V I R G I N I A:

IN THE COURT OF APPEALS OF VIRGINIA

WESLEY SMITH,	)	
	)	
APPELLANT / Defendant, pro se	)	
	)	
v.	)	**Record No. 2322-04-4**
	)	
CHERI SMITH,	)	
	)	
APPELLEE / Plaintiff	)	

APPELLANT'S MOTION TO FILE LATE REPLY and

REPLY TO MOTION TO DISMISS

1. Loretta Vardy, attorney for the Appellee mailed a motion to dismiss on February 24th 2005 to the Appellants address in Michigan which is his mothers home, however the U.S. Postal service did not deliver the motion to the Appellant but rather incorrectly forwarded it to the Appellants mother who was spending the winter in Florida (see exhibit #1).
2. Due to the incorrect delivery the Appellant did not receive the motion until March 9th 2005. This delay was both unpredictable and unavoidable and according to § vscr-5A:3 (b) "the times prescribed in these Rules for filing papers, except transcripts, may be extended by a judge of the court in which the papers are to be filed on motion for good cause shown and to attain the ends of justice." Since the Appellant did not receive the motion within the 10-day period, and Ms. Vardy did not in any other manner notify him that she had filed a motion, it would be unjust to dismiss the appeal due to an act of the U.S. Postal Service that prevented the Appellant from meeting the 10 day period.
3. In the MOTION to dismiss the Appellee asks to dismiss on the basis of a one day violation of rule 5A:8, the Appellee is simply trying to take advantage of the fact that the

Appellant is financially unable to hire an attorney, is not familiar with the laws or rules, and is attempting to deny him justice by getting the court to rule against him on technicalities instead of on the merits of the case. The fact that the Appellee is repeatedly trying to get the case tried on technicalities in both the trial court and Court of Appeals, while at the same time trying to avoid any discussion of the merits of the case, is a big red flag waving that the ends of justice would not be obtained by ruling on the case without hearing it based on its merits and all available evidence, and this appeal is an attempt to obtain the relevant evidence.

4. According to Virginia Code 16.1-93 where law and equity conflict equity should prevail. What could be less equitable than a excellent parent loosing all right to see his son due to lack of knowledge of the complex laws and rules of the court when the parent has made a good faith effort to comply with them? The Virginia Code also prohibits the court from dismissing if the court via court order can correct the problem for the dismissal. Either the Trial Court of the Court of Appeals could have extended the 55 day deadline for filing a statement of facts to 56 days, or concluded that because the Appellant was unaware of it and had thought he was complying with a 60 day rule, one court or the other could have made a court ruling to accept his statement of facts and thus void Ms. Vardy's argument, therefore it is against state law for this court to dismiss the case as Ms. Vardy requests as the reason to dismiss is correctable via a court order.

5. 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 courts provide pro se parties wide latitude when construing their pleadings and papers. When interpreting pro se papers, the Court should use common sense to determine what relief the party desires. S.E.C. v. Elliott, 953 F.2d 1560, 1582 (11th Cir. 1992). See also, United States v. Miller, 197 F.3d 644, 648 (3rd Cir. 1999)

(Court has special obligation to construe pro se litigants' pleadings liberally); Poling v. K.Hovnanian Enterprises, 99 F.Supp.2d 502, 506-07 (D.N.J. 2000).

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).

6. While the Trial Court should have signed the Appellants statement of facts, and should have made it part of the record, the Appellants unsigned version of the statement of facts is part of the court record with no conflicting statement of facts filed by either the Appellee or the Trial judge, with no conflicting statements it should be used if needed.
7. § vscr-5A:8 does discuss the lack of a transcript or statement of facts "**necessary to permit resolution of appellate issues**", it does not discuss the lack of a official transcript or statement of facts that **are not necessary** to permit resolution of appellate issues. The Appellant has provided the Court with all of the information needed to permit resolution of appellant issues. Given its clear that SAIC in its motion did not make a legal claim to support its request to quash and the Appellee did not file a motion to quash and chose not participate in the hearing on the matter, it is doubtful that the Court needs anything more than the motions and ruling to resolve the issue, however if it does the Appellant has provided it with a audio recording that would permit the Court to base its ruling on what was said at the hearing if it felt a need to do so. The fact it is in a different format is not a

just reason to dismiss the case, when in fact the recording is more accurate than any official transcript could be and would in fact be used to correct an official transcript to match the recording if an official transcript existed.

WHEREFORE, the Appellant requests that this court deny the motion to dismiss.

Respectfully submitted,
WESLEY C. SMITH

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CERTIFICATE OF SERVICE

I hereby certify that on March 16th 2005 a true copy of the foregoing was mailed via first-class mail to:

Attorney for Plaintiff:	Loretta Vardy	12388 Silent Wolf Dr, Manassas VA 20112	(703) 919-1417
Attorney for SAIC:	Robert Sparks	6862 Elm St #360, McLean VA 22101	(703) 848-4700
Guardian Ad Litem:	Ronald Fahy	9236 Mosby St # A, Manassas VA 20110	(703) 369-7991

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Wesley C. Smith