

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

COMMONWEALTH OF VIRGINIA)
)
)
v.) **Case No. CR23-145**
)
)
JACOB JOSEPH DIX,)
 Defendant.)

MOTION TO DISQUALIFY COMMONWEALTH’S ATTORNEY

COMES NOW Defendant Jacob Joseph Dix, by undersigned counsel, who moves this Court to disqualify Mr. W. Lawton Tufts and the other members of the Albemarle County Commonwealth’s Attorney’s office from this case. In support of his Motion, Defendant avers the following:

INTRODUCTION

1. The Virginia and United States Constitutions guarantee Defendant’s ancient rights of due process. Among those due process rights is Defendant’s right to a fair trial before an impartial judge on charges brought by a disinterested prosecutor. This Court must protect and enforce that right.
2. A previously filed Motion addresses concerns about the partiality of the judges of the 16th Judicial District. This Motion addresses the due process violation caused by the Albemarle County Commonwealth’s Attorney’s participation in this case.
3. Mr. W. Lawton Tufts (“Tufts”), the Assistant Commonwealth’s Attorney prosecuting this case, personally helped lead, organize, and advocate for the counter-protestors who physically—and in certain cases, violently—resisted Defendant and his Co-Defendants during the events of August 11-12, 2017. A self-proclaimed “anti-racist activist,” he acted

as a liaison between organized counter-protest groups and local law enforcement prior to that fateful weekend. He met with City of Charlottesville administrators to lobby for enactment of policies furthering the goals of counter-protestors. Tufts personally provided legal advice to Charlottesville's Black Lives Matter chapter, one of the foremost counter-protest groups whose members are some of the alleged "victims" in this case. Tufts attended the counter-protests in Charlottesville on August 12, 2017, and then attended a candlelit counter-rally just days later on the same grounds as the torch demonstration at issue here. At the August 12 demonstration, Tufts "followed supremacists who had dispersed through town to monitor if they stirred up violence."¹ His later statements to investigators and journalists indicate a deep personal animus against Defendant and his Co-Defendants. Never in Virginia's four-century history has a prosecutor participated in counter-protests against a lawful demonstration then subsequently prosecuted the demonstrators. Tufts' participation in this case "so infects the prosecution with the possibility that private vengeance has been substituted for impartial application of the criminal law" that his continued involvement constitutes a clear violation of Defendant's due process rights. Cantrell v. Commonwealth, 229 Va. 387, 394 (1985).

4. Tufts' conflict of interest is imputed to the entire staff of the Albemarle County Commonwealth's Attorney because Tufts, despite being aware of his conflict prior to the commencement of this case, did not exclude or screen himself from influencing the remaining attorneys in that office. His pervasive influence irreparably taints the participation of all other members of that office.

¹ See "August 11-12: How We Got Involved", UVA Lawyer, Fall 2017. P. 6.

APPLICABLE LAW

5. Defendants in criminal cases “are afforded constitutional protection against prosecutors who are partial to interests beyond their official duties.” Lux v. Commonwealth, 24 Va. App. 561, 568-69 (1997). The due process rights of a criminal defendant under both the Virginia and United States Constitutions are violated when a Commonwealth's attorney with conflict of interest relevant to the defendant's case prosecutes the defendant. Id. Such prosecution violates a defendant's rights under art. I, §11 of the Virginia Constitution and under the Fourteenth Amendment of the United States Constitution. Cantrell, 229 Va. at 394; Granger v. Peyton, 379 F. 2d 709, 712 (4th Cir. 1967). The specific due process right implicated when a Commonwealth's attorney has a conflict of interest is the defendant's right to the “fair minded exercise of the prosecutor's discretion.” Lux, 24 Va. App. at 569 (citing Granger, 379 F. 2d at 712).
6. In order to protect a defendant's due process rights, “a trial court has the power to disqualify a Commonwealth's attorney from proceeding with a particular criminal prosecution if the trial court determines that the Commonwealth's attorney has an interest pertinent to a defendant's case that may conflict with the Commonwealth's attorney's official duties.” Lux, 24 Va. App. at 568. “A Commonwealth's attorney's duties include the impartial prosecution of those accused of crime and the duty to see that an accused is accorded a fair trial.” Id. at 569.
7. Commonwealth's attorneys “should always remember whose commission they bear and should scrupulously respect the rights of the accused.” Commonwealth v. Kilgore, 15 Va. App. 684, 693 (1993) (internal quotations omitted). “Both [the] court and counsel should

not forget that the object sought is a fair trial...in keeping with our high traditions of justice. All that endangers that result should be avoided.” Id. The Commonwealth’s attorney “is not only under the duty to prosecute one accused of crime, but it is also his [or her] duty to see that the accused is accorded a fair trial.” Taylor v. Commonwealth, 180 Va. 413, 420 (1942). “It is as much the duty of a Commonwealth’s attorney to protect his fellow citizens from unjustified prosecutions as it is to prosecute the guilty. His duty is to seek justice, not merely to convict.” Cantrell, 229 Va. at 393 (internal quotations omitted).

8. A Commonwealth’s attorney must be disqualified from participating in any case “where the prosecutor has had some attorney-client relationship with the parties involved”; and/or where “the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question.” Lux, 24 Va. App. at 569 (citing Nicholas v. Sammons, 178 W.Va. 631, 633 (1987)). Disqualification is also required where a Commonwealth’s attorney previously represented a victim of the crime for which a defendant faces prosecution. Cantrell, 229 Va. at 393. Allowing prosecutors to participate in such situations “infects the prosecution with the with the possibility that private vengeance has been substituted for impartial application of the criminal law” and violates due process. Id.
9. Like the standard for recusing judges, only a *reasonable inference* of impartiality need be shown by a defendant. Lux, 24 Va. App. at 569. Actual prejudice to the Defendant is not required. Cantrell, 229 Va. at 394.
10. Failing to disqualify a prosecutor with a conflict of interest cannot be deemed harmless error on appeal. Id.

11. Conflicts of interest incurred by one member of a Commonwealth's attorney's office are imputed to the remaining members of that office. "A Commonwealth's attorney's office is subject to the same restrictions applicable to a private law firm." Va. Legal Ethics Op. 487 (9/3/1982). Under Va. Sup. Ct. Rule, 1.10, a conflict of interest with respect to one member of a firm (or prosecutor's office) is imputed to all other members of that firm. For normal firms, this conflict can be overcome if the firm prevents the conflicted attorney from participating in the case through the use of "Chinese walls."² However, such screening procedures cannot be implemented in Commonwealth's attorney's offices. See Va. Legal Ethics Op. 1020 (1/21/1988).
12. Despite the ethics opinions cited above, in one instance a Virginia court permitted a Commonwealth's attorney's office to remain on a case in which one of its attorneys suffered from a conflict of interest. That case, Harris v. Commonwealth, permitted continued representation by non-conflicted attorneys in the Fauquier County Commonwealth's Attorney's office after one assistant prosecutor recused himself. 75 Va. App. 534 (2022). The Harris court, though, only permitted that representation because the office imposed and followed strict screening procedures regarding the defendant's case. Id. at 548. The Court created a two-pronged test to evaluate screening procedures:

[w]e hold that a screening mechanism can never be effective unless, at a minimum (1) the disqualified lawyer acknowledged the obligation not to communicate with lawyers working on the matter and (2) those lawyers knew about the screen and that they could not discuss the matter with the disqualified lawyer. To evaluate the success of a particular screen, the trial court should consider whether a formal screening policy exists, when screening procedures were implemented, how comprehensive the procedures were, and whether affected files were marked or segregated under the policy.

² Defendant is unclear if modern sensibilities still permit use of this ethnically targeted phrase. It is invoked here only because of its ubiquity in relevant jurisprudence and legal parlance.

Id.

If a Commonwealth's attorney's office cannot show evidence of a successful screen under this rubric, the entire Commonwealth's attorney's office must be disqualified. The Court found that the Fauquier County Commonwealth's Attorney's office satisfied this test by vigorously maintaining a screen preventing the conflicted attorney's participation in the defendant's case.³

FACTS

13. In 2017, Charlottesville unexpectedly became a hotbed of national debate. Local disagreements about removing certain statues garnered nationwide attention. The statue debates quickly led to broader discussions about race, history, and free speech. Tensions steadily rose in early 2017 as advocates on opposing sides of the removal debate began demonstrating publicly.
14. Among the most noteworthy anti-statue advocacy groups were the local chapters of Black Lives Matter ("BLM") and Showing Up for Racial Justice ("SURJ"). BLM's local chapter was led by Jalane Schmidt ("Schmidt"), a religious studies professor at the University of Virginia. SURJ's local chapter was led at least in part by Benjamin Doherty ("Doherty"), a lecturer and law librarian at the University of Virginia School of Law. Lisa Woolfork ("Woolfork"), Doherty's wife and a professor of English at the University of Virginia, often appeared at SURJ events with Doherty. Congregate Charlottesville, a prominent local clergy collective, led a series of heavily attended anti-

³ The Lux case, decided more than twenty years before Harris, dealt with a similar situation. The Lux court did not use a formalized multi-step rubric when evaluating the imputed conflict of interest presented there but implicitly considered factors similar to those explicitly considered in Harris. The court found that the Commonwealth's attorney's office did not effectively screen the conflicted attorney, and therefore reversed the trial court's ruling denying the defendant's motion to disqualify.

statue meetings and trainings. These groups engaged in organized public demonstrations throughout 2017 advocating for removal of the statues and for other racial justice initiatives.

15. On May 13, 2017, a group of approximately 150 pro-statue demonstrators rallied in Charlottesville's Jackson Park and nearby Lee Park. These parks were the respective sites of the City's Thomas J. "Stonewall" Jackson statute and its Robert E. Lee statue.⁴ The demonstration, now largely forgotten in the wake of that summer's later events, was led by University of Virginia alumnus Richard Spencer. Local pro-statue activist Jason Kessler attended as well. Conscious of the tensions in Charlottesville at the time, the group did not publicize the event beforehand in order to avoid attracting violent counter-protestors. The demonstrators met at dusk in Jackson Park where they made speeches, chanted slogans, and sang songs. The group lit torches as night fell then marched to Lee Park a few blocks away. Upon arrival at Lee Park, they posed for photographs and made further statements:⁵

⁴ Jackson Park, adjacent to the Albemarle County Circuit Court building, has since been renamed Court Square Park. Lee Park, in the 100 block of East Market Street, has since been renamed Market Street Park.

⁵ The group captured much of the demonstration on video, which can be found at <https://www.youtube.com/watch?v=vVFhC4kuYDU> (retrieved 10/15/23).



The group encountered little opposition throughout the event. A few counter-protestors associated with SURJ heckled the group at Jackson Park, and one individual yelled at them during the torch rally at Lee Park.⁶ After a few minutes in front of the Lee statue, the demonstrators doused their torches and dispersed. No violence occurred, no arrests were made, and the demonstrators voiced their opinions largely unhindered by opposing groups. Spencer and Kessler deemed the demonstration a success. No charges have ever been filed related to this demonstration.

16. Spencer and Kessler later discussed the May 13 demonstration with Tim Heaphy (“Heaphy”), an attorney hired by the City of Charlottesville to create an independent report concerning the events of 2017:

⁶ See Lisa Provence, Lee Park Scene of White Nationalist Demonstration, Counterprotest, Cville Weekly, May 15, 2017, <https://www.c-ville.com/lee-park-scene-white-nationalist-demonstration-counter-protest/> (retrieved 10/15/23) (“The Jackson Park event was mostly peaceful until the end, when members of Showing Up for Racial Justice and others began shouting at the white nationalists as they left Jackson Park and followed them down Jefferson Street”).

According to Spencer, unannounced events like the May 13 gatherings “illustrated how matters proceed and people with whom [he] associate[s] conduct themselves when elements of the political Left do not appear to disrupt and attack peaceful demonstrators.” Similarly, Kessler told us that the evening gathering was meant to be a “flash demonstration”—a gathering with no prior publicity—to minimize the risk of violence and prevent counter-protestors from undermining Spencer’s message. Kessler also explained that the torches were not meant to intimidate, but rather to mimic the ancient funeral rights and commemorate the “fallen dead” from so-called “brother wars” in Europe, referring to the conflicts between European peoples.

Hunton & Williams, LLP, Final Report, Independent Review of the 2017 Protest Events in Charlottesville, Virginia, Pp. 27 (Nov. 24, 2017).⁷

17. Inspired by their positive experience on May 13, Spencer, Kessler, and leaders of other pro-statue groups began planning another, larger-scale torch demonstration to be held during a proposed gathering they dubbed “Unite the Right” on August 11 and 12, 2017. They expected the future torch demonstration to be similarly unannounced, unopposed, and non-violent.
18. Anti-statue activists seethed. The next day, May 14, 2017, local groups including BLM and SURJ along with other activists staged a candlelit counter-demonstration in Lee Park. They draped the Robert E. Lee statue in a banner reading “BLACK LIVES MATTER” and “FUCK WHITE SUPREMACY”:⁸

⁷ The full report is available at <https://www.documentcloud.org/documents/4639041-Heaphy-Report>.

⁸ The following facts and pictures are taken from Lisa Provence, Lee Park Scene of White Nationalist Demonstration, Counterprotest, Cville Weekly, May 15, 2017, <https://www.c-ville.com/lee-park-scene-white-nationalist-demonstration-counter-protest/> (retrieved 10/15/23).



BLM activists, SURJ members, and then-Vice Mayor Wes Bellamy made fiery speeches agitating for the removal of the statue and the dismantling of white supremacy. One speaker exhorted community members to “take back Lee Park”:





At least one attendee carried a torch just like the May 13 demonstrators, which can be seen in the background of the following photo. The curly-haired man in the foreground, Emerson Stern, was a pro-statue activist later assaulted by counter-demonstrators after he refused to put away his camera. Stern reported that counter-demonstrators locked arms to physically block and menace Jason Kessler, who also attended the counter-demonstration, while shouting “black lives matter”:⁹

⁹ This appears to be a common tactic by BLM activists, who executed the same tactic on the night of August 11, 2017. See section 32 below.



19. Kessler was jeered loudly before being spit on by an anti-statue activist. The activist was subsequently arrested.¹⁰

20. Upon information and belief, one of the counter-demonstrators that night was Mr. W. Lawton Tufts. Defendant believes Tufts is the individual circled in this picture:

¹⁰ Jordan McNeish, age 28, was arrested that night for spitting on Kessler. Coincidentally, McNeish was the lone individual who yelled at the May 13 demonstrators in Lee Park. See Lisa Provence, The Man Who Confronted White Nationalist in Lee Park, Cville Weekly, 5/24/17, <https://www.c-ville.com/man-confronted-white-nationalists-lee-park/> (retrieved 10/15/23).



21. No charges have ever been filed against attendees of this demonstration.
22. The May 14 counter-demonstration bolstered the confidence of anti-statute opposition groups. As Heaphy later noted,

The May 14 event demonstrated a degree of coordination between various activist groups in Charlottesville and their ability to rapidly mobilize a large-scale response to a perceived threat using social media and interpersonal networks. SURJ, [BLM], Antifa, Solidarity Charlottesville, and other interested individuals united in opposition to Spencer, Kessler, and the images of torches in downtown Charlottesville.

Final Report, P. 30.

Tufts soon became an integral part of this coordinated network.

23. Activism continued throughout the summer from both pro- and anti-statue groups. On July 8, 2017, a North Carolina-based group calling themselves The Loyal White Knights of the Ku Klux Klan held a permitted rally in Jackson Park in support of the statues. A much larger group of counter-protestors, including BLM and SURJ members, turned out to oppose them. Local law enforcement did an admirable job keeping the opposing

groups physically separated that day, thereby preventing the sort of violence that often accompanies Ku Klux Klan rallies. Many counter-protestors, though, viewed law enforcement's actions negatively, interpreting police neutrality as a tacit endorsement of the Klan. Nearly two dozen individuals were arrested when counter-protestors refused to leave.¹¹

24. After the Klan rally, anti-statue activists learned of Jason Kessler's plans for Unite the Right, scheduled to take place on August 11 and 12, 2023 in Charlottesville. BLM, SURJ, and other activist groups began mobilizing their opposition.

25. In late July 2017, Tufts took a more active role in anti-statue activism as the removal debates heated up. He and two politically like-minded law school colleagues, professors Anne Coughlin ("Coughlin") and Barbara Armacost ("Armacost"), began serving as liaisons of some sort between anti-statue clergy members and local police. The three scheduled a meeting with local clergy and Charlottesville police in late July to coordinate efforts ahead of Unite the Right. See Final Report, P. 73.

26. Doherty, SURJ leader and a colleague of Tufts' at the law school, wanted to link Tufts, Coughlin, and Armacost with SURJ and BLM leaders in advance of the meeting with police in hopes that those groups could be represented as well. Doherty sent this email on July 27, 2017:

¹¹ See Dean Seal, KKK Rally in Charlottesville Eclipsed by Protests, The Daily Progress, July 8, 2017, https://dailyprogress.com/news/local/kkk-rally-in-charlottesville-eclipsed-by-protests/article_f13cde22-6415-11e7-9756-c3a385058998.html (retrieved 10/15/23). See also Final Report at Pp. 31-69.

From: Ben Doherty [mailto:bendoherty@law.virginia.edu]
Sent: Thursday, July 27, 2017 11:01 AM
To: Coughlin, Anne M. (amc6z) <amc6z@virginia.edu>; Barbara Armacost (UVA) <bea4k@virginia.edu>; Lawton Tufts <ltufts@law.virginia.edu>; jalaneschmidt@gmail.com; [REDACTED]@gmail.com; [REDACTED]@gmail.com
Cc: Andrew Mahler <[REDACTED]@gmail.com>; Lisa Woolfork <woolfork@gmail.com>
Subject: Connecting BLM to Law Professors

Dear Jalane, Rosia, Katrina, Leslie, Anne, Barb and Lawton (and Lisa and Andrew),

Jalane is a professor in the Dept. of Religious Studies at UVA, and a member of the local BLM. She and three other BLM members—Rosia, Katrina and Leslie—would like to meet with the law school

people (Anne, Barb and Lawton) prior the law professors meeting with the police and Rev. Edwards. Rev. Edwards is apparently scheduling that meeting with the police for this Sunday at 4pm (sooner than we had anticipated), so hopefully there will be a time works for everyone in the next couple of days for you all to be able to talk.

One note—I do not actually have Rosia’s email, so I trust that Jalane will be able to relay any information about the meeting time you all set up to her?

Thank you to you all for you valuable and hard work on this!

Best wishes,
Ben

“Jalane” is the aforementioned BLM leader Jalane Schmidt; “Rosia” is Rosia Parker, a BLM activist; “Katrina” is Katrina Turner, a BLM activist who also served on the Charlottesville Police Civilian Review Board with Tufts in 2017; “Leslie” is Leslie Scott-Jones, a BLM activist; “Lisa” is Doherty’s aforementioned wife and activist Lisa Woolfork; and “Andrew” is Andrew Mahler, a member of the National Lawyers Guild who sent lawyers to Charlottesville on August 12 to support counter-protestors.

27. Tufts responded approvingly and thanked everyone “for the work being done”:

From: Lawton Tufts
Sent: Thu Jul 27 12:56:42 2017
To: Armacost, Barbara Ellen (bea4k); Ben Doherty; Coughlin, Anne M. (amc6z); Barbara Armacost (UVA); jalaneschmidt@gmail.com; [REDACTED]@gmail.com; [REDACTED]@gmail.com
Cc: Andrew Mahler; Lisa Woolfork
Subject: RE: Connecting BLM to Law Professors
Importance: Normal

I'm available Sunday at 4:00 and could meet with Jalane, Rosia, Katrina, and Leslie anytime tomorrow or Sunday before 4. I could also make Saturday before Noon work as well.

Thanks to everybody for all the work being done.

Lawton

28. Tufts, Coughlin, and Mahler soon spoke with the BLM members on the email chain to gather their input. Coughlin thanked them afterwards:

On Sat, Jul 29, 2017 at 5:18 PM, Coughlin, Anne M. (amc6z) <amc6z@virginia.edu> wrote:

Dear Friends:

Thank you for our conversation this morning. I will huddle with Lawton tomorrow before our meeting with the Reverend and the Chief. Send along any and all thoughts, concerns, criticisms, both now and as we move forward. I look forward to working together -- if you will have me! -- and to meeting everyone in person.

Anne

Schmidt then thanked Tufts, Coughlin, and Mahler for their assistance “representing the concerns of the community to the police.” She asked that they provide police certain documents on BLM’s behalf:

From: jalane schmidt [jalaneschmidt@gmail.com]
Sent: Saturday, July 29, 2017 10:25 PM
To: Coughlin, Anne M. (amc6z); Lawton Tufts; Andrew Mahler
Subject: Re: Connecting BLM to Law Professors

Dear Anne, Lawton, and Andrew:

Thank you again for representing the concerns of the community to the police. A small request: Could you print out copies of the Police brutality press release and the Heather Dorsey article (attached above) and give copies to the police?

Thank you.

Jalane

29. Schmidt soon began passing Tufts *et al* information about Unite the Right gleaned from “sources on our side.” She suggests the information could be used to pressure local authorities. Tufts agrees and says that he will tell the authorities to distance themselves from Unite the Right attendees:

On Aug 1, 2017, at 3:48 PM, Lawton Tufts <ltufts@law.virginia.edu> wrote:
Thanks for bringing this to our attention. I will definitely bring it up with both City officials and the police. They need to make it clear that they are NOT coordinating these efforts or supportive of having armed security present.

From: jalane schmidt [mailto:jalaneschmidt@gmail.com]
Sent: Tuesday, August 01, 2017 3:44 PM
To: Lawton Tufts <ltufts@law.virginia.edu>; Anne Coughlin (UVA) <amc6z@virginia.edu>
Subject: alt-right coordination with police?

So there are intel sources out there on our side who regularly track the social media spewing of the alt-right and report back.

This could be just braggadocio (see highlighted portion), but it could serve as a negotiating angle or later PR angle for applying pressure on City and police:

<http://restoringthehonor.blogspot.com/2017/07/exclusive-commander-of-pa-light-foot.html>

30. Soon after this email exchange, news leaked that Jason Kessler’s insurance carrier cancelled the policy indemnifying Unite the Right. Schmidt asked Tufts *et al* to share the news widely in hopes the City of Charlottesville would cancel Kessler’s event due to lack of insurance coverage. Tufts responded with legal advice:

From: Lawton Tufts
Sent: Tue Aug 01 16:12:12 2017
To: jalane schmidt;Coughlin, Anne M. (amc6z)
Subject: RE: alt-right coordination with police?
Importance: Normal

My understanding of the legal requirements is that insurance coverage cannot be required for this type of event but I will take a deeper look at it this evening. The insurance provider is definitely smart to cancel!

From: jalane schmidt [mailto:jalaneschmidt@gmail.com]
Sent: Tuesday, August 01, 2017 4:09 PM
To: Anne Coughlin (UVA) <amc6z@virginia.edu>
Cc: Lawton Tufts <ltufts@law.virginia.edu>
Subject: Re: alt-right coordination with police?

This just in: Insurance coverage denied to Kessler. Please share widely and use to pressure city council to revoke. <http://www.c-ville.com/coverage-denied-insurance-rally-cancelled/#.WYDeNYUpCEd>

31. Tufts continued coordinating with BLM, SURJ, and local clergy groups as Unite the Right approached. Tufts described his activism to Heaphy:

Lawton Tufts...played a role in facilitating communications between members of [Black Lives Matter] and [Stand Up for Justice] and city officials...Tufts attempted to arrange a meeting between Reverend Edwards, [Black Lives Matter], Congregate Charlottesville, and [Charlottesville Police Department] ... During the meeting...Tufts discussed the need for comprehensive community messaging, including sharing CPD's operational plan and using Tufts as an intermediary between CPD and BLM and SURJ...

Tufts shared with us that messaging he received in advance of August 12 suggested that law enforcement's focus was on restoring order after it broke down, not preserving order before conflict began. He noted that Lieutenant Brian O'Donnell told him before August 12 that CPD would be unable to prevent every act of violence, and that CPD officers would not enter a crowd unless and until the [Virginia State Police] mobile field force dispersed the crowd. Tufts took that to mean that CPD expected serious violence, and members of the community needed to be aware of the serious risk of injury. Tufts conveyed as much to BLM and SURJ, who continued to meet on a weekly basis until August 12...

Final Report, Pp. 73-74.

32. On the night of August 11, the date of the torch demonstration at issue in this case, Tufts' associates Doherty, Woolfork, and Armacost attended a counter-protest meeting at St.

Paul's Episcopal Church across from the Rotunda at UVA. This event was organized by Congregate Charlottesville, one of the clergy groups Tufts worked with that summer. Schmidt also helped organize the event. It was heavily attended by BLM and SURJ members, including Chief Judge Claude V. Worrell, II and his family.¹² The attendees personally witnessed the events for which Defendant stands charged. Doherty later described Defendant and his Co-Defendants as a "lynch mob," and feared they "were going to march to the church after they went to the Rotunda."¹³ For Armacost, "[i]t was one of the most terrifying and horrible sights I have ever seen. I called 911."¹⁴ BLM members across the street raced to the Thomas Jefferson statue at the rotunda to intercept the torch demonstrators. Once the demonstrators arrived BLM members locked arms around the statue and screamed at them, yelling "black lives matter!" just as they had during the May 14 rally.¹⁵

33. Members of Congregate Charlottesville, BLM, SURJ, Judge Worrell and his family, Doherty, Woolfork, and Armacost are all witnesses in this case. Armacost's 911 call may be used as evidence. Aside from Judge Worrell, Tufts worked closely with all of them that summer to oppose pro-statue activists like Defendant.

¹² Hannah Heinzekehr, Charlottesville Renews Call to Resist White Supremacy in Community Church, Anabaptist World, 8/14/2017, <https://anabaptistworld.org/charlottesville-events-renew-call-resist-white-supremacy-community-church/> (retrieved 10/16/23).

¹³ See Anti-Racist Activists Instruct, Cville Weekly, 8/22/2018, <https://www.c-ville.com/anti-racists-instruct> (retrieved 10.16.23); Mary Wood, Standing Up For Charlottesville, University of Virginia School of Law, <https://www.law.virginia.edu/news/201708/standing-charlottesville>, 8/15/2017 (retrieved 10.16.23).

¹⁴ Id.

¹⁵ Anne Coughlin, What Kind of Message Does Failing to Prosecute White Supremacists Send?, Cville Weekly, 9/11/2019, <https://www.c-ville.com/burning-questions-why-county-prosecute-torch-marchers/> (retrieved 10.16.23).

34. Tufts attended Unite the Right as a counter-protestor on August 12. He physically confronted Defendant and the other demonstrators alongside his UVA colleagues and members of BLM, SURJ, Congregate Charlottesville.

35. Tufts, Armacost, Doherty, and Coughlin described their Unite the Right experiences in UVa Lawyer, the law school’s magazine, a few weeks later:

AUG. 11-12, 2017: HOW WE GOT INVOLVED

AMONG THE MANY OTHERS INVOLVED IN COMMUNITY EFFO GUILD legal observer, and DIRECTOR OF STUDENT AFFAIRS K visits from attorneys for those who were arrested.

<p>PROFESSOR BARBARA ARMACOST '89 served as a legal observer for the National Lawyers Guild on Aug. 12,</p>	<p>alongside students AMANDA LINEBERRY '19 and ADELE STICHEL '19.</p>	<p>BEN DOHERTY, HEAD OF LIBRARY INSTRUCTION</p>	<p>AND RESEARCH LIBRARIAN, marched with activists.</p>	<p>LAWTON TUFTS, DIRECTOR OF PUBLIC SERVICE AND ALUMNI ADVISING, aimed to serve as an envoy between activists and the police on Aug. 12, but after police declared</p>	<p>the protest an unlawful assembly, he followed supremacists who had dispersed through town to monitor if they stirred up violence and help vulnerable people in need.</p>	<p>PROFESSOR ANNE COUGHLIN and her husband,</p>	<p>Mark, drove street medics on Aug. 12.</p>
--	---	--	---	---	---	--	--

<p>"ONE OF THE MOST MOVING THINGS I SAW ON SATURDAY WAS THE FEW MOMENTS RIGHT AFTER THE WHITE SUPREMACISTS WERE MOVED OUT. The counter-protestors surged in and for just a few minutes they held the park. There were</p>	<p>shouts of a kind of surprised joy. There was a sense of, 'Oh my gosh, we just took over the park and drove them out.' And it was just a moment, of course, because the police cleared them out then too. But it was a wonderful moment."</p>	<p>"IT WAS A DAY FILLED WITH TERRORISM. But I'm also taking away just a real sense of gratitude from all the people from</p>	<p>Charlottesville and from out of town all over the place who came downtown to defend the city."</p>	<p>"AS DISHEARTENING AS THE DAY WAS, IT WAS STILL POWERFUL IN SHOWING HOW MANY ALLIES THERE ARE AGAINST THAT HATE. Moving forward I hope that our community will continue to remain equally involved in trying to bring about equity in Charlottesville and in Virginia and in</p>	<p>the country, and not just feel like they took their stand on Aug. 12 and that their work is done. We need to harness the energy our community obviously has for fighting Nazis and use it to fight the injustices of everyday life and push towards equity for all."</p>	<p>"AT ONE POINT WE DROVE PAST ONE OF THE POLICE BARRIERS TO GET AS CLOSE AS WE COULD TO MARKET STREET—and this was right around the time of the homicide—and a police officer came running up and screamed at us for breaching the barrier. We apologized</p>	<p>and explained that we were dropping off medics and the officer immediately said, 'I'm sorry, that's fine.' And we then apologized again, we really apologized to the officer and said, 'We're so sorry,' and thanked them for their work, and the officer started tearing up."</p>
--	---	---	---	---	---	---	---

Armacost expressed pride that counter-protestors forcefully “took over the park and drove them out.” Doherty said it was “a day filled with terrorism,” but was proud of the counter-protestors who “defended the city.” Tufts thanked his “allies...against hate,” and hoped the City could harness the community’s energy for “fighting Nazis and use it to fight the injustices of everyday life.” Tufts also says that he chased after the white

supremacists—perhaps after Defendant himself—when the crowd dispersed “to monitor if they stirred up violence.”¹⁶ Tufts did not state what exactly he planned to do had such violence occurred.

36. On August 16, 2017, nearly one thousand UVA students and Unite the Right counter-protestors gathered on the UVA Lawn for a candlelit rally meant to mimic the torch rally of August 11. Demonstrators at this rally sang songs, chanted, and held flames aloft.¹⁷ Camera-friendly UVA professor Larry Sabato described it as “an exorcism for the lawn” meant to take back the space:¹⁸



¹⁶ “August 11-12, 2017: How we Got Involved.” UVA Lawyer, Fall 2017, p. 6.

¹⁷ Nicole Chavez, With Candles, Not Torches, Charlottesville Takes Back the Light, CNN.Com, 8/17/2017, <https://www.cnn.com/2017/08/17/us/uva-charlottesville-then-now/index.html> (retrieved 10/16/23).

¹⁸ Id.

37. Upon information and belief, Tufts attended this rally also. No charges have ever been filed against attendees of this demonstration.
38. In the weeks and months after August 12, 2017, Coughlin led local activists in pressuring Albemarle's then-Commonwealth's Attorney Robert Tracci to criminally charge the August 11 demonstrators.¹⁹ Her activism was hands-on: she personally gathered evidence for use by the Albemarle Commonwealth's Attorney. According to a Daily Progress article dated April 27, 2018, "Coughlin...and Rebecca Kimmel, a third-year law student...have worked to find students and faculty present Aug. 11 at the Lawn and Rotunda and encouraged them to file police reports. Because of Coughlin's hard work and the bravery of those survivors, UPD now has a solid record of victims' statements and extensive video evidence that can and should serve as the basis for criminal charges." Coughlin even "met with Albemarle County Commonwealth's Attorney Robert Tracci in the fall [of 2017] and discussed the evidence collected to create a case on the burning objects statute." The testifying witness listed on Defendant's indictment is a UPD detective who may have received evidence directly from Coughlin.
- Coughlin is a possible chain-of-custody witness in this case.
39. Coughlin grew frustrated by Tracci's unwillingness to bring charges against the torch demonstrators. "If we don't enforce that statute now," she said, "I don't know when we would."²⁰ She took issue with Tracci's concerns about the demonstrators' free speech rights under the First Amendment of the United States Constitution. Coughlin, Doherty,

¹⁹ See, e.g., Anne Coughlin, What Kind of Message Does Failing to Prosecute White Supremacists Send?, Cville Weekly, 9/11/2019, <https://www.c-ville.com/burning-questions-why-county-prosecute-torch-marchers/> (retrieved 10.16.23).

²⁰ Ruth Serven Smith, UVA Law Professor Encourages Filing of Police Reports to Prosecute Kessler, The Daily Progress, 4/27/18. https://dailyprogress.com/news/uva/uva-law-professor-encourages-filing-of-police-reports-to-prosecute-kessler/article_9d34c9ba-4a48-11e8-bd6e-df7508fb8d58.html (retrieved 10/16/23).

and Woolfork led a panel discussion organized by SURJ in late 2018 discussing “free speech and anti-racist work—and how false notions about the former hinder the latter.”²¹ The three are shown in this photo from that evening along with a local attorney from The National Lawyer’s Guild:²²



Coughlin called the idea that there’s such thing as legally protected free speech a myth, asserting that “we regulate free speech all the time...[T]he protections are much narrower than people believe.”²³ She told audience members that “the notion of a presupposed golden age of free speech and the sharing of ideas freely” was “completely false.” “We have the power,” she concluded, “to change the meaning of what’s protected speech and and what’s violence.”²⁴

40. Coughlin soon got her wish. Challenger James Hingeley (“Hingeley”) unseated Tracci in November 2019 to become the new Albemarle County Commonwealth’s Attorney. Part

²¹ Lisa Provence, *Anti-Racists Instruct*, Cville Weekly, 8/22/23, <https://www.c-ville.com/anti-racists-instruct> (retrieved 10/17/23) (internal quotations omitted).

²² *Id.* Pictured from left to right are Woolfork, Doherty, Coughlin, and Kim Rolla of the National Lawyers Guild.

²³ *Id.*

²⁴ *Id.*

of Hingeley’s campaign included a promise to prosecute Defendant and his fellow torch demonstrators, whom he discribed as “torch-wielding terrorists.”²⁵ Tufts joined the office in August 2021. The first torch demonstrators were indicted in February 2023 amidst Hingeley’s re-election campaign.

41. Coughlin, Doherty, Armacost, and Woolfork are still at UVA. Coughlin has commented publicly on Co-Defendants’ cases.²⁶ Tufts referred to her as “an esteemed professor of criminal law” during a hearing on October 5, 2023 in the case of Co-Defendant Augustus Invictus.

42. Tufts never disclosed his deep involvement in the summer 2017 counter-protests to Defendant or the Court. His intentional omissions caused Defendant to expend significant resources uncovering facts that should have been mentioned at some point—*any* point—of this proceeding. Some Co-Defendants pleaded guilty to their respective charges without ever being made aware of Tufts’ conflict of interest.

ARGUMENT

43. The facts stated above expose this case for what it is. This is not a criminal prosecution. This is a political vendetta. This Court is being used as a venue for partisan objectives by a prosecutor directly involved in the counter-protests that opposed Defendant and his fellow demonstrators on August 11 and 12, 2017. The Court must intervene immediately to restore and protect Defendant’s due process rights. Failing to do so irreparably taints the integrity of this proceeding.

²⁵ Jerry Miller, I Love Cville Show! 9/26/2019 at 56:30-58:00. <https://ilovecville.com/jimhingeley/> (retrieved 10/16/23).

²⁶ See, e.g., Hannah Rabinowitz, Judge Denies Bail for Man Charged in 2017 Charlottesville March, 4/21/23, <https://www.cnn.com/2023/04/21/us/charlottesville-rally-suspects-court/index.html> (retrieved 10/16/23). This article refers to the bail hearing of Co-Defendant Tyler Dykes, who was denied bail by Chief Judge Worrell. Worrell has since recused himself from these cases.

44. Mr. Tufts has forgotten whose commission he bears as a Commonwealth's attorney. He brings this case not on behalf of The People of Virginia but on behalf of a political faction that aims to use this Court "to change the meaning of what's protected speech and what's violence." This case appears to be a continuation of the partisan mission undertaken by Tufts and his associates in 2017. He tried to silence Defendant in 2017, and he tries to silence him today. Mr. Tufts was too involved in the events of that summer to impartially execute his duties in this case. If the Commonwealth wants to bring charges against political demonstrators, it cannot deploy a counter-demonstrator as its lead prosecutor.
45. Defendant has a due process right to the "fair minded exercise of the prosecutor's discretion." Lux, 24 Va. App. at 569 (citing Granger, 379 F. 2d at 712). Any conflict of interest imputed to the Commonwealth's attorney prevents that "fair minded exercise." In this context, a conflict of interest is any "interest pertinent to a defendant's case that may conflict with the Commonwealth's attorney's official duties." Lux, 24 Va. App. at 568. Those "duties include the impartial prosecution of those accused of crime and the duty to see that an accused is accorded a fair trial." Id. at 569.
46. Mr. Tufts has a conflict of interest in at least two independent ways, either of which is sufficient on its own to require disqualification. First, he has "some direct personal interest arising from **animosity**, a financial interest, kinship, **or close friendship** such that his objectivity and impartiality are called into question." Lux, 24 Va. App. at 569 (citing Nicholas v. Sammons, 178 W.Va. 631, 633 (1987) (emphasis added)). Second, he had (or has) an attorney-client relationship with one or more of the so-called "victims" in this case.

47. Mr. Tufts has a “direct personal interest arising from animosity...kinship, or close friendship such that his objectivity and impartiality are called into question.” His personal animus against Defendant and people sharing Defendant’s political views was on display throughout the summer of 2017. During that time Mr. Tufts was a leading left-wing, “anti-racist,” anti-statue activist who helped organize militant opposition groups that counter-demonstrated against Defendant and others on August 11 and 12. He personally joined in these counter-demonstrations. In his free time he worked closely with Coughlin, Doherty, Schmidt, and organizations like BLM, SURJ, and Congregate Charlottesville to oppose the presence and speech of Defendant and like-minded individuals. Schmidt referred to Tufts as part of “our side” that summer. Mr. Tufts told UVA Lawyer that he took pride in “fighting Nazis,” the people he accused of bringing “hate” to the City. He even admitted to chasing some of the demonstrators on August 12, possibly including Defendant, to “monitor if they stirred up violence,” which is a euphemistic way of saying he roamed the streets that day looking for a fight. These are not the actions of an impartial prosecutor.

48. Moreover, Mr. Tufts attended torchlit and candlelit rallies on May 14 and August 16, 2017 that are legally indistinguishable from the August 11 demonstration. If the Commonwealth’s interpretation of Va. Code §18.2-423.01 is correct, then attendees of the May 14 and August 16 rallies should face felony charges too. The only difference between the events is the content of the speech expressed: the May 14 and August 16 ralliers expressed views Mr. Tufts agrees with; the August 11 demonstrators expressed views Mr. Tufts disagrees with. This is an unconstitutional selective prosecution based on protected speech discrimination in violation of the equal protection component of the Due

Process Clause. See U.S. v. Armstrong, 517 U.S. 456, 464 (1996) (“a prosecutor’s discretion is subject to constitutional constraints. One of these constraints, imposed by the equal protection component of the Due Process Clause...is that the decision to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification.”) (internal citations and quotations omitted). Mr. Tufts is not evenhandedly exercising enforcement of the law within his jurisdiction.

49. Tufts also has an obvious bias based on his close friendship with some of the City’s leading leftist agitators who worked tirelessly to bring criminal charges against Defendant and his Co-Defendants. His fellow political operatives—all of whom may be called as witnesses in this case—vigorously, aggressively, and physically acted against pro-statue demonstrators throughout the summer of 2017. He was a long-time colleague of Coughlin, Armacost, and Doherty, and by all appearances shared their views wholeheartedly. If a man is judged by the company he keeps, what does Mr. Tufts’ close association with these activists tell us?

50. Doherty, a leader of SURJ, sought out Tufts, Coughlin, and Armacost for their help in 2017. UVA Law School has nearly 300 faculty and staff members, but Doherty chose these three specifically because of their known affinity for left-wing direct action. Mr. Tufts and the others immediately began helping SURJ and BLM. They used their connections to local authorities to lobby officials on behalf of those groups throughout that summer in an attempt to prevent Defendant and fellow demonstrators from exercising their free speech. Tufts admitted to Heaphy that he and the others acted as liaisons and/or agents for those groups when meeting with local officials. These associates later pressured the former Commonwealth’s attorney to bring charges, even

going so far as to personally collect evidence for a potential case. That evidence may be used at trial, along with some of the “intel from sources on our side” that Schmidt mentioned in her email. Mr. Tufts cannot be impartial when weighing evidence personally solicited and collected by his comrades.

51. Mr. Tufts may answer this concern by saying that he was not personally at the site of the torch rally on August 11, and therefore he has enough distance to prosecute cases arising from that night. This is wrong for three reasons. First, it is impractical to view the events of August 11 in isolation from the other events that weekend. Unite the Right was effectively one event spanning two days. All of the torch demonstrators attended the Lee Park event the next day, as did Mr. Tufts and his associates. Mr. Tufts’ physical participation in part of the event makes him impartial regarding the entire event. Second, Mr. Tufts’ close associates and members of the groups he worked for that summer *were* at the torch demonstration and may be called as witnesses in this case. Armacost, Doherty, Woolfork, Schmidt, BLM, and Congregate Charlottesville were all present at St. Paul’s Church, where they saw and heard the demonstration. BLM members were some of the counter-protestors who circled the Thomas Jefferson statue that night. Mr. Tufts cannot fairly evaluate the testimony of these persons and groups given his extensive connections with them. Third, the fact that he was not present at the torch demonstration in no way diminishes the animus he manifested toward Defendant by his actions at other times that summer.

52. Mr. Tufts also has a separate conflict of interest because he had (and possibly still has) an attorney-client relationship with Schmidt and/or BLM as an entity:

From: Lawton Tufts
Sent: Tue Aug 01 16:12:12 2017
To: jalane schmidt;Coughlin, Anne M. (amc6z)
Subject: RE: alt-right coordination with police?
Importance: Normal

My understanding of the legal requirements is that insurance coverage cannot be required for this type of event but I will take a deeper look at it this evening. The insurance provider is definitely smart to cancel!

From: jalane schmidt [mailto:jalaneschmidt@gmail.com]
Sent: Tuesday, August 01, 2017 4:09 PM
To: Anne Coughlin (UVA) <amc6z@virginia.edu>
Cc: Lawton Tufts <ltufts@law.virginia.edu>
Subject: Re: alt-right coordination with police?

This just in: Insurance coverage denied to Kessler. Please share widely and use to pressure city council to revoke. <http://www.c-ville.com/coverage-denied-insurance-rally-cancelled/#.WYDeNYUpCEd>

Here, Schmidt reaches out with information about Kessler’s insurance coverage. Anti-statue activists suspected that loss of insurance coverage would be grounds for revocation of Unite the Right’s permit to assemble on August 12. Tufts, a licensed attorney, responds by giving legal advice and promises to investigate the issue further. This is an implied attorney-client relationship recognized by Virginia law and ethics rules. See *Nicholson v. Shockey*, 192 Va. 270, 276-77 (“Formality is not an essential element of the employment of an attorney. The contract may be express or implied, and it is sufficient that the advice and assistance of the attorney is sought and received, in matters pertinent to his profession.”). Ms. Schmidt, either personally or on behalf of BLM, sought out these law school faculty for their legal expertise. Tufts responded to her inquiries with “advice...pertinent to his profession.” Tufts therefore had an attorney-client relationship with Schmidt and/or BLM. Schmidt and members of BLM are some of the so-called “victims” in this case who will be called at trial. And this email is just one snapshot from that summer. Testimony at the hearing on this matter is expected to expose other instances of Mr. Tufts providing legal advice to the “victims” in this case. A Commonwealth’s attorney cannot prosecute a case if he had an attorney-client

relationship with the victim. Cantrell, 229 Va. at 393. Permitting otherwise “so infects the prosecution with the possibility that private vengeance has been substituted for impartial application of the criminal law.” Id. Mr. Tufts appears to be pursuing the interests of his former client rather than pursuing impartial justice on behalf of the Commonwealth.

53. The above concerns can be summarized as follows: Mr. Tufts was too involved in the events to be impartial in this proceeding. His past activities and connections raise a reasonable inference of bias, which is all that is required for disqualification. Lux, 24 Va. App. at 569. Permitting Mr. Tufts to prosecute this case denies Defendant due process.
54. Disqualification of Mr. Tufts necessitates disqualification of the entire Albemarle County Commonwealth’s Attorney’s office. When one prosecutor is disqualified, the remaining attorneys must be disqualified as well unless strict screening procedures have been followed from the case’s outset to avoid the conflicted attorney’s influence. Harris, 75 Va. App. at 548. Here, Mr. Tufts has been thoroughly involved in this case from its beginning despite being aware of his conflicts of interest. He is the first-chair prosecutor in all the torch demonstration cases. There is clearly no screen against his participation. Attempting to erect a Chinese wall at this point is useless. Mr. Tufts’ influence cannot be erased now.
55. This Court must be vigilant in protecting the integrity of the justice system in Albemarle County. Appearances matter. This Court is very familiar with undersigned counsel, Mr. Tufts, Mr. Hingeley, the UVA community, many of the people and groups named in this Motion, and probably with the events of August 2017 as a whole. That familiarity may hinder a proper perspective on how this case appears to Defendant and to an outside observer. The latter parties, knowing nothing of how this Court operates, are faced with the following facts:

- i. Defendant was charged six years after the events in question and dragged to Virginia from his home in Ohio.
- ii. The previous Albemarle Commonwealth's Attorney publicly stated that he would not charge anyone for actions at the torch demonstration on August 11, 2017.
- iii. No charges have ever been filed against attendees of similar torchlit and candlelit demonstrations on May 13, May 14, and August 16, 2017.
- iv. Defendant and his Co-Defendants are the first people ever charged under Va. Code §18.2-423.01 despite that law being effective for more than twenty years in a Commonwealth of nearly nine million people.
- v. The Commonwealth has currently charged ten individuals, all of whom are non-Virginia residents.
- vi. The elected Commonwealth's Attorney made it a campaign promise to charge these individuals during his 2019 election despite never seeing the case file.
- vii. The Chief Judge of this Judicial Circuit attended an anti-statue counter-protest on the night of the torch demonstration with his BLM-activist wife, witnessed the demonstration, personally called the police on the demonstrators, and then presided over these cases without ever mentioning his involvement to anyone.²⁷
- viii. The lead prosecutor in this case was/is an "anti-racist activist" who helped organize the counter-protests against Defendant and fellow demonstrators

²⁷ See Defendant's Motion to Recuse filed in this matter on September 25, 2023.

throughout the summer of 2017, worked closely with the most militant leftist groups in town, gave legal advice to Black Lives Matter leaders, chased after demonstrators on August 12, publicly bragged about his actions, participated in demonstrations similar to those he now claims are “crimes,” and never disclosed any of this to the Court or the Defendant.

Do these circumstances give the impression that Defendant is receiving a fair trial in Albemarle County?

56. Defendant is not asking for much in this Motion. There is no shortage of prosecutors in this Commonwealth, and they all get paid for their work. Defendant merely requests that his case be prosecuted by a Commonwealth’s attorney who was not personally involved in counter-protesting against Defendant in the summer of 2017. This Court has the ability to appoint a special prosecutor. It must do so.

57. A hearing on this Motion is requested. Given the evidence presented here, Defendant asks that Mr. Tufts be required to confirm or deny the facts herein under oath before the Court.

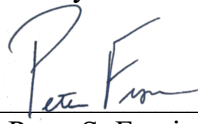
WHEREFORE, Defendant moves this Court to Disqualify Mr. W. Lawton Tufts along with the remaining members of the Albemarle Commonwealth’s Attorney’s office, and to appoint in their stead a special prosecutor who is impartial and disinterested.

RESPECTFULLY SUBMITTED
JACOB JOSEPH DIX
BY COUNSEL



Peter S. Frazier #89177
The Frazier Law Firm, P.C.
Counsel for Defendant
P.O. Box 177
Charlottesville, VA 22902
(434) 263-8009
(800) 947-0389 (fax)
peter@frazierlawfirm.net

I certify that a true and accurate copy of this pleading was hand-delivered to the Commonwealth's Attorney for the County of Albemarle this 18th day of October 2023.



Peter S. Frazier