IN THE

COURT OF APPEALS OF VIRGINIA

RECORD NO. 1667-11-4

FELECIA AMOS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

Petitioner's Petition for Rehearing En Banc

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ARGUMENT IN SUPPORT OF PETITION FOR REHEARING EN BANC

A divided panel of this Court affirmed Appellant's summary conviction for contempt in an August 7, 2012 opinion. For the reasons set out in this Petition, Appellant now respectfully requests that her case be reheard by the Court *en banc*.

I. INTRODUCTION

On June 10, 2011 Appellant Felecia Amos voluntarily testified as a non-party witness at a probation revocation hearing in Arlington County Circuit Court. At the conclusion of the hearing the presiding judge called on Ms. Amos, who had remained in the courtroom as a spectator, to stand before him, informed her that she had "lied," convicted her of contempt of court and sentenced her to ten days in jail. Ms. Amos was not represented by an attorney and was not offered the opportunity to say anything in her defense. She was immediately taken into custody. Released on a bond, Ms. Amos sought and received permission to appeal. On August 7, 2012, a panel of this Court, with Judge McCullough dissenting, rejected her pro se appeal and held that the circuit court had acted properly.

The panel's opinion upholding the circuit court's conduct—*sua sponte* sentencing an unrepresented non-party to jail without notice and without opportunity to present evidence or argument or to cross-examine witnesses—is incompatible with the United

States Constitution, as authoritatively interpreted by federal and Virginia courts, and works a grave injustice on Ms. Amos. In addition to erroneously affirming the court below, the panel opinion is also deficient in that it does not even discuss many of the important constitutional questions raised by this matter. At a minimum, the issues in this case merit a more thorough analysis. Consequently, *en banc* review should be granted.

Binding and on point precedent from the United States Supreme Court and the Virginia Supreme Court holds that the circuit court may not do what it did here—convict a defendant of contempt in a summary proceeding when the presiding judge lacks direct personal knowledge that contempt actually occurred. When a finding of contempt depends on testimony, rather than the judge's personal observations, a defendant must be afforded normal due process rights. In this case the trial judge based his determination that Ms. Amos had misled the court and manipulated the judicial system entirely on evidence offered by Ms. Amos' former husband. Consequently, as the dissent recognized, the circuit court's summary proceeding was entirely improper.

The panel opinion is also plainly wrong in its assertion that, even if Ms. Amos had meritorious claims, she has waived them. For one thing, a Defendant cannot waive her Sixth Amendment right to counsel by inadvertence or neglect, as the panel opinion

suggests happened here—such a waiver must be knowing and intentional. Moreover, Ms. Amos' other due process claims are not barred by the procedural requirement recently annunciated by the Virginia Supreme Court in *Brandon v. Cox*; *Brandon* appears inapplicable to the facts in this case and, in any event, its retroactive application to Ms. Amos would be clearly unconstitutional.

Even if Ms. Amos' claims were not preserved, the panel should have applied the "ends of justice" exception to avoid the manifest injustice that would occur if the Court affirms her conviction. Furthermore, the panel opinion should have more thoroughly examined whether there was sufficient evidence to convict Ms. Amos—the evidence falls short of the required proof beyond a reasonable doubt.

II. ISSUES

Ms. Amos respectfully argues that the panel opinion was erroneous or its reasoning incomplete with respect to the following issues:

1. Whether a summary contempt proceeding was constitutionally permissible under the circumstances of this case.
2. Whether Ms. Amos knowingly and voluntarily waived her constitutional right to counsel.
3. Whether Ms. Amos failed to preserve for appeal her claim that she was denied constitutionally required due process.
4. Whether this Court should apply the "ends of justice" rule to permit review of any claims not otherwise preserved for appeal.

5. Whether the evidence on the record is sufficient to sustain Ms. Amos' conviction.

III. BACKGROUND

Ms. Amos and her ex-husband, Antonio Amos, have a young son together, but have long had a bitterly acrimonious relationship. In July 2010 Mr. Amos was convicted in Arlington County Circuit Court of committing assault and battery against Ms. Amos and received a suspended sentence. App. 91-92. The circuit court imposed "special conditions" on Mr. Amos, including the requirements that "[t]he Defendant shall have no contact with the victim, Felecia Amos" and that "[t]he Defendant shall not harass the victim." App. 91-92.

On October 30, 2010 Ms. Amos wrote a letter to the Arlington Commonwealth's Attorney's office complaining that Mr. Amos had violated the special conditions.[1] App. 88-90. The bulk of the letter complained of a series of direct communications from Mr. Amos to Ms. Amos. App. 88-90. As Ms. Amos described these communications, they contained no explicit threats—they ostensibly dealt only with logistical issues relating to their child. Nevertheless, Ms. Amos complained that they were unnecessary—Mr. Amos was supposed to channel any communications through Ms. Amos' mother—and

[1] The letter indicates that it was copied to the trial judge, App. 90, but only the Commonwealth's Attorney's copy is in the record and the court apparently took no action on any copy it received.

violated the "no contact" provision of the court's special conditions. App. 88-90. She opined that Mr. Amos' "actions are only a ploy to intimidate and harass me." App. 89. She also complained that at the October 21, 2010 exchange of their child—the couple regularly exchanged the child at a Maryland McDonald's to allow Mr. Amos to have weekend visitation—Mr. Amos had videotaped her putting her child in her car. App. 89. Ms. Amos did not say that Mr. Amos threatened her, but said that she believed that the videotaping was meant to intimidate and harass her. App. 89. Although the reasonableness of Ms. Amos' view that these seemingly non-threatening actions by a man convicted of assaulting her were intended to intimidate and harass can be argued, there appears to be no material dispute about the factual accuracy of these statements in her letter.

There is a dispute, however, about whether Ms. Amos' letter accurately described events occurring during an October 29, 2010 exchange of their child at the McDonald's. Ms. Amos accused Mr. Amos of swearing at her and threating her—albeit obliquely (Ms. Amos was "going down"). App. 88. Ms. Amos also wrote that she had asked a customer to escort her out of McDonald's because she felt threatened and that Mr. Amos had followed her for a time as she drove away. App. 88.

At the request of the Commonwealth's Attorney, on June 10, 2011 the circuit court held a hearing on a rule to show cause on whether Mr. Amos' probation should be revoked in light of Ms. Amos' allegations. App. 1. Ms. Amos appeared voluntarily at the hearing and gave testimony consistent with her statements in her October letter. App. 5-30. Mr. Amos testified that he had not threatened or cursed at his former wife at the McDonald's and his testimony was supported, in part, by a witness that Mr. Amos had brought to observe the exchange and by an audio recording of the incident which Mr. Amos claimed to have covertly recorded. App. 47-67. As a non-party Ms. Amos was, of course, not permitted to cross-examine either of these witnesses, to challenge the authenticity or completeness of the audio recording or to present any evidence.

At the end of the hearing the court delivered "an uninterrupted monologue," Op.[2] at 11 (dissent), that included the following:

> [THE COURT:] You have come into this court and made some serious accusations, and you have flat-out lied under oath…. You're nothing but a vindictive woman….
>
> ….
>
> … the Court finds you in contempt of court. You're sentenced to jail for ten days. Remand her into custody, Sheriff.
>
> THE COURT: Call the next case.

[2] "Op." refers to the August 7, 2011 opinion in this case by a panel of this Court.

App. 68-69.

Ms. Amos was released on bail later that day. On June 27, 2011 she filed a pro se motion with the circuit court, asking that it reconsider its decision and vacate her conviction. App. 81-83. She argued that she had testified truthfully, that her constitutionally guaranteed due process rights—including her right to an attorney—had been violated and that the court lacked authority to summarily convict a witness for allegedly false testimony. App. 81-83. The circuit court never ruled on this motion. Op. at 5.

Ms. Amos raised the same issues in her pro se appeal to this Court. Her assignments of error, supported by citations to the record, were as follows:

a) THE EVIDENCE IN THIS RECORD DOES NOT MEET THE STANDARD OF PROOF NECESSARY TO SUSTAIN A CONVICTION FOR CRIMINAL CONTEMPT.

b) THE APPELLANT'S RIGHT TO NOTICE, A HEARING, COUNSEL AND CONFRONTATION WERE ALL VIOLATED BY THE TRIAL JUDGE AND THUS VIOLATED APPELLANT'S DUE PROCESS RIGHTS, AND THE SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF THE APPELLANT.

Appellants' Opening Br. at 3.

In an unpublished opinion the majority of a panel of this Court held that, regardless of the merits, because Ms. Amos "did not object to the trial court's ruling" at

the time it convicted her, and because she also "failed to obtain a ruling on her [subsequent] motion to vacate her conviction …, she has waived her arguments on appeal." Op. at 6. The panel opinion also held that this waiver could not be overcome by the "ends of justice exception" to the normal rules of appellate review because, to invoke the exception "she must" show that "the trial court convicted her of conduct that was not a criminal offense," a showing that, according to the panel opinion, had not been made. *Id.* at 8.

In his dissent Judge McCullough asserted that Ms. Amos had not waived her arguments. He believed that she could not be faulted for failing to object at the hearing because she had not been allowed to do so and that, in any event, as a non-party she was not required or expected to object. *Id.* at 10-11. Judge McCullough would have reversed on the grounds that a court cannot summarily punish a witness for giving allegedly false testimony. *Id.* at 12.

IV. ARGUMENT

A. The Summary Contempt Proceeding Was Contrary to Well Established Law

Summary contempt proceedings, such as that used to convict Ms. Amos, are "always, and rightfully … regarded with disfavor" because they lack the due process protections normally available in criminal prosecutions. *Scialdone v. Commonwealth*,

279 Va. 422, 443, 689 S.E.2d 716, 728 (2010) (quoting *Sacher v. United States*, 343 U.S. 1, 8 (1952)). Consequently, the Virginia Supreme Court and the United States Supreme Court have held that the federal constitution's guarantees of due process limit the use of such proceedings to situations involving "misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential." *Scialdone*, 279 Va. at 443, 689 S.E.2d at 728 (quoting *Sacher*, 343 U.S. at 8). Summary proceedings are prohibited where the judge's determination of guilt depends not on personal observation, but on "confession of the party, or by testimony under oath of others." *Id*. at 444, 689 S.E.2d at728 (quoting *Cooke v. United States*, 267 U.S. 517, 535 (1925)).

In *Scialdone* the circuit court had summarily convicted three defendants of "attempt[ing] to perpetrate a fraud upon the court by … altering [a] document that was to be presented to [the] court" or by "offering that fraudulent document to the court." 279 Va. at 433, 689 S.E.2d at 722. The Virginia Supreme Court held that a summary proceeding was improper because, although the allegedly fraudulent document was presented to the circuit court, "the circuit court's conclusion that the document was altered was based, at least in part, upon the testimony given . . . by one or more

witnesses other than petitioner." *Id.* at 446, 689 S.E.2d at 729 (brackets and quotations omitted). Consequently, the court lacked the "personal knowledge of the misconduct" required to impose sanctions in a summary contempt proceeding. *Id.* at 446, 689 S.E.2d 729 (quotation omitted).

The Fourth Circuit recently dealt with a similar situation in *Brandt v. Gooding*, 636 F.3d 124 (4th Cir. 2011), a habeas proceeding in which the petitioner had been summarily convicted of contempt for "knowingly introducing a fraudulent letter" in a state court civil case. *Id.* at 134. The Fourth Circuit held that such a summary conviction was inconsistent with "clearly established Supreme Court precedent" because the trial judge had no personal knowledge that the letter was fraudulent, but had instead based his determination "on the testimony of others." *Id.* (relying on *Taylor v. Hayes*, 418 U.S. 488 (1974) and *In re Oliver*, 333 U.S. 257 (1948)).

The situation here cannot be distinguished from *Scialdone* and *Brandt*. While Ms. Amos' testimony was in the trial judge's presence, the judge's key determination—that Ms. Amos had provided false information in her letter and her testimony—was based on the judge's evaluation of evidence presented to the court—he had no personal knowledge as to whether Ms. Amos was providing truthful information. The panel opinion suggests that a summary contempt conviction is appropriate because Ms. Amos

did more than merely lie on the stand—she is said to have engaged in "calculated misuse of the judicial system, including her letter to the Commonwealth's attorney imploring his assistance to institute [probation] revocation proceedings." Op. at 7. But *Scialdone* and *Brandt* rejected nearly identical arguments because, in those cases, as in this case, any factual finding of "calculated misuse of the judicial system" would necessarily be based on witness testimony, not the judge's personal knowledge.

B. Ms. Amos Did Not Knowingly and Intelligently Waive Her Right to Counsel

The "right to the assistance of counsel 'is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process.'" *McNair v. Commonwealth*, 37 Va. App. 687, 694, 561 S.E.2d 26, 29-30 (2002) (en banc) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 374, (1986)). This right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, attaches to any defendant actually sentenced to "a term of imprisonment" of any length. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1978); *see also Iowa v. Tovar*, 541 U.S. 77, 87 (2004) (defendant who received two day prison term had Sixth Amendment right to counsel).

Unlike other due process rights that can be more easily lost, "any … waiver [of the right to counsel] must be the voluntary act of the defendant and must constitute a

knowing and intelligent abandonment of a known constitutional right or privilege." *McNair*, 37 Va. App. at 695, 561 S.E.2d at 30 (citing *Edwards v. Arizona*, 451 U.S. 477, 482 (1981)). "[C]onstitutional jurisprudence requires courts to indulge every reasonable presumption against waiver of counsel." *Id.* at 698, 561 S.E.2d at 32 (citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). "The burden rests upon the party relying on a waiver to prove the essentials of such waiver by clear, precise and unequivocal evidence. The evidence … must be certain in every particular." *Blue v. Commonwealth*, 49 Va. App. 704, 644 S.E.2d 385) (quoting *White v. Commonwealth*, 214 Va. 559, 560, 203 S.E.2d 443, 444 (1974)).

Ms. Amos did not make a "knowing and intelligent abandonment" of her right to counsel. To the contrary, even though the circuit court never advised her of her right to an attorney, or allowed her to exercise that right, Ms. Amos complained of the denial of her right to counsel in her motion to the circuit court and in her appeal to this Court. Although neither the panel opinion nor the Attorney General's brief discuss the issue, and there is apparently no Virginia case law directly on point, it seems clear that Virginia's contemporaneous objection rule cannot bar Sixth Amendment right to counsel claims—if the right to counsel can be waived by a failure to object, the constitutional

requirement that any waiver be "knowing and the product of an intelligent decision," *McNair*, 37 Va. App. at 695, 561 S.E.2d at 30, would be meaningless.

C. Ms. Amos Did Not Waive Her Other Due Process Rights

The panel opinion's conclusion that Ms. Amos waived her due process rights is partly grounded on her failure to object at the June 10, 2011 hearing after the court announced her conviction. But, as the dissent points out, any reasonable reading of the record shows that "Amos had 'no opportunity to object'" and that, under such circumstances the statute embodying the contemporaneous objection rule provides that "'the absence of an objection shall not thereafter prejudice [her] . . . on appeal.'" Op. at 11 (quoting Va. Code § 8.01-384(A)).

The transcript shows that the court never invited Ms. Amos to speak. The hearing concluded as follows:

> [THE COURT:] [y]ou're sentenced to jail for ten days. Remand her into custody Sheriff."
>
> THE COURT: Call the next case.

App. 69. Arguably the panel opinion is technically correct that "the record … fails to show that the trial court took any action to prevent [Ms. Amos] from objecting to its ruling," Op. at 6 n.6—there is no indication that Ms. Amos was gagged or otherwise physically prevented from speaking. But the case law indicates that the rule is not

interpreted so literally. In *Mason v. Commonwealth*, 7 Va. App. 339, 346, 373 S.E.2d 603, 606 (1988), this Court, analyzing the contemporaneous objection rule, found that a defense attorney had been afforded no opportunity to object to "the court's comments to the jury" when the attorney "was taken by surprise." *Id.*; *see also Jones v. Commonwealth*, 194 Va. 273, 280, 72 S.E.2d 693, 697 (Va. 1952) (issue preserved despite failure to object where "[c]ounsel said they were taken by surprise"). If an attorney representing a party at a proceeding can be excused from objecting because a court's action is unexpected it is difficult to see how the application of the rule would be different when a non-attorney, non-party is unexpectedly and summarily convicted of a crime.

The panel opinion also ignores a point the dissent highlights: Ms. Amos was not required to object at the hearing to preserve her rights because she "was a witness, not a party." Op. at 11. "To expect *a witness* to master the nuances of due process and summary contempt versus indirect contempt is to expect the impossible. Rule 5A:18 presupposes that the person who is expected to object is an attorney or a *pro se* litigant rather than a witness and, consequently, the procedural bar does not apply here." *Id.* (emphasis in original).

The panel opinion also held that Ms. Amos' post-conviction motion for reconsideration, filed while her conviction remained subject to modification by the circuit court, did not preserve her appellate arguments. Relying on what it thought to be the rule set out in *Brandon v. Cox*, 284 Va. 251, 256-57, 726 S.E.2d 298, 301 (2012) (petition for rehearing pending), the panel held that "[b]ecause appellant failed to obtain a ruling on her motion [to the circuit court] … she has waived her arguments on appeal." Op. at 6.[3]

But *Brandon* does not apply here. For one thing, the situation in *Brandon* was very different from that now faced by this Court. *Brandon* held that the appellate issue in that case would have been preserved had it been raised before entry of judgment, but the record of what happened before the circuit court was so sparse (no transcripts were in the record) that the Supreme Court could not tell if, in fact, the issue had been raised with the circuit court before that court rendered its decision. 284 Va. at 254-55, 726 S.E.2d at 299-300. In this context—uncertainty about what pre-judgment argument

[3] It is unclear how Ms. Amos could have compelled the circuit court to rule on her motion for reconsideration. *Brandon* suggests that, under the facts of that case, the appellant should have "file[d] a notice of hearing to definitively place the matter before the trial court." 284 Va. at 256, 726 S.E.2d at 301. But Rule 4:15(d) provides that "[o]ral argument on a motion for reconsideration … shall be heard orally only at the request of the court."

had been made to the lower court—the Virginia Supreme Court held that the *Brandon* appellants should not only have included the argument they now advanced on appeal in their motion for reconsideration, but have actually caused the trial court rule on that motion. *Id.* at 255-57, 726 S.E.2d at 301. Because appellants had not done so, it was unclear in that case whether the issue had actually been raised with the trial court, making appellate review inappropriate. *Id.* The court emphasized that the "[t]he purpose of the rule is to … put the record in such shape that the case may be heard in this [C]ourt ***upon the same record upon which it was heard in the trial court***." 284 Va. at 255, 726 S.E.2d at 301 (quotations omitted, emphasis added).

Here the situation is different. There is no uncertainty about the record—there is a transcript, meaning that this Court can decide this case "upon the same record upon which it was heard at the trial court." Consequently, *Brandon* is inapposite.

Furthermore, because *Brandon* was decided in 2012, long after Ms. Amos had filed her motion for reconsideration, *Brandon* ***cannot*** be relied upon to deny Ms. Amos appellate review of her constitutional rights. A state procedural rule may be applied so as to prevent review of a defendant's "federal constitutional claim" only when it is a "firmly established and regularly followed state practice." *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). In *Ford* the Supreme Court held that the Georgia Supreme Court could

not apply retroactively a new, judicially established "contemporaneous objection" requirement that a constitutional challenge to jury selection be made "between the jurors' selection and [their] oath" because "the rule was not firmly established at the time" of defendants trial. *Id.* at 418, 424-25 ("The Supreme Court of Georgia's [retroactive] application of its decision in *Sparks* to the case before us does not even remotely satisfy the requirement").

The situation is the same here. As the dissent notes, prior to *Brandon* a reasonable interpretation of Virginia law was that "the act of filing objections or a motion for reconsideration, without more, ma[de] the objection or motion known to the trial court" and preserved appellate review. Op. at 10 n.10; *see also Brandon*, 284 Va. at 256, 726 S.E.2d at 301 (issue before the court "a matter of first impression"). To the extent *Brandon* establishes a requirement that a filed memorandum for reconsideration must actually be ruled upon to preserve an issue for appeal, such a rule was not "clearly established" when Ms. Amos filed her motion and cannot now be used to deny her due process.[4]

[4] Not only is *Brandon* not "firmly established" law, according to a Lexis database search the panel opinion is the first case in the Commonwealth to cite *Brandon*.

D. The "Ends of Justice Exception" Clearly Applies

The panel opinion wrongly held that the "ends of justice" provision, which allows this Court to decide an issue not otherwise preserved for appeal, cannot be applied in this case. The opinion correctly notes that "[w]hether the ends of justice provision should be applied involves two questions: (1) whether there is error as contended by the appellant; and (2) whether the failure to apply the ends of justice provision would result in a grave injustice." Op. at 6-7 (quoting *Gheorghiu v. Commonwealth*, 280 Va. 678, 689, 701 S.E.2d 407, 413 (2010)). But the panel opinion goes on to conclude that, to apply the exception, Ms. Amos "must" show that "the trial court convicted her of conduct that was not a criminal offense," notwithstanding the language it quotes from *Gheorghiu* indicating that the exception is broader.

In fact, Virginia's appellate courts have used the exception sparingly, but flexibly "when the record affirmatively shows that a miscarriage of justice has occurred." *McDuffie v. Commonwealth*, 49 Va. App. 170, 178, 638 S.E.2d 139, 143 (2006); *see, e.g., Jimenez v. Commonwealth*, 241 Va. 244, 249-51, 402 S.E.2d 678, 680-82 (1991) (invoking exception where defendant failed to object to erroneous jury instruction); *Ball v. Commonwealth*, 221 Va. 754, 758-59, 273 S.E.2d 790, 793 (1981) (invoking exception where defendant was "convicted of a crime of which under the evidence he could not

properly be found guilty"); *Hines v. Commonwealth*, 59 Va. App. 567, 575-80, 721 S.E.2d 792, 796-98; (2012) (impermissible sentence imposed).

In this case Ms. Amos was convicted, in a summary proceeding ***in which she was not a party***, despite established precedent prohibiting summary adjudication of the allegations against her. She had no notice that she had been accused of a crime until the moment she was convicted, she had no attorney, no opportunity to speak in her defense, no ability to cross-examine witnesses, and no chance to gather evidence. Moreover, the reasons that Ms. Amos' arguments were (according to the panel opinion) not preserved were her failure to object at a hearing at which she was not allowed to speak and her non-compliance with the procedural requirement of *Brandon*, a case decided long after her conviction. Given these circumstances, application of the ends of justice exception is entirely appropriate.

E. The Evidence Against Ms. Amos Is Untested And Unreliable

Ms. Amos was essentially tried by a trial court endorsed ambush. Because she had no advance notice of the evidence presented by her former husband, she could not test its veracity or present evidence of her own, allowing Mr. Amos' claims to stand essentially unrebutted. A careful review, however, indicates that the available evidence cannot sustain a criminal conviction. As with any other crime, criminal contempt "must

be proved beyond a reasonable doubt." *Nicholas v. Commonwealth*, 186 Va. 315, 322 42 S.E.2d 306, 310 (1947) (quoting *Kidd v. Virginia Safe Deposit & Trust Corp.*, 113 Va. 612, 614, 75 S.E. 145, 145 (1912)).

The nature of the evidence against Ms. Amos apparently first became known to the trial court at a May 27, 2011 hearing at which Ms. Amos was not present. At this hearing counsel for Mr. Amos told the court that Ms. Amos' October 2010 letter was "in some instances … a complete lie, not true" and that he had a witness and recordings which would prove this, evidence he did not believe Ms. Amos knew about. App. 73-77 ("she has no idea what we could prove"). The court said it wanted to hear from Ms. Amos because "something is going on here." App. 77. In response to Mr. Amos's attorney's concern that Ms. Amos might discover and be able to respond to this evidence, the court's recommendation to counsel was explicit: "[d]on't tell her." App. 77.

The corroborating witness Mr. Amos ultimately presented, U.S. Army Sargent Jason Salinas, was not unbiased. Although he claimed that he did "not really" have an interest in this case, Salinas was on active duty and was acting under orders to

accompany Mr. Amos and secretly observe his interactions with his ex-spouse.[5] App. 31-33, 43. Mr. Amos had retired from the army only several months earlier as a lieutenant colonel.[6] According to Salinas, the purpose of his mission was "help a soldier out" and he emphasized that it was part of military culture for soldiers to do their "best to support" one another. App. 32, 42. Moreover, Salinas testified that he had heard Mr. Amos' audio recording of the October 29, 2010 McDonald's exchange just prior to the trial, apparently in a session with Mr. Amos' attorney, App. 46, presumably to ensure that his testimony would not conflict with the recording.

The evidentiary value of the audio recording itself is also uncertain. For one thing, even assuming it accurately captured all interaction between Ms. and Mr. Amos on that day, the full recording was not played in court. Counsel for Mr. Amos indicated that "there's about four minutes left of this tape" that had not been transcribed and which "in the interest of time" he would not play because it was, supposedly, irrelevant. App. 58.

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[5] Initially Salinas said he had volunteered to assist Mr. Amos, but on cross-examination by the Assistant Commonwealth's Attorney he testified as follows:

> A. I was ***told*** that I was going to assist Colonel Amos.
> Q. Okay. Who told you?
> A. The commander and first sergeant.

App. 42-43 (emphasis added).

[6] The panel opinion inaccurately states that Mr. Amos had been a full colonel. Op. at 3 n.3.

Furthermore, the actual recording is not in the record, apparently because it was not retained by the circuit court. Consequently, this Court must rely on the partial transcript produced by Mr. Amos[7] and, without access to the recording, Ms. Amos cannot have an expert review it for alterations. This Court can take judicial notice of the wide availability of consumer software for editing video and audio recordings. *See* Rule 2:201.

Ms. Amos also had no chance to gather evidence to support her version of events—for example, security video, which might have been available from the McDonald's, or testimony from the two individuals that Ms. Amos testified she called just after the incident to describe what had happened.

Admittedly, as the record stands—with witnesses not subject to cross-examination, the audio recording not analyzed for editing, and Ms. Amos unable to offer affirmative evidence—the circuit court's view that Ms. Amos was untruthful is plausible. But the limited available facts are also consistent with another theory: that Mr. Amos, deeply embittered at a former spouse who retained custody of his child and had caused him to be convicted of a crime, threatened and harassed Ms. Amos at the McDonald's

[7] The transcript in the record was apparently prepared at Mr. Amos' attorney's direction. The court reporter did not transcribe the audio played in court. App. 55-57.

exchange, knowing that she would complain to the authorities, and then created a record meant to prove that she was a liar. Editing, a hand over a microphone or a momentarily paused recorder could easily explain the absence of Mr. Amos' threats on the recording. And Sargent Salinas, influenced by his respect for an army officer, his disposition and instructions from his superiors to help a fellow soldier, and his review of the audio recording just prior to his testimony, may have intentionally or inadvertently given inaccurate testimony about the incident, which occurred some seven months before the hearing.

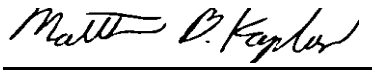
The information on the record is simply not sufficient to prove beyond a reasonable doubt that Ms. Amos was untruthful in her letter or her testimony.

V. CONCLUSION

For the reasons set out above, Appellant Amos respectfully requests that this Court grant her motion for a rehearing en banc.

Dated: August 21, 2012

Respectfully submitted,



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CERTIFICATE OF TRANSMISSION AND SERVICE

On August 21, 2012, I filed this Petition with the Court by emailing a PDF file of this Petition to cavpfr@courts.state.va.us. Also on August 21, 2012 I filed a PDF copy of this Petition on the following, via email, at the email address indicated:

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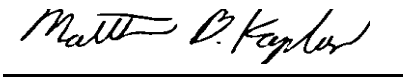

Matthew B. Kaplan

CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT

I certify that this Petition, excluding the cover page, table of contents, table of authorities and certificates, contains 5,223 words according to the word count feature of Microsoft Word 2010.

Matthew B. Kaplan