

JUN 14 2023

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No.

23-5253

IN THE

SUPREME COURT OF THE UNITED STATES

YOUSSEF HOBALLAH — PETITIONER
(Your Name)

VS.

COMMONWEALTH OF VIRGINIA RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS OF VIRGINIA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

YOUSSEF HOBALLAH
(Your Name)

to Norfolk City Jail

811 East City Hall Avenue, Norfolk, VA, 23510
(Address)

Norfolk, VA, 23510
(City, State, Zip Code)

3136366999
(Phone Number)

ORIGINAL

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1. The defendant signs a conditional plea agreement that contains a provision: "If the defendant files an appeal of this matter, then this plea agreement is null and void." Is it fair to sustain a conviction of the defendant, after he files an appeal of the matter, which he did in this case? In other words, is fair or unfair to force the defendant to be guilty based on a plea that became clearly "null and void" in this case based on its own provision?

2. Several legitimate reasons existed that pushed the defendant to ask to withdraw his plea which he did. These reasons include: misrepresentation of oral promises, breach of written terms by Government, and existence of unfulfillable promises in the plea. Given these circumstances, should the justice and constitutional guarantees of fundamental fairness allow a withdrawal of plea for the reasons existing?

The defendant was locked up due to a probation violation charge. He was never brought to trial for the probation violation. Is it a structural error to deny the defendant trial for the criminal charge? Is it a structural error to accuse the defendant of a charge, take his freedom away for that charge, but deny him of his due process rights, a constitutional protected right by the 5th and 14th amendment of U.S. Constitution?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Hoballah v. S. Commonwealth of Virginia. Record No. 0729-211. Court of Appeals of Virginia. Judgment entered September 13, 2022

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OPINIONS BELOW

I, Youssef Hoballah, declare that the opinions of the lower courts in the Appellant case have not been published. The opinion of the Court of Appeals of Virginia for this case appears in "Appendix A" of the booklet for the petition of writ of certiorari.

JURISDICTION

The circuit Court of City of Norfolk sentenced the defendant on July 9th 2021. The Court of Appeals of Virginia denied discretionary review.

March 24th 2023

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- due process clause of the 5th amendment of U.S Constitution
- due process clause of the 14th amendment of U.S Constitution
- 16th amendment of the U.S Constitution
- Article 1, section 11 Virginia Constitution
- Virginia Statute Code 19.2-296
- Virginia Supreme Court Rule 5A:18
- Federal Rule 22(d) of Federal Criminal Procedure

STATEMENT OF FACTS

Youssef Hoballah ("Appellant") was indicted and charged in the Norfolk Circuit Court for Stalking with Intent to Cause Fear 2nd offense within 5 years (Virginia Code § 18.2-60.3(B)), Stalking a person with a Protective Order (Virginia Code § 16.1-253.2 (C)), Aggressive Driving with Intent to Injure (Virginia Code § 46.2-868.1), Violation of a Protective Order (2 counts) (Virginia Code § 16.1-253.2 (A)) and Misdemeanor Unauthorized Use of Electronic Tracking Device (Virginia Code § 18.2-60.5). In October 2020, the Appellant pled not guilty to Stalking with Intent to Cause Fear 2nd offense within 5 years and a jury trial was held. The jury was unable to reach a verdict and a mistrial was declared. (R. 218-219). The jury trial was rescheduled for March 29, 2021. On December 15, 2020, the Appellant entered an Alford plea to three charges: Stalking with Intent to Cause Fear 2nd offense within 5 years, Stalking a Person,

with a Protective Order and one count of Violation of a Protective Order. Before the plea, the Commonwealth's Attorney, Mr. Rhett Wallace, and the Appellant's Attorney, Mr. Andrew Sacks entered an oral agreement regarding a good behavior probation for four misdemeanors convictions, where Mr. Wallace agreed not to violate the Appellant on this good behavior probation if he enters the Alford plea (R. 292, 1148). Only when Mr. Sacks made assurance to the Appellant about the effect of the Alford plea on the good behavior probation, the Appellant agreed to enter the plea. The Appellant believed this agreement meant the Commonwealth could never violate him as a result of the plea agreement for prior convictions or else he wouldn't enter that plea. The terms of the plea included three charges to be nolle prossed, and three remaining charges to be taken under advisement. The conditions to satisfy

included two years supervised probation with special conditions including prohibition from coming to Norfolk. A probation violation would result of a violation of the Finding under advisement. Provision five of the plea also included that "if the defendant files an appeal of this matter, the plea agreement would be null and void. (R. 223-224)

Judge Fulton, on December 15th 2020, went over the written plea agreement and entered it, and the Appellant was released on bond.

On January 25, 2021, the Appellant was taken into custody on a PB15.

On February 10th, the Appellant's Probation Officer requested a Capias and included a Major Violation Report, which was signed by Judge Fulton on same day (R. 242-247). The hearing for the Probation Violation was

set on March 3rd for docket call. The Commonwealth filed a motion to advance the Finding under advisement on the docket, noting that the Appellant had violated the terms of his plea agreement and probation.

Both, the Probation violation and the finding under advisement hearing were set for April 2nd 2021. The two cases were continued to April 29th. In that hearing the Court admitted that a Capias had been issued but believed there was no Probation Violation pending. R(638). The Appellant contended that there should have been a hearing on the Probation Violation and then the Court could address the finding under advisement if necessary. This is because he was picked on PB-15, a Capias was issued, a Major Violation Report was prepared, and the Appellant remained in custody. The Commonwealth disagreed with the Appellant's contention and supported the judge's belief that there was no Probation Violation on the docket. They claimed that the Capias was just a mechanism to get the Appellant back in Court (R. 611, 630, 682-685). The Court eventually treated the hearing as an advancement of the finding under advisement and not

a Probation Violation, and as a result the Probation Violation was not adjudicated at all. (R.638). The Commonwealth claimed the defendant violated the plea agreement by coming to Norfolk. The Appellant admitted coming to Norfolk, but under duress. The Court found the Appellant in violation of the plea agreement and found him guilty of the offenses: Stalking a Person with Protective Order, Stalking with Intent to Cause Fear 2nd offense within 5 years, and Violation of Protective Order. (R.643-644). On June 4th, a Sentencing hearing was held by Judge Lannetti. Two motions were filed to be heard on the same date: The Appellant Motion to Withdraw his Alford Plea, and a Motion to Set Aside the Findings of the Guilt made on April 30, 2021. The reasons given to withdraw the guilty plea before sentencing were: First, the Commonwealth violated an oral agreement, made on December 15, 2020, not to violate the

Appellant's earlier good but was probation, which is breach of the plea agreement by the Commonwealth. This scenario was never communicate would happen by both his Attorney or McWallace; which amounts also to material mistake of facts and misunderstanding of the effects of signing the plea, which the Appellant claims put him accordingly in a worse position than he was when he had a mistrial on the charges, and there was no reason for him to sign it if that scenario would transpire. Second, The Commonwealth not acknowledging his right to trial for what he was arrested for originally (the Probation violation (Capias) constituted breach of the plea agreement that implies an evidentiary hearing to decide if he violated the Probation, a term of the agreement itself. Third, the defendant had a legitimate defense (implied by a hung jury for his first trial), and Fourth the motion was made in good faith. Although, the Court denied his

motion to withdraw the plea (R.1198). For the motion to set aside the Findings of Guilty, the Appellant argued that the proceedings were defective because probation violation was initiated, and the Court never conducted an evidentiary hearing on that matter. This violated, accordingly, the due process rights in 5th and 14th amendment. The Judge denied that motion too (R.1145). The Appellant was sentenced on June 4, 2021.

Because the defendant was not given the right to allocate at the first hearing, he was given a resentencing hearing. The Appellant prepared a second motion to set aside the Findings of Guilty, and that motion was heard on the resentencing hearing on June 25th 2021. The motion was denied too, and at the sentencing the Appellant noted he wished to appeal, and was appointed Mr. Eric Korstlund to represent him on the appeal. (R.341-343) - The final order was dated

July 9, 2021 and the matter remained under control of the Trial Court until July 30, 2021, twenty-one days after the oral order.

During that time, Mr. Korslund filed his Notice of Appeal on July 16, 2021. (R. 350)

REASON FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE MOTION TO SET ASIDE THE FINDINGS FROM THE APRIL 30, 2021, HEARING BECAUSE A STRUCTURAL ERROR WAS COMMITTED THAT RENDERED THE PROCEEDING DEFECTIVE.

Argument

The court's failure to conduct a trial on the Appellant's probation violation Capias was a structural error that deprived the Appellant of his liberty without due process. The Appellant was arrested

on January 25, 2021 on, a PBIS. February 12, 2021, is when a Probation Violation Capias was issued, after which the Appellant was served with it while in jail. This matter was set for April 2nd, and continued afterwards to April 29th with another matter (finding under advisement). On this date, the court determined there was no Probation Violation pending, and refused to conduct a hearing on the Probation violation. (R. 638).

Constitutional errors are divided into two classes, trial errors and structural errors. Most errors are trial errors which occur during the presentation of a case to a jury and subject to harmless error analysis.

On the other hand, a structural error affects the framework within which the trial proceeds, rather than simply an error in the trial process.

Arizona v. Fulminante, 499 U.S. 279, 310 (1991). A structural error is

limited to some fundamental constitutional rights. "Structural errors require automatic reversal because they deprive the defendants of

basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair".

Neder v. United States, 527 U.S. 1, 8 (1999).

The due process clauses of the United States and Virginia Constitutions imply that: "no state shall deprive any person of life, liberty or property without due process of law. 5th and 14th Amendment,

U.S. Constitution, Article I section 11; Virginia Constitution. Both the

United States and Virginia Constitution also guarantee the right to a pub

trial. 6th Amendment U.S. Constitution, Article I section 8, Virginia Constitution

A trial consists of two phases, In the first phase, evidence is presented to determine the guilt of the defendant. IF he was found guilty, he moves to the 2nd phase which is sentencing.

In this case, the whole trial (including the two phases) was not

held since the Court held there was no Probation Violation (R. 638)

As explained above, there were two cases against the defendant in April 29th 2020.

The first one relates to the Finding under advisement. This case was supposed

to be on December 15 2022, after the Appellant signed his plea agreement

on December 15 2020, and was released on bond that day, and his case

was taken under advisement for 2 years, in which he was subjected to

certain conditions including but not limited to the supervised probation and

not entering NorPoW. This case was advanced from December 15 2022 to

April 29th 2020 and was adjudicated. Nonetheless, the Appellant's liberty

wasn't comprised, for the finding under advisement, till his sentencing

on June 4 2021, since in fact the Commonwealth never revoked the

bond given to him for the original charges on December 15 2020.

The other matter, which is the focus of this structural error, is the

Probation Violation Capias, which following the Appellant's arrest on

PB 15 on January 25, 2021 (R. 242-947), was issued and served on the Appellant on February 19, 2021 and kept the Appellant in jail without bond until his expected hearing on April 29th 2021. The main reason of the Appellant being in jail was not adjudicated at that point, but the Court proceeded on the other case (Finding under advisement). The Appellant was found in violation of Finding under advisement, but wasn't tried for the probation violation *capias*, since the Court decided there was no probation violation pending. Even after this, the Appellant stayed in jail although the Probation violation wasn't going to be adjudicated. So why did the Appellant stay in jail, knowing that technically he was still on a bond for the matter that other case (Finding under advisement) waiting for his sentencing on June 4th 2021.

The Court of Appeal erroneously said that a *capias* is simply a bench warrant of arrest and not a charging document. But, in this case

this capias deprived the Appellant of his liberty from January 25 2021,

until the other case ended by sentencing on June 4 2021. All this time,

he was supposedly on a bond for the other case (finding under advisement).

Typically, it works like this: if a capias is issued for, let's say,

a failure to appear for a charge, and the person is arrested at some point

and all the time he spends in jail waiting for court goes to the FTA (failure

to appear) and not the underlying charge (since his bond is not revoked, unless

the Commonwealth asks for it and gets his bond revoked). Then a hearing is

held for the failure to appear, regardless of the underlying charge that might

be on different date, and if he is found guilty for the failure to appear

the time in jail will go for the failure to appear and not the underlying

charge. So how in the Appellant's case, the capias hearing was

never held. The time he was serving should go towards the capias

Technically, based on this theory the Appellant should stay forever in jail

because his capias hearing was and still never adjudicated. He is in custody after and before doing time for the finding under advisement for nothing. This is the definition of depriving a person of his liberty without due process (the hearing to see if the Appellant is actually guilty of the capias). Several Cases explain this situation in the context of the 5th amendment, where one case say about 14th amendment that "it's a guarantee of fair procedure, sometimes referred to as "procedural due process". The State may not imprison, or fine a defendant without giving him a fair trial, nor it may take property without providing appropriate procedural safeguards." Daniel v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed2d 662 (1982), 339. So where are the procedural safeguards for the defendant who was dragged to court for one charge just to find the capias was not going to be adjudicated at all. The prosecutor explains this by saying it was

a mechanism to get the Appellant into custody. There were other ways to get the Appellant into custody (revoking his bond...) and even her argument shows that the purpose was taking freedom and not finding if the government had the right initially to take the Appellant liberty.

This is exactly why the 5th and 14th amendment were found, to protect people from the government's abusive actions.

This is an important value discussed in this quote: "certain constitutional rights are not, and should not be, subject to harmless error analysis because these rights protect important values" Rosa.

(Clark 478 U.S. at 587, 106 S.Ct. at 3111. Even Johanson v. United States

520 U.S. 461, 466-467 (1997) mentions examples of structural errors

including denial of public trial. So this is a case of denying a

trial is actually a denial of public trial because public trial

implies two components, a trial and the trial being public.

So when there is no trial, there can be no public trial. Even

without the above 6th amendment violation, this is a deliberate

5th and 14th amendment violation of trial after deprivation of liberty.

This is the mother of all errors in a procedural due process context.

This is not an error in the trial process itself, as trial errors are,

structural errors, since this error affects the whole framework of the trial process and a

as the structural errors are prohibited because the trial can't serve

its function of determining guilt or innocence, not allowing a trial

at all will never let the trial determine guilt or innocence of

Appellant. Even if probation proceeding are treated a bit different, a

probationer is still "entitled to an opportunity to show not only

that he didn't violate the conditions, but also there was a justifiable

excuse for any violation". Black v. Romano, 471 U.S. 606 (1985)

The Appellant is still entitled a trial. The Court refused to hold

a trial on the Probation Violation and that created the structural error that requires automatic reversal.

1. Importance of this argument as to grant certiorari for it:

1. This structural error is a novel issue that hasn't occurred before, so it is important to set precedent as a guiding light for the future instances on the federal and state level.

2. This constitutional error hits the heart of the 5th, 6th and 14th amendment of a trial (not to mention public one too). It is a total deprivation of due process and deals with the essence of all liberties freedom on top of them protected by the constitution. If the government follows this procedure against everyone then everybody would be in jail for no reason without having to justify their behavior.

3. This issue resolves the inconsistencies of treating a rapist as a simple bench warrant of arrest, not a charging document in this case, while in cases of failure to appear or pretrial violation, Virginia courts treat it as charging document.

II THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE MOTION TO WITHDRAW THE APPELLANT'S GUILTY PLEA BECAUSE IT WAS MADE IN GOOD FAITH AND THE APPELLANT HAD A REASONABLE BASIS FOR CONTESTING HIS GUILT

Rule 22 (d) of Fed. Rules Crim. Procedure and Virginia Code 19.2-996

both indicate "A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of a sentence is suspended, but to correct manifest injustice, the court within twenty-one days after entry of a final order may set aside the judgment of conviction and permit the defendant to withdraw his plea"

The rules above don't specify any conditions to withdraw a plea before sentencing, but several case laws discuss this issue. In Santobello v. New York

404 U.S. 257, 267, 92 S.Ct. 495, 501, 30 L.Ed.2d 427, the court says:

where a defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained at least where the motion to vacate is made

prior to sentence and judgment". Other cases give some examples of reasons

for withdrawing a plea by saying: "In *Brady v. United States*, 397 U.S. 740, 90

S.Ct. 1463, 25 L.Ed. 2d 747 (1970) we stated the applicable standard: "A plea

of guilty entered by one fully aware of the direct consequences, including the

actual value of any commitments made to him by the court, prosecutor or his own

counsel, must stand unless induced by threats or promises to discontinue

improper harassment, misrepresentation (including unfulfilled or unfulfillable promises)

or perhaps promises that are by their nature improper as having no proper

relationship to the prosecutor business (e.g. bribe). *Id.* at 755, 90 S.Ct. at 1472

(quoting *Shelton v. United States*, 246 F.2d 571, 572, n. 2 (CA5 1957) (en banc

? in turn quoting 242 F.2d 115 (Little, J. dissenting from panel opinion)), read on other

grounds, 356 U.S. 26, 78 S.Ct. 563, 2 L.Ed. 2d. 579 (1958). Thus, only, when it develops that the defendant was not fairly apprised of its consequences can this plea be challenged under the Due Process Clause. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427 (1971) illustrates the point. We began by acknowledging that the conditions for a valid plea presuppose fairness in securing agreement between an accused and a prosecutor. The plea must of course, be voluntary and knowing; and if it was induced by promises, the essence of these promises must be in some way made known. *Id.* at 261-262, 92 S.Ct. at 498. *Marby v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed. 2d 437 (1984) at 509. From this statement, we can conclude that if at least these conditions can give a good reason to invalidate and withdraw a plea: 1. Involuntary plea, 2. unknowingly plea (including mis understanding of consequences or misrepresentation of consequences) 3. unfairness in the execution, 4. threats inducement, 5. unfulfillible promises

6- Unfulfilled promises. There is enough reasons in this case for the Appellant to come forward and withdraw his plea.

A - The motion to withdraw the plea was made because misrepresentation and misunderstanding of its effects (meeting condition #2 (unknowing plea) for withdrawal of plea).

The Appellant initially plead not guilty to the charge of Stalking with Intent to Cause Fear. A jury trial was held, and the jury could not reach a verdict. The case was to be retried in March 2021 and the Appellant would be in custody until that date. The Appellant had no reason to stop fighting his case because obviously the Commonwealth were not able to prove their case to all jurors, especially that pleading guilty at that point will get him time for the charge and get him more time for violating the good behavior misdemeanor probation from 2018. Only by the Commonwealth promising not to violate the Appellant for 2018 probation, if he plead guilty, that the Appellant agreed to sign the plea agreement for stalking.

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The misunderstanding in this case, was that the Commonwealth and Mr. Sack's didn't fairly advise to the Appellant that other behaviors, other than signing the Alford plea (R. 237-238), could cause a violation of 2018 misdemeanor probation. Within months of being released the Commonwealth violated him on his 2018 misdemeanors, which the Appellant believed was direct violation of the Agreement between Mr. Wallace and Mr. Sack's after being charged of violation of plea agreement from 2020 plea. This was a misrepresentation of when can the Appellant be violated for 2018 probation, and when he can't be violated, and this wasn't cleared for the Appellant to understand at the time of the plea. This eventually lead to misunderstanding of what could and couldn't happen in terms of violating the defendant on his 2018 misdemeanors, and a clear misunderstanding of the effect of signing that plea which I give a very legitimate reason to withdraw the plea which the Appellant did right after knowledge

of the mistaken facts and before sentencing. In fact it's not strange to have such misunderstanding at time of plea signature and the court says it's a valid reason to withdraw. This Court stated "The federal courts cannot fairly adopt a per se rule excluding all possibility that defendants' representations at the time of his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentations by others as to make his guilty plea a constitutionally inadequate basis for imprisonment" Blackledge v. Allison, 431 U.S. 63, 47 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Thus the court in this case should have allowed the Appellant to withdraw his plea based on this conceded ~~misunderstand~~ misunderstanding.

B. The motion was made because the Commonwealth breached the plea agreement themselves. (meeting condition #3 (unfairness in execution) and #6 (unfulfilled promises));

As explained in Assignment Error I, there was a structural error made which

is not remedied through harmless error analysis. The Commonwealth deprived the Appellant of his liberty on January 25, 2021, when he was taken into custody on a PR 15. He was held in custody until June 4, 2021, when he was sentenced on the underlying offenses. He was never given a trial on the Probation Violation and kept him in custody during that time. Denying the Appellant of his 5th amendment due process constitutional rights by denying him a trial is a clear abuse of the plea agreement terms. In fact, "rights and responsibilities under the plea agreement is controlled by the principles of fundamental fairness imposed by the due process clause." Richels v. Adamson, 483 U.S. 1, 103 S.Ct. 2680, 97 L.Ed.2d 1 (1987) at 20, and by breaching the implicit rights of the defendant in the plea agreement by denying him a trial for probation violation in the plea, is dishonoring the plea. And a states refusal to honor a plea agreement after guilty plea has been entered undermine the voluntariness of the plea or may result in fundamental

unfairness to the defendant. State v. Rives 316 N.W.2d 395, 166 W.S.2d 405

(W.S. 1982). So because the fundamental fairness principles control rights in here,

dishonoring the rights is undermining the fairness in the plea. Therefore the result

of this breach as Mabry v Johnson, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d

437 (1984) at 509 explains: "when the prosecution breaches its promise

with respect to an executed plea agreement, the defendant pleads guilty on a

false premise, and his conviction cannot stand." Here not only that the prosecutor

initiated proceedings against defendant, locked him up and didn't get him to trial but

we can say the Commonwealth violated the defendant on 2018 misdemeanor probation

which was agreed orally wouldn't happen. All these violation result not only

as a separate reason to withdraw the plea, but can conclude involuntariness

(meeting condition #1 to withdraw plea) of the plea and add another reason to

withdraw it.

C. unfulfilled promises (provision #5 about the plea agreement being null and void if:

appeal is another reason (meeting condition #5 (unfulfillable promise) / w. the plea).

As explained in more detail in the next section, provision #5 says "if the defendant files an appeal of this matter, then this agreement is null and void" (R 223-995-237-238)

Yet this promise is unfulfillable because it can only be applied after the notice of appeal which happens after sentencing but Virginia Code 19.2-956 restricts

withdrawing the plea unless to correct "manifest injustice" which the Court of

Appeals refused to apply in this case. Also on appeal the issue can't be

raised due to 5A.18 rule of the Supreme Court of Virginia, and again the Court

of Appeals refused to apply the exceptions for that rule, so how would be

the promise of agreement being 'null and void' upon appeal fulfilled?

This promise is unfulfillable and give yet another reason to withdraw

this constitutionally invalid plea.

D. The motion was made in good faith and there exists a legitimate defense.

Because the Appellant only tried to withdraw the plea after misunderstanding

its effect, breach by the Commonwealth, and existence of unfulfillable promise, the Appellant acted in good faith as response to the Commonwealth violation of the oral and written agreement. Also, he had a legitimate defense and reasonable ground to go back to trial. The case started off as a multi day jury trial in which the Appellant cross examined witnesses, introduced exhibits and made argument in support of his position that he was not stalking Ms. Jackson. They were after several tries to push them to take a verdict (2 times) couldn't reach one, and a mistrial was declared. The jury itself reflected the Appellant reasonable defense, because at least some jurors had doubts of his guilt (R. 1162-1163). Even the new claimed evidence were subject to suppression, due to illegal seizure, so the result of a hung jury would be a big possibility in case of new trial. The Appellant only took the plea agreement after several guarantees that weren't respected by Commonwealth. Therefore, he had a legitimate defense and reason to withdraw the plea and go back to trial in good faith he will win and not to waste any judicial resources.

For the reasons mentioned, Appellant satisfied the prongs of legitimate reasons to withdraw his plea since again was withdrawn for - A - misrepresentation and misunderstanding plea effect - B. Breach of the Commonwealth of plea - C - unfulfillable promises in the plea - D. good faith for withdrawal and good defense for the case.

The Importance of this argument for granting certiorari:

1. This issue protects the defendant's as well as future defendants from the government stepping over their constitutional rights (5th amendment guarantee of trial before punishment and 14th amendment fundamental fairness guarantee) in the name of plea agreements, through their violation of unfair probation proceeding, and unfulfilled oral promises.

III THE COURT OF APPEALS ERRONEOUSLY REFUSED TO APPLY THE BASIC PRINCIPLE OF CONTRACT LAW BY REFUSING TO ALLOW THE APPELLANT TO WITHDRAW THE PLEA THAT BECAME "NULL AND VOID" THROUGH ITS OWN PROVISION

This argument revolves around a violation of due process clause of 5th and 14th amendment, U.S Constitution, equal protection and Fundamental Fairness clause of 14th amendment, U.S Constitution, Article Section 11, Virginia Constitution, which occurred when the plea agreement became "null and void" and the Appellant's liberty was still taken from him for the same agreement. Paragraph 5 of the plea agreement that both parties signed says "if the files an appeal of this matter then this agreement is null and void"

(R. 223-225, 237-238) The law of commercial contract may in some cases prove useful as an analogy or point of departure, in construing a plea agreement. Ricketts v. Adamson, 483 U.S. 141

Therefore because "if a contract is unambiguous on its face, the contract meaning and the intent of the parties must be sought with the four corners of the document." Shackles v. Massachusetts

Mut. Life Ins. Co. 369 F.3d 433, at 440, the same rule applies to the plea agreement. In this

The Appellant filed an appeal of this matter to Virginia Court of Appeals in July 16, 2021 (R. 34, 343, 350)

This appeal filing made the plea agreement "null and void" as the express term,

paragraph 5 indicates. Therefore, according to rule of plea agreement as being contracts

there should be no other interpretation afforded and the appellant should be released

from his commitment to a void plea agreement. The Court of Appeals, by saying in

Footnote 4 of their opinion that the only reason to force the appellant into

this guilty plea is because the issue was not preserved under Virginia

Supreme Court Rule 5A:18 is technically ignoring several factors:

A. This issue is technically not an objection for it to be preserved because we are applying a contract term only that the intent to apply it is at the appeal and not trial court because its conditions are satisfied only at appeal

B. Even if it was to be considered an objection, at least the miscarriage of justice exception must apply due to Virginia's courts own definition of miscarriage of justice. They say: the exception applies only in cases of "manifest

injustice. The expression, often found outside of domestic relations law, been used synonymously with the phrase "miscarriage of justice." *Harris vs Dimattin*, 950 Va. 306 at 318, 462 S.E.2d 338 at 343 (1995) (interpreting the duty imposed by Code § 8.01-1 on trial courts to prevent unjust results in the application of new provisions of law). The "manifest injustice" expression also serves as a shorthand for the narrow exception to Rule 5A:18's contemporaneous objection requirement.

Congdon v. Congdon, 40 Va. App. 255, 578 S.E.2d 833 (KApp, 2003). Then the definition of manifest injustice itself in Black's law dictionary (quoted in Virginia Court of Appeal cases) is: "Manifest injustice amounts to an obvious miscarriage of justice, such as involuntary guilty plea or plea based on a plea agreement that has been rescinded." Black's law dictionary 1048 (9th ed. 2009). *Howel v. Commonwealth*, 60 VaApp. 737, 739 S.E.2d 792 (Va App 2012). Because "Manifest injustice" is synonymous to "miscarriage of justice", as argued previously, miscarriage of justice... should mean, by example, a case where a plea agreement has been rescinded to,

therefore, to prove that an application of "miscarriage of justice" exception is necessary, is to prove the prerequisite that a plea based on a plea agreement that has been null and void (rescinded meaning annulled). The appellant satisfied the prerequisite of making the plea agreement rescinded, by filing an appeal. So the Virginia Court of Appeals should invoke its "miscarriage of justice" exception defined in their own caselaws, to prevent unjust result, the main reason the exception was enacted into the new technical provision of law.

Another way to prove that this is a case of "manifest injustice" is to start by the fact that rights and responsibilities under the plea agreement is controlled by the principles of fundamental fairness imposed by the Due Process clause.

Ricketts v. Adamson, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d (1987) at 20.

This is true because "the analogy of contract law doctrine is not determinative in the area of plea negotiations, however, because important due process rights are involved, plea negotiations must accord a defendant fairness and attended by

adequate safeguards and to insure the defendant what is reasonable in the

circumstances "Santobello v. New York 404 U.S. 257, 262. Moreover, "Once

the court unqualifiedly accepts the agreement, it too is bound by the bargain. U.S. v.

Holman, 728 F.2d 869 (6th Cir 1984). Therefore the court should enforce the terms

because "guilty pleas are enforceable" Ricketts v. Adamson 483 U.S. 1 at 91.

In this case, being that the court, Appellant, and Commonwealth are bound by the plea

they signed, the Commonwealth and the Appellant should respect it and the court should

be the one enforcing it. Nonetheless, in this case the court and Commonwealth refused to

make the plea agreement "null and void" due to a technical rule 5A, 18. But a states

refusal to honor a plea agreement after a guilty plea has been entered undermine the

voluntariness of the plea or may result in fundamental unfairness to the defendant.

State v. Rives 316 N.W.2d 395 (W.S. 1982). Therefore, by the State dishonoring the

term #5 of plea, requiring a null and void plea agreement, they undermined the

fundamental fairness right of the defendant, violating the fundamental fairness due

process clause of the 14th amendment U.S. Constitution. The analogy doesn't end here. Virginia courts themselves admit that "the denial of due process involves the denial of a fundamental Constitutional right and falls within the ambit of Rule 5A:18 to attain the ends of justice, Cooper v. Commonwealth, 205 Va. 882, so the Court of Appeals should apply the exception in the Appellant's case to prevent the fundamental due process violation and specifically the fundamental fairness clause of it.

B. The Court should apply the good cause exception as an alternative:

The Appellant didn't have a chance to object maturely on the issue of the plea agreement being null and void. Any attempt, as invited by the Court of Appeal opinion, to raise the issue before filing the notice of appeal on July 16, 2021, would be premature because no appeal was not filed yet to meet the condition for the plea to be null and void. For the only time window between the appeal notice on July 16th 2021 and the order being final on July 30th 2021 (21 days from written order on July 9th 2021), there were two

dilemmas. First the law itself of Virginia doesn't allow withdrawing the plea to be withdrawn without invoking manifest injustice exception (synonymous to SAIR miscarriage of justice exception) which the Court of Appeals refuse to apply in this case. Specifically the Virginia Statute 19.2-296:

A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed; but to correct manifest injustice, the court within twenty-one days after entry of a final order may set aside the judgment. Rule 32(d)
Fed. Crim. Proc.

So if the court of appeals refuses to apply "miscarriage of justice" standard, as they say it only applies to cases of actual innocence, how do they expect to even do it within these days after my appeal and before final order (from July 16th to July 30th 2021). This will not satisfy their standard of manifest injustice the way they applied, and as discussed before, any attempt before that time would be premature. The only time available for the Appellant is at the Appeal petition. This is enough good cause to apply good cause exception.

if the "miscarriage of justice" exception is inapplicable. On the other hand, even the lawyer appointed (Andrew Seck's wasn't involved after appointing Erik Karslund for the appeal) couldn't do much in the time period of July 16th 2021 and July 30th 2021 (the only time window when appeal was mature before order being final). He ordered the transcripts and got them in August August 25th 2021 way after the time elapsed (July 30th 2021) to make trial materials. How would he know the particularities of the case before then? He couldn't be prepared. Even the court's discussed this early phase of the appeal: "It typically takes place during a compressed window ... By the time this window has closed, the defendant will not yet have important documents from the trial court such as transcripts of key proceedings ... And because some defendants receive new counsel for the appeal, the lawyer responsible for deciding which appellate claims to raise may not even be involved in the case. Filing requirements reflect that claims are, accordingly, likely to be ill defined or unknown at this stage."

Garcia v. Idaho, 139 S.Ct. 738 at 745. And this explains why Mr. Karslund wasn't

readily available to discuss the issue of plea being null and void. He didn't know

and wasn't expected to know all the case in this small time frame (From July 16th to July 30th).

That's another good cause for not being able to comply by 5A1:18 rule.

These two causes not only satisfy Virginia's exception but resolve the inquiry into the

Supreme Court's position about state procedural defaults. The court says "the federal

judiciary is not bound by state procedural rules that are unreasonable

on their face or are unreasonably or inconsistently applied." Wainwright v.

Sykes 433 U.S. 72, 97 S.Ct. 2497 at 2517.

Here it is obvious that the procedural rules of Virginia is applied inconsistently

because, the exception of "manifest injustice" in Howell v. Commonwealth 60 Va.App. 73:

at 732 ("manifest injustice" amounts to an obvious miscarriage of justice such as

an involuntary guilty plea or plea based on a plea agreement that has been rescinded)

, this definition is only applied in that case and refuse to apply the same definition

in the Appellant's case: as a standard to apply the "miscarriage of justice" exception.

Also, it can be said that the rule 5A:18 is applied unreasonably; The court as argued previously expect the Appellant to raise the issue in April 30th 2021 and other dates before filing the appeal or within a time when his appeal lawyer (Erik Horstlund) can't be expected to be ready to know about it. Even if he was ready the Virginia 19.2-296 law of withdrawing please return him back to "manifest injustice" exception that, according to the Court of Appeals can't be applied anyway. It is like going in circles due to unreasonable procedure

File that can never be followed even if the Appellant want to a procedure therefore unconstitutional

This leads (as briefly discussed in the second assignment of error (II))

to an unfillable promise in the plea agreement that give the Appellant the right to withdraw when he tried to, according the fundamental fairness clause

of the 14th amendment, U.S Constitution

As the court wisely stated, "its constitutional requirements require" a trial or plea agreement honored by the Government before "the stigma of conviction can be imposed". *Puckett v. U.S.*, 556 U.S. 129 at 145. Here a plea agreement ceased to exist after being null and void through the Appeal, so why the Appellant was incarcerated is a violation of his due process Constitutional right.

The importance of this issue to grant certiorari

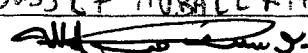
1. The issues discussed fundamental novel issues about a plea being "null and void" and the Court of Appeals refused to free the defendant from it (against due process and fundamental fairness clause of the 5th and 14th amendment)
2. This issue resolves inconsistencies of application of state procedural rules in Virginia to certain cases and preventing it in other cases (like the Appellant's case)

CONCLUSION

For all the above reasons the Appellant prays the court to grant certiorari in this case to resolve and prevent these constitutional violations.

Respectfully Submitted

YOUSSEF HOBALLAH

Signature: 

CERTIFICATE