IN THE

SUPREME COURT OF VIRGINIA

RECORD NOS. 090303 AND 090305

CLAUDE M. SCIALDONE, BARRY R. TAYLOR, AND EDWARD S. JONES

Appellants,
v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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Appellants,
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COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

Barry R. Taylor, Edward S. Jones, and Claude M. Scialdone (collectively referred to herein as "the defendants") were held in summary contempt of court in the Circuit Court of the City of Virginia Beach on July 12, 2006.[1]

On July 14, 2006, the trial court sentenced Taylor, Jones, and Scialdone each to ten days in jail and a $250 fine. The Court of Appeals

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[1] Jones and Taylor filed a single petition for appeal in Record Number 090305 and Sciadone's petition for appeal was filed in Record Number 090303. By order dated June 17, 2009, the Court has consolidated these cases for briefing purposes.

granted the three defendants' petitions for appeal. On April 28, 2008, a divided panel of that Court reversed and remanded the case in a published opinion. Taylor et al. v. Commonwealth, 51 Va. App. 679, 660 S.E.2d 317 (2008). The Court of Appeals granted the Commonwealth's petition for rehearing *en banc* in the cases, and in a published opinion dated January 13, 2009, the *en banc* Court affirmed the convictions, Taylor et al. v. Commonwealth, 53 Va. App. 226, 670 S.E.2d 752 (2009) (*en banc*).

This Court granted the defendant's assignments of error as well as the Commonwealth's assignment of cross-error by order dated May 28, 2009.

The contempt convictions of Taylor and Scialdone in the instant case arose out of their conduct during the felony jury trial in mid July, 2006, of Frankie Cecil Dulyea in the Circuit Court of the City of Virginia Beach. (A 125).[2] Dulyea was tried on charges of using electronic means to solicit a child for sexual acts, attempting to solicit a child for purposes of child pornography, and attempted indecent liberties with a minor. Scialdone, was Dulyea's trial attorney. Both Taylor and Scialdone were convicted based on their role in attempting to introduce a fraudulent document into evidence during Dulyea's trial.

[2] Page references are to the Joint Appendix in this Court and are denoted "(A __)."

While Jones (at the time a third-year law student who was assisting Scialdone in the courtroom) was convicted of contemptuous conduct during the Dulyea trial, his conviction arose from ***different*** conduct. The trial judge's interaction with him prior to holding him in contempt was very brief and limited in nature. Specifically, Jones prepared a document which contained the phrase "westisanazi" (the trial judge's surname is West), which Dulyea's counsel attempted to introduce into evidence.

APPELLANTS' ASSIGNMENTS OF ERROR

THE 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.

COMMONWEALTH'S ASSIGNMENT OF CROSS-ERROR

THE COURT OF APPEALS ERRED BY FAILING TO RULE, IN ADDITION TO ITS FINDING OF PROCEDURAL BAR, THAT THE USE OF SUMMARY PROCEDURE BY THE TRIAL COURT DID NOT VIOLATE THE DEFENDANTS' DUE PROCESS RIGHTS.

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 THE ARGUMENTS LACKED MERIT AND THAT THE SUMMARY PROCEEDINGS HAD BEEN PROPER? (Assignments of Error I-VII)

II. DID THE COURT OF APPEALS ERR BY NOT RULING, IN THE ALTERNATIVE, THAT THE TRIAL COURT DID NOT ERR IN EMPLOYING SUMMARY CONTEMPT PROCEDURES? (Assignments of Error VIII and IX; Assignment of Cross-Error)

STATEMENT OF FACTS (DOCUMENTS REFERRED TO HEREIN APPEAR AT A. 283-97)

During Dulyea's trial an issue arose concerning the rules governing the users of an internet chat room that Dulyea had visited. (A 126-128).

Scialdone attempted to introduce a document he represented to the court was a printout of the rules of the website. (A 127). The Commonwealth objected to the document on the ground that it was dated July 11, 2006, the previous day, and that there thus was no assurance that the rules it contained had been in effect on the date of the offense in 2005. (A 127-128, 130). The trial court sustained the objection. (A 130).

The trial court held that only the rules in place at the time of the offense would be admitted. (A 128-132). The court retained the rejected document. (A 157). Later in the trial, Scialdone represented to the court that a second document he was offering in evidence had been produced shortly after the offense. (A 157-158, 287-88). With the jury out of the courtroom, the court stated:

> For the record, I don't know—did we put the first rules on the record? I think we did. And they had a date on the bottom of 7/11/06. So they were printed yesterday. You've now shown me what appears to be the exact same thing with just no print date on the bottom.

(A 157, 287-88, 295).

After the court also noted that there had been different screen names on the two documents, the prosecutor suggested "we need to determine if there is something fraudulent about the document that is being presented."

(A 161). The trial court allowed Dulyea's father to testify concerning the document outside the presence of the jury. (A 170). The court stated it was

> quite concerned that it's the exact same document that you tried to offer earlier and I refused because it had a date of 7/11/06 and it had a copyright of 2006. And this one has everything exactly the same except there is no print date and no copyright date.

(A 169-170).

The father, Donald Dulyea, testified that, using his wife's online screen name "pdulyea," he and his cousin had gone onto the chat room site and downloaded and printed the rules within two weeks after bonding his son out of jail. (A 173-174). He stated they had stapled the two sheets together and had given them to defendant Taylor. (A 174-178). The trial judge noted that she had received only a single sheet, but Donald Dulyea confirmed he had delivered more than one sheet. (A 174). Scialdone then stated:

> I asked Mr. Taylor—while we were scrambling around trying to find the rules after you rejected the ones we did, I asked Mr. Taylor to find them because he told me that he had brought the rules into the office shortly after we were retained. I was not aware of it. Mr. Taylor went searching for them, and we went back at lunchtime to get that piece of paper; and I'll be glad to call him over here if you'd like to have him to testify.

(A 175).

The Commonwealth continued its cross-examination of Donald Dulyea, and he confirmed that "pdulyea" should be the screen name on the

rules he had printed out. (A 183). The trial court noted though, that instead of "pdulyea," the screen name "wndydpooh" was on the second document proffered by Scialdone; Donald Dulyea stated he did not recognize that name. (A 183-184). The trial court then asked, "Who's Wndydpooh? Who can answer that question?" (A 184).

The court asked Scialdone what his secretary's name was, and he replied, "Wendy." (A 184). The trial court then directed Scialdone to have his secretary, Wendy Suttlage, and his law partner, Barry Taylor, come to court immediately. (A 184-185). When they arrived, Taylor was sequestered in the hall and Suttlage was placed under oath and questioned by the trial court. (A 185-188). Suttlage stated that "wndydpooh" was her screen name on Yahoo, and that she had printed out the second document on the previous Sunday. (A 186). She did not recall if it had a date on the bottom when she printed it. (A 187). Suttlage testified she had not "whited out" anything on the document and had not seen the document that day. (A 187).

Ms. Suttlage was then directed to wait in the hall and Taylor was sworn. (A 187-188). Taylor testified that he recognized the document at issue and that he had gotten it from the conference room table in the law office. (A 188). Taylor identified it as the Yahoo chat instructions. (A 188).

He stated he did not know when it had been printed out, but said he thought it was the one Mr. Dulyea had given them. (A 188). The court asked Taylor to explain why the document was "under Wndydpooh's user name." (A 189). Taylor replied that he did not know; he said that he had been directed to look for the document that the client dropped off, and that he had found the document in a stack of documents on the conference room table. (A 189). Taylor denied he had altered the document in any way or that he had 'whited out' the date; he stated he did not know why there was no date on it. (A 189-190).

Ms. Suttlage stated that Taylor, Jones and possibly Scialdone were in the office on Sunday when she printed the document, but that no one was with her when she printed it. (A 191). Suttlage stated that Taylor had "asked for the listing of what needed to be—or the proxy thing or whatever." (A 191).

Defendant Edward Jones was placed under oath and warned by the court that he "better come clean right now." (A 193). Jones replied that he did not know anything other than what he had heard in the courtroom that day. (A 193). Jones testified he had worked on Sunday and may have seen the document then, but could not be sure as he had seen a lot of documents. (A 194). He admitted, however, that he had printed out the

document that Scialdone had originally proffered to the court containing the date of July 11, 2006. (A 195). The court then asked Jones about the screen name on the first document which read, “westisanazi.” (A 195, 295-296). The trial court stated, “West is a Nazi is what it says. Whose idea of a joke is that?” (A 195, 295-96).

Scialdone was then placed under oath, and Jones was sent to the hallway and directed not to speak to the other witnesses. (A 195-196). Scialdone testified that Frankie Dulyea had given Taylor “a couple of those screen things about adult chat rooms” at the time Dulyea retained them. (A 195-196). He stated that when he was given the one that was “dated afterwards,” he realized they needed to find the one from the file, and asked Taylor to look for it. Scialdone denied having seen the document that had been printed on Sunday and denied knowledge of the “westisanazi” screen name. (A 197). Scialdone stated he was not at all knowledgeable about using computers. (A 197-198). The trial court then said that it was finding Scialdone, Taylor and Jones in contempt. (A 198).

When subsequently questioned by the trial court during the same hearing, Jones admitted he was responsible for the “westisanazi” screen name on the first document proffered. (A 199). He stated he was “very

upset about some of the rulings" of the court. (A 199). Jones later said he wanted to apologize, and that "[n]obody else knew about that." (A 209).

The trial court again stated that it had found Scialdone, Taylor and Jones in contempt. (A 200). The court held that the "westisanazi" screen name constituted contempt, and that the defendants had tried to present documents and information that had been altered. (A 200-201, 203). Scialdone stated he believed there was no basis for his being held in contempt. (A 201).

After further discussion of the basis for the contempt ruling, Taylor stated to the court that there was a stack of materials in the firm's office on the conference table and Scialdone's desk. (A 203). The court directed him to gather the documents, in the company of a disinterested person, and return court with them within 20 minutes. (A 204). The court directed Ms. Suttlage to look through the documents for one with "pdulyea" as the screen name with a date of 2005 at the bottom; she was unable to find it. (A 208-209, 211).

The judge asked her deputy to accompany Ms. Suttlage back to the law office and "have her go on the same computer that she printed out this document that says Wndydpooh and go to that same page and print it out again for me." (A 212-213). The court also directed Suttlage to see if she

could determine when she had printed the second document that was proffered. (A 213).

As Suttlage and the deputy were about to leave, Scialdone stated that he had never seen the original document from Dulyea, although Dulyea's father had seen it, as had Taylor and Jones. (A 214). He stated that people at his office currently were looking for it, combing through everything including trash. (A 214).

Ms. Suttlage returned to court and delivered a document dated July 12, 2006, with a copyright date of 2006. (A 215). Comparing that document to the second, undated document proffered (A 287-290), the court noted that

> there's a space on there where evidently something was laid over on the copyright date and it was copied on a copier or it was whited out or something. Because you can see a line on the one that you gave me that it is clearly where the copyright was and its been altered.
>
> So which one of the three of you want to fess up? Who took the copyright off the document?

(A 216).

Scialdone denied having had anything to do with it. (A 216). He asked the trial court what type of contempt the defendants were being charged with; the court replied that it was finding all three of them in contempt and that they would deal with it after the trial. (A 217-218).

Scialdone stated he would like to know what he was being charged with, whether criminal, civil or "whatever," and that he might want a lawyer. (A 218). The court responded that it was finding all three of them in summary contempt, and they would finish Dulyea's trial and then deal with sentencing on the contempt charges. (A 218-220).

Taylor asserted that the undated document and the one just printed were not the same, but were "vastly different"; he argued that although the same text was on the page, the two were printed differently. (A 223-224). The trial court then sent Ms. Suttlage back to the law office to print the document again and attempt to "get it looking just like" the page with the missing copyright. (A 224). Scialdone asserted that he would not have had his client take the stand and testify that the original document contained the screen name "pdulyea" if he knowingly had submitted a document with the screen name "wndydpooh." (A 229).

Ms. Suttlage returned to court with the Yahoo chat page printed off from each of the computers in the office, each being connected to a different printer. (A 234). The court noted that the item that was printed off Taylor's computer was "the exact replica of the one that was introduced into evidence," except the date on the more recent one had not been

deleted. (A 234, 285-86). Scialdone requested a copy of the document, and the court adjourned for the day. (A 236-237).

At a point when the jury was out during the Dulyea case on the following day, July 13, 2006, the trial court noted that Scialdone had allegedly presented to the court the missing document (the one Dulyea's father had supposedly prepared earlier), which had been retrieved from the trash. (A 240). The court stated that the retrieval of the original document had no effect on the contempt finding, but only on whether the original was admissible in the Dulyea trial. (A 241). Scialdone stated he believed that he had presented the original document to the court before. (A 245). The trial court rejected that assertion, stating that what he had presented "was obviously a manufactured document" produced by him, Taylor or Jones. (A 245).

Immediately after Dulyea's sentencing on July 14, 2006, the trial court returned to the contempt issue. (A 249). The court stated that Taylor and Scialdone had violated Code § 18.2-456(4), misbehavior of an officer of the court in his official character, by offering a fraudulent document to the court. (A 250). The court found that this attempt to undermine the integrity of the judicial process warranted the maximum punishment of ten days in jail and

a fine of $250. (A 252). As stated earlier, the Court found Jones guilty of summary contempt based on the "westisanazi" document. (A 252).

At a subsequent hearing on Monday, July 24, 2006, the three defendants again appeared before the court on their motion to stay the execution of their sentences under Code § 19.2-319. (A 255-256). A notice of appeal to the Court of Appeals had been filed on July 14, 2006, (A 1-4, 15-16), and a motion for a stay of execution had been filed in the circuit court on July 17, 2006. (A 5-14, 17-21). The court noted that the motion for a stay had not been heard because it was never set for hearing by the parties. (A 256). Scialdone stated to the court that he was not representing himself; the court pointed out to him that he did not have the right to an attorney in a summary contempt proceeding. (A 260). Scialdone stated he believed they did have a right to counsel. (A 260). The court stated it would accommodate him in that regard but that the hearing would be held Wednesday, July 26, and the attorney would have to be there then. (A 260, 272).

On Wednesday, July 26, 2006, the trial court conducted a hearing on the motion for a stay of execution of the sentence, and noted that it had read the papers prepared by the defendants' attorney (who represented all three defendants), even though the defendants had been found in

summary contempt and thus had no right to counsel. (A 277). All three defendants were then represented by counsel, who had filed pleadings in the case but never actually appeared in court due to scheduling issues. (A 37, 277). The pleading filed requested only a stay of the execution of sentence, pending an appeal that was to be based upon alleged flaws in the underlying proceedings. (A 39-42). Neither counsel nor his clients ever asked the trial court to set aside the judgment and employ plenary nonsummary procedure. Because the court rejected the argument that this was not a case suitable for summary contempt, it denied the request for a stay of execution. (A 277-279).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DEFENDANTS' DUE PROCESS ARGUMENT, ALLEGING THE TRIAL COURT IMPROPERLY EMPLOYED SUMMARY CONTEMPT PROCEDURE, WAS PROCEDURALLY BARRED (Assignments of Error I-VII).

A. SUMMARY OF COURT OF APPEALS' DEFAULT HOLDING

The defendants argue that the Court of Appeals erred in finding that they failed to preserve their objection that the trial court had erroneously used summary contempt procedures because a plenary hearing was required. However, the defendants never presented that claim to the trial

court with a request that it employ plenary procedures. Thus, the Court of Appeals correctly held the issue was barred by Rule 5A:18. 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 . . . ."

In the case at bar the trial court informed the defendants on July 12, 2006, during the Dulyea trial, that it was holding them in contempt. When co-defendant Scialdone later asked what type of contempt and stated he might want a lawyer, the trial court informed him it was holding the defendants in summary contempt. (A 217). None of the defendants objected at that time to the form of procedure or requested any of the rights associated with plenary procedure.

The trial court stated to Scialdone during a break in the Dulyea trial on July 13, 2006, that his recovery of the original exhibit had "nothing to do with the contempt issue," for which Taylor and Scialdone were convicted, which was going to be dealt with "at a separate time." (A 241, 244). The court reiterated its finding that Scialdone and Taylor had been responsible for attempting to submit a fraudulent document into evidence. (A 246). There was no objection to the form of procedure at that time by any defendant.

On July 14, 2006, immediately after the completion of the Dulyea jury trial, the trial court returned to the matter of the contempt citations, and proceeded to sentence the three defendants. (A 249-253). There was no objection to the form of procedure or any request for any of the rights associated with plenary procedure.

At the hearing on Monday, July 24, 2006, regarding the motion to stay execution of the defendants' sentences, the court noted that the motion for a stay had not been heard because it was never set for hearing by the parties. (A. 256). Scialdone stated to the court that he was represented by counsel; the court pointed out to him that he did not have the right to an attorney in a summary contempt proceeding. (A 260). Scialdone stated he believed they did have a right to counsel. (A 260). The court stated it would accommodate him since he had hired counsel, but the hearing would be Wednesday, July 26, and the attorney would have to be there then. (A 260, 272). The defendants made no objection at that time to the form of procedure employed by the court.

On Wednesday, July 26, 2006, the trial court heard the motion for a stay of execution of the sentence pending appeal, and noted that it had

read the papers prepared by Mr. Miller, the attorney for the defendants,[3] even though the defendants had been found in summary contempt and thus had no right to counsel. The court rejected the argument that the sentence had to be stayed because this was not a case suitable for summary contempt. (A 277-279). The court further found the defendants had no "substantial likelihood" of prevailing on appeal and denied their request for a stay. (A 279). The defendants made no motion for the trial court to set aside or vacate its judgment so that the court could conduct a plenary hearing. Rather, during argument on the summary nature of the procedure, the defendants attempted to establish the likelihood of prevailing *on appeal* as a basis for granting the stay.

The defendants assert that the grounds contained in their "Motion for Stay of Execution of Sentence" filed on July 17, 2006 were adequate to preserve the procedural bar issue for appeal.[4]

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[3] Counsel was not present due to a scheduling issue, but represented all three defendants at this time. (A 39, 277)

[4] The defendant also relies on a memorandum filed on behalf of the National Association of Criminal Defense Lawyers (NACDL) in support of his argument. (A 22, Def. Br. 21). This document, however, is not part of the record in this case. (A 77-85). In any event, it suffers from the same defect as the arguments the defendants actually did present in the trial court.

In its ruling, the *en banc* Court of Appeals noted that the record did not show the appellants ever asked the trial court to recognize any specific procedural rights associated with plenary contempt, yet "argue the trial court erroneously deprived them of procedural rights they never requested." Taylor, 53 Va. App. at 234, 670 S.E.2d at 756. The Court of Appeals stated:

> Under Rule 5A:18, raising a legal argument in support of one type of relief does not preserve for appellate review the same argument in support of another type of relief which was never requested…Thus, a litigant who has merely "questioned the correctness" of the court's order but did not "expressly indicate the action [he] wanted the trial court to take" cannot appeal on the ground that the trial court erroneously failed to take some required action. Widdifield v. Commonwealth, 43 Va. App. 559, 562-63, 600 S.E.2d 159, 161-62 (2004) (en banc) (emphasis in original).

Id.

The motion heard on July 26, 2006 under Code § 19.2-319 asking the trial court to stay the sentence pending appeal did not constitute a request for the court to vacate its judgment and rehear the matter in a plenary hearing. The Court of Appeals noted that the defendants might have had a good reason for not asking the trial court to vacate and undertake plenary proceedings, given that the range of punishment available is substantially increased in plenary proceedings. See Code §§ 18.2-456, 18.2-457;

Singleton v. Commonwealth, 52 Va. App. 665, 672 n.3, 667 S.E.2d 23, 26 n.3 (2008).

Citing this Court's decision in Nusbaum v. Berlin, 273 Va. 385, 641 S.E.2d 494 (2007), the Court of Appeals stated:

> Like the lawyer in Nusbaum, appellants in this case never asked the trial court to vacate its oral contempt findings. Nor did they ever seek permission to relitigate the charges using plenary contempt procedures. Both the lawyer in Nusbaum and appellants in this case raised their arguments solely for appellate purposes: the former in an ineffectual effort at preserving the issue for appeal, the latter in an unpersuasive effort to obtain bail pending appeal. In neither instance, however, were the trial courts asked to supply any neglected due process protection. To be sure, the only difference between Nusbaum and this case is the lawyer in Nusbaum said he was not asking the trial court to vacate its earlier rulings based upon his objections to the summary process whereas, here, appellants made no such objections in the first place and thus had no reason to disavow them later.[5]
>
> For these reasons, we find it inconsequential that "the trial judge acknowledged she received and read appellants' motions

[5] For this reason, the defendants' argument that Nusbaum is distinguishable because they, unlike Nusbaum, never disavowed "a desire to have the trial court rule" on their objections is without merit. (Def. Br. 27). Moreover, the defendants' suggestion that the instant case is distinguishable because the trial court lacked jurisdiction to act when Nusbaum first objected (Def. Br. 27, stating that objections in Nusbaum were first "raised more than two months after entry of the order") is not supported by the procedural history cited in this Court's opinion in that case or the Court's actual ruling which does not rely on Rule 1:1 at all. The **final** order of the trial court in Nusbaum was entered in March, just after Nusbaum noted his "objections" for the first time, even though the oral contempt finding occurred in January. 273 Va. at 402-07, 641 S.E.2d at 503-06.

> for stay before she entered the order finding the men in contempt on Wednesday, July 19." *Post* at 23 (emphasis in original). Exactly the same thing could be said about the trial judge in Nusbaum. Prior to the entry of the final order, he heard in open court each of the lawyer's arguments challenging the summary contempt. The objections appeared on the later written order. Yet, like appellants, the lawyer in Nusbaum never asked the trial court to vacate its summary contempt findings so the case could be relitigated using plenary contempt procedures. This disconnect fully negates the assertion that appellants gave the trial court a sufficient opportunity to "correct the alleged error." *Post* at 28. In Nusbaum, as here, the only opportunity being presented to the trial court was the opportunity to *sua sponte* vacate its earlier rulings when the complaining parties conspicuously had not asked it to do so.

Taylor, 53 Va. App. at 238-39, 670 S.E.2d at 758-59.

In fact, Nusbaum's objections were arguably ***stronger*** than those of the defendants in the instant case. He specifically noted the due process objections and informed the trial court that he wanted to make sure that he preserved his appellate rights with respect to those due process issues. The defendants in the instant case merely made the procedural arguments in the context of a "stay" motion. In both this case and Nusbaum, the circuit court was "never allowed…to rectify the effect" of the error asserted on appeal. Nusbaum, 273 Va. at 406, 641 S.E.2d at 505.

B. CONTRARY TO THE DEFENDANTS' ARGUMENTS IN THIS COURT, THE COURT OF APPEALS CORRECTLY APPLIED RULE 5A:18 DUE TO THE DEFENDANTS' FAILURE TO OBJECT BELOW.

The defendants argue that the Court of Appeals erred by finding that their challenge to the summary procedure was defaulted due to their failure to make a contemporaneous objection in the trial court.

They contend that the Court of Appeals erred: 1) by improperly applying cases holding that an objection on one ground does not preserve other issues, including related ones, for appellate review; and 2) by ignoring the language of the contemporaneous objection rule and related statutes. The Commonwealth will address each of these issues herein.

1. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT THE CONTEMPORANEOUS OBJECTION RULE BARS CONSIDERATION OF ARGUMENT ON APPEAL WHEN THE DEFENDANTS DID NOT REQUEST THE RELIEF BELOW THAT HE SEEKS FOR THE FIRST TIME ON APPEAL.

The defendants acknowledge the settled principle that a "litigant who provides one ground for an objection [at trial] cannot argue a different ground for that same objection on appeal." (Def. Br. 18, n. 9). In fact, the commonsense underpinning for this rule is beyond dispute: It prevents "sandbagging" of the trial court. See Weidman v. Babcock, 241 Va. 40, 44, 400 S.E.2d 164, 167 (1991) (purpose of rule "is to afford the trial court an

opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals").

Still, they reason, the Court of Appeals erred when it found that "[u]nder Rule 5A:18, raising a legal argument [i.e. the defendants' contention that the summary procedure was improper] in support of *one* type of relief [a motion for stay] does not preserve for appellate review the same argument for support of *another* type of relief [a claim that the conviction should be set aside or overturned due to the improper summary procedure] which was never requested." (Def. Br. 15).

The Court of Appeals has stated that in most instances simply stating an objection "without more" is sufficient to achieve the goal of the "contemporaneous objection" rule. However, the Court correctly elaborated that "on occasion more is required":

> If a party disagrees with the action of the trial court, the statement of an objection and the grounds of the objection are required. **If, however, the party does not simply disagree with the action of the trial court, but seeks the trial court to take action, that action must be expressly sought.** For example, improper comments or conduct during closing argument may not be the basis for reversal unless a timely motion for a mistrial is made. A motion for mistrial is required to preserve such an issue for appeal **even if an objection is made to the conduct or comments and is overruled by the trial court.**

Parker v. Commonwealth, 14 Va. App. 592, 596, 421 S.E.2d 450, 453 (1992) (citing Martinez v. Commonwealth, 241 Va. 557, 559, n.2, 403 S.E.2d 358, 359, n.2 (1991); Cheng v. Commonwealth, 240 Va. 26, 38, 393 S.E.2d 599, 605-06 (1990); Virginia Code § 8.01-384) (emphasis added).

As the Court of Appeals found, at no point did the defendants specifically ask the trial judge to "take action" to accord them plenary procedures. Under these circumstances, the Court of Appeals properly found that consideration of this claim is barred under its contemporaneous objection rule.

2. THE COURT SHOULD NOT EXCUSE THE DEFENDANTS' FAILURE TO SEEK THE PROPER REMEDY BELOW EVEN IF SUCH OBJECTION MAY HAVE BEEN FUTILE. MOREOVER, THE EXTENSION OF THE CONTEMPORANEOUS OBJECTION RULE THE DEFENDANTS URGE ON THIS COURT IS UNWORKABLE IN PRACTICE AND UNFAIR TO THE TRIAL JUDGE.

Implicit in the defendants' argument is that this Court should conclude—and thus ignore their default—that had they requested the relief they seek in this Court below that the trial judge most assuredly would have rejected their request. While tempting in light of the trial judge's denial of the stay motion (apparently based at least in part on her "rejection" of the defendants' contentions regarding the summary procedure, A 277-280), the Court should reject this current invitation.

This Court has previously held that "the perceived futility of an objection does not excuse a defendant's procedural default at trial." See Commonwealth v. Jerman, 263 Va. 88, 94, 556 S.E.2d 754, 757 (2002) (citing Engle v. Isaac, 456 U.S. 107, 130 (1982) and Epperly v. Booker, 235 Va. 35, 44, 366 S.E.2d 62, 67 (1988)).

The rule the defendants urge on this Court, moreover, would be unworkable in practice. A simple example in the mistrial context illustrates this.

Under the defendant's rule that the "same argument/different remedy" would constitute an adequate contemporaneous objection, the sound reasoning of the Court of Appeals in Parker (cited in the previous section) would be cast aside. For example, a defendant could object to improper argument and request a cautionary instruction, but make no request for a mistrial. The trial judge could then hold that the argument was not improper and deny the requested instruction.

On appeal, however, this hypothetical defendant could argue that the trial judge had an opportunity to rule on whether the argument was improper and rejected that contention. This, using the defendant's reasoning, would constitute an adequate objection for him to pursue a mistrial ***remedy*** on appeal for the first time.

Another example in the civil context shows the flaw in the defendant's argument. A litigant could seek an injunction based on an argument that he is suffering immediate, irreparable, and continuing harm in the amount of $1,000 per day. The trial court could specifically find that the litigant had failed to prove that he was being damaged in any amount, and deny the requested injunctive relief.

Applying the defendants' logic, this hypothetical civil litigant could then challenge not only the trial court's factual finding and its denial of an injunction, but could argue for the first time on appeal that he was entitled to ***monetary damages, despite having sought only an injunction in the trial court***.[6] This would be true, even though he had failed to seek that relief with requisite particularity below.

This Court has repeatedly rejected such a rule which would allow a litigant to argue "a different twist" on appeal as being unfair to the trial judge, and the Court should continue to do so. Cf. Commonwealth v. Shifflett, 257 Va. 34, 44, 510 S.E.2d 232, 237 (1999).

[6] A civil litigant may seek both equitable and legal remedies in the same proceeding. See Rule 3:1 (civil action may include both legal and equitable claims).

3. VIRGINIA CODE § 8.01-384 DOES NOT COMPEL THE RESULT THE DEFENDANTS URGE.

The defendants also argue that a plain reading of Virginia Code § 8.01-384 dictates that their related argument at trial was adequate to preserve the issue they now raise on appeal.[7] (Def. Br. 25-29). That statute reads as follows (the pertinent part of the statute is emphasized):

> **§ 8.01-384. Formal exceptions to rulings or orders of court unnecessary; motion for new trial unnecessary in certain cases. —**
>
> A. Formal exceptions to rulings or orders of the court shall be unnecessary; **but for all purposes for which an exception has heretofore been 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 <u>or</u> his objections to the action of the court and his grounds therefor;** and, 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 motion for a new trial or on appeal. No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.

[7] The defendants cite to Virginia Code § 19.2-318 as well, but this statute simply allows one convicted of contempt to appeal to the Court of Appeals.

> B. **The failure to make a motion for a new trial in any case in which an appeal, writ of error, or supersedeas lies to or from a higher court shall not be deemed a waiver of any objection made during the trial if such objection be properly made a part of the record.** (Code 1950, §§ 8-225, 8-225.1; 1970, c. 558; 1977, c. 617; 1992, c. 564.)

The defendants argue that "[t]he plain meaning of [the highlighted portion of Subsection A 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 therefore *or* the relief sought." (Def. Br. 25, emphasis in original).

This reading of the statute, however, ignores that its purpose is not to define what constitutes a "specific objection." Rather, the statute merely eliminated the previous requirement that a formal "exception" is necessary, ***after*** a litigant has ***already*** made a specific objection below.

Subsection B of the statute also makes clear that a litigant who has ***previously*** made a proper objection need not seek a new trial in order to preserve that issue for appeal. Because the defendants never lodged a specific objection at any stage of the proceeding below, however, this portion of statute is also inapplicable in this case.[8]

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[8] For this reason, defendants' reliance on Helms v. Manspile, 277 Va. 1, 671 S.E.2d 127 (2009) is misplaced (Def. Br. 24-25). In that case, this Court found that a defendant who had ***previously*** made a specific objection did not waive it simply because he endorsed the final written

II. THE TRIAL COURT DID NOT ERR IN EMPLOYING SUMMARY CONTEMPT PROCEDURES (Assignments of Error VIII and IX; Assignment of Cross-Error).

A. SUMMARY OF ARGUMENT

The defendants argue that the trial court erred in convicting them of contempt of court in a summary proceeding. They rely on statements in cases from this Court and the Supreme Court of the United States in support of their assertions that a "summary" proceeding was improper because the trial court heard "evidence" and propounded questions on them during the proceeding.

However, the statements upon which they rely are merely *dicta* and not binding on this Court. See Morgan v. Commonwealth, 50 Va. App. 120, 131, 646 S.E.2d 901, 904 (2007). In fact, the legal issues the defendants raise in this case regarding the procedure below are far from settled.

As argued herein, the defendants' conduct (presenting a fraudulent document for admission into evidence and making a disparaging remark

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order as "Seen" without again stating specific objections. 277 Va. at 6, 671 S.E.2d at 129. Furthermore, although the Court need not reach this issue, the defendants' assertion that this statute must be strictly construed against the Commonwealth (Assignment of Error V) is erroneous because is it not a "penal statute." Cf. Greene v. Commonwealth, 277 Va. 408, 410-11, 672 S.E.2d 832, 833 (2009) (penal statutes must be so construed). Instead, the statute is one of general applicability in criminal and civil cases.

about the trial judge on a document proffered for admission) posed a direct immediate threat to the trial court's dignity and operation; therefore the trial court did not err in holding them in contempt in a summary proceeding.

B. GENERAL PRINCIPLES IN SUMMARY CONTEMPT CASES.

Summary proceedings are appropriate when offenses are "within the knowledge of the judge because they occurred in h[er] presence." Sacher v. United States, 343 U.S. 1, 9 (1952). That requirement plainly was met here, where the presentation of the fraudulent document (Taylor and Scialdone) and the "westisanazi" document (Jones) took place in open court in the trial judge's presence.

This Court has recognized that the law of summary contempt is *sui generis* and that summary contempt proceedings are not "criminal prosecutions" within the Sixth Amendment or in "common understanding."

> The Supreme Court has emphasized that Sixth Amendment rights do not apply to adjudications for contempt, including those of petty, direct contempt. "While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as sui generis and not 'criminal prosecutions' within the Sixth Amendment or common understanding." [citations omitted].
>
> Because criminal contempt proceedings are not "criminal prosecutions," the protections of the Sixth Amendment do not apply to such proceedings…Instead, the safeguards applicable in such cases are protections of fairness guaranteed by the due process clause of the Fifth and Fourteenth Amendments

> [citations omitted]. Summary adjudications for petty, direct contempt repeatedly have been held to provide due process of law.

Gilman v. Commonwealth, 275 Va. 222, 228, 657 S.E.2d 474, 476 (2008). See also Vasquez v. State, 925 A.2d 1112, 1122-23 (Conn. App. Ct. 2007); Brown v. Executive 200, Inc., 416 N.E.2d 610, 612 (Ohio 1980) (both discussing *sui generis* nature of contempt proceeding). The defendants here were not entitled to the full panoply of rights afforded a defendant in a criminal case. See International Union, United Mine Workers of America, et al. v. Bagwell, 512 U.S. 821, 826 (1994).[9]

Moreover, the United States Supreme Court has rejected the notion that the "due process" rights the defendant raises exist when the contempt is committed "in court." See Bloom v. Illinois, 391 U.S. 194, 201-05 (1968). In fact, the United States Supreme Court has stated that an attorney who is accused of "in court" contempt:

> should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say,

[9] For this reason, the Court should reject the defendants' arguments that they were entitled to various rights accorded defendants in criminal proceedings such as the right to counsel or to confront witnesses. (Def. Br. 37-41). See Higgins v. Liston, 870 A.2d 1137, 1142 (Conn. App. Ct. 2005) (right to counsel and other rights); Ex parte Daniels, 722 S.W.2d 707, 709 (Tex. Crim. App. 1987) (right to counsel); Vasquez, 925 A.2d at 1123-24 (finding no absolute right to cross-examine witnesses in summary contempt proceeding).

> however, that a full-scale trial is appropriate. Usually, the events have occurred before the judge's own eyes, and a reporter's transcript is available. But the contemnor might at least urge, for example, that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client; or, he might present matters in mitigation or otherwise attempt to make amends with the court.

Taylor v. Hayes, 418 U.S. 488, 499 (1974); see also Doral Produce Corp. v. Paul Steinberg Assoc., Inc. 347 F.3d 36, 40-41 (2d Cir. 2003).

Obviously that right was honored at the lengthy hearing about which the defendants complain, as well as the subsequent proceedings before the trial court. (A. 184-274).[10]

C. THE DEFENDANTS WERE NOT ENTITLED TO A PLENARY HEARING SIMPLY BECAUSE THE TRIAL COURT ASKED THEM QUESTIONS OR HEARD "EVIDENCE" BEFORE FINDING THEM GUILTY OF CONTEMPT OF COURT.

The United States Supreme Court has recognized that state regulation has a place in determining when summary procedure may be

[10] To the extent defendants Taylor and Jones argue that their right to be present was denied because they were excluded from the courtroom during portions of the proceeding, they have not made any allegation that they were unable to explain anything material during subsequent portions of the proceeding. (Def. Br. 39-40). In fact, Taylor voluntarily left court on one occasion. (A. 231-233). Moreover, their reliance on Groppi v. Leslie, 404 U.S. 496 (1972), is misplaced. As defendants admit, Father Groppi was found in contempt of a state legislature without being accorded any "opportunity to present a defense or information in mitigation." (Def. Br. 39, n. 25). Clearly, that was not the case here. As one Court has aptly noted, the problem is Groppi was not that the proceeding was "summary," but that it was "excessively" summary. See Doral Produce, 347 F.3d at 40.

warranted to vindicate the court's authority:

> While the Due Process Clause no doubt imposes limits on the authority to issue a summary contempt order, the States must have latitude in determining what conduct so infects orderly judicial proceedings that contempt is permitted. As we have noted, we have used various phrases to describe the type of conduct required. We need not explore these limitations and standards, however, for the conduct of counsel here was well within the range of contumacious conduct disruptive of judicial proceedings and damaging to the court's authority.

Pounders v. Watson, 521 U.S. 982, 991 (1997).[11]

Contrary to the defendants' argument, the trial court's ability to employ summary procedures in this case did not erode merely because the trial judge propounded questions on the defendants, see Pounders, 521 U.S. at 985-87 (judge propounding questions on defense lawyer); In re Yengo, 417 A.2d 533, 542 (N.J. 1980); State v. Jenkins, 950 P.2d 1338, 1346 (Kan. 1997) (both holding that court may question attorney who is absent from court and may, under appropriate circumstances, hold the attorney in contempt summarily based on the responses).

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[11] Although the Pounders majority did not explore in detail what effect its holding might have on the applicability to state court proceedings of the United States Supreme Court cases relied upon by the defendant, at least one federal court has stated very emphatically that Pounders did address this issue. The court stated "the majority in Pounders had the opportunity to align state court contempt powers in matters of direct or summary contempt with [federal law in place since 1831]." However, "the majority opted not to extend these restrictions as a matter of due process and constitutional governance to limit state law." See Goldberg v. Judge Timothy P. Maloney, 2004 U.S. Dist. LEXIS 25909 (N.D. Ohio 2004).

Furthermore, the proceeding was not converted into a nonsummary proceeding merely because the trial court sought out additional evidence after a fraudulent document and the document bearing the "westisanazi" had been presented during Dulyea's trial.[12] One court has adamantly rejected this notion:

> [Clancy's] contention assumes that no testimony can properly be heard in a case of direct contempt; that no matter how or to what extent the court is disturbed or impeded in the performance of its duties, to constitute direct contempt authorizing summary proceedings every detail necessary to constitute it must come within the actual personal knowledge of the judge. But no case has been called to our attention where knowledge thus acquired is held indispensable to the assumption of jurisdiction to proceed summarily. In fact in most of the cases above cited, holding that the contempt was committed in the presence of the court and warranted summary proceedings, it became necessary to hear some evidence to inform the court of some essential facts. Here the court had complete knowledge of the real matter that constituted the contempt, namely, the disturbance of its proceedings. The only information it required to exercise its authority in a summary way was as to the identity of the guilty parties. It seems absurd that in such a case the court is powerless to assert its dignity and authority at once without the delay and formalities incident

[12] In fact, it is noteworthy that if the defendants were correct (i.e. that a court can make ***no inquiry*** in a summary contempt proceeding), this would call into question the constitutionality of that portion of Virginia Code § 18.2-456(1) that allows a court to punish summarily for contempts which occur "so near [to the court] as to obstruct or interrupt the administration of justice." Cf. Simopoulos v. Commonwealth, 221 Va. 1059, 1076, 277 S.E.2d 194, 205 (1981) (statutes in Virginia are presumptively constitutional).

> to preliminary proceedings necessary in case of constructive contempt.

People v. Clancy, 239 Ill. App. 369, 374-375 (Ill. App. Ct. 1926); see also State v. Roll, 298 A.2d 867, 879 (Md. Ct. App. 1973); Ex parte Daniels, 722 S.W.2d at 710-711 (both stating that court may take some testimony in "summary" proceeding).

These cases simply recognize that a "necessity" justification (i.e. flagrant misbehavior in the court's presence), not the efficiency with which the case may be adjudicated, is really the determinative factor of whether a contempt case may be adjudicated summarily. See Pounders, *supra* (United States Supreme Court discussing necessity justification in both majority and dissenting opinions); see also In re Duckman, 898 A.2d 734, 746 (Vt. 2006) (specifically stating that, as the law has developed "over time," "necessity" justification, not "efficiency" one, is generally what differentiates summary contempt from nonsummary contempt); see also, Gabriel v. Gabriel, 746 P.2d 574, 575 (Hawaii Ct. App. 1987) ("summary contempt occurs when the offense is committed in the immediate view and presence of the court, ***or*** under such circumstances that the court has knowledge of all of the facts constituting the offense") (emphasis added, internal quotations and citation to statute omitted).

Similarly, the court here was immediately aware of the presentation of the fraudulent document and the disrespectful comment. Moreover, the trial judge's allowing the defendants an opportunity to explain the situation before pronouncing her finding did not change the character of the proceeding. The United States Supreme Court has noted that "[e]ven where summary punishment for contempt is imposed during trial, 'the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution." Taylor v. Hayes, 418 U.S. at 498.

D. THE MATTER BEFORE THIS COURT IS ONE OF FIRST IMPRESSION IN VIRGINIA AND THE RELEVANT UNITED STATES SUPREME COURT AUTHORITY DOES NOT COMPEL THE COURT TO FIND THAT THE SUMMARY PROCEEDING WAS IMPROPER.

Perhaps the most significant authority from the United States Supreme Court relied upon by the defendants is In re Oliver, 333 U.S. 257 (1948). In that case, the United States Supreme Court stated the following:

> If some essential elements of the [contempt] offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires . . . that the accused be accorded notice and a fair hearing as above set out.

333 U.S. at 275-76.

Despite the seemingly broad language in Oliver, the particular facts and the actual issues before the United States Supreme Court in that case are important and distinguishable. Oliver involved a contempt citation issued by a "one judge grand jury," which at the time was permissible under Michigan law. The Court summarized the state court proceedings as follows:

> In obedience to a subpoena the petitioner appeared as a witness before a Michigan circuit judge who was then conducting, in accordance with Michigan law, a "one-man grand jury" investigation into alleged gambling and official corruption. The investigation presumably took place in the judge's chambers, though that is not certain. Two other circuit judges were present in an advisory capacity. A prosecutor may have been present. A stenographer was most likely there. The record does not show what other members, if any, of the judge's investigatorial staff participated in the proceedings. It is certain, however, that the public was excluded -- the questioning was secret in accordance with the traditional grand jury method.
>
> After petitioner had given certain testimony, the judge-grand jury, still in secret session, told petitioner that neither he nor his advisors believed petitioner's story -- that it did not "jell." [sic] This belief of the judge-grand jury was not based entirely on what the petitioner had testified. As will later be seen, it rested in part on beliefs or suspicions of the judge-jury derived from the testimony of at least one other witness who had previously given evidence in secret. Petitioner had not been present when that witness testified and so far as appears was not even aware that he had testified. Based on its beliefs thus formed -- that petitioner's story did not "jell" -- the judge-grand jury immediately charged him with contempt, immediately convicted him, and immediately sentenced him to sixty days in jail. Under these circumstances of haste and secrecy, petitioner, of

> course, had no chance to enjoy the benefits of counsel, no chance to prepare his defense, and no opportunity either to cross-examine the other grand jury witness or to summon witnesses to refute the charge against him.

Oliver, 333 U.S. at 258-259.

Thus, the Supreme Court made several essential holdings. First, the Court found that Oliver was entitled to the public trial that he had been denied. Oliver, 333 U.S. at 272-73. This issue, of course, is not present in the instant case.

Second, the Court found that a summary contempt proceeding was inappropriate in Oliver because there was no possibility of "demoralization of the court's authority before the public," given that Oliver's alleged perjury occurred entirely in secret. Obviously, there is no claim in the instant case that Dulyea's criminal trial (from which the instant contempt convictions arose) was conducted in "secret."

Finally, the Supreme Court found that Oliver's due process rights were violated because he was not present when the witness who contradicted him had testified (and whose testimony was the sole basis for the contempt finding), nor was he ever given any opportunity to present ***any type*** of evidence or explanation to rebut the allegedly inconsistent testimony. Oliver, 333 U.S. at 273.

In sharp contrast, the defendants in the instant case were offered a substantial opportunity to defend and explain their actions and were present in court throughout the contempt proceedings. To the extent the defendants were excluded from the courtroom at some portion of the proceeding, each was offered an opportunity to respond to evidence presented in his absence. (A 184-274).

Of all the United States Supreme Court cases the defendant has cited, only Oliver, the "star chamber" case which is very narrowly limited to its unusual facts, addressed the Fourteenth Amendment due process issues here. This is significant in light of the United States Supreme Court's more recent admonition that "while the Due Process Clause no doubt imposes limits on the authority to issue a summary contempt order, the States must have latitude in determining what conduct so infects orderly judicial proceedings that contempt is permitted." Pounders v. Watson, 521 U.S. at 991.

Several other United States Supreme Court cases upon which the defendants rely are distinguishable for the following reasons: 1) they were cases applying federal law in federal cases and did not address the applicability of the holdings to state courts; and/or 2) the United States Supreme Court was not required to rule directly on the issues now before

this Court regarding what, if any, testimony a trial court may hear, and under what circumstances, in a summary contempt proceeding: See Satcher v. United States, 343 U.S. 1 (1952) (federal case in which issue before court was whether trial court could adjudicate contempt summarily by waiting until after trial concluded to issue contempt citation); Cooke v. United States, 267 U.S. 517 (1925) (contempt did not occur in open court); In re Savin, 131 U.S. 267 (1889) (federal case finding summary contempt proceeding appropriate even though attempted bribe occurred in the hallway); Ex parte Terry, 128 U.S. 289 (1888) (contemptuous acts occurred before trial judge, so court did not have to consider what, if any, taking of evidence would be appropriate).

Similarly, the statements in Virginia cases upon which the defendant relies to argue that the introduction of any "outside events and evidence" prevents the use of summary proceedings" (Def. Br. 29-37) are merely *dicta*. That is, although the opinions included language to that effect, in none of the cases was a Court actually required to rule on the issue of whether a summary proceeding was inappropriate when evidence is actually offered. Thus, the issues raised here regarding whether any evidence may be taken in a "summary contempt" proceeding are ones of first impression in the Commonwealth.

In Burdett's Case, 103 Va. 838, 48 S.E. 878 (1904), the issue was whether Burdett could be held in summary contempt for a letter he wrote to a newspaper which was critical of a judge (this Court found that he could). In Davis v. Commonwealth, 219 Va. 395, 397 247 S.E.2d 681, 682 (1978), the Commonwealth conceded that a contemnor's failure to comply with a subpoena *duces tecum* was "indirect contempt" which did not occur in the court's presence. In Gilman, *supra* the only issue before the Court was whether a contemnor's Confrontation Clause rights were violated because a judge's certificate was admitted against him at trial. Finally, in Higginbotham v. Commonwealth, 206 Va. 291, 142 S.E.2d 746 (1965), this Court held that a nonsummary proceeding should have been held both because of a substantial delay between the act and the contempt finding and because the trial judge did not immediately believe the contemnor attorney had violated a court order.

E. THE PROCEEDINGS PERTINENT TO DEFENDANT JONES WERE VERY SHORT.

Although the summary procedure was proper in each of the cases before the Court, unlike Scialdone and Taylor, defendant Jones was convicted of contempt for the "westisanazi" comment, not the presentation of the fraudulent document. The gathering of "evidence" from the time the judge became aware of this entry on the document until Jones admitted

preparing this document was not significant. (A. 195-209). The trial court did not rely on any of the "evidence" gathered from the law office in convicting him.

CONCLUSION

The Commonwealth asks that this Court affirm the judgment of the Court of Appeals of Virginia and the Circuit Court for the City of Virginia Beach.[13]

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

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[13] If the Court reverses the convictions based on the summary proceeding, the proper remedy is to remand the case to the circuit court to allow the Commonwealth's Attorney to prosecute the contempt, if he be so advised. See Powell v. Ward, 15 Va. App. 553, 560, 425 S.E.2d 539, 544 (1993).

CERTIFICATE OF TRANSMISSION AND SERVICE

On August 3, 2009, the required number of copies of this brief were hand-filed with this Court and the required number of copies were mailed to Marvin D. Miller, Esquire, Law Offices of Marvin D. Miller, 1203 Duke Street, Alexandria, Virginia 22314. I have also caused a copy to be emailed to scvbriefs@courts.state.va.us. The Commonwealth wishes to argue this case orally before this Court.

_____

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