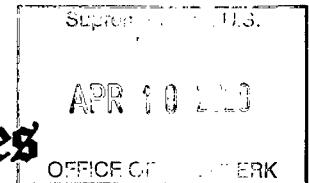


No. 19-8305 ORIGINAL

In The  
**Supreme Court of the United States**



\*\*\*\*\*

KINGSLEY AZUBUIKE ONONUJU

*(Petitioner)*

v.

COMMONWEALTH OF VIRGINIA

*(Respondent)*

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On Petition for Writ of Certiorari to the  
Supreme Court of Virginia

---

**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

The Equal Protection Clause of Fourteenth Amendment to United States Constitution guarantees equal protection of the law to all individuals, even when they are indigent. This case was denied appellate review in ~~issue~~ with transcript by Courts below due to late-filing of trial transcript arising out of indigence of Petitioner while in jail, which would not have happened had Virginia law mandated government to defray cost of transcript to misdemeanor indigent defendants, like it mandates for indigent felons.

The Due Process Clause of Fourteenth Amendment to the United States Constitution guarantees fairness to a criminal defendant, even at appeal stage. This case also concerns a situation where trial transcript, though late-filed, was fully received by appellate Court before they reviewed and adjudicated case, but they refused to make transcript part of record in review of case, even when Petitioner had no timely notice on when to file transcript.

The questions presented for review by this Highest Court of our land are;

1. On Equal Protection Clause; Whether Supreme Court of Virginia erred in refusing to find any unconstitutionality in VA Code § 19.2-165 that only mandates government to defray the cost of providing trial transcript to only convicted indigent felons for appeal, but never does same to millions of convicted indigent misdemeanants in Virginia State?
2. On Due Process Clause; Whether Supreme Court of Virginia erred in refusing to find that a late-filed trial transcript that was received by appellate Court before time an appealed case was reviewed and adjudicated, should be made part of record, where reason for its late-filing was premised on indigence of the defendant to defraying the cost?
3. On Due Process Clause; Whether Supreme Court of Virginia erred in refusing to find a reversible error where a transcript was not made part of record in review of case due to the fact that the criminal incarcerated defendant had neither notice nor knowledge as to when the filing of “transcript or statement of fact” would start running?

## **PARTIES TO THE PROCEEDING**

### **PETITIONER**

- **Kingsley Azubuike Ononuju**

### **RESPONDENT**

- **Commonwealth of Virginia**

Kingsley Azubuike Ononuju v. Commonwealth of Virginia

Kingsley Azubuike Ononuju v. Commonwealth of Virginia.

Commonwealth of Virginia v. Kingsley Azubuike Ononuju

Commonwealth of Virginia v. Kingsley Azubuike Ononuju

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Judgment of Supreme Court of Virginia

Decision Date: January 30, 2020.

Record No. **191200**

Include Exhibit A.

### Appendix B

Judgment on Rehearing of Virginia Court of Appeals

Decision Date: August 20, 2019.

Record No. **0538-18-1**

Include Exhibit B+.

### Appendix C

Judgment of Virginia Court of Appeals

Decision Date: February 13, 2019.

Case No. **0538-18-1**

Include Exhibit B, G.

### Appendix D

Judgment of trial de novo of Circuit Court  
for City of Virginia Beach, Virginia.

Decision Date: March 8, 2018.

Case No. **CR17-2385-00 and CR17-2385-01**

Include Exhibit C, D, E and F.

### Appendix E

Judgment of trial in General District Court

for city of Virginia Beach, Virginia.

Decision Date: August 8, 2017.

Case Nos. **810GC1700319**

## TABLE OF AUTHORITIES

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***CONSTITUTION;***

Equal Protection Clause of Fourteenth Amendment to US Constitution  
Due Process Clause of Fourteenth Amendment to US Constitution

***STATUTES;***

**VA §19.2-165**

***VA RULES;***

**Rule 5A:8(c), Rule 5A:8(a).**

**OPINION BELOW**

The Opinion of Supreme Court of Virginia was entered on January 30, 2020, Dkt. No. 191200, Ononuju v. Commonwealth of Virginia. Unpublished.

**JURISDICTION**

The judgment of Supreme Court of Virginia is from the highest Court of State of Virginia and was entered on January 30, 2020. The validity of Virginia statute is drawn in question on ground that it is repugnant and violative to United States Constitution, under Equal Protection Clause and Due Process Clause of United States Constitution. It therefore completely invokes the jurisdiction of this Court under 28 U.S. Code § 1257.

**RELEVANT STATUTORY PROVISION**

**The VA Code § 19.2-165 provides in pertinent part that;**

In all felony cases, the court or judge trying the case shall by order entered of record provide for the recording verbatim of the evidence and incidents of trial either by a court reporter or by mechanical or electronic devices approved by the court. The expense of reporting or recording the trial of criminal cases shall be paid by the Commonwealth out of the appropriation for criminal charges, upon approval of the trial judge.

1.

### **RELEVANT STATEMENT**

(1.) This matter originally arose from two jointly tried misdemeanor bench conviction, to wit; Sexual Battery under §18.2-67.4 and Assault and Battery under §18.2-57, at the General District Court for City of Virginia Beach "first court" in August 2017. On appeal de novo under **VA §16.1-132**, Petitioner was convicted on bench joint trial of Attempted Sexual Battery under §18.2-27/§18.2-67.4 with jail time of 365 days (165 days suspended), and Assault and Battery under §18.2-57 with jail time of 365 days (265 days suspended), all in Circuit Court for City of Virginia Beach "circuit court" in Virginia on March 8, 2018, after a pretrial "motion to sever" the two cases were denied in October 2017 by circuit court. Incarceration ensued on the day of conviction. *See attached Exhibit E and F under Appendix D.*

(2.) Before trial date in circuit court, Respondent secretly changed the Sexual Battery charge to Attempted Sexual Battery without notifying Petitioner or using direct indictment. And before and after this trial, Petitioner (who had no criminal record) was emotionally shattered to remember everything that materially happened at trial to prepare statement of fact under **VA Rule 5A:8(c)**.

(3.) In the "first court", Petitioner hired lawyer friend (who charged him less than standard fee rate) to represent him, but the lawyer refused to represent him on same rate in "circuit court". So, Petitioner found another lawyer who charged

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him lesser rate for trial, but close to day of trial, Petitioner became financially broke and could not afford to pay his lawyer who apprised him that he would not represent Petitioner without getting paid, if Petitioner is convicted.

(4.) Upon conviction, Petitioner could not retain his lawyer or even afford the appeal fee to appeal his conviction. And on learning of his indigence, the Virginia Court of Appeals waived his appeal fee to file his appeal.

(5.) Before his incarceration, Petitioner was told that the government only hires reporter and defrays cost of trial transcript only for felony cases under **VA Code §19.2-165**. Because Petitioner's cases were not felony but misdemeanor cases, the government thus refused to defray cost of ordering his trial transcript.

(6.) Entry of Petitioner's two final judgments were made on March 13, 2018, and March 15, 2018, while he was in jail, and he was never apprised about these dates, which are dates to start counting the running of the 60days for providing transcript and the 90days for requesting for any extension, pursuant to **Rule 5A:8(a)**.

(7.) While in jail, Petitioner wrote a request from jail to circuit court clerk asking them to provide entry dates of his judgments, but they never responded to his request nor provided him with any "knowledge or notice" about when to start counting the running of the 60 or 90 days for providing the transcript. See, (attached Exhibit C under Appendix D).

3.

(8.) Petitioner was mentally and emotionally wrecked when he was in incarceration, which made it extremely difficult for him to remember key issues that happened during trial, and thus he was not able to prepare logical statement of facts to send to appellate Court.

(9.) About four weeks in incarceration, Petitioner filed motion for reconsideration, asking the circuit court to grant him conditional bond to enable him see if he can borrow money from people to order the trial transcript, but it was turned down. Petitioner had no further choice than to wait till he gets released from jail, to look for money to order the transcript.

(10.) And while in jail, Petitioner was granted extension to file his petition for appeal, and by the time he filed it, it was found to be deficient, and was given time to correct it. The corrected version was done when Petitioner had finished serving his jail time. *See attached Exhibit G under Appendix C.*

(11.) By the time Petitioner was released from jail, and found money to defray cost of transcript, the timing to order the transcript had finished running. It

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was few days away. Petitioner ordered the transcript and filed it with the Court, and this was filed before the corrected version of “petition for appeal” was filed, which means the transcript was with appellate court before they adjudicated the petition.

(12.) On February 2019, the Court of Appeals of Virginia found Petitioner’s transcript as “untimely filed” and consequently denied his appeal, and Petitioner requested for “rehearing” in same Court. His appeal was denied on same reason. See attached Exhibit B and B+ under Appendix C and B.

(13.) Petitioner appeals to Virginia highest state Court, arguing that his appeal was denied by Court below because of his indigence to order transcript from jail, and because of Virginia law that mandates government to order transcript for only felony cases. His argument was found unpersuasive by this Supreme Court of Virginia, and on January 30, 2020, they denied his appeal. Petitioner appeals to this HIGHEST COURT of United States. See attached Exhibit A in Appendix A.

**WHY THE COURTS BELOW REFUSED AND ERRED TO  
GRANT APPEAL THAT GIVES RISE TO THIS PETITION**

(14.) The Virginia Court of Appeals refused to grant the appeal filed in

this case "only" because the trial transcript needed to adjudicate this case was filed outside the timing designated to file it, even when they received the trial transcript before they adjudicated this case. Because the time transcript was filed was caused by indigence of the criminal defendant hereof as to defraying the cost of the transcript and because it was also caused by lack of notice given to him as to when the timing to file transcript would run, the Virginia Court of Appeals thus erred in refusing to make the filed transcript part of record in adjudicating this case.

(15.) Also, the Virginia Supreme Court erred in refusing to find error in the foregoing errors committed by Virginia Court of Appeals, and also erred in finding nothing "unconstitutional" in Virginia statute that mandates government to defray the cost of providing transcript to only indigent felons but never accords same to indigent misdemeanants, for appellate review.

### **WHY THE COURT SHOULD GRANT THIS PETITION**

#### **COUNT I:**

**The Court should grant certiorari hereto because the erred opinion of Virginia Supreme Court hereof as to completely finding VA Code §19.2-165 "constitutional", does seriously infringe upon the Equal Protection Rights of millions of Virginians, under Fourteenth Amendment to US Constitution.**

(16.) The foregoing Virginia statute is a very bad law because it clearly mandates City and State governments in Virginia to defray the cost of trial transcript

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for appellate review to "ONLY" indigent convicted felons, without according same to indigent convicted misdemeanants, in Virginia.

(17.) Here, Petitioner filed a motion for reconsideration to circuit court from jail (see attached Exhibit D under Appendix D) and addressed that he is indigent to retain his lawyer or order trial transcript, but his motion was denied. *Id.* at ¶ 9. Had the foregoing Virginia statute accorded the indigent misdemeanants same treatment it accorded indigent felons, Petitioner hereof (who could not even afford the filing fee of his appeal (*id.* at ¶ 4)), could have timely ordered the trial transcript of his misdemeanor convictions while in jail, at government expense, by virtue of his indigence.

(18.) Admittedly, a felony is a different crime from a misdemeanor, but the both species of crimes can have same or similar jail sentence and/or adverse effects for rest of a defendant's life. It was this rationale that compelled this Court to find Washington state law, *inter alia*, "unconstitutional". See, e.g., Draper v. Washington, 372 U.S. 487, 498-500 (1963) (finding a state rule that distinctly disfavors an indigent defendant's ability to obtain a transcript at public expense "invalid"). See also, Mayer v. Chicago, 404 U.S. 189, 196-98 (1971) (finding state rule "invalid" where it does not provide an indigent defendant access to criminal

appeal, through providing the transcript of relevant trial proceeding. Equal access right should apply to felonies as well as petty offenses). Chambers v. Florida, 309 U.S. 227, 241 (1940) (holding that all people charged with crime must stand on an "equality" before the bar of justice in every American court).

**(19.)** So many Virginian residents who are indigent cannot appeal their wrong convictions for appellate review just because their crimes are misdemeanor. *Id.* Thus, by granting this petition and finding foregoing Virginia statutory law "unconstitutional", it would seriously create a state-wide "sigh of relief" to millions of indigent Virginians whose Equal Protection Rights have been unfairly and amply deprived under Fourteenth Amendment to US Constitution. *Id.*

## **COUNT II**

**The Court should further grant certiorari hereto because the erred opinion of Virginia Supreme Court hereof does seriously conflict with the precedent of this Court, in relation to denying justice due to indigence of the accused, under doctrine of "fundamental fairness" enshrined in the Due Process Clause of Fourteenth Amendment to United States Constitution.**

**(20.)** Though the Virginia Supreme Court fails to explicate how or why it refuses to overrule the ruling of Virginia Court of Appeals, it erred by sustaining such ruling because its ruling is distinctly inconsistent with precedent of this Court

on federally protected right of the accused.

(21.) This Court has ruled in the affirmative that destitute defendants must be afforded adequate appellate review as defendants who have money enough to buy transcript. *See, Griffin v. Illinois, 351 U.S. 12, 18-19 (1956)* (holding that destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcript).

(22.) Here, *pro se* Petitioner was emotionally shattered, following wrong and unfair conviction of crimes he utterly did not commit. In fact, circuit court trial judge hereof clearly stated that "he did not" find evidence to be beyond reasonable doubt (as shown in the certified trial transcript sent to appellate court), but he nevertheless still convicted Petitioner here. *Id.* That is total aberration to our judicial precedents, but the Virginia Court of Appeals would not point it out in its ruling simply because Petitioner did not file transcript on time due to his financial hardship, even when the Court below did get his transcript before it adjudicated his appeal. *Id.* at ¶ 11.

(23.) Because this Court has granted certiorari and reversed the holdings from other states against asking an indigent defendant defray the cost of transcript for appellate review, it is momentous this Court does same here, as doing otherwise

here would unfairly create inconsistency in administration of justice to so many Virginians in this federally protected right. In other words, by granting this petition and reversing the opinion of Virginia Supreme Court hereof, this Court would foster and safeguard the doctrine of *stare decisis* which is the hallmark upon which our judiciary was championed.

### COUNT III

**And the Court should further grant certiorari hereto because the erred opinion of Virginia Supreme Court hereof does seriously conflict with another precedent of this Court, in relation to injuring the Due Process Clause of the Fourteenth Amendment to US Constitution, where a criminal defendant in jail was never given any "timely notice" of entry of judgment upon which the timing for providing trial transcript was premised.**

**(24.)** The procedural Rule 5A:8(a) of Virginia Supreme Court provides

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i. In *Hardy*, this Court states that "even a responsible retained lawyer who represents a defendant at trial cannot rely exclusively on his memory, even when supplemented by trial notes, in composing statement of facts that addresses a list of possible trial errors that delimit his appeal. Nor should this be required..And whether or not he represented defendant at trial, he still needs a complete trial transcript to discharge his full responsibility of a viable appeal..This rule should mean that any criminal defendant who really cannot afford a transcript must be given one to help prepare his appeal" *Hardy v. United States*, 375 U.S. 277, 288-93 (1964).

ii. In *Mayer*, Chief Justice Burger, in concurring, opines in pertinent part that "he quite agrees with Mr. Justice Brennan that a full verbatim record..should be provided but judges and lawyers have a duty to avoid abuses that promote delays" *Mayer v. Chicago*, 404 U.S. 189, 201 (1971).

iii. Thus, even if the opposing party hereof lodges an argument that Petitioner here would have filed statement of facts if he could not pay for the transcript, such argument is never *persuasive*. *Id.*

**10.**

in pertinent part that "the transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court no later than 60 days after entry of the final judgment. This deadline may be extended by a Judge of the Court of Appeals only upon a written motion filed within 90 days after the entry of final judgment". And procedural Rule 5A:8(c)(1) of Virginia Supreme Court further espouses that it is fine for a written statement of fact be filed in lieu of a transcript. It presents in key part that "a written statement of facts, testimony, and other incidents of the case becomes a part of the record when..within 55 days after entry of judgment,a copy of such statement is filed in the office of the clerk of the trial court".

**(25.)** The time to provide trial transcript begins to run from 'date of entry of judgment' as delineated in foregoing rule, which means a criminal defendant has to be given "timely notice" as to when the entry of his judgment was made to enable him know when to start counting the running of the time upon which the transcript (or even a prepared statement of fact) would be filed. Without getting a timely notice in jail from circuit court clerk, he absolutely cannot know when the timing to file transcript would run and would run out, even where he is not an indigent.

11.

(26.) Here, the *pro se* Petitioner was put in jail immediately after his convictions on March 8, 2018, which was different date from dates of entry of his judgments. Because he was locked up in jail on same day he was convicted, and because the dates of entry of his judgments were clearly different from date of his convictions, he thus needed to be "timely notified" by the circuit court clerk as to dates of entry of his judgments, but he never got any notice from them throughout time he was in jail. While in jail, he wrote to them, requesting for any notice of dates of entry of his judgments but they inadvertently failed to respond to his request. This of course made it utterly impossible for Petitioner to know when to start counting the time to file either the transcript or statement of facts. Therefore, it is facially "unfair" to punish him in refusing to make his transcript part of record in appellate adjudication of his case due to time it was filed, especially when his transcript was received by Virginia Court of Appeals before his case was adjudicated. *Id.* at ¶ 11.

(27.) In *Manzo*, this Court establishes remarkable binding precedent on indispensability of providing "timely notice". *See, Armstrong v. Manzo*, 380 U.S. 545, 550-551 (1965) (*aff'g* *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950) (holding that, it is clear that failure to give a petitioner "notice alone" of the proceeding, violates the MOST rudimentary demand of due process law)). Thereof, this Court pointed out that it "disagrees" with the reasoning of the Texas

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Court that failure to give Petitioner notice was cured by hearings accorded to him.

(28.) This Court strongly opines in *Manzo* that, had they provided timely notice to Petitioner thereof, it would have made some difference. Same here. Had the circuit court clerk provided the pro se Petitioner here with timely notice when he was in jail as to dates entry of his judgments were made, he would have known when to begin counting the timing upon which the transcript (or even statement of facts) would be filed, and would have at least filed any scratchy statement of facts in any format. *Id.*

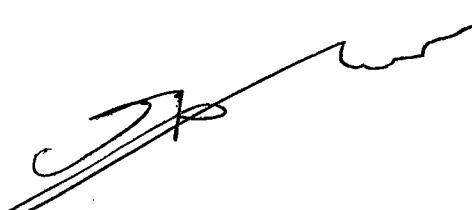
(29.) Generally, granting this petition would entrench true consistency in administration of justice to all the residents of Virginia State, as this Court accorded to the residents of Texas State (and other States) on providing "notice" protected and guaranteed under Due Process Clause of Fourteenth Amendment to United States Constitution.

(30.) Granting and reversing ruling of Virginia Supreme Court hereof would also mount binding precedent upon which all State courts in Virginia would follow, where, as here, a *pro se* criminal jailed defendant in Virginia will no longer be scared of being denied timely notice and knowledge of entry of their judgments when they want to elevate their misdemeanor convictions for appellate review.

### CONCLUSION

(31.) The State judicial system of Virginia is "broken", and we are in *dire* need of intervention of this HIGHEST Court of our land. We really need to be treated like residents of other States on our federal constitutional rights. This is why this very petition is not just all about the *pro se* Petitioner hereof but also all about so many millions of indigent Virginians who have been harshly deprived of opportunity of having their cases reviewed by appellate State Courts in Virginia just because they could not afford or timely afford the trial transcript needed to properly adjudicate their misdemeanor cases. *Id.* Denying this petition would mostly enhance and encourage the ongoing imbibition of impropriety accorded to misdemeanor cases in Virginia. Thus, on behalf of all the indigent residents of Virginia, we implore this Honorable Highest Court to please have mercy upon us in attending and answering our prayer hereof.

Respectfully Submitted:



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*Dated April 10, 2020*

# **APPENDIX A**