IN THE

Supreme Court of Virginia

RECORD NO. 160619

MATTHEW FITZGERALD HACKETT,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE

MATERIAL PROCEEDINGS BELOW

This is an appeal from an Order dated December 15, 2015 from the Court of Appeals of Virginia affirming the *Per Curiam* opinion issued by that Court on September 14, 2015 which let stand the December 30, 2014 Order of the trial court, issued by the Honorable William N. Alexander, denying Matthew Hackett's (hereinafter "Hackett"), Motion to Modify/Reconsider Hackett's conviction.

STATEMENT OF FACTS

On or about February 23, 2008, Hackett, was returning to college from his home in North Carolina. During his trip, he stopped at a fast food restaurant located in Franklin County, Virginia. He went into the restaurant, ordered food, and upon his return to his vehicle, he realized that he had locked his keys in the car. Hackett then called the Rocky Mount Police Department office for assistance in unlocking his car door. Upon arrival, the police officer was able to unlock and open the driver's side door of the vehicle. He noticed a smell of marijuana and a smoking device in the middle console of Hackett's vehicle. Upon a search of the vehicle the officer found a small amount of marijuana in the top compartment of the middle armrest, and in the back seat of the vehicle, in a backpack, the

officer discovered three ounces of marijuana and other paraphernalia. Hackett was arrested and charged with possession with intent to distribute more than one-half ounce, but less than five pounds of marijuana, in violation of Virginia Code §18.2-248.1. (J.A. 11 – Sealed).

A preliminary hearing on the matter was held in the General District Court of Franklin County on September 11, 2008, wherein after testimony was received, the case was certified to the Grand Jury. (J.A. 2). On or about October 6, 2008, Hackett was indicted for violating Virginia Code §18.2-248.1. After conducting discovery, the Franklin County Commonwealth's Attorney and counsel for Hackett reached an agreement regarding the disposition of the case. The parties agreed that Hackett would plead guilty to the charge and request that the Trial Court take the case under advisement for an extended period of time under whatever terms and conditions the Trial Court deemed appropriate. The parties also agreed that if Hackett successfully completed all terms and conditions, then the felony charge would be reduced to a misdemeanor. (J.A. 39). Both the Commonwealth and Hackett agreed to forgo a written plea agreement and instead agreed that these terms would be expressed to the Trial Court at the time that Hackett tendered his guilty plea.

On January 20, 2009, the parties appeared before the Trial Court and Hackett plead guilty to the single charge in the indictment. At that time, the parties both expressed to the Trial Court their desire that the case be taken under advisement and later reduced if Hackett complied with all terms imposed by the Trial Court. (J.A. 39). Thereafter, the Trial Court entered an Order of conviction, but continued the matter "before fixing punishment or imposing sentence" so that a pre-sentence report and sentencing guidelines could be prepared. (J.A. 9-10). The sentencing guidelines called for "probation/no-incarceration." (J.A.11 - Sealed). Hackett, on his own initiative prior to sentencing, entered and completed a thirty (30) day residential drug treatment program. He also completed his undergraduate degree. (J.A. 30).

On April 24, 2009, the parties appeared before the Trial Court for sentencing. At this hearing, Hackett renewed his request that the case be taken under advisement for a period of time to be determined by the Trial Court, and that the felony be reduced if Hackett successfully complied with the terms and conditions imposed by the Trial Court. The Commonwealth agreed that such a disposition was appropriate. (J.A. 39-40). After considering the arguments and evidence presented by counsel, the Trial Court provided Hackett with the following options: either he could walk out

of the courtroom with a sentence with no active incarceration but a felony conviction, or he could choose to, in the words of the Trial Court, "go the extra mile." Without hesitation, Hackett immediately chose to "go the extra mile." The Trial Court then sentenced Hackett to nine months active incarceration in the Franklin County Jail, and a period of two years of intensive probation upon his release (J.A. 40). The Trial Court advised Hackett that he would review the case on an annual basis and if he complied with the Trial Court's terms then the charge would be reduced to a misdemeanor.

On or about December 21, 2009, Hackett, who was still incarcerated, appeared before the Trial Court for a review. During his incarceration, Hackett was a model prisoner. Counsel for Hackett reminded the Trial Court of the request for a reduction from a felony to a misdemeanor. The Trial Court released the Hackett from jail, and placed him on probation for a period of twelve months, suspended all of the time, and stated to Hackett:

> "[a]t the end of twelve months I'm going to review it and at that time, Mr. Stanley, you can asked that it be reduced. And I will do one of two things, I will either reduce it or extend your probation for a period of another twelve months and if you do extremely well for the whole twenty-four months then I still will consider reducing it…..You've got to obey the terms of your probation….If you do that, then you're going to be home free from the felony." (J.A. 31, 111-112).

Thereafter, Hackett returned home to North Carolina. Over the next twelve months, he continued to be of good behavior, secured employment, got married and became a step-father. (J.A. 31). On December 17, 2010, Hackett again appeared the Trial Court and had his supervised probation terminated. The Trial Court, however, continued the matter for another twelve months to contemplate the reduction of the felony charge to a misdemeanor. (J.A. 31). The Trial Court took no further action until counsel for Hackett filed a subsequent Motion to Modify Sentence on August 5, 2013- after the case had been pending for approximately four years. (J.A., 24)

Believing that it now lacked the authority to reduce the felony to a misdemeanor, the Trial Court took the motion under advisement by Orders dated September 9, 2013 (J.A. 27) and October 16, 2013 (J.A. 28). The Trial Court subsequently requested an agreed factual synopsis regarding the case. After reviewing the factual synopsis, and even though the Trial Court stated that it "intended to reduce the felony to a misdemeanor" the Trial Court denied Hackett's Motion to Modify Sentence, finding that it had been "under a mistaken impression that it had the discretion to reduce the charge, as requested." (J.A. 31, 33). This appeal followed.

ASSIGNMENTS OF ERROR

I. THE COURT OF APPEALS ERRED WHEN IT FAILED TO FIND THAT THE TRIAL COURT ERRONEOUSLY ENTERED A CONVICTION ORDER THAT FAILED TO TAKE THE CASE UNDER ADVISEMENT FOR A POTENTIAL REDUCTION OF THE FELONY OFFENSE TO A MISDEMEANOR AND TO SUBSEQUENTLY MODIFY THE CONVICTION ORDER. (Preserved in Motion to Modify Sentence, dated 8/1/13, J.A. 24-26).

II. THE COURT OF APPEALS ERRED WHEN IT FAILED TO FIND THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ENTERED AN ORDER OF CONVICTION AND FINAL SENTENCING ORDER AND CONTINUED THE CASE AND ORDERED HACKETT TO CONTINUE UNDER QUASI-PROBATION STATUS WITH THE PROMISE OF A PARTICULAR DISPOSITION AT A LATER DATE, IN VIOLATION OF HACKETT'S CONSTITUTIONALLY PROTECTED DUE PROCESS RIGHTS, AND RIGHT TO A FUNDAMENTALLY FAIR SENTENCING PROCEEDING. (Preserved in Motion to Modify Sentence, dated 8/1/13. J.A.. 24-26).

III. THE COURT OF APPEALS ERRED WHEN IT FAILED TO FIND THAT THE TRIAL COURT ERRED WHEN IT DENIED HACKETT'S MOTION FOR MODIFICATION OF SENTENCE AND CORRECT THE ORDER TO REFLECT THE COURT'S INTENDED DISPOSITION IN THE MATTER, *NUNC PRO TUNC*.
(Preserved in Motion to Modify Sentence, dated 8/1/13 (J.A. 24-26), and 10/8/13 Motion hearing Transcript J.A. 137-138).

IV. THE COURT OF APPEALS ERRED WHEN IT FOUND THAT THE TRIAL COURT'S CONVICTION AND SENTENCING ORDERS ARE NOT VOID *AB INITIO*.
(Preserved in Motion to Modify Sentence, dated 8/1/13, J.A. 24-26).

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

The issues before the Court involve a Trial Court's inherent authority to modify its orders and also involve constitutional questions such as due process and fundamental fairness. As such, appellate review of these matters is a question of law and therefore the standard of review for all assignments of error is *de novo. See*, *Moreau v. Fuller*, 276 Va. 127, 661 S.E.2d 841 (2008). *See also Alcoy v. Valley Nursing Homes, Inc.* 272 Va. 37, 41 630 S.E. 2d 301, 303 (2006).

The Trial Court's ruling that it lacked authority to reduce Hackett's felony conviction to a misdemeanor was in error. Under established Virginia law, a court has substantial discretion to amend a felony charge to a misdemeanor. The Trial Court, on multiple occasions, promised Hackett that if he complied with the terms and conditions imposed by the court that his felony conviction would be reduced. Specifically, the Trial Court made a determination at the initial sentencing hearing, based upon a choice given by the Trial Court to Hackett to subject himself to more punishment and a deprivation of his liberty, in exchange for the Trial Court to take the felony conviction under advisement for final disposition at a later date. This promise made by the Trial Court to Hackett was never fulfilled and because Hackett relied upon the promise made to him to his detriment, such

resulted in substantial prejudice to Hackett. The Trial Court's failure to fulfill its promise, violated Hackett's due process rights and Virginia law, and the Court of Appeals of Virginia's failure to vacate the Trial Court's Order of December 30, 2014 and remand for further proceedings was reversible error in further violation of Hackett's constitutional rights.

Additionally, both the Conviction Order and Sentencing Order entered by the Trial Court were *void ab initio* because the Trial Court failed to properly incorporate the parties' agreement into its orders and the orders failed to capture the Court's own rulings and subsequent agreement with Hackett. The Trial Court erred when it failed to enter or amend its Conviction and Sentencing Orders after advising Hackett that "you're going to be home free from the felony" if he successfully complied with the court's terms and conditions. (J.A. 31, 111-112).

Because the procedure used by the Trial Court to defer final disposition was one that the court "could not lawfully adopt" to effectuate the parties' request the Trial Court's ruling was reversible error that requires both Orders to be vacated as being *void ab initio*. *Singh v. Mooney*, 261 Va. 48, 51-52, 541 S.E.2d 549, 551 (2001). The Court of Appeals committed reversible error when it failed to find error in the ruling of the Trial Court, in further violation of Hackett's due process rights.

ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT FAILED TO FIND THAT THE TRIAL COURT ERRONEOUSLY ENTERED A CONVICTION ORDER THAT FAILED TO TAKE THE CASE UNDER ADVISEMENT FOR A POTENTIAL REDUCTION OF THE FELONY OFFENSE TO A MISDEMEANOR AND TO SUBSEQUENTLY MODIFY THE CONVICTION ORDER.

(Relating to Assignments of Error I-III)

a. Under Virginia Law A Trial Court Has The Ability To Take A Felony Charge Under Advisement And To Later Reduce That Charge To A Misdemeanor.

Both the Commonwealth, the defense, and the Trial Court agree that Hackett should not be a convicted felon. The ability of a court to take a charge "under advisement" has been hotly disputed and debated in recent years, but this Court has always held that trial court's have substantial inherent authority. The first reported case discussing a trial court's ability to continue findings of guilt under advisement was *In re Commonwealth's Attorney for City of Roanoke*, 265 Va. 313, 576 S.E.2d 458 (2003). In *Moreau v. Fuller*, 276 Va. 127, 661 S.E.2d 841 (2008), the Supreme Court of Virginia held that "it was within the inherent authority of the court to take the matter under advisement or continue the case for disposition at a later date because 'such practices involve the essence of rendering judgment.'" *Id*. at 137. More recently, in *Starrs v. Commonwealth*, 287 Va. 1, 752

S.E.2d 812 (2014), the Supreme Court of Virginia held that a court retains inherent authority to stay adjudication of guilty even after accepting a defendant's guilty plea so long as there is no formal adjudication of guilt. *Id*. at 819. *See also Hernandez v. Commonwealth*, 281 Va. 222, 707 S.E.2d 273 (2011) (holding that such power only is available "[u]ntil [a trial] court enters a written order finding the defendant guilty of a crime." *Id*., at 226, 707 S.E.2d at 275.

b. The Trial Court Erred By Failing to Modify The Written Conviction Order

It is apparent from the record that the Trial Court clearly believed that it had the authority to reduce Hackett's felony conviction to a misdemeanor using the mode of procedure that it had adopted – i.e., entering an Order of Conviction and Sentencing Order that it believed could later be modified by it after keeping the matter within the breast of the Court.

The substantial error occurred when the Trial Court advised Hackett that it would take the felony charge under advisement but failed to enter a written order incorporating that decree. "[A] court has inherent power to correct any clerical error or misprision in the record so as to cause its acts and proceedings to be set forth correctly." *Council v. Commonwealth*, 198 Va. 288, 292, 94 S.E.2d 245, 248 (1956). "The power may be exercised not only in civil cases but also in criminal prosecutions." *Harris v.*

Commonwealth, 222 Va. 205, 209, 279 S.E.2d 395, 398 (1981). This power allows a court not only the ability to correct clerical errors in existing orders timely entered, but also the entry of orders memorializing action previously taken or judgment previously rendered in a timely fashion. *Id*. (allowing *nunc pro tunc* entry of order certifying juvenile for trial as an adult where court timely ruled on issue, as memorialized in letter to counsel, but did not enter order before expiration of twenty-one-day period prescribed by applicable statute). This is permissible because " '[a] judgment is the determination by a court of the rights of the parties, as those rights presently exist, upon matters submitted to it in an action or proceeding. A written order or decree endorsed by the judge is but evidence of what the court has decided.' " *Rollins v. Bazile*, 205 Va. 613, 617, 139 S.E.2d 114, 117 (1964) *quoting Haskins v. Haskins*, 185 Va. 1001, 1012, 41 S.E.2d 25, 31 (1947)). And, a court may only enter an order *nunc pro tunc* if there exists competent evidence to do so. *Council*, 198 Va. at 292, 94 S.E.2d at 248. In fact, counsel for Hackett and the Commonwealth suggested (at a later court proceeding) that this was the manner in which the Trial Court's error could be corrected, however, those suggestions were rejected by the Trial Court. (J.A. 137-138). This was reversible error.

When acting *nunc pro tunc*, a trial court need not reacquire jurisdiction over the case. Rather, the trial court is only correcting the record by the entry of the order, "under the accepted fiction that the order relates back to the date of the original action of the court 'now for then.'….[but]…'the power to amend should not be confounded with the power to create. While the power is inherent in the court, it is restricted to placing upon the record evidence of judicial action which has actually been taken, and presupposes action taken at the proper time.'" *Davis v. Mullins*, 251 Va. 141, 149, 466 S.E.2d 90, 94 (1996) (*quoting Council v. Commonwealth*, 198 Va. 288,292, 94 S.E.2d 245, 248 (1956). Entry of a *nunc pro tunc* order in this case would have been appropriate, because it would have merely been correcting the record of judicial action that had been promised throughout the proceedings.

Here, there existed substantial evidence on which the Trial Court should have entered an order *nunc pro tunc* to incorporate its mandate, made at the time of the initial hearings on the matter, that it would take the charge under advisement for future disposition as a misdemeanor. At the time of the entry of the guilty plea of Hackett, both the Commonwealth and counsel for the defendant asked the court to take the matter under advisement, which from the oral record, it accepted (J.A. 39). Later, at the

subsequent sentencing hearing, the Trial Court advised Hackett that it would take the matter under advisement and would reduce the felony charge to a misdemeanor if Hackett complied with the court's instructions (J.A. p. 39 - 40). But both the guilty plea order and the sentencing order did not accurately reflect the Trial Court's intent or action at the time. In fact, the Trial Court conceded that at the time of those hearings, it "intended to reduce the felony to a misdemeanor." (J.A. 33).

Quite simply, what was stated from the bench, with the agreement of all concerned, was not what was reduced into the Court's Orders. Therefore, a correction of the written record was required, *nunc pro tunc*, in order for the Orders in the case to "speak the truth."

There is no dispute that Hackett complied with the Trial Court's terms and conditions. In fact, as the Trial Court noted Hackett was a model citizen and "did well on probation, obtained a job, got married, paid all court costs and has had no further violations." (J.A. 31). Hackett's compliance with the Trial Court's orders given to him in open court should not prevent him receiving the benefit of was intended, just because the Trial Court erred in its written rulings. Unknown to Hackett at the time, the Trial Court mistakenly entered final orders both on the plea and sentence that prevented the eventual intended action of the Court from being carried out

at a later date, due to the restrictions of Rule 1:1 of the Rules of the Supreme Court.

While Rule 1:1 of the Rules of the Supreme Court of Virginia provides that a trial court may modify, vacate or suspend all judgments, orders, and decrees within twenty-one days of the date of entry, *but no longer*, because the expiration of the twenty-one day time limitation divests the trial court of jurisdiction, *See Virginia Dept. of Corr. v. Crowley*, 227 Va. 254, 260, 264. 316 S.E.2d 439, 442,444 (1984), it is still nevertheless subject to limited exceptions, *Davis v. Mullins,* 251 Va. 141, 149, 466 S.E.2d 90, 94 (1996), because the "court has the inherent power, independent of the statute, upon any competent evidence, to make the record 'speak the truth.'" *at* 149, 94. (*quoting Netzer v. Reynolds*, 231 Va. 444, 449, 345 S.E.2d 291,294.).

In this case, the Trial Court had the inherent power to correct the written record to reflect what it intended to do, consistent with what it said, and did, in open court. It was therefore reversible error for the Court not to correct the record by Order, *nunc pro tunc.*

II. THE TRIAL COURT'S CONVICTION AND SENTENCING ORDERS VIOLATED HACKETT'S CONSTITUTIONALLY PROTECTED RIGHTS TO DUE PROCESS, FUNDAMENTAL FAIRNESS, AND ARE THEREFORE VOID *AB INITIO*.

(Relating to Assignment of Error III- IV)

A court's power to hear a criminal case comes not from the Rules of Court but from the Virginia Constitution and the Acts of the General Assembly. Judicial power, after all, derives from "the sovereign authority which organizes the court," *Thacker v. Hubard*, 122 Va. 379, 386, 94 S .E. 929, 930 (1918) (*quoting Cooper v. Reynolds*, 77 U.S. 308, 316 (1870)), and not from the court itself. The general powers of the judiciary in Virginia are conferred by Article VI, Section 1 of the Constitution of Virginia, which states: "Subject to the foregoing limitations, the General Assembly shall have the power to determine the original and appellate jurisdiction of the courts of the Commonwealth." The concept of jurisdiction determines the powers of the Court and what it can, and cannot do. The powers and authority of Virginia's Circuit Courts are entirely prescribed by statute. *Kelley v. Stamos*, 285 Va. 68, 75, 737 S.E.2d 218, 221.

The primary "function of the judiciary [is] the act of rendering judgment in matters properly before it." *Moreau*, 276 Va. at 136, 661 S.E.2d at 846. The act of a judgment by a court has been defined as being "the determination by a court of the rights of the parties, as those rights presently exist, upon matters submitted to it in an action or proceeding." *Rollins*, 205 Va.at 617, 139 S.E.2d at 117.

In this case, there is no dispute that the Trial Court had jurisdiction over both the subject matter and the parties, and that it also possessed the ability to exercise judgment as to Hackett. The question is whether the Trial Court employed a lawful and proper method when it tried to effectuate a decision requested by the parties and decreed by the Court.

Again, it is well settled that it is within the "inherent authority of the court to 'take the matter under advisement' or 'continue the case for disposition' at a later date. Such practices involve the essence of rendering judgment." *Moreau*, 276 at 137, 661 S.E.2d at 846, and that "the act of rendering judgment is within the inherent power of the court and that the very essence of adjudication and entry of judgment by a judge involves discretionary power of the court." *Id*.

It cannot be said that Hackett's tendering of his guilty plea was fairly given, when he understood that both the government and the defense would ask the court to take such plea "under advisement" and to do so in a manner that was the trial court's habit in cases such as this, without the benefit of plea agreements, by entering a conviction order and later modifying it by deferring final sentencing to a later date after a period of terms and conditions imposed by the court upon the defendant. Hackett entered his guilty plea based upon this reliance that the Trial Court would

take his plea under advisement, with the consent and agreement of the Commonwealth. A "guilty plea is a serious and sobering occasions inasmuch as it constitutes a waiver of" fundamental rights: to a jury trial, *Duncan v. Louisiana,* 391 U.S. 1 (1968); to confront ones accusers, *Pointer v. Texas* 380 U.S. 400 (1965), to present witnesses in one's defense, *Washington v. Texas*, 388 U.S. 14 (1967), to remain silent, *Malloy v. Hogan* 378 U.S. 1 (1964), and to be convicted by proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970)). The United States Supreme Court has further recognized that "unfairly obtained" guilty pleas ought to be vacated. *See Kercheval v. United States,* 274 U.S. 220 (1927). Had Hackett known at the time that the method that had been employed by the Trial Court previously in similar circumstances would have later found to be invalid, he would not have proceeded in such a manner.

And, it is without question from the record that the parties asked the Trial Court to take Hackett's felony charge under advisement at the plea hearing, and that the Trial Court understood the request at that hearing, and later agreed to the request at sentencing. (J.A., p. 39, ¶1; J.A., p. 129, lines 6-7). Nevertheless, the Trial Court, on its own, entered a written order finding Hackett guilty of the felony charged in the indictment, because the Court "was under the mistaken impression that it had the discretion to

reduce the charge, as requested," even after it entered both that Order and a subsequent Sentencing Order. (J.A., p. 33). However, it was clearly the intent of the Court to consider a disposition that contemplated a misdemeanor conviction at the conclusion of the matter. This is further evidenced by the fact that at the sentencing hearing, the Trial Court gave Hackett a choice, with a promise attached to each—either leave the Court with no jail time and a felony conviction, or subject himself to a significant jail sentence and other terms for the chance at a later reduction of the felony to a misdemeanor. This decree from the Trial Court amounted to a judgment which continued the case with "terms akin to probation status with the promise from the court of a particular disposition at a later date." *Moreau*, at 137, 661 S.E.2d at 847. In a sense, the Court made Hackett an offer, which he accepted; the term of incarceration was the consideration given, and the reduction of the felony to a misdemeanor was the benefit of the bargain. Thus, an enforceable contract existed between the parties. The breach of that contract by the Trial Court, after Hackett's liberty was infringed and after he complied with the Trial Court's requests, was a complete and utter violation of Hackett's due process rights.

a. Constitutional Due Process and Fundamental Fairness mandate that the Court's intention to reduce the felony to a misdemeanor be enforced.

Hackett seeks to have the intended act of the Trial Court carried out to reduce the felony charge to a misdemeanor, on the grounds that the failure of the trial court to do so amounted to a violation of his constitutionally protected rights to Due Process and the principles of fundamental fairness. These constitutional concerns focus on the integrity of the criminal justice system. As noted in *United States v. Carter*, 454 F2d 426, 428 (4th Cir. 1972), in criminal prosecutions, "[t]here is more at stake than just the liberty of this defendant. At stake is the honor of the government [,] public confidence in fair administration of justice, and the efficient administration of justice in a federal scheme of government." *Id*. *See also* U.S. Const., Amend. V, XIV. Every agreement in which an accused waives a constitutional right in exchange from the government, whether it be from the prosecution or from the bench, is subject to fundamental fairness under the Due Process clauses of the Fifth and Fourteenth Amendments. *See Lampkins v. Commonwealth*, 44 Va. App. 709 (2005). Fundamental fairness requires that the government be scrupulously fair when honoring the terms of such proposals, because "fundamental fairness and public confidence in government officials require that [the government] be held to 'meticulous standards of both promise and performance.'" *Id*. at 728-729 (*quoting Palermo v. Warden*, 545 F.2d 286,

296 (2d Cir. 1976)). Here, the agreement of the parties and the Trial Courts' promise to Hackett implicated Hackett's constitutional rights (including but not limited to the deprivation of his liberty interests), and because Hackett took detrimental action in reasonable reliance upon the promise, the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution require that the felony conviction of Hackett be reduced to a misdemeanor.

Both the United States and Virginia Constitutions establish a trust between the judicial system and those who encounter it. Hackett relied upon the Trial Court's words, actions and promises to his detriment. If criminal defendants cannot trust the promises of a trial court judge- the criminal justice system in Virginia will cease to function. This is fundamental fairness at is core and Hackett's felony conviction runs afoul of these inherent principles.

b. The Trial Court's erroneous conviction and sentencing Orders are therefore void *ab initio*.

The Trial Court used its *proper* inherent powers to take the matter under advisement and defer final disposition to a later date, but *improperly* used a procedure in an attempt to achieve its goals of taking the matter under advisement. At that time, the Trial Court believed it could effectuate the parties' request by imposing terms and conditions on Hackett. The

procedure utilized by the Trial Court was one that it could not lawfully adopt.

Again, the bargain offered to Hackett by the Trial Court was onerous, but the promise of a future benefit was great: if Hackett was willing to serve a jail sentence that was far above that called for under the sentencing guidelines (nine months active time, compared to the "probation/no incarceration" called for in the sentencing guidelines), and if he complied with all other terms during the two-year period of supervised probation, at that time the charge would be then reduced to a misdemeanor. The Trial Court mistakenly believed that this could be accomplished by entering conviction and sentencing orders, when in fact the mode of the procedure used by the court was one that the court "could not lawfully adopt," *Singh*, 261 Va. at 51-52, 541 S.E.2d at 551 (2001), because these were final orders that could only be modified under certain limited circumstances. Consequently, the Trial Court violated Hackett's constitutional rights to substantive and procedural due process when it promised to do something that ultimately it could not do. Hackett argued that the Order was therefore void at the time it was entered, because it clearly did not accomplish the intent contemplated by the defense, the prosecution, and the sentencing court.

The Court of Appeals, applying principles consistent with Rule 1:1 held that unless the Trial Court modified its original conviction order within twenty-one (21) days of the date of entry of that order, "and no longer," the Trial Court was prohibited from any further correction. However, the United States Supreme Court has held that there may be other remedies available to a defendant under these similar circumstances: while speaking to plea bargains, the Court nevertheless stated that when the government's obligations to the defendant are not met, "rescission is not the only possible remedy; in *Santobello [v. New York*] we allowed for a resentencing at which the government would fully comply with the agreement – in effect specific performance of the contract. 404 U.S. at 263. In any case, it is entirely clear that a breach does not cause the guilty plea, when entered, to have been unknowing or involuntary. It is precisely because the plea was knowing and voluntary (and hence invalid) that the Government is obligated to uphold its side of the bargain." *Puckett v. United States*, 556 U.S. 129, 137 (2009). Here, the contract entered into by Hackett and the Trial Court created obligations upon the Trial Court that were not met by it, even though Hackett furnished the consideration for the parties' agreement (his guilty plea), and performed the requirement of the Trial Court as required by it to obtain the ultimate disposition of the case as the "benefit of the

bargain" he entered with the Trial Court. The Court of Appeals erroneously failed to find that a valid contract between Hackett and the Court existed, that the Court breached the agreement, and that constitutional due process and fundamental fairness required its enforcement. And, it committed reversible error by not remanding the matter back to the Trial Court for a new sentencing hearing that is required to effectuate the parties' intended agreement and remedy the due process violation.

Moreover, the Court of Appeals in its *Per Curiam* opinion ignored the fact that the Trial Court employed an improper method of taking Hackett's case under advisement that it could not lawfully adopt.

Whether an alleged error by a trial court renders its order *void ab initio* or merely voidable turns on the distinction "between a court lacking jurisdiction to act upon a matter and the court, while properly having jurisdiction, nonetheless erring in its judgment*." Kelley v. Stamos*, 285 Va. 68, 75, 737 S.E.2d 218, 221–22 (2013). An order that is *void ab initio* is "without effect from the moment it came into existence," *Id*., and can be attacked "by all persons, anywhere, at any time, or in any manner." *Wright v. Commonwealth*, 52 Va.App. 690, 704, 667 S.E.2d 787, 794 (2008) (*en banc*) *quoting Singh*, 261 Va. 48, 51–52, 541 S .E.2d 549, 551 (2001)). Moreover, a court finding that an order is *void ab initio* effectively sidelines

procedural default principles, including Rule 5A:18's requirement that arguments on appeal seeking to overturn a trial court order must first be presented and ruled upon by the trial court. *See e.g.*, *Gheorghiu v. Commonwealth*, 280 Va. 678, 689, 701 S.E.2d 407, 414 (2010) (describing "a conviction based on a void sentence" as one of the "limited circumstances" in which the ends-of-justice exception is applied); *Gordon v. Commonwealth*, 61 Va.App. 682, 685–86, 739 S.E.2d 276, 278 (2013) (applying the ends-of-justice exception to an order that was *void ab initio*). As stated in *Singh*, "[a]n order is *void ab initio* if entered by a court in the absence of jurisdiction of the subject matter or over the parties, if the character of the order is such that the court had no power to render it, *or if the mode of procedure used by the court was one that the court "could not lawfully adopt*." 51-52, 541 S.E.2d at 551. (emphasis added).

The Trial Court should have, at the time it accepted the representations of the parties that the final disposition of the criminal charge should be taken under advisement, used a different (and lawful) mode in effectuating what it wanted to occur. For example, it could have continued the matter without entering the final Conviction Order, revoked Hackett's bond for a period of time (9 months), placed Hackett on probation supervision after his release from incarceration, and continued the case for

final disposition where it could have then reduced the charge from a felony to a misdemeanor. Likewise, the Trial Court could have amended its Conviction Order using the court's *nunc pro tunc* powers. But, it did not. Rather, the Trial Court believed that it could enter orders that it could later modify. But, it could not under recent appellate case law. Therefore, the Orders were *void ab initio*, because the method of procedure employed was improper and one that the Court could not lawfully adopt in order to carry out the intended result.

CONCLUSION

For the foregoing reasons, Matthew Hackett urges this Court to reverse the judgement of the Court of Appeals and the Trial Court; to remand this matter back to the Trial Court for further proceedings; and to take such other and further actions it deems reasonable and appropriate.

Respectfully Submitted,

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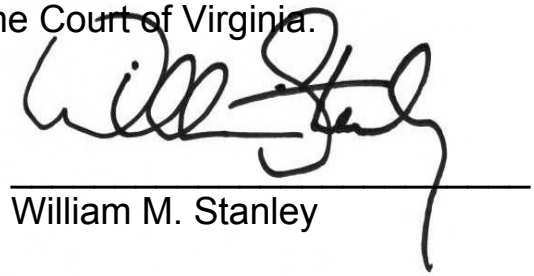
REQUIRED STATEMENTS

I hereby certify, pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia that:

1. Counsel for Appellant has complied with Rule 5:26 of the Rules of the Supreme Court.
2. A copy of the Brief of Appellant has been mailed and emailed on the 9th day of January, 2017 to all opposing counsel of record.
3. That this Brief of Appellant contains 5,753 words.

CERTIFICATE OF SERVICE

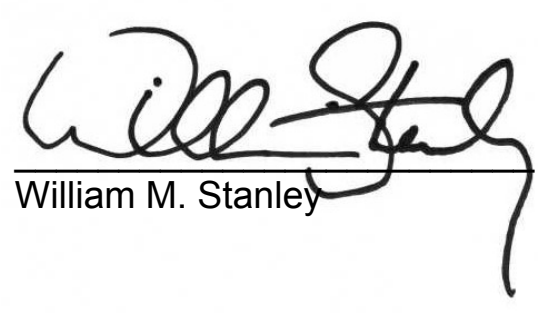
This is to certify that the original, one electronic version and ten copies of this opening brief have been filed with the Clerk of the Supreme Court of Virginia (paper copies delivered to court on January 10, 2017 due to the snow day), and that a copy has been emailed and mailed to all counsel of record this 9th day of January, 2017, in compliance with Rule 5:26(e) of the Rules of the Supreme Court of Virginia.



William M. Stanley

CERTIFICATE OF COMPLIANCE

I do hereby certify that the above has a word count of 5,753 words and does not exceed the required word count 12,300 set by Rule 5:26(b).



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