



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVON GORDON,)	
)	No. 225, 2024C
Defendant Below-)	No. 312, 2024C
Appellant,)	
)	ON APPEAL FROM
)	THE SUPERIOR COURT OF THE
v.)	STATE OF DELAWARE
)	ID Nos. 2108015289, 2201000032
STATE OF DELAWARE,)	2201007423, 2107009883
)	2202001715, 2308008915
Plaintiff Below-)	
Appellee.)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
DELAWARE IN AND FOR NEW CASTLE COUNTY

OPENING BRIEF

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Dated: December 18, 2024

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I. MR. GORDON’S PLEA WAS NOT KNOWING, INTELLIGENT AND VOLUNTARY BECAUSE HE WAS NOT INFORMED THAT THE GUILTY PLEA WOULD RESULT IN VIOLATIONS OF HIS PROBATION; IN FACT; HE WAS LED TO BELIEVE THAT HE COULD STILL LITIGATE HIS VOP MATTERS.

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NATURE AND STAGE OF PROCEEDINGS

Numerous arrests of Mr. Gordon result in an omnibus indictment with 31 charges.

Davon Gordon was arrested many times in 2021 and 2022. The following is a timeline:

ID No. 2107009883:

On July 19, 2023, Newark Police arrested Mr. Gordon following a domestic incident at a hotel.¹ The alleged victim, as is the case in all these matters, was Mr. Gordon's girlfriend Ajeenah Hopes. This case led to ten indicted charges:

1. Stalking
2. Theft of a Motor Vehicle
3. Terroristic Threatening
4. Theft
5. Endangering the Welfare of a Child
6. Endangering the Welfare of a Child
7. Endangering the Welfare of a Child
8. Malicious Interference with Emergency Communications
9. Offensive Touching
10. Offensive Touching²

ID No. 2108015289

On August 29, 2021, Mr. Gordon went to Ms. Hopes' residence to try to talk to her, despite the existence of a no-contact with her. An argument ensued, and

¹ A65-67.

² A78-81.

Hopes allegedly pointed a gun at Mr. Gordon. Police arrived at the scene to investigate.³ As to this incident, the omnibus indictment charged Mr. Gordon with:

11. Noncompliance with Bond Conditions
12. Criminal Trespass Third Degree⁴

ID No. 2201000032

On January 1, 2022, police responded to another domestic incident involving Mr. Gordon and Ms. Hopes. Noting the existence of a no-contact order, police arrested Mr. Gordon.⁵ The Noncompliance with Bond Conditions offense was charged as Count 15 of the omnibus indictment.⁶

ID No. 2201007423

On January 20, 2023, police again were at the residence for a domestic complaint. Ms. Hopes told police that no one else was in the house. When police checked the house, however, they found Mr. Gordon hiding in a back room.⁷ This incident resulted in another Noncompliance with Bond Conditions charge, Count 16 of the omnibus indictment.⁸

³ A68-70.

⁴ A82-83.

⁵ A71-72.

⁶ A83.

⁷ A76-77.

⁸ A83.

On February 2, 2022, police were again dispatched to the Hopes residence for another domestic incident. Ms. Hopes reported that Mr. Gordon came to the residence and threatened to kill her. Then he went inside and fell asleep. When he awoke, Mr. Gordon punched Ms. Hopes several times. Officers observed injuries to Hope.⁹

This incident resulted in several charged offenses in the omnibus indictment:

17. Noncompliance with Bond Conditions
18. Assault Third Degree
19. Unlawful Imprisonment Second Degree
20. Terroristic Threatening
21. Theft (iPhone)¹⁰

The indictment contained additional charges stemming from other incidents that are not germane to the issues on appeal because the State entered *nolle prosequis* as part of the global plea agreement:

- For an October 4, 2021 incident, Mr. Gordon was charged with Noncompliance with Bond Conditions and Harassment (Counts 18 and 19).¹¹
- For a January 20, 2022 incident, Mr. Gordon was charged with Noncompliance with Bond Conditions (Count 26).¹²

⁹ A73-75.

¹⁰ A83-84.

¹¹ A82.

¹² A86.

- For conduct between February 2 and 10, 2022, Mr. Gordon was charged with Stalking (Count 22).¹³
- For an incident occurring on February 10, 2022, Mr. Gordon was charged with Assault Third Degree and Noncompliance with Bond Conditions (Counts 23 and 24).¹⁴
- For an incident occurring on February 12, 2022, Mr. Gordon was charged with Noncompliance with Bond Conditions and Resisting Arrest (Counts 25 and 26).¹⁵
- For an incident occurring on March 9, 2022, Mr. Gordon was charged with Harassment (Count 27).¹⁶
- The omnibus indictment also charged Mr. Gordon with four additional Noncompliance with Bond Conditions charges (Counts 29-31).¹⁷

Mr. Gordon accepts a plea in Superior Court

Brian Chapman, Esquire, represented Mr. Gordon for all the cases in the omnibus indictment. With Mr. Chapman's assistance, Mr. Gordon entered into a plea agreement on May 1, 2023 to resolve his cases.¹⁸ Mr. Gordon pled guilty to five indicted counts – one count each from five of the indicted cases. The State entered *nolle prosequis* as to the rest of the charges.¹⁹

¹³ A85.

¹⁴ *Id.*

¹⁵ A86.

¹⁶ *Id.*

¹⁷ A87-88.

¹⁸ A89-91.

¹⁹ A89.

That same day, May 1, 2023,²⁰ the Superior Court sentenced Mr. Gordon.²¹ The Court suspended all Mr. Gordon's prison time for one year of Level 3 probation with GPS monitoring. The sentence included a no unlawful contact with Ajeenah Hopes and other conditions.²²

Mr. Gordon begins accruing violations of probation.

Having been sentenced to probation on five case numbers, Mr. Gordon was supervised by Probation and Parole in the community.

His first violation report was filed on June 27, 2023.²³ The probation officer alleged that Mr. Gordon violated his probation by being charged with Endangering the Welfare of a Child (three counts), Menacing, and Breach of Release in Case ID No. 2306000004.²⁴ The officer also alleged that Mr. Gordon violated the no unlawful contact order, because the alleged victims in the case were Ajeenah Hopes and her children.²⁵

On July 25, 2023, Probation alleged that Mr. Gordon violated his probation by having Ms. Hopes and her children visit the hotel where he was staying over the

²⁰ The Sentence Order incorrectly states May 1, 2022; sentencing occurred on May 1, 2023.

²¹ A92-98.

²² A95.

²³ A99-105.

²⁴ This case was dismissed on the day of trial pursuant to Court of Common Pleas Criminal Rule 48(b).

²⁵ A100.

course of three days in July.²⁶ The report notes that for Mr. Gordon's newest case, the bail condition had been upgraded to no contact with Ms. Hopes, rather than his sentenced condition of no unlawful contact.²⁷

On January 24, 2024, Probation filed a third violation report.²⁸ The report alleged that Mr. Gordon violated his probation by being charged with Act of Intimidation, and because the alleged victim in that case was Ajeenah Hopes.²⁹

Mr. Gordon incurs new criminal charges.

Due to his various charges and violations, Mr. Gordon by August 1, 2023 was in DOC custody. Ms. Hopes contacted police to report that she had received phone calls from Mr. Gordon despite the no contact order.³⁰ During the August 1, 2024 phone call, Mr. Gordon stated, "can you contact these people and let them know you want to drop this shit so I can get this shit over with, and just drop it please."³¹

On September 25, 2023, a grand jury approved an indictment charging Mr. Gordon with Act of Intimidation, Noncompliance with Bond Conditions, and Criminal Contempt.³²

²⁶ A106-112.

²⁷ A109.

²⁸ A113-120.

²⁹ A114.

³⁰ A123.

³¹ A125.

³² A127-128.

Plea agreement and sentencing

On January 25, 2024, Mr. Gordon accepted a plea offer to one count of Act of Intimidation.³³ The agreed-upon recommended sentence was 18 months of Level 3 probation. The parties sought immediate sentencing, but the judge ordered a presentence investigation owing to Mr. Gordon's history of domestic violence and out-of-state criminal history.³⁴ The plea agreement did not address the probation violations because Mr. Gordon wanted to address them at an upcoming VOP calendar.³⁵

But the VOP hearings did not occur, as Mr. Gordon's conviction was a violation of all his probationary sentences. On May 17, 2024, the Superior Court sentenced Mr. Gordon for both his intimidation case and his violations.

As to the Act of Intimidation charge, the Court sentenced Mr. Gordon to eight years in prison, all suspended for decreasing levels of community supervision.³⁶ For the violations of probation, the Superior Court sentenced Mr. Gordon to three years of unsuspended prison time, with credit given for 343 days previously served.³⁷ The remainder of the sentence was additional probation, concurrent to the probation served on the intimidation case.

³³ A129-131.

³⁴ A136-137; A166.

³⁵ A139.

³⁶ Exhibit A.

³⁷ Exhibit B.

Appellate proceedings

On June 7, 2024, Mr. Gordon filed a letter that this Court deemed a notice of appeal from the VOPs and sentence. This Court assigned Appeal Number 225, 2024 to this case. This Court agreed that Mr. Chapman did not have a continuing obligation to represent Mr. Gordon on his VOP appeal.³⁸

On August 5, 2024, Mr. Gordon filed a letter that this Court considered an untimely notice of appeal from the Act of Intimidation conviction. This Court assigned Appeal Number 312, 2024 to this appeal. Because Mr. Gordon pled guilty and his sentence was legal, Mr. Chapman asserted that he did not have continuing obligations. This Court disagreed and directed Mr. Chapman to file an amended notice of appeal.³⁹

The undersigned attorney (appellate counsel) filed a Substitution of Counsel to replace Mr. Chapman. Appellate counsel filed an amended Notice of Appeal. This Court issued a Notice to Show Cause why Mr. Gordon's appeal was not untimely.

Appellate counsel filed a response,⁴⁰ as did the State.⁴¹ On September 16, 2024, this Court issued an Order discharging the Rule to Show Cause.⁴² This Court

³⁸ A234.

³⁹ *Id.*

⁴⁰ A233-236.

⁴¹ A237-261.

⁴² A262-265.

also ordered the consolidation of the two appeals.⁴³ This is Mr. Gordon's Opening Brief.

⁴³ A264-265.

SUMMARY OF ARGUMENT

I. MR. GORDON'S PLEA WAS NOT KNOWING, INTELLIGENT AND VOLUNTARY BECAUSE HE WAS NOT INFORMED THAT THE GUILTY PLEA WOULD RESULT IN VIOLATIONS OF HIS PROBATION; IN FACT, HE WAS LED TO BELIEVE THAT HE COULD STILL LITIGATE HIS VOP MATTERS.

Davon Gordon was serving probationary sentences in five separate cases. Then he incurred a new case. He was offered two pleas: one included the violations of probation; the other was just to the single charge. He opted to plead guilty to the sole count of Act of Intimidation. During the plea hearing, the prosecutor, his defense attorney, and the judge all told Mr. Gordon that his VOP matters were separate, and he would have his day in court on those alleged violations.

Instead, Mr. Gordon's plea automatically triggered violations on all five of his probationary sentences. The Court sentenced Mr. Gordon on both the intimidation case and the violations.

Mr. Gordon's plea was not knowing, intelligent, and voluntary because he took it with the misapprehension that he would be able to have hearings on his violations. This Court should reverse and vacate the conviction and the violations.

STATEMENT OF FACTS

The foregoing discussion of the proceedings sets forth the relevant case facts. The facts pertaining to this appeal come from the plea hearing and the sentencing hearing.

The plea hearing

On January 29, 2024, Mr. Gordon appeared in Superior Court to plead guilty to Act of Intimidation. The Court immediately expressed concern about immediate sentencing, given the domestic violence nature of the charges and Mr. Gordon's criminal history.⁴⁴ The prosecutor explained that Mr. Gordon and Ms. Hopes have a lengthy history and both of them had been charged. Ms. Hopes had not been cooperative with the State, so the prosecutor offered a plea to a charge – Act of Intimidation – that could be proven without Ms. Hopes' participation.⁴⁵

The prosecutor explained that she had offered two pleas: one for just the charge and one that would have resolved the charge and the VOPs.⁴⁶ She noted that Mr. Gordon elected to handle his VOPs separately on a VOP calendar.⁴⁷

Defense counsel further explained that the probation officer was seeking a year in prison as a probationary sentence and Mr. Gordon did not want to accept

⁴⁴ A137.

⁴⁵ A137-139.

⁴⁶ A139.

⁴⁷ A139-140.

that. He stated, “so, in the alternative, he accepted a plea to the charge on the case that’s on the calendar today, with the understanding he will be brought back to court at a later date to have to deal with the VOP.”⁴⁸

Mr. Gordon then spoke at length. He explained that there were discrepancies in the no contact order and that he had talked to several judges at various proceedings. He stated that he had proof that the no contact order was improperly entered into the system.⁴⁹ He stated that the prison had blocked his phone calls because he was making too many phone calls to the Court.⁵⁰

The Court then conducted a thorough plea colloquy with Mr. Gordon.⁵¹ The judge asked Mr. Gordon if he was on probation at the time of the offense and Mr. Gordon agreed.⁵²

Mr. Gordon asked the judge about the scheduling of his VOP hearing, specifically mentioning a hearing upcoming on November 15, 2024. He told the Court that all the prior judges told him that his VOP matter was pending until the resolution of Case ID No. 2306000004 and then the present case.⁵³

In response, the Court stated:

⁴⁸ A142.

⁴⁹ A145-147.

⁵⁰ A150.

⁵¹ A152-159.

⁵² A158-159.

⁵³ A161-162.

The prosecution mentioned they offered you a plea that would have resolved the VOPs. So we're not here on that plea. We have a different plea here. So if that's what you were told by the judges, then the VOPs will not be resolved until this is sentenced.⁵⁴

Mr. Gordon then spoke at length about all the efforts he had made to get his VOPs rescinded. He stated that he had written 33 letters to various Court personnel and judicial officers.⁵⁵ He stated that the Prothonotary told him that the probation officer would submit a "letter of rescission" when his cases were over. He believed that the probation officer was supposed to rescind his VOP, but it never happened.⁵⁶ He continued to detail his phone conversations with the Prothonotary as to his belief that the VOPs were either rescinded or that he did not have to wait until his cases were resolved to litigate them.⁵⁷

During Mr. Gordon's lengthy speech, the judge interrupted him and explained that it was a lengthy calendar, and she needed to complete the plea. The Court further stated, "I would let you keep talking, but I don't have time – because there's other people that need to be tended to."⁵⁸ Ultimately, the judge accepted the plea and ordered a presentence investigation.⁵⁹

⁵⁴ A162.

⁵⁵ A163.

⁵⁶ *Id.*

⁵⁷ A164.

⁵⁸ A165.

⁵⁹ A166.

The case dockets confirm that all Mr. Gordon’s VOP matters were continued several times, but when he took a plea, they converted into violations without substantive hearings.

In Case ID No. 2107009883, Mr. Gordon’s VOP was placed on the “pending list” until the resolution of Case ID No. 2306000004 on June 28, 2023.⁶⁰ Then a VOP hearing was scheduled for July 26, 2023.⁶¹ But the hearing was continued.⁶² It was continued again on November 17, 2023; the notation is “defendant’s request – other charges.”⁶³ It was continued again on January 3, 2024.⁶⁴ On May 17, 2024, the day of Mr. Gordon’s sentencing, the docket entry is “Violation-of-Probation hearing. Defendant found in violation. Sentenced.”⁶⁵

In Case ID No. 2108015289, Mr. Gordon’s VOP was scheduled for July 26, 2023, but it was continued due to his new charges.⁶⁶ Mr. Gordon wrote to the Court on August 29, 2023, asking to be put on a VOP calendar.⁶⁷ But the hearing was continued again.⁶⁸ On May 17, 2024, the same entry regarding Mr. Gordon being found in violation and sentenced.⁶⁹

⁶⁰ A13; D.I. 15.

⁶¹ A13; D.I. 21.

⁶² *Id.*

⁶³ A14; D.I. 28.

⁶⁴ A14; D.I. 29.

⁶⁵ A15; D.I. 30.

⁶⁶ A25; D.I. 27.

⁶⁷ A25; D.I. 33.

⁶⁸ A25; D.I. 34.

⁶⁹ A26; D.I. 36.

In Case ID No. 2201000032, a VOP hearing was set for July 26, 2023, but continued due to Mr. Gordon's other charges.⁷⁰ After several reschedulings, Mr. Gordon was found in violation at his May 17, 2024 sentencing hearing.⁷¹

In Case ID No. 2202001715, Mr. Gordon's VOP matter was placed on the pending list until the resolution of Case ID No. 2306000004.⁷² Then it was scheduled again for July 26, 2023, but continued.⁷³ After additional continuances, Mr. Gordon was found in violation and sentenced on May 17, 2024.⁷⁴

In Case ID No. 2201007423, the same pattern occurred, with Mr. Gordon being found in violation and sentenced on May 17, 2024.⁷⁵

As the foregoing demonstrates, Mr. Gordon's VOP hearings were scheduled but then continued multiple times due to the existence of new charges. His letters to the Court requesting to be scheduled for VOP hearings were unsuccessful. Ultimately, the violations were assumed, and without substantive hearings, he was found in violation and sentenced.

⁷⁰ A35; D.I. 30.

⁷¹ A37; D.I. 39.

⁷² A46; D.I. 34.

⁷³ A47; D.I. 40.

⁷⁴ A49; D.I. 50

⁷⁵ A59; D.I. 40.

The sentencing hearing

The prosecutor explained to the sentencing judge that Mr. Gordon elected not to include his VOPs on his plea, but the State had spoken to the probation officer, who recommended a one-year sentence for his violations.⁷⁶

Ajeenah Hopes spoke at some length during the sentencing. Her statement went far afield of Mr. Gordon's charged offenses, resulting in a sidebar with the attorneys.⁷⁷ The judge assured the attorneys that he would only consider statements about conduct that meet the minimum indicia of reliability.⁷⁸ At the conclusion of Ms. Hopes' remarks, the judge stated that he would not consider some of the more egregious allegations of abuse and child sexual abuse because they did not meet the minimum indicia standard.⁷⁹

Defense counsel addressed the Court, stating, "again Your Honor, Mr. Gordon is here for two things: to be sentenced on the Act of Intimidation charge, as well as the violation of probation."⁸⁰

Mr. Gordon spoke. He seemed to be under the impression that the contact with Mr. Hopes resulting in the violation was that he called her about his mother's

⁷⁶ A174-175.

⁷⁷ A182-183.

⁷⁸ A184.

⁷⁹ A192-194.

⁸⁰ A197.

heart medication.⁸¹ After a lengthy speech, Mr. Gordon asked the judge to sentence him to one year total for all the cases.⁸²

The judge then stated, “there are several matters to be sentenced.”⁸³ The judge indicated that he would abide by the parties’ joint recommendation on the intimidation case but sentence Mr. Gordon separately for the violations of probation.⁸⁴ The Court considered them a “package,” although the sentences had to be separate.⁸⁵ Due to the extensive aggravating factors, the Court sentenced Mr. Gordon to three years in prison for the VOPs, followed by descending levels of community supervision.⁸⁶

⁸¹ A202-203.

⁸² A214.

⁸³ A221.

⁸⁴ A225.

⁸⁵ A226.

⁸⁶ A228-230.

ARGUMENT

I. MR. GORDON’S PLEA WAS NOT KNOWING, INTELLIGENT AND VOLUNTARY BECAUSE HE WAS NOT INFORMED THAT THE GUILTY PLEA WOULD RESULT IN VIOLATIONS OF HIS PROBATION; IN FACT, HE WAS LED TO BELIEVE THAT HE COULD STILL LITIGATE HIS VOP MATTERS.

A. Question Presented

Whether the Superior Court committed plain error by not informing Mr. Gordon that his guilty plea to an Act of Intimidation charge would automatically result in a finding of violations of his probation, despite both the prosecutor and defense attorney stating that the VOP hearings would be separately scheduled. This matter was not preserved in Superior Court. In fact, it was the opposite of preserved. The attorneys and the judge all told Mr. Gordon that he would still be able to litigate his VOP matters.

Mr. Gordon respectfully asserts that this Court should nevertheless review this claim pursuant to Supreme Court Rule 8. When the interests of justice require, this Court may consider issues not presented to the trial court. This is such an issue. Mr. Gordon’s due process rights were violated because his plea was not made knowingly, intelligently, and voluntarily.

B. Scope of Review

This claim having not been raised below, this Court reviews it for plain error. Under the plain error standard, the error complained of must be so clearly

prejudicial to substantial rights as to jeopardize the fairness and integrity of the process.⁸⁷

C. Merits of Argument

Applicable legal precepts

As this Court has held:

A criminal defendant's decision to plead guilty involves the waiver of several important constitutional rights. Therefore, in order for a guilty plea to be valid as a matter of due process, an agreement waiving these rights must be entered into knowingly, intelligently, and voluntarily.⁸⁸

This Court long ago set forth guidance on the nature and depth of the inquiry needed before the Court can accept a plea as knowing, intelligent, and voluntary:

- (1) That the defendant understands that he has a right to speedy trial, with the assistance of counsel, which he will waive by his plea of guilty;
- (2) That he understands he will have the assistance of counsel at sentencing if his plea is accepted;
- (3) That he understands the nature of the charges against him, and that the trial judge has explained them to him;
- (4) That he is in fact guilty of the charge or charges to which he seeks to plead guilty;
- (5) That his plea of guilty has not been induced by any promise or representation as to what sentence will be imposed upon him;
- (6) That his plea of guilty has not been induced by threats or coercion by anyone;

⁸⁷ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

⁸⁸ *MacDonald v. State*, 778 A.2d 1064, 1074 (Del. 2001).

(7) That he understands the consequences of entering a plea of guilty;

(8) That he seeks voluntarily to enter the plea of his own free will because he is guilty of the charge; and

(9) That he has discussed with his attorney fully the entry of his plea of guilty.⁸⁹

In *Patterson v. State*,⁹⁰ this Court found that the defendant's plea was not knowing and intelligent. His attorney told him that the Unlawful Sexual Intercourse Second Degree offense carried a sentence range of 10-20 years, but with good time credits and the time he had already spent in prison would result in only about six additional years.⁹¹ At the plea hearing, the TIS form handed up to the Court reflected a two-year minimum sentence on this count, although the TIS guideline was listed at "10-yr. minimum."⁹²

At the plea hearing, the prosecutor noted the discrepancy on the form. Defense counsel explained that the 10 years was a guideline, but the statutory minimum was two years. After being corrected by the judge, defense counsel, without any discussion with Patterson, made the change on the form.⁹³

⁸⁹ *Brown v. State*, 250 A.2d 503, 504 (Del. 1969).

⁹⁰ 684 A.2d 1234 (Del. 1996).

⁹¹ *Id.* at 1235-1236.

⁹² *Id.* at 1236.

⁹³ *Id.*

Moreover, since Patterson was intoxicated at the time of the offense, he entered a *Robinson* plea. His attorney never discussed with him the elements of the offenses to which he was entering pleas.⁹⁴

Reversing the denial of Patterson’s motion to withdraw his plea, this Court held that due to the defects in the plea process, Patterson did not knowingly or voluntarily consent to the plea agreement.⁹⁵

Plea agreements sometimes include resolution of VOPs; sometimes they do not. In *Hicks v. State*,⁹⁶ the defendant faced new criminal charges and associated violation of probation. The State offered him a “fast track” plea that resolved both the charges and the VOP. Hicks rejected that plea. Then Hicks incurred new criminal charges.⁹⁷ The State offered Hicks a plea that encompassed both sets of charges. His lawyer sent him a letter stating that the plea would resolve *all pending matters* in Superior Court.⁹⁸

A different attorney from the same firm represented Hicks for the plea hearing. He indeed received an eight-year sentence.⁹⁹ A month later, a Superior

⁹⁴ *Id.* at 1235.

⁹⁵ *Id.* at 1239.

⁹⁶ 2008 WL 3166329 (Del. 2008).

⁹⁷ *Id.* at *1.

⁹⁸ *Id.*

⁹⁹ *Id.* at *2.

Court judge held a VOP hearing. A third attorney represented Hicks. One of the grounds for violation was Hicks' new convictions.¹⁰⁰

Confusion ensued. The prosecutor informed the judge that he had not included the VOP in the plea agreement. The defense attorney expressed an understanding that the plea did include the VOP.¹⁰¹ The second attorney happened to be present; he told the judge that he also understood that the plea deal included the VOP.¹⁰² The judge continued the VOP hearing. The prosecutor then wrote to the judge, explaining that the plea agreement did not contain any language about the VOP, and that it was his practice not to ask for dismissal of a VOP when the fast track offer had been rejected by the defendant.¹⁰³

At the VOP hearing, yet another attorney represented Hicks. Hicks told the judge that his understanding was that the VOP would be dismissed as part of the plea deal. The judge nevertheless found Hicks in violation and sentenced him to three additional years of unsuspended prison time.¹⁰⁴

Hicks moved for postconviction relief, claiming his plea attorney was ineffective for not informing him that the plea deal did not include the VOP. This Court affirmed the denial of the motion. This Court found that Hicks was

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at *3.

informed by the TIS form that the guilty plea may constitute a violation. Moreover, no attorney ever told Hicks that his plea would also resolve his VOP matter.

Finally, this Court found that the record of the plea colloquy made it clear that Hicks knew exactly what charges were included in the plea agreement.¹⁰⁵

Mr. Gordon's plea was not knowing, intelligent, and voluntary because both attorneys and the plea judge stated that he would be able to litigate his VOP matters after the entry of the plea.

Unlike in *Hicks*, where the plea agreement and colloquy were silent as to the VOP being included, in Mr. Gordon's case, he was affirmatively told that his VOPs would be set for hearings in the future. He was offered two pleas: one included the VOPs and one did not. The prosecutor affirmatively stated that Mr. Gordon's VOP matters would be set for a hearing.¹⁰⁶ Defense counsel explained to the judge that Mr. Gordon did not like the probation officer's sentence recommendation, "so, in the alternative, he accepted a plea to the charge on the case that's on the calendar today, with the understanding he will be brought back to court at a later date to have to deal with the VOP."¹⁰⁷

Mr. Gordon spoke at length at the plea hearing regarding all his issues with his alleged violations. He complained that the no contact order had been entered improperly. He stated that he had written 33 letters to judges and court staff. He

¹⁰⁵ *Id.* at 4.

¹⁰⁶ A139-140.

¹⁰⁷ A142.

claimed he was assured by the Prothonotary that a “letter of rescission” of his probation would be forthcoming. He said that he had made so many phone calls that the prison had withdrawn his phone privileges. Indeed, the case dockets reflect that Mr. Gordon was very active in trying to get his VOP matters on the calendar, including writing letters to the Court and to individual judges.

When the judge asked Mr. Gordon if he was on probation at the time of the offense, Mr. Gordon agreed that he was. But the judge did not tell him that the guilty plea would be a violation of probation.¹⁰⁸ In fact, Mr. Gordon continued to ask the plea judge about upcoming VOP hearings. He told the judge that he had been told by specific judges that his VOP matters were stayed until his pending cases were resolved.

In response, the Court stated:

The prosecution mentioned they offered you a plea that would have resolved the VOPs. So we’re not here on that plea. We have a different plea here. So if that’s what you were told by the judges, then the VOPs will not be resolved until this is sentenced.¹⁰⁹

Anyone in Mr. Gordon’s position would take the comments by counsel and the Court to mean that he would still be able to contest his VOP matters after the conclusion of the plea hearing. Both attorneys told the judge that Mr. Gordon had

¹⁰⁸ The TIS form Mr. Gordon signed answers “yes” to the question about whether he was on probation. The form goes on to state, “(a guilty plea *may* constitute a violation.)” A131.

¹⁰⁹ A162.

elected to litigate his VOP matters separately, even though that was not a possibility. Despite the comments of counsel, it was error for the Court to not confirm with Mr. Gordon that his guilty plea would automatically constitute violations of his five probations.¹¹⁰

The Superior Court's failure to *sua sponte* inform Mr. Gordon that his guilty plea to Act of Intimidation would constitute a violation of his probation was plain error. Mr. Gordon's due process rights were violated because his plea was not knowing, intelligent, and voluntary. Specifically, he did not understand the consequences of his guilty plea, which runs afoul of *Brown v. State*.¹¹¹ The Court's error was so prejudicial to substantial rights as to jeopardize the fairness and integrity of the process. As such, this Court should find plain error and reverse.

¹¹⁰ See, e.g., *Thomas v. State*, 2002 WL 2017064 at *2 (Del. Aug. 29, 2002)(holding that conviction for a new offense constitutes a violation of probation).

¹¹¹ *Brown v. State*, 250 A.2d 503, 504 (Del. 1969).

CONCLUSION

For the foregoing reasons, Appellant Davon Gordon respectfully requests that this Court reverse the judgment of the Superior Court. This Court should vacate Mr. Gordon's guilty plea and violations of probation and remand for further proceedings.

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