which proof is introduced is a matter largely in the discretion of the trial court." *Flick v. Commonwealth*, 97 Va. 766, 774, 34 S.E. 39 (1899); see also *Bishop v. Webster*, 154 Va. 771, 777, 153 S.E. 832 (1930).

This discretion extends to whether a trial court [***17] allows a defendant to introduce additional evidence after the defense had rested its case. *Mundy v. Commonwealth*, 161 Va. 1049, 1063-64, 171 S.E. 691 (1933). "When all the testimony in the trial of a case has been concluded and the witnesses for the respective parties have been excused from their attendance upon court, whether the court will allow the introduction of other testimony is a question addressed to the sound discretion of the trial judge." *Id.* at 1064. Likewise, a trial court has the discretion to permit the Commonwealth to reopen its case-in-chief and present additional evidence. *Hargraves*, 219 Va. at 607-08.

Hargraves **HN10** reinforces a trial court's discretion not only to allow for additional evidence to be presented after a case is otherwise closed, but also to deny a motion to strike even when the court believes the evidence may be insufficient. *Id.* There, the trial court had "express[ed] doubt as to the sufficiency of the Commonwealth's evidence," before allowing the [*574] Commonwealth to call another witness. *Id.* at 607. After that new evidence, the court denied the motion to strike. *Id.* at 605. Rule 3A:15(a) gives a court this discretion.

This Court reached the same result when a trial court expressed that it was *likely* to grant a motion to strike but did not *actually* grant it. *Chrisman v. Commonwealth*, 3 Va. App. 371, 374-76, 349 S.E.2d 899, 3 Va. Law Rep. 1105 (1986); see also *McClain v. Commonwealth*, 189 Va. 847, 854-55, 55 S.E.2d 49 (1949) (finding no abuse of discretion [***18] when the court took judicial notice of venue after a motion to strike was made but not granted); *Lebedun v. Commonwealth*, 27 Va. App. 697, 715-16, 501 S.E.2d 427 (1998) (affirming trial court's discretion in *sua sponte* reopening the record for the Commonwealth to present evidence of a missing element after *denying* a motion to strike). **HN11** Each of these cases follows [Rule 3A:15\(a\)](#), which permits a court to deny a motion to strike—even if the court believes the evidence to be insufficient. **8** And each stands for the uncontroversial premise that a trial court needs discretion on how to manage a trial.

But there is a limit to this discretion. [Rule 3A:15\(c\)](#) draws a line in the sand when a trial court, in its vast discretion, decides to rule that the evidence is insufficient by granting a motion to strike. The language of the rule is clear: "The court *must* enter a judgment of acquittal if it strikes the evidence."

HN12 That a court must enter a written judgment of acquittal after ruling the evidence is insufficient is not only required by [Rule 3A:15\(c\)](#), but also necessarily follows from the nature of a judgment of acquittal—apart from whatever written order may follow. [**53] The Supreme Court has "defined an acquittal to encompass *any ruling* that the prosecution's proof is insufficient to establish criminal liability [***19] for an offense." *Evans v. Michigan*, 568 U.S. 313, 318, 133 S. Ct. 1069, 185 L. Ed. 2d 124 (2013) (emphasis added). Once the court has [*575] made a "factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability" the defendant has been acquitted. *Id.* at 319 (alterations in original) (quoting *United States v. Scott*, 437 U.S. 82, 98, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978)). Likewise, an "'acquittal' includes 'a ruling by the court that the evidence is insufficient to convict.'" *Id.* (quoting *Scott*, 437 U.S. at 91). This is true even if "the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles [that] affect[] the accuracy of that determination." *Id.* (quoting *Scott*, 437 U.S. at 98).

Once a court has announced that a defendant is acquitted based on the evidence before it, entry of the judgment of acquittal is merely the evidence of the same. The "rendition of a judgment must be distinguished from its entry on the court records." *Lewis v. Commonwealth*, 295 Va. 454, 466, 813 S.E.2d 732 (2018) (quoting *Jefferson v. Commonwealth*, 269 Va. 136, 139, 607 S.E.2d 107 (2005)); see

also *Haskins v. Haskins*, 185 Va. 1001, 1012, 41 S.E.2d 25 (1947) (holding that a "written order or decree endorsed by the judge is but evidence of what the court has decided").

The unambiguous language of [Rule 3A:15\(c\)](#) leads us to conclude that the trial court erred by not entering a judgment of acquittal after it struck the Commonwealth's evidence. The Commonwealth bore the burden of proving all the elements of the PWID, third offenses [\[***20\]](#) charged, and the fact that McBride was convicted of two prior qualifying convictions was an element of each offense.[9](#) After the court found [\[*576\]](#) the evidence fell short, [Rule 3A:15\(a\)](#) did not require the court to grant the motion to strike—it merely allowed the court to do so. Here, the court did not take McBride's motion to strike under advisement or deny the motion. Instead, it "grant[ed] the motion to strike with regard to the two priors" because it "had no evidence . . . as to the date of birth, photograph, mug shot, fingerprint, something tying [the defendant and the documents related to the prior convictions] together." The court made this decision after a long pretrial motion *in limine* hearing just one day before, where the court took not one but two recesses to consider the Commonwealth's evidence on the prior convictions. After hearing argument from the parties and ruling that the evidence was insufficient, [Rule 3A:15\(c\)](#) required the court to enter a corresponding judgment of acquittal.

[\[**54\]](#) [HN13](#) [Rule 3A:15\(c\)](#)'s bright-line rule is unsurprising in a criminal case given the constitutional implications at play. See *Smith v. Massachusetts*, 543 U.S. 462, 467, 125 S. Ct. 1129, 160 L. Ed. 2d 914 (2005) ("[T]he Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent as it prohibits [\[***21\]](#) reexamination of an [\[*577\]](#) acquittal by jury verdict."). Because we conclude that [Rule 3A:15\(c\)](#) prohibited the trial court from reopening the record and not entering an order of acquittal on these facts, we need not reach the harder question of whether the [double jeopardy clauses](#) of either the United States or Virginia Constitutions would also require reversal here. See *Bell v. Commonwealth*, 264 Va. 172, 203, 563 S.E.2d 695 (2002) (advising that appellate courts should avoid the "unnecessary adjudication of a constitutional issue"). Instead, we only observe that [Rule 3A:15](#)'s requirements prevent such constitutional issues from arising.[10](#)

C. That the judgment granting McBride's motion to strike was not reduced to writing does not change the outcome.

The Commonwealth argues that [Rule 3A:15\(c\)](#) does not apply here because the trial court never granted the motion to strike. Despite the court's decision to "grant the motion to strike with regard to the two priors," the Commonwealth focuses only on the written order issued after trial. That order, documenting everything that occurred on the second day of trial, stated, "Counsel for the Defendant moved the Court to strike the evidence presented by the Commonwealth. The Court, after hearing argument, denied the motion." Relying on the general principle that "a circuit [\[***22\]](#) court speaks only through its written orders," the Commonwealth concludes that the only relevant order here was the written order entered after trial, denying the motion to strike.

[\[*578\]](#) The record, and our caselaw, require a different conclusion. Here, the court first ruled that the Commonwealth's evidence as presented during its case-in-chief was insufficient. That is the only judgment that took place as to the sufficiency of this evidence. The court's later, separate, ruling was based on the Commonwealth's evidence as presented during its case-in-chief, *combined with the other document presented after reopening*. That later ruling is the only one that was reduced to writing, but it did not subsume the first.

The earlier judgment remained, not diminished for having never been reduced to writing. See *Jefferson*, 269 Va. at 140 (explaining that a written order only provides "evidence of judicial action, that is, a declaration of historical fact [but] [t]he statement, however, does not purport to govern the substantive validity of the judicial act"). [HN14](#) Indeed, "[a] judgment is the determination by a court of the rights of the parties, as those rights presently exist, upon matters submitted to it in an action or proceeding" [\[***23\]](#) and "[a] written order or decree endorsed by the judge is but evidence of what the court has decided." *Lewis*, 295 Va. at 465 (quoting *Haskins*, 185 Va. at 1012). The court did not merely change its mind on the issue "submitted to it" on the motion to strike—whether the evidence in the Commonwealth's case-in-chief was sufficient. Instead, it issued a new judgment entirely based on new evidence.

[HN15](#) Our Supreme Court has observed that "[i]n the trial of a case the court gives many orders and commands which are not reduced to writing" and that "[s]uch orders are lawful orders and directions of the court." *Robertson v. Commonwealth*, 181 Va. 520, 531, 25 S.E.2d 352 (1943). For this reason, a defendant who was tried for two separate offenses of assault and battery during a bifurcated trial on the

same day could be [\[**55\]](#) convicted under a repeat offender statute during the second trial. *Lewis, 295 Va. at 459*. The conviction for the first offense, stated orally by the judge, was a final judgment that established a predicate offense during the second trial. *Id.* Likewise, a trial court that orally pronounces [\[*579\]](#) a defendant guilty loses the authority to later defer that disposition, even if it has not yet entered a written conviction order. *Vandyke v. Commonwealth, 71 Va. App. 723, 735, 840 S.E.2d 8 (2020)*. [11](#)

HN16 Just as an oral judgment of guilt is final upon the [\[***24\]](#) pronouncement, an oral judgment of acquittal is final when a court holds the evidence is insufficient to sustain a conviction. See *Evans, 568 U.S. at 318-19* ("[A]n acquittal . . . encompass[es] any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." (emphasis added)). The court's determination that the evidence was insufficient then required entry of that acquittal.

CONCLUSION

HN17 When a defendant moves to strike the evidence as insufficient, a trial court has significant discretion about how to proceed. Even if the court agrees the evidence is insufficient, [Rule 3A:15\(a\)](#) does not require the court to grant the motion. The court can take a recess to consider the evidence, the court can take the motion under advisement, the court can opine that the evidence is thin, or the court can allow the Commonwealth to put on additional evidence. What the court cannot do under [Rule 3A:15\(c\)](#) is grant the motion to strike, ruling that the evidence is insufficient, then allow additional evidence to be presented and enter a different ruling based on that added evidence.

[\[*580\]](#) The court's failure to enter an order of acquittal here was an error of law, and thus an abuse of discretion requiring reversal. **HN18** "When an [\[***25\]](#) appellant successfully challenges the sufficiency of the evidence on some (but not all) aspects of his conviction, we must determine if the proven elements of the original charge qualify as a lesser-included offense." *Crowder v. Commonwealth, 41 Va. App. 658, 666, 588 S.E.2d 384 (2003)*. "If so, the appropriate remedy on appeal is a reversal of the conviction on the greater charge and a remand of the lesser charge for retrial—assuming the Commonwealth, in its prosecutorial discretion, chooses to go forward on the lesser charge." *Id.*; see also *Gorham v. Commonwealth, 15 Va. App. 673, 678, 426 S.E.2d 493, 9 Va. Law Rep. 842 (1993)* (observing that the "consistent practice in Virginia," when the evidence is found insufficient to sustain a conviction on appeal but sufficient to sustain a conviction on a lesser-included offense, is to remand the case for retrial on the lesser-included offense). Because PWID, first offense is a lesser-included offense of PWID, third offense, we vacate McBride's convictions for both PWID third offenses and remand for retrial on the PWID first offenses, if the Commonwealth be so advised.

Reversed and remanded.

Footnotes



These code sections pertain to the admissibility and certification requirements of judicial and nonjudicial records respectively.



In total, the documents included a (1) Commitment Record from Baltimore City Circuit Court for a Dan Juan McBride, AKA Tony Brown, Antonio McDan, **DanJuan** McBride, for PWID cocaine, Case No. 298135011, stating that the "defendant has been found guilty" by Judge [Evelyn Cannon](#) and listing a sentence of two years, nine months, and six days, with a box checked for "[c]ommitment is for execution of previously suspended sentence after Defendant was found in violation of probation," signed by Clerk/Judge Frank Conaway, dated May 6, 1999; (2) Criminal Information for defendant Tony Brown in the Circuit Court for Baltimore City charging PWID cocaine with an offense date of March 27, 1998, no case number provided; (3) Commitment Record from Baltimore City Circuit Court for Dan Juan McBride, stating that the

"defendant has been found guilty" of PWID Cocaine, case number 298230038, and sentenced to ten years, dated April 23, 1999; and (4) Criminal Information for defendant **Danjuan McBride** alleging PWID cocaine base on July 2, 1998, with no case number provided. The two commitment records had dates of birth listed with the same month and date, but birth years one year apart.

3

The Commonwealth described the difference in birth years on the Maryland documents as a clerical error.

4

McBride also argued that the Commonwealth had not introduced sufficient evidence to establish that the possession was with the intent to distribute. The court denied the motion to strike as to sufficient proof of possession with the intent to distribute, and McBride has not assigned error to this decision of the court.

5

The exhibit was also later introduced in front of the jury before the court invited the defense to present its case.

6

The jury instructions required that the jury find "beyond a reasonable doubt . . . [t]hat the defendant has previously been convicted of two or more offenses of possession with intent to manufacture, sell, give, or distribute a Schedule I or II substance."

7

McBride's counsel also renewed his objection at sentencing: "I want to renew my objection to the Court allowing the Commonwealth to reopen their case in order to put in more evidence after my motion to strike was denied."

8

McBride has not raised any challenge to the propriety or constitutionality of this aspect of the rule.

9

We have long held that "[c]onviction of a prior like offense is an element of the charge as it was set forth in the indictment, and is also a necessary predicate to an enhanced penalty pursuant to [Code § 18.2-248](#)." *Berry v. Commonwealth*, 22 Va. App. 209, 213, 468 S.E.2d 685 (1996). And "[w]hen the fact of a prior conviction is an element of a charged offense, the burden is on the Commonwealth to prove that prior conviction beyond a reasonable doubt." *Palmer v. Commonwealth*, 269 Va. 203, 207, 609 S.E.2d 308 (2005). In *Palmer*, our Supreme Court considered whether various juvenile court records introduced by the Commonwealth at trial sufficed to prove that the defendant was previously convicted of a "delinquent act which would

be a felony if committed by an adult" under [Code § 18.2-308.2](#). Because Palmer could have "agreed to plead guilty to four offenses that would have been misdemeanors, rather than felonies, if committed by an adult," the Commonwealth "did not present sufficient evidence in the circuit court to establish that Palmer previously had been convicted of a delinquent act that would have been a felony if committed by an adult." *Id.* Just as the fact that a prior conviction was for a "delinquent act which would have been a felony if committed by an adult" is an element of [Code § 18.2-308.2](#), the fact that "*the person* has been before convicted of such an offense or of a substantially similar offense" is an element of [Code § 18.2-248](#). (Emphasis added). See also [Mason v. Commonwealth](#), 64 Va. App. 599, 609, 770 S.E.2d 224 (2015) (explaining statutes are not "substantially similar" if a person could be convicted of an offense under another jurisdiction's statute for conduct that would not be criminal under [Code § 18.2-248](#)). A party cannot obtain a pretrial ruling about whether it has successfully proved an element of a claim or offense. Thus, the Commonwealth needed to prove that it was McBride who was previously convicted of the various drug offenses in Maryland and that the convictions were for a substantially similar offense.

10

In [Smith](#), the Supreme Court held that a state court's initial ruling that the evidence was insufficient to sustain a conviction on a firearms charge was a "judgment of acquittal" for double jeopardy purposes. [543 U.S. at 468](#). The Court observed that "as a general matter state law may prescribe that a judge's midtrial determination of the sufficiency of the State's proof can be reconsidered," but that the Massachusetts Rules of Criminal Procedure "direct[] the trial judge to enter a finding of not guilty 'if the evidence is insufficient as a matter of law to sustain a conviction.' *Id. at 467, 470-71*. Therefore, the lower court could not reconsider its ruling later during the trial.

11

Our recent decision in [Hammer v. Commonwealth](#), 74 Va. App. 225, 237-38, 867 S.E.2d 505 (2022), does not require a different result. There, this Court held that under [Code § 19.2-265.3](#), a *nolle pros* is only final when it is "entered," which "connotes a written order." *Id.* Therefore, a court could readily change its mind after orally granting a *nolle pros*. *Id.* [Hammer](#) also relied on [Rule 1:1](#), which generally gives a court the authority to reconsider its judgment of conviction until twenty-one days have elapsed from the entry of a final judgment. *Id.* The Commonwealth has not argued that [Rule 1:1](#) changes the result here. Whether [Rule 1:1](#) could ever apply to a judgment of acquittal without offending the [Double Jeopardy Clause](#) is a question that we need not reach here. See Section B *infra*; [Bell](#), 264 Va. at 203 (advising that appellate courts should avoid the "unnecessary adjudication of a constitutional issue").

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