No. _____

In The
Supreme Court of the United States

WILLIAM G. CLOWDIS, JR., MD,
Petitioner,

V.

VIRGINIA BOARD OF MEDICINE,
DEPARTMENT OF HEALTH PROFESSIONS
COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Did the Court of Appeals of Virginia err in holding moot and failing to rule substantively on Clowdis' claim that the Virginia Board of Medicine violated Full Faith and Credit by declaring him a convicted felon based upon a felony charge in a Colorado Criminal Court that was dismissed with prejudice?

2) Did the Court of Appeals of Virginia err by holding ambiguously either that: (a) the Virginia Board of Medicine had subject matter jurisdiction as an Administrative Court to declare Clowdis a convicted felon even though no criminal court ever convicted him of a felony; or (b) that Clowdis waived his right to object to the lack of subject matter jurisdiction making it "law of the case" when Clowdis did not appeal within 30 days of the Board's initial unilateral suspension of his license in 2007?

3) Did the Virginia Court of Appeals err by upholding, due to sovereign immunity, the Virginia Board of Medicine's unilateral expansion of its modes of procedure to act beyond the limits which the Virginia legislature has statutorily authorized?

4) Did the Virginia Court of Appeals err by alternatively applying "law of the case" and/or sovereign immunity to permit the Virginia Board of Medicine to permanently evade substantive judicial review of Clowdis' repeated claims of constitutional and statutory violations, including his Fourteenth Amendment due process rights?

RULES 24.1(B) AND 29.6 STATEMENT

Pursuant to Supreme Court Rule 24.1(b), petitioner William G. Clowdis, Jr., MD states that all parties to the proceeding below appear in the caption of the case on the cover page.

Pursuant to Supreme Court Rule 29.6, petitioner William G Clowdis, Jr., states that he has no parent company, and no publicly held corporation owns 10% or more of its stock.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner William G. Clowdis, Jr. ("Clowdis") respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

April 26, 2007 Order from the Director of the Virginia Department of Health Professions ("DHP") suspending Clowdis' license pursuant to Va. Code §54.1-2409(A). (Appendix ("A:"), A:31-38).

May 24, 2011, Order from the Virginia Board of Medicine staying the suspension of Clowdis' license. (A:24-30).

May 27, 2011, Notice from the Virginia Board of Medicine that in light of the Board's May 24, 2011 hearing, Clowdis' license was now "full and unrestricted", subject to so-called "limited" monitoring by the Virginia Health Practitioner Monitoring Program ("HPMP"). (A:23).

March 04, 2013 Order from the Virginia Board of Medicine indefinitely suspending Clowdis' license, fining him $5,000, and issuing a formal reprimand. (A:18-22).

June 04, 2015, DHP Report to the National Practitioner Data Bank ("NPDB"). (A:88, n.5).

April 19, 2017, Order by the Circuit Court of Richmond denying Clowdis' Motion to Void the Board's 2007, 2011, and 2013 Orders. (A:16-17).

August 03, 2017, Order by the Circuit Court of Richmond dismissing Clowdis' Appeal. (A:14-15).

February 13, 2018, Opinion by the Court of Appeals of Virginia ("CAV") affirming the dismissal of Clowdis' Appeal. (A:2-13).

May 07, 2018, Order by the Supreme Court of Virginia ("SCV") dismissing Clowdis' Petition for Appeal. (A:1).

June 29, 2018, SCV Order denying Clowdis Petition for Rehearing. (A:39).

JURISDICTION

The jurisdiction of this Court to review the Judgment (Opinion) of the Court of Appeals of Virginia dated February 13, 2018, for which Petition for Rehearing by the Supreme Court of Virginia was denied on June 29, 2018, is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES

(Reprinted in Appendix)

Full Faith and Credit, Article IV, Section 1 of the U.S. Constitution (Full Faith and Credit) (A:40).

Double Jeopardy, Fifth Amendment of the U.S.

Constitution (A:40).

Due Process, Fourteenth Amendment, Section 1 of the U.S. Constitution (A:40-41).

Virginia Mandatory Suspension (Medical License), Virginia Code §54.1-2409(A)/(D) (A:41-42).

Virginia Timetable for Decision, Virginia Administrative Process Act ("VAPA") §2.2-4021(B); §2.2-4001 (A:42-43).

Colorado Deferred Sentencing, Colorado C.R.S. §18-1.3-102 (A:43-45).

Colorado Diversion Outcomes, Colorado C.R.S. §18-1.3-101(10)(b) (A:45).

Virginia First Offense Sentencing, Virginia Code §19.2-303.2 (A:45-46).

STATEMENT OF THE CASE

The central question posed in this case is whether a Medical Board from Forum State 2 ("F-2") can lawfully: (a) declare a physician to be a "convicted" felon based upon a prior felony charge which was dismissed with prejudice in Forum State 1 ("F-1"); and then (b) use that "conviction" as the statutory authority for suspending his license to practice, without even giving him a hearing to show he was not convicted.

Here, the physician is Appellant Clowdis; F-1 refers generally to the forum state Colorado and specifically

to the Colorado court which adjudicated Clowdis' criminal case; and F-2 refers generally to the Commonwealth of Virginia and specifically to the Virginia Board of Medicine together with its umbrella organization the Department of Health Professions (collectively "Board") acting as an administrative court of limited statutory jurisdiction.

In 2004, Clowdis was charged with a felony in F-1. The Colorado prosecutor offered Diversion "as an alternative to prosecution", based upon Clowdis' affirmative defense of iatrogenic "involuntary intoxication". (A:151, 161). *People* v. *Garcia, Jr*., No. 03SCC675 (Colo. 2005) ("[A]n involuntary intoxicated defendant is absolved of responsibility for all criminal acts."). (A:76, 151 - Feb. 15, 2008 Fax to the Board stamped "2/13/08", from the Colorado D.A.'s Office Re. Colorado Diversion).

In September 2005, Clowdis submitted a *conditional* guilty plea to the F-1 Court, which issued an Order directing him to enter Diversion. (A:47). On March 16, 2007, the Colorado Diversion Council certified that Clowdis had successfully completed all the conditions of Diversion. (A:48).

The F-1 Court never convicted Clowdis on the felony charge, as the Board itself **admits**. (A:25 at 2). Nevertheless, on April 26, 2007, the Director of DHP unilaterally declared Clowdis a convicted felon, based upon that felony charge. (A:31-32). The Board then used its (erroneous) declaration of Clowdis' guilt to assert jurisdiction under Va. Code §54.1-2409 ("§2409"), thereby giving itself authority to: (a) suspend his medical license; (b) publish to the world

that he is a convicted felon; and (c) do so without granting him a hearing (much less a trial) to disprove the charge.

Clowdis promptly notified the Board of its error. (A:172). The Board responded that a hearing would likely not be required to correct the error. *Id*. Clowdis provided the Board with certified Court documents, including the certificate of completion of Diversion dated March 16, 2007 and citation to Colorado Diversion law, showing that Diversion is not a conviction. (A:48, 43-45: Colo. Code §18-1.3-102). But, the Board ultimately refused to correct its error.

The disposition in the F-1 Colorado Court shows through certified records that: (a) Clowdis agreed to Diversion, which required him to enter a *conditional* guilty plea (A:47, 76-77, 134); (b) the Colorado Court deferred judgment on his plea (*Id*.); (c) Clowdis completed Diversion on March 16, 2007 (A:48); (d) the Colorado Court declared the sentencing on the Diversion Order "void" (A:52-54); and (e) the Colorado Court dismissed the felony charge with prejudice. (A:49-51, 53-54).

In its 2011 Order, the Board made a formal *finding of fact* acknowledging that the felony charge in Colorado was dismissed (with prejudice). (A:25 at 2). Yet, in that same Order, the Board went on to make a *conclusion of law* that Clowdis is a convicted felon. (A:28 at 1; citing Va. Code §54.1-2915(A)(20) (requiring: "Conviction in any state … of any felony")).

Since, by the Board's own admission, the F-1 Court never convicted Clowdis, that leaves only the F-2

Board which did the "convicting". This is as true in 2007 as it was in 2011. But a state administrative body, such as the Board, cannot convict anyone of a felony. That requires an adjudication of guilt by a court of competent criminal jurisdiction.

Nor does the language of §2409 authorize the Board to make its own independent finding of law that a physician might or should have been convicted of a felony. It only authorizes the Board to accept and take notice of documentation confirming that a physician "*has been* convicted." (Past tense is built into the statute). Once this prior conviction is authenticated with a copy "of the documentation from such court" that convicted him, the Board is then, but only then, authorized to invoke §2409(A) to suspend the physician's license, unilaterally, (without a hearing).

A physician's license is a property right protected by the Fourteenth Amendment. *Va. Bd. of Med & DHP* v. *Zackrison,* No. 1291-16-2, p.8 (Va.App. 03/14/2017). Suspension constitutes a "deprivation" of that property right. *Id*. As a general matter, the Virginia Code requires a hearing prior to suspending a physician's license. Section 2409(A) represents an exception to that rule. The Virginia Code presumes that an *already convicted* physician received all the process he was due in the criminal Court that convicted him. Were §2409(A) written otherwise, to permit the Board to make its own judgment "convicting" a physician, without a hearing or prior conviction in a duly authorized criminal Court, then §2409(A) would be patently unconstitutional in clear violation of the due process requirements of both the Fourteenth and Fifth Amendments.

This raises a number of closely related Constitutional issues: (1) Full Faith and Credit; (2) Double Jeopardy (and right to trial by jury); (3) Subject Matter Jurisdiction ("SMJ") (not a criminal court); (4) SMJ (Ultra Vires); (5) SMJ (Modes of Procedure); and (6) Due Process.

Proceedings Below

A. State Agency Proceedings:

The Director of DHP suspended Clowdis' license on April 26, 2007 pursuant to §2409(A) for a felony conviction in Colorado based upon the Commonwealth's Exhibit 1, a Colorado bookkeeping *mittimus* showing mid-page that the felony charge, Count 5, was deferred for Diversion. (A:34-38). Clowdis immediately requested reversal. (A:172).

The Board issued an Order, on May 24, 2011, pursuant to §2409(D), staying the suspension, subject to "limited" monitoring by HPMP. The Board found as formal facts that: (1) Colorado did not convict Clowdis of a felony, and (2) Clowdis "demonstrated no evidence of current psychopathology or substance abuse", there was "no evidence of a substance abuse or mental illness problem" and "he is safe and competent to resume full independent OB/GYN medicine." It then concluded the exact opposite, as a matter of law; that he is a convicted felon, a substance abuser, and mentally unfit to practice medicine. (A:24-30). Nevertheless, the Board by its Order ostensibly reinstated his license.

On May 24, 2011, Clowdis reviewed HPMP's monitoring agreement with his attorney, the Board, and HPMP. (A:143, 165). Clowdis was instructed that monitoring would be "limited/conservative". (A:79, 161). Clowdis was further told he could begin medical employment after one month of negative testing, and that nonmedical employment only required location notice for urine test facility setup. (A:163).

The Board issued a Notice to Clowdis on May 27, 2011, advising and clarifying to him that in light of the May 24 hearing, Clowdis' license was now "full and unrestricted", subject to so-called "limited" monitoring by HPMP. (A:23).

On August 29, 2011, Clowdis had his first meeting with HPMP, (A:79, 163), who required him to sign a "new" 5-year contract. (A:164-66). After one month of negative testing, Clowdis requested permission to search for employment, potentially out-of-state. *Id*. His requests were denied. *Id*.

On November 16, 2011 Clowdis filed a request to the Board for an informal fact-finding "case decision" (defined in Va. Code §2.2-4001, A:43), to address HPMP's "limited", yet unconstitutional application of the Board's 2011 Order. (A:154-68; A:67, 126-27). In that request, Clowdis charged that the Board lacked SMJ from the beginning based on its "mistaken notion" of a felony conviction. (A:81-82, 155). Clowdis informed the Board that he only signed the HPMP monitoring agreement "with the understanding that [he] would be able to return to the practice of medicine … [and] No one ever mentioned … not be[ing] able to even contact potential worksites [for] obtaining

employment." (A:157). Citing medical evaluations, Clowdis further explained: "He is safe and competent to resume full OB/GYN medicine … No evidence of substance abuse or mental illness … The records also show [he does] not have an ongoing physical or mental condition or substance abuse disorder that would make it unsafe for [him] to practice medicine without monitoring." *Id*. Clowdis requested the Board to determine whether it: "agrees to restore [his] license to full active status [and] that the records previously placed publicly be removed, that these records are misleading to the public and cause extreme hardship for [him]." (A:79-84, 156, 166-68; A:55-70, 113, 100).

On November 17, 2011, the Board assigned Clowdis' request, "Case #144554". (A:154-68). Despite repeated reminders from Clowdis, the Board never rendered a decision for Case #144554. (A:80-88; Received A:168).

The Board held on March 04, 2013 that: (1) Clowdis had violated its 2011 Order when he withdrew from monitoring, rejecting Clowdis' affirmative defense that he did so with notice for the purpose of obtaining a Board hearing to review his challenges to the arbitrary and capricious application of that 2011 Order by HPMP. (A:68), The Board ruled *in limine* at the March 2013 hearing that Clowdis was not entitled to review: (a) of his submitted objections for the hearing (A148-50); (b) of his case decision request; (c) of his constitutional challenges to the 2011 and 2007 Orders; or (d) of his challenge that HPMP abused its authority under the 2011 Order (ordering him to sign a 5-year monitoring contract during which he could not seek employment even in non-medical fields nor travel out-of-state, and ordering him to sign a forced

"confession" that he is a substance abuser despite drug tests showing he was 100% clean, all under threat of losing his license if he did not comply with HPMP's orders). Consequently, the Board suspended Clowdis' license indefinitely, ordered him to pay a $5,000 fine, and issued a formal reprimand. (A:18-22).

Clowdis timely filed his appeal of this Order on May 03, 2013. (A:55-63: pointing out explicitly that: "Board had in its possession … [a] signed order by Judge Enquist in the Colorado court[] proving … Clowdis was not convicted of a felony"). (A:56).

The Board, on June 04, 2015, reported to the National Practitioner Data Bank ("NPDB") that the basis for the its action on March 04, 2013 was a felony "criminal conviction", and that Clowdis was unfit to practice due to "substance abuse", "psychological impairment or mental disorder." (A:88).

B. Appellate Proceedings:

The Circuit Court of Richmond City, on April 19, 2017, denied Clowdis' separate Motion to Void the Board's 2007, 2011, and 2013 Orders, holding that the Board had sovereign immunity. (A:16-17).

The Circuit Court of Richmond City, on August 03, 2017, dismissed Clowdis' Petition for Appeal holding that the Board's proceedings did not violate his constitutional rights. (A:14-15).

The CAV denied Clowdis' appeal on February 13, 2018, holding that: (1) The Board's declaration that Clowdis is a convicted felon became "law of the case"

when he did not appeal his initial April 2007 suspension within 30 days; (2) as a result, Clowdis waived his right to object substantively to the Board's jurisdiction or authority to declare him a convicted felon; (3) Clowdis' Full Faith and Credit argument objection also became moot as the "law of the case"; and (4) the Board acted within its discretion to deny review of Clowdis' other constitutional and statutory claims, notably his claim that the Board exceeded its authorized modes of procedure by restricting Clowdis' fundamental rights to liberty and interstate travel. (CAV's Opinion, Record No. 1381-17-2, dated February 13, 2018. (A:2-13).

Clowdis timely filed a Petition for Appeal of the CAV's Opinion to the SCV to review his Constitutional questions, whether: (1) "the Board must give Full Faith and Credit to judgments of a Colorado court"; (2) "the Supremacy Clause… requires…the Board comply with Title II of the ADA"; (3) "DHP and the Board may expand their subject matter jurisdiction by holding that a physician – over whom they have personal jurisdiction – was convicted of a felony even though no court ever entered a judgment of conviction"; (4) failing to appeal via Rule 2:A "an Order of the Board … gives the Board SMJ, despite … basic law [§2409(D)] providing a different procedure"; (5) the Board has SMJ to take action against a doctor based on the perception of having a *history of disability* under Va. Code… §54.1-2915(A)(2), (14)); (6) "any citizen, must do more than request relief from unconstitutional or otherwise illegal actions (with notifications of *no response*) in order to require the Board, or any administrative agency, to respond in a timely fashion pursuant to §2.2-4021(B)." (A:132-47).

The SCV declined Clowdis' Petition for Appeal, Record No. 180328 (Court of Appeals No. 1381-17-2), on May 07, 2018. (A:1).

The SCV denied Clowdis' Petition for Rehearing of Record No. 180328 on June 29, 2018. (A:39).

REASONS FOR GRANTING THE PETITION

I. Constitutional Violation: Full Faith and Credit ("FFC")

"Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State." U.S. Constitution, Article IV, Section 1. This command "is exacting" with respect to a judgment rendered by a court with subject matter and personal jurisdiction. *Baker* v. *Gen. Motors Corp*., 522 U.S. 222, 232-33 (1998). Even in the absence of such judgment, a state violates FFC when it construes another state's law to "contradict law of the other State that is clearly established and that has been brought to the court's attention." *Sun Oil Co*. v. *Wortman*, 486 U.S. 717, 730-31 (1988). The FFC clause gives "nationwide force" to State Court Orders for "claim and issue preclusion" purposes. *Baker*, 522 U.S. at 233. An F-2 state may not ignore, and then relitigate issues already resolved in an F-1 forum. *Id*. Adherence to the FFC mandate is a federal question, and correction of error always is possible through appeal to this Court. *Treines* v. *Sunshine Mining Co*., 308 U.S. 66, 77 (1939).

Here, the F-1 Colorado Court had personal and

subject matter jurisdiction over the criminal charges against Clowdis. Therefore, the F-2 Virginia Board was bound to recognize and give effect to the Colorado Court's Orders and to apply those Orders as F-1 Colorado law intended. *Morris* v. *Jones*, *Dir. of Ins. of Ill.*, 329 U.S. 545, 547 (1947).

In 2005, the Colorado Court Ordered Clowdis placed into a Diversion program. (A:47). The F-2 Board was obligated to respect this Order, and **to apply F-1 Colorado law** when determining whether Diversion constituted a "conviction".

Under Colorado law, a person who successfully completes Diversion cannot be considered "convicted" for any purpose. *Weber* v. *Colo. Bd. of Nursing*, 830 P.2d 1128, 1131 (Colo.App. 1992) (Nurse's license was wrongly suspended because a Diversion Order is not a conviction. Upon successful completion of Diversion "there exists no 'judgment of a court of competent jurisdiction of such conviction or plea.'"); *See* Colo. C.R.S. §18-1.3-102, regarding deferred judgments, ("upon full compliance with such conditions … the plea of guilty … **shall** be withdrawn and charge … **shall** be dismissed with prejudice." (A:44; Emphasis added to show this is mandatory, not subject to Judicial discretion). *See also* (A:44; Colo. C.R.S §18-1.3-101(10)(b), Diversion Outcomes: "**A successfully completed diversion agreement shall not be considered a conviction for any purpose**."

On **March 16**, **2007**, the Colorado Diversion Council certified that Clowdis had successfully completed Diversion and discharged him from supervision. (A:48). From that date forward, Colorado law

mandated that the conditional guilty plea be withdrawn and treated as if it no longer existed for any purpose; wherefore, no judgment of conviction could be said to exist. *Weber*, 830 P.2d at 1131. Moreover, once Diversion was certified complete, the Judge had no discretion under Colorado law but to declare the guilty plea void and dismiss the charge with prejudice. This qualifies for the most "exacting" command of FFC. *Barber* v. *Barber*, 323 U.S. 77, 86 (1944) (An Order not subject to modification by the Judge is entitled to the same FFC as a final judgment).

Therefore, on **April 26**, **2007**, when the Board first suspended Clowdis' license (solely based on the alleged felony conviction), it was estopped by FFC (and Colorado law) from holding that Clowdis had entered a *conditional* guilty plea at all, much less that Diversion constituted a "conviction", or that this "conviction" could form the basis to suspend his license without a hearing under §2409(A).

Clowdis objected (repeatedly) that he had not been convicted under Colorado law; whence, he could not be considered convicted at all; and therefore, the Board lacked statutory authority/SMJ to suspend his license under §2409(A). (A:154-68; 148-50; 55-131). But the Board deferred and deflected, without granting Clowdis a hearing until 2011.

Section 2409(A) requires the Board to provide official court documentation showing that a physician "*has* been convicted of a felony" *before* unilaterally suspending his license. The only document put forth by the Board is 'Exhibit 1' (Colo. Court *mittimus* entry

dated Feb. 06, 2006). (A:34-38). But, as this Court can see, Exhibit 1 is not an Order, much less an adjudication of guilt. It is a bookkeeping entry. On its face, it only memorializes that Clowdis was convicted on two misdemeanors. With respect to the one felony charge, Count 5, it shows in the middle of the page that the charge was deferred ("DJ&S"). (A:34, 37).

Thus, the *mittimus* document is not even indirect evidence of a felony conviction. To the contrary, it puts the lie to the Board's argument that this *mittimus* somehow reversed the 2005 Diversion Order (A:47) and convicted Clowdis retroactively. *See* Board's 2011 Order arguing (wrongly) that: (a) the Colorado Court "accepted Dr. Clowdis' guilty plea, convict[ing] him of the felony charge" "*nunc pro tunc* to September 6 2005" via its Feb. 2006 *mittimus* entry; whence (b) Clowdis also violated Va. Code §54.1-2915(A)(16) by (supposedly) falsely denying that he was convicted. (A:25 at 2; A:28 at 1).

But again, under Colorado law, a conditional guilty plea accompanying diversion is not a conviction for any purpose. *Weber*, 830 P.2d at 1131. This point was amplified by District Attorney of Jefferson County Colorado, Mark Pautler, who told the Board's investigator that under Colorado law "**William G. Clowdis, Jr., MD is not a convicted felon**." (A:77).

Besides, one cannot convict someone retroactively based on a *mittimus* document, without a hearing. *United States* v. *Daniels*, 902 F.2d 1238 (7th Cir. 1990) ("A judge may correct a clerical error … But he may not rewrite history."); *Bd. of Educ.* v. *Admiral Heating & Vent.*, 525 F.Supp. 165, 168 (N.D.Ill. 1981)

("[A] *nunc pro tunc* order is not a permissible synonym for retroactivity but rather is limited to current correction of the record to speak an earlier truth: an order made earlier but not formally entered.").

In its 2011 Order, the Board admitted that the Colorado Court never "entered" a felony conviction "on his record" (A:25 at 2), but then still held that Clowdis was "convicted" as a matter of law (A:28 at 1), even though F-1 Court records in the Board's possession plainly show the felony charge was dismissed with prejudice. (A:50-54).

Prior to 2017, the Board claimed to be applying/interpreting Colorado law (albeit wrongly) to convict Clowdis. (A:31). Not until its *Dec. 2017* Brief in Opposition to Clowdis' Appeal, did the Board formally abandon this position, instead arguing: "Clearly, **under Virginia law**, the *plea* of guilty is the equivalent of a conviction. An additional step by the court is not required for the plea of guilty to be considered a conviction." (A:171).

The Board may have changed its rationale to try to dodge its lack of SMJ; but in doing so, it *admitted* (for the first time) that it applied F-2 Virginia law to interpret the F-1 Colorado Court's Diversion Order, in explicit violation of FFC's dictate to apply Colorado law.

Clowdis raised this issue on appeal. (A:120-22; 134). But the CAV dismissed it as moot, without giving it a substantive review. (A:7, n.2).

It is generally assumed that states will honor their

constitutional obligation to respect each other's laws and judgments, but when a State knowingly and deliberately refuses to give FFC to the final judgments from a sister state, the only possible remedy is for the Supreme Court of the United States to intervene.

Clowdis therefore prays that this Court step in to restore Full Faith and Credit to the Colorado judgment dismissing the felony charge against him with prejudice.

II. Constitutional Violation: Lack of Subject Matter Jurisdiction, Not a Criminal Court

Even if Virginia law were applicable to Clowdis' felony charge, it is stunning that the Board also got Virginia law entirely wrong. The Board cited *Starrs* v. *Commonwealth*, 61 Va.App. 39 (**2012**) as its authority for holding that a deferred judgment would be a "conviction" under Virginia law. (A:171, Board's December **2017** Brief). However, the Board neglected to point out to the CAV that this holding has been **reversed** by the Virginia Supreme Court: "Until a trial court enters an order adjudicating guilt, it has not yet exercised its essential function of rendering judgment." *Starrs* v. *Commonwealth*, 752 S.E.2d 812, 820 (Va. **2014**).

In his Reply, Clowdis pointedly cited *Starrs* (2014) to show that *Starrs* (2012) was bad law, (A:119-22), but the CAV apparently ignored him, stating "Clowdis incorrectly argues that [§2409(A)] provides for mandatory suspension without a hearing if, and only if, the Director of Health Professions has

documentation of an *actual conviction* by a court of competent jurisdiction." (emphasis in original). (A:7, n.2). Given that *Starrs* (2014) is plainly controlling, and it requires an actual "order adjudicating guilt", it is shocking that the CAV cited no authority nor gave any explanation for not following this precedent; instead holding that the Board can declare a physician convicted, based solely upon a deferred judgment. Presumably, the CAV relied exclusively on the Board's citation to *Starrs* (2012), without even acknowledging the Virginia Supreme Court's 2014 reversal, as referenced in Clowdis' rebuttal.

In *Starrs* 2014, the Virginia Supreme Court cited several prior cases to show that the Appellate Court's mis-holding has never represented the law in Virginia: "'The rendition of a judgment is the judicial act of the court.'" *Starrs*, 752 S.E.2d at 816. (quoting *Rollins* v. *Bazile*, 205 Va. 613, 617 (1964)). The "mere acceptance and entry of a guilty plea does not constitute "a formal adjudication of guilt."" *Id*. at 818. (quoting *Hernandez* v. *Commonwealth*, 281 Va. 222, 225-26 (2011)). "[I]f it did, a trial court would have no authority to hear evidence and convict of a lesser offense." *Id*. (citing *Smyth* v. *Morrison*, 200 Va. 728, 734 (1959)).

Indeed, Virginia's own statutory analogue to Colorado's Diversion Act states: "Discharge and dismissal under this section shall be without adjudication of guilt and is a conviction only for the purpose of applying this section in subsequent proceedings." Va. Code §19.2-303.2 (A:45-46)

For the Board to substitute its own final adjudication

of guilt, where the criminal court has deferred judgment, amounts to "control[ling] the [Colorado court's] "exercise of judicial discretion."" *Starrs*, (2014) at 819 (quoting *In re Commonwealth's Att'y*., 576 S.E.2d 458, 462 (Va. 2003)). It follows that the Board's decision to "convict" Clowdis in April 2007 based upon nothing more than a Diversion Order (whose conditional guilty plea was already obviated upon Clowdis' successful completion of Diversion in March 2007) does not comport with Virginia law, any more than with Colorado law.

One can only conclude that the Virginia Board made its own independent judgment or interpretation of law that Clowdis should have been considered "convicted" based upon his Colorado Diversion agreement. But the Board is not a criminal court. It lacks jurisdiction to issue an Order, which effectively determines as a matter of first impression that the party before it is *guilty* of a felony, much less to do so without a trial. Thus, the Board violated SMJ as well as FFC in declaring Clowdis to be convicted.

Lack of SMJ is a fundamental Constitutional violation. It can be raised at any time in litigation. *Collins* v. *Shepherd*, 649 S.E.2d 672, 678 (Va. 2007). SMJ cannot be waived by the parties, either by words or actions. *Nelson* v. *Warden of Keen Mtn. Corr*., 552 S.E.2d 73, 75 (Va. 2001); *Bender* v. *Williamsport Area Sch. Dist*., 475 U.S. 534, 541 (1986) (A court may raise the issue *sua sponte* even for the first time on appeal). Any Order issued without SMJ is void *ab initio*. *Collins*, 830 P.2d at 678.

The Board was advised by attorneys, (A:30, *e.g.* Jennifer Deschenes, JD), who should have known that both Virginia law (Diversion is not a conviction) and FFC (duty to follow Colorado law regarding Clowdis' criminal charge) militate against declaring Clowdis "convicted". Moreover, before Clowdis agreed to enter Diversion, he was informed by the prosecutor and attorneys in Colorado that his *conditional* guilty plea would not affect his medical license (which he had voluntarily inactivated during his illness). (A:155-57, 166-68). It was patently unfair for the Board to change the law on him after the fact, with such egregious consequences.

At best, the Board acted with reckless indifference to Clowdis' right to a fair hearing, compounded by its attorney's amateurish act of citing the *Starrs* case that had been reversed by the Virginia Supreme Court in order to cover-up for the Board's lack of SMJ. At worst, the Board cited this reversed law deliberately in order to deceive the CAV and obtain a favorable ruling, knowing that Clowdis is now suing the Board for damages in a separate action in Federal Court and the Federal Court is waiting for the state to determine his rights. *Clowdis* v. *Silverman et al.*, 3:15-cv-00128-REP (E.D. Va.).

Clowdis' argument remains simple. The Virginia Medical Board lacks authority/discretion under Virginia enabling statutes to declare anyone to be a convicted felon as a matter of first impression. Moreover, for any state to grant such authority to any Administrative Board would violate the Fifth and Fourteenth Amendments of the U.S. Constitution.

The Board's counter-argument is to deny the premise by: (1) wrongly asserting the right to apply F-2 Virginia substantive law to an F-1 Colorado Court Order in *defiance of FFC*; and then (2) applying the *reversed* holding from the F-2 Appellate *Starrs* case to erroneously hold that a diversion order is a conviction under Virginia law. It took both errors together for the Board to justify the pretense that its role was merely ministerial in declaring Clowdis to be a convicted felon, rather than in truth, as Clowdis argued, a matter of issuing its own independent adjudication of guilt as a matter of first impression in Clowdis' criminal case.

Perhaps because Clowdis was *pro se*, the CAV failed to give a reasoned refutation of Clowdis' argument. Instead, the CAV simply adopted uncritically the Board's disingenuous and bad faith argument that the Colorado Diversion Order was already a pre-existing conviction when interpreted through the lens of (reversed) Virginia law; and therefore, it was not the Board, but Colorado which convicted Clowdis (according to Virginia "law"). The CAV then used this result to conclude that Clowdis' FFC claim was moot, without giving it any substantive review at all. In so doing the CAV failed to recognize that its reasoning was circular, because the Board's claim that its determination of Clowdis' guilt was merely ministerial depended fundamentally upon its faulty decision to apply Virginia substantive law to a Colorado Diversion Order, in violation of FFC.

As a consequence of these two mutually reinforcing and egregious errors, Clowdis was publicly "convicted" of a felony by the Medical Board, a result

that is an abomination of the Fifth Amendment.

An Appellate Court must review a claim of lack of SMJ *de novo*. *Freytag* v. *Comm'r*., 501 U.S. 868 (1991). In this case, the CAV relied upon erroneous law put forth disingenuously by the Commonwealth of Virginia, rendering its review of SMJ a sham, tantamount to no review at all.

Therefore, Clowdis prays that this Court intervene to restore Clowdis' due process rights by declaring that the Board lacked SMJ to declare him a criminal felon.

III. Constitutional Violation: Double Jeopardy In Violation of Clowdis' Liberty Rights

"[O]nce a person has been acquitted of an offense, he cannot be prosecuted again on the same charge." *Green* v. *United States*, 355 U.S. 184, 192 (1957) (citing *United States* v. *Ball*, 163 U.S. 662, 671 (1896): To review an acquittal, "on error or otherwise," would put the defendant "twice in jeopardy, and thereby violat[e] the constitution."

The Board has repeatedly published Clowdis' supposed "conviction" through Statements of Particulars (A:58), Orders, and Reports to the National Practitioner Data Bank ("NPDB").[1] These publications have caused Clowdis severe harm, reflecting the policy issue raised by Justice Black in

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[1] *Steinberg* v. *Grasso*, 2007 WL 701689 (N.J.Super.A.D. 2007) (Held: A false NPDB report is libel per se entitling obstetrician to damages, the inclusion of his name in the [NPDB] a proximate result of the fraud damaged his reputation and will continue to do so in the future.," *Id.* at 9.).

Green, 355 U.S. 184, 187-88 (1957):

> The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Here the Board knew that Clowdis was never convicted on the felony charge; yet it branded him a convicted felon, subjecting him to shame, humiliation, loss of livelihood, and general loss of liberty.

This Court has expanded "liberty" rights to include being free of official stigmatization, finding that threatened stigmatization requires due process. *Bd. of Regents* v. *Roth*, 408 U.S. 564, 569-70 (1972); *Gross* v. *Lopez*, 419 U.S. 565, 574-75 (1975); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436-37 (1971).

In *Fleury* v. *Clayton, et al*., 847 F.2d 1229 (7th Cir. 1988) (A medical board's written statement may cause harm (stigma) to a physician), the Seventh Circuit illustrated with a hypothetical that mirrors Clowdis' case: It would be one thing, the *Fleury* Court said, for a public official to call "a press conference to denounce Fleury as a bad doctor … Fleury could call his own press conference or file a libel suit but would not have a constitutional remedy." *Id*. However, if the public official "should send Fleury a document

"convicting" him of murdering a patient but imposing no sentence, we would have a much different problem. The formality enhances the seriousness of the act regardless of the gravity of the charge." *Id*. Additionally, by establishing criteria for discipline, states create "a 'property' interest in a blemish-free license to practice medicine." *Id*. at 1229.

The Board violated Clowdis' liberty rights by holding him out to the public to be a felon, based upon a felony charge that had been dismissed with prejudice in Colorado, thereby limiting all of his future opportunities. *Greene* v. *McElroy*, 360 U.S. 474, 508 (1959) ("[P]etitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure."); *Parker* v. *Ellis*, 362 U.S. 574, 593 (1960) ("Conviction of a felony imposes a status … affect[ing] his reputation and economic opportunities.")(dissent); *Green*, 355 U.S. 184, 187-92.

The formality by which the Board violated Clowdis' liberty rights involved publicly stripping him of his property right in his license via written orders/reports, thereby enhancing the seriousness of its act. *Fleury*, 847 F.2d at 1229.

Clowdis raised his double jeopardy argument on appeal. (A:65). The CAV made no substantive response.

IV. Constitutional Violation: Lack of Subject Matter Jurisdiction – Ultra Vires

In Virginia administrative law, "[c]ompliance with the conditions and restrictions set forth in the [authorizing] statute is **jurisdictional**." *Va. Bd. of Med*. v. *Va. Phys. Therapy Ass'n*., 13 Va.App. 458, 465 (1991).

Clowdis argued that: Being a convicted felon is a necessary precondition for the Board to invoke §2409(A) to suspend a physician's license unilaterally, and therefore it is a jurisdictional element of the statute. (A:61, 120, 132-35). This argument challenges SMJ, but it is statutory in nature (*ultra vires*), making it analytically distinct from the constitutional argument above that a Board may not act as a criminal court.

The CAV rejected this argument, citing *Hicks* v. *Mellis*, 275 Va. 213 (2008) (*Court*'s failure to provide notice of an impending hearing was not jurisdictional, and *De Avies*, 42 Va.App. 342 (2004) (*Court*'s failure to obtain a party's signature on a settlement agreement was not jurisdictional) to conclude that the Board's mistake was merely reversible error. (A:6-13; ns.2-4).

The CAV's reliance on *Hicks* and *De Avies* is misplaced. Each case involved a court of general jurisdiction, "which need not look to the statute for its jurisdictional authority." *People* v. *Castleberry*, 2015 IL 116916 (2016). Clowdis' case, however, involves an administrative agency which is a "purely statutory creature and [so] powerless to act unless statutory

authority exists." *Id*. Furthermore, in both cases, the presiding *Court* made a statutory error after the *Court* already had jurisdiction over the parties and subject in question. A *Court* is free to err once it has jurisdiction to act. But in Clowdis' case, the Board did not have statutory authority to act (much less unilaterally) to suspend Clowdis' license *until* it made the erroneous conclusion that he was a convicted felon.

The *De Avies* Court explained: "To determine whether an alleged error undermines a *trial court*'s subject matter jurisdiction, we focus on the statutory language delegating power to the *courts* to decide the issue and the legislative design it reveals." 42 Va.App. at 346. The criteria are: (1) plain language and (2) legislative design.

By its plain language, §2409(A) can only be invoked in the case of a physician who already "has been convicted of a felony". Furthermore, §2409(A) requires proof of that conviction in the form of "documentation" of a felony conviction from the Court which convicted the physician, *before* his license can be suspended unilaterally.

The legislative design clearly recognizes that a physician's license is a property right protected by the Fourteenth Amendment of the U.S. Constitution and Article I, §11 of the Virginia Constitution, and suspension is a deprivation of that right. *Zackrison,* Va.App. No. 1291-16-2, p.8. That is why the general rule is that a physician's license cannot be suspended without a hearing.

But §2409 is an exception. The legislature presumes the physician received all the process he was due in the criminal court which convicted him. Otherwise, §2409 itself would be unconstitutional in violation of Fourteenth Amendment due process.

There is no room for ambiguity in §2409's dictate. Either the physician was convicted by a court of competent criminal jurisdiction, or he was not. If convicted, there would have to be official documentation showing adjudication of guilt. That documentation would be indisputable proof (absent mistaken identity or fraud).

The Board's only role under §2409 is ministerial, to receive documentation and take note of an already existing conviction. §2409(A) does not invite the Board to make its own independent judgment or interpretation of law that a physician should have been convicted.

Thus, by both the plain language and legislative design, prior conviction in the form of an official adjudication of guilt by a duly authorized criminal court is a *jurisdictional* element, required before §2409 can be invoked in any manner.

In Clowdis' case, a felony charge was brought against him in Colorado. The Colorado Court (applying Colorado law) deferred judgment and then dismissed the charge with prejudice. As discussed *supra*, even if it were appropriate to apply Virginia law (which it is not), this would not be a conviction under Virginia law either.

Thus, no prior conviction existed; whence the Board lacked jurisdictional authority to invoke §2409 to suspend Clowdis' license in the first instance.

The CAV erred by allowing the Board to superimpose its own judgment of guilt in order to create authority to suspend Clowdis' license unilaterally, where no such authority exists under the statute. "It is fundamental 'that an agency may not bootstrap into an area in which it has no jurisdiction.'" *Adams Fruit Co*. v. *Barrett*, 494 U.S. 638, 650 (1990). "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of authority granted to it by its creators." *Stoll* v. *Gottlieb*, 305 U.S. 165, 171 (1931). The CAV's error of interpretation of §2409 violated Clowdis' constitutional rights and denied him due process.

Therefore, Clowdis prays that this Court grant cert to address this *ultra vires* violation of SMJ.

V. Constitutional Violation: Due Process – Lack of Substantive Review

At lower levels of review, Clowdis' objections on SMJ, FFC and due process grounds were procedurally blocked. Notably, the Board issued a ruling *in limine* barring these issues at his 2013 hearing (A:69, 130); and the Richmond Circuit Court ruled that sovereign immunity barred review of these issues on appeal. *Id*.

The CAV did not track those holdings directly. Instead, it held that a physician can be lawfully and permanently branded a felon in Virginia, with all the loss of rights that entails, merely because he did not

appeal a §2409(A) Order within 30 days.

That holding is wrong for multiple reasons. First (as discussed *supra*), the only interpretation consistent with due process is that prior conviction is a *jurisdictional* element of §2409. A quasi-judicial decision taken without jurisdiction is void *ab initio*, and therefore a nullity in all subsequent proceedings. *Collin*s, 830 P.2d at 678.

Second, under FFC, the CAV was required to apply Colorado (not Virginia) law to determine if Clowdis was convicted. As soon as the Board became aware that Clowdis was not convicted in Colorado, it had a duty under FFC to apply Colorado's holding: restoring his license and treating him from that point on as it would any doctor in good standing. To knowingly ignore that duty is an act of bad faith.

Third, FFC was not moot, as the CAV concluded, (A:7, n.2), because Clowdis did not have notice of the Board's intent to apply Virginia law to interpret the Colorado Orders until the Board's Response to his Appeal. The Board's 2007 Order merely stated that Clowdis' conditional guilty plea constituted a conviction *under Colorado law*. (A:171). It did not purport to apply Virginia law. Clowdis promptly answered in his allegation of error that the Board got Colorado law wrong. (A:58). In its 2011 Order, the Board changed its argument to "*nunc pro tunc*" but still invoked Colorado law for that "conviction". Again, Clowdis responded appropriately that the Board got Colorado law wrong. (A:151, 155-57, 166-68). It was not until the Board's December 2017 Appellate Brief that the Board, for the first time,

invoked *Virginia Law* to override Colorado law, in violation of its duty to give FFC to Colorado's Order dismissing the felony charge. It is the constitutional responsibility of an F-2 Court to give FFC to F-1 judgments and laws. Therefore, the F-2 Court must perform a substantive review of FFC when the question is ripe, and properly raised in the F-2 forum. *Fauntleroy* v. *Lum*, 210 U.S. 230, 237 (1908). The CAV failed to do so.

Fourth, even under Virginia law, the actions taken in Colorado did not constitute conviction. The Board clearly made up its own law to convict Clowdis. But the Board is not a criminal court. Lack of SMJ cannot be waived by the parties, whether by words (explicit consent) or action (failing to appeal within 30 days). *Nelson*, 552 S.E.2d at 75; *Bender*, 475 U.S. at 541.

Fifth, the CAV was procedurally wrong to apply Rule 2:A (a gap-filler provision per VAPA §2.2-4026), to conclude that Clowdis committed fatal neglect by not appealing the 2007 Order within 30 days. (A:5-7). "[T]he VAPA [generally] governs an agency's actions and judicial review thereof," *Va. Bd. of Med.* v. *Phys. Therapy Ass'n.*, "***except*** where an agency's basic law creates an action and provides its own due process." 13 Va.App. 458, 465 (1991).

Here, §2409 is the "basic law", §2409(A) creates the action (suspension), and §2409(D) provides two alternative remedies: (1) informal request for the Board to correct a plain error; or (2) formal application for Reinstatement of the suspended license. Under §2409(A) the Board has the duty of producing documentation of conviction. If this proves

wrong somehow, §2409(D) authorizes the physician to notify the Board directly of its error, rather than require a lengthy and costly process of formal appeal. But if the documentation is correct, the act of suspension would be *per se* legitimate; and the physician's only remedy would be to apply for Reinstatement under alternative (2), on the grounds that he is rehabilitated – competent to return to the practice of medicine.

§2409(D) is controlling in this case. Rule 2:A "**does not supersede or repeal**" the more specific §2409(D) procedures. *Rizzo* v. *Retirement System*, 497 S.E.2d 852, 855 (Va. 1998). (Emphasis added). Indeed, the Board itself **admitted** that a suspension under §2409 "is **not appealable** under the VAPA" because actions under §2409 "are not **case decisions** of a board subject to court review under Virginia Code §2.2-4026." (A:169).

Although alternative (1) in §2409(D) sets no time limit, Clowdis did promptly notify the Board of its error, requesting that his license be restored in May 2007, within 30 days of his initial suspension. (A:172). This notification constituted a request for a case decision, as defined in VAPA §2.2-4001, which in turn required the Board to provide a written (appealable) answer within 90 days. VAPA §2.2-4021(B) (A:42-43). Despite numerous follow-up notices, the Board dithered for more than a year.

In February 2008, Clowdis reminded the Board, per VAPA §2.2-4021(B), that a case decision whether to restore his license was overdue. (A:151-52; Board's Stamp "000154 02/13/08"). The 90-day trigger for

VAPA §2.2-4021(B) commences with the petitioner's request. (A:96-98, 128). The Board did not respond within 30-days of reminder notice. That put the Board in default, rendering the case decision automatically decided in Clowdis' favor with no further action by Clowdis required. The Board has no sovereign immunity to statutory default – even if it "adversely affects the sovereign's pecuniary interests." VAPA §2.2-4021(B); *Rizzo*, 497 S.E.2d at 854-58. Therefore, the suspension (and so-called felony "conviction") should be deemed void from that date forward.

On August 19, 2008, Clowdis again sent documentation to the Board, including the Final Judgment from the F-1 Court dismissing the felony charge with prejudice. With that judgment in hand, the Board could no longer in good faith insist that he was convicted.

Nevertheless, the Board responded by invoking the alternative remedy under §2409(D), directing Clowdis to apply for Reinstatement, as the only means for him to get his license back. This demand was made via phone from the Board's counsel to Clowdis' counsel. Therefore, Clowdis had no decision in writing which he could appeal. Since "reinstatement" presumes the original suspension was legitimate, the Board had no more SMJ to invoke §2409(D)'s Reinstatement process than it had to invoke §2409(A) to suspend his license.

Given no alternative, Clowdis filed for Reinstatement on December 01, 2008. (A:153) (stamped "VA BOM-DEC 04 2008"). Section 2409(D), requires that a physician be heard at the Board's first hearing 60

days after filing for Reinstatement. This occurred February 19-21, **2009**. (A:141). But the Board did not grant Clowdis a hearing until May 19, **2011**. This violated Clowdis' due process right to timely resolution, for which there was no legitimate state interest in delay. *Barry* v. *Barchi*, 443 U.S. 55, 66 (1979). Furthermore, it constituted yet another default by the Board. VAPA §2.2-4021(B); *Rizzo*, 497 S.E.2d at 854-57.

In a hearing of first impression to determine *if* a physician's license should be suspended, the burden of proof lies with the Board. *Goad* v. *Va. Bd. of Med*., 580 S.E.2d 494, 501 (Va.App. 2003). But "Reinstatement" shifted the burden to Clowdis to prove (by clear and convincing evidence) that he was no longer unfit to practice medicine.

In addition, the Board gave itself authority, via the Reinstatement process, to investigate the incident in which Clowdis was charged with a felony. As a result, the Board issued a public Statement of Particulars in April, 2009, charging that Clowdis is a substance abuser who is mentally unfit to practice medicine. (A:58, 123, 142). This charge was based solely on Clowdis' involuntary intoxication in 2004. *Id*. However, at the Reinstatement hearing, Clowdis had the burden to refute the substance abuse charge.

Most importantly, the Board treated Clowdis' coerced application for Reinstatement as if it were a voluntary admission that the 2007 suspension was lawful. The Board took it as an irrebuttable presumption that Clowdis was a criminal felon and substance abuser back in April 2007 (which he was not), and so the May

2011 hearing focused upon whether Clowdis could prove that he was no longer impaired, and that he was fit to return to practice.

The Board's May 2011 Order is so contradictory as to be unintelligible. Its conclusions of law were diametrically opposed to its findings of fact – the hallmark of a sham hearing. The Board found as fact that the F-1 Colorado Court never entered a conviction, and dismissed the felony charge with prejudice. (A:25 at 2). Yet, it concluded that he is a convicted felon as a matter of law. (A:28 at 1). The Board found as fact that there was no evidence (citing expert witnesses) that Clowdis has a *current* drug problem or that he is *currently* mentally unfit to practice medicine. (A:27 at e, A:27-28 at 4). Yet, it concluded as a matter of law that he is a current substance abuser who is mentally unfit to practice medicine. (A:28 at 2).

Inexplicably, after supposedly finding Clowdis unfit, the only *action* the Board took was to restore his license (technically "stay" the suspension), subject to what it described as "limited" monitoring by HPMP. (A:23; 161-62). Just three days after this Order, the Board sent Clowdis a letter assuring him that his restored license was "full and unrestricted." (A:23). On this record – an *action* restoring his license "full and unrestricted" subject to periodic urine tests – Clowdis had nothing to appeal.

However, the Board's promise of a "full and unrestricted license" turned out to be disingenuous. Clowdis was not told the onerous nature of his supervision, until his first meeting with HPMP on

August 29, 2011, (long after the 30-day time to appeal the May 2011 Order had expired). (A:163).

Both the Board and the CAV have treated this procedural history as if the 2007 suspension, the 2011 hearing, and the 2013 hearing were each analytically separate. Clowdis recites this history to show that they formed one continuum – from the original suspension, to his §2409(D) request for a case decision, to the Board's 2008 Order to file for Reinstatement, to the wording of the Board's 2011 Order finding that he is and is not a convicted felon and that he is and is not a current drug abuser, to the action of the Board's 2011 Order reinstating his license, to the Orders by HPMP (issued under the supposed authority of the 2011 Order but after the time to appeal that Order had expired) which denied Clowdis his liberty rights (such as work and travel).

VI. Constitutional Violation: Modes of Procedure

HPMP violated Clowdis' due process by invoking the Board's 2011 Order arbitrarily to bar him from: (1) leaving Virginia (interstate travel); (2) working in *any* capacity, medical or nonmedical (liberty); (3) communicating with potential employers (liberty); and (4) forcing him to make false admissions under duress, on penalty of having his license resuspended if he disobeyed. (A:154-68).

Clowdis sought relief by petitioning for a case decision on November 16, 2011. *Id*. The Board assigned his case, "Case #144554", on November 17, 2011. (A:154). In addition to challenging HPMP's due process

violations, Clowdis again raised SMJ – arguing that the Colorado Court never convicted him. Although Clowdis gave numerous notices that a decision was due, the Board never responded (A:100-02); thereby automatically defaulting in 2012 on all issues raised, by operation of VAPA §2.2-4021(B). *Rizzo*, 497 S.E.2d at 854-57.

Stymied by the Board's stonewalling, Clowdis voluntarily withdrew from HPMP to obtain a hearing (at the advice of his HPMP supervisor). (A:85-87, 100). Clowdis gave clear notice of his intent. *Id*.

As a result, the Board held a hearing on Feb. 22, 2013. However, rather than treat Clowdis' withdrawal as a good faith attempt to obtain review of Case #144554, the Board ruled *in limine* barring any issues from Clowdis' Case request. The only issue permitted for review was whether Clowdis withdral from HPMP constituted "noncompliance." (A:88, 111). The Board found him in noncompliance with its 2011 Order, and resuspended his license with sanctions. (A:20-22).

Clowdis objected at the hearing and appealed. (A:55-63). But the CAV upheld the Board's ruling *in limine*, finding that Clowdis' petition for Case #144554 was a mere (unexplained) 'reminder' which did not rise to the level of a case request (A:8-10), thereby avoiding substantive review.

The Board and its agent HPMP only have statutory authority to regulate Clowdis' practice of medicine, not his interstate travel or nonmedical work. *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (presuming "that a cause lies outside this

limited jurisdiction, [whence] the burden of establishing the contrary rests upon the party asserting jurisdiction.").

The *Colliins* Court explained, "[Al]though the court may possess jurisdiction … it is still limited in its modes of procedure, and in the extent and character of its judgments … and *cannot then transcend the power conferred by the law*." *Collins*, 649 S.E.2d at 678 quoting *Windsor* v. *McVeigh*, 93 U.S. 274 (1876) ("**absolutely void**" *Id*. at 681). Under the modes of procedure doctrine (649 S.E.2d at 678), HPMP's orders and the 2013 hearing itself are void. "[T]he character of the judgment was not such that the court had the power to render.") *Id*.; *Grafmuller* v. *Commonwealth*, 290 Va. 525, 529 (2015), holding that "a sentence imposed in violation of prescribed statutory range of punishment is void *ab initio*."

The Board's ruling *in limine* at the 2013 hearing effectively ratified HPMP's unconstitutional acts. In doing so, the Board made them its own acts. *Cal. Sch'l. Employees Ass'n*. v. *Personnel Comm. of P.V.U.S.D.*, 474 P.2d 436, 439 (1970).

Two years later on June 04, 2015, and shortly after Clowdis filed his civil suit against the Board in federal court, the Board suddenly reported to the NPDB for official publication that Clowdis is a convicted felon and substance abuser, who is mentally unfit to practice medicine. (A:88, 117-18). Because this report was based solely upon the Board's finding in 2013, it violated 45 C.F.R. §60.5's timeliness requirement (30 days), an apparent act of retaliation.

Moreover, the 2013 Order merely found that Clowdis' withdrawal from HPMP constituted noncompliance with the Board's 2011 Order. This cannot form a basis for the Board to issue its own judgment that Clowdis is a convicted felon, even though never convicted by any criminal court. Nor can it form a basis for finding that Clowdis is a substance abuser or otherwise mentally unstable, even though no evidence was ever presented of drug use or abuse, or mental instability (since the 2004 involuntary intoxication).

Thus, the Board defined its own modes of procedure to transcend its authority under the law. In doing so, the Board rendered all of its Orders void *ab initio*.

CONCLUSION

Based on the foregoing, and to correct the injustice of a mere Medical Board's public declaration convicting Clowdis of a felony, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Court of Appeals of Virginia.

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