V I R G I N I A:

IN THE SUPREME COURT OF VIRGINIA

WESLEY CLAY SMITH,	)	
	)	
APPELLANT / Defendant	)	
	)	
v.	)	**Record No. _____**
	)	
***COMMONWEALTH OF VIRGINIA*,**	)	
	)	
APPELLEE	)	

From Court Of Appeals Of Virginia, Smith v. Commonwealth, Record No. 2615-05-4, order 9/14/2006
From Fairfax County Circuit Court, Commonwealth v. Smith, case no: MI-2005-1559
Judge Gaylord L. Finch Jr., Circuit Judge

An electronic copy of this brief with related background info, motions, and orders is available at:
http://www.liamsdad.org/court_case/trespassing/trespassing.shtml

PETITION FOR APPEAL

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PETITION FOR APPEAL

The trespassing conviction, which is the basis of this appeal, is clearly not one of the most serious cases this court has been asked to hear, Mr. Smith was punished with just 3 days in jail and a $100 fine. However the manner in which the Trial Court denied Mr. Smith, an indigent defendant, his Constitutional Right to Due Process, while at the same time taking steps to impede his appeal, is a serious issue.

The Court Of Appeals refusal to hear Mr. Smith's appeal is based on an interpretation of Rule 5A:8 that not only relied upon an out of date precedent, made before the rule was modified, but is also Unconstitutional as it effectively denies the poor, appellate review that is accorded to all who have the money to pay for a court reporter and transcript. If the panel's opinion is allowed to take effect, vast numbers of Virginia's indigents will be denied appellate review simply because they are poor.

This case is unique in that the complete "crime" was recorded, and that the parties agree on many key points. Given the actions of Mr. Smith do not meet the statutory, nor case law criteria, of criminal trespass, the case should have been dismissed before trial. Instead the way in which the Trial Court handled this case leads to troubling questions about the current state of the court system in Virginia.

The main issue at stake in this appeal is not the misdemeanor conviction of Mr. Smith but rather the

reputation and integrity of the courts in Virginia, and should the general public have any faith whatsoever in the rulings of these courts when the facts are less clear, the issues more complex, the case more serious, and the punishments more severe.

This case is also important because there is no precedent setting ruling on VA § 22.1-4.3 and its impact on prosecution via VA § 18.2-119 and such a ruling will either support or destroy the right of children in Virginia to have both parents participating in their education as intended by the legislature.

Given the Constitutional issues of Due Process and Equal Protection for indigents, Mr. Smith respectfully asks this court to review this case with strict scrutiny and not just defer to the rulings of the Trial or Appeals Courts.

SUBJECT INDEX:

TABLE OF CITATIONS:

ASSIGNMENTS OF ERROR:

1. The Appeals Court erred by not providing Mr. Smith with Equal Protection when it denied his petition on account of his poverty and inability to pay for a court reporter, transcript, or attorney.

2. The Trial Judge erred in not recusing himself in violation of Virginia Canon 3E(1)(a).

3. The Trial Court erred by not providing Mr. Smith with Equal Protection:

    a. Refused to provide a court appointed attorney

    b. Refused to provide a court reporter and transcript

    c. Refused to let Mr. Smith record the trial.

4. The Trial Court erred by abusing its discretion and not providing Mr. Smith with Due Process:

    a. Refused to rule on the Motion To Dismiss, which was properly and timely filed.

    b. Refused to admit relevant material evidence

    c. Refused to make offered evidence part of the record

    d. Refused to let Mr. Smith use recordings and transcripts to impeach witnesses

    e. Refused to force witnesses to answer relevant questions asked by Mr. Smith, and by cutting off questioning, thus depriving Mr. Smith of his right to question his accusers.

    f. Refused to enforce a witness subpoena, denying Mr. Smith the opportunity to call witnesses for his defense to attack the credibility of the prosecution witnesses.

    g. Denying two Motions to Strike when the Prosecution had clearly not presented a sufficient case, having failed to provide any evidence of criminal intent, refusal to leave, or that the school owned the property in question.

    h. Not answering the question posed by the Jury when the answer was available.

CASE SUMMARY:

On June 17th 2005, Mr. Smith, the non-custodial parent of an 8-year-old son with Down Syndrome, attended his son's class party to which the school had invited parents. There was no court order prohibiting contact and in fact the custody order required the mother to provide timely notice of such events so Mr. Smith could attend. Mr. Smith behaved appropriately, his son was happy to see him, the child's mother did not attend, and there was no disruption. The School Principal, as part of his personal unwritten "red flag policy" relating to non-custodial parents and in violation of state law § 22.1-4.3 and school district regulations, called the police and had them present Mr. Smith with a Trespass Notice. Mr.

Smith then left the school and was arrested on the adjacent soccer field while still walking away from the school.

Mr. Smith qualified for and requested a court appointed attorney, and a Public Defender did "represent" him in District Court but who refused to present a viable case, specifically refusing to present his claim of right and § 22.1-4.3 and refused to present relevant case law such as O'Banion v. Com.. Mr. Smith insisted the Public Defender present his claim of right, § 22.1-4.3 and O'Banion v. Com in the Circuit court trial and the Public Defender refused and withdrew from the case. Mr. Smith asked the Court to appoint him an attorney who would present those issues and the court refused.

Mr. Smith filed a MOTION TO DISMISS explaining the actions of coming to the school before being forbidden or in walking away from the school to the soccer fields after being forbidden do not meet the criteria stated in § 18.2-119 and that the legal requirement of criminal intent was also lacking. The motion also presented the defense of a claim of right to be on the property due to § 22.1-4.3, the custody order, school regulations, and school invitation, all of which indicate Mr. Smith not only has a right but was encouraged to attend his son's school activities. The Trial Court refused to rule on this motion.

In spite of the failure to meet the legal definition of criminal trespass the case proceeded to trial with Judge Gaylord L. Finch who was the least appropriate choice available as he was the only judge with a known connection to Mr. Smith. The Trial court forced Mr. Smith to handle the case himself and then preventing him from presenting material evidence, preventing proper cross-examination, preventing adequate presentation of case law, and not allowing him to impeach of commonwealth witnesses. In short the Trial Court appeared to go out of its way to assure a conviction when no ground for conviction existed and compounded its abuse of discretion by taking steps to deprive Mr. Smith of the record needed to appeal the case.

QUESTIONS PRESENTED:

1. What is the meaning of the word "notice" in Rule 5A:8? Is its usage too vague? (Error 1)

2. Does Rule 5A:8, violate Equal Protection in that it can allow a moneyed defendant to have a record for appeal but denies an indigent defendant a record for appeal, when both moneyed and indigent fail to follow the notice provision? (Error 1, 3b, 3c)

3. Is it a violation of Equal Protection for the Court Of Appeals Of Virginia to dismiss an appeal of an indigent defendant due to lack of record, when the defendant had requested a court reporter/transcript, requested to record the hearing, and made a good faith effort to have a Statement Of Facts made part of the record? (Error 1, 3b, 3c)

4. Did the Trial Court violate Equal Protection when it refused Mr. Smith's request for a court reporter and transcript? (Error 3b, 3c)

5. Does the refusal of the Public Defenders Office to represent Mr. Smith, remove the obligation of the state to provide effective counsel? (Error 1, 3a)

6. Does the Commonwealth's statute for court appointed attorney fail to provide sufficient funds competent counsel for indigent defendants thus violating Equal Protection? Or does the failure of the state to fully fund the statute deny effective counsel for indigent defendants. (Error 1, 3a)

7. Does VA 22.1-4.3 provide a claim of right defense to non-custodial parents in a trespassing case and/or does VA 22.1-4.3 mean the principal was not lawfully allowed to forbid Mr. Smith from attending his child's events? (Error 4a, 4i)

8. Could Judge Finch's impartiality be reasonably questioned due to his concern over Mr. Smith's website, and should he have recused himself? (Error 2)

9. Did the Trial Court abuse its discretion? (Error 2, 3, 4)

FACTS:

Facts Relating To Appeal Denial

1. Mr. Smith requested the court to provide a court reporter and transcript and the court refused in spite of Mr. Smith being declared indigent.

2. Mr. Smith, a non-attorney, was forced to try to appeal the case himself due to the court not approving his request for a court-appointed attorney even though he qualified financially.

3. Mr. Smith submitted DEFENDANT'S STATEMENT OF FACTS and letter to the trial court within the 55 day limit of Rule 5A:8 and served the same on the prosecution. In the letter Mr. Smith attempted to comply with 5A:8(c)(2) by stating: "Please submit this to the Judge Finch for signature per vscr- 5:11(1), as I understand it... no earlier than 15 days nor later than 20 days after it is filed."

4. The prosecution did not file any objections to the DEFENDANT'S STATEMENT OF FACTS.

5. The Trial Court neither signed the DEFENDANT'S STATEMENT OF FACTS nor informed Mr. Smith he needed to schedule a hearing on the matter.

6. The Court Of Appeals dismissed the appeal on the basis that the letter asking the clerk to submit the DEFENDANT'S STATEMENT OF FACTS to the judge did not count as 'notice' per 5A:8(c) and stated: "The November 23,2005 letter to the clerk does not constitute a notice of presentation. It is the duty of an appellant, not the clerk, to notice a hearing and to bring the matter before the court within the requisite period."

7. Mr. Smith filed a motion for rehearing on the basis of the Rule having changed after the case cited, the word 'notice' being vague, and no material prejudice to the prosecution.

8. On Sep 14, 2006 the motion for rehearing was denied without reason or citation.

Facts Relating To The "Crime" Itself

9. Mr. Smith was the temporary non-custodial parent of an 8-year-old son with Down Syndrome.

10. Per an order of the Circuit Court of Prince William County, dated 10/2/2003, the child's mother was required to forward to Mr. Smith all copies of invitations to school events so that he might attend. Due to the child's Mother not following the provision and Mr. Smith missing out on several school events, the Court signed a rule to show cause and in an order dated 03/03/2004 specifically ordered the child's Mother to supply "notice of Specia1 Events" at school to Mr. Smith so he could attend.

11. Per the order, the child's Mother forwarded to Mr. Smith an invitation from the school that specifically invited parents to a school event on June 17th, 2005.

12. There is not, and was not on June 17, 2005, any court order in place barring Mr. Smith from participating in his son's school activities, nor had Mr. Smith been served with a no trespass letter from the school.

13. Mr. Smith attended his son's school event on June 17th. He went to the principal's office, stated that he was there for his son's party and was told to sign in and take a visitor sticker. Mr. Smith then proceeded to his son's classroom.

14. Mr. Smith's son was happy to see him and the child's mother did not attend.

15. Mr. Smith expecting his wife to be present was taping his visit to the school and told the principal he was recording it. Thus there does exist a record of the entire incident and what Mr. Smith, the principal and others said.

16. Mr. Smith behaved appropriately and did not cause any disturbance. Note the position of the Commonwealth in the District Court trial was that Mr. Smith was disruptive, that the teacher was "absolutely paralyzed" by his presence and that the classroom had to be evacuated. This changed in Circuit Court trial to Mr. Smith not being disruptive, the move from classroom to soccer field being planned in advance but the principal being concerned over the contents of Mr. Smith's fanny pack. However the teacher herself testified Mr. Smith behaved appropriately, did not express concern over his fanny pack, and did in the divorce hearing, with a court reporter present, state that Mr. Smith did nothing to attract attention and didn't really notice his presence.

17. The recording/transcript indicate nobody ever asked Mr. Smith about his fanny pack/camera bag.

18. The recording/transcript indicates the principal did not ask Mr. Smith to leave or mention trespassing to him.

19. On the basis of the principal's unofficial and unwritten "red flag" policy relating to non-custodial parents, the principal called the police and had them serve him with a no trespass letter.

20. The parties agree that Mr. Smith, after being given the trespass letter, left the entrance of the school and **was walking away from the school** toward the soccer field (and his son) when he was arrested and charged with trespass under Va. Code Ann. § 18.2-119.

21. The arrest took place on the soccer field next to the school (in front of his handicapped son). The parties dispute if the soccer field is school property or not but do agree there was **no fence or sign to indicate the soccer field belonged to the school** and was not part of the adjacent soccer fields/park. Indeed the only sign indicated it was a "McLean Youth Soccer Field".

22. Mr. Smith was held in jail in solitary confinement for the entire Fathers-Day weekend and released the following Monday on a $1,000 bond.

Facts Relating To The Trial

23. Mr. Smith could not afford an attorney so the District Court appointed Dawn Butorac of the Office of the Public Defender to represent him.

24. Mr. Smith requested both orally and in writing that Ms. Butorac defend him based on state law Va. Code Ann. § 22.1-4.3, combined with established case law such as O'Banion v. Com., that a person with a claim of right can't be convicted of trespass.

25. Ms. Butorac refused to present either the state law or the relevant case references at the trial in District Court on Aug 8, 2005; as a result Mr. Smith was convicted and given a suspended sentence.

26. On Sep 6th, 2005 Ms. Butorac informed Mr. Smith her office was unwilling to represent him if he insisted on having the relevant state laws and case rulings presented. Mr. Smith brought the matter up with the Judge who informed Mr. Smith he had a choice between the Public Defender, who was refusing to represent him, or representing himself. Mr. Smith clearly stated to the Judge that **he did not want to represent himself** but that the Public Defender was refusing to represent him and present the relevant state law and case rulings. The Judge instructed Mr. Smith to sign a waiver if he was unwilling to have the Public Defender represent him. Mr. Smith having already noted his objection to the Judge about the conduct of the Public "Defender" and also having clearly stated that he did not wish to represent himself did sign the waiver to avoid contempt of court.

27. On Sep 24, 2005 Mr. Smith filed a Request For Witness Subpoena for several school employees including Superintendent Dale.

28. On Sep 26, 2005 Mr. Smith filed a MOTION TO DISMISS on the grounds that Va. Code Ann. § 22.1-4.3 and Fairfax County School Board's regulation number 2240.3 both of which state that a non-custodial parent is allowed to attend school events unless a court orders specifically states otherwise, constitutes a bona fide claim of right and that per Virginia case law, a person with a bona fide claim of right cannot be convicted of trespass. (Exhibit A)

29. On Sep 26, 2005 Mr. Smith filed a MOTION FOR ATTORNEY requesting the court to appoint an attorney for him. (Exhibit B)

30. On Oct 4th 2005, **the day before the trial**, the school district filed a motion to quash the witness subpoena of Superintendent Dale.

31. On Oct 5th 2005, The Circuit Court with Judge Finch held a trial on the trespassing charge.

32. The court denied Mr. Smith's MOTION FOR ATTORNEY without any meaningful discussion and without giving any indication he had read the motion.

33. Mr. Smith tried to present the court with a written MOTION FOR COURT REPORTER. Judge Finch refused to take the paper copy of the motion or to read motion (Exhibit F).

34. Mr. Smith pointed out he would appeal if found guilty and wanted the ability to have a transcript for the appeal. Judge Finch said he would not approve a court reporter for a misdemeanor.

35. There was a court reporter present and ready and Judge Finch instructed her not to record the hearing. When Judge Finch observed the court reporter manipulating her equipment he questioned her to ensure she was not recording the hearing.

36. Mr. Smith requested to be able to tape record the hearing and informed the court he had brought a tape recorder for that purpose. The court denied Mr. Smith's request to tape record the hearing.

37. Mr. Smith requested that Judge Finch hear his MOTION TO DISMISS before hearing the motion to quash or holding the trial but the court refused to rule on the MOTION TO DISMISS.

38. The court did hear the Schools MOTION TO QUASH WITNESS. Mr. Smith objected to hearing the motion, as it wasn't filed until the day before the trial and he didn't receive a copy of it until the night before the trial, denying him adequate time to properly prepare a response.

39. The court refused to read, accept or consider DEFENDANT'S REPLY TO MOTION TO QUASH. (exhibit C)

40. Mr. Smith presented e-mail from the superintendent in which the superintendent made statements about the case, including one where superintendent Jack Dale stated, "The father in question has several court orders prohibiting contact and presence on school property. The principal was following police and court directives."

41. In spite of the superintendent having made specific statements about why Mr. Smith was charged with trespassing, Judge Finch ruled to quash the subpoena for the superintendent.

42. Mr. Smith requested again that the court rule on his MOTION TO DISMISS and again the court refused to rule.

43. Mr. Smith gave his opening statement, including holding up a CD recording of the incident in question and told them he would play it for them so they could judge for themselves instead of having to rely on witnesses unreliable recollections of the incident. Mr. Smith also said that state law and school district policy both give him the right to attend his son's school events and that according to case rulings the prosecutor would have to show he had a criminal intent and did not think he had a right to attend the event at school. (Exhibit E)

44. The prosecution entered as evidence the "no trespass" letter that the school issued Mr. Smith **after** the police arrived at the school.

45. Mr. Vanderhye testified that Mr. Smith did sign in at the principal's office and that most parents could just sign in and got to the event but that he had instituted a "Red Flag" policy for custody cases. Mr. Vanderhye stated that non-custodial parents must seem him first before attending school events. Mr. Vanderhye testified that his "Red Flag" policy was not written, and that the school board did not approve it.

46. Under cross-examination Mr. Vanderhye went on and on with claims the Mr. Smith had a website with comments about the custody case that Mr. Vanderhye didn't approve of. Mr. Smith objected to Mr. Vanderhye going on about these claims instead of answering the question asked of him. The Judge

refused to order Mr. Vanderhye to answer the question and allowed him to continue his tirade against Mr. Smith.

47. Mr. Smith was confused why a Judge would allow such comments that were not related to the case, but after Mr. Vanderhye went on about being called a "White Collar Child Abuser" on the website it became clear that Judge Finch was allowing the commentary due to Judge Finch having been upset with the content website in connection with an unrelated case that Judge Finch handled.

48. Judge Finch handled the custody case of Ron Jagannathan and ordered Ron Jagannathan to have pages referring to Janine Saxe and Mr. Robert Machen as "White Collar Child Abuser" s removed from Mr. Smith's web site. http://www.liamsdad.org/others/sveta_lisa.shtml The attempt by Judge Finch to have information removed from Mr. Smith's website is a gross abuse of his First Amendment Rights that Judge Finch had no legal authority to attempt. His actions were privately motivated and not as a result of his honoring his office or judicial responsibilities.

49. Once Mr. Smith realized that Judge Finch was the same Judge who was previously upset with his website and that Judge Finch appeared to be abusing his discretion as a result, Mr. Smith made an oral motion for the Judge to recuse himself. Judge Finch refused to recuse himself.

50. Judge Finch incorrectly stated that he had never heard the phrase "White Collar Child Abuser" before. (see official court documents for proof his statement was incorrect – that is if he reads orders before he signs them). (Exhibit F, G)

51. Mr. Smith repeatedly tried to question Mr. Vanderhye about the custody orders he and the superintendent claim are related to the case and which he may have told the superintendent about and each time Judge Finch would interrupt and say he would not allow Mr. Smith to ask questions about the custody orders.

52. Mr. Vanderhye stated that he perceived Mr. Smith as a danger due to his bulging fanny pack. Mr. Vanderhye did not make any comment about his fears subsiding after he observed Mr. Smith take a camera out of his fanny pack to take pictures of his son.

53. Mr. Smith asked Mr. Vanderhye how many times Mr. Smith had been to the school. Mr. Vanderhye stated he was only aware of 3 or 4 visits by Mr. Smith to the school. Mr. Smith asked Mr. Vanderhye if he was aware of Mr. Smith bringing his son to school on a weekly basis and entering the school each time to drop him off. Mr. Vanderhye indicated he was unaware of that taking place or that being a provision of the custody order.

54. Mr. Smith presented Mr. Vanderhye with the notice the school sent that specifically invited parents to the event along with the envelope the child's mother sent it in to Mr. Smith, per the custody order. Mr. Vanderhye admitted to knowing the school was holding a first grade Field Day and that the school had invited the parents to attend.

55. Mr. Vanderhye testified there were no signs or fence present to support his claim that the school owned the soccer fields next to the school where Mr. Smith was arrested.

56. Mr. Smith attempted to present photos of the soccer fields on both sides of the street, including a sign indicating the field next to the school as a "McLean Youth Soccer Field" and across the street as a park with soccer fields. Judge Finch admitted one or two of the photos close to the school itself but refused to admit most of the photos.

57. Mr. Smith attempted to ask questions about the property boundaries, how Mr. Vanderhye arrived at his knowledge of the boundaries, the look of the supposed soccer field compared to the others and Judge Finch repeatedly cut off questioning preventing Mr. Smith from finding out exactly how Mr. Vanderhye learned of the boundaries, where he thought they were, and how anyone was supposed to know where the boundary is.

58. Mr. Vanderhye testified there was no previous no-trespass notices barring Mr. Smith from school property.

59. Mr. Smith asked Mr. Vanderhye to look at a photo of Mr. Smith at the event, taken by his son, and asked Mr. Vanderhye if there was any offensive or obscene material on Mr. Smith's shirt. The photo showed Mr. Smith wearing a red t-shirt with blue trim and no words or photos other than a white sticker

with the letter ‘V’ on it. Mr. Vanderhye admitted the only item on the shirt was the sticker that was issued by the school to Mr. Smith to indicate he had signed in at the office as a visitor.

60. At several points during the cross-examination Mr. Smith held up copies of the recordings and transcripts of the incident and District Court trial and attempted to use them to impeach the testimony of Mr. Vanderhye as his testimony differed in material details from that which was recorded during the incident as well as that which he testified to at the District Court Trial.

61. Judge Finch repeatedly refused to let Mr. Smith use the transcripts and recordings to impeach Mr. Vanderhye and to show that his testimony differed from his previous testimony and differed from what actually occurred during the incident. Mr. Smith was repeatedly quite insistent on using the transcripts even going so far as to continue reading from them after the Judge interrupted him to say he wasn’t going to allow use of the transcripts or recordings.

62. Officer Beyer testified that when Mr. Smith left the officers he went down the side walk to the end of the parking lot and then veered left onto the soccer fields where he was arrested.

63. Upon cross-examination of Officer Beyer Mr. Smith questioned her if she was sure she told Mr. Smith that he couldn’t go to the soccer fields rather than that he couldn’t see his son. She repeated she had told Mr. Smith he couldn’t go on the soccer field. Mr. Smith attempted to read her exact words from the transcript but again the Judge interrupted him and prevented Officer Beyer and the Jury from hearing the actual words she uttered.

64. The prosecution didn’t present any evidence about the exact property boundaries of the school.

65. At the end of the prosecutions case Mr. Smith made a MOTION TO STRIKE pointing out that the prosecution had not presented evidence to show that he did not have a claim of right to attend, that he had any criminal intent, that he had any reason to believe the soccer filed was owned by the school, and in fact that no evidence had been presented to show that the school owned the soccer field, and that no evidence had been presented to show that Mr. Vanderhye had authority to instruct someone to leave the property in contradiction to school district policy. Judge Finch ruled against Mr. Smiths MOTION TO STRIKE.

66. Ms. Richards, his son's teacher, stated that Mr. Smith was not disruptive, that he behaved appropriately. Ms. Richards stated that his son was happy to see Mr. Smith. Ms. Richards indicated that the problem wasn't with the conduct of Mr. Smith but rather that Mr. Vanderhye had told her that according to the mother Mr. Smith was not to have any contact with their son without her permission.

67. Officer Colwell stated Mr. Smith was still moving and was heading away from the school when arrested.

68. Mr. Smith asked if the school gave the Officer a copy of a previous "no trespass" letter. Officer Colwell stated the school did not, that he had Mr. Smith wait while the school wrote up a "no trespass" letter.

69. Officer Colwell stated he told Mr. Smith he needed to leave now. Mr. Smith asked if it wasn't the case that instead it was Mr. Smith who asked to leave instead of being told to leave. Mr. Smith again tried to refer to the transcript and again Judge Finch interrupted and refused to let Mr. Smith use the transcript to correct the statement of the officer.

70. At the end of his case Mr. Smith again made a MOTION TO STRIKE. Judge Finch denied the MOTION TO STRIKE

71. Closing statements were made by Mr. Smith, during which Judge Finch interrupted and objected to Mr. Smith reading a portion from state law 22.1-4.3 and added his own comments on the law.

72. Mr. Smith also pointed out that the testimony given differed from the actual facts and the previous testimony and that the Jury had been prevented from knowing the truth by the Judge by excluding the recordings and transcripts.

73. During the entire trial the demeanor of Judge Finch toward Mr. Smith was dismissive.

74. About 15 minutes after starting deliberations the Jury asked a question which the Judge read. The Jury had requested to know if Mr. Vanderhye had told Mr. Smith to leave before or after the police were called. Judge Finch said his response to the Jury was that they would have to rely on the testimony of the witnesses.

75. Mr. Smith pointed out he had recordings and transcripts that would show the truth that Mr. Vanderhye never instructed him to leave either before or after the police arrived and suggested the evidence be provided to the Jury

76. Judge Finch refused to provide the Jury with the recordings or transcripts that would have answered their question.

77. The Jury deliberated for about another hour and 15 minutes before returning a guilty verdict.

ARGUMENT:

I. The meaning of the word "notice" in Rule 5A:8 is to provide information not to schedule a hearing and any other meaning is too vague to be enforced against a pro se defendant. (Error 1)

> Rule 5A:8(c)(1) "within 55 days after entry of judgment a copy of such statement is filed in the office of the clerk of the trial court. A copy must be mailed or delivered to opposing counsel accompanied by notice that such statement will be presented to the trial judge no earlier than 15 days nor later than 20 days after such filing;"

The Appeals Court appears to be trying to define this statement in the rule: "… a notice that the statement will be presented…" to require scheduling a hearing and informing the opposing counsel of the hearing. Such an interpretation is neither reasonable nor consistent. If the rule required a hearing before a judge it should have so stated. Instead it just claims notice to the opposition upon which the opposition can submit any objections. In its use of the word 'notice' it neither uses capitalization or other emphasis to indicate anything other than its plain English meaning. I did look the word 'notice' up in a legal dictionary and even though it lists multiple lengthy definitions, not a one of them suggested the word 'notice' would imply a hearing.

> "NOTICE. The information given of some act done, or the interpellation by which some act is required to be done."

The same Rule uses the term 'notice of appeal' and there is no hearing associated with filing a notice of appeal. The Rules use the term 'notice' in many places where a hearing is not to be scheduled. These include Rules such as 5:39A "The notice of intent to apply for a rehearing…" and 5:39 (b) "A party intending to apply for a rehearing shall file written notice …" Unless the Supreme Court really does expect a party to schedule a hearing when filing for a rehearing then clearly the term 'notice' as used in

Rules does, at least at times, not imply scheduling a hearing. Thus Rule 5A:8 either does not state a hearing is required or is too ambiguous to expect a pro se party to understand a hearing is required. As such Rule 5A:8 does deny appeals and Equal Protection to those who cannot afford and attorney to advise them to schedule a hearing when then rule does not clearly state that.

The courts interpretation about a hearing is also unreasonable as it is common practice to submit a document to a judge for signature without a hearing such as in agreed orders or in submitting a petition to proceed without fees/costs. The rule provides a procedure for the opposition to object. It is reasonable to conclude that since the opposition did not file an objection to the statement of facts that the judge could simply sign the statement without the burden of a hearing.

II. Rule 5A:8 violates Equal Protection in that it can allow a moneyed defendant to have a record for appeal but denies an indigent defendant a record for appeal, when both moneyed and indigent fail to follow the notice provision. (Error 1, 3b, 3c)

According to Rule 5A:8, a party that can afford a transcript but fails to comply with the notification rule will still have the submission made part of the record unless the other party establishes material prejudice. The Rule fails to apply the same standard to a statement of facts, which is the only method by which a poor defendant can submit a record for appeal.

> "Any failure to file the notice required by this Rule that materially prejudices an Appellee will result in the affected transcripts being stricken from the record on appeal."

Applying a stricter standard to those who cannot afford a transcript and instead file a statement of facts is a violation of Equal Protection as it results in the same violation of the notice provision (with no claim of prejudice by Appellee) resulting in a record for an appeal for a wealthy party but in no record for an appeal for an indigent party, with subsequent dismissal of appeal for the indigent.

The Rule does not require a moneyed criminal defendant to schedule a hearing in order to have a record upon which to base an appeal; only the poor, who fail to schedule a hearing, lose their right to a meaningful appeal.

> In Griffin v. Illinois, [351 U.S. 12 (1956)], we held that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of

> their poverty. There, as in Draper v. Washington, [372 U.S. 487 (1963)], the right to a free transcript on appeal was in issue. Here the issue is whether or not an indigent shall be denied the assistance of counsel on appeal. In either case the evil is the same: discrimination against the indigent**. For there can be no equal justice where the kind of an appeal a man enjoys "depends on the amount of money he has."** Douglas, 372 U.S. at 355 (quoting Griffin, 351 U.S. at 19).
>
> there is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, e. g., McKane v. Durston, 153 U.S. 684, 687 - 688. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. See Cole v. Arkansas, 333 U.S. 196, 201 ; Dowd v. United States ex rel. Cook, 340 U.S. 206, 208 ; Cochran v. Kansas, 316 U.S. 255, 257 ; Frank v. Mangum, 237 U.S. 309, 327 .
>
> The Equal Protection Clause proclaims that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of laws." U.S. Const. amend. XIV, § 1. The central mandate of the equal protection guarantee is that "the sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." Lehr v. Robertson, 463 U.S. 248, 265 (1983).

III. It is a violation of Equal Protection for the Court Of Appeals Of Virginia to dismiss an appeal of an indigent defendant due to lack of record, when the defendant had requested a court reporter/transcript, requested to record the hearing, and made a good faith effort to have a Statement Of Facts made part of the record. (Error 1, 3b, 3c)

The reason Mr. Smith filed a Statement Of Facts instead of a transcript was because he could not afford a court reporter/transcript and the trial court denied his request to provide a court reporter or transcript. Mr. Smith did the best he could to comply with Rule 5A:8 and filed the Statement Of Facts on time and served it on the prosecution. Mr. Smith did not understand the word 'notice' to mean schedule a hearing and thus in attempting to comply with the Rule sent the prosecution a letter stating the statement of facts would be submitted to the judge for signature.

The prosecution could have filed objections and then scheduled a hearing if it felt one was needed, but instead the prosecution chose to neither object to the contents of the statement of facts nor schedule a

hearing on the matter. In essence using the same standard applied to wealthy defendants, the prosecution by its inaction, waived any objections it may have had, and his submission should have been made part of the record, just as it would have been for a wealthy party with a transcript.

In order to provide Equal Protection the Court Of Appeals should have used the same standard in Rule 5A:8 that is applied to wealthy defendants who file a transcript but fail to comply with the notice provision. The standard would require the prosecution to establish material prejudice before striking the Statement Of Facts from the record. Given the prosecution neither objected to the facts in the Statement Of Facts, nor claimed material prejudice the submission by Mr. Smith should have been accepted as part of the record just as it would have for a wealthy defendant in the same situation.

It is clear that the result of having no record for an appeal, and thus having the appeal dismissed is a direct consequence of the economic status of Mr. Smith and that had he the money for a reporter and transcript that the ruling by the Court Of Appeals would have been completely different.

> "[the State cannot adopt procedures which leave an indigent defendant `entirely cut off from any appeal at all,' by virtue of his indigency, or extend to such indigent defendants merely a `meaningless ritual' while others in better economic circumstances have a `meaningful appeal.' " Ross v. Moffitt, 417 U.S. 600, 612 (1974)

The only reason Mr. Smith a non-attorney was interpreting Rule 5A:8 was because the court had denied his request for a court appointed attorney even though the court recognized he qualified financially. It is a violation of Equal Protection to deny Mr. Smith an attorney and then deny his appeal on the basis of a supposed technical violation of a rule due to his legal inexperience.

> the Supreme Court explained in Douglas, an indigent appellant forced to proceed without the assistance of appellate counsel **"has only the right to a meaningless ritual, while the rich man has a meaningful appeal."** 372 U.S. at 358.

> the Court has consistently recognized that a typical indigent is completely incapable of identifying and raising any kind of issue in a first direct appeal without the assistance of counsel. As the Court put it in Evitts, "To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake." 469 U.S. at 636.

IV. The Trial Court violated Equal Protection when it refused Mr. Smith's request for a court reporter and transcript. (Error 3b, 3c)

Given that a record is required for a meaningful appeal, and that a Statement Of Facts, even when accepted is less accurate, particularly with respect to witness testimony, than a transcript, the refusal to grant a court reporter and transcript put Mr. Smith at a material disadvantage in appealing this case compared to a moneyed defendant. When Mr. Smith requested a court reporter he specifically informed the court of his needing it for a possible appeal. The denial of a transcript pretty much eliminated all ability to prove that the testimony of the commonwealth witnesses differed materially from what they gave in the District Court trial, as well as differing from the recording of the incident itself.

While the state might not be required to provide appellate review of misdemeanor cases, the state may not provide appellate review based on an accurate record to moneyed defendants and deny indigent defendants appellate review or provide them only appellate review based on a less accurate record. That is the state must either provide free transcripts to misdemeanor indigent defendants or prohibit wealthy misdemeanor defendants from submitting transcripts. See previously cited cases: Griffin v. Illinois, Douglas, McKane v. Durston, Cole v. Arkansas, Lehr v. Robertson.

The Supreme Court has also ruled that indigent defendants are entitled to a free transcript see Draper v. Washington, [372 U.S. 487 (1963)].

V. The refusal of the Public Defenders Office to represent Mr. Smith, did not remove the obligation of the state to provide effective counsel. (Error 1, 3a)

Mr. Smith was determined to be indigent and qualify for a court appointed attorney and was "represented" (note the quotes) by the Public Defender in District Court. However when Mr. Smith insisted that the "Defender" actually present a viable case in Circuit Court, including the case O'Banion v. Com. and a defense based on a claim of right and state law 22.1-4.3 the Public Defender refused to represent him and withdrew from the case. Mr. Smith requested the court to appoint him a different attorney, who would present a viable case and the court refused.

State law requires the Court to appoint counsel for indigent defendants in a case such as this were conviction could result in jail time, Mr. Smith was potentially subject to one year in jail. The right to counsel has been interpreted to require effective and reasonably competent counsel and the right to counsel's undivided loyalty. Clearly the counsel offered to Mr. Smith by not being aware of and suggesting using O'Banion v. Com. and a defense based on a claim of right and state law 22.1-4.3 was clearly not effective or reasonably competent. The fact that the counsel offered to Mr. Smith refused to present O'Banion v. Com. and a defense based on a claim of right and state law 22.1-4.3 demonstrates that the counsel was not offering its undivided loyalty to Mr. Smith.

> The guarantee of **effective** assistance of counsel comprises two correlative rights: the right to reasonably competent counsel and the right to counsel's undivided loyalty. Fitzpatrick v. McCormick, 869 F.2d 1247, 1251 (9th Cir. cert. denied, 493 U.S. 872 (1989)

The lack of competence and loyalty by the Public Defender is really not surprising when payment by the Commonwealth is considered. By state law the Commonwealth would only reimburse the Public Defender $148, an amount clearly insufficient to cover the time necessary to present even this simple case. The Public Defender certainly had, and even indicated, she had more important cases to cover.

The state code allows not providing counsel if the defendant refuses counsel but does not provide an exception for when the counsel refuses the case. Mr. Smith repeatedly stated to the court that he wanted counsel, that he did not wish to represent himself but he eventually did sign a waiver as directed by the Judge rather than risk going back to jail for contempt. The court neither gave Mr. Smith time to read the form or provide a copy of the form. The condition of signing the waiver does not meet the conditions of VA 19.2-160 as the court did not "ascertains that such waiver is voluntary and intelligently made…" given the Defendant made specific and repeated statements that he did want a court appointed attorney and did not want to represent himself. Mr. Smith not only asked for an attorney orally but later in writing prior to the trial.

> A waiver of a constitutional right must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson, 304 U.S. at 464. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v.

United States, 397 U.S. 742, 748 (1970)

"Courts indulge every reasonable presumption against a waiver of fundamental constitutional rights." White v. Commonwealth, 214 Va. 559, 560, 203 S.E.2d 443, 444 (1974)

"[T]the Commonwealth must demonstrate that the waiver 'not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege . . . .'" Grogg, 6 Va. App. at 611, 371 S.E.2d at 556

"The courts must presume that a defendant did not waive his rights." North Carolina v. Butler, 441 U.S. 369, 373 (1979);

Every case to consider the issue had concluded that Douglas guarantees an indigent defendant the assistance of appellate counsel for a first appeal, whether that first appeal is automatic or by leave of the court. See, e.g., Bundy v. Wilson, 815 F.2d 125, 130 (1st Cir. 1987) (concluding that Douglas governs first-tier appeal by leave to New Hampshire Supreme Court); Cabaniss v. Cunningham, 143 S.E.2d 911, 913-914 (Va. 1965) (Douglas guarantees right to counsel for first-tier appeal by leave to Virginia Court of Appeals);

VI. The Commonwealth's statute for court appointed attorney fails to provide sufficient funds for competent counsel for indigent defendants thus violating Equal Protection. The failure of the state to fully fund the statute denies effective counsel for indigent defendants. (Error 1, 3a)

By state law the Commonwealth would only reimburse the Public Defender $148 for handling this case. The Virginia Supreme Court has established an hourly reimbursement rate of $90 per hour. Thus the state by statute has restricted the Constitutional right to counsel to 1 hour 39 minutes of attorney time for a misdemeanor case such as this. That is clearly insufficient for even this simple case. A competent effective attorney would need time to learn about the case, prepare before trial, write pre-trial motions such as a motion to dismiss, have the motion's heard, etc. That alone would be likely to take more than 1 hour 39 minutes. In this case the Trial itself from Jury selection to closing arguments took 3 hours or twice as long as the state was paying for even if the attorney skipped out during the hour and ½ the Jury deliberated and skipped the sentencing part.

Clearly the funds provided for Public Defenders by the Commonwealth are nothing short of a farce that makes a mockery of the Constitutional right to counsel. But wait it gets even better… the General Assembly hasn't completely funded even the pathetic amounts allowed per statute!! Virginia's caps are the lowest in the country and not even fully funded!!

A 1971 study by the state bar association said court-appointed attorneys are "overworked, underpaid, inadequately trained, without adequate, if any, investigational resources, and thus **often unable to provide a full and aggressive defense**." The situation was termed a **crisis** in a 1974 report by the Virginia State Bar. The Bill of Rights gives defendants the right to counsel and that Supreme Court decisions have expanded that to the right to **effective assistance from competent counsel**. Clearly the Virginia funding for Public Defenders falls well short of providing effective assistance from competent counsel and instead "Defendants are prevented or restricted from contesting the evidence against them. They are unable to develop and present meritorious defenses. Innocent persons waive important rights and plead guilty. Defendants receive harsher sentences than the facts warrant. Individuals are wrongfully convicted."

Given the above situation, its no surprise the Public Defender insisted on trying to get me to plead guilty in spite of my being innocent, and refused to present a credible case even though grounds for dismissal existed without a trial due to complete lack of all the elements of criminal trespass and the existence of a bona fide claim of right as a defense.

One wonders if there is any material difference between the counsel provided indigent defendants and providing no counsel at all. Clearly if a state must provide counsel for indigent defendants to comply with the Equal Protection provision and Right to counsel, the commonwealth's statute and funding are in violation of those requirements.

VII. VA 22.1-4.3 provides a claim of right defense to non-custodial parents in a trespassing case and means the principal was not lawfully allowed to forbid Mr. Smith from attending his child's events at school. (Error 4a, 4i)

Case law in Virginia has uniformly construed the statutory offense of criminal trespass to require a willful trespass. Certainly a reading of § 22.1-4.3 could lead a non-custodial parent into believing they have a right to be on school property in order to attend their child's events due to VA 22.1-4.3 prohibiting schools from excluding non-custodial parents, by virtue of being non-custodial parents, from participating in their children's school events. Such participation obviously includes going onto the school property. In

this case Mr. Smith was prohibited from being on school property and participating in his son's event solely on the basis of his being a non-custodial parent. Its clear from the recording where the principal and police discuss court orders that if Mr. Smith had been the custodial parent he would have been allowed to participate and his being denied access was due to his non-custodial status not misconduct.

Given that § 18.2-119 defines a trespasser as a person "without authority of law", § 22.1-4.3 can be interpreted to grant all well-behaved non-custodial parents "authority of law". 22.1-4.3 prohibits the school from taking the action that it did against Mr. Smith. In the absence of misconduct or a court order to the contrary, the combination of § 18.2-119 and § 22.1-4.3 from being prosecuted for criminal trespass. It is important to get a court ruling on this point because many children in Virginia are denied the joy of having both parents participate in their school events due to schools ignoring § 22.1-4.3 and telling non-custodial parents they aren't allowed on school property thru no fault of their own.

> "As such, one who enters or stays upon another's land under a bona fide claim of right cannot be convicted of trespass. A bona fide claim of right is a sincere, although perhaps mistaken, good faith belief that one has some legal right to be on the property."
> O'Banion v. Com., 30 Va.App. 709, 717, 519 S.E.2d 817, 821 (1999), citations omitted.
>
> § 22.1-4.3. Participation by and notification of noncustodial parent.
> Unless a court order has been issued to the contrary, the noncustodial parent of a student enrolled in a public school or day care center (i) shall not be denied the opportunity to participate in any of the student's school or day care activities in which such participation is supported or encouraged by the policies of the school or day care center solely on the basis of such noncustodial status.
>
> § 18.2-119. Trespass after having been forbidden to do so; penalties.
> If any person **without authority of law** goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or **other person lawfully in charge** thereof, …

VIII. Judge Finch's impartiality can be reasonably questioned due to his concern over Mr. Smith's website, and he should he have recused himself. (Error 2)

The Fairfax County Circuit Court has around 13 Judges; Mr. Smith was not a resident of Fairfax County and had no known connection to any of the Judges except for Judge Finch. Mr. Smith had posted (but did not write) information to his website about a case that Judge Finch had handled. By the accounts reported to Mr. Smith, Judge Finch was very upset about the content on the website and attempted to

coerce others into getting Mr. Smith to give up his First Amendment Right to Free Speech and remove the information from his website. Hence a reasonable person would conclude that Judge Finch would not be unbiased hearing a case involving Mr. Smith.

With a 93% change of getting a Judge Mr. Smith had never heard of and only a 7% chance of getting Judge Finch, guess what happened? That's right Judge Finch was the Judge to hear the case. That alone has the appearance of Impropriety. During the trial, Judge Finch seemed to go out of his way to make adverse rulings contrary to law and seemed to make a point of making sure that Mr. Smith knew he was getting even with him. Given that Mr. Smith neither wrote, or even read thoroughly, the information to his website, Mr. Smith did not immediately realize this was the same Judge until Judge Finch allowed, over Mr. Smith's objection, for a witness to testify about his website and specifically mentioning the phrase "White Collar Child Abuser". Given that Mr. Smith's website could have no possible bearing on a trespassing charge, and neither could the phrase "White Collar Child Abuser", it became quite obvious that Judge Finch was bluntly driving home the point that he did not approve of Mr. Smith's website.

> Generally, evidence tending to show an accused committed prior crimes or **bad acts is inadmissible for the purpose of showing the accused committed the crime charged**. See Woodfin v. Commonwealth, 236 Va. 89, 95, 372 S.E.2d 377, 380 (1988).

Mr. Smith made an oral motion for Judge Finch to recuse himself. Judge Finch not only refused in violation of Virginia's Canons of Judicial Conduct, but went so far as to state he had no knowledge of the Defendant or his website, or the phrase "White Collar Child Abuser". Ample evidence exists in official court records to prove that Judge Finch's claim was incorrect (Exhibit H), in that it shows Mr. Smiths name, address, and website URL in motions and orders to have information removed from it. Judge Finch took an interest in Mr. Smith's website and according to eyewitnesses he was very upset about it. It is impossible to prove that Judge Finch lied on purpose about his connection to Mr. Smith, rather than simply forgetting, but clearly the situation has the appearance of impropriety, and the appearance alone was sufficient to require him to recuse himself. No person seeing a Judge lie about his previous conduct is going to believe the Judge is ruling in a fair and impartial manner, hence the judgment below is tainted with an appearance of impropriety and should be vacated and granted a new trial.

> "In exercising such discretion, a judge must not only consider his or her true state of impartiality, but also the public's perception of his or her fairness, so that the public confidence in the integrity of the judicial system is maintained." Buchanan v. Buchanan, 14 Va. App. 53, 55, 415 S.E.2d 237, 238 (1992).
>
> This collective failure to guard against appearances of impropriety constitutes an abuse of discretion sufficient to warrant reversal. *See, e.g.*, *In re*: Wisconsin Steel Co., 48 B.R. 753, 763-64 (Bankr. N.D. Ill. 1985) (mem.) (reversing denial of motion to disqualify for *inter alia* violation of canon); Norton v. Ferrell, 981 S.W.2d 88, 90-91 (Ark. 1998) (same substantive holding); Bowlin v. State, 643 P.2d 1, 4 (Alaska Ct. App. 1982) (noting that an Alaska canon strikingly similar to Virginia Canon 3B(7)(b) "is directed as much at the appearance of judicial impropriety as it is at actual impropriety").

IX. The Trial Court abused its discretion. (Error 4)

Refused to rule on the Motion To Dismiss, which was properly and timely filed. (Error 4a)

The Defendant filed a MOTION TO DISMISS prior to trial that the trial court refused to rule on. This motion details the elements of criminal trespass and shows that the Defendant had a bona fide claim of right, as defined by O'Banion, as well as an actual right, to be present at his son's school on June 17, 2005 and thus could not be found guilty of trespass. This court should have ruled on the MOTION TO DISMISS prior to holding the trial.

Refused to admit relevant material evidence (Error 4b)
Refused to let Mr. Smith use recordings and transcripts to impeach witnesses (Error 4d)

The tape recording of the incident was made with Mr. Smith holding the tape recorder in full view of the Principal and Police and even pointed out he was recording. The Recording of the District Court trial was made by the Public Defender with the permission of the Judge and knowledge of the Prosecution. The Prosecution should have been aware of the existence of these recordings yet did not ask for copies of them. Given that the Prosecution made no effort to examine the recordings prior to trial its not clear why the Prosecution objected at trial, but given that Mr. Smith brought the original tapes to court and stated the recordings were accurate and others on the tapes were present in court and could have authenticated their own voices and statements, it was an error to not allow the recordings/transcripts as evidence, and an even bigger error not to allow their use to impeach false testimony by Prosecution witnesses. Mr. Smith repeatedly from opening arguments to closing tried to use the tapes/recordings both as evidence and also to impeach witnesses. Mr. Smith even held up a copy in opening arguments and told

the Jury he would play it for them so they could hear for themselves what really occurred. Mr. Smith also read from the transcript the exact words used by witnesses with the Judge yelling at him to stop.

> "As a general rule, a litigant is entitled to introduce all competent, material, and relevant evidence tending to prove or disprove any material issue raised, unless the evidence violates a specific rule of admissibility." "**Evidence is admissible if it is both relevant and material**," and it is inadmissible if it fails to satisfy either of these criteria. "Evidence is relevant if it has any logical tendency**, however slight**, to establish a fact at issue in the case." "Evidence is material if it relates to a matter properly at issue." Peeples v. Commonwealth, 28 Va. App. 360, 365, 504 S.E.2d 870, 873 (1998) (citations omitted).
>
> "'[C]alling for evidence in one's favor is central to the proper functioning of the criminal justice system. It is designed to **ensure that the defendant in a criminal case will not be unduly shackled in his effort to develop his best defense**.'" Clark v. Commonwealth, 31 Va. App. 96, 109, 521 S.E.2d 313, 319 (1999)
>
> If the evidence was admissible, its exclusion was not harmless. Daniel P. Brugh V John Lee Jones, Record No. 020852 Opinion By Justice Donald W. Lemons, January 10, 2003
>
> It is well settled that a mistake of the court must be **presumed to a have affected the verdict of the jury** and is therefore ground for which the judgment **must be reversed** unless it plainly appears from the record that the error did not affect and could not have affected the verdict. See Norfolk Ry. & Light Co. v. Corletto, 100 Va. 355, 360, 41 S.E. 740, 742 (1902).
>
> While an error committed in the trial of a criminal case does not automatically require reversal of an ensuing conviction, Code 8.01-678, **once error is established it is presumed to be prejudicial**. The burden then shifts to the Commonwealth to show that the error was non-prejudicial. **A criminal case will be reversed if the Commonwealth fails to overcome the presumption of prejudice and fails to show that the error was harmless beyond a reasonable doubt**. Pavlick v. Commonwealth, 25 Va. App. 538, 544, 489 S.E.2d 720, 724 (1997)

Mr. Smith sought to prove for impeachment purposes that statements made by Mr. Vanderhye and Officer Beyer were inconsistent with their statements made at the incident and in District Court. The Defendant even attempted to question them by specifically reading from the transcripts. Under these circumstances, it was error to exclude the recordings/transcripts even if somehow not admissible on the merits, they would still be proper for impeachment. The trial court denied the Defendant the opportunity to prove the inconsistent statement upon which his effort to impeach Vanderhye and Beyer rested.

> [O]n cross-examination **great latitude is allowed** and . . . the general rule is that anything tending to show the bias on the part of a witness may be drawn out. If a witness gives testimony that **is inconsistent with a prior statement, . . . opposing counsel may cross-examine the witness as to the inconsistency.** In addition, all inconsistent portions of that prior . . . statement are admissible for impeachment purposes. Smith v. Commonwealth,

15 Va. App. 507, 511, 425 S.E.2d 95, 98 (1992) (citations omitted).

> It is fundamental to the right of cross-examination that a witness who is not a party to the case on trial may be impeached by prior statements made by the witness which are inconsistent with his present testimony, provided a foundation is first laid by calling his attention to the statement and then questioning him about it before it is introduced in evidence. Hall, 233 Va. at 374, 355 S.E.2d at 594.

With the aid of the tape recordings/transcripts, the Jury might well have found Mr. Smith's statements more credible than those of the Prosecution and its witnesses and returned a verdict in his favor. Indeed the tape recording/transcript of the incident would have pointed out to the jury several important misstatements by the prosecution's witnesses and could reasonably be expected to result in a not-guilty verdict.

A. The principal testified he told Mr. Smith to leave; yet the tape recording contradicts his testimony.

B. The Principal testified he was concerned about the contents of Mr. Smiths fanny pack, yet he made no mention of it on the tape of the incident, or on the tape of the first trial.

C. The tape of the incident confirms the Principal's testimony at the first trial that his concern was with court custody orders, not with Mr. Smith's actions or possessions. The Jury could have been expected to have significant concerns about why the reasons for the arrest as stated by the main witness changed materially from those stated at the first trial.

D. Officer Beyer testified she told Mr. Smith he would be arrested if he went to the soccer field, when in fact the tape recording indicates she stated he would be arrested if he went to see his son, which clearly is not only different but not related to trespassing.

E. Officer Colwell testified he instructed Mr. Smith to leave when the tape recording indicates that he did not instruct Mr. Smith to leave but rather that Mr. Smith asked if he could leave and Officer Colwell instructed him not to come back.

Not answering the question posed by the Jury when the answer was available. (Error 4h)

The importance of the non-admitted evidence is made even more clear by the fact the Jury interrupted deliberations to ask a question about when the Principal made a specific statement and the recording would have shown that he did not make the statement they were asking about. The Court erred

by refusing to provide an accurate answer to their question, leaving them in the dark as to what the Principal actually said. The trial court erred by refusing to allow this evidence and refusing to allow it to be used to impeach the witnesses. See Hooker v. Commonwealth, 14 Va. App. 454, 458, 418 S.E.2d 343, 345 (1992). The Court's refusal to allow Mr. Smith to use audiotapes or transcripts made from those tapes is sufficient error to justify ordering a new trial.

Refused to make offered evidence part of the record (Error 4c)

Given the repeated attempts to admit and use for impeachment the recordings and transcripts made from the recordings (see Exhibit E) the Judge should have made them part of the record. The transmittal letter from the trial court only lists 4 exhibits offered by the Defendant and no exhibits denied. Yet the Defendant did offer as evidence both Audio CD's and transcripts of the actual incident and the District Court trial. Per vscr-5A:7 Record on Appeal: Contents "(a) Contents. The following constitute the record on appeal from the trial court … (3) each exhibit offered in evidence, whether admitted or not,…" The unofficial transcripts and CD's should be part of the official record and available for consideration by the Appeals Court. The fact that the trial court did not follow § vscr-5A:7 and make them part of the record even when not-admitted goes a long way to support the claim that the judge acted improperly in not admitting them.

> The exclusion from the record of any evidence that the trial court has considered in reaching its decision, when the evidence has been properly tendered for the record by a litigant, impedes appellate review and constitutes an abuse of discretion. An exhibit offered in evidence, whether admitted or not, becomes a part of the record when initialed by the trial judge, and not before. Rule 5:10(a)(3). The duty of the trial judge to make up the record in this respect is a judicial function, and cannot be delegated. Town of Falls Church v. Myers, 187 Va. 110, 119, 46 S.E.2d 31, 36 (1948). An appellate court cannot review the correctness of a trial court's decision unless the evidence upon which the trial court relied is included in the record on appeal. Packer v. Hornsby, 221 Va. 117, 121, 267 S.E.2d 140, 142 (1980).

Refused to enforce a witness subpoena, denying Mr. Smith the opportunity to call witnesses for his defense to attack the credibility of the prosecution witnesses. (Error 4f)

The record shows the Mr. Smith filed a witness subpoena for Mr. Dale, school superintendent, to testify as to why Mr. Smith was arrested (which was inconsistent with the prosecutions case) and the

record shows that the judge improperly quashed the subpoena thus preventing the Mr. Smith from presenting testimony that should have affected the verdict and violating his right to confront his accusers. The motion to quash claimed, "Dr. Dale can provide no testimony material to any of the issues in this case" however "*The relevancy of the testimony sought is not an issue which may be raised by a motion to quash*." People v Slochowsky, 116 Misc 2d 1069, 456 NYS2d 1018.

> **"no legislation, however salutary its purpose, can be so construed as to deprive a criminal defendant of his Sixth Amendment right to confront and cross-examine his accuser and to call witnesses in his defense."** Winfield, 225 Va. at 218, 301 S.E.2d at 19 (citing Davis v. Alaska, 415 U.S. 308 (1974));

Denying two Motions to Strike when the Prosecution had clearly not presented a sufficient case, having failed to provide any evidence of criminal intent, refusal to leave, or that the school owned the property in question. (Error 4g)

The court abused its discretion in not approving Mr. Smiths two Motion to Strike. The prosecution had clearly failed to show that Mr. Smith had any criminal intent, a requirement for conviction of trespass, failed to show any evidence he came on the property after being notified to remain off, and failed to provide any evidence he refused to leave, in fact Officer Colwell testified Mr. Smith was walking away from the school. The prosecution failed to provide any evidence that he was on school property when arrested – no signs, fence, landmark, or property plot. At the minimum the prosecution needed to show he came on or remained on the school's property in violation of law and the prosecution did neither.

Case law in Virginia has uniformly construed the statutory offense of criminal trespass to require a willful trespass. "As such, one who enters or stays upon another's land under a bona fide claim of right cannot be convicted of trespass. A bona fide claim of right is a sincere, although perhaps mistaken, good faith belief that one has some legal right to be on the property." *O'Banion v. Com.*, 30 Va.App. 709, 717, 519 S.E.2d 817, 821 (1999), citations omitted.

Because (a) state law, local school board regulations, and individual school policy all permit Mr. Smith to attend school events like the one in question; and (b) there was no court order in place

prohibiting him from participating in such events; and (c) his presence at the class party was in response to an invitation that he had received from the child's mother, Mr. Smith clearly had a bona fide claim of right, as defined by *O'Banion*, to be present at his son's school on June 17, 2005 and to participate in his son's class party. The court should have approved his motion to strike.

Mr. Smith has pointed out multiple Errors by the trial court and 'by definition, when the trial court makes an error of law, an abuse of discretion occurs. Bass v. Commonwealth, 31 Va. App. 373, 382, 523 S.E.2d 534, 539 (2000).

CONCLUSION:

For the foregoing reasons, Mr. Smith respectfully requests that he be granted an appeal or a summary judgment in his favor, with a remand for new trial with a different Judge with instructions that Mr. Smith be appointed an competent qualified attorney, who will be required to present state law and case precedence, that a court reporter and transcript will be provided, and the audio recordings/transcripts will be admitted and also used for impeachment, and that Mr. Smith may call Mr. Dale as a witness.

Or in the alternative that a summary judgment be entered declaring Mr. Smith not guilty and that VA 22.1-4.3 does indeed require schools to allow non-custodial parents access to their children at school unless otherwise prohibited by custody order or justified by unruly behavior at the school.

Respectfully submitted,
WESLEY C. SMITH
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_____

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CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing was mailed first-class to Fairfax County Commonwealth's Attorney's Office, 4110 Chain Bridge Rd., Room 123, Fairfax, VA 22030 on Oct 10th, 2006.

Mr. Smith is unable to afford counsel, and the Public Defender has refused to represent him.

Mr. Smith desires to state orally, in person, to a panel of this Court the reasons why his petition for appeal should be granted.

Submitted By Appellant/Defendant: (no attorney)

Wesley Smith
5347 Landrum Road, #1
Dublin, Virginia 24084
liamsdad@liamsdad.org
(no phone – can't afford one)

Counsel for Appellee/Plaintiff:

Robert F. Horan, Jr.
Commonwealth Attorney for Fairfax County
4110 Chain Bridge Road Room 123
Fairfax, Virginia 22030-4047

_____
Wesley Smith

Exhibits

Exhibit A….. Defendants' Motion to Dismiss - Sept 28, 2005, Record pages 21-36
http://www.liamsdad.org/court_case/trespassing/2005_09_26_motion_dismiss.pdf

Exhibit B….. Defendant's Motion for an Attorney - Sept 28, 2005 Record Pages 18-20
http://www.liamsdad.org/court_case/trespassing/2005_09_26_motion_attorney.pdf

Exhibit C….. Defendant's Reply to Motion to Quash Witness
http://www.liamsdad.org/court_case/trespassing/2005_10_05_reply_quash.pdf
http://www.liamsdad.org/court_case/trespassing/2005_10_05_reply_a.pdf
http://www.liamsdad.org/court_case/trespassing/2005_10_05_reply_b.pdf

Exhibit D….. Defendant's Motion For Clarification Of Charges
http://www.liamsdad.org/court_case/trespassing/2005_10_05_motion_clarification.pdf

Exhibit E….. Transcripts and Recordings

MP3 Recording of incident at school 06/17/2005:
http://www.liamsdad.org/hall_of_shame/fcps/springhill_tape.mp3

Text Transcript Part 1 - Sign in at Office, and harassed by Principal:
http://www.liamsdad.org/court_case/trespassing/2005_06_17_office_vanderhye.pdf

Text Transcript Part 2 - In the classroom with my son Liam:
http://www.liamsdad.org/court_case/trespassing/2005_06_17_classroom.pdf

Text Transcript Part 3 - The cops arrive, discuss court orders and arrest me:
http://www.liamsdad.org/court_case/trespassing/2005_06_17_cops.pdf

MP3 Recording - **District** Court 'Trial' - recorder was voice activated:
http://www.liamsdad.org/court_case/trespassing/2005_08_08_court_district.mp3

Vanderhye Testimony - Text Transcript of Roger Vanderhye's **District** Court testimony
http://www.liamsdad.org/court_case/trespassing/2005_08_08_vanderhye.pdf

Colwell Testimony - Text Transcript of Officer Colwell's **District** Court testimony
http://www.liamsdad.org/court_case/trespassing/2005_08_08_colwell.pdf

Exhibit F ….. Defendant's Motion For A Court Reporter (Record Page 53)
http://www.liamsdad.org/court_case/trespassing/2005_10_05_motion_reporter.pdf

From: Ron Jagannathan <ron.jagannathan@gmail.com>
Date: December 4, 2005 5:06:31 PM EST
To: "Liam's Dad" <liamsdad@liamsdad.org>
Subject: Re: finch order

Wes,

I will send this to you soon.

A motion with Liams dad as exhibit 1 was presented to Judge Finch, There was a 3 hour hearing on a Friday docket that was scheduled as 30 min. Ron Fisher was a witness to the whole hearing. There was also a court reporter. (If you want a transcript).

There is an order, asking you to be contacted via certified mail and to remove the web pages of White collar child abuse.

I will scan the doc and send it to you soon. Actually in an hour.

Ron J

Exhibit G

JANINE M SAXE 703 691 1190 12/09/04 07:10pm P. 008

It is further Ordered that Rajon Jogannathan shall be prohibited from providing any information regarding this case to any individual, organization or other entities that will distribute or attempt to distribute and/or publish or make public this information and Mr. Jogannathan is also ordered to contact those individuals and organizations that have made public information about this case and request that this information is removed from the web and all other communication entities; it is also

Ordered that those organizations, individuals and websites be identified that either received, transmitted or responded to the Petition Naming the Guardian ad Litem & Robert Noble, & that Rajon Jogannathan provide this information to the Court by November 1, 2004; Defendants Motion to TO The Order Pg 60, 3rd ¶ to Reconsider a change ~~of Spousal or Child Support~~ re demands regarding.

Entered this 16 day of Dec 2004.

Gaylord L. Finch, Jr.
Judge, Circuit Court of Fairfax County

Counsel for the Plaintiff

SEEN AND OBJECTS TO (SEE REVERSE)

Counsel for the Defendant

A COPY TESTE:
JOHN T. FREY, CLERK
BY: Deputy Clerk
Date: 10-22-2004

Guardian ad Litem

Exhibit H

VALERIA V. JAGANNATHAN, PLAINTIFF,	:	IN CHANCERY NO. 182927; 182928
VS.	:	ON APPEAL FROM:
	:	THE FAIRFAX COUNTY JUVENILE &
RAJAN JAGANNATHAN	:	DOMESTIC RELATIONS DISTRICT COURT
DEFENDANT.	:	IN RE: SVETA JAGANNATHAN
	:	LISA JAGANNATHAN
	:	CASE NOS: JJ352771-01-01; JJ352762-01-01

LIAM'SDAD.ORG

"PLEASE JOIN US IN STANDING UP AGAINST ORGANIZED WHITE COLLAR CHILD ABUSE OF OUR CHILDREN BY ATTORNEY MS. JANINE SAXE AND ATTORNEY MR. ROBERT MACHEN.

EXHIBIT "B"

Exhibit H

1. That Rajan Jagannathan shall, in writing, contact the following individuals and organizations and request that all references to this case, the parties' children, and Janine M. Saxe, be immediately removed from the Internet:

(a) ThePetitionSite.com [http://www.thepetitionsite.com]; [thepetitionsite.com/takeaction/116360611]. Hosted by Care 2, Inc. at abuse@earth.care2.com. This organization's address is: Care 2, Inc., 275 Shore Drive, Suite 151, Redland, California 94065; its phone number is: (650) 622-0860. The author of the petition is: Walter Johnson; and his email address is: wjohnsonva@lycos.com; and

(b) LiamsDad.org [liamsdad.org/wes/Wesley.shtml]; [liamsdad.org/others/petition.html]. Hosted by Wesley Smith. Mr. Smith's address is: 3215 Ridge View Court, # 104, Woodbridge, Virginia 22192; his phone number is (703) 220-2637; and his email address is liam'sdad@liam'sdad.org;

2. That Rajan Jagannathan shall, in writing, contact all Internet search engines and request that all Internet sites pertaining to this case and alleging child abuse by Janine M. Saxe be immediately re-indexed, and that all such references be deleted, together with all cached information, from the Internet. The Internet search engines to be contacted include, but are not limited to, the following:

(1) Altavista;
(2) dogpile;
(3) lycos;
(4) yahoo;
(5) metacrawler;
(6) excite;
(7) webcrawler;
(8) search.netscape;
(9) search.com
(10) alltheweb;
(11) go.com; and
(12) msn.com;

Exhibit H