No. _____

In The
Supreme Court of the United States

BRIAN HAMPTON CLARK,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

HENRY W. MCLAUGHLIN (VSB NO. 07105)
THE LAW OFFICE OF HENRY MCLAUGHLIN, P.C.
707 EAST MAIN STREET, SUITE 1050
RICHMOND, VIRGINIA 23219
Tel. (804) 205-9020
Facsimile (804) 205-9029
Email: henry@mclaughlinvalaw.com

Counsel of Record for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

The petitioner, Brian Hampton Clark ("Brian Clark") seeks reversal of a conviction of contempt of court entered by the Honorable David V. Williams, chief judge of the Circuit Court of Patrick County, Virginia ("Judge Williams") on grounds Judge Williams erred in denying Brian Clark's motion for recusal of Judge Williams in this case. Brian Clark contends that Judge Williams' denial of such recusal motion denied Brian Clark his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

The questions for consideration by this Court are as follows:

1. Whether the fact that the contempt charge in this case was openly brought in response to Brian Clark's petition for a writ of prohibition in the Virginia Supreme Court joining as respondent one of the judges of the Circuit Court of Patrick County, Virginia ("the trial court") required that the Honorable David V. Williams ("Judge Williams"), chief judge of the trial court, to comply with Brian Clark's federal due process rights, to grant Brian Clark's motion that Judge Williams recuse himself?

2. Whether the totality of the circumstances indicated that an average judge in the position of Judge Williams would have a "potential for bias" so as to require his recusal to comply with Brian Clark's federal due process rights, where (a) Judge Williams had previously issued a written

opinion stating that Brian Clark had "paranoid" views; (b) along with other judges of the trial court, Judge Williams had recused himself from Brian Clark's divorce case; (c) Judge Williams would not have issued the contempt charge except that Judge Clark suggested he do so in response to Brian Clark filing an action in a higher court joining Judge Clark as respondent; (d) the outcome of the contempt charge in this case pending when Brian Clark moved for recusal at that time carried a manifest potential to affect the petition for prohibition (solely on state law grounds) then pending in the Virginia Supreme Court, and a case Brian Clark filed in federal court also challenging (solely on federal law grounds) Judge Clark's order, issued without notice or opportunity for hearing conditioning Brian Clark's access to the clerk's office of the trial court on conditions not imposed on the general public; and (f) Judge Williams, in discussing linkage between the case Brian Clark filed in the Virginia Supreme Court and the contempt charge stated, "Well, the matter raised was your client didn't have a chance to have a hearing, which is want your client wanted."?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian Hampton Clark ("Brian Clark") submits this petition for a writ of certiorari to review the order of the Virginia Supreme Court refusing his appeal from the refusal by the Court of Appeals of Virginia to grant him an appeal from his conviction for contempt of court – with a jail sentence – by the Circuit Court of Patrick County, Virginia; and the order by the Virginia Supreme Court denying his petition to rehear that court's refusal of his appeal.

OPINIONS AND ORDERS BELOW

Included as exhibits to this petition are (a) the order for conviction of Brian Clark by the Circuit Court of Patrick County, Virginia; (b) an order by one of the judges of the Court of Appeals of Virginia denying Brian Clark's appeal; (c) a further order by the Court of Appeals of Virginia denying Brian Clark's petition to rehear denial of his appeal; (d) order by the Virginia Supreme Court denying Brian Clark's appeal to that court; and (e) order by the Virginia Supreme Court denying Brian Clark's petition to rehear denial of appeal. None of the foregoing specifically addressed Brian Clark's contention that denial of his recusal motion violated his federal due process rights because those rights required recusal where an objection view would indicate that an average judge in Judge Williams' positon would likely have an unconstitutional "potential for bias." Of the above, only Appendix C contained any opinion. Appendix C addressed Brian Clark's recusal motion only as to Virginia State law, but did not address Brian Clark's assertion of his

federal due process rights as grounds for recusal of Judge Williams.

JURISDICTION

The Virginia Supreme Court entered an order on January 28, 2020 denying Brian Clark's appeal and entered an order denying his petition to rehear on March 21, 2020. This Court's jurisdiction to consider this petition for certiorari rests on 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution. (Appendix F)

STATEMENT OF THE CASE

Undisputed facts in this case are unprecedented in this country.

Prior to Brian Clark's conviction of contempt of court in this case, he had never been convicted of any felony, any misdemeanor involving moral turpitude, or anything involving violence.[1] He had been

[1] A certified copy of the entire record of the case in which Brian Clark filed a petition for a writ of certiorari in the Virginia Supreme Court ("the prohibition case") was made a part of the record in the hearing on motions, including recusal motions, heard prior to evidence at the trail of this case in the trial court on March 20, 2018 at p. 7 of the transcript of the trial in the trial court. (The entire record of the petition for writ of prohibition case, as thus entered into the record of this case, is

acquitted by the Honorable Willard Greer ("Judge Greer"), a different judge of the Circuit Court of Patrick County, Virginia ("the trial court"), of an earlier charge of contempt of court.[2]

Although Brian Clark had a clean criminal record, he was considered in Patrick County, Virginia ("Patrick County") to be a malcontent. In a domestic case involving child visitation, Judge Williams had referred to him as having "paranoid" beliefs.[3] All of the judges of the 21st Judicial Circuit of Virginia had recused themselves from his divorce case.[4] While riding as a passenger in a car driven by his sister, he had been stopped in Patrick County by a deputy sheriff. After Brian Clark filed a 42 U.S.C. Section 1983 lawsuit ("Brian Clark's federal lawsuit") that included challenge of that traffic stop, a jury rendered a verdict in favor of the deputy sheriff. The U.S. District Court of the Western District of Virginia granted a motion filed under Rule 58 of the Federal Rules of Civil Procedure; set

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referred to herein after as "Rec., pet. for proh.") As introduced into the record in this case, Brian Clark's petition for a writ of certiorari at pp. 43-46 contained Brian Clark's declaration under penalty of perjury that , except for the original of certain emails, those facts were true and correct to the best of his knowledge, information and belief. Therefore, he swore to the fact set forth at pp. 10-11 that he had never been convicted of any felony, misdemeanor involving moral turpitude, or anything involving violence or threat of physical violence. (For purposes of the record, the petition for a writ of prohibition filed by Brian Clark in the Virginia Supreme Court and made a part of the record in this case as stated herein, is referred to hereafter as "the pet. for proh")

[2] Pet. for proh., p. 6 ¶ 10

[3] Pet. for proh. Exh. J, p. 2 of letter opinion by Judge Williams.

[4] P. 1, Brian Clark's Recusal Motion, filed September 12, 2017

aside the jury verdict; and entered a judgment in favor of Brian Clark against the deputy sheriff for nominal damages and attorney's fees. (*Clark v. Coleman, et a*l; U.S. District Court, Western District of Virginia; Case No. 4: 17-cv-00045-MFU-RSB, Order entered on March 24, 2020 Dkt No. 156)[5]

One of the judges of the Circuit Court of Patrick County, Virginia, the Honorable Martin F. Clark Jr. ("Judge Clark"), (no kin to Brian Clark) without any opportunity for Brian Clark to be heard, or any prior notice at all, had issued an oral order banning Brian Clark from the clerk's office ("the clerk's office") of the trial court[6]. After Brian Clark retained his present legal counsel, Judge Clark modified his order to allow Brian Clark access to the clerk's office if accompanied by his lawyer.[7] In response to written objection by Brian Clark's legal counsel and after Brian Clark was acquitted of contempt of court by Judge Greer, Judge Clark modified his order a second time to allow Brian Clark to enter the clerk's office on 24 hour notice,[8] but would not allow him access to the clerk's office on the same terms available to the general public. *Id.*

On grounds such modified order put him in a status of second class citizenship, Brian Clark filed a petition for a writ of prohibition in the Virginia Supreme Court, joining Judge Clark as respondent[9], and filed his federal lawsuit, joining the Patrick

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[5] This case is herein after referred to as "Clark v. Coleman et al."
[6] Pet. for proh., pp. 4-5, ¶,¶ 1-2, 8
[7] Pet. for proh. P 5, ¶ 3
[8] Pet. for proh. pp 5, n. 3, 7, ¶ 11, Exh. J
[9] Pet. for proh.

County sheriff as one of the defendants, seeking in one of the counts of that case a declaratory judgment that the sheriff could not enforce Judge Clark's order limiting Brian Clark's access to the clerk's office to less than that available to the general public – on grounds, *inter alia*, that such order violated Brian Clark's federal rights of free speech, due process, and equal treatment under the law.[10]

As respondent in the case brought by Brian Clark seeking a writ of prohibition, Judge Clark wrote Judge Williams, enclosing emails over a year old, which stated they were from Brian Clark and which spoke contemptuously about local public officials, including judges.[11] Judge Clark wrote Judge Williams suggesting that if Judge Williams thought well of it, he could charge Brian Clark with contempt of court on the basis of such emails and "give him [Brian Clark] the due process he demands from the Virginia Supreme Court." *Id.* In response, Judge Williams issued a contempt of court charge in the trial court against Brian Clark based on the emails attached to Judge Clark's letter to him.[12]

Judge Clark, by counsel, then filed a responsive pleading in the Virginia Supreme Court attaching his letter to Judge Williams, the emails enclosed with that letter, and a request that the Virginia Supreme Court stay Brian Clark's case seeking a

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[10] Clark v. Coleman et als. (Dkt No. 1)

[11] Rec. of Proh. case, Letter from Judge Clark to Judge Williams, attached as Exh. to Judge Clark's answer to Pet. for proh.

[12] July 25, 2017 charge of contempt of court in the trial court in this case.

writ of prohibition pending the outcome of the contempt charge issued by Judge Williams against Brian Clark.[13]

While the petition for a writ of prohibition and Brian Clark's federal lawsuit were pending, Brian Clark filed defense motions in this case which included a motion seeking recusal of Judge Williams and all of the judges of the 21st Judicial Circuit.[14] In that motion, Brian Clark argued that any objective observer would be likely to conclude that any acquittal of him as to the pending contempt charge could be construed in favor of his petition for a writ of prohibition in the Virginia Supreme Court and in favor of his federal lawsuit as to that count seeking a declaratory judgment that the sheriff could not enforce Judge Clark's order restricting Brian Clark's access to the clerk's office to less than that allowed the general public. *Id.* Brian Clark's motion for recusal cited case law by this Court to the effect that the issue was not whether a judge was in fact biased against ta defendant, but whether the average judge in such judge's position would have an unconstitutional "potential for bias." *Id.* Brian Clark's motion for recusal also cited case law of this Court to the effect that there were increased grounds for recusal in contempt of court cases with the passage of time. *Id.*

On September 15, 2017, Judge Williams heard the recusal motion. (Tr. September 15, 2020 hearing in trial court) When Brian Clark's counsel pointed

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[13] Rec. of Proh. case, Answer by Judge Clark to pet. for proh.

[14] Pp. 1-5, Motion 1 (Motion for Recusal) filed in trial court on September 12, 2017.

out that Judge Clark had suggested a charge of contempt of court in response to Brian Clark's petition in the state's highest court joining Judge Clark as respondent, Judge Williams stated,

> "Well, the matter raised was your client didn't have a change to have a hearing, which is what your client wanted." [15]

Counsel for Brian Clark contended that such statement at such hearing by Judge Williams was additional grounds for Judge Williams to recuse himself.[16] Brian Clark's counsel argued that "the law says if an independent observer concluded that there is a potential for biased [sic] then there should be recusal."[17]

Judge Williams stated that a judge must avoid impropriety or the appearance of impropriety[18] and further stated he could be impartial[19] and denied the motion for recusal.[20] Brian Clark renewed his recusal motion after being served with the contempt charge on March 20, 2019, with his renewed motion adding as grounds Judge Williams statement on September 15, 2017 that, "Well, the matter raised was your client didn't have a change to have a

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[15] Trans. September 15, 2017 hearing, p. 7

[16] "Well, Your Honor, I submit that the state … that that statement is added grounds for the motion for recusal. *Id.*

[17] Id, p. 18.

[18] Id p. 21

[19] Id p. 23

[20] Id p. 24

hearing, which is what your client wanted?[21] Judge Williams denied the renewed recusal motion.[22]

After a trial[23] Judge Williams found Brian Clark guilty of contempt of court and sentenced him to 90 days in jail, with all but 10 days suspended, based on conditions that included compliance with Judge Clark's aforesaid order, as modified, placing the aforesaid conditions on Brian Clark's access to the clerk's office.[24]

The Court of Appeals of Virginia[25] and the Virginia Supreme Court[26] denied appeal, from which Brian Clark files this petition for certiorari.

Throughout this case, Brian Clark contended that the refusal of Judge Williams to recuse himself violated Brian Clark's federal due process rights, a positon stated explicitly in the trial court, on appeal to the Court of Appeals of Virginia (which denied appeal) and to the Virginia Supreme Court (which refused an appeal and denied a petition to rehear).[27] This petition asks this Court to grant a writ of *certiorari* and reverse Brian Clark's conviction with

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[21] Brian Clark's renewed March 2018 motion, submitted after he was served with the contempt charge on the day of trial and before the trial commenced, pp. 5-6, 8-9 Trans. March 20, 2019 Trial in trial court.
[22] Id. p. 9
[23] Trans. March 20, 2018 trial.
[24] Appendix D.
[25] Appendix B, Appendix C
[26] Appendix A, Appendix E
[27] This is set forth in detail in Section III of the argument that follows.

remand of this case for appointment of a new judge with a new trial.

Brian Clark's petition for a writ of prohibition was denied by the Virginia Supreme Court on grounds the issue on prohibition was not whether an order should have been issued, but whether the trial court had jurisdiction to do so[28] After the trial of this case, on August 16, 2018, that part of Brian Clark's federal lawsuit seeking a declaratory judgment finding Judge Clark's order unenforceable by the sheriff was dismissed on a motion for summary judgment on grounds that the *Rooker-Feldman* doctrine barred the U.S. District Court from overruling the decision by the Virginia Supreme Court in denying the petition for a writ of prohibition. (Clark v. Coleman et al., Dkt. No. 89)

REASONS FOR GRANTING THE PETITION

I. THE PROSECUTION OF BRIAN CLARK WAS MANIFESTLY INTENDED TO PUNISH HIM FOR BRINGING AN ACTION IN A HIGHER COURT AND IN FEDERAL COURT CHALLENGING AN ORDER ENTERED WITHOUT ANY NOTICE TO HIM OR OPPORTUNITY TO BE HEARD BY THE TRIAL COURT ON THE PRETEXT THAT THE CONTEMPT CASE WOULD PROVIDE HIM THE NOTICE AND HEARING HE COMPLAINED TO A HIGHER COURT OF HAVING BEEN DENIED.

While Brian Clark contends in this petition that the prosecution in this case was to punish him for joining a judge of the trial court as respondent in a

[28] Rec. of Prob. Case, order by Virginia Supreme Court

case he filed in a higher court, Brian Clark does not contend that such was done in any devious way. What Judge Clark and Judge Williams did, which Brian Clark contends was to punish him for going to a higher court, was done completely on the public record. After being served with Brian Clark's petition for a writ of prohibition, Judge Clark wrote the trial court's chief judge, Judge Williams, attaching emails more than a year old, and stated that if Judge Williams thought well of it, he could charge Brian Clark with contempt of court because of those emails and "give him the due process he demands from the Virginia Supreme Court."

In stating that Brian Clark was demanding due process from the Virginia Supreme Court, Judge Clark referred to Brian Clark's petition for a writ of prohibition, which had set forth facts not in dispute that Judge Clark had banned him from the clerk's office by means of an oral order with no prior notice to Brian Clark and with no opportunity to be heard, and despite the fact Brian Clark had a clean criminal record with no evidence that he had threatened violence. When Brian Clark's lawyer wrote Judge Clark to seek reversal of Judge Clark's order, Judge Clark confirmed such order, and, although modifying it to allow Brian Clark entry into the clerk's office with his lawyer or on 24 hour notice, Judge Clark did not allow Brian Clark him the same right of entry to the clerk's office permitted to the general public.

In responding to letters from Brian Clark's lawyer's request for reversal of his orders as to Brian Clark's entry into the clerk's office, Judge Clark did

not reference the emails he later sent to Judge Williams, so that, on the record, it does not appear that Brian Clark's counsel was put on notice that if he filed a petition for a writ of certiorari in the Virginia Supreme Court, he would thereby risk prosecution of Brian Clark based on emails that were not cited by Judge Clark as grounds for his order denying Brian Clark the same rights for entry into the clerk's office granted to members of the general public.

In reaction to Brian Clark's petition for a writ of prohibition, Judge Clark did not offer him a hearing for consideration of the emails as "the due process he demands" for a determination of whether he would be allowed the same access to the clerk's office as members of the general public. Rather, after being served as respondent in Brian Clark's petition for a writ of prohibition, Judge Clark raised the emails for the first time in a letter to Judge Williams stating that if Judge Williams thought well of it, he could charge Brian Clark with contempt of court based on the emails (more than a year old) and thereby give Brian Clark the due process he demanded from the Virginia Supreme Court. However, this contempt case could not have given Brian Clark due process he requested, because, as Judge Williams later acknowledged, Brian Clark never asked to be subjected with a charge carrying a jail sentence, rather asked for due process on whether he would have the same rights to entry of the clerk's office as available to the general public. Judge Williams' contempt charge served on Brian Clark, initiated at the suggestion of Judge Clark, was a classic case of "look what you made me do." This was reinforced by

Judge Williams's statement during a hearing in September 2017, in which Judge Williams characterized Judge Clark's letter to him as follows:

> "Well, the matter raised was your client didn't have a change to have a hearing, which is what your client wanted."

II. BECAUSE OF THE COMBINATION OF (A) WHAT IS SET FORTH IN (I) ABOVE; (B) PRIOR RECUSAL OF ALL OF THE JUDGES OF THE TRIAL COURT IN ANOTHER CASE ON LESSER GROUNDS; (C) JUDGE WILLIAMS' PRIOR JUDICIAL STATEMENT THAT BRIAN CLARK HELD "PARANOID" VIEWS; AND (D) THE LONG PASSAGE OF TIME SINCE THE EMAILS AT ISSUE IN THIS CASE AND THE FILING OF THE CHARGE, JUDGE WILLIAMS WAS REQUIRED BY BRIAN CLARK'S FEDERAL DUE PROCESS RIGHTS TO GRANT HIS RECUSAL MOTION

Leaving aside everything else in the record of this case, on the grounds alone that Judge Williams issued the contempt charge in this case to meet the suggestion of Judge Clark seeking, in effect, punishment of Brian Clark for going over Judge Clark to Virginia's highest court. Brian Clark's due process rights under the Fifth and Fourteenth Amendments to the United Supreme Court required Judge Williams to grant Brian Clark's recusal motion. However, there were additional grounds requiring recusal to guarantee such due process rights:

- Judge Williams had previously issued a written opinion stating that Brian Clark held "paranoid" views.

- Judge Williams, and all of the judges of the trial court, had previously recused themselves from the Brian Clark's divorce case.

- Even if the contempt charge were not construed as a form of punishment for Brian Clark filing his petition for a writ of prohibition in the Virginia Supreme Court, when Brian Clark filed his recusal motion, and when it was heard and first denied in September 2017, there were pending in the Virginia Supreme Court and in the U.S. District Court for the Western District of Virginia two cases brought by Brian Clark challenging Judge Clark's orders granting Brian Clark less access to the clerk's office than allowed to the general public. As set forth in Brian Clark's recusal motion, when he filed such motion, it appeared that if he were acquitted in the contempt case then pending, such could support his case challenging Judge Clark's order as to conditions for his entry into the clerk's office.

Further, Judge Clark had made the contempt case an issue in the case as to the petition seeking a writ of prohibition then pending in the Virginia Supreme Court. Because Judge Clark, by counsel, had made the contempt case an issue as to the outcome of a case in which Judge Clark was a party, Judge Williams should have, on that grounds alone, recused himself, because he had acted on Judge Clark's suggestion to issue the contempt charge against Brian Clark on the open proposal that such would be relevant to Brian Clark's petition to a higher court.

- For the reasons set forth above, an objective view of this case was that a average judge in Judge Williams' position would be likely to have an unconstitutional "potential for bias."

- The contempt charge in this case based on a letter from Judge Williams dated July 25, 2017, which referenced email stated to have been from Brian Clark, including an email dated February 14, 2016 which, in part, referenced local judges who had recused themselves (which included all of the judges of the 21st Judicial Circuit, of which Judge Williams was chief judge) and stated

> "… I therefore request copies of each ones Oath of Office, and the surety bond information and BSB license numbers.
>
> I WILL tie in their Motives with BB&T and others involving the theft of hundreds of thousands of Dollars …."

Because the contempt charge against Brian Clark alleged he sent an email more than 17 months before the charge was brought that included language indicating that judges including Judge Williams had been corrupt, the passage of time alone required that Judge Williams grant Brian Clark's recusal motion.

Brian Clark, by counsel, submits the following case law in support of the five contentions set forth above.[29]

In a case involving due process rights in contempt proceedings[30], *Cooke v. United States,* 267 U.S. 517 (1925) Chief Justice Taft of this Court stated the following:

> "The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. The rule of caution is more mandatory where the contact charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backwards and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course, where acts of contempt are palpably aggravated by a

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[29] The following argument tracks the argument on this issue in Brian Clark's petition for appeal to the Virginia Supreme Court.

[30] While contempt cases have been held to be *sui generis* and not "criminal prosecutions" under the Sixth Amendment (see *United Mine Workers of America v. Bagwell,* 512 U.S. 821 (1994)), a defendant in a contempt case is entitled to due process of law. *Fisher v. Pace,* 336 U.S. 155 (1949); see also, *Pounders v. Watson,* 521 U.S. 982 (1997)

> personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. Cornish v. United States, 299 F. 283, 285; Toledo Newspaper Co. v. United States, 237 F. 986, 988. The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows."

In *Mayberry v. Pennsylvania,* 400 U.S. 455 (1971), a *pro se* defendant engaged in personal abuse of the trial judge. This Court appeared to leave open the option of the trial judge to act immediately and summarily to quell contempt by citing and convicting an offender, thus empowering the judge to keep the trial going, but indicated that if the judge waited until the conclusion of the trial he should defer to another judge.

In *Taylor v. Hayes,* 418 U.S. 488 (1974), Justice White's opinion for this Court stated that because "marked personal feelings were present on both

sides" and because "unseemly conduct [had] left personal stings" another judge should have been substituted for the trial judge for the purpose of finally disposing of contempt charges in that case.

In *Caperton v. A. T. Massey Coal Co.,* 556 U.S. 868, 869 (2009), this Court cited *Mayberry, supra.* stating, in part, the following:

> In reiterating that the rule that "a defendant in criminal contempt proceedings should be [tried] before a judge other than the one reviled by the contemnor," *Mayberry v. Pennsylvania* ....., rests on the relationship between the judge and the defendant (citation), the Court noted that the objective inquiry is not whether the judge is actually biased, but whether the average judge in his position is likely to be neutral or there is an unconstitutional "potential for bias." (citation).

Brian Clark, by counsel, submits it is not necessary for a defendant charged with contempt to show -- in a motion seeking recusal -- that the judge assigned the trial of the contempt case is prejudiced against him. It should be sufficient to justify recusal if matters related to or surrounding the contempt case indicate an objective inquiry would demonstrate that the average judge in the position of the judge assigned the case would have an unconstitutional "potential for bias." (See *Caperton, supra.)* That was the argument made on Clark's behalf before Judge Williams, before the Court of Appeals of Virginia, and before the Virginia Supreme Court.

In this case, any objective observer would be likely to conclude that any acquittal of the contempt charges pending against Brian Clark in this case when he first filed a recusal motion in September 2017, could be construed in favor of his then pending petition in the Virginia Supreme Court seeking a writ of prohibition (in which he stated he was solely invoking his rights under state law)[31] and in a complaint he had filed (solely invoking rights under federal law) in the case of *Clark v. Coleman, et a*l; U.S. District Court, Western District of Virginia; Case No. 4: 17-cv-00045-MFU-RSB, in which Brian Clark, *inter alia,* challenged the 24 hour advance notice requirement imposed by Judge Clark for him to visit the clerk's office unattended by his counsel on federal grounds.[32].

The foregoing, combined with (a) Judge Williams' previous holding that Brian Clark held "paranoid" views' (b) Judge Williams' prior recusal from Brian Clark's divorce case; (c) the record in this case indicating that the contempt case was filed

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[31] The Virginia Supreme Court denied Brian Clark's petition for a writ of prohibition on grounds the issue was not whether Judge Clark had erred or not erred, but whether he acted within his jurisdiction. By necessary inference, the Virginia Supreme Court indicated Judge Clark acted within his jurisdiction as to restriction on Brian Clark's entry into the clerk's office.

[32] The U.S. District Court granted summary judgment as to that part of Brian Clark's federal claim. Brian Clark remains within the time allowed to appeal that decision to the Fourth Circuit Court of Appeals, because the final order in that case (reversing a jury verdict against Brian Clark and granting him nominal damages and attorney's fees because of a traffic stop by a deputy sheriff of Patrick County, Virginia) was entered on March 24, 2020 (Dkt No. 156)

against Brian Clark as punishment for his filing a petition for a writ of prohibition in the Virginia Supreme Court joining Judge Clark as respondent; and (d) Judge Williams' statement as to such subject that "Well, the matter raised was your client didn't have a change to have a hearing, which is what your client wanted" --taken together, established that an average judge in Judge Williams' position would be likely to have an unconstitutional "potential for bias."

Brian Clark submits that this motion should be held to meet the test recited above in due process case decisions by this Court to justify recusal as sought in this motion on federal due process grounds required to vindicate Brian Clark's due process rights under the Fifth and Fourteenth Amendment to the U.S. Constitution. This is particularly so because of the statement by Judge Williams during the oral argument on September 15, 2017 that "…the matter raised was your client didn't have a chance to have a hearing, which is what your client wanted."

III. BRIAN CLARK PROPERLY COMPLIED WITH APPLICABLE RULES TO PRESERVE HIS FEDERAL DUE PROCESS CONSTITUTIONAL RIGHTS AT EVERY STAGE OF THE PROCEEDINGS OF THIS CASE IN VIRGINIA COURTS

Brian Clark's recusal motion filed on September 12, 2017, specifically raised his federal due process rights as grounds to support his recusal motion and cited the *Cooke, supra., Mayberry, supra., Taylor, supra. and Caperton cases.*

Brian Clark's renewed recusal motion filed on March 20, 2020 after he was served repeated the grounds set forth in his September 2017 recusal motion and added as grounds for recusal Judge Williams statement during the hearing on September 15, 2017 that "Well, the matter raised was your client didn't have a change to have a hearing, which is what your client wanted."

In his petition for appeal to the Court of Appeals of Virginia, Brian Clark repeated the federal due process arguments above [33]

One of the judges of the Court of Appeals of Virginia, in denying Brian Clark's petition for appeal, on February 25, 2019 held, *inter alia*, that the petition for appeal had not complied with Rule 5A:12(c)(5) of the Rules of the Virginia Supreme Court as to other issues raised by Brian Clark on appeal, because that court held that, as to those other assignments of error, Brian Clark had not submitted sufficient principles of law and authorities on the record to develop Brian Clark's grounds for appeal as to those other issues.[34] However, that February 19, 2018 decision (issued *per curium*) did not make any finding that Brian Clark had not sufficiently set forth principles of law and authorities on the record as to that part of his appeal contending that Judge Williams erred in denying Brian Clark's motion that he recuse himself[35] (which is the issue in this petition for certiorari).

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[33] Petition for appeal to the Court of Appeals of Virginia, pp. 5-6, 21-24

[34] Appendix C

[35] Appendix C, pp. A6-7

The one judge *per curium* decision by the Court of Appeals of Virginia held against Brian Clark's recusal motion citing Virginia state law, holding that, in support of a motion for recusal, Brian Clark had the burden of proving actual bias by Judge Williams. (February 25, 2019 per curium opinion, pp. 3-4) Such *per curium* opinion made no reference to Brian Clark's grounds for recusal citing his federal due process rights under the decisions of this Court (recited herein above and in his motions in the trial court and in his petition for appeal to the Court of Appeals of Virginia) that a judge should recuse himself if an objective observer would find that an average judge in his position would have an unconstitutional "potential for bias." Rather, that per curium opinion held that it was sufficient to deny the motion for recusal that Judge Williams, in ruling on such motion, stated that he would be unbiased. (*Id*. p. 4).

Brian Clark filed a petition for rehearing that stated, in part, at p, 2, that the *per curium* decision (referenced at the "Denial Order" by the one judge acting for the Court of Appeals)[36] was in error because

> "It held against Clark's contention of error by the Circuit Court of Patrick County, Virginia ("the trial court") refusing Clark's motion for judge recusal because (a) the Denial Order order appeared based solely on state law, yet Clark also sought judge recusal on federal due process grounds,

[36] Appendix C

> mandating recusal for a "potential for bias" so that the trial court had no discretion to deny recusal…."

After oral argument, three judges of the Virginia Court of Appeals, on behalf of that court, on July 2, 2019, issued an order denying Brian Clark's petition for appeal "for the reasons previously stated in the order entered by this Court on February 25, 2019," (Appendix B) thereby reiterating the grounds solely on state law for upholding Judge Williams' denial of Brian Clark's motion that he recuse himself.

On August 2, 2019, Brian Clark filed a petition for appeal in the Virginia Supreme Court contending, in part, that Judge Williams' refusal to recuse himself was unconstitutional under federal law.[37] That petition for appeal contained the arguments set forth herein above regarding Brian Clark's contention that the refusal of Judge Williams to recuse himself deprived Brian Clark of his federal due process rights.

On January 28, 2020, the Virginia Supreme Court issued an order refusing Brian Clark's appeal stating that "the Court is of the opinion there is no reversible error in the judged complained of." [38]

On February 11, 2020, Clark filed a petition to rehear in the Virginia Supreme Court which cited the decisions by this Court in *Cooke, supra., Mayberry, supra., Taylor, supra., and Caperton*, *supra.* and contended that the refusal of Judge

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[37] Petition for Appeal to Virginia Supreme Court, pp 7-8 26-30)
[38] Appendix A

Williams to recuse himself breached Brian Clark's federal due process rights.[39]

On March 20, 2020, the Virginia Supreme Court entered an order stating, "On consideration of the petition of the appellant to set aside the judgment rendered herein on January 28, 2020 and grant a rehearing thereof, the prayer of the said petition is denied." [40]

As set forth above, at every state of this case in the applicable state courts, Brian Clark contended his federal due process rights required that Judge Williams recuse himself on grounds including that an objective obsever would conclude that an average judge in Judge Williams positon would have an unconstitutional "potential for bias." The contention was overruled by Judge Williams, the Court of Appeals of Virginia, and the Virginia Supreme Court, but none of those courts – except for the contention that Judge Williams was not, in fact, biased, addressed Brian Clark's contention that an objective view would be that an average judge in Judge Williams' position would have an unconstitutional "potential for bias."

For the reasons set forth herein above, Brian Clark submits he has preserved his claim of error for consideration by this Court on petition for certiorari.

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[39] Petition to Rehear to Virginia Supreme Court, pp. 7-9
[40] Appendix D

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Respectfully submitted.

HENRY W. MCLAUGHLIN (VSB NO. 07105)
LAW OFFICE OF HENRY MCLAUGHLIN, P.C.
707 East Main Street, Suite 1050
Richmond, Virginia 23219
(804) 205-9020; fax (804) 205-9029
henry@mclaughlinvalaw.com

Counsel for Petitioner

April 15, 2020

No. _____

In The
Supreme Court of the United States

BRIAN HAMPTON CLARK,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

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

APPENDIX

HENRY W. MCLAUGHLIN (VSB NO. 07105)
THE LAW OFFICE OF HENRY MCLAUGHLIN, P.C.
707 EAST MAIN STREET, SUITE 1050
RICHMOND, VIRGINIA 23219
Tel. (804) 205-9020
Facsimile (804) 205-9029
Email: henry@mclaughlinvalaw.com

Counsel of Record for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

APPENDIX:

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 28th day of January, 2020.

Record No. 191006
Court of Appeals No. 0637-18-3

Brian Hampton Clark, Appellant,
against
Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

Justice Chafin took no part in the resolution of the petition.

A Copy,

Teste: Douglas B. Robelen, Clerk

By: /s/ Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday the 2nd day of July, 2019.

Record No. 0637-18-3
Circuit Court No. CR17000709-00

Brian Hampton Clark, Appellant,
against
Commonwealth of Virginia, Appellee.

From the Circuit Court of Patrick County
Before Judges Chafin, Russell and Senior Judge Clements

For the reasons previously stated in the order entered by this Court on February 25, 2019, the petition for appeal in this case hereby is denied.

This order shall be certified to the trial court.

A Copy,

Teste: Cynthia L. McCoy, Clerk

By: /s/ Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Monday the 25th of day of February, 2019.

Record No. 0637-18-3
Circuit Court No. CR17000709-00

Brian Hampton Clark, Appellant,
against
Commonwealth of Virginia, Appellee.

From the Circuit Court of Patrick County

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code§ 17.1-407(C), and is denied for the following reasons:

Appellant was convicted of contempt of court in violation of Code § 18.2-456. He includes eight assignments of error in his petition for appeal.

I., IV., V., VI., and VIII. Appellant contends that the trial court erred by denying his motions "to dismiss the charges against him on public policy grounds," denying his motions "seeking dismissal of the charges in this case on grounds of double jeopardy," denying his motion "seeking recusal of the Commonwealth's Attorney," "excluding from evidence expert testimony by John Bryan Kasarda," and finding the evidence sufficient to convict him of contempt.

Appellant did not comply with Rule 5A:12(c)(5); the petition for appeal does not contain sufficient

principles of law and authorities or the record to fully develop appellant's arguments pertaining to these assignments of error. "If the parties believed that the circuit court erred, it was their duty to present that error to us with legal authority to support their contention." Fadness v. Fadness, 52 Va. App. 833, 851 (2008). This Court "will not search the record for errors in order to interpret the appellant's contention and correct deficiencies in a [petition for appeal]." Yap v. Commonwealth, 49 Va. App. 622, 629 (2007) (quoting Buchanan v. Buchanan, 14 Va. App. 53, 56 (1992)). "Nor is it this Court's 'function to comb through the record ... in order to ferret-out for ourselves the validity of [appellant's] claims.'" Burke v. Catawba Hosp., 59 Va. App. 828, 838 (2012) (quoting Fitzgerald v. Bass, 6 Va. App. 38, 56 n.7 (1988) *(en banc))*.

"A court of review is entitled to have the issues clearly defined and to be cited pertinent authority. The appellate court is not a depository in which the appellant may dump the burden of argument and research." Mitchell v. Commonwealth, 60 Va. App. 349, 352 (2012) (quoting Jones v. Commonwealth, 51 Va. App. 730, 734-35 (2008)). "An appellant who asserts that a trial court's ruling was erroneous has an obligation to state clearly to the appellate court the grounds for that assertion. A cross-reference to arguments made at trial is insufficient." Jenkins v. Commonwealth, 244 Va. 445, 461 (1992) (quoting Spencer v. Commonwealth, 240 Va. 78, 99 (1990)). We find that these defects are significant. See Jay v. Commonwealth, 275 Va. 5 LO, 520 (2008) ("the Court of Appeals should ... consider whether any failure to strictly adhere to the requirements of [the Rules of Court] is insignificant ..."); cf. Rule 5A:1A(a)

(authorizing dismissal of appeal or "such other penalty" deemed appropriate). Because appellant failed to develop these arguments, we need not consider these assignments of error. Atkins v. Commonwealth, 57 Va. App. 2, 20 (2010).

II. Appellant contends that the trial court erred by denying his motions "to dismiss the charges against him as barred by a one-year statute of limitation in" Code§ 19.2-8.

"Judicial interpretation of a statute is a question of law that this Court reviews *de novo*." Dunne v. Commonwealth, 66 Va. App. 24,29 (2016). "We view the facts in the light most favorable to the Commonwealth." Sandidge v. Commonwealth, 67 Va. App. 150, 156 (2016).

After finding that appellant "over the course of many months, harassed, intimidated, threatened and harangued the staff" of the Patrick County Circuit Court Clerk's Office, Judge Martin F. Clark, Jr. prohibited appellant from entering the courthouse without counsel. Judge Clark later allowed appellant to enter the courthouse alone, provided that he gave twenty-four hours' notice before his arrival. Thereafter, appellant filed a writ of prohibition with the Supreme Court of Virginia "demanding a hearing on these matters.[1]" Judge Clark contacted Chief Judge David V. Williams and provided Judge Williams with e-mails the court had received from appellant. On July 25, 2017, after having reviewed the materials, the circuit court issued a rule to show cause why appellant should not be fined or imprisoned for contempt of court. The rule referenced three e-mails, dated February 14,

[1] The Supreme Court refused the writ on December 4, 2017.

2016, February 22, 2016, and February 25, 2016-the dates of the alleged offenses.

Appellant argues that the one-year statute of limitation in Code § 19.2-8 barred a prosecution for ton tempt because the e-mails were sent more than a year before the trial court issued the show cause order. Code § 19.2-8 provides, in pertinent part: "A prosecution for a misdemeanor, or any pecuniary fine, forfeiture, penalty or amercement, shall be commenced within one year next after there was cause therefor. . . ."

"As contempt proceedings are not 'criminal prosecutions,' statutes of limitation for crimes do not apply to bar them." Porter v. Commonwealth, 65 Va. App. 467, 477 (2015). "[W]e recognize that '[w]hile contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not "criminal prosecutions" within the Sixth Amendment or common understanding.'" Id. (quoting Myers v. United States, 264 U.S. 95, 104-05 (1924)). Furthermore, "even if statutes of limitation for crimes applied to contempt proceedings," a violation of Code§ 18.2-456 "is not classified as a misdemeanor and thus, Code § 19.2-8 does not apply." Id. Accordingly, the trial court did not err in ruling that the contempt charges against appellant pursuant to Code § 18.2-456 was not time-barred.

III. Appellant contends that the trial court erred by denying his "motion for recusal." He asserts that the trial judge should have recused himself because of "potential for bias" considering that appellant had filed the writ of prohibition in the Supreme Court and had filed a complaint in federal court

challenging the trial court's restrictions on appellant's access to the clerk's office.

According to Canon 3(A) of the Canons of Judicial Conduct, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned ...." Our Supreme Court has held that "in making the recusal decision, the judge must be guided not only by the true state of his impartiality, but also by the public perception of his fairness, in order that public confidence in the integrity of the judiciary may be maintained." Prieto v. Commonwealth, 283 Va. 149, 163 (2012) (quoting Wilson v. Commonwealth, 272 Va. 19, 28 (2006)). "Exactly when a judge's impartiality might reasonably be called into question is a determination to be made by that judge in the exercise of his or her sound discretion." Davis v. Commonwealth, 21 Va. App. 587, 591 (1996). The party moving for recusal "has the burden of. proving the judge's bias or prejudice." Commonwealth v. Jackson, 267 Va. 226, 229 (2004). And, "[i]n the absence of proof of actual bias, recusal is properly within the discretion of the trial judge." Id. "We employ an abuse-of-discretion standard to review recusal decisions." Prieto, 283 Va. at 163.

Here, the trial judge specifically found that he could "be very fair and impartial" with appellant and "give him a fair and impartial trial on" the "only real" issues before the court, namely: "were these emails sent by [appellant] and if so, were they contemptuous." Appellant has not demonstrated any actual bias or prejudice. Nothing in the record suggests that the judge abused his discretion by not recusing himself.

VII. Appellant argues that the trial court "erred in admitting into evidence over defense objection an affidavit in response to a" subpoena *duces tecum*.

"[T]he determination of the admissibility of relevant evidence is within the sound discretion of the trial court subject to the test of abuse of that discretion." Atkins v. Commonwealth, 68 Va. App. 1, 7 (2017) (quoting Adjei v. Commonwealth, 63 Va. App. 727, 737 (2014)). The Commonwealth introduced a 'document prepared by JiffySnap IT Solution, LLC showing that appellant's contact information was associated with the e-mail account from which the contemptuous e-mails were sent. The record also included an affidavit signed by Clifford C. Seals, Jr., the authorized custodian of JiffySnap records. The affidavit notes that the records "were kept in the course of regularly conducted business activity and were prepared, or received, as a regular practice and custom." Appellant argues that Code § 8.01-390.3 and Virginia Rule of Evidence 2:902 "did not provide grounds for admission of an affidavit obtained by subpoena *duc[e]s tecum* because the affidavit did not state that the information was from business records."

> In any proceeding where a business record is material and otherwise admissible, authentication of the record and the foundation required by subdivision (6) of Rule 2:803 of the Rules of Supreme Court of Virginia may be laid by (i) witness testimony, (ii) a certification of the authenticity of and foundation for the record made by the custodian of such record or

> other qualified witness either by affidavit or by declaration pursuant to § 8.01-4.3, or (iii) a combination of witness testimony and a certification.

Code§ 8.01-390.3. Rule 2:902 addresses the self-authentication of business records. Here, the affidavit expressly declared that the JiffySnap record was prepared in the ordinary course of business and the affidavit certified the authenticity of the document, as permitted by Code§ 8.01-390.3. Accordingly, we find no abuse of discretion with the trial court's admission of the evidence.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code§ 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The Commonwealth shall recover of the appellant the costs in the trial court.

This Court's records reflect that Henry W. McLaughlin, Esquire, is counsel of record for appellant in this matter.

A Copy,

Teste: Cynthia L. McCoy, Clerk

By: /s/ Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF PATRICK

On the 20th day of March, 2018

PRESENT: The Honorable David V. Williams, Judge.

COMMONWEALTH
Vs: #17000709-00
BRIAN HAMPTON CLARK

SS#: xxx-xx-xxxx
DATE OF BIRTH: 07-28-1970
HEARING DATE: 03-20-2018
HEARING TYPE: Trial by Court
ATTORNEY FOR THE COMMONWEALTH: Stephanie Vipperman
ATTORNEY FOR THE DEFENDANT: Henry McLaughlin (retained)
ORIGINAL CHARGE DESCRIPTION: Contempt of Court (M)
STATUTE VIOLATION CHARGED: 18.2-456, 19.2-11
OFFENSE DESCRIPTION IF CONVICTED: Contempt of Court (M)
ALLEGED OFFENSE DATE: 02-14-2016, 02-22-2016,02-25-2016
COMMENCING STATUS OF DEFENDANT: Released on Bail

This day came the Attorney for the Commonwealth and Brian Hampton Clark in person, who stands charged with contempt of court, and came also Henry McLaughlin, his attorney.

Thereupon the defendant was arraigned and after being advised by his counsel pleaded not guilty, which plea was tendered by the defendant in person. The Court determined that the defendant knowingly, voluntarily and intelligently waived trial by jury and proceeded to hear and determine the case without a jury, and having heard evidence and argument of counsel, finds the defendant guilty of contempt of court, as charged in the capias. The defendant shall be confined in a local correctional facility for ninety (90) days, the execution of all except ten (10) days of which sentence is suspended upon defendant's good behavior for two (2) years and defendant shall pay a fine of $250.00 and the costs of this hearing. It is further ordered that the defendant shall comply with the courthouse safety plan as described in letter dated October 25, 2016, and also in letter dated May 5, 2017 from Judge Martin F. Clark, Jr. to Henry McLaughlin and filed as a part of the record herein.

Upon the verbal noting of an appeal in open court, the Court set an appeal bond in the amount of $2,500.00.

The Court certifies that at all times during the trial of this case the defendant was personally present with his attorney.

And the defendant was remanded to jail.

The caption of the order is made a part of the order of the Court.

ENTER: 5/9/2018

/s/ Judge

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 28th day of January, 2020.

Record No. 191006
Court of Appeals No. 0637-18-3

Brian Hampton Clark, Appellant,
against
Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on January 28, 2020 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Chafin took no part in the resolution of the petition.

A Copy,

Teste: Douglas B. Robelen, Clerk

By: /s/ Deputy Clerk

U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.