

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

WESLEY CLAY SMITH,)	
)	
APPELLANT / Defendant)	
)	
v.)	Record No. 062142
)	Court of Appeals No. 2615-05-4
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 REHEARING

Submitted By Appellant: (no attorney)

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PETITION FOR REHEARING

COMES NOW the Defendant, Wesley Clay Smith, and prays that this court grant a rehearing of the
decision of this court dated February 1, 2007 which denied his PETITION FOR APPEAL, and
respectfully states that the decision is grossly in error and has the effect of overturning major rulings by
the U.S Supreme Court (such as Griffin v. Illinois, Miranda v. Arizona, and Gideon v. Wainright) - a
legal position the Supreme Court Of Virginia has no authority to take.

The ruling claims that the petition failed to raise a "... substantial constitutional question...".
This is a gross error. Had the court actually read the petition, or even just the first page of the
petition, it would have found a claim of violation of a Constitutional Right to Due Process, and a claim
that Rule 5A:8 is unconstitutional as applied to indigent defendants 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.

Given that both Due Process and Equal Protection for the indigent are substantial constitutional
issues sufficient to reverse or remand for new trial, the above claim by this court is grossly in error, either
as an unlawful refusal to perform the duties as sworn to in the oath of office or by negligence in

ruling without even bothering to read the brief. [I'm not a VBA member so I can tell the truth]

The Appeals Court dismissed the case due to lack sufficient record, which was a direct result of the Defendant's indigent status, thus unconstitutional as violating Equal Protection. The Court of Appeals also failed to accept the filed and **unopposed Statement Of Facts** due the Defendant not knowing he was supposed to schedule a hearing on it, again a direct result of the Defendant's indigent status combined with the Trial Court's refusal to appoint effective counsel (in spite of a written motion requesting the same), again another blatant violation of Due Process.

This Court must ask itself if the Defendant had been able to afford an attorney would the reasons given by the Court Of Appeals denying the appeal still apply. If not then it must remand for violation of Equal Protection.

This Court must ask itself if the Defendant had been able to afford a court reporter and transcript would the reasons given by the Court Of Appeals still apply. If not then it must remand for violation of Equal Protection.

In case you can't figure it out for yourself, I'll give you the answer to the above questions. **NO.** If the Defendant had hired a court reporter and provided a transcript the CAV would not have been able to weasel out of hearing the case by the excuse given. Same thing goes if the Defendant had hired, or was appointed effective counsel, that would have properly handled the statement of facts per court rules, the CAV would have not been able to use the same lame excuse to avoid performing its judicial duty to hear the case. The Defendant would have taken both steps if able, **thus his financial status is the determining factor in why his appeal was denied.**

Violation of Equal Protection runs deep in the "justice" system of this commonwealth, with a hundreds year old tradition of denying equal justice due to race continuing up to the present day with the laughable insufficient funds allotted by the legislature to pay for counsel for indigent defendants (about 45 minutes worth), followed up by the lack of the legislature to fully fund even that pathetic program, which farce is only allowed to continue because neither the Court Of Appeals Of Virginia nor the Supreme Court Of Virginia are willing to uphold the constitution and force the state and trial courts to

follow U.S. Supreme court rulings about effective counsel and Equal Protection for the poor.

"In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color **There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.**" Griffin v. Illinois, 351 U.S. 12, 17, 19 (1956)

It is well established that an indigent defendant subject to imprisonment in a state criminal case has a right to assigned counsel pursuant to the Sixth Amendment as applicable to the states through the Fourteenth Amendment's Due Process Clause. See Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, **cannot be assured a fair trial unless counsel is provided for him.** This seems to us to be an obvious truth The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." Gideon v. Wainwright, 372 U.S. 335, 344 (1963)

The right to meaningful opportunity to be heard within limits of practicality must be protected against denial by particular laws that operate to jeopardize it for particular individuals. BODDIE V. CONNECTICUT, 92, S.Ct. 780, 401 U.S. 371. 28 L.Ed.2d 113 conformed t 329 F. Supp. 844 (1971)

The ruling also claims that the petition did not state a "matters of significant precedential value"

which just indicates **the court didn't read page 2 of the petition** where clearly stated in plain English:

"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."

Also the effect of the Appeals Court ruling **sets a precedent denying Due Process and Equal Protection for all indigent defendants in Virginia.** That is a significant constitutional issue sufficient to warrant not only this court but also the U.S. Supreme Court ruling if necessary. It wouldn't be the first time the U.S. Supreme Court needed to remind this court of the existence of the U.S. Constitution.

Finally the ruling lists Rule 5:17(c) without any indication of how it applies to the ruling or the case - not that it matters, as the Defendant has brought a claim of violations of Due Process, Equal Protection, Right to Counsel, Right to present evidence, Right to impeach witnesses, etc, **thus any citation or reliance on laws or court rules is in error as no law or rule can overrule the constitution.** Its almost like this court has never even heard of the U.S. constitution, let alone the Supremacy Clause... but not to worry I'll give you some help with that :-) The Supreme Court Of The United States has said:

"Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." Miranda v. Arizona, 384 US 436 at 491.

Article VI, Paragraph 2 of the United States Constitution is known as the **Supremacy Clause**. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the **supreme Law of the Land**; and the **Judges in every State shall be bound thereby**, any Thing in the Constitution **or Laws of any State to the Contrary notwithstanding**.

In cases involving the application of constitutional principles, the Supremacy Clause, U.S. Const. Art. VI, cl.2, **does not allow state court decisions to trump decisions of the United States Supreme Court**. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 750-51 (1995); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993); *Kessler v. Department of Public Safety*, 369 U.S. 153, 172 (1962).

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, and then the lack of the Court Of Appeals or Supreme Court to provide appropriate review is a very serious issue.

The facts of the case are these:

1. Judge Finch with an axe to grind against an indigent defendant heard a case that he should have recused himself from. He may even have worked to get the case assigned to him.
2. Judge Finch refused to provide the indigent defendant with an attorney even though the defendant filed a written motion demanding one - thus violating his right to counsel and intentionally violating the well settled doctrine set in *Gideon v. Wainwright*.
3. Judge Finch knowing that he was going to run a Kangaroo Court, not wanting his actions exposed, denied the defendant's written motion for a court reporter. Judge Finch took the extra step of asking the court reporter that was present not to record the hearing. Judge Finch also refused the defendant's request to allow him to tape record the hearing, something the court allows attorneys to do thus violating Equal Protection.
4. Judge Finch refused to even rule on the defendant's MOTION TO DISMISS, which outlined that there was no legal basis whatsoever to charge the defendant with criminal trespass. The motion had substantial merit as it was written by a Virginia Circuit Court law clerk.
5. Judge Finch, over objection, let a witness ramble on about his dislike of the defendant's website, something totally unrelated to the charge of trespassing. Apparently Judge Finch apparently did

this to make clear why he was violating the rights of the defendant, as Judge Finch was upset about the contents of the website, especially with statements about another case Judge Finch was handling. Judge Finch had previously been unable to shut it down given both the defendant and website are located out of his court's jurisdiction...not to mention the pesky little problem about Free Speech in the Constitution.

6. Judge Finch refused to let the defendant present relevant evidence in his defense including an audio recording of the incident that would have allowed the jury to know exactly what took place.
7. Judge Finch refused to let the defendant use the recording and transcripts of it to impeach the prosecutions witnesses. [Due Process violation]
8. The Jury asked a question and Judge Finch refused to answer it forcing the Jury to rule without the facts that it felt necessary and which could be readily answered by the recording/transcripts.
9. Judge Finch improperly curtailed the presentation of evidence and argument, thereby denying the defendant a fair trial and forestalling the ends of justice.

So after Judge Finch had gone out of his way to violate the Constitutional Rights of the defendant the defendant asked the Virginia Court Of Appeals to correct the injustice. Instead of correcting the violation of Rights the Court Of Appeals ruled that because Judge Finch had denied the defendant a transcript of the hearing, because Judge Finch had denied the defendant a recording of the hearing, because Judge Finch had denied the Defendant an attorney to file motions and briefs according to arcane rules that the Court Of Appeals would not hear the case. It should be noted that this is contrast to the established rulings that lack of a proper record is grounds for a new trial not to uphold a personal vendetta of a Judge against a Defendant.

In other words the CAV ruled that yes in Virginia at least a Circuit Court Judge an intentionally deprive a defendant of Due Process and that the very violation of Due Process is grounds to dismiss an appeal.

Its like the Court Of Appeals has never heard of, or rather has no intention of following, Griffin v. Illinois, which struck down the Illinois rule that deprived most defendants lacking the means to pay for a

transcript of any access to appellate review - the same situation as this case except its a Virginia Rule (Rule 5A) denying appellate review for the poor who can't afford a transcript.

Essentially the CAV ruling is that since Judge Finch denied the Defendant a sufficient record that it will dismiss the appeal. This is contrary to precedent. If CAV felt a more complete record was needed then Virginia had the obligation to provide a more complete record.

"Thus, Mississippi may not withhold from M. L. B. 'a `record of sufficient completeness' to permit proper [appellate] consideration of [her] claims." Mayer, supra, at 198. P. 24. see Mayer v. Chicago, 404 U.S. 189, 195-196

Finally the Defendant Appealed the constitutional issues of Due Process and Equal Protection to the Virginia Supreme Court which replied in a completely absurd ruling that totally ignores the constitutional issues of Equal Protection and Due Process for indigent defendants and then purports to overcome the requirements of the supreme law of the land by citing inferior Virginia rule and statute. The ruling while laughable by its ignorance of the contents of the petition in question also ignores U.S. Supreme Court precedent that requires this court to not hold the pro se defendant's petition to the same technical standards as professional attorneys.

Pro se litigants' court submissions are to be construed liberally and held to less stringent standards than submissions of lawyers. If the court can reasonably read the submissions, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or **litigant's unfamiliarity with rule requirements**. Boag v. MacDougall, 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982); Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)(quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); McDowell v. Delaware State Police, 88 F.3d 188, 189 (3rd Cir. 1996); United States v. Day, 969 F.2d 39, 42 (3rd Cir. 1992)(holding pro se petition cannot be held to same standard as pleadings drafted by attorneys); Then v. I.N.S., 58 F.Supp.2d 422, 429 (D.N.J. 1999).

The Plaintiffs are not professional attorneys, and **their pleadings cannot be held to the same level of technical standards** that pleadings from the Defendant should be held to, or that will be expected from any future professional counsel in this cause. See, e.g., Haines v. Kerner, 92 S.Ct. 594; Jenkins v. McKeithen, 395 U.S. 411; Picking v. Penna. Rwy. Co., 151 F.2d 240; and, Puckett v. Cox, 456 F.2d 233.

In short the ruling by this court of February 1, 2007 is nothing less than a declaration of this courts independence from the U.S. and Virginia Constitutions and from precedence setting rulings of the U.S. Supreme Court, thus allowing all courts in Virginia to completely ignore Due Process and Equal Protection for the indigent. As such the 'ruling' of this court is an act of treason and should

be immediately vacated by a panel and an appeal granted. Should the court fail to do that the appropriate remedy is for the legislature to impeach the justices for treason... we all know it won't happen, but that would still be the appropriate legislative response.

The United States Supreme Court has stated "**No State legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it**". Cooper Vs. Aaron. 358 U.S. 1 78 S.Ct. 1401 (1958). If a judge does not fully Comply with the Constitution, then his orders are void, in re Sawyer, 124 U.S. 200 (1888), he/she is Without jurisdiction, & **he/she has engaged in an act or acts TREASON!**

Should there be any honest Judge on the bench of this court, one who has even a slight interest in upholding his oath of office, upholding the constitution, or even just interested in protecting the image of the Court, I will provide the clerk with not only the required PDF version of this PETITON FOR REHEARING but also a MS-WORD copy of the PETITION FOR APPEAL that has html links to all the relevant court documents. [yes it would be nicer if I could send a pdf file with html links... :- (]
http://www.liamsdad.org/court_case/trespassing/2006_10_10_petition_links.doc

It should be a piece of cake for any interested justice to verify that Due Process was not followed by both the Circuit Court or the Virginia Court Of Appeals... not to mention the nagging little problem that **the defendant actions don't meet the legal requirements of criminal trespassing** even if the prosecutions version of facts is accepted. Double-click on the MOTION TO DISMISS [never ruled on] which was written by a Circuit Court law clerk that points out that there is **NO LEGAL BASIS for a charge of criminal trespass...** which given the subsequent erroneous conviction and refusal of the Court Of Appeals and Supreme Court to reverse the ruling raises some very troubling questions about the condition of the "justice" system in the Commonwealth, and explains the newspaper article about law firms threatening to sue the state over failure to provide proper representation for indigent defendants.

Clearly the "justice" system in Virginia isn't working

(and this court bears a significant portion of the blame for the failure)

Given the mockery of justice that has occurred in this factually simple, minor criminal case, that was caught completely on tape, **the very thought of Virginia Courts being allowed to handle felony cases**

is a terrifying thought. Although the good news is the Virginia Courts are good for race relations, now when I see an African American teen on the news decrying the court convicted him unfairly I'm inclined to believe him rather than the court.

CONCLUSION

For the foregoing reasons, Mr. Smith respectfully requests that the court vacate and **apologize** for its absurd ruling of Feb 1, 2007 and that he be granted an appeal, or that in the alternative that the court at least be honest and state for the record that neither the U.S. or Virginia Constitutions are applied to indigent defendants in Virginia Courts and then for a Judge to have the balls to sign the order himself instead abdicating his judicial duty to a clerk of the court. (FYI its not an order if a clerk signs it)

**Respectfully submitted,
WESLEY C. SMITH
Appellant / Defendant, pro se**

/s/ _____
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CERTIFICATE OF WORD COUNT LIMIT

I hereby certify this petition is in compliance with the word count limit, of approx 3,400 words being significantly less than the 7,500 word limit.

/s/ _____
Wesley Smith

CERTIFICATE OF SERVICE

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 Feb 15th, 2007.

/s/ _____
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