IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 131447

IN RE: STEVEN ROY ARNOLD, *Appellant*

AMICUS CURIAE BRIEF OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
PRELIMINARY STATEMENT 1
APPELLANT'S ASSIGNMENT OF ERROR 3
STATEMENT OF FACTS 3
A. The Code allows prisoners to change their names except in limited circumstances. 3
B. Arnold submitted the required application and an affidavit explaining why good cause existed for her name change. 6
C. Judge Lee summarily denied Arnold's application. 7
ARGUMENT 9
I. Standard of review. 9
II. The Circuit Court erred by failing to cite support for its finding that Arnold's application lacked good cause. 10
A. Denials of name-change applications must be supported by evidence in the record. 10
B. This Court previously resolved a case legally indistinguishable from this one by reversing and remanding. 12
III. On remand, the Circuit Court should follow the process set forth in the revised statute. 14
IV. An applicant's transgender identity is an insufficient basis, standing alone, to conclude "good cause" does not exist to accept an application for consideration, or to deny the application once accepted. 18
A. Transgender status should not stand in the way of finding good cause for a name-change application. 20

1. Changing one's name to reflect transgender status is not a frivolous pursuit. 20

2. The Court's remand instructions in *Brown* suggest that a gender transition constitutes good cause to review an application. 22

3. *In re Champion* is not applicable. 23

B. Transgender status, standing alone, is insufficient grounds to deny an application. 27

1. Changing one's name to reflect gender is not an inherently fraudulent purpose. 29

2. Changing one's name to reflect gender identity does not infringe on the rights of others. 33

C. The record in this case does not reveal any evidence that Arnold's application lacks good cause or falls within one of the limited statutory exceptions to the general rule in favor of granting name changes. 34

CONCLUSION 36

RULE 5:26(H) CERTIFICATE 38

CERTIFICATE OF SERVICE 39

TABLE OF AUTHORITIES

Page

Cases

Bain v. Boykin,
180 Va. 259, 23 S.E.2d 127 (1942) 15

Barrett v. Virginia,
689 F.2d 498 (4th Cir. 1982) 35

De'lonta v. Johnson,
708 F.3d 520 (4th Cir. 2013) 21

Doe v. State of Minn. Dept. of Pub. Welfare,
257 N.W.2d 816 (Minn. 1977) 21

In re A.M.B.,
997 A.2d 754 (Me. 2010) 12

In re Ashleigh Nicole Haley,
Order for Name Change,
Case No. CL13000069-00 (Va. Cir. Ct. June 17, 2013) 30

In re Champion,
72 Va. Cir. 588 (2004) 24, 25, 27, 35

In re Change of Name of Picollo,
668 N.W.2d 712 (Neb. App. 2003) 12

In re Eck,
584 A.2d 859 (N.J. Super. Ct. App. Div. 1991) 31

In re Golden,
867 N.Y.S.2d 767 (N.Y. App. Div. 2008) 33

In re Guido,
771 N.Y.S.2d 789 (N.Y. Civ. Ct. 2003) 19, 29

In re Harris,
707 A.2d 225 (Pa. Super. Ct. 1997) 32, 34

In re Harvey,
293 P.3d 224 (Okla. Civ. App. 2012) 31, 32

In re Joseph David Fialkowski,
Letter Opinion, Case No. CL14000005-17
(Va. Cir. Ct. May 21, 2014) 29, 30, 33, 34

In re Knight,
537 P.2d 1085 (Colo. App. 1975) 12

In re Ladrach,
513 N.E.2d 828 (Ohio Prob. Ct. 1987) 33

In re McIntyre,
715 A.2d 400 (Pa. 1998) 32

In re Miller,
218 Va. 939, 243 S.E.2d 464 (1978) 29, 33, 35

In re Robert Floyd Brown, Jr.,
Record No. 131284 (Va. Dec. 12, 2013) 12, 14, 18

In re Wampler,
46 Va. Cir. 312 (1998) 20, 21, 27

In re Winn-Ritzenberg,
891 N.Y.S. 220 (N.Y. Sup. Ct. 2009) 19

Landfill One, Inc. v. Bailey,
21 Va. Cir. 318 (1990),
amended by Landfill One, Inc. v. Bailey,
1991 WL 835161 (Va. Cir. Ct. Sept. 11, 1991) 16

Landrum v. Chippenham & Johnston-Willis Hosps., Inc.,
282 Va. 346, 717 S.E.2d 134 (2011) 9

Lawlor v. Commonwealth,
285 Va. 187, 738 S.E.2d 847 (2013) 9, 19

Morency v. Commonwealth,
274 Va. 569, 649 S.E.2d 682 (2007) 15

O'Donnobhain v. Comm'r of Internal Revenue,
134 T.C. 34 (2010) 21, 22

Pinneke v. Preisser,
623 F.2d 546 (8th Cir. 1980) 21

Rowland v. Shurbutt,
259 Va. 305, 525 S.E.2d 917 (2000) 8

Shebelskie v. Brown,
287 Va. 18, 752 S.E.2d 877 (2014) 9

Shiflet v. Eller,
228 Va. 115, 319 S.E.2d 750 (1984) 15

Stephens v. Commonwealth,
274 Va. 157, 645 S.E.2d 276 (2007) ..... passim

Ziffrin v. U.S.,
318 U.S. 73 (1943) 16

Statutes

2014 Virginia Acts ch. 232 (H.B. 233) 14

Va. Code Ann. § 32.1-269(E) (2011) 19, 28

Va. Code Ann. § 8.01-1 (2007) 15

Va. Code Ann. § 8.01-217(A) (Supp. 2014) 4, 5, 10, 16

Va. Code Ann. § 8.01-217(B) (Supp. 2014) 4, 5, 8

Va. Code Ann. § 8.01-217(C) (2007) 27, 29

Va. Code Ann. § 8.01-217(C) (Supp. 2014) 4, 5, 8, 23

Va. Code Ann. § 8.01-217(D) (Supp. 2014) 16, 17, 18, 26, 27, 29

Va. Code Ann. § 8.01–670(A)(3) (2007) 8

Va. Code Ann. § 9.1–900 et seq. (Supp. 2014) 17

Other Authorities

1985-86 Op. Va. Att'y Gen. 182 ..... 20, 28

1989 Op. Va. Att'y Gen. 40 16

Brad Kutner,
Lynchburg Transwoman Denied Name Change by Former Liberty University Lawyer Turned Judge, GAYRVA.COM (May 19, 2014), http://www.gayrva.com/arts-culture/lynchburg-transwoman-denied-name-change-by-former-liberty-university-lawyer-turned-judge/ 30

GayRVA Staff,
Lynchburg Transwoman Granted Name Change, GAYRVA.COM (May 21, 2014), http://www.gayrva.com/news-views/lynchburg-transwoman-granted-name-change/ 30

Matthew Leonard,
Louisa Transgender Man Wins Court Case in Name Change Battle, GAYRVA.COM (June 17, 2013), http://www.gayrva.com/news-views/louisa-transgender-man-wins-court-case-in-name-change-battle/ 30

Petition for Appeal, *In re Robert Floyd Brown, Jr.*,
Record No. 141130 (Va. Jul. 28, 2014) 13, 19

PRELIMINARY STATEMENT

In 2013, nearly eight thousand Virginia residents applied to legally change their names, over eight hundred in July 2013 alone.[1] Among those eight hundred routine applicants was Steven Roy Arnold, a transgender individual.

Arnold followed the process set forth in the Code, completing the requisite application and submitting it to the local circuit court with an affidavit explaining the reason for the name change. Unlike the many name-change requests that were reviewed and granted, however, Arnold's application was not even considered.

This result was in part a consequence of Arnold's status as a prisoner. Virginia law requires that prisoners, unlike other applicants, demonstrate "good cause" for their applications before a court even considers them. The court below concluded, in its discretion, that "good cause" did not exist for the name change Arnold sought.

In failing to explain its reasons for denying good cause, however, the court committed reversible error. This Court held, in *Stephens v.*

[1] Data compiled from statistics available at the website of the Office of the Executive Secretary of the Supreme Court of Virginia: http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/circuit/ccmsmonthly/ccms_1003.pdf.

Commonwealth, that when a circuit court denies a name-change application, it must ground the decision in evidence in the record.[2] Here, the Circuit Court provided no such evidence or reason for its decision.

At the invitation of the Court, the Commonwealth files this amicus brief in support of Arnold's position that the order should be reversed and the case remanded for proper consideration. Without a stated basis for the lower court's ruling, the decision is susceptible to the inference that the trial court disfavors applications from transgender persons. Steven Roy Arnold was applying to change her name to "Ashley Jean Arnold" to reflect her true gender identity. Arnold's application and the accompanying affidavit explained her treatment for gender dysphoria, her discomfort carrying the name Steven Roy, and her plans to fully transition to the female gender through surgery. Although Arnold provided this documentation of her condition as evidence of "good cause," the Circuit Court nonetheless dismissed her application out-of-hand.

This Court should correct the error below in light of *Stephens*. In doing so, it should make clear to lower courts that a prisoner's transgender identity does not, in and of itself, negate good cause for a name change.

[2] 274 Va. 157, 645 S.E.2d 276 (2007).

APPELLANT'S ASSIGNMENT OF ERROR

The circuit court erred in denying the application for a change of name where appellant provided ample evidence of "good cause" for the application, and the record contains no evidence of fraudulent purpose within the meaning of Virginia Code § 8.01-217.[3]

STATEMENT OF FACTS

The appellant in this case, Steven Roy Arnold, is an inmate in federal prison in Hopewell, Virginia who has been diagnosed with Gender Identity Disorder. Arnold "is a 31 year old transgender woman who is transitioning from a male to a female gender."[4] In connection with this process, she desires to change her name from Steven Roy Arnold to Ashley Jean Arnold.[5]

A. The Code allows prisoners to change their names except in limited circumstances.

The Virginia Code sets forth the process by which "[a]ny person desiring to change his own name" may apply to do so, in the circuit court

[3] JA 35.

[4] *See* JA 22.

[5] Because Arnold "prefers feminine pronouns to describe herself," *see id.*, we abide by the same convention.

for the locality in which he resides.[6] Prisoners are expressly permitted to apply for name changes; a prisoner like Arnold "may apply to the circuit court of the county or city in which such person is incarcerated."[7]

Applications must be under oath and provide the following information:

> the place of residence of the applicant, the names of both parents, including the maiden name of his mother, the date and place of birth of the applicant, the applicant's felony conviction record, if any, . . . whether the applicant is presently incarcerated or a probationer with any court, and if the applicant has previously changed his name, his former name or names.[8]

When a non-incarcerated adult submits an application that satisfies this rule, the Code provides that the court "*shall* . . . order a change of name."[9] Only two exceptions justify denying the application: when "the evidence shows that the change of name is sought for a fraudulent purpose" or when it "would otherwise infringe upon the rights of others . . . ."[10]

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[6] Va. Code Ann. § 8.01-217(A) (Supp. 2014).

[7] *Id.*

[8] Va. Code Ann. § 8.01-217(B) (Supp. 2014).

[9] Va. Code Ann. § 8.01-217(C) (Supp. 2014) (emphasis added).

[10] *Id.*

The Code's presumption in favor of name changes is less strong in the case of prisoners. This Court has recognized that "the inclusion of a good cause requirement in [Code § 8.01-217(A)] for applications for change of name filed by incarcerated persons contemplates a different determination than the one under the requirements of subsection (C) of the statute."[11]

When Arnold filed her application in July 2013, the name-change statute provided that "[a]pplications of probationers and incarcerated persons *may* be accepted if the court finds that good cause exists for such application."[12] The Code was (and remains) silent on what constitutes "good cause." But if a circuit court found good cause, and the application complied with the requirements of Code §§ 8.01-217(B) and (C), then the Code provided that the court "shall . . . order a change of name."[13]

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[11] *Stephens*, 274 Va. at 162, 645 S.E.2d at 278.

[12] Va. Code Ann. § 8.01-217(A) (2007) (emphasis added). *See also* JA 2 (Form CC-1411, indicating that "Applications of probationers and incarcerated persons MAY be accepted if the Court finds good cause exists for such application" and instructing applicants to "[a]ttach explanatory documentation to the application").

[13] Va. Code Ann. § 8.01-217(C) (2007) (emphasis added).

B. Arnold submitted the required application and an affidavit explaining why good cause existed for her name change.

On July 25, 2013, Arnold submitted her application to the Circuit Court for Prince George County, the county in which she is incarcerated. She provided the information required by the Code by completing Form CC-1411, certifying her responses under oath, and swearing that "this name change is not sought for any fraudulent purposes and will not infringe upon the rights of others."[14]

Along with her application, Arnold filed an affidavit setting forth the reasons she was requesting a name change, in which she stated, in relevant part:

> I am applying for a change of name because I am presently engaged in the process of transitioning from a male gender to a female one. I am currently in treatment for my gender issues. . . . It is my intention to fully transition to a female gender via surgical means. . . . As part of my transition, I have taken the name Ashley Jean Arnold. I have left "Steven" behind . . . . The use of the name "Steven" causes me great distress and anxiety, and exacerbates [my] gender identity disphoria [sic].[15]

As evidence of her gender identity dysphoria ("GID"), Arnold submitted a document signed by a Federal Bureau of Prisons official reporting that Arnold:

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[14] *See* JA 3.

[15] JA 4.

> has been diagnosed with GID. This comes after many years of struggle and contemplation. Inmate Arnold meets criteria for GID through a strong and persistent cross-gender identification, persistent discomfort with his own sex or sense of inappropriateness in the gender role of that sex. The disturbance is no[t] concurrent with any physical intersex condition, and the disturbance has caused clinically significant distress or impairment in social, occupational and other important areas of functioning.[16]

At the conclusion of her sworn affidavit, Arnold added, "I submit that my change of gender constitutes 'good cause' for a change of name" and that "there is no fraudulent purpose behind my application."[17]

Arnold enclosed with these materials a check for the application fee[18] and complied with all other requirements of the statute.

C. Judge Lee summarily denied Arnold's application.

On August 2, 2013, Judge Nathan Lee of the Circuit Court of Prince George County denied Arnold's application.[19] He wrote on the proposed Order for Change of Name that good cause "does not" exist for the application.[20] Judge Lee did not provide reasons for his decision and did

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[16] JA 6.

[17] JA 5.

[18] *See* JA 7 (cover letter), JA 8 (receipt).

[19] JA 9.

[20] *Id.*

not cite any evidence in support of his conclusion. He made no suggestion, for instance, that Arnold had failed to comply with the informational requirements of Code § 8.01-217(B), or that her application was sought for a fraudulent purpose or would infringe on the rights of others in derogation of Code § 8.01-217(C). The Circuit Court simply concluded there was an absence of good cause even to accept the application for review.

Arnold filed a notice of appeal on August 8, 2013, and filed a petition with this Court on September 10, 2013, asking that the Court vacate the circuit court's decision and order that her name-change application be granted. The petition argued that she had demonstrated the requisite good cause and that the lower court erred by making a contrary determination that was not "supported by evidence in the record," under *Stephens v. Commonwealth*.[21]

On September 19, 2014, the Court granted Arnold's petition for appeal.[22]

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[21] 274 Va. 157, 645 S.E.2d 276 (2007). *See* JA 24-25.

[22] "An order in an independent civil action changing a name . . . is 'a final judgment' in a 'civil case,' within the meaning of Code § 8.01–670(A)(3), which provides for appeal of such an order to this Court." *Rowland v. Shurbutt*, 259 Va. 305, 308, 525 S.E.2d 917, 918 (2000).

ARGUMENT

I. Standard of review.

In accordance with *Stephens*, the Court reviews the lack-of-good-cause denial of a name-change application under an abuse-of-discretion standard.[23] "Reviewing for an abuse of discretion does not simply mean that a circuit court 'may do whatever pleases it.'"[24] Rather,

> the law often circumscribes the range of choice available to a court in the exercise of its discretion. In such cases, [t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions, because a court also abuses its discretion if it inaccurately ascertains its outermost limits.[25]

"Such an error may occur when the court believes . . . the law requires something it does not . . . ."[26]

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[23] 274 Va. at 162, 645 S.E.2d at 278.

[24] *Shebelskie v. Brown*, 287 Va. 18, 26, 752 S.E.2d 877, 881 (2014) (quoting *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011) (internal quotation marks omitted)).

[25] *Lawlor v. Commonwealth*, 285 Va. 187, 213, 738 S.E.2d 847, 861 (2013) (quotation and citation omitted).

[26] *Id.*

II. The Circuit Court erred by failing to cite support for its finding that Arnold's application lacked good cause.

A. Denials of name-change applications must be supported by evidence in the record.

The Circuit Court erred in denying Arnold's application without evidence for its finding that the application lacked good cause. Since this Court's decision in *Stephens v. Commonwealth*,[27] it has been clear that a circuit court's discretionary denial of an inmate's name-change application for lack of good cause must be supported by evidence in the record.

In *Stephens*, the Supreme Court of Virginia reversed the denial of an inmate's application to change his name in connection with his practice of Islam.[28] The Commonwealth conceded that the Circuit Court for Greensville County erred in denying Stephens's application when it did not make a specific determination under Code § 8.01-217(A) whether good cause existed[29] but instead indicated merely that "the proposed name does not appear to have any religious meaning or significance contrary to its general and accepted meaning."[30] The Commonwealth maintained that,

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[27] 274 Va. 157, 645 S.E.2d 276 (2007).

[28] *Id.* at 159, 645 S.E.2d at 276.

[29] *Id.* at 161-62, 645 S.E.2d at 278.

[30] *Id.* at 159, 645 S.E.2d at 276.

because the court had failed to make a specific determination that good cause was lacking, the Supreme Court should remand the case simply to allow the court to make that determination.[31]

In reversing the circuit court's order in *Stephens*, the Court rejected the Commonwealth's interpretation and clarified that a circuit court must do more than conclude that "good cause" does not exist. A circuit court's determination that an application lacks good cause "must be supported by evidence in the record."[32] Accordingly, this Court remanded with directions that the circuit court reconsider the name-change application:

> [S]ince there is no basis for the denial of Stephens' petition for lack of good cause under Code § 8.01–217(A) and the circuit court apparently did not consider Stephens' petition under Code § 8.01–217(C), the circuit court should resume its review and consideration of the petition in accord with the requirements of Code § 8.01–217(C).[33]

The Court underscored that "the circuit court's implicit denial of Stephens' petition for lack of good cause was clearly an abuse of discretion requiring reversal and remand *without further consideration of the good cause issue*

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[31] *Id.* at 161-62, 645 S.E.2d at 278.

[32] *Id.* at 162, 645 S.E.2d at 278.

[33] *Id.* at 162-63, 645 S.E.2d at 278.

by the circuit court."[34]

Stephens is consistent with numerous decisions in other jurisdictions holding that courts must provide specific reasons for denying name-change requests.[35] As in *Stephens* and those cases, this Court should reverse and remand so that the Circuit Court can state the evidence, if any, that good cause does not exist for Arnold's application.

B. This Court previously resolved a case legally indistinguishable from this one by reversing and remanding.

Stephens provided clear direction to circuit courts that their discretion to deny a name-change application for lack of good cause is bounded, at the least, by a requirement that the decision be grounded in evidence. Yet, in a case last year substantially identical to Arnold's, this Court found it necessary to reiterate to the Circuit Court below that *Stephens* remained controlling.

In that case,[36] Robert Floyd Brown—like Arnold, an inmate at FCI Petersburg—applied to the Circuit Court for Prince George County to

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[34] *Id.* at 162, 645 S.E.2d at 278 (emphasis added).

[35] *See, e.g.*, *In re A.M.B.*, 997 A.2d 754, 755 (Me. 2010); *In re Knight*, 537 P.2d 1085, 1086 (Colo. App. 1975); *In re Cruchelow*, 926 P.2d 833, 834 (Utah 1996); *In re Change of Name of Picollo*, 668 N.W.2d 712, 714 (Neb. App. 2003).

[36] *In re Robert Floyd Brown, Jr.*, Record No. 131284 (Va. Dec. 12, 2013).

change her name to "Alicia Jade Brown." She complied with the statutory requirements and explained in the affidavit accompanying her application that she was being treated for GID and had been living as a female for more than a decade.[37] As in this case, Judge Lee denied the application, without explanation, by indicating merely that good cause "does not" exist. Brown petitioned for appeal. In a summary order, this Court found error in the Circuit Court's order and reversed and remanded for the Circuit Court to undertake the required analysis "in accordance with this Court's holding in *Stephens* . . . ."[38] With that order, the Court underscored that merely stating the absence of good cause, without supporting evidence, is reversible error.

Arnold's case is legally indistinguishable from Brown's. This case involves the same factual situation, the same judge, the same claimed

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[37] *Id.*

[38] *Id.* On remand, the trial court again denied Brown's name-change application. This time it provided some explanation for its decision, as required by *Stephens*. It stated, in relevant part, that "good cause does not exist because the petitioner's stated reasons for the name change do not outweigh the potential negative impact on the community. Given that the name change reflects a shift in gender identity of a federal prisoner, the Court declines to accept the application . . . ." *See* JA 34. Brown's petition appealing that order remains pending. Record No. 141130 (Va. Jul. 28, 2014).

good cause, and the same arguments on appeal. The outcome should be the same as well.

III. On remand, the Circuit Court should follow the process set forth in the revised statute.

Unlike in *Stephens*, the Court should not simply remand the case for the Circuit Court to resume its review of the application and determine whether suspected fraud or harm justifies denying the application.[39] The General Assembly revised Code § 8.01-217 during its 2014 regular session, modifying the process that courts must follow in considering applications from probationers, sex offenders, and prisoners.[40] Because the Circuit Court has not previously accepted Arnold's application for review, and the procedural changes to the statute do not affect a substantive or vested right of Arnold, on remand the Circuit Court's consideration of Arnold's application should comport with the statute as revised.

Code § 8.01-1 provides the rule for how revisions to Title 8.01 ("Civil Remedies and Procedure") should be applied:

> [A]ll provisions of this title shall apply to causes of action which arose prior to the effective date of any such provisions . . . [unless] if in the opinion of the court any

[39] *See Stephens*, 274 Va. at 162-63, 645 S.E.2d at 278.

[40] *See* 2014 Virginia Acts ch. 232 (H.B. 233).

> particular provision (i) may materially change the substantive rights of a party (as distinguished from the procedural aspects of the remedy) or (ii) may cause the miscarriage of justice.[41]

This Court has elaborated on this distinction between substantive rights and procedural law: "Substantive rights . . . are included within that part of the law dealing with creation of duties, rights, and obligations, as opposed to procedural or remedial law, which prescribes methods of obtaining redress or enforcement of rights."[42]

The revisions to Code § 8.01-217 do not "materially change" any of Arnold's substantive rights. The procedure a circuit court follows in processing a name-change request does not involve the creation of a duty, right or obligation—let alone a vested right. A right is not vested if it is "dependent on any future act, contingency, or decision to make it more secure," [43] as a name-change application inherently is. And "mere expectancy that the law in effect at the time of the submission of an application will apply to the application does not rise to the level of a vested

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[41] Va. Code Ann. § 8.01-1 (2007).

[42] 228 Va. 115, 120, 319 S.E.2d 750, 754 (1984). *See also Morency v. Commonwealth*, 274 Va. 569, 576-77, 649 S.E.2d 682, 685 (2007) (distinguishing substantive and vested rights from procedural remedies, which "may be altered, curtailed, or repealed at the will of the legislature").

[43] *Bain v. Boykin*, 180 Va. 259, 23 S.E.2d 127 (1942).

right."[44] Nor would applying the revised statute cause the miscarriage of justice.

Accordingly, on remand the Circuit Court should follow the process provided in the revised statute. The revised statute preserves the circuit courts' discretion to deny consideration of applications from inmates who have not demonstrated good cause for their applications. It eliminates the good-cause requirement from Code § 8.01-217(A) and reformulates it in new section 8.01-217(D):

> No application shall be accepted by a court for a change of name of a probationer, [sex offender], or incarcerated person unless the court finds that good cause exists for consideration of such application under the reasons alleged in the application for the requested change of name.[45]

If the circuit court determines that good cause exists for the application, it must then notify certain Commonwealth's attorneys of the application and

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[44] 1989 Op. Va. Att'y Gen. 40, 42 (explaining that "[m]ere acceptance and processing of an application . . . does not necessarily mean that [a] permit will be issued or that additional information will not be necessary."). *See also Landfill One, Inc. v. Bailey*, 21 Va. Cir. 318 (1990), *amended on reconsideration in part by* 1991 WL 835161 (Va. Cir. Ct. Sept. 11, 1991) ("Since Landfill One's application for Part B . . . was still pending . . . when amended [Code §] 10.1-1408.1 B was enacted, the new statutory requirement [applies] . . . to Part B") (citing *Ziffrin v. U.S.*, 318 U.S. 73 (1943)).

[45] Va. Code Ann. § 8.01-217(D) (Supp. 2014).

allow the Commonwealth's attorney where the application was filed to respond to the application:

> If the court accepts the application, the court shall mail or deliver a copy of the application to the attorney for the Commonwealth for the jurisdiction where the application was filed and the attorney for the Commonwealth for any jurisdiction in the Commonwealth where a conviction occurred that resulted in the applicant's probation, registration with the Sex Offender and Crimes Against Minors Registry pursuant to Chapter 9 (§ 9.1–900 et seq.) of Title 9.1, or incarceration. The attorney for the Commonwealth where the application was filed shall be entitled to respond and represent the interests of the Commonwealth by filing a response within 30 days after the mailing or delivery of a copy of the application. The court shall conduct a hearing on the application . . . .[46]

As the statute indicates, this required notice and hearing allows for the interests of the Commonwealth, if any, to be raised. Following this gathering of information, the court retains the discretion to deny a name change:

> The court . . . may order a change of name if, after receiving and considering evidence concerning the circumstances regarding the requested change of name, the court determines that the change of name (i) would not frustrate a legitimate law-enforcement purpose, (ii) is not sought for a fraudulent purpose, and (iii) would not otherwise infringe upon the rights of others. Such order shall contain written findings stating the court's basis for granting the order.[47]

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[46] *Id*.

[47] *Id.*

The revised statute requires the circuit courts to review and consider more information in deciding name-change applications than before, but they retain the discretion to grant or deny applications. As demonstrated below, however, in the Circuit Court's review of Arnold's application, Arnold's transgender identity should not, standing alone, constitute grounds to deny her application.

IV. An applicant's transgender identity is an insufficient basis, standing alone, to conclude "good cause" does not exist to accept an application for consideration, or to deny the application once accepted.

The record here does not indicate whether the Circuit Court concluded that Arnold's application was made for fraudulent purpose or would inflict harm on others. Nor is it clear whether the Circuit Court would conclude that Arnold's application clears the hurdles imposed by new Code § 8.01-217(D) (Supp. 2014). But one thing ought to be clear: a person's transgender status alone is not good cause to deny a name-change request and should not by itself preclude a circuit court from reviewing or granting an application.

The Circuit Court's refusal to accept Arnold's application for review, in the absence of any apparent fraud or harm to others, leaves the impression that it denied Arnold's application based solely on her transgender identity. Indeed, in the parallel *Brown* case, following remand by this Court, the

same Circuit Court judge declined to accept Brown's application for consideration because "the name change reflects a shift in gender identity of a federal prisoner."[48]

To the extent that ruling reflects judicial hostility to transgender persons, the Circuit Court abused its discretion because it was "guided by erroneous legal conclusions."[49] The Commonwealth submits, and recommends that the Court underscore here, that Virginia's name-change statute does not countenance discrimination against transgender applicants.[50]

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[48] JA 34. Order, *In re Petition for Change of Name (Robert Floyd Brown, Jr.*), Case No. 13-172 (Va. Cir. Ct. Mar. 26, 2014). *See also* Petition for Appeal, *In re Robert Floyd Brown, Jr.*, Record No. 141130 (Va. July 28, 2014).

[49] *Lawlor*, 285 Va. at 213, 738 S.E.2d at 861 (internal punctuation omitted).

[50] Arnold is *not* asking that the Circuit Court recognize her as a woman. *See In re Guido*, 771 N.Y.S.2d 789, 791 (N.Y. Civ. Ct. 2003) ("Petitioner has not asked this Court to declare his sex changed from male to female, nor is such a declaration within the scope of this Court's powers. This Court is asked only to sanction legally Petitioner's desire for a change of name, after satisfying itself that Petitioner has no fraudulent purpose for doing so and that no other person's rights are interfered with thereby."). Arnold seeks a simple name change, not judicial recognition of whether she has changed gender. *See In re Winn-Ritzenberg*, 891 N.Y.S. 220, 221 (N.Y. Sup. Ct. 2009) ("In granting petitioner's application, we do not address the separate issue of whether petitioner has changed gender for legal purposes.").

Indeed, the Code contemplates an independent process for having one's sex declared legally changed. *See* Va. Code Ann. § 32.1-269(E) (2011)

A. Transgender status should not stand in the way of finding good cause for a name-change application.

1. Changing one's name to reflect transgender status is not a frivolous pursuit.

Although the Code "does not define what constitutes good cause for an application for change of name," this Court has held that the "good cause requirement reflects a legislative intent to invest circuit courts with discretion regarding the summary disposition of, for example, frivolous applications."[51] By denying Arnold's petition outright, the Circuit Court found that it was on par with a "frivolous" application.

Few Virginia cases illuminate what constitutes a "frivolous" application. In *Stephens*, the Court noted that the "facts stated in the petition did not in any way suggest the name change was sought with frivolous intentions," and proceeded to allow Stephens to change his name for "'religious purposes' in furtherance of his faith in the Islamic religion."[52] And in *In re Wampler*, the Circuit Court for Rockingham County did not find

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(referring to "an order of a court of competent jurisdiction indicating that the sex of an individual has been changed by medical procedure"). *See also* 1985-86 Op. Va. Att'y Gen. 182, 182 ("[O]nce the medical procedure changing the sex of an individual has been completed, the person may apply to the circuit court for an order indicating the change.").

[51] *Stephens*, 274 Va. at 162, 645 S.E.2d at 278.

[52] *Id.*

good cause where the applicant gave *no* reason for changing his name for a third time.[53]

Allowing an applicant to change her name to match her gender identity, by contrast, is hardly frivolous. Arnold gave weighty reasons: using "Steven" causes her "great distress and anxiety and exacerbates" her GID.[54] GID is a serious condition recognized by state and federal courts.[55] For instance, in *O'Donnobhain v. Commissioner of Internal Revenue*, the United States Tax Court found that petitioner's GID condition was a disease for purposes of deducting associated medical expenses, in view of:

> (1) GID's widely recognized status in diagnostic and psychiatric reference texts as a legitimate diagnosis, (2) the seriousness of the condition as described in learned treatises in evidence and as acknowledged by all three

[53] *In re Wampler*, 46 Va. Cir. 312, 313 (1998).

[54] JA 4-6.

[55] *See, e.g.*, *De'lonta v. Johnson*, 708 F.3d 520, 522 (4th Cir. 2013) (describing GID as a "rare, medically recognized illness . . . characterized by a feeling of being trapped in a body of the wrong gender"); *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980) (noting that "transsexualism is a very complex medical and psychological problem which is generally developed by individuals early in life" and acknowledging that "[b]y the time an individual reaches adulthood, the problem of gender role disorientation and the transsexual condition resulting therefrom are . . . severe"); *Doe v. State of Minn. Dept. of Pub. Welfare*, 257 N.W.2d 816 (Minn. 1977) ("In cases when sex and gender do develop independently, the end product is often a transsexual person plagued by the serious problem of gender role disorientation, a painful cross-gender identity") (internal punctuation and citation removed).

> experts in this case; (3) the severity of petitioner's impairment as found by the mental health professionals who examined her; [and] (4) the consensus in the U.S. Courts of Appeal that GID constitutes a serious medical need for purposes of the Eighth Amendment . . . .[56]

For these same reasons, Arnold's diagnosed GID is a serious condition, and the name-change application she submitted should not have been cast aside as if it were frivolous.

2. The Court's remand instructions in *Brown* suggest that a gender transition constitutes good cause to review an application.

This Court's disposition of *In re Brown* provides further support for the conclusion that transgender status does not preclude a finding that good cause exists for a name-change application. In *Brown*, as discussed above, this Court reversed the Circuit Court's denial of a transgender prisoner's application and remanded "with direction *to enter judgment* in accordance with this Court's holding in *Stephens* . . . ."[57] And in *Stephens*—like here—there was "no basis for the denial of Stephens' petition for lack of good cause under Code § 8.01–217(A) and the circuit court apparently did not consider Stephens' petition under Code § 8.01–

[56] 134 T.C. 34, 63 (2010).

[57] JA 34.

217(C)."[58] Accordingly, the Court directed that "the circuit court . . . resume its review and consideration of the petition in accord with the requirements of Code § 8.01–217(C)."[59] The Court underscored that "the circuit court's implicit denial of Stephens' petition for lack of good cause was clearly an abuse of discretion requiring reversal and remand *without further consideration of the good cause issue by the circuit court*."[60]

The Court's remand directions in these cases to "enter judgment" and to consider the petition "in accord with the requirements of Code § 8.01-217(C)" suggest that, in this case as well, the focus on remand should not be on the threshold question whether "good cause" exists to consider the application. Rather, it should be on whether the traditional factors of potential fraud and harm to others—and, under the revised statute, frustration of a legitimate law-enforcement purpose—militate against granting the application.

3. *In re Champion* is not applicable.

Other than *Brown*, the Commonwealth has identified only one Virginia case that touches on whether a prisoner's transgender identity should

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[58] *Stephens,* at 162, 645 S.E.2d at 278.

[59] *Id.* at 162-63, 645 S.E.2d at 278.

[60] *Id.* at 162, 645 S.E.2d at 278 (emphasis added).

prevent a finding that good cause exists for the application. Ten years ago, in the case *In re Champion*,[61] the Circuit Court of Lee County rejected a name-change application from a pre-operative transsexual who intended to undergo surgery after his release from prison. The court found that Champion failed to show his stated reasons demonstrated good cause. *Champion* is distinguishable from this case for the reasons below. But to the extent it stands for the proposition that an applicant's transgender status alone militates against finding good cause, this Court should disapprove of it.

At the outset of its analysis, the court in *Champion* acknowledged that the good-cause standard "has not yet been addressed by the Virginia Supreme Court in the context of name change petitions to accommodate gender dysphoria," but concluded that "'good cause' in the context of prisoner petitions to accommodate gender dysphoria rests within the discretion of the court."[62] It then proceeded to deny Champion's application based on its concern that his "criminal record contain[ed] several convictions for sex offenses that require future registration with law

[61] 72 Va. Cir. 588 (2004).

[62] *Id.* at 589.

enforcement agencies."[63] It explained that allowing Champion to change his name could "frustrate the purpose of the registration requirements, regardless of the petitioner's actual intent," and concluded that "petitioner's stated reasons for the name change" failed to "outweigh the potential negative impact upon the community."[64] On these grounds, the court denied the name-change request.[65]

Despite arising from a similar situation, *Champion* is not persuasive authority here and is distinguishable because the concern that underlay the decision has been obviated by revisions to the statute. First, Champion was subject to sex-offender-registration requirements. The court's reasoning depended entirely on its conclusion that a name change would frustrate those registration requirements. As a result, its holding would not

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[63] *Id.*

[64] *Id*. Although the Circuit Court for Prince George County did not cite *Champion* in its second denial of Robert Floyd Brown's name-change petition, it appears to have invoked *Champion*'s reasoning when it concluded that "good cause does not exist because the petitioner's stated reasons for the name change do not outweigh the potential negative impact on the community." JA 34.

[65] *Id.* at 589. The court also noted alternate grounds for denying the petition: at the time the prisoner applied for the name change, he was incarcerated in Missouri, having been transferred there from the federal penitentiary in Virginia, and "maintain[ed] no contact whatsoever to the Commonwealth." *Id.* at 588, 589. The court observed that "petitioner's efforts should be directed toward [his birth state] Arizona or Missouri." *Id.* at 589.

justify denying a good-cause finding to a transgender inmate who is not subject to the registration requirements. (The record here does not disclose whether Arnold would be subject to those registration requirements.)

Second, the concern that animated the holding in *Champion* has been obviated by the revisions to Code § 8.01-217. The revised statute provides additional safeguards against the possibility that sex offenders could abuse the name-change process. The statute now includes a notice and hearing process for a Commonwealth's attorney to raise the interests of the Commonwealth. It requires that the application be denied if the circuit court determines that the name change would frustrate a legitimate law-enforcement purpose, which would include interference with the sex-offender-registration requirements.[66] Having those considerations built into the statutory scheme means that a circuit court does not need to speculate about potential harms prematurely, at the good-cause phase, before it accepts an application for review.

[66] *See* Va. Code Ann. § 8.01-217(D) (Supp. 2014).

If what remains from *Champion* is the proposition that an applicant's transgender identity, standing alone, should preclude a finding of good cause, this Court should reject it.[67]

B. Transgender status, standing alone, is insufficient grounds to deny an application.

Code § 8.01-217 expressly provides the limited circumstances in which a prisoner's name-change application should be denied. Being transgender is not one of them. A name change to reflect one's gender identity does not trigger either of the two traditional linchpins for denial—*i.e.*, where the change of name is sought for a fraudulent purpose or would otherwise infringe upon the rights of others[68]—nor does it run afoul of the new statutory requirement that a prisoner's name change "not frustrate a legitimate law-enforcement purpose."[69]

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[67] In support of its decision, the court in *Champion* cited *In re Wampler*, 46 Va. Cir. 312 (1998), stating that the name-change petition refused there by the Circuit Court of Rockingham County was "filed under similar circumstances to those presented by the instant case." *Champion*, 72 Va. Cir. at 589. That mischaracterized *Wampler*. There, the petitioner had changed his name multiple times already—from Philip David Wampler to Gina Dotson, then back to Philip David Wampler—before seeking to change his name to Kelly Cook. It was on the ground of repeated name-changes, rather than the petitioner's gender identity, that the circuit court found good cause lacking. 46 Va. Cir. at 313.

[68] Va. Code Ann. § 8.01-217(C) (2007); *see also* Va. Code Ann. § 8.01-217(D) (Supp. 2014).

[69] Va. Code Ann. § 8.01-217(D) (Supp. 2014).

The General Assembly has already implicitly recognized that a change to one's *sex* is an appropriate basis for a name change. Indeed, the same Code section sets forth the procedure for amending one's birth certificate to show a new sex *and* a new name:

> Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual has been changed by medical procedure and upon request of such person, the State Registrar shall amend such person's certificate of birth to show the change of sex and, if a certified copy of a court order changing the person's name is submitted, to show a new name.[70]

Given the Code's acceptance of name-change events associated with sex-change events, there is no reason to deny name-change applications under Code § 8.01-217, particularly when, as here, the petitioner plans to "fully transition . . . via surgical means."[71]

As discussed below, however, some lower courts, in the Commonwealth and elsewhere, have subjected transgender name-change applicants to enhanced scrutiny and have improperly denied their

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[70] Va. Code Ann. § 32.1-269(E). *See also* 1985-86 Op. Va. Att'y Gen. 182, 182 (discussing legal process for sex changes and noting that a transsexual "may also make application to the circuit court to have [his] name changed, and upon submission . . . of the court's order changing the individual's name, the State Registrar will amend the person's certificate of birth to show a new name").

[71] JA 4.

applications. When reviewing those cases, appellate courts have concluded, as should this Court, that transgender identity alone should pose no barrier to a name change. When it comes to name changes, "apart from the prevention of fraud or interference with the rights of others, there is no reason—and no legal basis—for courts to appoint themselves the guardians of orthodoxy in such matters."[72]

1. Changing one's name to reflect gender is not an inherently fraudulent purpose.

Both the common law and statutory law in Virginia prohibit name changes that are sought for a fraudulent purpose.[73] Changing one's name to reflect a different gender identity is not inherently fraudulent.

In re Joseph David Fialkowski[74] involved a petitioner's application to change her name to "Julianna Tourmaline Fialkowski" in connection with her transition to the female gender.[75] Fialkowski's petition was initially

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[72] *In re Guido*, 771 N.Y.S.2d 789, 791 (N.Y. Civ. Ct. 2003).

[73] Va. Code Ann. § 8.01-217(C) (2007); *see also* Va. Code Ann. § 8.01-217(D) (Supp. 2014). *See also In re Miller*, 218 Va. 939, 943, 243 S.E.2d 464, 467 (1978) (noting "common-law principle that names may be changed in the absence of a fraudulent purpose").

[74] Letter Opinion, Case No. CL14000005-17 (Va. Cir. Ct. May 21, 2014).

[75] Brad Kutner, *Lynchburg Transwoman Denied Name Change by Former Liberty University Lawyer Turned Judge*, GAYRVA.COM (May 19, 2014), http://www.gayrva.com/arts-culture/lynchburg-transwoman-denied-name-change-by-former-liberty-university-lawyer-turned-judge/.

denied by the Circuit Court for the City of Lynchburg after it was flagged for "extra scrutiny," according to Fialkowski,[76] but was granted after a second hearing.[77] The judge concluded that Fialkowski's application "complies with Virginia Code § 8.01-217 and that the change of name is not sought for any fraudulent purpose . . . ."[78] In granting Fialkowski's application, the court implicitly rejected the idea that there is anything inherently fraudulent about being transgender.[79]

Other States' courts have made that point more explicitly. In the case *In re Eck*, for instance, a New Jersey trial court denied a preoperative transsexual's request for a name change, saying it was "inherently

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[76] *Id.*

[77] Letter Opinion, *In re Joseph David Fialkowski*, Case No. CL14000005-17.

[78] *Id. See also* GayRVA Staff*, Lynchburg Transwoman Granted Name Change*, GAYRVA.COM (May 21, 2014), http://www.gayrva.com/news-views/lynchburg-transwoman-granted-name-change/.

[79] The Circuit Court for Louisa County did likewise when it permitted Ashleigh Nicole Haley to change his name to Jacob Nicholas Haley. *See* Order for Name Change, Case No. CL13000069-00 (Va. Cir. Ct. June 17, 2013) (finding that "[a]pplicant is not seeking a name change for any fraudulent purpose"). The court had previously denied Haley's name-change request until Haley produced medical documentation related to his transition process. *See* Matthew Leonard, *Louisa Transgender Man Wins Court Case in Name Change Battle*, GAYRVA.COM (June 17, 2013), http://www.gayrva.com/news-views/louisa-transgender-man-wins-court-case-in-name-change-battle/.

fraudulent for a person who is physically a male to assume an obviously 'female' name for the sole purpose of representing himself to future employers and society as a female."[80] The Superior Court of Appeals reversed, holding that being transgender or transsexual is irrelevant to whether a name change is proper:

> Absent fraud or other improper purpose a person has a right to a name change whether he or she has undergone or intends to undergo a sex change through surgery, has received hormonal injections to induce physical change, is a transvestite, or simply wants to change from a traditional "male" first name to one traditionally "female," or vice versa.[81]

Similarly, in *In re Harvey*, the petitioner "sought to have his name changed from 'Steven Charles Harvey' to 'Christie Ann Harvey,' because he was in the process of undergoing sexual/gender change."[82] The trial court denied Harvey's petition, "finding that Harvey sought a name change for an illegal or fraudulent purpose."[83] On appeal, the Court granted the petition, finding "no fraud in identifying oneself by a traditionally male or

[80] 584 A.2d 859, 860 (N.J. Super. Ct. App. Div. 1991).

[81] *Id.* at 860-61.

[82] *In re Harvey*, 293 P.3d 224, 224 (Okla. Civ. App. 2012).

[83] *Id.* at 225.

female name while having the DNA of the other sex."[84] And in the case *In re Harris*, the Superior Court of Pennsylvania rejected the trial court's assumption that a transsexual name-change applicant's petition was for a fraudulent purpose.[85] Rather than "perpetrating a fraud upon the public," the court concluded, "the name change would eliminate what many presently believe to be a fraud; that is, that petitioner is a man."[86]

Decisions by numerous other State appellate courts show that seeking a name change on account of one's transgender identity is not inherently fraudulent:

- In Pennsylvania, the Supreme Court reversed the denial of a pre-operative transsexual's name-change application where the petitioner "was not seeking a name change to avoid any financial obligations or commit fraud"; the court noted that "[t]he fact that he is a transsexual seeking a feminine name should not affect the disposition of his request" and "there is no public interest being protected by the denial of Appellant's name change petition. The details surrounding Appellant's quest for sex-reassignment surgery are not a matter of governmental concern."[87]

- In New York, the Appellate Division reversed the lower court's decision denying a name-change to a transgender individual due to the "potential for confusion"; the appellate court

[84] *Id.* at 225.

[85] *In re Harris*, 707 A.2d 225, 228 (Pa. Super. Ct. 1997).

[86] *Id.*

[87] *In re McIntyre*, 715 A.2d 400, 402-03 (Pa. 1998).

concluded that, because there were no factors suggesting fraud, misrepresentation, or interference with the rights of others, the petition should be granted.[88]

- In Ohio, the Probate Court, applying a statute that provides that a name can be changed if there exists "reasonable and proper cause," held that "so long as there is no intent to defraud creditors or deceive others and the applicant has acted in good faith, then the petition should be granted," and granted a name change requested by a pre-operative transsexual.[89]

These holdings demonstrate that the mere fact that a name-change applicant is transgender is insufficient to show that the applicant seeks to further some kind of fraud.

2. Changing one's name to reflect gender identity does not infringe on the rights of others.

A decision by a court that a name change would infringe on the rights of others "must be based on facts, not speculation."[90] There are no facts that show that a name change by a transgender individual would inherently infringe upon the rights of others. The Circuit Court for the City of Lynchburg implicitly made that finding in *In re Fialkowski* when it concluded that petitioner's application "complies with Virginia Code § 8.01-217 . . . and

[88] *In re Golden*, 867 N.Y.S.2d 767 (N.Y. App. Div. 2008).

[89] *In re Ladrach*, 513 N.E.2d 828, 829 (Ohio Prob. Ct. 1987).

[90] *In re Miller*, 218 Va. 939, 943, 243 S.E.2d 464, 467 (1978).

is not intended to infringe upon the rights of others."[91] Indeed, at least one court has found that a transgender individual's "name change would *benefit* . . . the public at large."[92] The court reasoned that "[s]hould petitioner be allowed to change his name [from 'Brian'] to 'Lisa' . . . the general public's outward perception of petitioner would be reaffirmed by petitioner's legal name."[93]

C. The record in this case does not reveal any evidence that Arnold's application lacks good cause or falls within one of the limited statutory exceptions to the general rule in favor of granting name changes.

There is no evidence that Arnold's petition lacks good cause or that changing her name to reflect her gender identity is "frivolous." While it is possible that the outcome may be different on remand once the correct procedures are followed, the current record contains no evidence that the requested name change should be denied.

First, there is no evidence that Arnold sought a name change for a fraudulent purpose. In fact, she certified under oath, in completing Form CC-1411, that her "name change [was] not sought for any fraudulent

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[91] Letter Opinion, Case No. CL14000005-17 (Va. Cir. Ct. May 21, 2014).

[92] *In re Harris*, 707 A.2d 225, 228 (Pa. Super. Ct. 1997) (emphasis added).

[93] *Id.*

purposes."[94] Arnold also submitted an affidavit with her application that included her attestation that "there is no fraudulent purpose behind my application."[95] There is no evidence in the record that Arnold applied for the name change in furtherance of fraud.

Second, there is no evidence in the record—none of the required "facts, not speculation"[96]—that granting Arnold's requested name change would infringe on the rights of others.

And third, the record provides no reason to conclude that granting Arnold's name-change request would frustrate a legitimate law-enforcement purpose, such as the concern in *Champion*, discussed above, that allowing the petitioner to change all three of his names would frustrate sex-offender-registration requirements.[97] Nor would changing Arnold's name impede "the reliability and efficiency of correctional records."[98]

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[94] JA 3.

[95] JA 5.

[96] *Miller*, 218 Va. 939 at 943, 243 S.E.2d at 467.

[97] *Champion,* 72 Va. Cir. at 589.

[98] *Barrett v. Virginia*, 689 F.2d 498, 503 (4th Cir. 1982) (in case involving prisoner's application for legal recognition of his adopted religious name, noting that the "the reliability and efficiency of correctional records could . . . be safeguarded . . . by adding the religious name to the existing records reflecting the inmate's previous legal name and aliases").

Accordingly, unless competent evidence is adduced on remand to justify denying the name change, the Circuit Court would abuse its discretion in refusing to allow it.

CONCLUSION

The Circuit Court abused its discretion in rejecting Arnold's name-change application for lack of good cause, and this Court should remand so that the Circuit Court can properly apply the statutory framework, as revised by the General Assembly earlier this year. The Court should make clear in its opinion that a prisoner's transgender identity, standing alone, is not a sufficient basis to conclude that her application lacks good cause or fails to satisfy the statutory criteria.

Respectfully submitted,

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RULE 5:26(H) CERTIFICATE

I hereby certify, pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, that the foregoing brief complies with the requirements of Rule 5:26.

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CERTIFICATE OF SERVICE

I certify that, on October 29, 2014, pursuant to Rule 5:26(e), fifteen copies of this brief amicus curiae were filed with the Clerk of the Supreme Court of Virginia, an electronic copy was e-mailed to scbriefs@courts.state.va.us, and one electronic copy, by e-mail, and three bound copies, by U.S. Mail, were sent to counsel for Appellant at the following address:

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