IN THE COURT OF APPEALS OF VIRGINIA

WESLEY CLAY SMITH,	)	
	)	
APPELLANT / Defendant	)	
	)	
v.	)	**Record No. 2187-06-4**
	)	
	)	
CHERI SMITH,	)	
	)	
APPELLEE / Plaintiff	)	

From Prince William County Circuit Court, Cheri Smith v. Wesley C. Smith,
Chancery No. 53360 Final Divorce Decree 06/09/2006

An electronic copy of this petition, background info, motions, and orders is available at:
http://www.liamsdad.org/court_case/divorce_appeal/

PETITION FOR REHEARING

Wesley Smith
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Appellant

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APPELLANT / Defendant	)	
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v.	)	**Record No. 2187-06-4**
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PETITION FOR REHEARING

For there can be no equal justice where **the kind of an appeal a man enjoys "depends on the amount of money he has**." Douglas, 372 U.S. at 355 (quoting Griffin, 351 U.S. at 19).

COMES NOW the Defendant and respectfully prays that this court grant a rehearing and rehearing en banc of the decision of this court dated March 1, 2007, and respectfully suggests that the decision conflicts with decisions of the U.S. Supreme Court and the Supreme Court Of Virginia.

As will be shown below, the decision was incorrect in its application of existing law and it is likely that the majority of this Court, sitting en banc, would, or should, disagree with the underlying opinion as a matter of law.

The appeal in question is an "appeal of right" per VA Code 17.1-405(3)(b). Per VA Code 17.1-410 the court has an obligation to consider the merits of the case.

> § 17.1-410. Disposition of appeals; finality of decisions.
> A. Each appeal of right taken to the Court of Appeals and each appeal for which a petition for appeal has been granted shall be considered by a panel of the court.

The dismissal of this appeal of right without regard to its substantive merit was an abuse of the Court of Appeals' discretion. See the Supreme Court Of Virginia's ruling the day after the Court Of Appeals dismissed this case. If filing frivolous motions and not paying a $500 sanction are not reasons for denying a appeal of right, then the fact that an indigent pro se Appellant was not able to comply with the rules as accurately as an attorney is not sufficient reason to dismiss an appeal. The cases are different in that in Switzer the appellant refused to comply with the sanction and in this case the Appellant has made a good faith effort to comply with court rules.

> The summary dismissal of the two present appeals pursuant to the May 2003 order, without regard to their procedural or substantive merit, was an abuse of the Court of Appeals' discretion. These appeals were "appeals of right" under the provisions of Code 17.1-405. Thus, the Court of Appeals' dismissal of these appeals as a sanction denied Thomas his statutory right to have his appeals considered by a panel of that Court. See Code 17.1-410(A). SWITZER v. SWITZER, Record No. 060554, March 2, 2007 http://www.courts.state.va.us/opinions/opnscvtx/1060554.txt

The decision claims to dismiss the appeal due to failure to comply with the order of Oct 23, 2006. Yet the decision admits that Mr. Smith did file a reply to the order as directed. In his #1 - REPLY & MOTION, Re: APPENDIX Mr. Smith pointed out that he was proceeding pro se and in forma pauperis, cited multiple cases that indicate that pro se indigent parties filings are not to be held to the same standard as attorneys. Due to the cited cases Mr. Smith specifically requested that the Court "ignore any supposed violation of the Rule(s) and hear the case on the merits" or that the court appoint an attorney to help him comply with the rules.

Mr. Smith was awaiting a ruling on his #1 - REPLY & MOTION, Re: APPENDIX when he received the order to dismiss the case. If the court was unwilling to follow the case law cited by Mr. Smith and proceed to rule on the merits, the court should have informed him and given him a chance to correct any issues before dismissing the case.

It should also be noted that the court only described any claimed violation in vague legal

terms instead of stating in plain English what it found wrong with the format of Mr. Smiths Opening Brief.

Mr. Smith's submissions to the court were extremely well done for a pro se indigent litigant. The Court has a responsibility to overlook any minor rule violations and rule on the merits of the appeal if it could do so. The brief submitted by Mr. Smith was more than sufficient for this court to rule on the merits of the case. Thus the dismissal of the case is due to the Court Of Appeals refusing to follow established case law instead of any fault by the Appellant.

> Pro se litigants' court submissions are to be construed liberally and **held to less stringent standards than submissions of lawyers**. **If the court can reasonably read the submissions, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with rule requirements.** Boag v. MacDougall, 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982); Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)(quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652(1972); McDowell v. Delaware State Police, 88 F.3d 188, 189 (3rd Cir. 1996); United States v. Day, 969 F.2d 39, 42 (3rd Cir. 1992)(holding pro se petition cannot be held to same standard as pleadings drafted by attorneys); Then v. I.N.S., 58 F.Supp.2d 422, 429 (D.N.J. 1999).
>
> The Plaintiffs are not professional attorneys, and **their pleadings cannot be held to the same level of technical standards** that pleadings from the Defendant should be held to, or that will be expected from any future professional counsel in this cause. See, e.g., Haines v. Kerner, 92 S.Ct. 594; Jenkins v. McKeithen, 395 U.S. 411; Picking v. Penna. Rwy. Co., 151 F.2d 240; and, Puckett v. Cox, 456 F.2d 233.
>
> Defendant has the right to submit pro se briefs on appeal, even though they may be inartfully drawn but the court can reasonably read and understand them. See, Vega v. Johnson, 149 F.3d 354 (5th Cir. 1998). **Courts will go to particular pains to protect pro se litigants against consequences of technical errors if injustice would otherwise result**. U.S. v. Sanchez, 88 F.3d 1243 (D.C.Cir. 1996).
>
> The right to meaningful opportunity to be heard within limits of practicality must be protected against denial by particular laws that operate to jeopardize it for particular individuals. BODDIE V. CONNECTICUT, 92, S.Ct. 780, 401 U.S. 371. 28 L.Ed.2d 113 conformed t 329 F. Supp. 844 (1971)
>
> **For there can be no equal justice where the kind of an appeal a man enjoys "depends on the amount of money he has."** Douglas, 372 U.S. at 355 (quoting Griffin, 351 U.S. at 19).

Given the wealth of case law that a indigent's filings can't be held to the same standards as attorneys and the quality of the submissions by Mr. Smith, only one conclusion can be reached - that this court simply didn't want to rule on the merits of the case and was simply looking for an excuse to dismiss it in direct violation of cited rulings.

This Court must ask itself if the Defendant had been able to afford an attorney and an attorney prepared the appeal and followed all the rules would the reasons given by for the dismissal appeal still apply. If not then it must recognize the order dismissing the appeal is a violation of the Equal Protection Clause.

The complicated rules combined with the court refusing to tell a indigent pro se Appelant what needs to be done in plain English makes it much more difficult for indigents to appeal, while fully preserving the right of moneyed defendants to appeal. The rules do not require a moneyed criminal defendant to give up his or her right to an appeal on the merits; **only the poor lose their right to a meaningful appeal**.

> The Supreme Court has specifically recognized that those procedural hurdles are "hopelessly forbidding" to any layperson filing a first appeal. *Evitts*, 469 U.S. at 636.

It should also be noted that dismissing the case is not going to reduce the work load on the Court Of Appeals or make the problem go away. The trial court didn't have jurisdiction, Mr. Smith was never served with process. Thus the orders by the trial court are null and void and repeatedly challengeable in any court in any court case.

There are now 3 different ongoing state court cases based on the disputed trial court order in this case (and more cases expected in the future), thus multiple appeals to the Virginia Court Of Appeals will come from those cases. If the Court is too lazy to rule on the merits now, it will just be dealing with exactly the same issues over and over again as new appeals of new orders

are filed.

CONCLUSION

For all of the reasons set forth above, this petition for a rehearing and a rehearing en banc must be granted and a ruling on the merits of the case must be granted.

Respectfully submitted,
Wesley C. Smith
Appellant / Defendant

/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was emailed to Loretta Vardy at lorvardy@comcast.net and mailed first-class to Ronald Fahy 9236 Mosby St # A, Manassas VA 20110 on March 15th, 2007.

/s/_____
Wesley Smith

CERTIFICATE OF WORD COUNT LIMIT

I hereby certify this petition is in compliance with the word count limit, its 1,753 words being significantly less than the 7,500 limit specified in § 5A:34A.

/s/_____
Wesley Smith