IN THE

Supreme Court of Virginia

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

FELECIA AMOS,

Appellee.

No. 130757

On Writ of Error
to the Court of Appeals of Virginia

BRIEF FOR APPELLEE

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INTRODUCTION

Felecia Amos was charged, convicted, and sentenced to jail without the most basic due process. The *en banc* Court of Appeals reversed her conviction, holding that the court below could not use its summary contempt powers to punish Ms. Amos without counsel or a hearing. This Court should affirm.

Throughout this case, the Commonwealth has never once tried to defend Ms. Amos's summary contempt conviction on the merits. Nor could it. The circuit court gave Ms. Amos no notice of the charges against her, no opportunity to seek counsel, no opportunity to offer evidence in her defense, and no opportunity to cross-examine the witnesses against her. Instead, the court summoned her to the podium, charged her with a crime, convicted her, and remanded her to custody — all in a single uninterrupted monologue. That was unmistakable error. Longstanding precedent makes clear that the summary contempt power applies only where the judge directly observes all elements of the offense and need not rely on the testimony of others to establish the defendant's guilt. The Commonwealth does not dispute that Ms. Amos's conviction fails that standard here.

Instead, the Commonwealth stakes its entire case on the theory that Ms. Amos defaulted her claims under Rule 5A:18 by not properly objecting

in the circuit court. But the Court of Appeals correctly ruled that Ms. Amos's claims are reviewable under Rule 5A:18's "good cause" exception because Ms. Amos was denied a contemporaneous opportunity to object. Code § 8.01-384(A) provides that, "if a party has no opportunity to object to a ruling or order ***at the time it is made***, the absence of an objection shall not thereafter prejudice him . . . on appeal." (Emphasis added). That is what happened here: The circuit judge ordered Ms. Amos remanded to custody without giving her any opportunity to object "at the time [the contempt order] was made."

Rule 5A:18's "ends of justice" exception also empowered the Court of Appeals to afford relief, for multiple reasons. First, that exception applies when a court summarily punishes conduct that does not fall within the definition of summary contempt. Such a conviction is void *ab initio* and can be challenged at any time. Second, the exception applies where a defendant is denied "essential rights." Here, the court deprived Ms. Amos of virtually every right the Constitution guarantees a defendant. Finally, review is necessary to avoid a violation of Ms. Amos's Sixth Amendment right to counsel. Waiver of that right must be knowing and voluntary, and the record contains no evidence of such a waiver here.

STATEMENT OF THE CASE

Felecia Amos was convicted by the Circuit Court of Arlington County on June 10, 2011, of summary contempt. App. 99.[1] On June 27, 2011, she filed a *pro se* motion seeking to vacate that order. App. 95-97. The court did not rule on that motion.

That same day, Ms. Amos also filed a timely notice of appeal. App. 94. A panel of the Court of Appeals initially affirmed her conviction on August 7, 2012. App. 10-14. After granting rehearing *en banc*, however, the court reversed in a published opinion on April 9, 2013. App. 2-9. The Commonwealth filed a petition for review, which this Court granted on September 24, 2013.

STATEMENT OF FACTS

I. Background

Felecia Amos and her ex-husband Antonio have a troubled past. While they share a child, they divorced in April 2011. App. 62. On July 30, 2010, the Circuit Court of Arlington County convicted Mr. Amos of assault and battery for attacking Ms. Amos. App. 105-06. The court sentenced Mr. Amos to six months' imprisonment, suspended on condition of good behav-

[1] Citations to "App." are to the joint appendix filed in this Court.

ior. App. 105. Among other things, the court ordered that Mr. Amos "shall have no contact with" and "shall not harass" Ms. Amos. *Id.*

On October 30, 2010, Ms. Amos wrote a letter to the Commonwealth's Attorney complaining that Mr. Amos had violated his probation. App. 102-04. Ms. Amos reported that he had violated the "no contact" order by communicating with her directly rather than relaying messages through her mother. App. 102-03. She also complained that he had videotaped her during an October 21, 2010 custody exchange. App. 103. Mr. Amos, she explained, was trying to "intimidate and harass" her. *Id.*

Ms. Amos's letter also described another custody exchange at a McDonald's restaurant a week later, on October 29, 2010. App. 102. According to the letter, Mr. Amos had cursed at her and told her she was "done" and "going down." *Id.* The letter reported that she then asked a stranger to escort her out to her car, and that Mr. Amos had threatened the man. *Id.* Finally, it stated that Mr. Amos followed her in his car after she drove away, until she pulled over to force him to pass. *Id*.

II. The Revocation Proceedings

The Commonwealth's Attorney's Office obtained a rule to show cause why Mr. Amos's probation should not be revoked. App. 100-01. A hearing was then held in Ms. Amos's absence on May 27, 2011. App. 85-93. At

that hearing, Mr. Amos's lawyer described Ms. Amos's story as "completely untrue" and promised to refute it with an "independent witness" and "tape recordings." App. 87, 90. The court ordered counsel not to give any advance notice of that evidence to Ms. Amos: "***Don't tell her.*** . . . I'm going to get to the bottom of it." App. 91 (emphasis added).

The hearing resumed on June 10. App. 15. The Commonwealth called Ms. Amos, who testified consistently with her letter. App. 19-44. Mr. Amos testified in his own defense. App. 61-81. He also called Sgt. Jason Salinas, whom he had brought to the October 29 custody exchange. App. 46-61. Sgt. Salinas admitted that he had accompanied Mr. Amos, a fellow solider, because his commanding officer had asked for "a volunteer to help a soldier out." App. 46.

Mr. Amos's and Sgt. Salinas's testimony confirmed Ms. Amos's account in significant part. Mr. Amos admitted to communicating directly with his ex-wife. App. 74-76, 79-80. He also admitted to videotaping the October 21 custody exchange. App. 76-79. Finally, Sgt. Salinas confirmed that, during the October 29 exchange, Ms. Amos left the McDonald's accompanied by another man. App. 52-53.

In other respects, however, Sgt. Salinas and Mr. Amos contradicted Ms. Amos. Sgt. Salinas testified that Mr. Amos did not say anything to his

ex-wife during the October 29 exchange and did not follow her out. App. 49-53. Mr. Amos likewise denied saying anything to his ex-wife or any other customer, and denied following his ex-wife in his car. App. 64-67.

Mr. Amos also testified that he had secretly tape-recorded the October 29 exchange. App. 67-68. He stated that he had copied the recording onto a CD, which he claimed contained "the entire event." App. 67. Mr. Amos's counsel played a portion for the court, omitting about four minutes "in the interest of time." App. 69-72. He also submitted a transcript. App. 68-69, 111-14. The recording itself is not in the record, apparently because the court never retained a copy.

The transcript reflects Ms. Amos talking to her son about his medication and Mr. Amos ordering a drink for him. App. 112-13. It does not reflect any profanity or other statements by Mr. Amos to his ex-wife. *Id.* The transcript repeatedly notes the son crying. *Id.* According to the *pro se* motion Ms. Amos later filed, there were "significant pauses throughout the recording." App. 96 ¶ 5.

After hearing Mr. Amos testify, the Commonwealth's Attorney declined to cross-examine him. App. 80. The court did not offer Ms. Amos any chance to explain herself, to cross-examine Sgt. Salinas or Mr. Amos,

or to contest the tape's authenticity. Instead, after dismissing the rule to show cause, App. 81, the court stated:

> THE COURT: I'm not through. I am not through. The Court is not through.
>
> When this first started, I said, well, it has been eight months without incident, so — it's not unusual in a divorce case to see some back and forth, but there has been nothing for eight months, and I just don't know what would be accomplished by punishing this man in keeping this flame burning.
>
> But we have a different situation now.
>
> There's no question that he has not violated this Court's orders. But what we do have is a various [sic] situation that this Court does not take lightly.
>
> Ms. Amos, come up here. Come up here by the podium, Ms. Amos. Yes ma'am. Come on up here. I want to make sure we're on the same page.
>
> Stand in front of that podium.
>
> You have come into this court and made some serious accusations, and you have flat-out lied under oath. And it's very offensive to this Court, to every person in the legal community what you're doing. You're nothing but a vindictive woman towards this man.
>
> I can understand your dislike for whatever reason. But you will not, as far as this Court is concerned, use this process to further that vindictiveness.
>
> The Code of Virginia, under 18.2-456 provides that courts and judges may issue attempts [sic] for contempt and punish them summarily, only in the following cases — and there are several, but I want to share one with you.

> "Misbehavior in the presence of the court or so near thereto as to obstruct or interrupt the administration of justice."
>
> I can't think of any more interruption of justice than what you have done deliberately in this courtroom.
>
> And the Court finds you in contempt of court. You're sentenced to jail for ten days.
>
> Remand her into custody, Sheriff.
>
> THE COURT: Call the next case.

App. 81-83. As that transcript reflects, the court gave Ms. Amos no opportunity to object during its uninterrupted monologue. Instead, it proceeded directly from charging her to finding her guilty, sentencing her, and remanding her to custody.

On June 27, 2011, Ms. Amos filed a *pro se* "Motion to Vacate Sentence and Object to This Honorable Courts [*sic*] Finding." App. 95-97. She reaffirmed that she had "testified truthfully." App. 95 ¶ 2. And she objected that she "was never afforded notice and/or hearing" and "was never given an opportunity to have counsel." App. 96 ¶¶ 8-10. Quoting *Scialdone v. Commonwealth*, 279 Va. 422, 689 S.E.2d 716 (2010), she pointed out that her conviction was invalid because contempts may be punished summarily only if "'all of the essential elements of the misconduct . . . are actually observed by the court.'" *Id.* ¶¶ 12-13. Although Ms. Amos properly filed that

motion in the clerk's office, *see* App. 95, the court did not rule on it. Ms. Amos filed a *pro se* notice of appeal the same day. App. 94.

III. The Court of Appeals' Decision

A panel of the Court of Appeals initially affirmed Ms. Amos's conviction on the ground that Ms. Amos had defaulted her claims. App. 10-14. Rule 5A:18, the court noted, provides that "'[n]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice.'" *Id.* at 11. The court observed that Ms. Amos did not object at the June 10 hearing while being led off to jail. *Id.* It did not dispute that her later *pro se* motion to vacate set forth her claims in detail. But the court found that motion insufficient because the circuit court never ruled on it. *Id.* at 11-12.

The Court of Appeals then granted rehearing *en banc* and, on April 9, 2013, reversed. App. 2-9. The court first noted that Code § 8.01-384(A) provides that "'if a party has no opportunity to object to a ruling or order ***at the time it is made***, the absence of an objection shall not thereafter prejudice him . . . on appeal.'" *Id.* at 3 (emphasis added). That statute applied here, the court held, because "Mrs. Amos did not have an opportunity to object at the time of the ruling or order." *Id.* at 4.

As the court explained, "Mrs. Amos, who had appeared as a witness rather than as a party, was called to the bench. After the court castigated Mrs. Amos for her lies and for her vindictiveness toward her husband, the court ordered the sheriff's deputy to remove Mrs. Amos from the courtroom and directed the clerk to call the next case." App. 4. "On review of this record," the court concluded, "it is plain that Mrs. Amos did not have the 'opportunity to object to [the] ruling or order . . . at the time it [was] made.'" *Id.* The court noted that, even when punishing a contempt summarily, "a court ordinarily will afford the contemnor the opportunity to speak." *Id.* at 8 n.2 (citing authorities). "The record reveals no such opportunity here." *Id.*

The court acknowledged that Ms. Amos could have filed (and did file) a motion to vacate her conviction ***after*** the hearing. App. 4-5. But that motion was beside the point, because Code § 8.01-384(A)'s plain text precludes default "'if a party has no opportunity to object to a ruling or order ***at the time it is made***.'" *Id.* at 4 (emphasis added). "Whatever other situations Code § 8.01-384(A) may cover, it plainly applies when a litigant has been ***foreclosed from*** making a timely objection 'at the time the ruling or order was made.'" *Id*. The purpose of summary contempt, the court added, is to enable a judge to punish misbehavior ***immediately***, and a delayed

objection would deny the judge the opportunity to rectify errors at a time when that power could still be effectively exercised. *Id*.

Turning to the merits, the court observed that "the Commonwealth . . . does not attempt to defend the correctness of the summary contempt finding." App. 5. Under *In re Oliver*, 333 U.S. 257 (1948), and *Scialdone v. Commonwealth*, 279 Va. 422, 689 S.E.2d 716 (2010), summary proceedings are impermissible "'[i]f some essential elements of the 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.'" *Id*. "The truth or falsity of Mrs. Amos's testimony . . . 'depend[ed] upon statements made by others.' Therefore, summary contempt was not available." *Id.* (citations omitted).

The dissent did not dispute that the circuit court deprived Ms. Amos of a meaningful opportunity to object at the hearing. App. 6. But it argued that she nonetheless defaulted her claims because she could have filed a motion after the fact. *Id.* at 6-7. While Ms. Amos in fact ***did*** file such a motion, the dissent deemed it insufficient because "there is no indication in the record that appellant sought a ruling" on it. *Id.* at 6.

SUMMARY OF ARGUMENT

Basic principles of due process require that an individual charged with a crime have notice, an opportunity to respond, and the assistance of counsel. The circuit court denied Ms. Amos all of those rights. She was charged, convicted, sentenced, and remanded to custody, all in the span of a few moments, in a proceeding where she was not a party, was not represented by counsel, and had no fair opportunity to meet the evidence against her. A more complete denial of basic procedural rights is difficult to imagine.

Although the summary contempt power provides an exception to normal due process requirements, it applies only in narrow, carefully defined circumstances. A judge may punish contempts summarily only where "'all of the essential elements of the misconduct are under the eye of the court [and] are ***actually observed by the court***,'" and the judge need not "'depend upon statements made by others for his knowledge.'" *Scialdone v. Commonwealth*, 279 Va. 422, 443-44 (2010) (quoting *In re Oliver*, 333 U.S. 257, 275-76 (1948)) (emphasis added). That clearly is not the case here. The judge did not have personal knowledge of whether Ms. Amos's testimony was true or not; he relied on uncross-examined and untested evidence from her ex-husband.

The Commonwealth has ***never even attempted*** to construct a plausible theory under which the circuit court could legitimately wield its summary contempt power against Ms. Amos. The record thus stands uncontested that Ms. Amos suffered an egregious denial of her constitutional rights. Instead of defending the circuit court's actions, the Commonwealth tries to avoid review by invoking Rule 5A:18's contemporaneous objection requirement. That rule, however, contains two express exceptions — for "good cause" and to attain the "ends of justice" — both of which apply here.

First, there was "good cause" for Ms. Amos's failure to object at the hearing because the circuit court denied her a meaningful opportunity to object. Although Rule 5A:18 does not define "good cause," Code § 8.01-384(A) states that, "if a party has no opportunity to object to a ruling or order ***at the time it is made***, the absence of an objection shall not thereafter prejudice him on a motion for a new trial or on appeal." (Emphasis added). Cases falling within that statute necessarily qualify as "good cause" within the meaning of the rule.

The Court of Appeals properly found the statute applicable here. Ms. Amos had no meaningful opportunity to object to the contempt ruling "at the time it [wa]s made" because the circuit judge summoned her to the podium, convicted her, sentenced her, and remanded her to custody, all without giv-

ing her the slightest chance to respond. That Ms. Amos could have filed a motion for reconsideration at some ***later*** time is irrelevant. Under the plain text of Code § 8.01-384(A), all that matters is whether Ms. Amos had an "opportunity to object to a ruling or order ***at the time it [wa]s made***."

Rule 5A:18's "ends of justice" exception also applies, for several reasons. First, that exception applies where a court summarily punishes conduct outside the definition of summary contempt. Where "'the mode of procedure used by the court was one that the court could not lawfully adopt,'" the judgment is void *ab initio* and may be challenged whether or not there was any objection below. *Collins v. Shepard*, 274 Va. 390, 402, 649 S.E.2d 672, 678 (2007). Second, the exception applies where a defendant has been denied "'essential rights.'" *Rowe v. Commonwealth*, 277 Va. 495, 503, 675 S.E.2d 161, 165 (2009). Here, the court denied Ms. Amos virtually every right the Constitution guarantees a defendant. Finally, review is necessary to avoid a violation of Ms. Amos's Sixth Amendment right to counsel. Any waiver of that right must be knowing and voluntary, and the record contains no evidence of such a waiver here.

STANDARD OF REVIEW

The interpretation of a constitutional provision, statute, or rule is a question of law this Court reviews *de novo*. *See L.F. v. Breit*, 285 Va. 163,

176, 736 S.E.2d 711, 718 (2013); *Belew v. Commonwealth*, 284 Va. 173, 177, 726 S.E.2d 257, 259 (2012).

ARGUMENT

I. The Circuit Court Denied Ms. Amos Due Process of Law

A. Due Process Requires Notice, a Fair Opportunity To Rebut the Charges, and Assistance of Counsel

Basic due process requires that a defendant have notice of the charges and an opportunity to respond. *Powell v. Alabama*, 287 U.S. 45, 68 (1932). The defendant must be allowed to confront the witnesses against him, *Pointer v. Texas*, 380 U.S. 400, 404-05 (1965), to have compulsory process for obtaining evidence in his favor, *Washington v. Texas*, 388 U.S. 14, 17-18 (1967), and to have the assistance of counsel, *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963). The circuit court flouted every one of those guarantees here.

The court gave Ms. Amos no notice whatsoever of the charges against her. She did not even learn she would be charged with a crime until the judge summoned her to the podium, convicted her, sentenced her, and remanded her to custody, all within the span of a few moments. App. 81-83. Indeed, the judge affirmatively kept Ms. Amos in the dark by instructing counsel not to give her advance notice of the evidence to be used against her. App. 91.

Nor did Ms. Amos have any chance to defend herself. As a non-party witness in her ex-husband's probation hearing, she had no right to cross-examine either Sgt. Salinas or Mr. Amos. She had no chance to use compulsory process to gather evidence supporting her account of the facts. Nor could she obtain expert testimony to cast doubt on the authenticity of Mr. Amos's recording. In fact, the Commonwealth's Attorney simply declined to cross-examine Mr. Amos altogether, leaving his accusations wholly untested. App. 81.

Finally, Ms. Amos was denied her right to counsel. She came to the hearing as an unrepresented witness and could not possibly have retained counsel during the few seconds between her accusation and conviction. Without a lawyer, Ms. Amos had no realistic opportunity to rebut the charges or to preserve her arguments for review.

If, indeed, Ms. Amos filed a false criminal report and perjured herself at the hearing, there is no shortage of criminal statutes under which the Commonwealth's Attorney could prosecute her. *See, e.g.*, Code § 18.2-434 (perjury); *id.* § 18.2-460 (obstruction); *id.* § 18.2-461 (false reports). But Ms. Amos has consistently maintained her innocence, insisting that she "testified truthfully." App. 95 ¶ 2. A full and fair hearing could well undermine the accusations against her.

For example, the lower court convicted Ms. Amos based on evidence from her estranged ex-husband — a man previously convicted of assaulting her — and a fellow serviceman admittedly trying to "help a soldier out." App. 46. Those obvious sources of bias could have been explored in detail on cross-examination.

Moreover, while Mr. Amos testified that his audio recording accurately captured the events of October 29, the record reveals ample reasons to doubt his claim. Mr. Amos could have edited out his threats and curses in the version of the recording played for the court, *see* App. 111-14; he could have turned off or covered the microphone temporarily when he made the recording (consistent with the "significant pauses" in the recording described by Ms. Amos in her motion to vacate, App. 96 ¶ 5); the statements could have been contained in the four minutes of audio his attorney never played for the court, App. 72; or they could have been obscured by the constant crying of the Amoses' son, App. 112-14. Those powerful points, developed through expert analysis and cross-examination, could have undermined Mr. Amos's story. But because Ms. Amos had no opportunity to prepare a defense or seek counsel, the record is entirely one-sided.

B. The Circuit Court's Actions Cannot Be Justified As an Exercise of Its Summary Contempt Power

The circuit court justified dispensing with ordinary due process based on its summary contempt power under Code § 18.2-456. App. 82-83. But that power does not apply here.

"Criminal contempt is a crime in the ordinary sense," and accused contemnors are thus ordinarily entitled to "the protections that the Constitution requires of such criminal proceedings." *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826 (1994) (quotation marks omitted). Those protections include notice, the assistance of counsel, and an opportunity to confront adverse witnesses and offer evidence in response. *See, e.g.*, *Sialdone v. Commonwealth*, 279 Va. 422, 447 (2010); *In re Oliver*, 333 U.S. 257, 275 (1948); *Cooke v. United States*, 267 U.S. 517, 537 (1925). Those safeguards are particularly vital in contempt proceedings because of the potential for abuse: "Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court." *Bloom v. Illinois*, 391 U.S. 194, 202 (1968).

The law provides only a narrow exception to those safeguards — for "summary" contempt. To qualify as summary contempt, "'***all of the essential elements of the misconduct [must be] under the eye of the court [and be] actually observed by the court***.'" *Scialdone*, 279 Va. at 443 (quoting *Oliver*, 333 U.S. at 275) (emphasis added). "'If some essential elements of the 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 . . . .'" *Id.* at 443-44 (quoting *Oliver*, 333 U.S. at 275-76) (emphasis added). Virginia law incorporates that limitation by restricting summary contempt to, among other things, "[m]isbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice." Code § 18.2-456(1).

Courts have thus upheld summary contempt convictions only where the court ***directly observed*** all elements of the crime. In *Ex parte Terry*, 128 U.S. 289 (1888), for example, the U.S. Supreme Court affirmed the conviction of an attorney who assaulted a marshal in the courtroom. *Id.* at 305-06, 314. Likewise, in *Parham v. Commonwealth*, 60 Va. App. 450 (2012), the Court of Appeals affirmed a conviction where a losing party crumpled up copies of orders she received in open court. *Id.* at 459-60.

By contrast, a judge may not resort to summary contempt where he lacks personal knowledge of all elements of the offense. In *Oliver*, for example, the judge summarily held a witness in contempt because his testimony did not "jell" with earlier testimony of another witness. 333 U.S. at 259. The U.S. Supreme Court reversed, explaining that summary proceedings were impermissible because the judge's "conclusion that the petitioner had testified falsely was based, at least in part, upon the testimony given before him by one or more witnesses other than petitioner." *Id.* at 276.

Likewise, in *Scialdone*, the circuit court summarily held an attorney in contempt for doctoring a printout of a webpage and "offering that fraudulent document to the court." 279 Va. at 433. This Court reversed because, "[a]lthough Scialdone's offering the document into evidence occurred in the circuit court's presence, the court's ***conclusion that the document was altered*** was the result of extensive questioning and evidence-gathering" and was "based, at least in part, upon the testimony given . . . by one or more witnesses other than petitioner." *Id.* at 445-46 (alterations and quotation marks omitted).

This case falls squarely within that line of authority. Although Ms. Amos was present in court when she testified, an "essential element" of her alleged contempt was that her account of the October 29 custody ex-

change ***was not true***. Because the judge was not present at the exchange, he could not personally know whether Ms. Amos was telling the truth. "[A]ll of the essential elements of the misconduct" thus were not "under the eye of the court [and] actually observed by the court." *Oliver*, 333 U.S. at 275-76. Instead, the "conclusion that the [witness] had testified falsely was based, at least in part, upon the testimony given before him" by others. *Id.* at 276. Summary contempt was therefore forbidden.

II. Ms. Amos's Claims Are Reviewable for Good Cause

The Commonwealth does not (and cannot) defend Ms. Amos's contempt conviction on the merits. Instead, it urges that Ms. Amos defaulted her claims under Rule 5A:18. That rule provides: "'No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, ***except for good cause shown or to enable the Court of Appeals to attain the ends of justice***." (Emphasis added.) The Commonwealth claims that Ms. Amos never properly stated her objection in the circuit court because (1) she did not object at the hearing as she was being hauled off to jail; and (2) although she did object in her later motion to vacate, that motion was insufficient under *Brandon v. Cox*, 736 S.E.2d 695, 697 (Va. 2012), because she

did not afford the circuit court an opportunity to rule on it (having filed her notice of appeal the same day). Com. Br. at 25-28.[2]

Even assuming that Ms. Amos did not properly preserve her arguments below, however, that is only the beginning of the inquiry. Rule 5A:18 contains two express exceptions that permit review nonetheless: "for good cause shown" and "to enable the Court of Appeals to attain the ends of justice." The Court of Appeals properly found the "good cause" exception applicable here — and, as explained further below, the "ends of justice" exception also independently permits review.

A. Ms. Amos's Claims Are Reviewable for Good Cause under Code § 8.01-384(A)

Rule 5A:18 does not define what constitutes "good cause" for failing to preserve an objection. But Code § 8.01-384(A) states that, "if a party has no opportunity to object to a ruling or order ***at the time it is made***, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal." (Emphasis added.) That statutory exception is

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[2] The Commonwealth's accusation that Ms. Amos did not even "*intend* to afford the trial court an opportunity to rule on her motion," Com. Br. at 27 (emphasis added), is baseless. Ms. Amos filed both her motion to vacate and her notice of appeal *pro se* and had no reason to know that the latter filing could deprive the court of jurisdiction to act on the former. Her mistake, if any, was filing ***too many*** papers to attack her unlawful conviction at the same time. While the notice of appeal may have prevented the circuit court from acting on her motion to vacate, it is absurd to suggest that Ms. Amos ***intended*** that result.

"subsumed under the 'good cause' exception [to Rule 5A:18]." *Campbell v. Commonwealth*, 14 Va. App. 988, 995-96, 421 S.E.2d 652, 656-57 (1992) (Barrow, J., concurring). And the statute squarely covers this case.

The circuit court denied Ms. Amos any meaningful opportunity to contemporaneously object. The judge summoned her to the podium, convicted her, sentenced her, and remanded her to custody all in a single uninterrupted monologue. App. 81-83. A *pro se* witness cannot realistically be expected to lodge carefully reasoned legal objections while the bailiff physically hauls her off to jail. As the Court of Appeals recognized, Ms. Amos was "***foreclosed from*** making a timely objection 'at the time the ruling or order was made.'" App. 4.

The Commonwealth does not claim that Ms. Amos had any contemporaneous opportunity to object at the hearing. But it urges that she could have obtained review after the fact by filing a post-conviction motion (as indeed she did) and then taking additional, unspecified steps to obtain a ruling on her motion before filing her notice of appeal. Com. Br. at 24-25. As the Court of Appeals recognized, however, that ***later*** opportunity to object is irrelevant.

Code § 8.01-384(A) could hardly be clearer: "[I]f 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." (Emphasis added.) Under the plain text of that statute, what matters is whether Ms. Amos had an opportunity to object to the contempt order "at the time it [wa]s made," *i.e.*, at the hearing. The fact that she ***could*** have sought reconsideration through a later post-conviction motion does not mean she was ***required*** to do so in order to preserve her claims for appeal. Code § 8.01-384(A) directly speaks to that issue and makes clear that no such subsequent motion is required. The Court of Appeals thus straightforwardly applied the settled rule that a statute's "plain meaning" controls. App. 4 (citing *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007)).

B. *Nusbaum* Is Inapposite

The Commonwealth stakes almost its entire argument on *Nusbaum v. Berlin*, 273 Va. 385, 641 S.E.2d 494 (2007). *See* Com. Br. at 20-25. But *Nusbaum* bears no resemblance to this case.

In *Nusbaum*, the circuit court imposed a $250 contempt sanction on an attorney who was himself represented by counsel. 273 Va. at 397-98, 641 S.E.2d at 500. Although this Court commented that everyone was "surprised" by the ruling, *id.* at 403, 641 S.E.2d at 504, it never suggested that Nusbaum lacked a meaningful opportunity to object at the time. The

Commonwealth is thus wrong to claim that this Court "excused the absence of objection" at the hearing. Com. Br. at 21. Rather, this Court specifically faulted Nusbaum for not objecting "either ***during the argument at that hearing*** or after." 273 Va. at 403, 641 S.E.2d at 504 (emphasis added). Distinguishing Code § 8.01-384(A), *Nusbaum* held that "this is ***not*** a situation where the circuit court prevented Nusbaum from voicing his objections." *Id.* at 406, 641 S.E.2d at 505 (emphasis added).

Unlike Ms. Amos, Nusbaum was not a *pro se* witness dragged off to jail before he could say anything. He was an attorney fined $250 at a hearing where he and his attorney had every opportunity to voice their concerns. The Court of Appeals thus properly found *Nusbaum* inapposite because Nusbaum was not "foreclosed from offering an objection at the time the Court pronounced its judgment." App. 8 n.4.

To be sure, this Court ***also*** faulted Nusbaum for mishandling his objection at a later hearing. At that later hearing, Nusbaum argued that he could not be punished summarily, but stated: "'I am not asking [the court] at this time to change [its] ruling.'" 273 Va. at 397, 641 S.E.2d at 500. By adding that disclaimer, the Court ruled, "Nusbaum did not afford the circuit court an opportunity to rule intelligently on the due process issues that he now raises." *Id.* at 406, 641 S.E.2d at 505.

The fact that *Nusbaum* ***also*** mishandled his objection at that later hearing does not change the fact that he squandered his earlier opportunity to object to the order when it was made. That contemporaneous opportunity to object is what fundamentally distinguishes *Nusbaum* from this case. *Nusbaum* simply does not address situations like this, where "a litigant has been ***foreclosed from*** making a timely objection 'at the time the ruling or order was made.'" App. 4 (quoting Code § 8.01-384(A)).

C. Code § 8.01-384(A) Is Not Limited to "Time Sensitive" Matters

The Commonwealth urges that summary contempt "lacks the time sensitive quality of a failure to proffer expected evidence or the failure to object to improper argument," situations where an objection must be made immediately to be effective (such that a court's failure to allow a contemporaneous objection might be "good cause" for raising the claim on appeal even without a later motion for reconsideration). Com. Br. at 24. But that argument ignores the statute's text. Code § 8.01-384(A) does not distinguish between "time sensitive" objections and other objections, nor does it contain any requirement that a person prevented from contemporaneously objecting ***also*** file a later motion for reconsideration. Rather, the statute sets forth a simple, straightforward rule: "[I]f a party has no opportunity to object to a ruling or order ***at the time it is made***, the absence of an objec-

tion shall not thereafter prejudice him on motion for a new trial or on appeal." That statutory text perfectly describes what happened here, and for that reason, the statute applies.

Regardless, as the Court of Appeals explained, summary contempt ***is*** a time-sensitive matter. App. 4. The whole reason for summary contempt is that "a court's business could not be conducted unless it could suppress disturbances within the courtroom by ***immediate punishment***." *Oliver*, 333 U.S. at 274 (emphasis added). The consequences for both orderly courtroom proceedings and the defendant's liberty and reputation are immediate and severe. The court thus needs to know ***at the time of its ruling*** whether it has a lawful basis to exercise its summary contempt powers.

For precisely that reason, even "[w]hen exercising its power to hold a witness or a litigant in [summary] contempt, a court ordinarily will afford the contemnor the opportunity to speak." App. 8 n.2 (citing *Taylor v. Hayes*, 418 U.S. 488, 498 (1974) ("[W]here summary punishment for contempt is imposed during trial, 'the contemnor has normally been given an opportunity to speak on his own behalf in the nature of a right of allocution.'")). The law mandates that opportunity because the propriety of summary contempt should be determined ***before*** the defendant is sent to jail, not after.

Of course, the contemnor could still obtain ***some*** relief from a post-conviction motion, since the court could set aside the conviction after the fact. But the same is true of a failure to proffer evidence or a failure to object to improper argument: The court ***could*** grant relief after the fact simply by ordering a new trial. The point in either case is that after-the-fact resolution is far inferior to addressing the issues at the time the ruling is made. In that respect, summary contempt is a "time sensitive" matter, no different from the other matters the Commonwealth invokes.

D. The Court of Appeals Did Not Ignore Rule 5A:18 or Promulgate a New Rule of Appellate Procedure

Contrary to the Commonwealth's claims, the Court of Appeals did not interpret Code § 8.01-384(A) "unmoored from the provisions of Rule 5A:18." Com. Br. at 24. Rule 5A:18 does not define what constitutes "good cause." Under Code § 8.01-384(A), however, no objection is necessary where "a party has no opportunity to object to a ruling or order at the time it is made." That situation is necessarily "good cause" under the rule because the statute makes it so.

As the Court of Appeals recognized, therefore, "Code § 8.01-384(A) operates in conjunction with this rule." App. 3. The Commonwealth itself agrees that "the statutory exception is subsumed under the 'good cause' exception [to Rule 5A:18]." Com. Br. at 18 (quoting *Campbell*, 14 Va. App.

at 995-96, 421 S.E.2d at 656-57 (Barrow, J., concurring)). The Court of Appeals simply construed the statute and the rule together, consistent with the plain meaning of each.

Even if the statute and the rule did conflict, the statute would control. Virginia's Constitution provides that Rules of this Court "shall not be in conflict with the general law as . . . established by the General Assembly." Va. Const. art. VI, § 5. This Court has thus made clear that, "[t]o the extent . . . that any of th[e] rules could be construed as conflicting with the statute, the statute would 'prevail[] over [them].'" *Lahey v. Johnson*, 283 Va. 225, 230-31, 720 S.E.2d 534, 537 (2011). In fact, this Court has explicitly stated that "Code § 8.01-384 controls [its] interpretation . . . of Rule 5A:18." *Brown v. Commonwealth*, 279 Va. 210, 217, 688 S.E.2d 185, 189 (2010); *see also Helms v. Manspile*, 277 Va. 1, 7, 87 S.E.2d 127, 130 (2009).

Finally, contrary to the Commonwealth's claim, the Court of Appeals did not "act[] without authority to create a rule excusing Amos' failure to comply with Rule 5A:18 and establishing a special rule to excuse waiver for contempt cases." Com. Br. at 33. The Court of Appeals did not promulgate a rule. It ***interpreted*** Rule 5A:18 and Code § 8.01-384(A) and concluded that this case fell within both the plain meaning of the statute and the "good cause" exception to the rule. That was a straightforward exercise

in statutory interpretation, not a rulemaking. That the Commonwealth disagrees with the Court of Appeals' interpretation does not mean that the court promulgated a rule. Here too, the Commonwealth's argument lacks merit.

III. Ms. Amos's Claims Are Reviewable to Attain the Ends of Justice

Wholly apart from the "good cause" exception, the Court of Appeals also had power to review Ms. Amos's claims under Rule 5A:18's "ends of justice" exception. That exception permits review of unpreserved claims "to enable the Court of Appeals to attain the ends of justice." Rule 5A:18. The exception applies in circumstances "***including, for example,*** where the record established that an element of the crime did not occur; a conviction based on a void sentence; conviction of a non-offense; and a capital murder conviction where the evidence was insufficient to support an instruction." *Gheorghiu v. Commonwealth*, 280 Va. 678, 689, 701 S.E.2d 407, 414 (2010) (citations omitted). As the "including, for example," phrasing makes clear, those examples are illustrative, not exhaustive.

Here, at least three grounds support reaching the merits of Ms. Amos's claims under the ends of justice exception.[3]

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[3] Because the Court of Appeals held that Ms. Amos had shown good cause for failing to object, it did not reach her ends of justice claim. But the ends of justice provide an alternative basis for affirming the judgment below, and

A. The Circuit Court Improperly Invoked Summary Process to Punish Conduct That Was Not Summary Contempt

First, review is appropriate under the ends of justice exception because the circuit court used a form of proceeding — summary contempt — that it could not lawfully adopt. Code § 18.2-456(1) restricts summary contempt to "[m]isbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice." By summarily punishing Ms. Amos for conduct that falls outside the definition of summary contempt, the court rendered a judgment that was void *ab initio* and may be challenged at any time.

Review under the ends of justice exception is appropriate where an order is "void *ab initio*." *See Charles v. Commonwealth*, 270 Va. 14, 20, 613 S.E.2d 432, 434-35 (2005) (applying exception because court imposed a void sentence); *Gordon v. Commonwealth*, 61 Va. App. 682, 685-86, 739 S.E.2d 276, 278 (2013) (same). As this Court recently reaffirmed, "an order that is void ab initio 'may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner.'" *Amin v. Cnty. of Hen-*

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the Commonwealth has briefed the issue here. Alternately, this Court should remand for the Court of Appeals to address the issue in the first instance if necessary. *See Commonwealth v. Tuma*, 285 Va. 629, 639-40, 740 S.E.2d 14, 20 (2013) (remanding for consideration of second assignment of error after reversing grant of relief on first assignment of error).

rico, 749 S.E.2d 169, 171 (Va. 2013) (quoting *Singh v. Mooney*, 261 Va. 48, 52, 541 S.E.2d 549, 551 (2001)). "An order is void ab initio . . . if 'the character of the judgment was not such as the court had the power to render, or because ***the mode of procedure employed by the court was such as it might not lawfully adopt***.'" *Collins v. Shepard*, 274 Va. 390, 402, 649 S.E.2d 672, 678 (2007) (quoting *Evans v. Smyth-Wythe Airport Comm'n*, 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998) (in turn quoting *Anthony v. Kasey*, 83 Va. 338, 340, 5 S.E. 176, 177 (1887))) (emphasis added); *see also Singh*, 261 Va. at 52, 541 S.E.2d at 551.

In *Collins*, for example, a party brought an untimely challenge to a circuit court's local rule providing for automatic *sua sponte* dismissal of complaints not served within one year of filing. The court found the challenge's untimeliness immaterial because "the 'mode of procedure' utilized by the circuit court was one that it could 'not lawfully adopt,'" and thus "the dismissal order was void ab initio and subject to challenge at any time." 274 Va. at 402-03, 649 S.E.2d at 678.

Likewise, in *Anthony*, this Court found an order void *ab initio* on facts directly analogous to this case. The appellee there was a surety on a contract for the sale of land. After the purchaser defaulted, the sellers attempted to recover their losses from him. Rather than require the sellers to

assert claims against the surety, however, the court simply issued a summary order "to show cause why a decree should not go against [him]" for the sellers' losses. 83 Va. 338, 5 S.E. at 177.

This Court held that the order to show cause was void because "the mode of procedure employed by the court was such as it might not lawfully adopt." *Anthony*, 83 Va. 338, 5 S.E. at 177. "[T]hough the sureties of the receiver may have been liable for his default, the circuit court had no power, under the law, to proceed against them . . . according to the method adopted." *Id.* at 178. "[N]o . . . reason exists . . . for such a ***summary procedure*** against a surety." *Id.* (emphasis added); *see also id.* ("[W]e can perceive [no reason] to justify such a summary proceeding."). "[T]he proceeding by rule was such a departure from the established mode of procedure as to render the decree not only erroneous, but void." *Id.*

Anthony thus stands clearly for the rule that an order is void *ab initio* where a court invokes summary process in circumstances where the law does not permit summary proceedings. This Court continues to cite *Anthony* regularly as good law. *See, e.g.*, *Collins*, 274 Va. at 402, 649 S.E.2d at 678; *Singh*, 261 Va. at 52, 541 S.E.2d at 551.

Ms. Amos's case falls squarely within that rule. Code § 18.2-456 restricts the summary contempt power to, among other things, "[m]isbehavior

in the presence of the court." The court lacked power to punish Ms. Amos summarily both on due process grounds and because her conduct fell outside § 18.2-456's scope. Because summary contempt was a "mode of procedure . . . the court . . . [could] not lawfully adopt," *Anthony*, 83 Va. 338, 5 S.E. at 177, Ms. Amos's conviction is void *ab initio* and may be challenged at any time under the ends of justice exception.

B. Ms. Amos Was Denied Essential Rights

The ends of justice also allow review because Ms. Amos was denied "essential rights." This Court has repeatedly held that "'[a]pplication of the ends of justice exception is appropriate when the judgment of the trial court was error and application of the exception is necessary to avoid a grave injustice or the ***denial of essential rights***.'" *Rowe v. Commonwealth*, 277 Va. 495, 503, 675 S.E.2d 161, 165 (2009) (quoting *Charles*, 270 Va. at 17, 613 S.E.2d at 433) (emphasis added); *see also Brown v. Commonwealth*, 279 Va. 210, 219, 688 S.E.2d 185, 190 (2010) (applying exception); *Cooper v. Commonwealth*, 205 Va. 883, 889, 140 S.E.2d 688, 693 (1965) (same).

In *Cooper*, for example, the defendant contended that "evidence concerning his alleged admission was inadmissible because he was denied his constitutional right to the assistance of counsel at the time it was obtained."

205 Va. at 889, 140 S.E.2d at 692. The Commonwealth urged the Court "not [to] consider the point" because "the evidence was not objected to in the lower court on this ground." *Id.* But this Court held that review was appropriate nonetheless in order to "'prevent the denial of essential rights.'" 205 Va. at 889, 140 S.E.2d at 693.

Ms. Amos was likewise denied "essential rights" here. Indeed, the full extent of the due process violations is staggering. Ms. Amos was ***completely denied*** virtually every constitutional procedural right a criminal defendant enjoys. She was given no prior notice of the charges; she had no opportunity to confront the witnesses against her or to use compulsory process to obtain evidence in her favor; and she had no opportunity to retain counsel who could challenge the evidence against her and help her mount a defense. Instead, she was charged, tried, convicted, sentenced, and remanded to custody, all in a single uninterrupted monologue that cannot have spanned more than a few moments.

The due process requirements of notice and an opportunity to be heard are "immutable principles of justice, which inhere in the very idea of free government." *Holden v. Hardy*, 169 U.S. 366, 389-90 (1898). The right to confront one's accusers is likewise an "essential and fundamental requirement for the kind of fair trial which is this country's constitutional

goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). And the right to counsel "implicat[es] the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990). Ms. Amos was thus denied "essential rights" at every turn.

If the defendant in *Cooper* was denied his essential rights merely because he did not have a lawyer present when he confessed, 205 Va. at 889, 140 S.E.2d at 693, surely Ms. Amos was denied her essential rights here, where she was charged, tried, convicted, and sentenced, all without the assistance of counsel and without even an opportunity to mount a defense herself. That denial of essential rights likewise warrants review.

C. Ms. Amos Did Not Knowingly and Voluntarily Waive Her Right to Counsel

Finally, the ends of justice require review because Ms. Amos alleges a denial of her Sixth Amendment right to counsel, and the record does not reflect any knowing and voluntary waiver of that right.

A waiver of the right to counsel must be "voluntarily and intelligently made." *Church v. Commonwealth*, 230 Va. 208, 215, 335 S.E.2d 823, 827 (1985). "The right to counsel . . . is so fundamental to the human rights of life and liberty that its waiver is never presumed, and the 'courts indulge every reasonable presumption against waiver.'" *Id.*; *see also Brewer v. Williams*, 430 U.S. 387, 404 (1977). The Commonwealth must provide "clear,

precise, and unequivocal evidence" of waiver that is "certain in every particular." *White v. Commonwealth,* 214 Va. 559, 560, 203 S.E.2d 443, 444 (1974) (citing *Utica Mut. Ins. Co. v. Nat'l Indem. Co.*, 210 Va. 769, 773, 173 S.E.2d 855, 858 (1970)).

That more demanding standard for waivers of the right to counsel makes sense. The whole point of counsel is to help a defendant navigate the intricacies of the judicial system. A party represented by counsel, or a litigant who voluntarily forgoes representation and proceeds *pro se*, can fairly be expected to comply with a court's procedural rules. *See Townes v. Commonwealth*, 234 Va. 307, 319, 362 S.E.2d 650, 656 (1987) (citing *Faretta v. California*, 422 U.S. 806, 834-35 n.46 (1975)). But a non-party witness who attends a hearing merely to testify — and then is suddenly charged with and convicted of a crime — cannot reasonably be held to the same standard. As Judge McCullough noted below, "To expect parties to come to court prepared to object is sensible enough. To expect ***a witness*** to master the nuances of due process and summary contempt is to expect the impossible." App. 13.

Ms. Amos never knowingly and voluntarily waived her right to counsel. To the contrary, she defaulted her claims below only because she lacked the very thing she needed to preserve them — a lawyer. Refusing

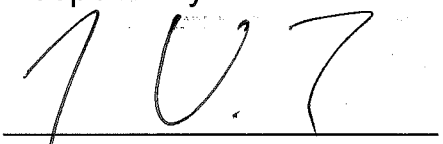
to review Ms. Amos's claims on the merits would violate the Sixth Amendment's mandate that the right to counsel can be waived only knowingly and voluntarily. For that reason too, the ends of justice require review.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Washington, D.C.
November 26, 2013

Respectfully submitted.



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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 8,588 words and 38 pages of double-spaced, 14-point text in Arial font in accordance with Rules 5:6 and 5:26(b), excluding the cover page, the table of contents, the table of authorities, and this certificate. Word counts were performed using Microsoft Word 2003. I further certify pursuant to Rule 5:26(e) that, on November 26, 2013, I served upon the Clerk of Court by next-day Federal Express fifteen copies of this brief and filed an electronic copy of this brief by emailing the same to scvbriefs@courts.state.va.us. I further certify pursuant to Rule 5:26(e) that three paper copies and one electronic copy of this brief were mailed on November 26, 2013 to the following counsel of record:

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