

NO. 20-7339
IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN ANTONIO WATSON,
Petitioner,
v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITIONER'S REPLY BRIEF

Kevin A. Watson, #1003366
Pro-Se Petitioner
Red Onion State Prison
P.O. Box 970
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No. 20-7339

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN ANTONIO WATSON,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITIONER'S REPLY BRIEF

COMES NOW, the Petitioner Kevin A. Watson, by Pro-Se and Per U.S. SUP. CT. R. 15 (6) to respectfully submit his Reply Brief For this Honorable Court's Consideration in the above styled matter. The Petitioner now state the following information in support of his reply brief:

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A. STATEMENT OF FACTS

1. The Petitioner's Writ of Certiorari in the above entitled case was filed on February 12, 2021 and Placed on the docket for March 5, 2021, as: "No. 20-7339."

2. On March 15, 2021, the Petitioner mailed Respondent's Counsel - Henrico County Deputy Commonwealth Attorney Michael S. Huberman Notice of the Case Filing. On March 19, 2021, Mr. Huberman received the Notice and he filed a Waiver to respond with this Court's clerk's office on April 12, 2021.

3. On April 12, 2021, this Court entered an order directing the Henrico County Commonwealth Attorney to give a response on or before May 12, 2021.

4. On June 10, 2021, the Respondent by Counsel filed a Brief in Opposition to the granting of a writ of Certiorari with this Court.

B. ARGUMENT

1. Respondent's Brief In Opposition has no merits and Petitioner should be granted a writ of Certiorari.

Respondent argues First, "Petitioner does not accurately describe the lower Court's holdings..." The state trial Court did not hold, as Petitioner claims, that Petitioner's trial Counsel sleeping Structural Error claim had no merits". Resp. Brf. Pg. 6. Respondent asserted, the state trial Court concluded--after "a review of the files and the evidence during the trial and sentencing"--that there was no "basis" to vacate Petitioner's state conviction under a specific state Virginia Code Section 8.01-428(D). Id. at Pg. 6.

Respondent argues Secondly, per Charles v Precision Tune, Inc., 414 S.E.2d 831 (1992),

the Virginia Supreme Court has rejected the argument that Virginia Code Section 8.01-428(D), permits a circuit Court to relieve a party from "any judgment." Resp. Brf. Pgs. 6-9.

Petitioner asserts Respondent's above two arguments ~~are~~ mis placed for the reason(s) that its arguments ~~are~~ predicated on a misinterpretation of the Facts and laws in this case for the following reason(s):

First, a dismissal for failure to state a claim, upon which relief may be granted, is generally on the merits, unless the Court says otherwise (i.e. dismisses without prejudice). *Federated Dept. Stores, Inc., v Moities*, 452 U.S. 394, 399 N. 3 (1981).

Respondent's first argument in essence is the state's trial Court dismissed Petitioner's →

Motion To Vacate, upon the ground that it failed to state a claim under Virginia Code Section 8.01-428(D), which relief may be granted. However, Respondent wants this Court to believe the decision was not on the merits, without producing any evidence to support that fact. Contrary to, the Petitioner has produce evidence that the decision was on its merits per *Federated v Moities*, supra., 399 N.3, because the state's trial Court order ~~does not~~ state the motion was dismissed "without prejudice". Pet. Writ of Cert., App. B. Furthermore, Virginia Supreme Court refusal to grant a petition for Appeal constitutes a decision on the merits of the case. *Sheets v Castle*, 263 Va. 407; 559 S.E.2d 616 (2002).

Thus, for the above reasons, the State's trial Court and Virginia Supreme Court decisions was on the merits of Petitioner's structural error Federal Claim.

Secondly, the Virginia Supreme Court and trial Court have no constitutional or Virginia Code Section [statute] authority to make a rule or decision that would in effect abrogate, abolish, Annul or limit statutory subject-matter jurisdiction. See e.g., *Dorn v Dorn*, 222 Va. 288, 279 S.E. 2d. 393 (1981) ("The Constitution of Virginia Article 6, Section 5, Prohibits the Promulgation of any court rule in conflict with the general law as the same shall, from time to time, be established by the General Assembly"); *Collins v Shepherd*, 274 Va. 390, 649 S.E. 2d 672 (2007); *Smith v Commonwealth*, 56 Va. App. 351, 693 S.E. 2d 765 (2010) ("A rule of Court can not limit statutory Subject-matter Jurisdiction").

Respondent's second argument in essence is the Virginia Supreme Court and the trial Court has abrogated, abolished, annulled or limited the trial Court's statutory subject-matter jurisdiction under Virginia →

Code Section 8.01-428(D), per *Charles v. Precision Tune, Inc.*, 414 S.E.2d 831, 833 (1992); *Turner v Commonwealth*, No. CL14-9380, 2015 WL 10765165 (Va. Norfolk Cir. Ct.).

However, Virginia Code Section 8.01-428(D), is a general statutory law established by the Virginia General Assembly and per *Dorn v Dorn*, supra., Code 8.01-428(D), plain language apply and not Charles or Turner case laws supra..

Code Section 8.01-428(D), irrelevant parts states: "This section does not limit the power of the court to entertain at any time an independent action to relieve a party from any judgment or proceedings..."
Id.

The term: "ANY" means each or all. *Phelps v Commonwealth*, 275 Va. 139, 654, S.E.2d 926 (2008). Thus, for purposes of the first clause or provision of Code 8.01-428(D),: "any judgment" means each or all judgments.

However, Respondent reads *Charles v Precision* to mean that said Statutory clause applies only to claims of "Fraud upon the Court." Petitioner asserts to apply *Charles v Precision*, *supra*, to the facts of his case, would in effect abrogate, abolish, annul or limit Virginia Code Section 8.01-428(D) clause #1 statutory subject-matter Jurisdiction, contrary to *Dorn v Dorn*, *supra*. "When a court of last resort has established a precedent, after full deliberation upon the issue by the Court, the precedent will not be treated lightly or ignored, in the absence of Flagrant error or mistake." *Morrison v Bestler*, 239 Va. 166, 176, 387 S.E.2d 753, 759 (1990). Petitioner asserts, *Dorn v Dorn*, *supra*, established a precedent, after full deliberation upon the issue; "a Virginia Supreme Court Rule could not limit the trial Court's statutory authority under Virginia Code Section 8.01-428." *Id.*

Its no Flagrant error or mistake in Dorn v Dorn, supra, because the Virginia Supreme Court's decision were supported by Virginia Constitution Article 6, Section 5. The Flagrant error or mistake is in Charles v Precision, supra, if it is read to hold that the Virginia Supreme Court can make a rule or decision that in effect would limit, abolish, annul or abrogate the trial Court's statutory subject-matter Jurisdiction Under Code 8.01-428 (D) clause #1.

"In Virginia, the doctrine of stare decisis is more than a mere cliché. That doctrine plays a significant role in the orderly administration of Justice by assuring consistent, predictable, and balanced application of legal principles." Morrison v Bestler, supra, 239 Va. At Pg. 759.

Consequently, to apply Charles v Precision to Petitioner's case and not apply Dorn v Dorn, supra, would make the doctrine of stare decisis in Virginia a mere cliché.

Futhermore, when apply a rule of Statutory Construction to Code 8.01-428(D), it Shows the General Assembly Provided three (3) Separate and distinct Provisions or clauses. When the legislature uses the Comma followed by the Conjunction "or" its their intent to Provide a choice in the matter. When Code 8.01-428(D) is reviewed under this Statutory Construction rule, it shows the Virginia legislature used a Comma followed by the Conjunction "Or" after the Phrase: "any Judgment or Proceeding". Id. Thus, the First clause or choice has nothing to do with the last clause or choice: "This section does not limit the Power of the Court to... Set aside a Judgment or decree for Fraud upon the Court." Evenmore so, in two different Motions to vacate cases under Code 8.01-428(D), Respondent by Counsel Richmond City Assistant Commonwealth's Attorney's argued that the Richmond City Circuit Court should dismiss the motions →

because the Petitioner(s) does not allege the Judgment was void due to extrinsic fraud or "structural error". See: Attached Exhibit A, Motion To Dismiss and Draft Court Order. The Richmond City Circuit Court granted the Respondent Motions to dismiss and dismissed the motions. See: Antonio H. Blount v Commonwealth, Case #CR10-F-4917, (Richmond City Circuit Court, 2019); Joel M. Hicklin v Commonwealth, Case #13-F-1978, (Richmond City Circuit Court, 2019). Petitioner asserts implicit in those cases, had the Petitioners' Proved that their Criminal Judgment was void due to a "structural error", the Richmond City Circuit Court would have granted their motions. Petitioner asserts, his Motion to Vacate record shows that he made a claim that his criminal Judgment was void due to a "structural error" by his trial Counsel being asleep during a critical stage of trial. Pet. Mot. Pg. 2-3 of 3, Section B - Henrico County Cir. Ct. Case No. CR99-1420.

Thus, IN Petitioner's Case when the Circuit Court denied his Motion and the Virginia Supreme Court refused to grant him an Appeal, those decisions constituted a decision on the merits of his "structural error claim". Wherefore, Petitioner's case does implicate federal law and does confer jurisdiction on this Court Per U.S. v Cronin, 466 U.S. 648 (1984); Yates v Aiken, 484 U.S. 211 (1988). Consequently, Respondent's second argument has no merits.

3. Respondent's third argument that Petitioner's structural error claim has no merits because it is predicated on a clerical error committed by the trial judge that has been corrected on May 10, 2000. Petitioner asserts Respondent's third argument has no merits for the following reason(s):

First, Respondent alleges, on May 10, 2000, upon Henrico County Commonwealth's Attorney's Motion to correct trial transcript, the Henrico County Circuit Court granted the Motion. However, Respondent did not attach a copy of the alleged Court Order to its Brief in opposition.

Secondly, Respondent alleges, the Circuit Court corrected the error on the original trial transcript that: "the trial Court was talking about Tom Campbell, a local newspaper reporter who was asleep and not Petitioner's trial Counsel Robert G. Cabell." However, Respondent did not attach a copy of the MAY 10, 2000, Motion's hearing transcripts to his brief; Nor did he submit evidence etc., to support that it was the alleged error corrected. Did Respondent read the Court order and transcripts or did someone tell him about the matter? Petitioner asserts, if the alleged Motion hearings did occur, who presented the evidence to the trial Court that it was →

Tom Campbell who was asleep and not Petitioner's trial Counsel Mr. Cabell? What type of evidence was presented to the trial Court to show that it was Mr. Campbell who was asleep and not Mr. Cabell? Its no evidence before this Court to answer the above Questions. However, the Respondent wants this Court to believe its allegations on Face value. Petitioner's Evidence at Appendix C shows the trial Court statement: "I'm going to wake up Mr. Cabell." If Mr. Cabell heard this alleged mistake, its reasonable to believe that he would have corrected it at that moment. However, he did not, but acknowledged that he was asleep and he stated: "I'm sorry, Your Honor." Id. APP. C. The alleged Person Tom Campbell did not have any thing to do with Petitioner's Criminal Case and nor was he ~~the~~ Petitioner's trial Counsel or associated with Petitioner's

trial Counsel Mr. Cabell. At no time did Respondent allege in State Court Proceedings that Petitioner's Original trial transcripts had been corrected on May 10, 2000, and the State Courts' was relying on the Correction to dismiss Petitioner's Motion to Vacate. Appendix B. Nor did the Virginia Supreme Court state that it was relying on it to refuse the Appeal. Appendix A. However, again, Respondent wants this Court to assume that the courts below did rely on it. Furthermore, if the alleged May 10, 2000, hearing is true, the Respondent placed the trial Court Judge in the position of arguably conducting an ex Parte hearing." A Judge shall not initiate, permit, or consider ex Parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." See Virginia's Rule of Professional Conduct 3.5(c); Virginia's →

Canons of Judicial Conduct, 3(B)(7). On May 10, 2000, Petitioner's Criminal Case, styled: Commonwealth v Watson, Case # CR99-1420, was pending in the trial Court for direct appeal proceedings, when the Respondent initiated the alleged Motion to correct the original transcripts. However, neither Petitioner's Sentencing and direct appeal Counsel - Joseph D. Morrissey were giving notice of such hearing. For such reason, Mr. Morrissey nor the Petitioner were allowed to attend the alleged hearing. The Petitioner had a legal interest in the hearing proceeding. "A judge shall accord to every person who has a legal interest in a proceeding or that person's lawyer, the right to be heard according to law". Rule of Professional Conduct, 3.5 (e); Canons of Judicial Conduct, 3(B)(7). Thus, if the alleged May 10, 2000, hearing is true, the trial Court consider the Respondent's Motion ex Parte Communication in violation of said rules of Professional Conduct.

Even more so, if the May 10, 2000, hearing did occur and the trial Court granted the motion, the Court's May 10, 2000, order is void ab initio for Extrinsic Fraud. Extrinsic Fraud includes Circumstances as Preventing another Party's witness from appearing and intentionally failing to join necessary Party, Gulfstream Bldg. Associates, Inc., v Britt, 239 Va. 178, 387 S.E.2d 488 (1990); Ellett v Ellett, 35 Va. App. 97, 642 S.E.2d 816 (2001). In Petitioner's Case, Respondent-Henrico County Commonwealth's Attorney did not give Petitioner notice of the May 10, 2000, hearing and did not join the Petitioner to such hearing, a necessary Party. The Petitioner had a Federal and State Constitution due process right to be at such hearing; the right to present evidence at such hearing and the right to have witness to appear on his behalf. However if the May 10, 2000, hearing did occur, the Respondent's actions →

Prevented a fair submission of issue of:
whether it was Tom Campbell or Robert
Cabell who was ~~asleep~~ at the Petitioner's
trial. Thus, if true, it is evidence that
the Respondent perpetrated extrinsic
fraud on the court and the Petitioner.
Moreover, if this Court determines that
it was Petitioner's trial Counsel Mr.
Cabell who was asleep, "A presumption
a prejudice attaches automatically."
"We agree with other circuits and hold
that a defendant's Sixth Amendment right
to Counsel is violated when the defendant's
Counsel is asleep during a substantial
portion of the defendant's trial.^{#3} In such
circumstances, Cronin requires us to
presume prejudice because the defendant
has been constructively denied counsel."
U.S. v Rasin, 820 F.3d 609 [4th Cir. 2016]
["Footnote #3... Our holding today does not
preclude a claim in which Counsel is asleep
during a critical stage of defendant's
trial. Again, however, has not pled facts →

that would implicate such a rule."].
Petitioner asserts the Respondent's
Statement that the Federal Court of
Appeals have held that a presumption
of Prejudice does not attach automatically
to cases of sleeping counsel is not
true. *Ragin*, supra, 820 F.3d at Pg. 619.
Petitioner did not cite *Norde v Keene*,
Hunter v Moore, and *U.S. v Boone*, to say
that those cases involved sleeping lawyers,
but he did cite them to say: (1) denial of
right to counsel, even temporarily, during
a critical stage of trial is a structural
error; (2) an ineffective assistance of
trial counsel claim should be analyzed under
Cronic rather than Strickland, if the
defendant is denied counsel constructively
at a critical stage of the trial. Thus,
Petitioner's questions presented are
implicated by these facts - and for the
reason(s) discussed above; in his writ
of certiorari he would have prevailed in
a different lower court without the
legal conflicts amongst the courts.

For the above reason(s), Respondent's third argument has no merits.

CONCLUSION

The Petition For a writ of Certiorari should be granted.

Respectfully Submitted,

Kevin A. Watson

DATE: June 22, 2021 Kevin A. Watson, #1003366
Pro-se Petitioner
Red Onion State Prison
P.O. Box 970
Pound, VA 24279

DECLARATION

Per 28 U.S.C. Section 1746, I swear under the Penalty of Perjury that this Reply Brief is true and correct.

DATE: June 22, 2021 Kevin A. Watson
Kevin A. Watson, #1003366

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2021, that I mailed the Respondent's Counsel - Toby J. Heykens, Solicitor General, 202 North 9th Street, Richmond VA, 23219, by first class mail.

Kevin A. Watson
Kevin A. Watson, #1003366

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

ANTONIO H. BLOUNT,
PLAINTIFF,

V.

Case Nos.: CR10-F-4917, CR10-F-4328, CR10-F-4331/CR10-F-4332

The Honorable C. N. Jenkins, Jr.

COMMONWEALTH OF VIRGINIA,
RESPONDENT.

COMMONWEALTH'S MOTION TO DISMISS PETITIONER'S MOTION TO VACATE

Comes now the Commonwealth of Virginia, by counsel, and in support of its motion to dismiss Petitioner's "Motion to Vacate," tenders the following response:

On October 29, 2010, Antonio H. Blount (hereafter referred to as "Petitioner") pled guilty in the Circuit Court of the City of Richmond to five counts of robbery (18.2-58). On the same day, Petitioner was sentenced for each of these convictions to one hundred years imprisonment with ninety-eight years suspended for life. Petitioner also pled guilty to one count of malicious wounding and three counts of use of a firearm in the commission of a felony. Those charges are not the subject of Petitioner's motion to vacate.

On or about July 30, 2019, Petitioner, *pro se*, filed a "Motion to Vacate Void Judgment" for relief of void judgment. In that motion, Petitioner asserts that the judgment was void due to the fact that the Court lacked subject matter jurisdiction. (Page 2 of Petitioner's Motion to Vacate). Specifically, Petitioner alleges that Virginia Code Section 18.2-58 describes robbery as a common law crime. Common law crimes, Petitioner argues, do not carry the force of laws. (Page 2 of Petitioner's Motion to

Vacate). Therefore, according to petitioner's argument, he was unlawfully convicted.

(Page 3 of Petitioner's Motion to Vacate).

ARGUMENT

Rule 1:1 of the Rules of the Supreme Court of Virginia provides that final judgments, orders, and decrees remain under the trial court's control for twenty-one days after entry, and no longer. At the expiration of that twenty-one day period, the trial court loses jurisdiction to disturb a final judgment. Additionally, Virginia Code Section 19.2-303 allows a trial court to modify an unserved portion of a sentence "at any time before the person is transferred to the Department [of Corrections]." More than twenty-one days have lapsed, and Defendant has already been transported to the Department of Corrections. Therefore, this Court no longer has jurisdiction over this matter under either of these authorities.

The Commonwealth concedes that "a final and conclusive judgment that is void may be attacked at any time, by direct or collateral attack." *Comm. v. Hudson*, 57 Va. Cir. 92 (2001) (citing *Peet v. Peet*, 16 Va. App. 323, 326 (1993)); see Va. Code. § 8.01-428(D) (providing "the power of the court to entertain at any time an independent action to relieve a party from any judgment or proceeding . . . or to set aside a judgment or decree for fraud upon the court"). In order for a final judgment to be collaterally attacked, it must be one that is void due to an "extrinsic fraud" or structural error, rather than a mere "intrinsic fraud" which is accessible only on direct appeal, and not subject to collateral challenge in an independent proceeding. *Peet*, 16 Va. App. at 326; *Jones v. Willard*, 224 Va. 602, 607 (1983). Extrinsic fraud consists of "conduct which prevents a fair submission of the controversy to the court." *Id.*

At no time does Petitioner allege that this judgment was void due to extrinsic fraud or structural error.

WHEREFORE, the Commonwealth prays that this Court deny and dismiss Petitioner's motion to vacate judgment.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By: Brooke E. Pettit

Brooke E. Pettit, VSB No. 82515
Assistant Commonwealth's Attorney
for the City of Richmond
Marsh Criminal/Traffic Division at Manchester
920 Hull Street
Richmond, VA 23224

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Commonwealth's Motion to Dismiss Petitioner's Motion to Vacate was mailed this 20th day of September, 2019, to Antonio H. Blount #1438122, Wallen's Ridge State Prison, P.O. Box 759, Bridgestone Gap, Virginia, 24219.

Brooke E. Pettit
Brooke E. Pettit

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

ANTONIO H. BLOUNT,
PLAINTIFF,

V.

Case Nos.: CR10-F-4917, CR10-
F-4328, CR10-4331/CR10F-4332

The Honorable C. N. Jenkins, Jr.

COMMONWEALTH OF VIRGINIA,
RESPONDENT.

ORDER

Whereas the Petitioner has failed to show that the judgment was void due to extrinsic fraud or structural error, it is ORDERED that the Petitioner's Motion to Vacate is dismissed.

Date: ____/____/2019

Judge, Circuit Court for the City of Richmond

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

**JOEL MALIK HICKLIN,
PLAINTIFF,**

V.

Case Nos.: 13-F-1978 & 14-F-3735

**COMMONWEALTH OF VIRGINIA,
RESPONDENT.**

ORDER

Whereas the Petitioner has failed to show that the judgment was void due to extrinsic fraud or "structural error," it is ORDERED that the Petitioner's Motion to Vacate

is dismissed.

Date: ____/____/2019

Judge, Circuit Court for the City of Richmond