IN THE
Supreme Court of Virginia

RECORD NO. 090303

CLAUDE M. SCIALDONE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

RECORD NO. 090305

BARRY R. TAYLOR, and
EDWARD JONES, s/k/a EDWARD S. JONES,

Appellants,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

CONSOLIDATED BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR

The en banc Court of Appeals erred:

I. By finding that Appellants had failed to preserve the objection that the trial court had erred by using summary contempt proceedings and violating their due process rights for acts not fully occurring in its presence when that issue was presented to and considered by the trial court before entry of its final order.

II. By transforming Va. S.Ct. Rule 5A:18 from a rule ensuring that a trial judge has been afforded an opportunity to consider an objection when she has authority to take corrective action to a rule elevating form over substance by requiring a party to also ask for every potential form of relief in order to preserve the objection for appeal.

III. By failing to follow Va. Code § 8.01-384(A), which provides that it shall be *sufficient* if a party, at the time the court order is sought or made, makes known to the court his *objections* to the actions of the court and his *grounds* therefor, that party shall not be required to make his objection again to preserve his right to appeal.

IV. By failing to follow Va. Code §§ 8.01-384(B) and 19.2-318, which provide that, in a contempt case, an accused need not make a motion for a new trial to preserve for appeal an objection when the objection

is made part of the record.

V. By failing to comply with the rules of statutory construction, which require that statutes be construed strictly against the Commonwealth and liberally in favor of an accused.

VI. By ignoring the rule that courts speak through their written orders.

VII. By finding that pro se litigants, unaware that they are on trial, who are excluded from portions of their trial and who have not waived counsel, are to be held to the same standard in preserving issues under Rule 5A:18, as accused who have notice of the charges and the right to present a defense and to be represented by counsel.

VIII. By failing to find that the trial court erred by the use of summary contempt, which violated their due process rights, instead of plenary proceedings where the alleged contempt was based on witnesses and exhibits summoned to court for evidence of events not occurring in the presence of the court.

IX. The trial court erred by the use of summary contempt, which violated their due process rights, instead of plenary proceedings where the alleged contempt was based on witnesses and exhibits summoned to court for evidence of events not occurring in the presence of the court.

QUESTIONS PRESENTED

I. Did Appellants preserve for appeal their objections to the trial court's summary proceeding when they moved for the court to stay execution of their sentences pending appeal based on the validity of those objections, and when the trial court had the objections prior to entry of its contempt order and decided that the arguments lacked merit and that the summary proceedings had been proper?

Assignments of Error: I, II, III, IV, V, VI, and VII.

II. Did the trial court commit reversible error by using summary contempt proceedings, violating Appellants' right to due process of law, in a nearly three and one-half hour contempt trial in which the decision depended on witnesses and exhibits about events occurring at a law office, outside of court?

Assignments of Error: I, II, III, IV, V, VI, VII, VIII and IX.

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This case arose out of a criminal jury trial in the Circuit Court of Virginia Beach, where defendant, Frankie Cecil Dulyea, was represented by Claude M. Scialdone, assisted by a law student clerk, Edward S. Jones. The charges stemmed from Dulyea's conduct in an internet chat room with an undercover police officer posing as a juvenile.

During the trial, the rules governing the chat room came into play and defense counsel tendered a document containing the rules. It was rejected because it was dated July 11, 2006, and the events at issue occurred on or about June, 2005. (A 127-28).[1] After a recess, a document containing the chat room rules was offered, but it had no print date. (A 41, 157-58). The court excluded the jury and allowed testimony by the defendant's father about the document's admissibility. (A 169-70).

During the testimony, the court noted that "wndydpooh" was the screen name on the document. (A 183-84). The trial attorney's secretary was Wendy. (A 184). At that point, the court ordered the secretary and the attorney's partner, Barry R. Taylor, to come to court. (A 184-85). The court then commenced what turned into an approximately three and one-half hour contempt trial involving the court-ordered production of documents and appearance of witnesses regarding events that occurred out of the court's presence. (A 185, 193, 196).

Scialdone, Taylor, and Jones were not told that they were on trial, let alone the charges that they faced, and had no opportunity to present a defense, nor to be represented by counsel. (A 185, 193, 196). They were questioned by the judge without notice or a waiver of their Fifth and Sixth

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[1] The Appendix is hereafter referenced as "A."

Amendments rights. (A 184-237). Taylor and Jones also were excluded from portions of their own trial. (A 185, 193, 195-96, 199).

During this lengthy contempt trial, Scialdone attempted to invoke the right to counsel and to learn what charges the court was considering. (A 218). The court replied that it was conducting a summary proceeding. It provided no notice of what charges were at issue. At the conclusion of the trial, the trial judge told Scialdone, Taylor, and Jones generally that they were in contempt, but made no finding of what statute was violated. (A 220, 237-39).

The *Dulyea* trial reconvened the next day and concluded on Friday, July 14, 2006. The court then reconvened the contempt trial and informed Scialdone and Taylor that they had violated Va. Code § 18.2-456(4), and Jones that he had violated Va. Code § 18.2-456(3). (A 248-50). Each was sentenced to ten days in jail and fined $250. (A 252).

Scialdone and Taylor filed notices of appeal on Friday, July 14, 2006 and motions to stay execution of sentence on Monday, July 17, 2006. (A 1-14). Jones filed his notice of appeal and motion to stay on July 18, 2006. (A 15-21). The National Association of Criminal Defense Lawyers ("NACDL") also filed a brief in support of the stay. (A 22-30) The motions and brief contained the same arguments presented in this appeal.

On July 18th, appellate counsel faxed a letter to the court requesting action on the motions for stay either without a hearing or by telephone conference. Copies also were faxed to the clerk of the court. The court took no action and entered no orders.

The Court of Appeals granted an emergency request for a stay and directed the trial court to rule on the motions. (A 256). In response to an inquiry by the Court of Appeals about the lack of the necessary contempt order, the trial court prepared and entered one on July 19th. *Scialdone v. Commonwealth*, 51 Va. App. 679, 698-99, 660 S.E.2d 317, 327 (2008); (A 22).

Appellants filed supplement memorandum in support of a stay by hand-delivery and by Federal Express on July 25th. In that memorandum, they argued that summary contempt was inapplicable, that an individual facing incarceration was entitled to counsel, and that the factual basis for the contempt holding was not sufficient. (A 39-45).

In an affidavit filed in support of the arguments advanced to the trial court by Scialdone, Taylor, and Jones, Dulyea's father confirmed that he had viewed the relevant 2005 chat room rules and both documents tendered to the court in the *Dulyea* trial. He confirmed that all of the documents contained the same chat room rules. (A 41).

At a July 26th hearing in the trial court on the motions to stay the sentences, Appellants were denied the right to counsel. The trial judge stated in open court that she had read and considered their arguments, including that of the NACDL. On the argument that the use of summary contempt proceedings was not proper in this case, she stated, "I do not find the arguments persuasive." (A 277-79). The motions for stay were denied.

An appeal was taken to the Court of Appeals. When that court vacated its stay of Scialdone, Taylor, and Jones' sentences pending appeal, this Court granted an emergency stay. Appellants timely filed petitions for appeal in the Court of Appeals. The court agreed to decide the merits of whether due process was violated and summary contempt was improper. The case was briefed and argued.

A three-judge panel of the Court of Appeals noted that summary contempt was "only available when the charges of misconduct and all essential elements of it are under the eye of the court and are actually observed by the court." *Scialdone*, 51 Va. App. at 714-15, 660 S.E.2d at 335 (citing *In Re Oliver*, 333 U.S. 257, 275 (1948)). That had not happened in this case.

The entire panel decided that Appellants were denied due process, but, because they found that the evidence presented in the trial court was

sufficient to convict, the panel reversed and remanded for further proceedings. *Id.* at 721-27, 660 S.E.2d 338-41.

A dissenting judge found that the issue of summary contempt was not preserved for appeal because Scialdone, Taylor, and Jones had not asked the trial court to reconsider, vacate, or set aside its decision on the same legal grounds that it had already considered and found lacked merit when it denied the motions to stay the execution of the sentences pending appeal. *Id.* at 728-30, 660 S.E.2d at 342-43 (Kelsey, J., dissenting).

The panel majority applied long-standing case law and held that the purpose of Supreme Court of Virginia Rule 5A:18 is to ensure that a lower court had an opportunity to consider the issues presented on appeal. The trial judge here made it clear that she had an opportunity to consider, did consider, and did rule on the issues before she entered the final order of conviction. *Scialdone*, 51 Va. App. at 704-06, 660 S.E.2d at 329-31; (A 277-79).

The Commonwealth sought rehearing en banc, which was granted. Briefs were filed and argued. The Court of Appeals entered a 5-4 split decision on January 13, 2009. (A 86, 97, 105). Five judges decided that Scialdone, Taylor, and Jones had not preserved for appeal their challenge

to the summary nature of the contempt proceeding.[2] Four judges dissented, finding that the arguments in the motions filed, considered, and rejected by the trial court prior to entry of the final order of conviction had raised and preserved the challenge. Two judges had recused themselves.

Notices of appeal were timely filed for Scialdone, Taylor, and Jones. (A 116-18). This Court granted their petition for appeal and the government's cross appeal on May 28, 2009. This consolidated brief is timely filed.

STATEMENT OF THE FACTS

During the *Dulyea* jury trial, an issue arose regarding the rules for an online chat room. The trial attorney, Scialdone, sought to introduce a copy of the chat room rules bearing the date July 11, 2006, rather than June, 2005, when the incident was alleged to have occurred. The July 11th rules were rejected. (A 127-30). After a recess, a second document containing the chat room rules was offered; it bore no date. (A 41, 157).

The trial court wanted the document authenticated. Dulyea's father

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[2] The en banc Court of Appeals majority opinion relied on 27 cases. One was the three-judge panel decision being considered en banc, three were cases cited by the Commonwealth and/or Appellants, but 23 were raised for the first time by the majority in their opinion. Neither side had an opportunity to address those 23 cases before the decision.

was called to testify, out of the jury's hearing. (A 169-84).[3] When the court noticed that the screen name used to access the chat room appeared to be "wndydpooh," she asked the trial attorney the name of his secretary; it was Wendy. (A 184).

Unaware of who, if anyone, had done anything wrong, the court ordered the law firm's secretary, Wendy Suttlage, and law partner, Barry Taylor, to court. (A 184-85). They had eleven minutes to get to the court room, were not to talk to anyone, and were not told why. When they arrived, Taylor, like Jones, was excluded from the courtroom. (A 184-85). Only the judge knew that an accusation was pending.

The judge called Suttlage as a witness. She testified that she printed the undated rules the day before trial and could not say whether there was a date on the document that she printed. (A 186-87). No one was in the room when she printed the document and she had not altered it. (A 191-92).[4] It was printed at Taylor's request. (A 191-92).

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[3] Both the first and second document tendered by trial counsel contained the same rules and, in actuality, were the very same rules Dulyea's father had viewed in June, 2005, when the offense occurred. (A 41).

[4] The court had earlier admitted that she did "not know anything about computers, either," but insisted that all documents printed from computers always bear a date. (A 158). Apparently due to this lack of understanding, no inquiry was made into whether the date function on the computer was

Taylor was then brought into the courtroom, unaware that he was on trial, and was questioned by the judge. He thought that the document was the one given to him by the client. He had found it in a pile of papers on a conference room table in the firm's office. (A 188-89, 192-93). Taylor denied altering it. (A 189).

The trial court, not knowing who had done what, declared that someone was "going to come clean about this...[S]omebody better take the fall, or everybody is going to take the fall for this." (A 190). The court excluded Taylor and ordered Jones into the courtroom. Jones also did not know that he was on trial. (A 193). He was asked who had run off the undated document. He did not know. (A 193-94).

The court then inquired about the first document which appeared to have the screen name "westisanazi." (A 195). The judge said she had no idea what it meant "until it was shown to me what it says...It says West is a Nazi." (A 195). The judge did not know who had created it and inquired: "Whose idea of a joke is that?" (A 195). Jones was then excluded from the courtroom.

The court told Scialdone to start talking. (A 195). He did not know how to use e-mail, Suttlage was not his secretary, and he did not know

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on or off when the document was printed. According to Suttlage, the document may have been printed without a date. (A 186-87, 191-92).

whether she had printed anything on the Sunday before trial. (A 196-97). The trial judge did not know who had done what, but thought someone had done something wrong, and suspected all three. (A 198).

Taylor and Jones were brought back into the courtroom and the judge told them that they were in contempt, but had not decided for what. The trial judge then asked which one of them wanted to "fess up" to the screen name; she did not know who to blame. She asked Jones if he had used that name. (A 199-200).

Jones said he had. He said that he had been upset with the court's rulings, had planned to delete the screen name, and was the only one who knew about it. (A 199, 209). Jones had not brought the document to court, nor offered it to the judge. On its face, the document was not connected to the trial judge, nor to any court action. Only through the judge's questions to Jones in open court was the screen name connected to her.

The court excused the *Dulyea* jury for the remainder of the day. (A 206-07). The contempt trial continued; more documents were brought to court from the law office at the direction of the judge. Those documents were examined by Suttlage for the judge. (A 208-10).

Taylor informed the court that there were documents all over the office because the firm had been preparing for two big trials simultaneously

and had worked late at night for several days; the original rules could be anywhere. (A 211). He added that there was no intent to cause any problem. He had been asked to find the rules, thought he found them, did not examine them, and handed them to trial counsel. (A 212).

Suttlage was ordered back to the law office under the supervision of a deputy sheriff to print the document exactly as she had printed it the previous Sunday. (A 212-13, 215). Scialdone, Taylor, and Jones were held sequestered in the courtroom. (A 215).

Suttlage and the deputy returned and provided the court with a copy of the chat room rules with a date of 2006. (A 215). The judge admitted, once again, that she did not know who had done what and said: "So, which one of the three of you want to fess up? Who took the copyright off the document?" (A 216).

The court said that the three were in contempt, but not what for. Scialdone asked what kind of contempt, but the court, undecided, did not tell them. (A 217-18). Inquiry as to whether it was civil or criminal contempt also went unanswered. The court said she might do something else, but not what. (A 218).

The judge ordered Suttlage back to the law office once again, under the deputy's supervision, to print the document from the various computers

in the office. (A 222-25). When Suttlage returned, the trial judge stated that the undated document that she said was printed from Taylor's computer was a replica of the one at issue; however, the record does not indicate whose computer or printer was used to make that "replica."

The judge said: "Look, *one* of you all knows what is going on here. It is so obvious that this document has been altered. I mean, there is no other explanation that *one* of the three of you, *or someone* in your office, *or someone* at your direction altered the documents and then offered them to the court as something they are not." (A 221) (emphasis added). The court still could not, and as a consequence, did not, make a finding as to who had done what.

After the conclusion of the *Dulyea* trial, the court told Scialdone and Taylor that they had violated Va. Code § 18.2-456(4) and sentenced each of them to ten days and a $250 fine. She told Jones that he had violated Va. Code § 18.2-456(3) and imposed a like sentence. (A 242-53). Taylor only had time to note their exception as the judge immediately left the bench. *Scialdone*, 51 Va. App. at 697, 660 S.E.2d at 326; (A 17).

ARGUMENT

I. A CLAIM OF ERROR IS PRESERVED FOR APPEAL BY AN OBJECTION MADE WITH THE GROUNDS THEREFOR AT A TIME WHEN THE TRIAL COURT HAS AN OPPORTUNITY TO RULE.

A. The purpose and plain meaning of Rule 5A:18, Rule 5:25 and Va. Code § 8.01-384(A) require only that the objection and the grounds therefor were raised.

The en banc Court of Appeals erroneously held that: "Under Rule 5A:18, raising a legal argument in support of *one* type of relief does not preserve for appellate review the same argument for support of *another* type of relief which was *never* requested." That is not the law of this Commonwealth and has not been for at least sixty years. *See Jackson v. C. & O. Ry. Co.*, 179 Va. 642, 651, 20 S.E.2d 489, 492-93 (1942) (the duty is to object and provide grounds so that court knows what is to be decided).

Rule 5A:18 provides that: "[n]o ruling of the trial court...will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling." Its purpose is "to avoid unnecessary appeals, reversals, and mistrials by requiring a litigant to inform the trial judge of the action complained of so that the judge has the opportunity to consider the issue intelligently." *Robinson v. Commonwealth*, 13 Va. App. 574, 576, 413 S.E.2d 885, 886 (1992).

There is no specific procedure that must be used to preserve an

issue for appeal. "A simple statement that embodies the objection and reason therefor suffices" to comply with Rule 5A:18. *Lee v. Lee*, 12 Va. App. 512, 515, 404 S.E.2d 736, 738 (1991). Treatises have long included this interpretation of Rule 5A:18 and its equivalent, Rule 5:25.[5] *See e.g.* Charles E. Friend, *The Law of Evidence in Virginia* § 8-2, p. 272 (4th ed.).

The en banc Court of Appeals erroneously decided that a litigant, in addition to stating the objection and grounds to the court, must also ask for various forms of specific relief to preserve an objection for appeal. The cases cited by the court do not support that proposition. In those cases, unlike this case, either no objection was made, no grounds were provided for the objection, or the objection with grounds was made at a time when the court did not have an opportunity to consider it intelligently.

In *Spencer v. Commonwealth*, 238 Va. 295, 306-07, 384 S.E.2d 785, 792-93 (1989), cited by the majority, the defendant objected only to a question asked of a juror during voir dire; he did not object, nor state any grounds for an objection, to the seating of that juror as unqualified. Spencer did not preserve for appeal a claim of error in the seating of the

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[5] *See also* Va. S.Ct. Rule 5:25 ("Error will not be sustained to any ruling of the trial court...unless the objection was stated with reasonable certainty at the time of the ruling"); *Brown v. Commonwealth*, 8 Va. App. 126, 131, 380 S.E.2d 8, 10 (1989) (Rule 5A:18 is the equivalent of Rule 5:25).

juror.[6]

In *Parker v. Commonwealth*, 14 Va. App. 592, 595, 421 S.E.2d 450, 452 (1992), an alternate juror deliberated for twenty-five minutes with the jury; defense counsel preferred a cautionary instruction, requested it, and the court gave it. Only after the jury returned to the jury room did counsel note for the record an "object[ion] to the irregularity of the jury."

Parker did not argue that "the prejudicial effect of the impropriety [could] not be removed by the instructions of the trial court." *See e.g. Lewis v. Commonwealth*, 211 Va. 80, 83, 175 S.E.2d 236, 238 (1970).[7] He did not state the grounds for a mistrial, and therefore, did not afford the trial court an opportunity to rule on it. A claim for mistrial was not preserved. *Parker*, 14 Va. App. at 596, 421 S.E.2d at 453.

In fact, Parker, as did the defendant in *Elliot v. Commonwealth*, 267 Va. 396, 419-21, 593 S.E.2d 270, 284-85 (2004), left the impression that

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[6] As this Court stated in *Spencer*: "Grounds of objections to the seating of a juror that are not stated with sufficient specificity at the time of the trial court's ruling will not be considered on appeal." 238 Va. at 306, 384 S.E.2d at 793; *see also Mu'Min v. Commonwealth*, 239 Va. 433, 445 n.6, 389 S.E.2d 886, 894 n. 6 (1990) (defendant objected only to a question during voir dire of a juror; he did not object to the seating of that juror and thereby did not preserve for appeal a claim of error in seating that juror). That is unlike this case, where objection to the summary proceeding was made to, considered by, and rejected by the trial court prior to its entry of the final order.

[7] *See also Coffey v. Commonwealth*, 188 Va. 629, 51 S.E.2d 215 (1949).

the trial court had properly corrected the claimed error. In *Elliot*, the prosecution would not stipulate that a written statement referenced by a witness did not exist. The remedy suggested by the trial judge and accepted by Elliot was to call as a witness the detective alleged to have taken the statement.

Elliot did not argue the grounds for a mistrial and the trial court had no opportunity to rule on such grounds. Elliot was precluded from raising that alleged error for the first time on appeal.[8] *Id.* at 422, 593 S.E.2d 286-87; *see also Widdifield v. Commonwealth*, 43 Va. App. 559, 562-63, 600 S.E.2d 159, 161-62 (2004) (defendant "failed to state an objection 'together with the grounds'" when he stated "I'm not sure that's how it works" in response to the sentence announced by the court).[9]

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[8] As this Court has noted: "Every instance in which it is possible...that a witness has been untruthful with respect to some part of her testimony does not require the declaration of a mistrial...or some other intervention on the part of the trial court." Elliot had successfully impeached the witness' claim of a written statement by the testimony of the detective that neither he, nor another officer had prepared such statement. 267 Va. at 422-23, 593 S.E.2d at 285, 287.

[9] Other cases cited by the en banc Court of Appeals similarly fail to support its erroneous decision that a litigant must also state all potential forms of relief in addition to the objection and grounds, even when the trial court has found that the legal grounds lack merit. For example:

A litigant who provides one ground for an objection cannot argue a different ground for that same objection on appeal because the trial court was not afforded an opportunity to consider the second ground. *See Commonwealth v. Shifflett*, 257 Va. 34, 44-45, 510 S.E.2d 232, 237 (1999)

In *Bennett v. Commonwealth*, 29 Va. App. 261, 280-82, 511 S.E.2d 439, 448-49 (1999), the defendant objected to the prosecutor's improper comment during closing argument, but did not seek a mistrial until after the argument was completed. Bennett's motion was not timely; the court was not afforded an opportunity to consider the grounds for a mistrial at the time the action complained of, *i.e.*, the improper comment, occurred. He did not preserve the claim of a mistrial for appeal.

As the court noted in *Bennett*, the purpose of the requirement that a motion for a mistrial be timely is "to prevent retrials by calling error to the attention of the trial judge, who may then caution the jury to disregard the inappropriate remarks." 29 Va. App. at 281, 511 S.E.2d at 448. Defense

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(reversing when the defendant argued at trial that he was entitled to adduce testimony about the impact of his incarceration on his family and employment, but the appellate court decided it was admissible on the different ground of showing the defendant's character and propensities); *Bowling v. Commonwealth*, 51 Va. App. 102, 106-07, 645 S.E.2d 354, 356-57 (2007) (defendant objected at trial to the admissibility of an order; he did not preserve for appeal the separate ground that the evidence was insufficient because the order did not prove the "willful" element of the failure to appear offense). That is not this case. The grounds for the objection, as raised in this appeal, were presented to and rejected by the trial court. (A 5-14, 17-21, 22-30, 277, 279).

When a litigant objects to the content of testimony by one witness, but fails to object to the same content by a second witness, the first objection is waived because any error is deemed harmless by the unobjected testimony of the second witness. *See Philip Greenberg, Inc. v. Dunville*, 166 Va. 398, 403-04, 185 S.E. 892, 894 (1936); *Portner v. Portner's Ex'rs.*, 133 Va. 215, 263, 112 S.E. 762, 766-67 (1922). That is not this case. The objection and grounds were stated and rejected.

counsel, for tactical reasons, may prefer a cautionary instruction so as not to overemphasize and draw the jury's attention to the objectionable conduct or evidence, as occurred at trial in *Parker*, *supra*., and *Elliot*, *supra*.[10]

Trial counsel cannot sit idly while objectionable conduct occurs during trial to build error into the final judgment. Rule 5A:18 and Rule 5:25 as written and as long interpreted by Virginia courts have served to properly prevent such conduct. As this Court has stated:

> It is the duty of a party, as a rule, when he objects to evidence, to state the grounds of his objection, so that the trial judge may understand the precise question or questions he is called upon to decide. The judge is not required to search for objections which counsel have not discovered, or which they are not willing to disclose.

Jackson, 179 Va. at 651, 20 S.E.2d at 492-93. The goal is an error-free trial. The judge must be afforded an opportunity to rule.[11] *Id.* The judge in this case was afforded an opportunity to rule and did rule on the claims of

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[10] Similarly, defense counsel may prefer no cautionary instruction at all. *See Largin v. Commonwealth*, 215 Va. 318, 320-21, 208 S.E.2d 775, 777 (1974) (defendant objected to admission of evidence, but, once admitted did not argue grounds for a cautionary instruction); *Berry v. Commonwealth*, 22 Va. App. 209, 211, 214, 468 S.E.2d 685, 686, 687-88 (1996) (same). When the grounds are not stated, and the judge is not afforded an opportunity to consider intelligently those grounds, a defendant has not complied with Rule 5A:18 and has not preserved the claim of error for appeal.

[11] *See also Jimenez v. Commonwealth*, 241 Va. 244, 248-49, 402 S.E.2d 678, 680 (1991) (The purpose of Rule 5A:18 and Rule 5:25 is "to protect the trial court from appeals based upon undisclosed grounds, to prevent the setting of traps on appeal, to enable the trial judge to rule intelligently, and to avoid unnecessary reversals and mistrials.").

error presented in the appeal before the Court of Appeals and this Court.

The scenarios presented in the cases cited by the en banc Court of Appeals are not related to this case. Appellants' objections to the improper summary proceedings, due process violations and grounds for those objections were raised in motions, memoranda and an NACDL amicus brief in the trial court before entry of the final order. (A 5-14, 17-21, 22-30).

The judge had an opportunity to and did consider the objections before she entered the order.[12] As she said, she: "read all of the papers and information submitted by Mr. Miller and...the [NACDL]." (A 277). She ruled that they had no merit.

Because courts speak through their written orders, the summary proceeding and due process objections were timely raised on July 17th and 18th before the trial court issued the order of conviction on July 19th. *See Cunningham v. Smith*, 205 Va. 205, 208, 135 S.E.2d 770, 773 (1964); *accord Murdaugh Volkswagen, Inc. v. First Nat. Bank of S.C.*, 741 F.2d 41, 44 (4th Cir. 1984).[13]

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[12] Appellee has previously conceded that the trial court had an opportunity to consider these arguments. *See* Panel Brf. in Case No. 1738061 at 14; Panel Brf. in Case No. 1739061 at 8-9.

[13] The fact that Appellants filed their notices of appeal prior to entry of the order of conviction and sentence did not deprive the trial court of jurisdiction to rule on the objections. A notice of appeal is deemed filed only when the final order is entered, in this case, on July 19th. *See*

The en banc Court of Appeal's reliance on *Rollins v. Bazile*, 205 Va. 613, 139 S.E.2d 114 (1964) for the proposition that "contempt orders 'orally pronounced from the bench' are immediately enforceable" is misplaced. In *Rollins*, the failure of the trial judge to sign an order entered in the record did not invalidate the judgment in the unsigned order. *Id.* at 617-18, 139 S.E.2d at 117-18; *see also Jefferson v. Commonwealth*, 269 Va. 136, 138-39, 607 S.E.2d 107, 109 (2005) (same). That is not at issue here.

Furthermore, *Rollins* did not negate the rule that a "court speaks only through its orders." *Jefferson*, 269 Va. at 139, 607 S.E.2d at 109.[14] In this case, the summary proceeding and due process objections were made and the grounds for those objections were provided to the trial court and were considered by it before any order was entered.

The trial court had an "opportunity to rule intelligently on the issues presented" and to take timely corrective action as in *Kaufman v. Kaufman*, 12 Va. App. 1200, 1204, 409 S.E.2d 1, 3 (1991). In that case, a litigant informed the court of his position on the proposed order in memoranda and correspondence submitted to the court prior to entry of that order.

Kaufman did not endorse the final order or state any objection to it at

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Saunders v. Commonwealth, 12 Va. App. 154, 155, 402 S.E.2d 708, 709 (1991).

[14] *See also Walthall v. Commonwealth*, 3 Va. App. 674, 679, 353 S.E.2d 169, 171 (1987).

its entry. 12 Va. App. at 1203-04, 409 S.E.2d at 3. He satisfied Rule 5A:18 because his objections were made in the memoranda and correspondence prior to entry of the final order, as noted by the trial judge in that order. *Id.* at 1204, 409 S.E.2d at 3-4. Because that court considered the objections before entering its order, the issues were preserved for appeal. The same applies here.

Appellants in this case objected to their unlawful convictions for summary contempt without due process of law in their motions for stay of execution of their sentences. They provided the grounds for the objections by written argument. The trial court considered and denied those objections to its use of a summary proceeding and entered the order of conviction and sentence on July 19th. (A 31).

Even under the en banc Court of Appeals' erroneous interpretation of *Rollins* and *Jefferson*, Appellants' motions and memoranda were filed and ruled on within 21 days of the trial court's oral announcement on Friday, July 14th, of conviction and sentence. (A 248-50, 252, 276-77, 279). The court had jurisdiction to modify, vacate or suspend the order within those 21 days, but decided that the grounds for the objections lacked merit. *See* Va. S.Ct. Rule 1:1.[15]

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[15] Virginia courts have held that motions made within 21 days in

The trial judge denied Appellants' objections. She did "not find their arguments persuasive" and she did "not believe that you have a substantial likelihood of prevailing on appeal." (A 5-14, 17-21, 277, 279). She decided, after considering the objections and grounds, that summary contempt proceedings had been properly applied. Rule 5A:18 was satisfied.

The trial court was afforded an opportunity to rule intelligently on the objections and did rule while it had authority to take timely corrective action, both prior to and within 21 days of entry of the contempt order. *See Singsom v. Commonwealth*, 46 Va. App. 724, 748-49, 621 S.E.2d 682, 693 (2005) (Rule 5A:18 requires that the "trial judge...[have] the particular point being made in time to do something about it").[16]

The decision of the en banc Court of Appeals is contrary to Rule 5A:18, Rule 5:25, the long-standing interpretation of these rules by Virginia courts, as well as a related, controlling codification. *Helms v. Manspile*,

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compliance with Rule 1:1 can satisfy Rule 5A:18 and Rule 5:25. *See Wiedman v. Babcock*, 241 Va. 40, 44, 400 S.E.2d 164, 166-67 (1991).

[16] In *Singsom*, the defendant made a pretrial objection that his prosecution raised "grave concerns under the proscription of cruel and unusual punishment," but made no Eighth Amendment objection either after he was convicted or sentenced. 46 Va. App. at 748, 621 S.E.2d at 693-94. Because his objection was not made at a time when the trial court could "do something about it," he did not satisfy Rule 5A:18. He did not preserve for appeal the objection that his three year sentence of incarceration for solicitation to commit oral sodomy was cruel and unusual. *Id.* at 730-32, 749, 621 S.E.2d at 671-72, 693-94.

277 Va. 1, 6-7, 671 S.E.2d 127, 129-30 (2009) (memorandum filed after the presentation of evidence at trial, on which the judge ruled by letter opinion, complied with Va. Code § 8.01-384(A), which is controlling over Rule 5:25).

Va. Code § 8.01-384(A) provides that formal exceptions to rulings or orders are not necessary; "it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take *or* his objections to the action of the court and his grounds therefor."[17]

A statute must be construed from its four corners, not by singling out a particular phrase, and must be given its plain, obvious, rational meaning. *See Wright v. Commonwealth*, 53 Va. App. 266, 278-79, 670 S.E.2d 772, 778 (2009).[18] The plain meaning of Va. Code § 8.01-384 is that an issue is preserved for appeal when the trial court is informed of the objection and the grounds therefor *or* the relief sought.[19]

The plain meaning of the phrase "or" the relief sought gives effect to

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[17] Emphasis added.

[18] *See also Anderson v. Commonwealth*, 182 Va. 560, 565, 29 S.E.2d 838, 840 (1944) (words in a statute are presumed to have their usual and ordinary meaning).

[19] The plainly understood word "or" has significance. *See Raven Coal Corp., Inc. v. Absher*, 153 Va. 332, 335, 149 S.E. 541, 542 (1929) (it is a fundamental rule of statutory construction that "[e]very part of an act is presumed to be of some effect and is not to be treated as meaningless unless absolutely necessary").

the legislative purpose of § 8.01-384, which is to preempt and/or mitigate the effect of principles that put form over substance. *See* Friend, *supra*. at 283-84, 288-89 (6th ed. 2003); *Wright*, 53 Va. App. at 278-79, 670 S.E.2d at 778 (statutes must be construed to give effect to legislative intent).

This Court has reinforced the trend that substance takes precedence over form. *See e.g. George v. Commonwealth*, 276 Va. 767, 773, 667 S.E.2d 779, 782 (2008) (issue of "fatal variance" was preserved for appeal because defendant's "arguments before the trial court were sufficient to put that court on notice of his position regarding the inconsistency"); *Helms*, 277 Va. at 6-7, 671 S.E.2d at 129-30.

Appellants preserved their claims of error for appeal in this case. The en banc Court of Appeals, however, erroneously found that the "only opportunity being presented to the trial court," as in *Nusbaum v. Berlin*, 273 Va. 385, 641 S.E.2d 494 (2007) "was the opportunity to *sua sponte* vacate its earlier rulings when...not asked it to do so."

In so holding, the en banc court mischaracterized *Nusbaum*, which addressed the purpose of Rule 5:25, as with Rule 5A:18, that an objection be made at a time when the trial court has an opportunity to consider it intelligently. A trial court is not afforded that opportunity when an objection is waived. *Id.* at 404-05, 641 S.E.2d at 503-04. Appellants in this case

never waived their objections.

"[U]nlike Nusbaum, who twice specifically disclaimed a desire to have the trial court rule on his objections, the appellants never indicated that they did not wish to have the trial court consider their due process arguments and in fact attempted to obtain a prompt ruling on the motions by the trial court." *Scialdone*, 51 Va. App. at 709, 660 S.E.2d at 332; *see Nusbaum*, 273 Va. at 405-06, 641 S.E.2d at 505-06.

Appellants, unlike Nusbaum, raised their objections to the unlawful summary proceedings and due process violations prior to entry of the order. *Scialdone*, 51 Va. App. at 709-10, 729, 660 S.E.2d at 332, 342; *Nusbaum*, 273 Va. at 404, 641 S.E.2d at 504 (objections were raised more than two months after entry of the order). The trial court in this case had jurisdiction to consider the objections and to take corrective action.

The en banc Court of Appeals erroneously interpreted the waiver of an objection made at a time when the court did not have authority to decide it, as in *Nusbaum*, to mean that unless a litigant asks the court to vacate an order, the court has not been given a sufficient opportunity to correct the alleged error. That is not consistent with Rule 5A:18, Rule 5:25 or Va. Code § 8.01-384(A).

The rules and statute require only that an objection and the grounds

therefor be made before an argument is considered on appeal. Their purpose is "to inform the trial judge of the action complained of so that the judge has the opportunity to consider the issue intelligently." *Robinson*, 13 Va. App. at 576, 413 S.E.2d at 886. That happened in this case.

The decision of the en banc Court of Appeals, in contravention of these statute, the rules of this Court, and long-standing case law has put form over substance.[20] The decision violated the cannons of construction and is inconsistent with the law of this Commonwealth. The claims of error presented in this appeal were preserved. This Court should reverse the en banc Court of Appeals.

B. Va. Code §§ 8.01-384(B) and 19.2-318 do not require an objection to also include a request to vacate the conviction.

The en banc Court of Appeals also ignored Va. Code §§ 8.01-384(B) and 19.2-318. Appellants' objections were made in motions and supporting memoranda, as well as in the NACDL amicus brief, all of which were filed, considered, and decided on the merits before entry of the order of

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[20] The en banc Court of Appeals focus on "bail" further exemplifies this point. Appellants' motions objected to the unlawful summary contempt proceedings and the concomitant due process violations. The motions did not argue the issue of bail. The trial court did not hold a bail hearing. *See Askew v. Commonwealth*, 49 Va. App. 127, 132, 638 S.E.2d 118, 120 (2006) ("under the express terms of Code § 19.2-319 postponement or suspension of execution of the sentence is a pre-condition for setting post-conviction bail"). The motions sought a stay, not bail.

conviction and sentence. (A 5-14, 17-22, 22-30, 277, 279). The objections were properly and timely made.

Va. Code § 8.01-384(B) provides that the failure to make a motion for the specific relief of a new trial is not deemed to waive a properly made objection in a case where a writ of error lies from a higher court. Read in conjunction with Va. Code § 19.2-318, which provides that a "writ of error shall lie from the Court of Appeals for a judgment for criminal contempt of court," Appellants in this case were not required to also file motions to vacate the convictions and grant a new trial.

This Court should reverse the en banc Court of Appeals because the claims of error presented in this appeal were preserved.

II. AN ACCUSED MAY NOT BE SUBJECTED TO SUMMARY CONTEMPT PROCEEDINGS WHEN THE ALLEGED CONTEMPT DID NOT OCCUR IN THE PRESENCE OF THE COURT AND REQUIRED FURTHER PROOF.

A. A three-hour trial in which witnesses are summoned and exhibits are produced about events occurring outside of court is not a summary proceeding.

The en banc Court of Appeals granted review, but did not reach the issue of whether the trial court unlawfully convicted Appellants of contempt in a summary proceeding that violated their due process rights. This Court should decide, consistent with entire three-judge panel of the Court of Appeals, that the summary proceedings in this case were unconstitutional.

The power to summarily convict a person of contempt is very narrow. It is the only instance in which a court may punish an individual without affording him all of the fundamental constitutional protections guaranteed in criminal cases. The United States Supreme Court noted in *Sacher v. United States*, 343 U.S. 1, 8 (1952), that "(s)ummary punishment always, and rightly, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes."

Summary contempt is limited to events occurring in the presence of the court that are clear, complete and need no further proof for a decision. *See In Re Oliver*, 333 U.S. 257 (1948); *Gilman v. Commonwealth*, 48 Va. App. 16, 628 S.E.2d 54 (2006) *aff'd on other grounds* 275 Va. 222, 657 S.E.2d 474 (2008). This limitation is not negated by courts' historic power to punish for summary contempt to maintain order in proceedings. *Ex parte Terry*, 128 U.S. 289, 303, 309 (1888).

In Re Oliver addressed the narrow, limited nature of summary contempt proceedings:

> [D]ue process of law...requires that one charged with contempt...be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call witnesses in his behalf...The narrow exception to these due process requirements includes only charges of misconduct, in open court, in

> the presence of the judge, which disturbs the court's business, *where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public.*

In Re Oliver, 333 U.S. at 275 (emphasis added). A court may not use summary contempt to subvert the constitutional protections that attach to a criminal trial.

The Supreme Court again defined summary contempt in *Pounders v. Watson*, 521 U.S. 982 (1997), as an exception to due process applicable only to "misconduct, in open court, in the presence of the judge, which disturbs the court's business, where *all* of the essential elements of the misconduct are *actually observed* by the court." *Watson*, 521 U.S. at 988 (citing *In re Oliver*, 333 U.S. 257 (1948)) (emphasis added).

Summary contempt dispenses with the formality of "the issuance of process, 'holding hearings, taking evidence, listening to arguments'", the purpose of which is "to inform the court of events not within its own knowledge." *Sacher*, 343 U.S. at 9-11.[21] Conduct occurring outside of the court's presence requires such further proof, and therefore, requires the issuance of formal process; summary contempt is not lawful. *Id.*

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[21] The contempt was obvious in *Sacher* because the attorney's conduct of ignoring the court's rulings, in open court in the presence of the judge, was immediately apparent as contemptuous when it occurred. 343 U.S. at 9-11.

Appellants' case is not one of summary contempt. Evidence about events occurring outside of court was summoned to court for trial by the judge who, as she confessed, did not know who had done what. (A 190, 197-98, 216). Both Supreme Court and Virginia cases in which it was appropriate for a court to use summary contempt proceedings differ from this case.

In *Ex parte Terry,* the defendant assaulted a court officer in the presence of the judge in the courtroom while that officer was carrying out an order issued by the judge. The misconduct occurred directly in the personal view of the judge on the bench. 128 U.S. at 305-06. The defendant's conduct was properly addressed summarily. *Id.* at 308.

In *Watson*, even though the judge admonished counsel on several occasions not to discuss punishment, the attorney disobeyed the court and questioned a witness about the death penalty. Summary contempt was proper because Watson flagrantly defied the order in open court and thereby prejudiced the jury. 521 U.S. at 984-85, 990-91.

In *Gilman*, the judge directly ordered the defendant, in open court, to undergo a drug screen. Gilman violated that direct order by not taking the ordered test and not returning to court. *Gilman*, 48 Va. App. at 20-21, 628 S.E.2d at 56-57. Her conduct was properly addressed summarily. *Id.* at

24-25, 628 S.E.2d at 58.

Other examples are *Middlebrooks v. Commonwealth*, 02 Vap UNP 1516011 (2002), where a defendant insulted a prosecutor in open court in the judge's presence; *Crandley v. Commonwealth*, 99 Vap UNP 1694981 (1999), where an attorney continued to question a witness inappropriately in court after the judge repeatedly ordered him to stop; and *Baugh v. Commonwealth*, 14 Va. App. 368, 417 S.E.2d 891 (1992), where an attorney made derogatory remarks about the judge in open court at trial.

In sharp contrast, this case involved a lengthy bench trial with exhibits and witnesses summoned to the court to determine who had done what and to learn of events outside of court on different days. This case is more like *Higginbotham v. Commonwealth*, 206 Va. 291, 296, 142 S.E.2d 746, 750 (1965), in which a later adjudication of summary contempt, when made "upon reflection," required notice and a right to defend.

In *Higginbotham*, the alleged contempt consisted of a client rolling up his sleeves, at the direction of his attorney, Higginbotham, during closing argument, to reveal tattoos not admitted into evidence during trial. 206 Va. at 292, 142 S.E.2d at 747-48. The jury returned a verdict of not guilty and, the following Thursday, the judge called Higginbotham into chambers and held him in summary contempt for his conduct during closing argument. *Id.*

at 292-93, 142 S.E.2d at 748.

The failure to provide notice and a hearing required reversal in *Higginbotham*, as it should here. Although Va. Code § 18.2-456(4) authorizes a court to summarily convict an attorney of contempt for misbehavior in his official character, the court may only exercise this power if the misbehavior occurred completely in the presence of the court without the need to take any further evidence.[22] The same prohibition on "further evidence" applies to cases under Va. Code § 18.2-456(3).

When, as occurred here, outside events and evidence are involved in a trial, it is not summary contempt and the court must afford the accused the protections available to criminal defendants. *Ex parte Terry*, 128 U.S. at 309; *In Re Oliver*, 333 U.S. at 275; *Davis v. Commonwealth*, 219 Va. 395, 398, 247 S.E.2d 681, 682 (1978); *Burdett's Case*, 103 Va. 838, 845-46, 48 S.E. 878, 880-81 (1904) (holding that any outside evidence bars the use of summary proceedings).

A court must "by rule or other process...require the offender to appear and show cause why he should not be punished" when the judge gains knowledge of the misbehavior only "by confession of the party, or by

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[22] The three plus hour evidentiary trial in this case, including the summoning and examination of witnesses and exhibits, was "further evidence."

the testimony under oath of others," which is exactly what occurred here. *See In re Savin*, 131 U.S. 267, 277 (1889). The accused must be advised of the charges and afforded a reasonable opportunity to meet them by way of defense or explanation. *Cooke v. United States*, 267 U.S. 517, 537 (1925).

The trial judge in this case relied on unwarned statements by the unknowing accused, witness testimony, elicited by her examination, and exhibits, created and produced in court at her direction and under the supervision of her deputy. Contempt was not immediately apparent from conduct in the presence of the court during the *Dulyea* trial; in fact, Taylor was not even present during that trial. The trial court was required, but failed, to issue formal process.

As to Scialdone and Taylor, who the court found to have violated Va. Code § 18.2-456(4), Suttlage, a law office secretary, and Taylor, Scialdone's law partner, were ordered to the courthouse. (A 185). Suttlage testified that she printed the document that began the contempt trial. It was printed on the Sunday before the *Dulyea* trial, no one else was present and she did not recall if it had a date on it.[23] (A 186-87, 191-92). Questioning

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[23] The court admitted to lack of knowledge about computers, and never asked Suttlage whether the date function on her computer was active when she printed the rules. (A 158, 227).

witnesses precludes the use of summary contempt.

The judge also called for exhibits and ordered Taylor to "bring me every piece of paper that you have related to this case" from your office to the courthouse in the next twenty minutes. (A 204-05). She ordered Suttlage to find one "similar to the one you printed out." (A 208).

When Suttlage did not find the requested printout, the court ordered her, accompanied by a supervising deputy, to return to the law office and print the rules using the same computer she used on Sunday. (A 211-13). The court later ordered Suttlage back to the office once again to print the rules to look exactly like those presented at the *Dulyea* trial. (A 224-25, 234-36). Calling for the creation and production of exhibits precludes use of summary contempt.

The judge presented witness testimony, elicited by her examination, and exhibits, produced at her direction, concerning events outside of court. Contempt was not immediately apparent from the conduct that occurred in the presence of the court during the *Dulyea* trial. The facts upon which the court based Scialdone and Taylor's convictions were not within its knowledge until the three and one-half hour trial. The use of summary contempt was unlawful.

As to Jones, who the court found to have violated Va. Code § 18.2-

456(3), the judge admitted that contempt was not immediately apparent but required reflection. The judge stated: "I kept going, What name is this? I couldn't figure out what it was *until it was shown to me* what it says." (A 195) (emphasis added). Neither Jones' conduct, nor the face of the document, provided the court with knowledge of who created the screen name "westisanazi" or who, if anyone, the screen name referenced. The judge's questions raised the issue and caused the uncounseled and unadvised disclosure.

This is not a case of summary contempt. The trial judge collected and considered "further proof" upon which she reflected prior to announcing conviction. *See Davis*, 219 Va. at 398, 247 S.E.2d at 682 (citing *Burdett*, 103 Va. at 845-46, 48 S.E. at 880-81); *Higginbotham*, 206 Va. at 296, 142 S.E.2d at 750. This Court should reverse Appellants' convictions.

B. <u>In a non-summary proceeding, due process requires notice of the accusation and protects the rights to counsel, to be present during the proceedings, and to prepare and present a defense</u>.

Appellants were entitled to due process, which includes notice, the right to counsel, the right to be present during trial, and the right to prepare and present a defense. *In Re Oliver,* 333 U.S. at 275. In *Davis*, this Court reiterated its holding in *Burdett's Case*, 103 Va. at 845-46, 48 S.E. at 880-81, that:

> The substantial difference between a direct and a constructive contempt is one of procedure. Where 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*, and *without issue or trial in any form*." In dealing with indirect contempts...the offender must be brought before the court by a rule or some other sufficient process.

Davis, 219 Va. at 398, 247 S.E. 2d at 682 (emphasis added).

In *Davis*, the defendant produced certain documents pursuant to a subpoena, but a prosecutor informed the court that he believed Davis had not produced all. The prosecutor called Davis' attorney, at the court's direction, and informed him that Davis had to appear in court the following day. *Id.* No rule or other process was issued for this alleged contempt, which did not occur in the presence of the court.

Even though Davis had counsel and a day's prior verbal notice to come to court, he was denied pretrial notice of the charge against him and an opportunity to prepare his defense as required by due process. 395 Va. at 398, 219 S.E.2d at 682. Appellants in this case were provided less than Davis. They were denied the right to counsel, pretrial notice and an opportunity to attend, prepare and present a defense.

In *Groppi v. Leslie*, 404 U.S. 496 (1972), the Supreme Court admonished that "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.* at 502-03 (citing *In Re Oliver, supra.*; *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Mullane v. Central Hanover Trust Company*, 339 U.S. 306, 313 (1950)).[24]

Father Groppi was found in contempt of the Wisconsin legislative assembly by resolution entered two days after he led a gathering of people on the floor of the Assembly in violation of an Assembly Rule. 404 U.S. at 497. His actions constituted disorderly conduct in the immediate view of the legislature. The resolution sentenced him to six months in jail by the use of an unlawful summary proceeding.[25] *Id.*

Scialdone, Taylor, and Jones, like Father Groppi, received no notice of the charges that they faced and were not afforded an opportunity to present a defense. Appellants in this case did not even know that they were on trial. Taylor and the law firm's secretary, Suttlage, were ordered to come to the courtroom from the office. (A 184-85).

They had only eleven minutes to get there, were not allowed to speak with anyone, and were not told why. Upon arriving, Taylor and Jones were

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[24] The Due Process Clause applies to the states through the Fourteenth Amendment. It was not followed in this case.

[25] Father Groppi was given no notice prior to the resolution, nor offered an opportunity to present a defense or information in mitigation. A copy of the resolution was served on him and he filed actions in state and federal court seeking his release for violation of his constitutional rights. *Id.* at 499.

sequestered in the hall. (A 184-85). The trial court violated Appellants' due process rights.

Appellants also were unlawfully jailed without the right to counsel.[26] In *Argersinger v. Hamlin,* 407 U.S. 25, 31-33, 35 (1972),[27] the Supreme Court held: "absent a knowing and intelligent waiver, no person may be imprisoned for any offense," however classified, "unless he was represented by counsel at his trial." *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

The court must make the defendant "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975). On appeal, a court should indulge every reasonable presumption against waiver. *See Church v. Commonwealth*, 230 Va. 208, 216, 335 S.E.2d 823, 827-28 (1985).[28]

Appellants faced a proceeding for which they received jail time. They

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[26] The Sixth Amendment applies to the states through the Fourteenth Amendment. *See Argersinger v. Hamlin,* 407 U.S. 25 (1972). It was not followed here

[27] In *Argersinger*, the defendant was charged in Florida with carrying a concealed weapon, which was an offense punishable by confinement. He was tried by a judge and was unrepresented by counsel. His sentence was 90 days in jail. 407 U.S. at 26.

[28] *See also White v. Commonwealth*, 214 Va. 559, 203 S.E.2d 443 (1974); *Harris v. Commonwealth*, 20 Va. App. 194, 455 S.E.2d 759 (1995).

had the right to counsel, which is not waived by the failure to assert it.[29] The significance of that right is magnified in this case because Appellants had no notice that they were on trial and were denied the right to counsel. Taylor and Jones also were excluded from portions of their own trial. (A 185, 193, 194-95, 199).

The Confrontation Clause of the Sixth Amendment protects the right of an accused to participate in the proceedings and to confront and contest the evidence presented against him. *See Lewis v. United States*, 146 U.S. 370, 372 (1892) (zealously protecting this right because essential to the type of fair trial that is this country's well-defined constitutional goal).

Just as the right to reasonable notice and an opportunity to be heard in defense are basic to our system of jurisprudence, the right to be present in court and the right of confrontation includes, at a minimum, the right to examine the witnesses and evidence against the accused. *Crawford v. Washington*, 541 U.S. 36 (2004).[30] These fundamental rights were plainly

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[29] Scialdone attempted to assert his right to counsel, but it was denied by the trial court. There was no waiver of rights by Scialdone, Taylor or Jones. (A 218).

[30] The United States Supreme Court as recently as June 25, 2009 has reaffirmed the great significance of this constitutional right. *See Melendez-Diaz v. Massachusetts*, No. 07591, 557 U.S. ___ (2009) (slip opinion) (admission of a certificate of analysis of an alleged drug, without any testimony from the analyst, violates the Sixth Amendment; an accused's power to subpoena witnesses is not a substitute for his right to confront the

denied in this case.

The three plus hour contempt trial in this case was one-sided. The accused were interrogated by the trial judge and were ordered to produce evidence against themselves. Even after a bench trial with no defense counsel, no notice of the charges, no time to prepare or present a defense, and no right to assert the Fifth Amendment, the trial judge did not know who had done what, and so she punished all three accused. (A 190).

The one-sided proceedings in this case violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 8, 11, and 17 of the Virginia Constitution. This Court should decide that the summary proceedings in this case were unconstitutional. Scialdone, Taylor, and Jones were denied the due process of law.

CONCLUSION

The trial court had an opportunity to rule intelligently on Appellants objections and the grounds therefor, consistent with the requirements of Rule 5A:15, Rule 5:25, long-standing case law in Virginia, and Va. Code § 8.01-384(A). A motion for a new trial was not required under Va. Code §§

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witnesses against him). In this case, the trial judge, who acted as prosecutor, denied the accused their firmly protected constitutional right to confront the witnesses against them. Indeed, Scialdone, Taylor, and Jones did not know what they were on trial for. When asked, the trial judge refused to say. (A 217-18).

8.01-384(B) and 19.2-318. This Court should reverse the en banc Court of Appeals in that the claims of error presented in this appeal were preserved.

In addition, Appellants were denied the due process of law to which they were entitled. This Court should decide that Scialdone, Taylor, and Jones were unlawfully convicted for criminal contempt in a non-summary proceeding in which they were denied the right to notice of the accusation, to counsel, to be present during the proceedings, and to prepare and present a defense. This Court should reverse Appellants' convictions for summary contempt.

Respectfully submitted,

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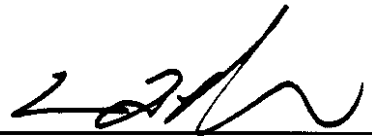

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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(d) was followed in this case, and fifteen copies of the Consolidated Brief of Appellants and Appendix were filed in the Office of the Clerk of the Supreme Court of Virginia and on the same day, that three true and correct copies of the foregoing Consolidated Brief of Appellants and Appendix were mailed, first class, postage prepaid this 7th day of July, 2009, to Donald E. Jeffrey, III, S.A.A.G., Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, Phone: (804)736-2071.

I hereby certify that an electronic copy was sent in PDF format on CD of the Consolidated Brief of Appellants and Appendix on the same date in the Office of the Clerk of the Supreme Court of Virginia.

Counsel for the appellants respectfully requests oral argument on the issues presented in this appeal.

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