In The

Supreme Court of Virginia

RECORD NO.: 090012

GORDON ANDREW ZEDD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF VIRGINIA AT RICHMOND

GORDON ANDREW ZEDD,

Appellant,

v.

Va. Sup. Ct. Record No. 090012
Ct. App. Record No. 2621-07-1
Circuit Court No. CR07-3900

COMMONWEALTH OF VIRGINIA,

Appellee.

APPELLANT'S OPENING BRIEF

TO THE HONORABLE CHIEF JUSTICE AND
THE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

NATURE OF THE CASE

The appellant, Gordon Andrew Zedd ("Zedd"), respectfully represents that he is aggrieved by a final judgment of the Circuit Court for the City of Norfolk dated October 2, 2007, the Honorable Charles D. Griffith, Jr. presiding, in a criminal proceeding in which Zedd was the defendant. The appellant will be referred to herein as "Defendant" or "Zedd". The appellee will be referred to herein as the "Commonwealth." There is no transcript of

any pertinent hearings in this case. Any reference to the Appendix in this case[1] will be indicated by ("A. ___").

MATERIAL PROCEEDINGS

On October 2, 2007, Zedd, an attorney, appeared in front of Judge Griffith for a scheduled court date for his client, Kiwani Scott ("Scott"). (A. 4) Scott was appealing a reckless driving conviction from Norfolk General District Court. (A. 4) During this court hearing, Judge Griffith summarily held Zedd in contempt for excusing his client from this court date without any judge having signed a written continuance order. (A. 4-5) However, prior to excusing his client, Zedd had spoken with the attorney prosecuting the case who had agreed to a continuance. (A. 4). Both attorneys had signed the continuance order before they made an oral motion to continue the case. (A. 3) The continuance order, which Judge Griffith ultimately entered that same day, reflected that the motion for a continuance was "joint." (A. 3) Additionally, it is undisputed that the Commonwealth would not have been able to proceed with the trial on that date because the state trooper handling the case was not available. (A. 3, 4-5). Judge Griffith

[1] Because Judge Griffith provided no process to Zedd, there is no transcript of proceedings in this case. There is a statement of facts not transcribed, however, Zedd objected to language contained in this statement of facts that was unilaterally inserted by Judge Griffith. (A. 4-6)

summarily held Zedd in criminal contempt and imposed a $50 fine. The conviction order was entered by Judge Griffith on October 2, 2007[2]. (A. 1)

Zedd timely filed a Notice of Appeal. The Court of Appeals granted Zedd's Petition, then affirmed his conviction in an unpublished opinion. (A. 9-11) Zedd appealed this decision to this Court. By order dated May 6, 2009, this Court awarded Zedd an appeal from these prior rulings.

QUESTIONS PRESENTED

1. Did the trial court err by holding Zedd in criminal contempt of court where there was insufficient evidence of any intention to obstruct or interrupt the administration of justice? (A. 1, 4-5) This Question Presented relates to Assignment of Error # 1.

2. Did the trial court err by holding Zedd in summary contempt for conduct that did not occur exclusively in the presence of the court or so near thereto as to justify invocation of summary contempt? (A. 1, 4-5) This question presented relates to Assignment of Error # 2.

3. Did the Court of Appeals err by affirming Zedd's conviction, holding both that the evidence was sufficient and that Zedd failed to

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[2] For some reason, Judge Griffith entered another order several months later in February 28, 2009, well after Zedd had initiated this appeal. (A. 8) This order erroneously indicates that Zedd had "retained counsel" for the summary contempt proceeding. (A. 8) Of course, Zedd had no counsel, notice or other process before being held in summary contempt.

preserve his due process objections to the trial court's finding of summary contempt. (A. 9-11) This question presented relates to Assignment of Error # 3.

ASSIGNMENTS OF ERROR

1. The trial court erred by holding Zedd in criminal contempt of court where there was insufficient evidence of any intention to obstruct or interrupt the administration of justice. (A. 1, 4-5)

2. The trial court erred by holding Zedd in summary contempt for conduct that did not occur exclusively in the presence of the court or so near thereto as to justify invocation of summary contempt. (A 1, 4-5)

3. The Court of Appeals erred by affirming Zedd's conviction, holding both that the evidence was sufficient and that Zedd failed to preserve his due process objections to the trial court's finding of summary contempt. (A. 9-11) __

STATEMENT OF FACTS

Scott retained Zedd to represent him in Norfolk Circuit Court for an appeal of a misdemeanor conviction for reckless driving. (A. 4). The matter was originally set for a non-jury trial on October 2, 2007. (A. 4). On October 1, 2007, Zedd contacted Tanja Korpi ("Korpi"), the prosecutor assigned to the case, in order to inquire about a continuance. (A. 4) Korpi

agreed to a joint continuance because the state trooper who charged Scott was unavailable.[3] (A. 3, 4) Zedd and Korpi agreed to a new trial date of November 6, 2007. Prior to the court date, Zedd advised his client that he need not appear in court the next day. (A. 4) On October 2, 2007, Zedd and Korpi appeared in court to present their joint continuance motion, and the signed proposed order, to Judge Griffith. Judge Griffith asked Zedd where his client was; Zedd replied that his client was not present because the state trooper was unavailable and because the Commonwealth was not ready to proceed. (A. 4-5)

Korpi "highlighted" to Judge Griffith that this was a joint continuance motion and that she was not ready to proceed because of the unavailability of the trooper. (A. 5) Judge Griffith, in the unilaterally revised Statement of Facts, claimed that Zedd acknowledged that he had no authority to excuse his client without prior judicial approval. (A. 5) Zedd vehemently denies that he made such a concession. (A. 6-7). Judge Griffith then summarily held Zedd in criminal contempt in violation of 18 Va. Code § 456 and fined

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[3] The Statement of Facts indicates that the trooper was unavailable due to a death in the family. (A. 4) The Joint Continuance Motion indicates that the trooper was "ill." (A. 3) Nonetheless, there is no dispute that the Commonwealth could not proceed with the underlying trial of Zedd's client because its only witness could not be present.

him $50. (A. 1) Zedd was later arrested for this offense, taken into custody and released. (A. 2)

ARGUMENT

I. THE TRIAL COURT ERRED BY HOLDING ZEDD IN CRIMINAL CONTEMPT OF COURT WHERE THERE WAS INSUFFICIENT EVIDENCE OF ANY INTENTION TO OBSTRUCT OR INTERRUPT THE ADMINISTRATION OF JUSTICE.

Va Code § 18.2-456 governs criminal contempt in Virginia and allows a judge to punish for summary contempt "only" in certain specified cases. A trial court may find a party guilty of summary criminal contempt "only in the cases following:" 1) "misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice"; 2) violence or threatened violence to a judge, juror, etc.; 3) vile or insulting language addressed to a judge; 4) misbehavior of an officer of the court in his official capacity; and 5) disobedience or resistance to a lawful court order.

The Court of Appeals has clearly defined contempt as "an act in disrespect of the court and its processes, or which obstructs the administration of justice, or tends to bring the court into disrepute." *Carter v. Commonwealth*, 2 Va. App. 392, 395, 345 S.E. 2d 5 (1986). In *Carter*, the Court of Appeals addressed whether a criminal defendant was guilty of

criminal contempt by waiting until the day of his scheduled non-jury trial to request a jury. *Id.* When counsel for Carter indicated that his client had only advised him of his desire for a jury trial the preceding day, the court found Carter in contempt and imposed a 10-day jail sentence. The court underlined that a person charged with criminal contempt "is entitled to the benefit of the presumption of innocence, and the burden is on the prosecution to prove the guilt of the accused." *Id.* at 396-397. The Commonwealth must prove the elements of the offense beyond a reasonable doubt. *Id.* The key question in the case was whether the Commonwealth's evidence sufficiently proved that Carter made the late request for a jury trial "**with the intent to 'obstruct or impede the administration of justice'.**" *Id.* (emphasis added)

The Court continued to hold that "intent is a necessary element in criminal contempt and ... no one can be punished for criminal contempt unless the evidence makes it clear that he intended to commit it." *Id.*, quoting 17 Am. Jur. 2d *Contempt* § 100 (1964). Bare conclusory assertions of criminal intent are insufficient to support a conviction for criminal contempt; the "record must show facts to support proof that contempt was committed willfully." *Id.* (emphasis in original) Thus, in *Carter*, the court reversed the defendant's criminal contempt conviction

because there was insufficient evidence that Carter requested a jury trial "for the purpose of obstructing or interrupting the administration of justice ... "

Therefore, in order to sustain Zedd's conviction for criminal contempt, the evidence, viewed in a light most favorable to the Commonwealth, must demonstrate beyond a reasonable doubt that Zedd excused his client for "the purpose of obstructing or interrupting the administration of justice." Because the record demonstrates that Zedd was seeking to facilitate the administration of justice by excusing his client under the circumstances of this case, the Court should reverse his conviction for criminal contempt. Indeed, Zedd could not, as a matter of law, have formed the requisite criminal intent to obstruct or interrupt the administration of justice where the Commonwealth's witness was unavailable to attend the trial of Zedd's client and, therefore, the trial could not have proceeded.

In two more recent opinions, the Court of Appeals affirmed criminal contempt convictions for lawyers who "scheduled multiple matters in different jurisdictions at the same time (because) there was sufficient evidence of willful intent to obstruct the administration of justice." *Brown v. Commonwealth*, 26 Va. App. 758, 762, 497 S.E. 2d 147 (1998); *Robinson v. Commonwealth*, 41 Va. App. 137, 143, 583 S.E. 2d 60 (2003).

However, both cases reiterated the requirement that intent is a necessary element of criminal contempt. *Robinson*, 41 Va. App. at 143-144 ("intent is a necessary element in criminal contempt" and "no one can be punished for a criminal contempt unless the evidence makes it clear that he intended to commit it"); *Brown*, 26 Va. App. at 149, quoting *Potts v. Commonwealth*, 184 Va. 855, 859, 36 S.E. 2d 529, 530 (1946)(defining contempt as "any act which is calculated to embarrass, hinder or obstruct the court in the administration of justice.") In both cases, the court affirmed contempt convictions for attorneys because they purposefully scheduled multiple cases in multiple jurisdictions, and, thus, had sufficient intent to convict them of criminal contempt. By contrast, Zedd has engaged in no such willful or intentional misbehavior, nor has his conduct in any way interfered with the administration of justice.[4]

Applying these precedents to the facts of this case, Judge Griffith was plainly wrong when he found there was sufficient evidence of Zedd's

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[4] Indeed, it could be argued that requiring criminal defense counsel to secure a written, entered order from a judge before excusing their clients from court, and subjecting them to criminal contempt convictions without such an order, would have a far greater likelihood of interrupting the administration of justice than the reasonable actions taken by Zedd in this case. If Zedd had been afforded some process and a hearing, he could have presented evidence that criminal defense lawyers routinely excuse their clients without a court order and that trial judges rarely, if ever, hold them in contempt for doing so.

intention to obstruct or interrupt the administration of justice. It is undisputed that Zedd called the prosecuting attorney in the underlying case and secured her agreement to continue the case; Zedd did both of these things **before** his client's scheduled court date. (A. 4) Zedd and the prosecuting attorney also signed a joint continuance order which they both presented to the court on the scheduled trial date. (A. 4-5) Perhaps most significant, Korpi had advised Zedd that she could not proceed on the scheduled court date because her only witness was not available. (A. 4-5) Thus, it is undisputed that the Commonwealth could not have proceeded with the trial of Zedd's client even if the client had been present. Zedd's actions were not contemptuous, as a matter of law, because his conduct had neither the intention, nor the effect, of obstructing the administration of justice.

II. THE TRIAL COURT ERRED BY HOLDING ZEDD IN SUMMARY CONTEMPT FOR CONDUCT THAT DID NOT OCCUR EXCLUSIVELY IN THE PRESENCE OF THE COURT OR SO NEAR THERETO AS TO JUSTIFY INVOCATION OF SUMMARY CONTEMPT.

The trial court committed reversible error by applying summary contempt procedures to find Zedd guilty of criminal contempt where the purported contempt did not occur entirely in the court's presence or so near its presence as to justify the extraordinary application of the trial

court's summary contempt powers. The Court of Appeals in *Robinson* emphasized that "[c]ontempt proceedings are categorized as either direct or indirect." *Robinson*, 41 Va. App. at 145. The difference between the two is "procedural": in a case of direct contempt, in which the contempt "is committed in the presence of the court, it is competent for it to proceed upon its own knowledge of the facts, and to punish the offender without further proof." *Id.* However, when dealing with indirect contempts, "that is, such as are committed not in the presence of the court, the offender must be brought before the court by a rule or some other sufficient process." *Id.*, citing *Davis v. Commonwealth*, 219 Va. 395, 398, 247 S.E. 2d 681, 682 (1978). Thus, "indirect or constructive contempt charges ... are not brought summarily, but must proceed under a more formal procedure than an immediate adjudication by the court." *Id.* at 146.

Unlike in the present case, in *Robinson,* the trial judge did not apply summary procedures, but issued a show cause. Additionally, the court afforded defendant an opportunity to obtain counsel, to prepare his case, and to have a plenary hearing on his guilt or innocence. *Id.* Judge Griffith allowed Zedd none of these safeguards before summarily finding him guilty of criminal contempt. (A. 4-5) The purported contempt in this case– Zedd's advising his client that his appearance was not necessary– clearly

occurred outside the presence of the court. As such, Zedd was entitled to some notice, a hearing, the right of counsel and the right to prepare a defense against such an accusation. The trial court's failure to provide Zedd with these procedural protections is particularly troubling where the trial court's decision saddled a respected member of the bar, and an officer of the court, with a misdemeanor criminal conviction. Therefore, the trial court erred by applying summary procedures to hold Zedd guilty of criminal contempt for conduct that did not occur entirely in the presence of the court.

It is well-established that "[s]ummary punishment always, and rightfully, is regarded with disfavor." *Sacher v. United States,* 343 U.S. 1, 8 (1952). Likewise, the United States Supreme Court has indicated that "the power to punish summarily for contempt is limited because it provides an exception to the normal due process requirements such as a hearing, counsel, and the opportunity to call witnesses." *Pounders v. Watson*, 521 U.S. 982, 988 (1997). In *Taylor v. Hayes*, 418 U.S. 488, 497-500 (1974), the United States Supreme Court reversed the criminal contempt convictions of an attorney because the summary procedure applied violated fundamental norms of the due process clause. The Court first cited with approval *Sacher*'s admonition that summary punishment is

always rightfully viewed with disfavor. Further, "we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are basic in our system of jurisprudence." *Id.* (citation omitted)

The Court also cited the American Bar Association's advisory committee on judge's functions: "[b]efore imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment." Imposing criminal contempt sanctions without notice or an opportunity to defend "is inconsistent with the basic notions of fairness and is likely to bring disrespect upon the Court." *Id.* Finally, the Court stated that some procedure is "essential in view of the heightened potential for abuse posed by the contempt power. ... The provision of fundamental due process for contemnors accords with our historic notions of elementary fairness." *Id.*

Because of these limitations, all of the conduct, and elements, necessary to establish contempt must occur in the Court's presence to justify the exceptional decision to forego procedures typically required by due process. In short, a court has the power to impose summary contempt "only (for) charges of misconduct ... (of which) all of the essential elements

... are under the eye of the court (and) are actually observed by the court." *In Re Oliver*, 333 U.S. 257, 275 (1948). Most important, in cases of alleged misbehavior where the judge lacks personal knowledge of any of the essential elements and "is informed thereof only by the confession of the party, or by the testimony under oath of others", the Court may not use its limited summary contempt powers. *In Re Sabin*, 131 U.S. 267, 277 (1889).

Applying these principles to the instant case, Judge Griffith erred by summarily finding Zedd guilty of criminal contempt for conduct that did not occur exclusively in the presence of the Court. Judge Griffith could not learn the facts surrounding Zedd's decision to excuse his client, an act that occurred outside the court room, solely through his own observation. Indeed, Judge Griffith found Zedd in contempt not for anything that he observed, but purely in response to Zedd's statement that he released his client without a signed order entered by a judge. (A. 4-5) Judge Griffith erred by applying his summary contempt powers despite the fact that not all of the elements and purported misconduct that served as the basis for the contempt occurred in his presence. Additionally, *Oliver* and *Sabin* make clear that a trial court may not punish for summary contempt where it is relying on the confession of a party, or on testimony of others, such as

the prosecuting attorney in the case, Tanya Korpi. Because Judge Griffith based his contempt finding, in part, on statements made Zedd and Korpi about what occurred outside the court room, he overstepped the limited bounds of summary, direct contempt.

The purported contempt in this case– Zedd's decision to advise his client that his appearance was not necessary because the Commonwealth agreed to the continuance and could not proceed– clearly occurred outside the presence of the court. As such, Zedd was entitled to some process with the right of counsel and the right to prepare a defense against such an accusation. Additionally, there is no indication in the record that the Court needed to apply its summary contempt powers for immediate vindication of the Court's authority. To the contrary, in *Robinson* and in *Nusbaum v. Berlin*, 273 Va. 385, 641 S.E. 2d 494 (2007), the trial courts correctly stayed a final finding of contempt charges against attorneys until after they had been afforded a fair opportunity to respond to the charges and to obtain counsel.

This Court has also awarded an appeal to Kenneth Singleton, another attorney who was held in summary criminal contempt by Judge Griffith for releasing his client from court because there was an agreed

continuance. *See* Record No. 082270.[5] In affirming Singleton's conviction, the Court of Appeals cited two Fourth Circuit opinions for the proposition that a "lawyer's willful absence from his client's trial, **without a legitimate reason**, is contemptuous." *United States v. Marx*, 553 F.2d 874, 876 (4th Cir. 1977)(emphasis added); *United States v. Linney*, 134 F.3d 274, 277 (4th Cir. 1998) Interestingly, in both cases, the judge did not immediately find the lawyers guilty of contempt but issued a show cause and allowed for a separate hearing. *Marx*, 553 F.2d at 876; *Linney*, 134 F.3d at 277. Indeed, Linney was represented by counsel at his contempt hearing. Moreover, neither case remotely resembles the factual scenario in the present case involving Zedd because Zedd appeared for his client's trial. Additionally, Zedd had spoken with the prosecuting attorney, who had agreed to a continuance, the two attorneys had signed a written continuance order, and the prosecutor had released its witness and could not proceed with the trial on the scheduled trial date. By contrast, in *Marks*, the attorney failed to appear in court for the trial because he had not been paid and the trial proceeded without him. Linney was at the court for the start of the trial and told the trial judge he was not prepared.

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[5] Singleton, unlike Zedd, did not appear in court on the scheduled trial date.

Linney, 134 F.3d at 277. The district court denied the attorney's motions to withdraw and for a continuance and ordered Linney to be present when jury *voir dire* commenced. Linney then left the court and flew to another city, telling the deputy "you will have to come get me." *Id.* Zedd was held in contempt even though he was present in court.

In its published opinion denying Singleton's appeal, the Court of Appeals conceded that other jurisdictions were divided on the subject of whether an attorney's **unexcused** absence can serve as the basis for summary contempt. *Singleton v. Commonwealth*, 52 Va. App. 665, 671 n. 2, 667 S.E. 2d 23, 26 (2008), *comparing In Re Rosen*, 315 A.2d 151, 152-153 (D.C. 1974)(holding that summary contempt is proper where "an attorney fails to appear in court" and *Chula v. Superior Court of Orange County*, 368 P.2d 107, 110 (Cal. 1962)(holding that "failure of an attorney without a valid excuse to be present in court" constitutes a "direct contempt which the court is empowered to punish summarily") *with In Re Davis*, 602 N.E. 2d 270, 276 (Ohio Ct. App. 1991)("Ohio has generally treated an attorney's absence from court as an indirect contempt"), and *State v. Jenkins*, 950 P.2d 1338, 1345, 1347 (Kan. 1997)("unexplained absence of an attorney is a hybrid" and the "characterization of the contempt as direct

or indirect should be deferred until after the attorney has an opportunity to explain his absence").

Given the long line of precedents disfavoring summary contempt and warning of the abuses of that power, the decisions requiring some process before an attorney is held in contempt are the more persuasive authority. The Ohio Court of Appeals rightly underlined that summary contempt should only be applied where "the nature or quality of the contumacious act (is) such that the orderly and effective conduct of the court's business requires its immediate suppression and punishment." *In Re Davis*, 602 N.E. 2d at 263-4, citing *In Re Oliver*, 333 U.S. at 257. In other words, courts should dispense with even minimum procedural safeguards only where the conduct creates "an open threat to the orderly procedure of the court" such that if "not instantly suppressed and punished, demoralization of the court's authority will follow." *Cooke v. United States*, 267 U.S. 517, 536 (1925) Thus, the court in *In Re Davis* rightly concluded that summary contempt must not only be direct, but the contumacious conduct must create a "need for speed" to immediately punish the conduct. *In Re Davis*, 602 N.E. 2d at 275. In the present case, summary contempt was wholly inappropriate because 1) Zedd was present in court, had a good reason for excusing his client and because the court learned of the reasons for the

excusal only by questioning Zedd and Korpi; and 2) there was no need for immediate punishment of Zedd's purported contempt to vindicate the trial court's authority. The Commonwealth cannot plausibly assert that providing Zedd with some process would have, in any way, led to "demoralization" of the trial court's authority. Thus, the trial court's use of summary contempt under the facts of this case constituted a clear violation of Zedd's due process rights.

Finally, the Court of Appeals in this case held that its holding in *Singleton* controlled the outcome in this case. The court rejected Zedd's argument that *Singleton* was distinguishable because Zedd was present and called this a "distinction without a difference." However, the Court of Appeals cited no authority to support the proposition that summary contempt is appropriate where a lawyer excuses his client based on a joint continuance and where the lawyer appears in court on the scheduled trial date. Zedd is aware of no authority sanctioning the use of summary criminal contempt merely because a lawyer excused his client because the Commonwealth could not proceed with the trial. The absence of any such authority demonstrates the "heightened potential for abuse" which the United States Supreme Court warned about in *Sacher*. The trial court's

use of summary contempt powers to punish an attorney who did nothing wrong violated Zedd's due process rights.

III. THE COURT OF APPEALS ERRED BY AFFIRMING ZEDD'S CONVICTION, HOLDING BOTH THAT THE EVIDENCE WAS SUFFICIENT AND THAT ZEDD FAILED TO PRESERVE HIS DUE PROCESS OBJECTIONS TO THE TRIAL COURT'S FINDING OF SUMMARY CONTEMPT.

In its unpublished panel opinion in this case, the Court of Appeals declined to address Zedd's due process argument, holding that Rule 5A:18 barred Zedd from raising this issue for the first time on appeal. (A. 9-11). This Court should grant review of this ruling for several reasons. First, this case must be viewed through the unique prism of Zedd's quandary in this case. In a blink of an eye, Zedd went to court to check on the joint continuance and instantaneously became a criminal defendant with an immediate trial without access to an attorney or any procedural safeguards. Under these circumstances, under either the "good cause" or "ends of justice" exceptions of Rule 5:25, Zedd should not be barred from raising this issue for the first time on appeal. Equally important, Va. Code § 8.01-384 specifically provides that "if a party has no opportunity to object to a ruling or order **at the time it is made**, the absence of an objection shall not thereafter prejudice him ... on appeal." (Emphasis added)

In *Mason v. Commonwealth*, 7 Va. App. 339, 345, 373 S.E. 2d 603 (1988), the Court of Appeals held that a defendant did not waive his right to challenge improper, surprise comments made by the trial judge to the jury because he failed to make a contemporaneous objection. The court held that there was a limited exception to Rule 5A:18 "where defense counsel ... was taken by surprise at the court's comments to the jury." *Id.* at 346. Since the trial court acted without consulting the lawyers, "we find that Mason did not have an opportunity to object to the trial court's ruling" and could, therefore, raise the issue for the first time on appeal. By analogy, Zedd had no opportunity to object to Judge Griffith's decision at the time it was made.[6] Even more so than the defense lawyer in *Mason*, Zedd was essentially ambushed by the trial judge when he went from an attorney to criminal defendant. It is hard to conceive of a situation where there is a greater surprise. Also, Zedd had a real concern that if he objected too vociferously to the contempt finding, he could end up in lock up. In fact,

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[6] Because the statute states that there is no prejudice on appeal if a defendant has no opportunity to interpose an objection at the time a ruling is made, Zedd was under no obligation to file a post-conviction motion attacking the summary nature of the proceedings against him. The Court of Appeals erroneously suggested that waiver occurred, in part, because Zedd filed no post-conviction motion to set aside his conviction. (A. 11 n. 3) The plain language of § 8.01-384 alleviated the need for any such post-trial motion.

Zedd was later arrested, (A. 2), so this fear was far from idle. Accordingly, Va. Code §8.01-384 allows Zedd to raise his due process concerns for the first time on appeal.

Finally, Rule 5:25 provides for two distinct exceptions to the contemporaneous objection rule, both of which apply under the unique facts of this case. Rule 5:25 provides that there is an exception either "for good cause shown" or "to enable the Court of Appeals to attain the ends of justice." Zedd acknowledges that these exceptions to Rule 5:25 are sparingly applied, but nonetheless asserts that this case is ideally suited for application of these exceptions. Indeed, the purpose of the rule is to give the trial judge "a fair opportunity to rule intelligently on objections while there is still an opportunity to correct errors in the trial court." *Vasquez v. Mabini*, 269 Va. 155, 163, 606 S.E. 2d 809, 813 (2005). In this case, where Zedd had no warning that he had to instantly go from representing his client's interests, to representing himself in a criminal trial, good cause clearly obviated the need for a contemporaneous objection. Good cause is particularly compelling where it was the trial court's failure to afford him even a modicum of process that resulted in his failure to apprise himself of his remedies for the judge's actions. A legitimate apprehension of arrest also provides good cause for failing to object. Given that Zedd was, in fact,

later arrested, this fear was hardly idle. (A. 2) Additionally, good cause exists for the lack of an objection because Zedd faced an untenable conflict between zealous representation of his client and protecting his own interests and liberty. If the trial court had merely allowed Zedd a separate hearing on this issue, with some notice, some procedure, and the right to consult an attorney, Zedd would not have faced this impossible conundrum.

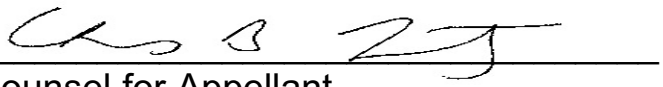
Finally, the ends of justice exception also applies because the procedure afforded Zedd resulted in a serious miscarriage of justice: an attorney, and officer of the court, was saddled with a criminal, misdemeanor conviction without any due process including the right to counsel. The Court of Appeals decision erroneously concluded that Zedd was procedurally barred from raising these important issues.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Zedd respectfully requests that the Virginia Supreme Court reverse his conviction for summary contempt for two reasons: 1) the Commonwealth did not meet its burden of proving that Zedd had the specific intent to obstruct or interrupt the administration of justice; and 2) the trial court improperly applied its summary contempt powers to convict Zedd for behavior that did not occur exclusively within

the trial court's presence. Additionally, Zedd did not waive his right to raise these issues because he had no opportunity to object to these rulings at the time that they were made, and because the good cause and ends of justice exceptions apply.

GORDON ANDREW ZEDD



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CERTIFICATE

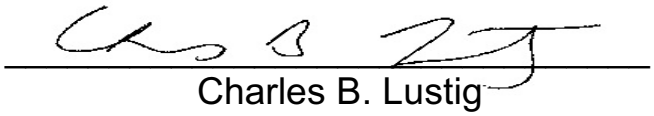
1. The name and address of Appellant is: Gordon Zedd, 4101 Granby Street, Suite 200, Norfolk, VA 23504.

2. The names, addresses, telephone numbers and email addresses for counsel for the Appellant are: Thomas B. Shuttleworth, tshuttlworth@srgslaw.com , and Charles B. Lustig, clustig@srgslaw.com , Shuttleworth, Ruloff, Swain, Haddad & Morecock, P.C., 4525 South Boulevard, Suite 300, Virginia Beach, VA 23452-1137, (757) 671-6000. Counsel are retained.

3. The name of the Appellee is: Commonwealth of Virginia.

4. The name, address, telephone number and email address of counsel for the Appellee is: Joanne V. Frye, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, (804) 786-2071. Ms. Frye's email address is jfrye@oag.state.va.us

5. I certify that on June 9, 2009, three (3) copies of this Opening Brief and Appendix were mailed, by first-class mail, postage prepaid, to Counsel for Appellee, Joanne V. Frye, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219. I also certify that on June 9, 2009, 15 (15) copies and one electronic copy of this Opening Brief and Appendix were hand filed in compliance with Rule 5:26(d) of the Rules of the Supreme Court of Virginia.



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