

COURT OF APPEALS OF VIRGINIA

Record No. 0311-25-3

JORDAN KYLE DUNCAN
v.
COMMONWEALTH OF VIRGINIA

Present: Judges Ortiz, Causey and Callins

Argued at Lexington, Virginia

Opinion Issued September 8, 2026

FROM THE CIRCUIT COURT OF NELSON COUNTY

Michael R. Doucette, Judge

Dana R. Cormier (Dana R. Cormier, P.L.C., on briefs), for appellant.

Robert D. Bauer, Assistant Attorney General (Jason S. Miyares,¹ Attorney General, on brief), for appellee.

PUBLISHED OPINION BY JUDGE DORIS HENDERSON CAUSEY

After a bench trial, Jordan Kyle Duncan was convicted of the felony offense of escape from custody without force or violence under Code § 18.2-479(B). Duncan’s conduct did not constitute a violation of Code § 18.2-479(B). Nonetheless, the trial court held that the conviction was permitted pursuant to a furlough order endorsed by Duncan’s prior counsel as part of a previous legal matter. That furlough order stated that the relevant conduct would “be deemed” a violation of that statute.

On appeal, Duncan argues that the trial court erred by convicting him where the evidence indisputably showed he did not commit the offense. He argues that the waiver arguments

¹ Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

advanced by the Commonwealth and adopted by the trial court did not permit the language of the furlough order to override the substantive criminal elements of Code § 18.2-479(B).

For the following reasons, we agree with Duncan and find the appropriate-reprobate doctrine inapplicable in this case. The trial court erred by convicting Duncan under Code § 18.2-479(B) because the evidence showed he did not violate that statute. Therefore, we reverse Duncan's conviction.

BACKGROUND²

Jordan Kyle Duncan was arrested for a probation violation and subsequently incarcerated at Middle River Regional Jail. On July 2, 2024, he was granted a furlough from custody to attend a substance abuse treatment program in Radford, where he was admitted into the Pyramid Healthcare Program (Pyramid).

On July 30, two days before Duncan was set to successfully complete the Pyramid program, Duncan's then-counsel³ moved the Circuit Court of Nelson County for a continued furlough for Duncan to complete a second drug treatment program, the Tandem Behavioral Health Program (Tandem) in Roanoke, Virginia. The motion was unopposed by the Commonwealth and granted by the court, permitting Duncan to be transported to Tandem to complete the program.

The court issued an order granting Duncan continued furlough to attend the continued drug treatment program, which was endorsed by both Duncan's then-counsel and the Commonwealth. That order contained the following language relevant to this appeal:

If the defendant fails to remain in full compliance with the Tandem Behavioral Health program, and or leaves the program, he shall immediately return to the Middle River Regional Jail. Failure to

² We recite the facts in the light most favorable to the Commonwealth, the prevailing party below. *Farhoumand v. Commonwealth*, 288 Va. 338, 351 (2014).

³Duncan obtained different counsel for his subsequent felony charges and this appeal.

do so *shall be deemed* an escape from custody pursuant to Virginia Code Section 18.2-479(B), and the defendant *shall be on notice that he is likely to be charged with such*. The defendant shall waive venue for the above-mentioned potential offense and agrees that this Court shall be the proper venue for any such charge.

(Emphases added).

Duncan began treatment with Tandem as required but absconded and failed to attend programming after August 6, 2024. On August 12, following Duncan's continued absence, Tandem discharged him from the program. Duncan did not return to jail until August 24, when he was arrested on apparently unrelated charges. Subsequently, the Commonwealth sought and obtained an indictment against Duncan for a violation of Code § 18.2-479(B), the code section referred to in the furlough order. This code section makes it a felony for any "[a]ny person lawfully confined in jail . . . *on a charge or conviction of a felony*" to "escape[], other than by force or violence or by setting fire to the jail." (Emphasis added).

A bench trial was held on the felony escape charge on February 5, 2025. Duncan entered a plea of not guilty. The Commonwealth presented two witnesses and the furlough order, establishing the sequence of events referred to above: that Duncan was incarcerated on probation charges, was furloughed from jail to attend the drug treatment programs, and failed to remain in compliance with the second program or to return to jail.

Following the Commonwealth's evidence, Duncan, by his new counsel, moved to strike. He noted that the charged felony offense, Code § 18.2-479(B), applied only to those who escape when in custody for a charge or conviction of *a felony*. By contrast, Code § 18.2-479(A), a Class 1 misdemeanor, applied to those who, like Duncan, were incarcerated for probation violations. Duncan pointed out that under the clearly established facts of the case, Duncan obviously did not commit the charged offense. Further, he argued that the language of the furlough order was

insufficient to permit the court to “order that Mr. Duncan be convicted of a charge for which he is not guilty.”

The Commonwealth did not dispute Duncan’s assertion that he was innocent of the relevant offense. Instead, referring to the furlough order, the Commonwealth argued that Duncan was “on notice that this would be a felony charge.” The Commonwealth noted that Duncan, by counsel, consented to the order, and argued that the order should be “upheld.” The trial court overruled Duncan’s motion to strike, stating as follows:

I’m going to find that the law of the case, your previous counsel abrogated the law of the case. The abrogation the previous counsel did is the law of the case in that, basically, he asked for and got his bargain. His bargain was, give me a furlough, and if I don’t return, it’ll be a violation of Subsection B. He asked for it, he got his bargain, and then he reneged on his end of the bargain. This is pure contractual law. So your motion to strike is denied.

Duncan was the only witness for the defense. He denied knowing about or understanding the terms of the furlough order. Duncan stated that he recalled only being taken before the magistrate to review bond conditions after leaving Middle River and his prior counsel telling him, “You’re getting out. Don’t mess up.”

Duncan then renewed his motion to strike. He disputed the court’s characterization of the order as a contract. He also argued that, regardless of whether the order constituted a contract, “the Court cannot order someone to be convicted of a crime that they did not commit.” The court overruled Duncan’s motion stating as follows:

I have heard of cases dealing with the law of the case, where the law of the case is basically that where one side concedes a certain position, even though that’s not the law, that becomes the law of the case.

The court therefore denied Duncan’s renewed motion to strike, subsequently noting that the case law it had referred to was *Banks v. Commonwealth*, 217 Va. 527 (1976).

After closing argument, the court found Duncan “guilty of [the] charge of escape, violation of Code Section 18.2-479(B).” This appeal followed.

ANALYSIS

I. The Sufficiency of the Evidence

On appeal, Duncan’s primary argument is that the trial court erred by convicting him where the evidence did not show he committed the felony offense for which he was charged, tried, and convicted. Duncan repeatedly pressed this argument below.

“Any person lawfully confined . . . or . . . in . . . custody . . . *on a charge or conviction of a felony* who escapes, other than by force or violence or by setting fire to the jail, is guilty of a Class 6 felony.” Code § 18.2-479(B) (emphasis added). On the other hand, a defendant who commits the same action while confined or in custody “*for violation of his probation* or parole or on a charge or conviction of a misdemeanor . . . is guilty of a Class 1 misdemeanor.” Code § 18.2-479(A) (emphasis added).

At the time of his furlough to attend drug treatment, Duncan was incarcerated for a probation violation. He was not being held on a charge or conviction of a felony. The plain language of the two statutes and our case law make clear that a person in Duncan’s situation cannot violate the felony Code § 18.2-479(B), but instead can, at most,⁴ violate the misdemeanor provision, Code § 18.2-479(A). *See Lawson v. Commonwealth*, 38 Va. App. 93, 97 (2002) (holding a person has not been “charged with a felony” when they are charged with a violation of probation conditions imposed upon an underlying felony conviction); *see also Khaliq v.*

⁴ Duncan argues that he was not technically in custody *at all* when he was released from jail pursuant to the furlough order. We find that we need not reach this question to resolve this case. *See Butcher v. Commonwealth*, 298 Va. 392, 396 (2020) (“[T]he doctrine of judicial restraint dictates that we decide cases ‘on the best and narrowest grounds available.’” (quoting *Commonwealth v. White*, 293 Va. 411, 419 (2017))).

Commonwealth, No. 1588-01-2 (Va. Ct. App. May 7, 2002) (applying *Lawson* to the provisions of Code § 18.2-479).

Before the trial court and on appeal, the Commonwealth has declined to argue that Duncan was guilty of the elements of the felony offense for which he was convicted.⁵ We hold that the evidence was insufficient to support a conviction of Duncan under Code § 18.2-479(B). In fact, the evidence affirmatively shows that Duncan did not commit that offense.

Ordinarily, holding that the evidence was insufficient to sustain Duncan’s conviction would compel us to vacate the conviction. *Smallwood v. Commonwealth*, 14 Va. App. 527, 534 (1992); *Jackson v. Virginia*, 443 U.S. 307, 314 (1979).⁶ Here, however, the Commonwealth argues that we cannot reverse Duncan’s conviction because of the doctrine prohibiting “approbation and reprobation.” Therefore, we will assess that argument before ruling on this appeal.

II. The Approbate-Reprobate Doctrine

On appeal, the Commonwealth argues that the approbate-reprobate doctrine prohibits Duncan from arguing that his offense did not constitute a violation of Code § 18.2-479(B). According to the Commonwealth, because Duncan’s prior counsel acquiesced in the furlough order stating that the relevant conduct would “be deemed” a violation of that code section,

⁵ This implicit concession is consistent with the Commonwealth’s duty of candor to the tribunal. See *Merritt v. Commonwealth*, 69 Va. App. 452, 459 n.5 (2018).

⁶ See also *Jimenez v. Commonwealth*, 241 Va. 244, 251 (1991) (“We think it clear that the General Assembly meant what it said, i.e., that a person accused of violating the statute cannot be convicted unless the evidence proves beyond a reasonable doubt, *inter alia*, that the accused” committed each statutory element of the crime.); *Taylor v. Commonwealth*, 58 Va. App. 435, 441-42 (2011) (noting that when the General Assembly has passed a criminal statute and established its elements, it has also, “by negative implication, . . . identif[ied] the host of impermissible judicial ‘considerations extraneous to the legality of [a] conviction’” (quoting *Ex Parte United States*, 242 U.S. 27, 42 (1916))).

Duncan waived his right to argue otherwise at his trial or on appeal. We reject the Commonwealth’s contention for the following reasons.

A. Background Legal Principles

“[A] litigant cannot ‘approve and reprobate by taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory.’”

Commonwealth v. Holman, 303 Va. 62, 71 (2024) (quoting *Rowe v. Commonwealth*, 277 Va. 495, 502 (2009)). This doctrine has “ancient roots.” *Wooten v. Bank of Am., N.A.*, 290 Va. 306, 309-10 (2015). When applied in the proper case, it can promote values such as “preclud[ing] litigants from ‘playing fast and loose’ with the courts . . . or ‘blowing hot and cold’ depending on their perceived self-interests.” *Babcock & Wilcox v. Areva*, 292 Va. 165, 204 (2016) (first quoting *Wilroy v. Halbleib*, 214 Va. 442, 445 (1974); and then quoting *United Va. Bank v. B.F. Saul Real Est. Inv. Tr.*, 641 F.2d 185, 190 (4th Cir. 1981)).

Here, the Commonwealth urges that the approve-reprobate doctrine barred Duncan—both during his trial and on appeal—from arguing for his acquittal due to the lack of evidence that he violated an essential element of Code § 18.2-479(B). The right to be free from criminal conviction except by proof beyond a reasonable doubt is guaranteed by the Fourteenth Amendment’s Due Process Clause and is a bedrock principle of our criminal legal system. *See In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”)⁷; *Bishop v. Commonwealth*, 275 Va. 9, 12 (2008) (The reasonable doubt principle is a “fundamental precept [that] has been the bedrock of Virginia’s

⁷ Indeed, the conviction in this case would appear to contravene a constitutional principle perhaps even *more* basic than that recognized in *In Re Winship*: that “a conviction based upon a record *wholly devoid of any relevant evidence of a crucial element of the offense* charged is constitutionally infirm.” *Jackson*, 443 U.S. at 314 (emphasis added) (citing *Thompson v. Louisville*, 362 U.S. 199 (1960)).

criminal jurisprudence since the inception of this Commonwealth.” (citing *Savage v. Commonwealth*, 84 Va. 582, 585 (1888))). Application of the approbate-reprobate doctrine in these circumstances would therefore constitute a waiver of a basic constitutional right. *Holman*, 303 Va. at 75 (holding that a defendant’s “approbation and reprobation” constituted a “concession of law that qualifies . . . as a waiver” (quoting *Butcher v. Commonwealth*, 298 Va. 392, 395 (2020))); *Travis v. Finley*, 36 Va. App. 189, 199 (2001) (noting that a waiver is “an intentional relinquishment or abandonment of a known right or privilege” (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))).

To be sure, our precedent clearly recognizes that the approbate-reprobate doctrine can operate to bind “even a defendant in a criminal case.” *Powell v. Commonwealth*, 267 Va. 107, 144 (2004) (quoting *Fisher v. Commonwealth*, 236 Va. 403, 417 (1988)). However, given that its application here would require us to find the waiver of a fundamental constitutional right, we will exercise heightened care to ensure that the doctrine’s established boundaries compel its application before we apply it. *See Allen v. Commonwealth*, 252 Va. 105, 111 (1996) (“[W]ith respect to fundamental constitutional rights, ‘courts indulge every reasonable presumption against waiver[.]’” (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937))); *Sisk v. Commonwealth*, 3 Va. App. 459, 462 (1986) (“There is a presumption against a defendant’s waiver of any constitutional right.” (citing *Johnson*, 304 U.S. at 464)); *see also D’Ambrosio v. Wolf*, 295 Va. 48, 58 (2018) (“Estoppel, because it concludes a party from alleging the truth, must be certain to every intent and its scope should not be extended by argument or inference.” (quoting *Gilmer v. Brown*, 186 Va. 630, 636 (1947))).

The approbate-reprobate doctrine has established limits. For instance, the approbate-reprobate doctrine binds litigants only within the particular “course of litigation” in which they originally took the relevant position. *See Rowe*, 277 Va. at 502 (stating the rule as applicable to

“successive positions *in the course of litigation*” (emphasis added)); *see also, e.g., Cangiano v. LSH Bldg. Co.*, 271 Va. 171, 181 (2006) (same); *Bethea v. Commonwealth*, 297 Va. 730, 753 n.9 (2019) (same). Further, the doctrine cannot permit a court to take actions that exceed the limits of its authority. *Holman*, 303 Va. at 72 n.2 (first citing *Bazemore v. Commonwealth*, 42 Va. App. 203, 219-20 (2004); and then citing *Batts v. Commonwealth*, 30 Va. App. 1, 11 (1999)); *see also* Melville M. Bigelow, *A Treatise on the Law of Estoppel* 739 n.1 (6th ed. 1913) (“Attempting to choose a right which one wrongly or mistakenly supposes to exist is no election.”).

B. The Appropriate-Reprobate Doctrine Will Not Bind Duncan to a Legal Position Taken Prior to the Commencement of the Relevant Criminal Prosecution

In this case, we find that the Commonwealth’s appropriate-reprobate argument fails due to both of the doctrine’s established limitations. Regarding the principle that litigants may be bound to a singular position only within a singular “course of litigation,” *Rowe*, 277 Va. at 502; *Cangiano*, 271 Va. at 181; *Bethea*, 297 Va. at 753 n.9, we know of no case in which the doctrine has ever been held to bind a criminal defendant to a position of law that he took *prior* to his prosecution—indeed, before he even engaged in the conduct on which his prosecution would be based. This is reasonable; the course of litigation for a criminal case begins with an arrest or indictment and ends with the verdict. Criminal prosecutions do not, and cannot, bleed into one another.

Allowing the appropriate-reprobate doctrine to bind criminal defendants to their legal positions across criminal cases would threaten hallowed tenets of our criminal legal system. For example, an accused must face trial presumed innocent of the charges against him. *Hodge v. Commonwealth*, 217 Va. 338, 342 (1976). No person may be convicted of a crime unless the Commonwealth proves guilt, beyond a reasonable doubt, as to all elements of the crime charged. *In re Winship*, 397 U.S. at 364; *Hodge*, 217 Va. at 342. Each case must be decided on its own

merits. *Walker v. Commonwealth*, 212 Va. 289, 291 (1971) (“[A] defendant has a right to have his guilt or innocence, and punishment, determined by the evidence against him[.]”). A criminal defendant has the right to an attorney who makes effective arguments on his behalf. U.S. Const. amend. VI.

If criminal defendants were limited in their substantive legal arguments by an obligation not to contradict positions adopted in separate proceedings, prior to the occurrence of the alleged crime, the doctrine might still theoretically contribute in some way to concepts of consistency or fair play—but, much more clearly, would undermine the above-discussed, hallowed principles that protect citizens against deprivations of their freedom except upon the most rigorous proof and process. *See In Re Winship*, 397 U.S. at 372 (Harlan, J., concurring) (“I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”).

The Commonwealth, though acknowledging that our approbate-reprobate case law refers to the “course of litigation,” nonetheless takes the position that the doctrine should apply to bind defendants to their positions taken in the same “or related” courses of litigation.⁸ For this proposition, the Commonwealth points to *In Re Commonwealth*, 278 Va. 1 (2009), which the *Holman* Court described as showing that approbate-reprobate may apply to bind the Commonwealth in “in two related but different *cases*.” 303 Va. at 62. We find two dispositive problems arising from this analogy. First, *In Re Commonwealth* applied the doctrine to bind the

⁸ On brief, the Commonwealth also cites generally to the concept of Fourth Amendment waivers signed as part of plea agreements in support of this argument. However, Fourth Amendment waivers do not involve the approbate-reprobate doctrine at all; they are valid only upon a record showing a knowing and intelligent waiver (which, as discussed *infra*, is absent here); and they are agreements not to assert certain constitutional rights in public—not agreements permitting factually wrongful convictions. *See Anderson v. Commonwealth*, 256 Va. 580, 584-85 (1998).

Commonwealth, not a criminal defendant, and therefore did not pose the basic jurisprudential issues discussed above. Secondly, the facts of *In Re Commonwealth* involved an attempted collateral attack on the holding issued in a single case, as opposed to a separate criminal prosecution that was merely close in time to the first. The “two cases” in *In Re Commonwealth* were, in reality, a singular “course of litigation.”

In Re Commonwealth arose when the Commonwealth sought mandamus following a circuit court’s decision vacating a defendant’s death sentence and imposing a sentence of life imprisonment. The Supreme Court rejected the Commonwealth’s petition for mandamus, ruling that it had misused the writ as an attempted “substitute or guise for an appeal” for which it lacked statutory authority. *See In Re Commonwealth*, 278 Va. at 13-14 (“The Commonwealth essentially seeks, using the guise of a mandamus proceeding, to appeal the circuit court’s judgment[.]”).

In addition to rejecting the request for mandamus directly, the Supreme Court ruled that the approve-reprobate doctrine barred the Commonwealth from arguing—in support of the unavailable mandamus writ—that the circuit court had erred by rendering a ruling that the Commonwealth had asked the circuit court to make. *Id.* at 12-13. Applying the approve-reprobate rule in these circumstances was logical. Given that a litigant’s taking one “position in the trial court below prevents us from considering an opposite position on appeal,” *Nelson v. Commonwealth*, 71 Va. App. 397, 404-05 (2020), it must be that a party cannot subvert that bar by attempting to disavow an argument made before a circuit court in “a substitute or guise for an appeal” of that circuit court proceeding, *In Re Commonwealth*, 278 Va. at 14. *In Re Commonwealth* shows only that the approve-reprobate bar can be applied across the life stages of a criminal appeal and post-conviction proceedings. *See Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19, 26-27 (2008) (holding that separate stages of the “same litigation” must “involve

identical parties and *issues*” (emphasis added)). That case involved an attempt to continue litigating the same issues decided before a circuit, challenging that same decision after the defendant missed his appellate window. At most, it might suggest that the approbate-reprobate bar will be applied across criminal cases when the new case is an attempt to manufacture the “guise” of a separate case but is really a continuation of the same case—perhaps in an impermissible collateral attack on one’s conviction.

Duncan is not pursuing “a substitute or guise for an appeal” of the court’s ruling in his probation violation case. The two cases are only “related” in the sense that Duncan’s actions for the second charge (for a violation of Code § 18.2-479(B)) arose during his term of incarceration for the former probation violation charge. The two cases, however, are legally distinct, as they are based on separate charges for different actions: the first is based on violations of Duncan’s probation, and the second is based on an escape committed by failing to return to jail following a furlough. The charges require entirely separate findings to show guilt. These two cases were not a singular “course of litigation.” *Rowe*, 277 Va. at 502. This case is, thus, entirely distinguishable from *In Re Commonwealth*.

Regarding the second limitation, that a court cannot exceed its authority, we find that *Holman* is inapposite to the case at hand. Defining what actions or elements constitute a crime is a strictly legislative function. *See Cook v. Commonwealth*, 20 Va. App. 510, 513 (1995) (“[D]efining crimes and fixing penalties are legislative, not judicial, functions.” (alteration in original) (quoting *United States v. Evans*, 333 U.S. 483, 486 (1948))). In *Holman*, the Court examined whether some prior action qualified as an element of the crime charged. 303 Va. at 73 (“*Holman* approbated by staking out a position with respect to the charge of use of a firearm in the commission of a felony—that he was guilty of it and that he had stipulated to it. He later reprobated, by ‘raising an objection or exception.’”). Under *Holman*, it was irrelevant whether

the defendant pled guilty to the crime, if sufficient facts showed the elements *could have* been met. Counsel (and Holman himself) stipulated to and admitted the facts were sufficient, then later tried to undermine his own admission.

By contrast, in the present case, the order’s operative language—“shall be deemed”—came immediately before a statement of notice that Duncan would likely be “charged.” This language is forward-looking, stated in the passive voice. Duncan did not and could not have stipulated to facts that had not yet occurred. And unlike in *Holman*, where the defendant *could have* been convicted because his actions met each element of use of a firearm in the commission of a felony beyond a reasonable doubt, Duncan’s actions did not meet the elements of Code § 18.2-479(B). Under Code § 18.2-479(B), to be convicted of the Class 6 felony for escape, the defendant must be “on a charge or conviction of a felony.” This element cannot be met because Duncan was not initially charged with a *felony*; he was charged with a misdemeanor probation violation. Interpreting the furlough order signed by Duncan as an admission of guilt would allow the parties and the court to effectively rewrite Code § 18.2-479, thereby violating the separation of powers in Virginia. A court cannot exceed what the legislature has defined as an offense and its subsequent punishment. To do so is to exceed its judicial authority.⁹ See *Holman*, 303 Va. at

⁹ The United States Supreme Court has repeatedly allowed defendants to receive habeas relief where a defendant pleaded guilty to an offense, and the Court later found that the conduct they pleaded guilty to was not actually violative of the statute. For example, after the Court in *Bailey v. United States*, 516 U.S. 137, 144 (1995), held that the “use” prong of 18 U.S.C. § 924(c)(1) required “active employment of the firearm” and not mere possession, defendants who previously pleaded guilty based on mere possession were able to pursue collateral relief showing they were actually innocent of the offense. See, e.g., *Bousley v. United States*, 523 U.S. 614 (1998). This was not only true on collateral review, but also on direct review. *Id.* The same is true for what counted as a “violent felony” under the same statute. See *Johnson v. United States*, 576 U.S. 591 (2015); *Welch v. United States*, 578 U.S. 120 (2016). In other words, the fact the parties and trial court agreed that a defendant’s action constituted an offense did not preclude the defendant from later arguing that it was not actually an offense.

72 n.2. And, as stated above, the same rule applies to the parties, who cannot concede the legislature-defined elements of the law.¹⁰

We decline to expand the approbate-reprobate doctrine past its current bounds.¹¹ No case has applied the doctrine to bind criminal defendants to legal positions taken in their defense of two separate criminal charges, or to a position taken prior to the defendant's commission of the charged conduct. That limit is reasonable, is consistent with basic principles of criminal jurisprudence, and we will not disturb it. *See D'Ambrosio*, 295 Va. at 58; *Zerbst*, 304 U.S. at 464.¹²

CONCLUSION

Our decision today does not undercut the viability of the approbate-reprobate doctrine; we merely decline to extend its reach. In this case, Duncan pled not guilty to the felony offense

¹⁰ A criminal defendant can plead guilty, admitting or conceding that the elements of the crime *apply to the facts* of their case. But that same defendant cannot say that an element of the law is no longer an element of the law, nor can the Commonwealth. Only the General Assembly can promulgate, define, and fix penalties of a crime. *See Cook*, 20 Va. App. at 513.

¹¹ *Holman* also addresses when a concession of law could act to waive an issue, but no waiver principles apply here, as Duncan raised proper objections.

¹² We note that the trial court explicitly characterized its holding as rooted in the “law of the case” doctrine—but the “law of the case” doctrine is subject to substantially identical limitations to the ones discussed above, *see Miller-Jenkins*, 276 Va. at 26-27 (noting that the law of the case doctrine “extends to future stages of *the same litigation*” (emphasis added) (quoting *Kondaurov v. Kerdasha*, 271 Va. 646, 658 (2006))), and that *Banks v. Commonwealth*, the case cited by the trial court, is inapposite to the facts of this case. 217 Va. at 532-33. Additionally, the Commonwealth has abandoned this argument on appeal, as it never alluded to it on brief, nor in oral argument.

The trial court also alluded generally to contract law principles in explaining why Duncan should be convicted, but the Commonwealth has abandoned this argument on appeal as well; it has made no reference to contract principles on brief or in oral argument. Additionally, establishing the elements of the criminal statutes governing Duncan's conduct was a legislative act, not subject to alteration by the judicial branch—and attempting to change those criminal elements through contract would seriously undermine that basic constitutional structure. *Cook*, 20 Va. App. at 513 (“[D]efining crimes and fixing penalties are legislative, not judicial, functions.” (alteration in original) (quoting *Evans*, 333 U.S. at 486)); J.A.G. Davis, *Criminal Law* 17 (1838) (“The power of determining what acts should incur punishment, and the nature

for which he was charged and all parties and the court contemporaneously recognized, during the trial, that the defendant was not guilty of the elements of that offense. Therefore, the trial court erred by convicting Duncan under Code § 18.2-479(B).

Reversed and vacated.

and degree of punishment shall be inflicted, belongs of right to every society [T]he acts which shall be enjoined or prohibited . . . necessarily and solely depend upon the judgment and will of each society.”); Va. Const. art. III, § 1 (“The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others[.]”); *see also Commonwealth ex rel Attorney Gen. v. Newport News*, 158 Va. 521, 545 (1932); *Evans v. Smyth-Wythe Airport Comm’n*, 255 Va. 69, 73 (1998). Given our preference for avoiding constitutional questions, and the Commonwealth’s abandonment of this position on appeal, we will not, *sua sponte*, apply contract law principles to affirm Duncan’s conviction in this case. *See Watts v. Commonwealth*, 57 Va. App. 217, 225 n.2 (2010).

Finally, we emphasize that our holding in no way implicates the principles governing plea agreements. Plea agreements involve entirely different considerations from the furlough order in this case, as plea agreements permit defendants to agree to admit facts, *see In re Watford*, 295 Va. 114, 126 (2018) (discussing the action taken via a guilty plea), and do not alter the substantive criminal law. Considering this distinction and the fact that the record lacks any evidence of a plea colloquy or similar principles prior to the entry of the furlough order in this case, we find that this order does not constitute a plea agreement.