NO. _____

In The
Supreme Court of the United States

JIMMY RAY WEATHERHOLT, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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Dated: November 30, 2020

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QUESTION PRESENTED

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. A critical component of that right is the "right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006).

Whether trial counsel's suspension and ultimate disbarment during the pendency of criminal charges deprived Mr. Weatherholt of his constitutional right to counsel during critical stages of the prosecution against him.

PARTIES TO PROCEEDING AND RULE 26.6 STATEMENT

Petitioner is Jimmy R. Weatherholt, Jr. Respondent is the Commonwealth of Virginia. No party is a corporation.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

Weatherholt v. Commonwealth, 298 Va. 438, 839 SE.2d 492 (2020); *Weatherholt v. Commonwealth*, 2018 WL 6738966, Record No. 1797-17-4, Court of Appeals Unpublished, December 26, 2018; *Weatherholt v. Commonwealth*, CR16001099-00; CR16001100-00, Frederick County Circuit Court, Virginia.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jimmy R. Weatherholt, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Virginia Supreme Court. Petition Appendix at 1a-9a ("Pet. App."). The relevant order of the appellate court is published.

INTRODUCTION

The instant case provides the ideal avenue to further establish and expound on the Sixth Amendment principals and guidelines established by *United States v. Ash*, 413 U.S. 300 (1973), *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006) and their progeny. Specifically, this case presents the ideal vehicle to outline what critical stages are applicable to a defendant's Sixth Amendment right. Mr. Weatherholt was denied his right to counsel consistent with the Sixth Amendment and applicable case law due to the multiple suspensions of his trial attorney during the pendency of his charges. Mr. Weatherholt's trial counsel incurred multiple suspensions during the pendency of the instant charges at crucial times during the proceedings against Mr. Weatherholt, thereby constructively leaving him without counsel and without waiving his right to the same.

Further, Mr. Weatherholt was not afforded a trial by neutral court or factfinder, with the trial judge utilizing extrajudicial sources in convicting Mr. Weatherholt in contravention of the authority outlined in *Litkey v. U.S.*, 510 U.S. 540, 555 (1994). The trial judge's crucial determination of a confidential informant's credibility was unquestionably influenced by the trial judge's previous position as Commonwealth's Attorney and by his presiding over the informant's ancillary

charges in another jurisdiction during the pendency of Mr. Weatherholt's charges. The Petition should be granted.

OPINIONS BELOW

The Virginia Supreme Court's opinion (Pet. App. 1a-9a) is reported at 839 S.E.2d 492.

JURISDICTION

The Frederick County Circuit Court entered an Adjudication and Final Sentencing Order on August 22, 2017. Pet. App. at 20a. The final order was stayed for consideration of a motion to reconsider that was denied by the Court on November 3, 2017. Id. at 18a. On December 26, 2018, the Virginia Court of Appeals issues a Memorandum Opinion affirming Mr. Weatherholt's conviction. Id. at 10a. On March 9, 2020, the Virginia Supreme Court in a published opinion affirmed Mr. Weatherholt's convictions. Id. at 1a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. A critical component of that right is the "right of a defendant who does not require appointed counsel to choose who will represent him." *Gonzalez-Lopez*, 548 U.S. 140, 144 (2006).

STATEMENT OF THE CASE

The central pillar of the Sixth Amendment is the accused's right to counsel during all critical stages of prosecutions against him. In early 2016, law enforcement

approached a known confidential informant to conduct a controlled buy of narcotics from the appellant, Jimmy Ray Weatherholt, Jr. (hereinafter referred to as "Mr. Weatherholt"). The subject confidential information, Billy Schull (hereinafter referred to as "the informant" or "Mr. Shull"), initially came to work with law enforcement while charged with multiple offenses and became an informant to "work off" charges against him, and continuing to work as an informant for monetary compensation. Commonwealth utilized the informant more than thirty (30) times over the court over approximately four (4) years. On May 4, 2015, the informant was taken to Cole Lane in Frederick County to conduct a controlled buy for the Frederick County Sheriff's Department and given one hundred dollars ($150) to conduct the transaction.

During the transaction, a hand to hand sale occurred between the informant and an individual known as Michael Underwood. The actual identity of the person conducting the sale was not known until he was engaged by law enforcement in open court at Mr. Weatherholt's first trial date of April 27, 2016. Investigator Foster from the Frederick County Sheriff's Office confirmed the hand to hand transfer occurred between Michael Underwood and the informant. Despite the hand to hand sale occurring between the informant and Mr. Underwood, Investigator Kahle confirmed the target of the buy was Mr. Weatherholt. Although Investigator Kahle indicated the informant believed he could buy narcotics from Mr. Weatherholt, the informant did not make contact with Mr. Weatherholt prior to attempting to purchase narcotics. Upon the informant's return to the law enforcement vehicle following the controlled

buy, the informant handed law enforcement a cellophane wrapper with blue pills inside alleged to have been purchased from Mr. Underwood.

Prior to the prosecution of Mr. Weatherholt, the confidential informant was incarcerated on multiple charges, including crimes or moral turpitude. The investigator confirmed the informant was also previously convicted of multiple crimes of moral turpitude during and before his time as a confidential informant. The informant confirmed that he had known Mr. Weatherholt for nearly twenty (20) years. At the time of trial, the informant confirmed he was currently incarcerated for giving false information to a police officer. The informant was contacted by the sheriff's department specifically to obtain a controlled purchase from Mr. Weatherholt. Identifying two visits to the Cole Lane location of the controlled buy, the informant confirmed Mr. Underwood was present both times – and this being the individual conducting the actual transaction. In speaking with Mr. Weatherholt on the phone, the informant confirmed Mr. Weatherholt could not get him the desired narcotics, and would need to contact someone else like Mr. Underwood. In conducting the transaction, the informant was given a price for the narcotics by Mr. Underwood. The informant paid Mr. Underwood one hundred and fifty dollars ($150) for the narcotics.

The informant, in conjunction with being reimbursed for his undercover work, also utilized his cooperation with Frederick County for consideration with the Commonwealth's Attorney in Clarke County for multiple offenses. The extent and basis of Mr. Weatherholt's conversation with the informant, on the date of the

transaction, related to work and injury problems of the informant. The informant confirmed Mr. Weatherholt did not discuss or provide information to the informant about pills or narcotics on May 4. The informant confirmed on April 30, 2016, he was pulled over for a speeding ticket where he proceeded to provide law enforcement with false information, including the name and identifying information of his brother. The informant was not charged for this crime until May 15, 2016.

On November 11, 2016, Mr. Weatherholt was indicted by grand jury of Conspiracy to Distribute Oxycodone and Distribution of Oxycodone. On February 14, 2017, the parties appeared in open Court for scheduling during the first suspension of trial counsel, Shelley Collette (hereinafter referred to as "Ms. Collette"). On April 21, 2017, the parties appeared for a pre-trial hearing six days before the scheduled jury trial, to address the second law license suspension Mr. Weatherholt's counsel Ms. Collette. April 21, 2017 At the April 27, 2017 scheduled jury trial, the parties were unable to sit a venire of jurors, after questioning and strikes, and the matter was continued. On April 28, 2017, the parties appeared in open court to waive a jury and set the matter for a bench trial. On May 10, 2017, the matter was tried to Judge Alexander Iden at a bench trial. The matter was continued several times for sentencing, until August 11, 2017, with counsel for the defense filing a post-trial motion for a retrial based on the trial judge's conflict of interest in presiding over the matter. On August 18, 2017, the parties appeared to argue the Commonwealths' motion to amend Mr. Weatherholt's sentence. On September 7, 2017, a hearing was held on the Defendant's motion to stay execution of the final order for leave to file

additional post trial pleadings, which was granted. On November 3, 2017, a hearing was held on Mr. Weatherholt's motion to set aside the verdict, and other relief, filed by his new counsel. Mr. Weatherholt's notice of appeal was timely filed with the trial court on November 3, 2017. The Virginia Court of Appeals rendered a decision December 26, 2018 affirming the rulings of the trial court. Mr. Weatherholt timely filed a Petition for Rehearing *En Banc* which was denied on January 17, 2019. A notice of appeal to the Supreme Court of Virginia was filed February 11, 2019. On March 9, 2020, the Virginia Supreme Court in a published opinion affirmed Mr. Weatherholt's convictions and subsequently denied as petition for rehearing *en banc*.

REASONS FOR GRANTING PETITION

I. The Circuit Court violated Mr. Weatherholt's Sixth Amendment right to counsel by having him appear without counsel during the pendency of his criminal charges at critical stages of the prosecution against him.

Mr. Weatherholt was denied his right to counsel consistent with the Sixth Amendment and applicable case law due to the multiple suspensions of his trial counsel during the pendency of his charges. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. A critical component of that right is the "right of a defendant who does not require appointed counsel to choose who will represent him." *Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). This Court has recognized "that the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. *Maine v. Moulton*, 474 U.S.

159 (1985). Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, this court has held that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Id.* See also, *United States v. Wade*, 388 U.S. 218, 224 (1967) (quoted in *United States v. Gouveia*, 467 U.S. 180, 189 (1984)).

"It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused." *Painter v. Leeke*, 485 F.2d 427, 429 (4th Cir. 1973). Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking due process. Such a case was *Id.*; quoting *In re Murchison*, 349 U.S. 133, [99 L. Ed. 942, 75 S. Ct. 623] (1955), where Mr. Justice Black for the Court pointed up with his usual clarity and force:

> 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . To perform its high function in the best way "justice must satisfy the appearance of justice". *Offutt v. United States*, 348 U.S. 11, 14, [99 L. Ed. 11], [75 S. Ct. 11].' 349 U.S. at 136 (Emphasis added.) [by the Supreme Court].

In order to prevail in a deprivation of due process claim, a defendant must show a level of bias that made "fair judgment impossible." *Rowsey v. Lee*, 327 F.3d 335 (4th Cir. 2003). The foregoing will establish a fair judgment on the merits, in the instant matter, was impossible and the judgments must be reversed.

While there is no "comprehensive and final one-line definition of 'critical stage," the analysis usually turns on the likelihood of "substantial prejudice to

defendant's rights" during the "particular confrontation" and "the ability of counsel to help avoid that prejudice," *Dir. of the Dep't of Corr. v. Kozich*, 290 Va. 502 (Va. 2015) (quoting *United States v. Wade*, 388 U.S. 218, 227, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); see also *Coleman v. Alabama*, 399 U.S. 1, 7, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970)). The Court in *Van v. Jones* found "plea negotiations, guilty plea hearings, and sentencing hearings are all 'critical stages.'" 475 F.3d 292 (6th Cir. 2007). It is settled that a complete absence of counsel at a critical stage of a criminal proceeding is a per se Sixth Amendment violation warranting reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error. *Id.* at 311-312.

Finally, Mr. Weatherholt was not afforded a trial by neutral court or factfinder, with the trial judge utilizing extrajudicial sources in convicting Mr. Weatherholt in contravention of the authority outlined in *Litkey v. U.S.*, 510 U.S. 540, 555 (1994).

A. Mr. Weatherholt's counsel was suspended by the Virginia State Bar multiple times, and immediately preceding, trial on the instant charges which directly impacted counsel's ability to adequately prepare for trial in the matter.

Mr. Weatherholt's trial counsel, Shelley Collette (hereinafter referred to as "Ms. Collette"), was suspended multiple times during the pendency of trial on the merits in the instant matter and accepted a permanent suspension soon after Mr. Weatherholt was suspended. Ms. Collette, during the second suspension, was suspended from the practice of law up and until six (6) days before Mr. Weatherholt's scheduled jury trial. Further, soon after Mr. Weatherholt was sentenced on the instant offenses, Ms. Collette accepted a permanent suspension from the Virginia

State Bar on the grounds of impairment. During the hearing in front of the Virginia State Bar on the issues related to her bar discipline, Ms. Collette was represented by her own counsel. Further, at this proceeding, Ms. Collette admitted to impairment substantive enough to constitute an indefinite suspension with the State Bar.

Similar to the instant matter, the Sixth Circuit in *Mason v. Mitchell*, 536 U.S. 901, 122 S. Ct. 2354, 153 L. Ed. 2d 177 (2002), found trial counsel's behavior, including "total absence during the period of his suspension from practice, his near-total absence during the six additional months of his representation, and the fact that he spent only six minutes with Mitchell "in the bullpen," constituted a "complete denial of counsel during at a critical stage of the proceedings." *Van v. Jones*, 475 F.3d 292 (quoting *Mason*, 325 F.3d at 741). The Sixth Circuit characterized the entire "pre-trial period" as a "critical stage," including plea negotiations. *Mason* at 742.

Crucially in the instant case, the Commonwealth went on the record to emphasize he could not even negotiate with Mr. Weatherholt's counsel, as she was suspended from the practice of law. On April 21, 2017, just days before the originally scheduled trial date, the Commonwealth relayed in open Court, "I can't even negotiate until she is reinstated. It is an unusual circumstance that I have never faced."

In *Tucker v. Commonwealth*, the Virginia Supreme Court observed, "[i]t is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." 159 Va. 1038 (1933). In the instant matter was

arrested on a capias on or about February 9, 2017. Further, trial counsel, Ms. Collette, made her first appearance with Mr. Weatherholt on February 14, 2017. According to the Virginia State Bar, Ms. Collette was suspended from the practice of law at this juncture.

Just over two months after beginning representation in this matter, with approximately nineteen (19) days of suspension during this timeframe, Ms. Collette materially limited her own ability to prepare for trial and thereby prejudiced Mr. Weatherholt's due process right to be adequately represented by counsel and for a fair trial. The Commonwealth even addressed the issues with preparing for trial on the record, in stating, "I can't even negotiate until she is reinstated. It is an unusual circumstance that I have never faced." The duration and timing of trial counsel's suspensions, on their face, limited counsel's preparation for trial in the instant matter to the prejudice of Mr. Weatherholt.

B. The suspension of trial counsel deprived Mr. Weatherholt of the right to be represented by counsel during the pendency of the indictments against him which constituted a denial of due process.

The Sixth Amendment right to counsel guarantees the assistance of counsel to a defendant confronted by "prosecutorial forces;" constitutional protections need not be invoked in the absence of adversarial proceedings. *United States v. Johnson*, 935 F.2d 47 (4th Cir. 1991); See *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (quoting *Maine v. Moulton*, 474 U.S. 159, 170 (1985)); see also *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). Further, the proper standard for attorney performance is that of reasonably effective assistance. *Strickland v. Washington*, 466 U.S. 668 (1984). It

relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. *Id*. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. *Id*.

The multiple suspensions of trial counsel immediately leading up to the schedule trials in this matter, quite simply, is contrary to the professional standards identified both in the plain terms of the Sixth and Fourteenth Amendments and the Supreme Court's analysis in *Strickland*. The instant matter differs from a plain claim for ineffective assistance of counsel, but instead stands for the proposition that during crucial proceedings in the prosecution against Mr. Weatherholt, he was wholly without counsel. Instead, trial counsel's conduct was violative of Mr. Weatherholt's constitutional rights and subject to relief from this tribunal.

In *United States v. Smith*, 640 F.3d 580 (4th Cir. 2011), the Fourth Circuit adopted the Sixth Circuit's analysis in *Mitchell v. Mason*, specifically finding constructive denial of counsel may occur, and thereby trigger a violation of an Appellant's Sixth Amendment right to counsel, by virtue of an attorney's suspension during the pendency of a criminal proceeding. As clear in the record in the instant appeal, the minimal amount of time counsel was retained, balanced with the length of her suspensions, render the denial of counsel violative of Mr. Weatherholt's constitutional rights.

In *Blue v. Commonwealth*, the Virginia Court of Appeals reaffirmed the position that, "absent a knowing and intelligent waiver, no person may be imprisoned

for any offense unless he was represented at trial by an attorney." 49 Va. App. 704 (2007). As stated herein, the Sixth Amendment right to counsel attaches after indictment and initiation of proceedings against the accused. See *Maine v. Moulton*, 474 U.S. 159, 170 (1985). During the period of suspensions by trial counsel, the trial court failed to obtain a waiver from Mr. Weatherholt of counsel and additionally failed to appoint standby court appointed counsel. Without a waiver of counsel during the proceedings against him on the instant offenses, during the period of time Mr. Weatherholt's Sixth Amendment Right attached, he was ultimately convicted. His conviction must be reversed.

C. The Court's failure to appoint standby counsel or appraise Mr. Weatherholt of his right to counsel violated Mr. Weatherholt's Sixth Amendment and due process rights.

On April 21, 2017, the trial court held a hearing during one of Ms. Collette's suspensions and brought Mr. Weatherholt in to appear without counsel. At said hearing, the Court made several inquiries as to Mr. Weatherholt's knowledge of retained counsel's suspension and his desires on proceeding with the case against him:

> 3 So, Mr. Weatherholt, the matter has been
> 4 brought to the Court's attention that Ms. Collette, the
> 5 lawyer, is currently not in good standing with the Bar and
> 6 your trial is scheduled for jury trial next Thursday.
> 7 The Court is further informed that the Clerk
> 8 had a conversation with Ms. Collette. And, Ms. Collette
> 9 said to the Clerk that everything is about resolved and if
> 10 it is not resolved it will be resolved Monday.
> 11 I think it is appropriate to inquire of you
> 12 what your position is in regard to Ms. Collette's
> 13 representation of you. Currently, she apparently can not
> 14 represent you, apparently, today.
> 15 THE DEFENDANT: Well, she has been paid. So,

16 I don't have any more money to hire a lawyer unless you all
17 would appoint me one.
18 THE COURT: Well, do you wish to go forward
19 on Thursday if Ms. Collette is re-instated?
20 THE DEFENDANT: Yeah. I mean. She has done
21 been paid to do her job, so...
22 THE COURT: Are you saying that she has been
23 paid?
1 THE DEFENDANT: Yes.
2 THE COURT: Okay. So, you are saying that
3 "she has done been paid" and not that she is not paid?
4 THE DEFENDANT: No. She has been paid.
5 THE COURT: Gotcha. Okay. So, as far as you
6 are concerned, you would like to find out if she is
7 admitted to practice next week and move forward with the
8 trial on Thursday?
9 THE DEFENDANT: Yeah. I mean, I want to get
10 it over with.
11 THE COURT: So, Mr. Manthos, the Court is
12 informed that there is Court Tuesday. Before we bring in a
13 jury we could know for sure on Tuesday. Continue the
14 matter to that day for Ms. Collette's experience.
15 MR. MANTHOS: Your Honor, I guess my concern
16 is that I understand that she appeared in General District
17 Court yesterday and represented to the Court that she was
18 in good standing when, in fact, she was not. So, I don't
19 know about the value of her representations. This is
20 nothing against you, Mr. Weatherholt. It is that we are
21 just kind of up in the air. (April 21, 2017 Tr. 59-60).[1]

In the foregoing interaction with the Court, at which Mr. Weatherholt appears *pro se*, the Defendant makes clear he is unable to retain new counsel and his only ability to do so it to have the Court appoint him counsel. The trial court fails to appoint counsel based upon Mr. Weatherholt's request to the Court. Further, implicit in Mr. Weatherholt's narrative with the trial court, he is without resources to obtain

[1] In the contemplation of the Fifth and Sixth Amendments, a trial court has an obligation, when such an impediment to counsel's ability to provide the assistance which is his client's constitutional guarantee appears, to make inquiry and, when appropriate, to appoint substitute counsel." *United States v. Smith*, 640 F.3d 580 (4th Cir. 2011).

new retained counsel and maintains that Ms. Collette has "done been paid to do her job." Of course, due to her suspensions, Ms. Collette was unable to do the job for which she was retained.

The aforementioned interaction cannot be said to be either a knowing waiver of counsel, or a confirmation of his desire to continue with retained counsel. Mr. Weatherholt makes clear he is simply without resources to hire another lawyer, and the appointment of counsel is his only option. Any affirmation made to the court as to the continuation of representation by Ms. Collette, without assistance of counsel on the day in question, was done solely with the expressed reasoning that she had been paid to represent the interests of Mr. Weatherholt during this prosecution. Of course, due to her conduct and suspensions, Ms. Collette could not adequately fulfill this obligation to her client, thereby leaving him without basic rights those subject to criminal prosecutions enjoy.

II. The Circuit Court violated Mr. Weatherholt's right to due process and a fair trial and abused its discretion by failing to recuse himself from presiding over the instant matter due to violations of the Canons of Judicial Conduct.

The trial court violated Mr. Weatherholt's right to a fair trial and due process with the trial judge failing to recuse himself due to a material conflict and violation of applicable judicial canons that materially prejudiced the outcome of Mr. Weatherholt's bench trial leading to his conviction.

As stated in *Litkey v. U.S.*, 510 U.S. 540, 555 (1994):

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would

> make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

The Commonwealth of Virginia Canons of Judicial Conduct state in pertinent part, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding; (b) The judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it. Canon 3(E)(1). While the judicial canons serve as a guidepost, [a] purported violation of the Canons alone is not enough to mandate recusal." *Commonwealth v. Jackson*, 267 Va. 226 (2004). "In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge." Id. at 229. Absent an abuse of that discretion, we will not disturb a trial judge's decision on whether to recuse himself. *Davis v. Commonwealth*, 21 Va. App. 587, 591 (1996).

The trial judge abused his discretion in not recusing himself from the underlying matter due to his past involvement with the confidential informant and tenure as the Commonwealth's Attorney for the City of Winchester.

In the instant proceeding, the trial judge abused his discretion in failing to recuse himself in the bench trial, which led to Mr. Weatherholt's convictions, due to

independent knowledge of evidentiary facts concerning the proceeding and the judge's past involvement with the subject confidential informant Mr. Shull. In the trial court's closing remarks before handing down its verdict, the trial judge noted the following observations:

> Sitting as the fact finder, this Court is the judge of the facts, the credibility of the witnesses, the weight of the evidence, the appearance and manner of the Witness on the stand. ….
>
> The other testimony, or the other points, the crimes of moral turpitude and the previous offenses of Mr. Shull, those weighed heavily in the Court's determination... making determinations with regard to Mr. Shull. But, the bottom line on Mr. Shull is: The Court finds him credible. The Court heard his testimony today. The Court observed his demeanor. The Court ultimately finds him to be, as the Commonwealth suggests, a mercenary... another character in the opioid Crisis. But, that he is 'one who is not in it. There is nothing to indicate that there is any prejudice or any bias or any interest in the outcome. I think "mercenary" fits him well for how he fits into this. (May 10, 2017 Tr. 297-298).

As outlined in the above-styled soliloquy from the trial court, the trial judge's determination as to the confidential informant's credibility was central in the determination of Mr. Weatherholt's case and ultimate conviction. This determination of his credibility, whether known or unknown to the court at the time verdict was handed down, was precipitated by a long history with the subject informant Mr. Shull. As identified on the record, the trial judge, while acting as the Commonwealth's Attorney for the City of Winchester, prosecuted the confidential informant, Mr. Shull, on multiple occasions. (Aug. 11, 2017 Tr. 179-180). Further, investigators called to testify as to the ongoing relationship with Mr. Shull, and his use as a confidential informant, confirmed his status as an informant and cooperation

with prosecutors and law enforcement over a period of no less than four years. (May 10, 2017 Tr. 25).

Implicit in the scenario raised at trial and in post-trial motions reiterates the abuse of discretion exercised by the trial judge in failing to recuse himself from sitting in judgment of Mr. Weatherholt as the subject bench trial. In the comments to Canon 3(E)(1), the commentary makes the observation that "a judge formerly employed by a government agency … should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association." In the instant proceeding, the trial judge, during his time as the Commonwealth's attorney, relied on the use of a confidential informant. Inherent in the prosecutor's use of said informant is the threshold that he be credible in prosecuting that Commonwealth's Attorney's cases in which the informant is utilized. Undoubtedly, the trial judge's history as a government attorney, engaging the same confidential informant used during his tenure as Commonwealth's Attorney, impacts his ability to neutrally assess the credibility of the same informant in a proceeding in which he now sits as a neutral fact finder.

The trial judge further abused his discretion in failing to recuse himself given the judge implicitly having knowledge related to relevant evidence obtained outside the proceeding over which he was presiding.

Further, a crucial element to the argument surrounding the confidential informant's credibility centered around Mr. Shull being charged with several crimes of moral turpitude in and around the time of the alleged offense in Mr. Weatherholt's

case. During his testimony, Investigator Kahle indicated he did inform the Clarke County Commonwealth's Attorney that Mr. Shull was cooperating with Frederick County law enforcement and providing assistance, while denying that Mr. Shull received any consideration, to this knowledge, for the same. Further, Mr. Shull was charged with the Clarke County offenses, involving felony forgery of a public document, identity theft, false identification to law enforcement, and driving while revoked, on May 15, 2016 with an offense date of April 30, 2016. The incident at issue in Mr. Weatherholt's case, allegedly occurring May 4, 2016, happened in between Mr. Shull's offense date of April 30 and his arrest of May 15, 2016.

Considerable evidence was taken on this issue, with the trial judge making several observations, prior to rendering his decision as to the Clarke County charges of Mr. Shull. The trial court, with the same judge having taken the plea and presiding over Mr. Shull's charges in Clarke County, made clear that he believed "the Court did not import evidence or facts from another jurisdiction or another matter into the case." While indicating no facts were imported from Clarke County to Mr. Weatherholt's trial, the trial judge made a further observation regarding Mr. Shull, "[t]he Court has got the [sic] weigh the creditability, Mr. Shull's credibility, and the timing of the Clarke County charges, though not dispositive as to Mr. Shull's credibility, were important to the Court." Even with the trial judge's insistence that no facts from Clarke County were carried over to Mr. Weatherholt's case, the mere fact that the judge presided over those same Clarke County charges is contrary to the

Canon 3(E)(1) and the trial judge's failure to recuse himself or set aside the verdict delivered at the bench trial was an abuse of discretion that must be reversed.

The Court, in summarizing the importance of Mr. Shull, made the following observations," [h]is credibility, of course, is critically important because he establishes if he is credible, then he establishes that he makes the contact with the Defendant, Mr. Weatherholt." The key observation of the trial court cannot be overlooked in light of the foregoing observations as to the inherent issues with the trial judges' position of the factfinder and assessor of credibility based on the inherent bias and conflict implicit in the trial judge's dealings with the subject confidential informant.

CONCLUSION

For the foregoing reasons, Mr. Weatherholt urges this Court to grant a writ of certiorari to review the decision of the Virginia Supreme Court, and to vacate and reverse the convictions against Mr. Weatherholt.

Respectfully submitted,

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NOVEMBER 30, 2020

APPENDIX

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Present: Goodwyn, Mims, Powell, Kelsey, and McCullough, JJ., and Russell and Koontz, S.JJ.

JIMMY RAY WEATHERHOLT, JR.

v. Record No. 190206

OPINION BY
SENIOR JUSTICE LAWRENCE L. KOONTZ, JR.
March 19, 2020

COMMONWEALTH OF VIRGINIA

FROM THE COURT OF APPEALS OF VIRGINIA

In this appeal we consider whether Jimmy Ray Weatherholt, Jr. was deprived of his right to counsel during a critical stage of a criminal prosecution in violation of the Sixth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment, thus necessitating the setting aside of his convictions and awarding him a new trial.

BACKGROUND

Because our inquiry will be limited to a specific instance during the pre-trial proceedings, we will recite only those facts necessary to our resolution of this appeal. *See, e.g.*, *Hood v. Commonwealth*, 280 Va. 526, 530 (2010); *Commonwealth v. Garrett*, 276 Va. 590, 593, 667 (2008).

Following his indictment by the Frederick County Grand Jury on November 10, 2016 for conspiracy to distribute oxycodone and distribution of oxycodone, third or subsequent offense, Weatherholt retained Shelly Renee Collette as his defense counsel. On April 12, 2017, the Virginia State Bar suspended Collette's license to practice law in the Commonwealth for her failure to comply with a disciplinary proceeding subpoena.[1] Upon learning of Collette's

[1] The record reflects that Collette's license to practice law had previously been suspended from February 14 to 24, 2017. Additionally, on September 14, 2017, Collette assented to an indefinite suspension of her license due to impairment and subsequently consented to having her license permanently revoked. *In the Matter of Shelly Renee Collette*, Record No, 17-000-19062, et al. (Va. State Bar Disciplinary Board March 23, 2018). Although Weatherholt contended at trial and in the Court of Appeals that Collette's disciplinary record would support a finding that her representation fell below the acceptable standard for effective assistance of counsel, the

suspension, the Commonwealth requested that the circuit court conduct a hearing "to see what Mr. Weatherholt wanted to do about counsel." On April 21, 2017, Weatherholt appeared without counsel and, in response to an inquiry from the court, confirmed that Collette had failed to appear that morning in a neighboring jurisdiction on another matter in which she represented Weatherholt.

The circuit court then engaged Weatherholt in the following colloquy:

> THE COURT: So, Mr. Weatherholt, the matter has been brought to the Court's attention that Ms. Collette, the lawyer, is currently not in good standing with the Bar and your trial is scheduled for jury trial next Thursday[, April 27, 2017].
>
> The Court is further informed that the Clerk had a conversation with Ms. Collette. And, Ms. Collette said to the Clerk that everything is about resolved and if it is not resolved it will be resolved Monday[, April 24, 2017].
>
> I think it is appropriate to inquire of you what your position is in regard to Ms. Collette's representation of you. Currently, she apparently cannot represent you . . . today.
>
> WEATHERHOLT: Well, she has been paid. So, I don't have any more money to hire a lawyer unless you all would appoint me one.
>
> THE COURT: Well, do you wish to go forward on Thursday if Ms. Collette is re-instated?
>
> WEATHERHOLT: Yeah. I mean. She has done been paid to do her job[.]
>
> . . . .
>
> THE COURT: . . . So, as far as you are concerned, you would like to find out if she is admitted to practice next week and move forward with the trial on Thursday?
>
> WEATHERHOLT: Yeah. I mean, I want to get it over with.

The circuit court indicated that if Collette's license had not been reinstated by the following Tuesday, April 25, 2017, the trial could be continued at that time. Responding to the

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Court of Appeals correctly concluded that this issue was not cognizable in a direct appeal, but must be raised through a habeas proceeding. *Weatherholt v. Commonwealth*, Record No. 1797-17-4, slip op. at 5 (December 26, 2018).

Commonwealth's concern that Collette's suspension might interfere with other aspects of the proceedings, the court responded, "The Sixth Amendment guarantees the right to counsel. This is the counsel he wants." At the conclusion of the hearing, the court entered an order continuing the matter to April 25, 2017 for a "review of attorney standing."

The record does not indicate that there was any proceeding on April 25, 2017. It appears that the circuit court, having been advised that Collette's license to practice law had been reinstated effective April 21, 2017, simply allowed the matter to proceed.

On April 27, 2017, with Collette present and prepared for trial, the case was called on the circuit court's docket. However, due to "the insufficiency of the number of the jury panel," the matter was continued. At a hearing held the following day, the Commonwealth agreed to waive its request for a jury trial, indicating that Weatherholt had previously indicated that he did not want a jury. The circuit court then inquired whether Weatherholt, who was present with Collette as counsel, still wished to waive his right to a jury trial. Weatherholt agreed to a bench trial, indicating to the court that he had discussed the implications of so doing with Collette. The court continued the case to May 10, 2017.

At the outset of the trial on May 10, 2017, the circuit court conducted a colloquy in which Weatherholt stated that he had discussed the charges against him with Collette, that he had had sufficient time to discuss with her any possible defense he might have to these charges, that the witnesses he needed for trial were present, that Collette had explained to him the mandatory and maximum sentences possible for the offenses, and that he was satisfied with her services. After receiving evidence from the Commonwealth and the defense, the court convicted Weatherholt of both offenses and continued the case for sentencing. On August 27, 2017, the circuit court

sentenced Weatherholt to 30 years' imprisonment on each charge with 15 years suspended and the sentences to run concurrently.

On September 1, 2017, Weatherholt, represented by new counsel, filed a motion to stay the sentencing order, asserting as grounds his intent to seek a new trial based on multiple claims including that he had been improperly denied the right to counsel at the April 21, 2017 hearing. The circuit court entered an order suspending the judgment until November 7, 2017.

On October 13, 2017, Weatherholt filed his motion to set aside the verdict and for a new trial. As relevant to this appeal, Weatherholt alleged that at the hearing held April 21, 2017 he was deprived of his Sixth Amendment right to counsel. Relying on *Maine v. Moulton*, 474 U.S. 159, 170 (1985), Weatherholt contended that to deprive a person of counsel during the period prior to trial "may be more damaging than denial of counsel during the trial itself." Asserting that "the assistance of counsel is shaped by the need for the assistance of counsel," Weatherholt contended that he should have been afforded the assistance of counsel before being required to make a decision about whether to proceed with the scheduled trial without the assistance of his then-suspended counsel. Thus, Weatherholt maintained that the April 21, 2017 hearing constituted a critical stage of the criminal process in which he was improperly denied the assistance of counsel and that the subsequent proceedings were necessarily suspect.

With respect to the claim that he was deprived of the assistance of counsel at a critical stage of the pre-trial proceedings, the Commonwealth asserted that "the entire right to counsel analysis turns on whether there was some deprivation of counsel during a 'critical stage of the proceeding.'" Maintaining that Weatherholt had not made "specific assertions regarding how the [period] of suspension impacted a critical stage of the proceedings," the Commonwealth asserted that there was no basis for setting aside the judgment.

The circuit court conducted a hearing on Weatherholt's motion on November 3, 2017. Following argument by the parties, the court stated that the purpose of the April 21, 2017 hearing "was simply to make sure that Mr. Weatherholt was informed with regard to the situation with his counsel and to inquire of him what he wished to do in terms of counsel at that point. It was clear to the Court that he wanted Ms. Collette to continue as his counsel." Accordingly, the court found "that the [April 21, 2017] hearing was not a critical stage of the proceeding." Consequently, the court entered an order of even date denying the motion to set aside the verdict.

Weatherholt appealed his convictions to the Court of Appeals. The Court of Appeals granted Weatherholt an appeal. As relevant in affirming Weatherholt's convictions, the Court of Appeals observed that while there is no comprehensive definition of what constitutes a critical stage in criminal proceedings, previous instances where a defendant had been found to have been improperly deprived of counsel included during a police lineup, at a preliminary hearing, at a plea hearing, at sentencing, and on appeal. *Weatherholt v. Commonwealth*, Record No. 1797-17-4, slip op. at 4 (December 26, 2018). Noting that at the April 21, 2017 hearing Weatherholt, "after being informed that his counsel's license had been suspended temporarily, specifically chose to proceed with his trial as scheduled if his counsel's suspension was lifted as expected," the Court of Appeals concluded that Weatherholt had not been deprived of counsel at any critical stage of the criminal proceedings and consequently there was "no error with the trial court's decision not to appoint standby counsel" at that hearing to provide him with advice with regard to his decision to have Collette continue as his attorney. *Id.* at 5. Accordingly, the Court of Appeals affirmed Weatherholt's convictions.

DISCUSSION

Weatherholt noted an appeal from the judgment of the Court of Appeals to this Court. We granted him an appeal limited to the following assignment of error:

> The circuit court violated Mr. Weatherholt's right to counsel by having him appear without counsel during the pendency of his criminal charges and failing to advise Mr. Weatherholt as to the nature of his counsel's failure to appear.

For purposes of our resolution of this appeal, Weatherholt has essentially asserted that the April 21, 2017 hearing constituted a critical stage of the criminal proceedings against him. He maintains that this is so because the decision he was being asked to make, whether to continue to trial with Collette as his counsel, was "shaped by the need for the assistance of counsel" and that the circuit court's error consisted of it requiring him to make that decision without the aid or advice of counsel.[2] The Commonwealth responds, as it did in the Court of Appeals, that the April 21, 2017 hearing, did not constitute a critical stage of the criminal proceedings. Thus, the Commonwealth contends that the fact that Weatherholt was not represented by counsel at that hearing and Weatherholt was not appointed standby counsel at that time, does not constitute reversible error. We agree.

The Sixth Amendment guarantees defendants facing the possibility of incarceration the right to counsel "at all critical stages of the criminal process." *Marshall v. Rodgers*, 569 U.S. 58, 63 (2013). "While there is no comprehensive and final one-line definition of 'critical stage,' the

[2] In addition, Weatherholt again asserts that because Collette was suspended multiple times during and immediately after the criminal proceedings and was ultimately disbarred, he was essentially deprived of the right to counsel throughout the proceedings because Collette was not capable of rendering him effective representation. The Court of Appeals held that this issue was not cognizable on direct appeal. Because Weatherholt did not assign error to this aspect of the Court of Appeal's decision, we need not address the merits of that issue. Moreover, we agree with the Court of Appeals that such matters may only be addressed in a habeas proceeding after the exhaustion of direct appellate remedies. *McGinnis v. Commonwealth*, 296 Va. 489, 495 n.1 (2018).

analysis usually turns on the likelihood of substantial prejudice to defendant's rights during the particular confrontation and the ability of counsel to help avoid that prejudice." *Dir. of Dep't of Corr. v. Kozich*, 290 Va. 502, 512–13 (2015) (citations and internal quotation marks omitted). The inquiry is not whether the defendant *was prejudiced* by the lack of assistance of counsel at a certain point in the proceedings against him, but rather whether the point at which he was denied counsel was a critical stage of those proceedings. Thus, the United States Supreme Court has held that "courts may presume that a defendant has suffered unconstitutional prejudice if he is denied counsel at a critical stage" of the proceedings. *Woods v. Donald*, 575 U.S. 312, 315 (2015) (internal quotation marks omitted). Because there is no dispute that Weatherholt did not have the assistance of counsel at the April 21, 2017 hearing, the issue before us is to determine whether that hearing constituted a critical stage of the criminal proceedings. For the reasons that follow, we conclude that it did not.

Beyond question, an attorney whose license is administratively suspended is not authorized to practice law in the Commonwealth. *Nerri v. Adu-Gyamfi*, 270 Va. 28, 30 (2005). Thus, at the April 21, 2017 hearing, Collette lawfully could not have advised Weatherholt concerning any aspect of the criminal proceedings. Weatherholt contends that he required advice on the sole question upon which the circuit court sought a definitive answer – whether he wished to continue to have Collette as his counsel, with the understanding that if her license were not reinstated at the time of trial, the case would be continued. Such an inquiry does not constitute a critical stage of the criminal proceedings.

It is well established that the right to counsel includes "the right of a defendant . . . to choose who will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). Indeed, this is generally the first decision a defendant must make when he is taken into custody

and is a decision routinely undertaken without the advice of counsel. In this regard, the circuit court's inquiry at the April 21, 2017 hearing was not effectively different from that made of every unrepresented defendant at arraignment.

The circuit court informed Weatherholt that his counsel was not then able to represent him and inquired whether he wished to continue to have her as his counsel should she be able to resume the practice of law. Weatherholt clearly and explicitly stated that he wished for Collette to continue as his attorney. Although Weatherholt indicated that this was in part because he lacked funds to retain another attorney, he also clearly understood that the court would appoint an attorney to represent him if necessary and that doing so would necessitate a further delay in the proceedings. Nonetheless, Weatherholt was firm in his desire to have Collette continue as his counsel if possible because he "want[ed] to get it over with."

The Commonwealth notes that the temporary unavailability of counsel during the course of criminal proceedings is not an unusual occurrence. Counsel may fall ill, have a family emergency, be stranded because of adverse weather, or be unexpectedly away from one jurisdiction because of the pressing nature of a different matter in another. In such cases, it would not be unusual for the court to inquire of a defendant whether he or she wished to accept the delay occasioned by such occurrence or to seek other counsel. Such a proceeding is held for the benefit of the defendant, who might otherwise not be aware of the potential delay in the proceedings. As such, it is difficult to see how a defendant would be likely to suffer a substantial prejudice to his rights or how the presence of counsel would help to avoid such prejudice.

Likewise, the particular facts of this case do not support the conclusion that the April 21, 2017 hearing constituted a critical stage of the criminal proceedings against Weatherholt. As the record demonstrates, Weatherholt was already aware that Collette had failed to appear at an

earlier proceeding that day, necessitating that it be continued. When informed of the reason for her failure to appear and that, unless her license were to be reinstated, the trial scheduled for the following week would likewise be continued, Weatherholt was simply being asked to elect between having Collette remain as his counsel or requesting that new counsel be appointed. While in retrospect it might have been prudent for Weatherholt to have chosen differently, he clearly and unequivocally elected to have Collette continue as his counsel when she became able to do so.

The essence of the April 21, 2017 hearing was to advise Weatherholt of the status of his case and to ascertain what his wishes were with respect to having counsel of his choice. Accordingly, we hold that this inquiry did not require Weatherholt to have the assistance of counsel to formulate his response and, thus, this was not a critical stage of the criminal proceedings that would give rise to a presumption of prejudice as a result of his not having counsel at that time. [3]

CONCLUSION

For these reasons, we will affirm the judgment of the Court of Appeals upholding Weatherholt's convictions.

Affirmed.

[3] The Court of Appeals held that the issue whether the circuit erred in "failing to advise Mr. Weatherholt as to the nature of his counsel's failure to appear" was not properly before the Court because it was being asserted for the first time in his brief after his petition had been granted. Because we conclude that the April 21, 2017 hearing did not constitute a critical stage of the proceedings, we need not consider whether this subsidiary issue be considered under the ends of justice, Rule 5:25, as any alleged failure on the part of the circuit court to provide Weatherholt with more information on the reasons for Collette's suspension would not have resulted in any reversible error.

COURT OF APPEALS OF VIRGINIA

UNPUBLISHED

Present: Judges Decker, Malveaux and Senior Judge Haley
Argued at Fredericksburg, Virginia

JIMMY R. WEATHERHOLT, JR.

v. Record No. 1797-17-4

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION* BY
JUDGE JAMES W. HALEY, JR.
DECEMBER 26, 2018

FROM THE CIRCUIT COURT OF FREDERICK COUNTY
Alexander R. Iden, Judge

William B. Ashwell (Mark B. Williams & Associates, PLC, on brief), for appellant.

John I. Jones, IV, Assistant Attorney General (Mark R. Herring, Attorney General; Victoria Johnson, Assistant Attorney General, on brief), for appellee.

Jimmy R. Weatherholt, Jr. ("appellant") was convicted of conspiracy to distribute Oxycodone and distribution of Oxycodone, third or subsequent offense. Appellant's assignments of error, as granted, read as follows:

> I. The circuit court violated Mr. Weatherholt's sixth and fourteenth amendment right to counsel and due process by failing to appoint standby counsel, requiring he appear without counsel during the pendency of the instant charges, and by failing to set aside the verdicts rendered against him due to the multiple suspensions of trial counsel's law license.
>
> II. The circuit court violated Mr. Weatherholt's right to due process and a fair trial and abused its discretion by the trial

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

> judge's failure to recuse himself from presiding over the instant matter due to violations of the canons of judicial conduct.[1]

We disagree and affirm.[2]

BACKGROUND

"In accordance with familiar principles of appellate review, the facts will be stated in the light most favorable to the Commonwealth, the prevailing party at trial." Gerald v. Commonwealth, 295 Va. 469, 472 (2018) (quoting Scott v. Commonwealth, 292 Va. 380, 381 (2016)). Appellant was indicted on November 10, 2016. On February 14, 2017, the parties appeared in the trial court for scheduling. Appellant appeared with his trial counsel, Shelly Collette. The trial court entered a discovery order and continued the case to March 10, 2017, for entry of a plea or setting of trial date. Nothing further occurred during the proceeding. On March 10, 2017, the trial court continued the case to March 17, 2017 for a bail determination. On March 17, 2017, the trial court heard testimony from Dr. Robert Strauss regarding appellant's pending surgery for sleep apnea. The trial court denied the motion for bail, citing appellant's criminal history and the severity of the charges. The court scheduled the case for a jury trial on April 27, 2017.

Upon learning that Collette's law license had been suspended by the Bar, the Commonwealth placed the matter on the trial court's docket on April 21, 2017, to determine how appellant wished to proceed. Appellant appeared without counsel. The trial court explained that Collette was "currently not in good standing with the Bar" but that she had informed the trial

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[1] Unless leave of court is granted, "[i]t is impermissible for an appellant to change the wording of an assignment of error." White v. Commonwealth, 267 Va. 96, 103 (2004). Accordingly, as appellant did not receive leave of Court to change the wording of the granted assignments of error, we consider only the wording of the assignments of error that were granted by this Court at the petition for appeal stage of the proceedings.

[2] We deny appellant's "Motion for Reconsideration on Appointment of Court-Appointed Counsel by Leave of the Court."

court clerk that "everything is about resolved and if it is not resolved it will be resolved Monday." The trial court inquired of appellant if he wanted to proceed with his trial the following Thursday, April 27, 2017, in the event Collette was reinstated by that time, as expected. Indicating that he "want[ed] to get it over with," appellant affirmed that he wished to proceed with his trial as scheduled with Collette as his counsel. On April 27, 2017, due to "the insufficiency of the number of the jury panel," the trial court continued the case to May 10, 2017. The record reveals that during the pendency of appellant's case, Collette's license was suspended for two brief periods – from February 12, 2017 until February 24, 2017, and again from April 12, 2017 until April 21, 2017. The two suspensions were based solely on Collette's failure to comply with a subpoena duces tecum issued by the Bar. Both suspensions were lifted upon Collette's compliance with the subpoenas.

ANALYSIS

I.

Appellant argues that because of the suspensions, Collette "materially limited her own ability to prepare for trial and thereby prejudiced [appellant's] due process right to be adequately represented by counsel and for a fair trial." Appellant also asserts that he did not receive effective assistance of counsel because of Collette's suspensions during the pendency of his case. He contends that "[t]he instant matter differs from a plain claim for ineffective assistance of counsel" and "instead stands for the proposition that during crucial proceedings in the prosecution against [him], he was wholly without counsel." Finally, he argues that the trial court "failed to obtain a waiver from [appellant] of counsel and additionally failed to appoint standby court appointed counsel."

The issue of whether appellant was denied his right to counsel during the proceedings is a constitutional question that we review *de novo*. See Huguely v. Commonwealth, 63 Va. App.

92, 105 n.9 (2014) ("Although the right to counsel 'is not explicitly set out in the Constitution of Virginia,' the Supreme Court of Virginia has 'held that it is nonetheless a fundamental right guaranteed to an accused by the Bill of Rights of the Constitution of Virginia.'" (quoting Thomas v. Commonwealth, 260 Va. 553, 558 n.2 (2000))). "The Sixth Amendment to the United States Constitution provides: 'In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.'" Spence v. Commonwealth, 60 Va. App. 355, 369-70 (2012) (quoting U.S. Const. amend. VI). "[O]nce the adversary judicial process has been initiated, . . . a defendant [is guaranteed] the right to have counsel present at all 'critical' stages of the criminal proceedings." Montejo v. Louisiana, 556 U.S. 778, 786 (2009).

During the November 3, 2017 hearing on appellant's motion to set aside the verdict, the trial court observed that the purpose of the dialogue with appellant on April 21, 2017, "was simply to make sure that [appellant] was informed with regard to the situation with his counsel and to inquire of him what he wished to do in terms of counsel at that point. It was clear to the [c]ourt that he wanted Ms. Collette to continue as his counsel." In denying appellant's motion, the trial court found that appellant "was represented by licensed counsel at every critical stage of the proceeding."

> While there is no "comprehensive and final one-line definition of 'critical stage,'" Van v. Jones, 475 F.3d 292, 312 (6th Cir. 2007), the analysis usually turns on the likelihood of "substantial prejudice to defendant's rights" during the "particular confrontation" and "the ability of counsel to help avoid that prejudice," United States v. Wade, 388 U.S. 218, 227 (1967).

Director v. Kozich, 290 Va. 502, 512-13 (2015). Examples of critical stages may include a police lineup, United States v. Wade, 388 U.S. 218 (1967), a preliminary hearing, Coleman v. Alabama, 399 U.S. 1 (1970), a pleading stage, Rice v. Olsen, 324 U.S. 786 (1945), sentencing, Townsend v. Burke, 334 U.S. 736 (1948), or appeal, Douglas v. California, 372 U.S. 353 (1963).

At the February 14, 2017 hearing, appellant appeared with his counsel, even though her license was at that time suspended. The trial court entered a discovery order and continued the case for further proceedings. No other matters were addressed, and the entry of the discovery order and the continuation of the matter was not a critical stage of the proceeding. At the April 21, 2017 hearing, appellant, after being informed that his counsel's license had been suspended temporarily, specifically chose to proceed with his trial as scheduled if his counsel's suspension was lifted as expected. Because appellant's substantial rights were not affected during the brief periods of his counsel's suspension, and appellant made clear his desire to proceed to trial as scheduled knowing that his counsel's license had been suspended, we find no error with the trial court's conclusion that appellant was represented by competent counsel during all critical stages of the proceedings. As appellant was represented by counsel at all critical stages, we find no error with the trial court's decision not to appoint standby counsel, *sua sponte*. The trial court determined that appellant knowingly chose to proceed with his retained counsel in spite of her suspensions. The record supports the trial court's denial of appellant's motion to set aside the verdict "based on the conduct of trial counsel."

Appellant's assertion that the suspensions "directly impacted counsel's ability to adequately prepare for trial," is nothing more than a claim that he received ineffective assistance of counsel. As appellant acknowledges, "[c]laims raising ineffective assistance of counsel must be asserted in a habeas corpus proceeding and are not cognizable on direct appeal." Lenz v. Commonwealth, 261 Va. 451, 460 (2001). See also 1990 Va. Acts, ch. 74 (repealing Code § 19.2-317.1).

II.

Appellant contends that "the trial judge abused his discretion in failing to recuse himself in the bench trial, which led to [appellant's] convictions, due to independent knowledge of

evidentiary facts concerning the proceeding and the judge's past involvement with the subject confidential informant Mr. Shull."

Informant Billy Schull worked with Sergeant Sean Foster and Investigator Stephen Kahle in a controlled drug purchase from appellant. Shull was equipped with a covert camera in order to record the transaction. The trial court viewed the video recording and Shull's interaction with appellant. Shull had arranged to purchase five pills of Oxycodone. After meeting with appellant, Shull returned to the police vehicle with five blue pills, which testing confirmed were Oxycodone. Noting the importance of Shull's credibility to prove appellant committed the offenses, the trial court found that the totality of the evidence presented at trial demonstrated appellant's guilt.

After trial, appellant filed a motion to dismiss, arguing that the trial judge had a conflict of interest and should have recused himself. The trial court heard argument on the motion on August 11, 2017. At that time, the trial judge acknowledged that he had "served as Winchester's Commonwealth's Attorney from January 1st of 2002 until July 31st of 2015." Appellant indicates that the trial judge, while Commonwealth's Attorney for the City of Winchester "prosecuted the confidential informant, Mr. Shull, on multiple occasions." He states that Shull had been used as a confidential informant "over a period of no less than four years," overlapping with the trial judge's tenure as Winchester's Commonwealth's Attorney. Appellant asserts that "the trial judge's history as a government attorney, engaging the same confidential informant used during his tenure as Commonwealth's Attorney, impacts his ability to neutrally assess the credibility of the same informant in a proceeding in which he now sits as a neutral fact finder."

Appellant also notes that the trial judge presided over a separate matter in which Shull entered guilty pleas in a different jurisdiction. At appellant's trial, Investigator Kahle testified that he informed the Clarke County Commonwealth's Attorney that Shull was cooperating with

Frederick County law enforcement, but indicated Shull had not received any consideration for his cooperation. Shull faced charges in Clarke County involving forgery of a public document, identity theft, providing false identification to law enforcement, and driving with a revoked license. Appellant asserts that "the mere fact that the judge presided over those same Clarke County charges is contrary to the Canon 3(E)(1) and the trial judge's failure to recuse himself or set aside the verdict delivered at the bench trial was an abuse of discretion that must be reversed."

According to Canon 3(A) of the Canons of Judicial Conduct, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." "[I]n making the recusal decision, the judge must be guided not only by the true state of his impartiality, but also by the public perception of his fairness, in order that public confidence in the integrity of the judiciary may be maintained." Prieto v. Commonwealth, 283 Va. 149, 163 (2012) (quoting Wilson v. Commonwealth, 272 Va. 19, 28 (2006)). "Exactly when a judge's impartiality might reasonably be called into question is a determination to be made by that judge in the exercise of his or her sound discretion." Davis v. Commonwealth, 21 Va. App. 587, 591 (1996). "A purported violation of the Canons alone is not enough to mandate recusal." Commonwealth v. Jackson, 267 Va. 226, 229 (2004). Rather, the party moving for recusal "has the burden of proving the judge's bias or prejudice." Id. at 229. And, "[i]n the absence of proof of actual bias, recusal is properly within the discretion of the trial judge." Id. at 229. "We employ an abuse-of-discretion standard to review recusal decisions." Prieto, 283 Va. at 163.

Here, the trial court specifically noted that "the [c]ourt did not import evidence or facts from another jurisdiction or another matter into this case" and that "there is nothing in the Clarke County matter that in any way impaired the [c]ourt's impartiality to hear this matter." Further, "[w]ith regard to having previously prosecuted Mr. Shull in the City of Winchester in 2013, the

[c]ourt did not become aware or was not reminded, in this case, until" after appellant's trial was complete. The trial judge emphasized that even if he had known he had "previously prosecuted Mr. Shull or had in any way been involved in his plea agreement, the [c]ourt finds that that would not impair the [c]ourt's impartiality with regard to the matter." The trial court denied appellant's motion to dismiss.

Here, appellant failed to demonstrate any actual bias or prejudice. The trial judge determined that he was not impacted by the former interactions with the witness and had impartially presided over appellant's trial. The trial judge had no recollection of having prosecuted the witness. Appellant does not make a claim of bias beyond the judge's prior dealings with the witness. Nothing in the record suggests that the judge abused his discretion in denying the motion to dismiss due to a conflict of interest.

Accordingly, we affirm appellant's convictions.

Affirmed.

VIRGINIA:

IN THE FREDERICK COUNTY CIRCUIT COURT

THE COMMONWEALTH OF VIRGINIA	
v.	
JIMMY R. WEATHERHOLT, JR.	**Case Nos: CR16-1099 CR16-1100**
Defendant.	

ORDER

COMES NOW, the Defendant, JIMMY RAY WEATHERHOLT, by counsel, and the Assistant Attorney for the Commonwealth of Virginia for a hearing on the Defendant's Motion to Set Aside and Reconsider,

AND IT APPEARING TO THE COURT, that the Adjudication and Final Dispositional Order previously entered by the Court was suspended and stayed until November 7, 2017;

AND IT FURTHER APPEARING that upon the pleadings filed and the argument of counsel, it is;

ADJUDED ORDERED and DECREED;

The Defendant's Motion to Reconsider and Set Aside the convictions previously entered by this Court on May 10, 2017 and Final Adjudication and Sentencing Order entered August 22, 2017 is hereby DENIED.

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&
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Entered this 3rd day of November, 2017.

JUDGE

SEEN & OBJECTED TO for REASONS ON RECORD + IN MOTION TO SET ASIDE + RESENTENCE

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SEEN & _____

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VIRGINIA:

IN THE CIRCUIT COURT FOR FREDERICK COUNTY

Hearing Date: August 11, 2017 (FIPS) CODE: 069
Presiding Judge: Alexander R. Iden

COMMONWEALTH OF VIRGINIA

V. DOCKET: CR16-1099 & 1100

Jimmy Ray Weatherholt, Jr.,
Defendant

ADJUDICATION AND FINAL SENTENCING ORDER

Commonwealth Attorney Present: Nicholas Manthos

Defense Attorney Present: Shelly Collette
Defendant personally present

The Defendant previously was arraigned, pled not guilty, tried without a felony venire, found guilty, and adjudicated on May 10, 2017.

Offense Tracking Number	**Virginia Crime Code** (For Administrative Use Only)	**Code Section**	**Case Number**	
069CR1600109900	**NAR-3042-C9**	**18.2-248**	**CR16001099-00**	
Offense Date: 05/04/2016	**Description: CONSPIRE TO SELL OXYCODONE**			**FELONY**
069CR1600110000	**NAR-3042-F9**	**18.2-248**	**CR16001100-00**	
Offense Date: 05/04/2016	**Description: DISTRIBUTION OF OXYCODONE 3+**			**FELONY**

Presentence Report Requested, filed with the Court and with Defense Counsel at least 5 days prior to hearing and made a part of the record in this case: Yes X.

On August 11, 2017 Defense made a motion to dismiss verdict or for a new trial due to Judge's conflict. Argument was heard, motion was denied.

Plea Agreement: No: X

Evidence or proffer and/or Exhibits presented by the Commonwealth: Yes: X

COMMONWEALTH OF VIRGINIA V. Jimmy Ray Weatherholt, Jr., Defendant

Evidence or proffer and/or Exhibits presented by the Defendant: Yes: ___X___

Pursuant to Va. Code 19.2-298.01 Sentencing Guidelines were filed with and reviewed by the Court after guidelines were reviewed by and discussed by Defendant and his/her attorney: Yes:___X___. The Guidelines worksheet and explanation for any departure from the guidelines were made a part of the record in this case.

Argument of counsel was heard and prior to the Court proceeding to sentencing the Defendant was afforded his right of allocution, which he did not exercise.

The Court sentences the Defendant as follows:

Case No.: **CR16-1099** Description: **Conspire to Distribute Oxycodone**
[X] Incarceration within the Virginia Department of Corrections for a term of ___30___ years; ___15___ years suspended

[X] The Defendant is Ordered to pay a fine of $__50.00__ together with the costs of his prosecution.

[ ] RESTITUTION. NONE

[X] OPERATORS LICENSE SUSPENSION: The Defendant's operator's license and/or privilege to drive a motor vehicle upon the highways of the Commonwealth of Virginia is suspended/revoked for a period of ___6___ months.

Case No.: **CR16-1100** Description: **Distribute Oxycodone Being Third or Subsequent Offense**
[X] Incarceration within the Virginia Department of Corrections for a term of ___30___ years; ___15___ years suspended

[X] The Defendant is Ordered to pay a fine of $__50.00__ together with the costs of his prosecution.

[ ] RESTITUTION. NONE

[X] OPERATORS LICENSE SUSPENSION: The Defendant's operator's license and/or privilege to drive a motor vehicle upon the highways of the Commonwealth of Virginia is suspended/revoked for a period of ___6___ months.

Consecutive/concurrent
These sentences shall run concurrently with each other.

COMMONWEALTH OF VIRGINIA V. Jimmy Ray Weatherholt, Jr., Defendant

Conditions of Active Incarceration: If active incarceration is imposed, as part of the condition of the suspended sentence, the defendant shall comply with rules and regulations of any penal facility where defendant is incarcerated and the defendant shall violate no criminal laws of Virginia or any other jurisdiction while incarcerated.

Conditions of Suspended Sentence:

[X] Supervised Probation: The Defendant is placed on probation under the supervision of a Probation Officer of this Court to commence upon release from confinement and to continue for a period of ___3___ years unless sooner released from probation by this Court or the Probation Officer. Defendant shall comply with all rules and requirements of probation as set by his Probation Officer and this Court. Probation shall include substance abuse treatment/counseling and/or drug and alcohol testing as required by his Probation Officer or by this Court and such other counseling and/or testing as may be set as a condition of his probation.

The Defendant shall violate no criminal laws of the Commonwealth of Virginia or any other jurisdiction. The Defendant shall maintain gainful employment to the extent he is able to do so and he shall support legal dependents, if any. The Defendant shall abstain from the use or possession of alcohol and illegal drugs. The Defendant shall pay the fine and all Court costs imposed to the Frederick County Circuit Court Clerk's Office. The Defendant waived his Fourth Amendment Rights and shall submit to search and seizure of his person, belongings, and residence on a random basis by the Probation Officer or any law enforcement officer without the necessity of there being a warrant, probable cause, or reasonable articulable suspicion.

[X] Good Behavior: The Defendant shall keep the peace , be of good behavior and violate no criminal laws of this or any other jurisdiction for ___2___ years immediately following successful completion of supervised probation.

Defendant shall provide a DNA sample and legible fingerprints as directed.

The Defendant shall be given credit for the time spent in confinement while awaiting trial pursuant to Va. Code 53.1-187.

The Defendant was remanded to the custody of the sheriff.

DEFENDANT IDENTIFICATION:

Name: Jimmy Ray Weatherholt, Jr.

SSN: DOB 09/29/1973 SEX: ___M___

SENTENCE SUMMARY:

Total incarceration sentence imposed: 30 years

COMMONWEALTH OF VIRGINIA V. Jimmy Ray Weatherholt, Jr., Defendant

Total incarceration sentence suspended: 15 years

Total supervised probation term: 3 years followed by 2 years unsupervised probation

Total fine imposed $ 100.00

22 August 2017
DATE

Judge

CC:

CWA ✓
Def Atty ✓
Probation ✓
Jail ✓
Other ✓ DMV
08-22-17

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 1st day of July, 2020.

Jimmy Ray Weatherholt, Jr., Appellant,

against Record No. 190206
Court of Appeals No. 1797-17-4

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on March 19, 2020 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Chafin took no part in the resolution of the petition.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: 

Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on **Thursday** *the* **17th** *day of* **January, 2019.**

Jimmy R. Weatherholt, Jr., Appellant,

against Record No. 1797-17-4
Circuit Court Nos. CR16-1099 and CR16-1100

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing En Banc

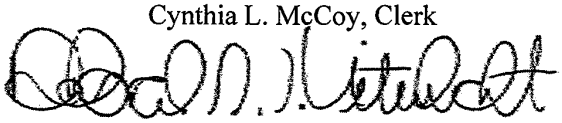
Before the Full Court

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 26th day of December, 2018 and grant a rehearing *en banc* thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing *en banc* in this case. Code § 17.1-402(D).

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: 

Deputy Clerk