VIRGINIA

IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

CR14000063-00 thru

CR14000065-00

CR14000067-00

COMMONWEALTH	)
	)
v.	) ORDER
	)
DWAYNE LAMAR WILLIAMS, SR.	)
D.O.B. 10/22/1971	)

It appears counsel, for the defendant, who stands convicted of felonies, to-wit: 2 counts of distribution of a controlled substance, distribute marijuana and distribute a controlled substance on school property, and the defendant is in the state penitentiary system serving his sentence that was imposed by this Court on April 24, 2014 with thirty (30) years imposed of which twenty-two (22) years was suspended; and

It now appears counsel, for the defendant, in writing, has filed a *Motion to Vacate Judgment* in this matter, and the Court having read and considered the defendant's Motion, it is

ORDERED by the Court that the defendant's *Motion to Vacate Judgment* imposed be and it hereby is denied.

Anita Tilson (S)

JUDGE

ENTERED: APRIL 30, 2018

IN TESTIMONY that the foregoing is a true copy taken from the records of this court, I hereby set my hand and affix the SEAL of this court.

This 4 day of May 2018.

Michelle M. Trout, Clerk Circuit Court of Rockbridge County, Virginia by:

Tracey Smith, Deputy Clerk (S)

VIRGINIA:

In the Court of Appeals of Virginia on **Thursday** the **7th** *day of* **June 2018**.

Dwayne Lamar Williams, Sr., Appellant,

against Record No. 0842-18-3
Circuit Court Nos. CR14000063-00 through CR14000065-00 and CR14000067-00

Commonwealth of Virginia, Appellee.

From the Circuit Court of Rockbridge County

It appears that this Court does not have jurisdiction over this case, Accordingly, the case hereby is transferred to the Supreme Court of Virginia pursuant to Code Section 8.01-677.1.

A Copy,

Teste: *Cynthia L. McCoy (S)*
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 16th day of January, 2019.

Dwayne Lamar Williams, Sr., Appellant,

against Record No. 180984
Circuit Court Nos. CR14000063-00 through CR14000065-00 and CR14000067-00

Commonwealth of Virginia, Appellee.

From the Circuit Court of Rockbridge County

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: (illegible signature)

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 22nd day of March, 2019.

Dwayne Lamar Williams, Sr., Appellant,

against Record No. 180984
Circuit Court Nos. CR14000063-00 through CR14000065-00 and CR14000067-00

Commonwealth of Virginia, Appellee.

From the Circuit Court of Rockbridge County

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 16th day of January, 2019 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: (illegible signature)

Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

COMMONWEALTH OF VIRGINIA, Plaintiff,

v. Case Nos. CR14-63 & 67

Dwayne L. Williams, Defendant.

MOTION TO VACATE JUDGMENT

Comes now the Defendant, Dwayne L. Williams ("Williams"), by counsel, and hereby respectfully moves this Honorable Court to issue an Order granting his Motion to Vacate the Judgment of convictions rendered in the above styled criminal cases, on the grounds that those convictions were void ab initio and null when a court does not have jurisdiction.

This Court has jurisdiction pursuant to Va. Code § 17.1-513.

Long-standing binding legal precedent requires proper grand jury proceedings to have been followed in order for a court to have jurisdiction in a criminal case. In order for this Court to have had jurisdiction, Williams had to have been properly indicted by a grand jury, the indictment must be presented in open court, and the indictment properly recorded. A detailed review of the records of this Court show no indication that Williams's grand jury indictment was ever properly recorded.

Accordingly, the convictions in the above styled cases are void ab initio and legal nullities and should be declared as such.

Under Virginia law, although a prisoner has in fact been arraigned on, and has pleaded to, an indictment not appearing by the record to have been found by the Grand Jury, and if a third actual term has passed without such record of the findings, he is

entitled under Va. Code § 19.2-242 to be discharged from the crime.

Likewise, in this case Williams should be forever discharged of the crimes charged because three (3) or more terms of the Circuit Court have passed without a trial on valid indictments that were presented in open court by the Grand Jury and recorded.

Accordingly, Williams requests that this Honorable Court rule that be forever discharged for the crimes charged and immediately released from incarceration.

CONCLUSION

Wherefore, for the foregoing reasons, Dwayne L. Williams prays that this Honorable Court Grant his Motion to Vacate Judgments and issue an Order discharging those judgments and ordering his immediate release from incarceration.

RESPECTFULLY SUBMITTED, By:

Dale Jensen

Counsel Dale R. Jensen (VSB 71109)

VIRGINIA

IN THE CIRCUIT COURT OF THE COUNTY OF ROCKBRIDGE

COMMONWEALTH OF VIRGINIA, Plaintiff, v. DWAYNE LAMAR WILLIAMS, Sr., Defendant.	Case Nos. CR1400063-00, CR1400064-00, CR1400065-00 and CR1400067-00

MEMORANDUM IN SUPPORT OF MOTION TO VACATE JUDGMENT

Comes now the Defendant, Dwayne Lamar Williams, Sr. ("Williams"), by counsel, presents this Memorandum in Support of his Motion to Vacate Judgment (the "Motion") of convictions rendered in the above styled criminal cases; and in support of the Motion states:

I. Introduction

The Motion should be granted because Williams was never indicted in accordance with the requirements of Virginia law. An indictment is a bedrock requirement for a court to have jurisdiction

to enter a valid criminal judgment under Virginia law.

The Motion relies upon a well-established rule that when a grand jury returns an indictment, the grand jury verdict must be presented in open court and the facts recorded by an order signed by a judge; and until this is done the accused is not indicted.

Because no such indictment does not appear to have signed by a judge and recorded, the judgments against Williams must be vacated and Williams ordered to be released from custody of the Virginia Department of Corrections.

II. Background

Documents of the Rockbridge Circuit Court (the "Circuit Court") purported to indict Williams, but those documents show that none of Williams' indictments were compliant with Virginia law. Indictments were never entered in an Order Book via

a judge signed order in compliance with Va. Code §§ 17.1-123(A), 17.1-124, and 17.1-240.

Williams entered guilty pleas to two counts of possession with intent to distribute a controlled substance, one count of possession with intent to distribute marijuana, and one count of selling drugs on or near certain properties. On April 28, 2014, Williams was sentenced to a total of thirty years for these convictions with twenty two years suspended.

Williams did not appeal his convictions.

The Virginia Supreme Court denied Williams' Petition for Writ of Habeas Corpus on October 17, 2016 on procedural grounds.

The U.S. District Court for the Western District of Virginia denied Williams' Petition for Writ of Habeas Corpus on January 5, 2017, also on procedural grounds.

III. Argument

A. The Right to a Grand Jury Indictment Conferred by the Fifth Amendment to the United States Constitution Applies to Virginia via the Fourteenth Amendment

The Fifth Amendment to the United States Constitution provides in pertinent part:

> 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.

1. The Grand Jury Right Should Apply to the States Under the Fourteenth Amendment Due Process Clause

The right to a grand jury indictment conferred by the Fifth Amendment to the United States Constitution should apply to state indictments via the Fourteenth Amendment. Changes in constitutional law that have occurred since Hurtado

v. California, 110 U.S. 516, 519 (1884) require this change.

State courts, such as those of Virginia in this case, are simply not allowed to ignore long-standing grand jury law and rights of defendants and then claim that defendants effectively have no recourse. A fundamental constitutional right, such as the Fifth Amendment right to a grand jury indictment, or its judicial equivalent, simply cannot be violated with impunity, and Virginia courts then claim that right to be "merely procedural" and subject to waiver by a defendant's counsel's failure to recognize the violation of the grand jury right and object prior to appeal.

A Virginia Supreme Court case decided over 70 years ago is flawed and should no longer be valid law. Hanson v. Smyth, 183 Va. 384, 390-91 (1944).

In Hanson, the Virginia Supreme Court opined (emphasis added):

> While the Fifth Amendment to the Federal Constitution requires a presentment or indictment in prosecutions under Federal statutes "for a capital, or otherwise infamous crime," the Virginia Constitution contains no such requirement. Farewell v. Commonwealth, 167 Va. 475, 484, 189 S.E. 321, 325; Pine v. Commonwealth, 121 Va. 812, 835, 93 S.E. 652; Guynn v. Commonwealth, 163 Va. 1042, 1046, 177 S.E. 227. In this State the requirement is merely statutory …
>
> Since the statutory requirement for an indictment in the present case is not jurisdictional, the failure of the record to show affirmatively that the indictment was returned into court by the grand jury is not such a defect as will render null and void the judgment of conviction based thereon.

Hanson, 183 Va. at 390-91.

The Hanson opinion relied upon a premise that the Fifth Amendment to the Federal Constitution did not apply to Virginia under any of

the equal protection clause, the privileges and immunities clause, or the due process clause of the Fourteenth Amendment. However, since Hanson was decided, the United States Supreme Court has significantly expanded the application of the Bill of Rights of the Constitution to state law matters under the equal protection portion of the Fourteenth Amendment. For example; in Griffin v. California, 380 U.S. 609, 615 (1965); the Court specifically held that the self-incrimination provision of the Fifth Amendment applied to the States by reason of the Fourteenth Amendment.

The right to indictment by grand jury was and is a longstanding right established by the law of England. See, e.g., Ex parte Wilson, 114 U.S. 417, 423-24, 5 S. Ct. 935, 938 (1885). Without the intervention of a grand jury, trials were not allowed for capital crimes, nor for any felony. Id. The right

to a grand jury indictment was so fundamental to the criminal justice rights of defendants that rights therefor were placed in the Fifth Amendment of the Bill of Rights. Id.; Fifth Amendment of the U.S. Constitution.

As the United States Supreme Court has held (emphasis added):

> In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. Costello v. United States, 350 U.S. 359, 361-362 (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. Branzburg v. Hayes, 408 U.S. 665, 686-687 (1972).

United States v. Calandra, 414 U.S. 338, 342-43, 94 S. Ct. 613, 617 (1974).

In 2010, the Court explained in some detail the history of application of the Bill of Rights to the States via the Fourteenth Amendment. McDonald v. City of Chi., 561 U.S. 742, 761-65, 130 S. Ct. 3020, 3032-35 (2010). In McDonald, the Court set forth in pertinent part (emphasis added):

> An alternative theory regarding the relationship between the Bill of Rights and § 1 of the Fourteenth Amendment was championed by Justice Black. This theory held that § 1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights. See, e.g., Adamson, supra, at 71-72, 67 S. Ct. 1672, 91 L. Ed. 1903 (Black, J., dissenting); Duncan, supra, at 166, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (Black, J., concurring). As Justice Black noted, the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States and, in so doing, overruled this Court's decision in Barron. Adamson, supra, at 72, 67 S. Ct. 1672, 91 L. Ed. 1903 (dissenting opinion). Nonetheless, the Court never has embraced Justice Black's "total incorporation" theory.

While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of "selective incorporation," i.e., the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. See, e.g., Gideon v. Wainright, 372 U.S. 335, 341, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); Malloy v. Hogan, 378 U.S. 1, 5-6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); Pointer v. Texas, 380 U.S. 400, 403-404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); Washington v. Texas, 388 U.S. 14, 18, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Duncan, 391 U.S., at 147-148, 88 S. Ct. 1444, 20 L. Ed. 2d 491; Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

The decisions during this time abandoned three of the previously noted characteristics of the earlier period. The Court made it clear that the governing standard is not whether any "civilized system [can] be imagined that would not accord the particular protection." Duncan, 391 U.S., at 149, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491. Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice. Id., at 149, and n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491; see also id., at 148, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (referring to those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (emphasis added; internal quotation marks omitted)).

> The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated.

Id.

Williams avers that Justice Black's theory is substantively correct and the Bill of Rights is not an ala carte menu for courts to pick and choose from. The substantive protections of the Bill of Rights were adopted to limit the ability of the government, including its courts, to infringe upon the basic rights of citizens. No court should take it upon itself to judicially amend the Constitution by purporting to pick and choose which rights of the Bill of Rights should apply and which should not. All of those rights should be guaranteed to all citizens at both state and federal levels of government Williams respectfully avers that Bill of Rights applies to the

states through the Fourteenth Amendment in its entirety. Accordingly, any remaining provisions of the Bill of Rights not explicitly applied to states via the Fourteenth Amendment heretofore should be incorporated as jurisprudence moves forward in accordance with Justice Black's views.

Williams acknowledges that McDonald referenced the Hurtado case from over 130 years ago concerning grand jury indictments standing for the premise that jurisprudence to date had not incorporated the Fifth Amendment's grand jury indictment requirement. Id., 561 U.S. at 765 n.13. However, although the case of Hurtado, 110 U.S. at 519 stopped short of applying the grand jury provision of the Fifth Amendment to the States via the Fourteenth Amendment, it affirmatively held that the due process requirements had to be met as

to indictments. Id., 110 U.S. at 538. The Hurtado Court specifically held that:

> we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.

Id. The Hurtado Court did not hold that California could ignore indictment rights and laws established under California law as Virginia courts did pursuant to in Williams' case. The due process requirement needed to be met even under Hurtado and the right to a grand jury indictment is jurisdictional rather than procedural. Virginia still must meet the due process requirement. That requirement has simply not been met in Williams' case.

Williams avers that the Bill of Rights guarantee of a grand jury indictment is fundamental to our scheme of ordered liberty and system of justice under the selective incorporation doctrine if that standard is deemed applicable to this case. McDonald, 561 U.S. at 761-65.

In order to understand why the right to a grand indictment is fundamental, it is instructive to review the history of grand juries and their equivalents further. The history of grand juries goes back to early Grecian use of "Dicasteries", which were tribunals picked from lists of citizens whose duty it was to accuse, try, and convict those alleged to have committed crimes. Bonner, Lawyers and Litigants in Ancient Athens 36 (1927). Roman law utilized "Judices", which functioned similarly. Patterson, The Administration of Justice in Great Britain 200 (1936). Grand juries were subsequently

adopted as a part of the English system of law, which then formed a basis for the legal system of most of the United States. See, e.g., Whyte, Is the Grand Jury Necessary?, 45 Wm. and Mary L. Rev. 462-71 (1959). The grand jury system was then brought to Virginia early in the seventeenth century and has been a part of Virginia's legal system since that time. Id. As summarized in the Handbook for Virginia Grand Jurors (the "Handbook") that is currently used by Virginia Courts (emphasis added):

> The Grand Jury had its origin more than seven centuries ago in England from which, in large part, this country inherited its legal system. Many legal historians trace its origin to events in the reign of Henry II and to one of the articles of the Constitution of Clarendon in 1164. It was recognized in Magna Carta granted by King John at the demand of the people in 1215. One of its earliest functions was to protect citizens from despotic abuse of power by the king; its other function was to report those suspected of having committed criminal offenses.
>
> These two functions are carried forward today in the work of the Grand Jury, and its

> importance in controlling the start of prosecutions for serious crimes is recognized in both the Constitution of the United States and the Constitution of Virginia.

Thus, the Virginia Supreme Court, which is responsible for the Handbook recognize the fundamental importance of grand juries in controlling the start of prosecutions. The Virginia Supreme Court affirmed this fundamental importance using the Constitution of the United States and the Constitution of Virginia as primary authorities.

Federal and state judges have repeatedly acknowledged the fundamental importance of grand juries and the right thereto. For example, in an opinion from the District Court of the Northern District of California provided a discourse on the importance of the grand jury right (internal footnote references omitted, emphasis added):

The institution of the grand jury is a development which comes to us out of the mists of early English history. It has undergone changes, but has been remarkable stable because the institution has been molded into an instrument of democratic government, extraordinarily efficient for reflecting not the desires or whims of any official or of any class or party, but the deep feeling of the people. As such, with its essential elements of plenary power to investigate and secrecy of its deliberations, it was preserved by the Constitution of the United States not only to protect the defendant but to permit public spirited citizens, chosen by democratic procedures, to attach corrupt conditions. A criticism of the action of the grand jury is a criticism of democracy itself.

The inception of the 'grand inquest' is shrouded in the early reaches of English history. It was a device whereby originally, when first authoritatively noticed c. 1166, the Norman kings of England required answers from representatives of local units of government concerning royal property and franchise and also enforced communal responsibility for the acts of criminals. By gradations, the grand juries gave voice to the fama publica of the locale as to crimes, and were later recognized in the character of witnesses. Through hundreds of years, these characteristics remain inherent. In an early stage of evolution, the body made presentment or presented indictments at the behest of

private individuals or the Prosecutor for the King. Vestiges of all these factors still subsist.

The institution was thus evolved as an instrument for efficient prosecution of crime, and as such it has remained until this day. The principle of secrecy was developed to protect the King's Counsel and to permit the Prosecutors to have influence with the grand jury, and in modern times it is still useful for the same purpose. By degrees the secrecy of proceedings permitted two outstanding extensions in that grand jurors at times refused to indict notwithstanding pressure from the Crown and the Judges. This prerogative stood the people will in hand during the tyranny of the Stuarts, and, as it was eulogized by Coke and Blackstone, the institution was encysted with all its characteristics in the Fifth Amendment. But the grand jurors, by use of secrecy of their proceedings, stubbornly retained the power of instituting an investigation of their own knowledge or taking a rumor or suspicion and expanding it through witnesses. As we shall see, this comprehensive power also remains at this hour. The Constitution of the United States preserved the grand jury with all its powers and inherent character … the grand jury is an essential element in the structure of the federal government now. No other instrument can cope with organized crime which cuts across state lines, conspiracies to overthrow the government of the United States, or alleged deviations from rectitude by

> those who have been entrusted by the government with public trust …
>
> The grand jury breathes the spirit of a community into the enforcement of law. Its effect as an institution for investigation of all, no matter how highly placed, creates the elan of democracy. Here the people speak through their chosen representatives.
>
> United States v. Smyth, 104 F. Supp. 283, 288-91 (N.D. Cal. 1952).

The opinion in Smyth provides solid reasoning showing why the Bill of Rights guarantee of a grand jury indictment is fundamental to our scheme of ordered liberty and system of justice.

Likewise, in Virginia in particular, the Handbook emphasizes the fundamental importance of grand juries and the right thereto by quoting Harlan Fiske Stone, late Chief Justice of the Court (emphasis added):

> In time of peace a citizen can perform no higher public duty than that of Grand Jury service. No body of citizens exercises public functions more vital to the administration of law and order.

> The Grand Jury is both a sword and a shield of justice-a sword, because it is a terror of criminals; a shield, because it is a protection of the innocent against unjust prosecution. No one can be prosecuted for a felony except on an indictment by a Grand Jury. With its extensive powers, a Grand Jury must be motivated by the highest sense of justice, for otherwise it might find indictments not supported by the evidence and thus become a source of oppression to our citizens, or on the other hand, it might dismiss charges against those who should be prosecuted.

For all of the stated reasons stated herein, the grand jury indictment is fundamental to our scheme of ordered liberty and system of justice under the selective incorporation doctrine because of its functions of protecting citizens against despotic abuses of power by sovereigns and to report those suspected of having committed criminal offenses.

2. The Grand Jury Right Should Apply to the States Under the Fourteenth Amendment Privilege and Immunities Clause

Moreover, Section 1 of the Fourteenth Amendment requiring that the privileges and

immunities of the Fifth Amendment should apply to Virginia in Williams' case. The argument for applicability of the privileges and immunities section of the Fourteenth Amendment is perhaps even more compelling.

"It cannot be presumed that any clause in the constitution is intended to be without effect." Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 174 (1803) (opinion for the Court by Marshall, C. J.).

The Fifth Amendment to the United States Constitution states (emphasis added):

> 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 offence 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.

The denial of Williams' Petition effectively renders his grand jury right guaranteed by the Fifth Amendment without effect. This is error and should be reversed.

It is noteworthy that all other rights conferred by the Fifth Amendment other than the grand jury right have been specifically held by the Court to apply to the states. The double jeopardy prohibition of the Fifth Amendment has been held to apply to the States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062 (1969).

Likewise, the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States. Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492 (1964).

Further, by using comparable language to that of the Fifth Amendment, the Fourteenth Amendment specifically decreed that no person can be deprived of "life, liberty, or property, without due process of law". Therefore, that provision of the Fifth Amendment also applies to the states.

Finally, the taking of private property for public use without just compensation also applies to the states through the Fourteenth Amendment. See, e.g., Chi., B. & Q. R. Co. v. Chicago, 166 U.S. 226, 234, 17 S. Ct. 581, 583-84 (1897).

Williams avers that there is simply no valid reason why Virginia should be allowed to violate Williams' constitutional right to a presentment or indictment by a grand jury prior to answering for crimes. It is erroneous for any court to take the position that the grand jury provision is without

effect while enforcing all other Fifth Amendment rights. Marbury, 5 U.S. 137.

Concerning the importance of enforcing the Bill of Rights, Justice Black has stated (emphasis added):

> The first ten amendments [the Bill of Rights] were proposed and adopted largely because of fear that Government might unduly interfere with prized individual liberties. The people wanted and demanded a Bill of Rights written into their Constitution. The amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments -- Legislative, Executive, and Judicial. The Fifth, Sixth, and Eighth Amendments were pointedly aimed at confining exercise of power by courts and judges within precise boundaries, particularly in the procedure used for the trial of criminal cases. Past history provided strong reasons for the apprehensions which brought these procedural amendments into being and attest the wisdom of their adoption. For the fears of arbitrary court action sprang largely from the past use of courts in the imposition of criminal punishments to suppress speech, press, and religion. Hence the constitutional limitations of courts' powers were, in the view of the Founders, essential supplements to the First Amendment, which was itself designed to

> protect the widest scope for all people to believe and to express the most divergent political, religious, and other views.

Adamson v. California, 332 U.S. 46, 70, 67 S. Ct. 1672, 1685 (1947) (Black. J., dissenting) (footnotes omitted).

The Privileges or Immunities Clause of the Fourteenth Amendment declares that "[n]o State . . . shall abridge the privileges or immunities of citizens of the United States."

As noted by Justice Thomas, constitutional provisions are "written to be understood by the voters." McDonald v. City of Chi., 561 U.S. 742, 813, 130 S. Ct. 3020, 3063 (2010) (Thomas. J., concurring) (citing, District of Columbia v. Heller, 554 U.S. 570, 576, 128 S. Ct. 2783, 2783 (2008). Thus, in determining the scope of the Fourteenth Amendment, it is pertinent to discern what "ordinary citizens" at the time of ratification of the Fourteenth

Amendment would have understood the Privileges or Immunities Clause to mean. Id.

At the time that the Fourteenth Amendment, the terms "privileges" and "immunities" had an established meaning as synonyms for "rights." Id. The two words, standing alone or paired together, were used interchangeably with the words "rights," "liberties," and "freedoms," and had been since the time of Blackstone. Id. 561 U.S. at 814 (citing, 1 W. Blackstone, Commentaries, which described the "rights and liberties" of Englishmen as "private immunities" and "civil privileges"). A number of antebellum judicial decisions used the terms in this manner. Id. (citing, Magill v. Brown, 16 F. Cas. 408, 428, F. Cas. No. 8952 (No. 8,952) (CC ED Pa. 1833) ("The words 'privileges and immunities' relate to the rights of persons, place or property; a privilege is a

peculiar right, a private law, conceded to particular persons or places"). Id.

By the time of the adoption of the Fourteenth Amendment, it had long been established that both the States and the Federal Government existed to preserve their citizens' inalienable rights, and that these rights were considered "privileges" or "immunities" of citizenship. Id.

These principles arose from our country's English roots. Id. Fundamental rights, according to English traditions, belonged to all people but became legally enforceable only when recognized in legal texts, including acts of Parliament and the decisions of common-law judges. Id. (citing, B. Bailyn, The Ideological Origins of the American Revolution 77-79 (1967)).

Notably, concerning such rights, the First Continental Congress declared in 1774 that the King

had wrongfully denied the colonists "the rights, liberties, and immunities of free and natural-born subjects . . . within the realm of England." Id. (citing, 1 Journals of the Continental Congress 1774-1789, p. 68 (W. Ford. ed. 1904)).

Several years later, the Bill of Rights was adopted to amend the Constitution to expressly protect the fundamental rights of citizens against interference by the Federal Government. Id. 561 U.S. at 818. Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text. Id., 561 U.S. at 818-819 (citing, inter alia, 1 Annals of Cong. 431-432, 436-437, 440-442 (1789) (statement of Rep. Madison) (proposing Bill of Rights in the First Congress).

The United States Supreme Court's subsequent decision in Barron, however, held at the time it was rendered that the codification of these rights in the Bill of Rights made them legally enforceable only against the Federal Government, not the States. 7 Pet., at 247, 32 U.S. at 469, 8 L. Ed. at 751.

Section 1 of the Fourteenth Amendment protects the rights of citizens "of the United States". Id. 561 U.S. at 823. In McDonald, Justice Thomas provided evidence that overwhelmingly demonstrated "that the privileges and immunities of such citizens included individual rights enumerated in the Constitution". Id. Those individual rights also include those enumerated in the Fifth Amendment, including the right requiring a grand jury indictment before being made to answer for any infamous crime.

Notably, when the Fourteenth Amendment was recommended for adoption, the Joint Committee on Reconstruction argued "adequate security for future peace and safety . . . can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic." Id. 561 U.S. at 827 (citing, Report of the Joint Committee on Reconstruction, S. Rep. No. 112, 39th Cong., 1st Sess., 15 (1866); H. R. Rep. No. 30, 39th Cong., 1st Sess., p. XXI (1866).

Justice Thomas' concurring analysis in McDonald cited to a large body of evidence including numerous speeches, publications, and legal decisions as proving that the privileges and immunities clause of section 1 of the Fourteenth Amendment was intended and understood to have the purpose to enforce the Bill of Rights against the states. Id. 561 U.S. at 827-835.

In this case, Williams had a fundamental right to constitutionally mandated grand jury indictments in his case. Indeed, the law of Virginia is fully compatible with the Fifth Amendment provision in requiring Grand Jury indictments for crimes such as those for which Williams was convicted. This is not a case where Virginia had any reliance on an alternate procedure that could be claimed to provide equivalent privileges and immunities to a grand jury indictment.

Instead of acting properly, this Court chose to largely ignore the mandated grand jury indictment process and proceeded to try Williams without proper indictments. There was no proper judge signed order indicting Williams.

In summary, the grand jury right of the Fifth Amendment should apply to the states through the Fourteenth Amendment for the reasons stated

herein. This Court should not be allowed to violate Williams' right to a presentment or indictment from a Grand Jury and then for Williams to have no recourse.

Thus, the Fifth Amendment right to a grand jury indictment or its functional equivalent should apply to the states including, without limitation, the Commonwealth of Virginia and this Court.

Williams' defective grand jury indictments deprived this Court of Jurisdiction

Williams avers that the lack of an order of this Court indicting him, this Court had no jurisdiction over his case.

A void judgment, is a judgment not subject to time limitation and can be challenged at any time. See, e.g., Galpin v. Page, 85 U.S. (18 Wall.) 350, 366 (1873); Slaughter v. Commonwealth, 222 Va. 787,

793 (1981). A judgment entered by a court without jurisdiction is void. Id. A void judgment may be attacked collaterally or directly in any court at any time. Id.

The Virginia legislature has placed statutory requirements on grand jury procedures in addition to the long-standing common law and constitutional requirements. Among other provisions, it is required that grand jury indictments list the name of the witness relied upon by the grand jury. Va. Code § 19.2-202.

It has also generally been long-standing law in Virginia, until Hanson was incorrectly decided in 1948, that a failure to record a proper grand jury indictment in a court's order book deprived a court trying a case of jurisdiction. Commonwealth v. Cawood, 4 Va. 527, 541 (1826). In Cawood, the Virginia Supreme Court held:

> It is undoubtedly true, that before any person can have judgment rendered against him for a felony, they must be regularly accused by the Grand Jury of his country, and his guilt must be established by the verdict of a jury. The accusation in due and solemn form, is as indispensable as the conviction. What, then, is the solemnity required by Law in making the accusation? The Bill Indictment is sent or delivered to the Grand Jury, who, after hearing all the evidence adduced by the Commonwealth, decide whether it be true Bill, or not. If they find it so, the foreman of the Grand Jury endorses on it, 'a true Bill,' and signs his name as foreman, and then the Bill is brought into Court by the Whole Grand Jury, and in open Court it is publicly delivered to the Clerk, who records the fact. It is necessary that it should be presented publicly by the Grand Jury; that is the evidence required by Law to prove that it is sanctioned by the accusing body, and until it is so presented by the Grand Jury, with the endorsement aforesaid, the party charged by it is not indicted, nor is he required, or bound, to answer to any charge against him, which is not so presented.
>
> Id., 4 Va. at 541-542.

Thus, in order for a judgment based upon an indictment to be valid, an indictment must be proper, and must be "delivered in court by the grand jury,

and its finding recorded." Simmons v. Commonwealth, 89 Va. 156, 157 (1892). Failure to deliver the indictment in court and record the finding is a "fatal defect". Id.

These long-standing principles have been embodied in both Virginia statutory law and the Virginia Supreme Court Rules. For example, Virginia Supreme Court Rule 3A:5(c) requires that a Grand Jury return and presents their indictment findings in open court and that the indictment be endorsed 'A True Bill' or 'Not a True Bill' and signed by the foreman. Virginia statutes require the Clerk of the Court to record the Grand Jury indictment findings in the Order Book in compliance with Va. Code §§ 17.1-123(A) and 17.1-124 and 17.1-240.

A court speaks only through its orders. In those cases where the jurisdiction of the court depends upon compliance with certain mandatory

provisions of law, the court's order, spread upon its order book, must show such compliance or jurisdiction is not obtained. See, e.g., Simmons, 89 Va. at 159; Cawood, 4 Va. at 542.

The Simmons case is particularly pertinent authority. In Simmons, the defendant was convicted of first degree murder. Simmons, 89 Va. at 157. Like Williams in this case, the defendant in Simmons was convicted and sentenced based upon a grand jury document, just as in Williams' case, that had allegedly been signed by a grand jury foreman, but had not been recorded in any order book of the circuit court. Id. The Lee County Virginia Circuit Court had found the defendant in Simmons guilty and did not grant him relief based upon a lack of any recording of grand jury indictment. Id. However, the Virginia Supreme Court reversed the conviction and found that the failure to record the grand jury

indictment in an order book of the circuit court was a fatal defect. Id.

Under Virginia law, although a prisoner has in fact been arraigned on, and has pleaded to, an indictment not appearing by the record to have been found by the Grand Jury, and if a third actual term has passed without such record of the findings, he is entitled under Va. Code § 19.2-242 to be discharged from the crime. Cawood, 4 Va. at 546; Adcock v. Commonwealth, 49 Va. (Gratt.) 661, 671 (1851).

In this case Williams should be forever discharged of the crimes charged because three (3) or more terms of the Circuit Court have passed without a trial on valid indictments that were presented in open court by the Grand Jury and recorded.

Federal Courts have generally fully complied with the requirements of the Fifth Amendment concerning grand jury indictments. As a result, the

United States Supreme Court does not appear to have previously addressed a case in which no order was entered indicting a defendant in a criminal matter. In a rare occurrence of non-compliance, the Fourth Circuit Court of Appeals found that a failure to properly record a grand jury indictment was a fatal defect. In its opinion, the Fourth Circuit Court of Appeals stated concerning proper procedures for grand jury indictments and their importance:

> 1 Chitty on Crim. Law, 324, describes the mode in which the grand jury returns the results of their inquiries to the court, by indorsing "A True Bill" if found, and "Not a True Bill" if rejected; and says:
>
> "When the jury have made these indorsements on the bills, they bring them publicly into court, and the clerk of the peace at sessions, or clerk of assize on the circuit, calls all the jurymen by name, who severally answer to signify that they are present, and then the clerk of the peace or assize asks the jury whether they agreed upon any bills, and bids them present them to the court, and then the foreman of the jury hands the indictments to the clerk of peace or clerk of assize."

> 4 Blackstone, 306, also describes the functions of the grand jury and the methods of its proceedings, the necessity of 12 at least assenting to the accusation, and adds:
>
> "And the indictment when so found is publicly delivered into court."
>
> A later text-writer (1 Bishop on Crim. Procedure, § 869) says:
>
> "When the grand jury has found its indictments, it returns them into open court, going personally in a body."
>
> Renigar v. United States, 172 F. 646, 648 (4th

Cir. 1909). The importance of following proper constitutionally based processes was particularly emphasized in Renigar:

> Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty, nor ought the courts in their abhorrence of crime, nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused, are often prepared …
>
> Illegitimate and unconstitutional practices get their first footing in that way, namely, by

> silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance. It is the duty of all the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments. Their motto should be Obsta principiis.'"

Renigar, 172 F. at 652, 655.

Williams recognizes that Renigar has been criticized and claimed by lower courts to have been abrogated. See, e.g., United States v. Lennick, 18 F.3d 814, 817 (9th Cir. 1994). However, Renigar has not been deemed invalid law by a ruling of the United States Supreme Court, which is the only court having authority to do so. It is also the case that Lennick specifically is distinguishable in that there was actually an order entered in that case that was compliant other than not being properly entered

in open court. Id. In Williams' case, no proper order of any form was ever entered for his indictments.

In the case at bar, Williams avers that his constitutional rights were violated as to never being properly indicted. There is nothing in the court's records that show that a clerk called each of the grand jurors by name to signify that they were present or asked the grand jury whether they agreed on any bills. Moreover, this Court has no record of any indictment against Williams having been entered in the Order Book. The failure of this Court to record in the Order Book, that the Grand Jury had returned into open court and presented true bill indictments against Williams, is a fatal defect in the indictment process. Williams contends that the failure of this Court to record the Grand Jury's indictment findings in an Order Book in a judge signed order is a fatal defect that rendered his

indictments a nullity and his convictions void ab initio for lack of jurisdiction. Cawood, 4 Va. at 541.

Accordingly, Williams requests that this Honorable Court grant this Motion and rule that the failure to indict Williams are fatal defects that render his indictments nullities and his convictions void for lack of jurisdiction.

B. Conclusion

Wherefore, for the foregoing reasons, Williams prays that this Honorable Court grant this Motion in its entirety and issue an Order vacating the judgments against him.

RESPECTFULLY SUBMITTED,

By: _____
Dale Jensen

Counsel
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CERTIFICATE OF SERVICE
I hereby certify that the original of the foregoing was, on this 18th day of April, 2018, sent via Express Mail to the Office of the Clerk for the Circuit Court of Chesapeake and a true copy thereof was served by US Mail to the following:

Chris Billias
Commonwealth's Attorney
Rockbridge County
20 S Randolph St.
Lexington, VA 24450

Respectfully Submitted

_____
Dale R. Jensen
Counsel for Dwayne Lamar Williams, Sr.

VIRGINIA

IN THE CIRCUIT COURT OF THE COUNTY OF ROCKBRIDGE

COMMONWEALTH OF VIRGINIA, Plaintiff, v. DWAYNE LAMAR WILLIAMS, Sr., Defendant.	Case Nos. CR1400063-00, CR1400064-00, CR1400065-00 and CR1400067-00

NOTICE OF APPEAL

Dwayne Lamar Williams, Sr. ("Williams"), by counsel, hereby notices his appeal to the Virginia Court of Appeals from the denial of his Motion to Vacate Judgment, which denial was by Order dated April 30, 2018.

There is no transcript or statement of facts, testimony or other incidents of the case will be filed.

The decision of the Circuit Court of County of Rockbridge was rendered without hearing based

upon the Motion to Vacate Judgment filed by

Williams.

Dated: May 21, 2018
By: _____
Dale Jensen, Counsel (VSB 71109)
Dale Jensen, PLC
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CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was, on this 21st day of May, 2018, sent via Priority Mail to the Office of the Clerk for the Circuit Court of Rockbridge County and a true copy thereof was served by US Mail to the following:

Chris Billias
Commonwealth's Attorney
Rockbridge County
20 S Randolph St.
Lexington, VA 24450

Respectfully Submitted

_____
Dale R. Jensen
Counsel for Dwayne Lamar Williams, Sr.

VIRGINIA SUPREME COURT

DWAYNE LAMAR WILLIAMS, SR., Petitioner, v. Commonwealth of Virginia, Respondent.	Record No. _____ Appealed From The Circuit Court Of The County of Rockbridge Case Nos. CR1400063-00, CR1400064-00, CR1400065-00 and CR1400067-00 **DWAYNE LAMAR WILLIAMS, SR. PETITION FOR APPEAL**

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

United States Constitution

Virginia Statutory Law

Page

Virginia Court Rules

Case Law

Page

Page

Secondary Authority

Page

I. ASSIGNMENTS OF ERROR.

The Circuit Court of the County of Rockbridge (the "Circuit Court") erred in denying the Motion to Vacate Judgment (the "Motion") filed by Dwayne Lamar Williams Sr. ("Williams") because the Circuit Court denial was in blatant violation of the Fifth Amendment to the United States Constitution and relied upon case law that should be held as no longer valid. This error was preserved in the Motion and its accompanying Memorandum in Support of the Motion filed by Williams.

This Petition involves a substantial constitutional question as a determinative issue or matters of significant precedential value.

II. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This Petition for Appeal arises pursuant to the Motion, which was filed by Williams to vacate judgments rendered against him.

Documents of the Rockbridge Circuit Court (the "Circuit Court") purported to indict Williams, but those documents show that none of Williams' indictments were compliant with Virginia law. Indictments were never entered in an Order Book via a judge signed order in compliance with Va. Code §§ 17.1-123(A), 17.1-124, and 17.1-240.

Williams entered guilty pleas to two counts of possession with intent to distribute a controlled substance, one count of possession with intent to distribute marijuana, and one count of selling drugs on or near certain properties. On April 28, 2014,

Williams was sentenced to a total of thirty years for these convictions with twenty two years suspended.

Williams did not appeal his convictions.

The Virginia Supreme Court denied Williams' Petition for Writ of Habeas Corpus on October 17, 2016 on procedural grounds.

The U.S. District Court for the Western District of Virginia denied Williams' Petition for Writ of Habeas Corpus on January 5, 2017, also on procedural grounds.

Williams filed the Motion on or about April 18, 2018.

On April 30, 2018, the Circuit Court denied the Motion and entered the Order denying the Motion.

Williams timely filed a Notice of Appeal on or about June 13, 2016.

III. STATEMENT OF FACTS

A detailed review of Circuit Court records in late 2017 revealed that no order signed by a judge was ever entered indicting Williams. Staff personnel represented the Grand Jury's alleged indictment was never recorded in an Order Book in compliance with the mandatory provisions of Va. Code § 17.1-123 (A), which states:

> [a]ll orders that make up each day's proceedings of every circuit court shall be recorded by the clerk in a book known as the order book. Orders that make up each day's proceedings that have been recorded in the order book shall be deemed the official record pursuant to § 8.01-389 when (i) the judge's signature is shown in the order, (ii) the judge's signature is shown in the order book, or (iii) an order is recorded in the order book on the last day of each term showing the signature of each judge presiding during the term.

IV. AUTHORITIES AND ARGUMENT

At its core, this Petition for Appeal (the "Petition") asks this Court to reverse earlier judgments and affirmatively acknowledge that no court, including the United States Supreme Court

has the authority to amend the United States Constitution by judicial fiat. The right to a grand jury indictment is guaranteed by the Fifth Amendment, which applies to Virginia via the Fourteenth Amendment. Past legal error by courts, including this Court and the United States Supreme Court, simply should not be allowed to stand under the plain language of the United States Constitution.

This Petition should be granted because Williams was never indicted in accordance with the requirements of Virginia law. Pursuant to the Fifth Amendment, an indictment is a bedrock requirement for a court to have jurisdiction to enter a valid criminal judgment under Virginia law.

Documents of the Rockbridge Circuit Court (the "Circuit Court") purported to indict Williams, but those documents show that none of Williams' indictments were compliant with Virginia law.

Indictments were never entered in an Order Book via a judge signed order in compliance with Va. Code §§ 17.1-123(A), 17.1-124, and 17.1-240.

The Petition relies upon a well-established rule that when a grand jury returns an indictment, the grand jury verdict must be presented in open court and the facts recorded by an order signed by a judge; and until this is done the accused is not indicted.

Because no such indictment was ever signed by a judge or recorded, the judgments against Williams should be vacated.

1. Argument

A. The Right to a Grand Jury Indictment Conferred by the Fifth Amendment to the United States Constitution Applies to Virginia via the Fourteenth Amendment

The Fifth Amendment to the United States Constitution provides in pertinent part:

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.

1. The Grand Jury Right Applies to the States Under the Fourteenth Amendment Due Process Clause

The right to a grand jury indictment conferred by the Fifth Amendment to the United States Constitution should apply to state indictments via the Fourteenth Amendment. Changes in constitutional law that have occurred since Hurtado v. California, 110 U.S. 516, 519 (1884) require this change.

State courts, such as those of Virginia in this case, are simply not allowed to ignore long-standing grand jury law and rights of defendants and then claim that defendants effectively have no recourse. A fundamental constitutional right, such as the Fifth Amendment right to a grand jury indictment, or its judicial equivalent, simply cannot be violated with impunity, and Virginia courts then claim that right to be "merely procedural" and subject to waiver by a defendant's counsel's failure to recognize the violation of the grand jury right and object prior to appeal.

A Virginia Supreme Court case decided over 70 years ago is flawed and should no longer be valid law. Hanson v. Smyth, 183 Va. 384, 390-91 (1944).

In Hanson, the Virginia Supreme Court opined (emphasis added):

> While the Fifth Amendment to the Federal Constitution requires a presentment or

> indictment in prosecutions under Federal statutes "for a capital, or otherwise infamous crime," the Virginia Constitution contains no such requirement. Farewell v. Commonwealth, 167 Va. 475, 484, 189 S.E. 321, 325; Pine v. Commonwealth, 121 Va. 812, 835, 93 S.E. 652; Guynn v. Commonwealth, 163 Va. 1042, 1046, 177 S.E. 227. In this State the requirement is merely statutory …
> Since the statutory requirement for an indictment in the present case is not jurisdictional, the failure of the record to show affirmatively that the indictment was returned into court by the grand jury is not such a defect as will render null and void the judgment of conviction based thereon.

Hanson, 183 Va. at 390-91.

The Hanson opinion relied upon a premise that the Fifth Amendment to the Federal Constitution did not apply to Virginia under any of the equal protection clause, the privileges and immunities clause, or the due process clause of the Fourteenth Amendment. However, since Hanson was decided, the United States Supreme Court has significantly expanded the application of the Bill of Rights of the Constitution to state law matters under

the equal protection portion of the Fourteenth Amendment. For example; in Griffin v. California, 380 U.S. 609, 615 (1965); the Court specifically held that the self-incrimination provision of the Fifth Amendment applied to the States by reason of the Fourteenth Amendment.

The right to indictment by grand jury was and is a longstanding right established by the law of England. See, e.g., Ex parte Wilson, 114 U.S. 417, 423-24, 5 S. Ct. 935, 938 (1885). Without the intervention of a grand jury, trials were not allowed for capital crimes, nor for any felony. Id. The right to a grand jury indictment was so fundamental to the criminal justice rights of defendants that rights therefor were placed in the Fifth Amendment of the Bill of Rights. Id.; Fifth Amendment of the U.S. Constitution.

As the United States Supreme Court has held (emphasis added):

> In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. Costello v. United States, 350 U.S. 359, 361-362 (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. Branzburg v. Hayes, 408 U.S. 665, 686-687 (1972).

United States v. Calandra, 414 U.S. 338, 342-43, 94 S. Ct. 613, 617 (1974).

In 2010, the Court explained in some detail the history of application of the Bill of Rights to the States via the Fourteenth Amendment. McDonald v. City of Chi., 561 U.S. 742, 761-65, 130 S. Ct. 3020,

3032-35 (2010). In McDonald, the Court set forth in pertinent part (emphasis added):

> An alternative theory regarding the relationship between the Bill of Rights and § 1 of the Fourteenth Amendment was championed by Justice Black. This theory held that § 1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights. See, e.g., Adamson, supra, at 71-72, 67 S. Ct. 1672, 91 L. Ed. 1903 (Black, J., dissenting); Duncan, supra, at 166, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (Black, J., concurring). As Justice Black noted, the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States and, in so doing, overruled this Court's decision in Barron. Adamson, supra, at 72, 67 S. Ct. 1672, 91 L. Ed. 1903 (dissenting opinion). Nonetheless, the Court never has embraced Justice Black's "total incorporation" theory. While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of "selective incorporation," i.e., the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. See, e.g., Gideon v. Wainright, 372 U.S. 335, 341, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); Malloy v. Hogan, 378 U.S. 1, 5-6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); Pointer v. Texas, 380 U.S. 400, 403-404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); Washington v. Texas, 388 U.S. 14, 18,

> 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Duncan, 391 U.S., at 147-148, 88 S. Ct. 1444, 20 L. Ed. 2d 491; Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).
>
> The decisions during this time abandoned three of the previously noted characteristics of the earlier period. The Court made it clear that the governing standard is not whether any "civilized system [can] be imagined that would not accord the particular protection." Duncan, 391 U.S., at 149, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491. Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice. Id., at 149, and n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491; see also id., at 148, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (referring to those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (emphasis added; internal quotation marks omitted)).
>
> The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated.

Id.

Williams avers that Justice Black's theory is substantively correct and the Bill of Rights is not an

ala carte menu for courts to pick and choose from. The substantive protections of the Bill of Rights were adopted to limit the ability of the government, including its courts, to infringe upon the basic rights of citizens. No court should take it upon itself to judicially amend the Constitution by purporting to pick and choose which rights of the Bill of Rights should apply and which should not. All of those rights should be guaranteed to all citizens at both state and federal levels of government Williams respectfully avers that Bill of Rights applies to the states through the Fourteenth Amendment in its entirety. Accordingly, any remaining provisions of the Bill of Rights not explicitly applied to states via the Fourteenth Amendment heretofore should be incorporated as jurisprudence moves forward in accordance with Justice Black's views and the plain language of the Constitution.

Williams acknowledges that McDonald referenced the Hurtado case from over 130 years ago concerning grand jury indictments standing for the premise that jurisprudence to date had not incorporated the Fifth Amendment's grand jury indictment requirement. Id., 561 U.S. at 765 n.13. However, although the case of Hurtado, 110 U.S. at 519 stopped short of applying the grand jury provision of the Fifth Amendment to the States via the Fourteenth Amendment, it affirmatively held that the due process requirements had to be met as to indictments. Id., 110 U.S. at 538. The Hurtado Court specifically held that:

> we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.

Id. The Hurtado Court did not hold that California could ignore indictment rights and laws established under California law as Virginia courts did pursuant to in Williams' case. The due process requirement needed to be met even under Hurtado and the right to a grand jury indictment is jurisdictional rather than procedural. Virginia still must meet the due process requirement. That requirement has simply not been met in Williams' case.

Williams avers that the Bill of Rights guarantee of a grand jury indictment is fundamental to our scheme of ordered liberty and system of justice under the selective incorporation doctrine if that standard is deemed applicable to this case. McDonald, 561 U.S. at 761-65.

In order to understand why the right to a grand indictment is fundamental, it is instructive to review the history of grand juries and their

equivalents further. The history of grand juries goes back to early Grecian use of "Dicasteries", which were tribunals picked from lists of citizens whose duty it was to accuse, try, and convict those alleged to have committed crimes. Bonner, Lawyers and Litigants in Ancient Athens 36 (1927). Roman law utilized "Judices", which functioned similarly. Patterson, The Administration of Justice in Great Britain 200 (1936). Grand juries were subsequently adopted as a part of the English system of law, which then formed a basis for the legal system of most of the United States. See, e.g., Whyte, Is the Grand Jury Necessary?, 45 Wm. and Mary L. Rev. 462-71 (1959). The grand jury system was then brought to Virginia early in the seventeenth century and has been a part of Virginia's legal system since that time. Id. As summarized in the Handbook for Virginia

Grand Jurors (the "Handbook") that is currently used by Virginia Courts (emphasis added):

> The Grand Jury had its origin more than seven centuries ago in England from which, in large part, this country inherited its legal system. Many legal historians trace its origin to events in the reign of Henry II and to one of the articles of the Constitution of Clarendon in 1164. It was recognized in Magna Carta granted by King John at the demand of the people in 1215. One of its earliest functions was to protect citizens from despotic abuse of power by the king; its other function was to report those suspected of having committed criminal offenses.
>
> These two functions are carried forward today in the work of the Grand Jury, and its importance in controlling the start of prosecutions for serious crimes is recognized in both the Constitution of the United States and the Constitution of Virginia.

Thus, the Virginia Supreme Court, which is responsible for the Handbook recognize the fundamental importance of grand juries in controlling the start of prosecutions. The Virginia Supreme Court affirmed this fundamental importance using the Constitution of the United

States and the Constitution of Virginia as primary authorities.

Federal and state judges have repeatedly acknowledged the fundamental importance of grand juries and the right thereto. For example, in an opinion from the District Court of the Northern District of California provided a discourse on the importance of the grand jury right (internal footnote references omitted, emphasis added):

> The institution of the grand jury is a development which comes to us out of the mists of early English history. It has undergone changes, but has been remarkable stable because the institution has been molded into an instrument of democratic government, extraordinarily efficient for reflecting not the desires or whims of any official or of any class or party, but the deep feeling of the people. As such, with its essential elements of plenary power to investigate and secrecy of its deliberations, it was preserved by the Constitution of the United States not only to protect the defendant but to permit public spirited citizens, chosen by democratic procedures, to attach corrupt conditions. A criticism of the action of the grand jury is a criticism of democracy itself.

The inception of the 'grand inquest' is shrouded in the early reaches of English history. It was a device whereby originally, when first authoritatively noticed c. 1166, the Norman kings of England required answers from representatives of local units of government concerning royal property and franchise and also enforced communal responsibility for the acts of criminals. By gradations, the grand juries gave voice to the fama publica of the locale as to crimes, and were later recognized in the character of witnesses. Through hundreds of years, these characteristics remain inherent. In an early stage of evolution, the body made presentment or presented indictments at the behest of private individuals or the Prosecutor for the King. Vestiges of all these factors still subsist.

The institution was thus evolved as an instrument for efficient prosecution of crime, and as such it has remained until this day. The principle of secrecy was developed to protect the King's Counsel and to permit the Prosecutors to have influence with the grand jury, and in modern times it is still useful for the same purpose. By degrees the secrecy of proceedings permitted two outstanding extensions in that grand jurors at times refused to indict notwithstanding pressure from the Crown and the Judges. This prerogative stood the people will in hand during the tyranny of the Stuarts, and, as it was eulogized by Coke and Blackstone, the institution was encysted with all its characteristics in the Fifth Amendment. But

> the grand jurors, by use of secrecy of their proceedings, stubbornly retained the power of instituting an investigation of their own knowledge or taking a rumor or suspicion and expanding it through witnesses. As we shall see, this comprehensive power also remains at this hour. The Constitution of the United States preserved the grand jury with all its powers and inherent character … the grand jury is an essential element in the structure of the federal government now. No other instrument can cope with organized crime which cuts across state lines, conspiracies to overthrow the government of the United States, or alleged deviations from rectitude by those who have been entrusted by the government with public trust …
>
> The grand jury breathes the spirit of a community into the enforcement of law. Its effect as an institution for investigation of all, no matter how highly placed, creates the elan of democracy. Here the people speak through their chosen representatives.

United States v. Smyth, 104 F. Supp. 283, 288-91 (N.D. Cal. 1952). The opinion in Smyth provides solid reasoning showing why the Bill of Rights guarantee of a grand jury indictment is fundamental to our scheme of ordered liberty and system of justice.

Likewise, in Virginia in particular, the Handbook emphasizes the fundamental importance of grand juries and the right thereto by quoting Harlan Fiske Stone, late Chief Justice of the Court (emphasis added):

> In time of peace a citizen can perform no higher public duty than that of Grand Jury service. No body of citizens exercises public functions more vital to the administration of law and order.
>
> The Grand Jury is both a sword and a shield of justice-a sword, because it is a terror of criminals; a shield, because it is a protection of the innocent against unjust prosecution. No one can be prosecuted for a felony except on an indictment by a Grand Jury. With its extensive powers, a Grand Jury must be motivated by the highest sense of justice, for otherwise it might find indictments not supported by the evidence and thus become a source of oppression to our citizens, or on the other hand, it might dismiss charges against those who should be prosecuted.

For all of the stated reasons stated herein, the grand jury indictment is fundamental to our scheme of ordered liberty and system of justice under the selective incorporation doctrine because of its

functions of protecting citizens against despotic abuses of power by sovereigns and to report those suspected of having committed criminal offenses.

2. The Grand Jury Right Should Apply to the States Under the Fourteenth Amendment Privilege and Immunities Clause

Moreover, Section 1 of the Fourteenth Amendment requiring that the privileges and immunities of the Fifth Amendment should apply to Virginia in Williams' case. The argument for applicability of the privileges and immunities section of the Fourteenth Amendment is perhaps even more compelling.

"It cannot be presumed that any clause in the constitution is intended to be without effect." Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 174 (1803) (opinion for the Court by Marshall, C. J.).

The Fifth Amendment to the United States Constitution states (emphasis added):

> 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 offence 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.

The denial of Williams' Motion effectively renders his grand jury right guaranteed by the Fifth Amendment without effect. This is error and should be reversed.

It is noteworthy that all other rights conferred by the Fifth Amendment other than the grand jury right have been specifically held by the Court to apply to the states. The double jeopardy prohibition of the Fifth Amendment has been held to apply to the States through the Fourteenth Amendment. Benton, 395 U.S. at 794, 89 S. Ct. at 2062.

Likewise, the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States. Malloy, 378 U.S. at 6, 84 S. Ct. at 1492.

Further, by using comparable language to that of the Fifth Amendment, the Fourteenth Amendment specifically decreed that no person can be deprived of "life, liberty, or property, without due process of law". Therefore, that provision of the Fifth Amendment also applies to the states.

Finally, the taking of private property for public use without just compensation also applies to the states through the Fourteenth Amendment. See, e.g., Chi., B. & Q. R. Co. v. Chicago, 166 U.S. 226, 234, 17 S. Ct. 581, 583-84 (1897).

Williams avers that there is simply no valid reason why Virginia should be allowed to violate

Williams' constitutional right to a presentment or indictment by a grand jury prior to answering for crimes. It is erroneous for any court to take the position that the grand jury provision is without effect while enforcing all other Fifth Amendment rights. Marbury, 5 U.S. 137.

Concerning the importance of enforcing the Bill of Rights, Justice Black has stated (emphasis added):

> The first ten amendments [the Bill of Rights] were proposed and adopted largely because of fear that Government might unduly interfere with prized individual liberties. The people wanted and demanded a Bill of Rights written into their Constitution. The amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments -- Legislative, Executive, and Judicial. The Fifth, Sixth, and Eighth Amendments were pointedly aimed at confining exercise of power by courts and judges within precise boundaries, particularly in the procedure used for the trial of criminal cases. Past history provided strong reasons for the apprehensions which brought these procedural amendments into being and attest the wisdom of their adoption. For the fears of arbitrary court action sprang largely from the past use of courts in the imposition of criminal

> punishments to suppress speech, press, and religion. Hence the constitutional limitations of courts' powers were, in the view of the Founders, essential supplements to the First Amendment, which was itself designed to protect the widest scope for all people to believe and to express the most divergent political, religious, and other views.

Adamson v. California, 332 U.S. 46, 70, 67 S. Ct. 1672, 1685 (1947) (Black. J., dissenting) (footnotes omitted).

The Privileges or Immunities Clause of the Fourteenth Amendment declares that "[n]o State . . . shall abridge the privileges or immunities of citizens of the United States."

As noted by Justice Thomas, constitutional provisions are "written to be understood by the voters." McDonald v. City of Chi., 561 U.S. 742, 813, 130 S. Ct. 3020, 3063 (2010) (Thomas. J., concurring) (citing, District of Columbia v. Heller, 554 U.S. 570, 576, 128 S. Ct. 2783, 2783 (2008). Thus, in determining the scope of the Fourteenth Amendment, it is pertinent to discern what "ordinary

citizens" at the time of ratification of the Fourteenth Amendment would have understood the Privileges or Immunities Clause to mean. Id.

At the time that the Fourteenth Amendment, the terms "privileges" and "immunities" had an established meaning as synonyms for "rights." Id. The two words, standing alone or paired together, were used interchangeably with the words "rights," "liberties," and "freedoms," and had been since the time of Blackstone. Id. 561 U.S. at 814 (citing, 1 W. Blackstone, Commentaries, which described the "rights and liberties" of Englishmen as "private immunities" and "civil privileges"). A number of antebellum judicial decisions used the terms in this manner. Id. (citing, Magill v. Brown, 16 F. Cas. 408, 428, F. Cas. No. 8952 (No. 8,952) (CC ED Pa. 1833) ("The words 'privileges and immunities' relate to the rights of persons, place or property; a privilege is a

peculiar right, a private law, conceded to particular persons or places"). Id.

By the time of the adoption of the Fourteenth Amendment, it had long been established that both the States and the Federal Government existed to preserve their citizens' inalienable rights, and that these rights were considered "privileges" or "immunities" of citizenship. Id.

These principles arose from our country's English roots. Id. Fundamental rights, according to English traditions, belonged to all people but became legally enforceable only when recognized in legal texts, including acts of Parliament and the decisions of common-law judges. Id. (citing, B. Bailyn, The Ideological Origins of the American Revolution 77-79 (1967)).

Notably, concerning such rights, the First Continental Congress declared in 1774 that the King

had wrongfully denied the colonists "the rights, liberties, and immunities of free and natural-born subjects . . . within the realm of England." Id. (citing, 1 Journals of the Continental Congress 1774-1789, p. 68 (W. Ford. ed. 1904)).

Several years later, the Bill of Rights was adopted to amend the Constitution to expressly protect the fundamental rights of citizens against interference by the Federal Government. Id. 561 U.S. at 818. Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text. Id., 561 U.S. at 818-819 (citing, inter alia, 1 Annals of Cong. 431-432, 436-437, 440-442 (1789) (statement of Rep. Madison) (proposing Bill of Rights in the First Congress).

The United States Supreme Court's subsequent decision in Barron, however, held at the time it was rendered that the codification of these rights in the Bill of Rights made them legally enforceable only against the Federal Government, not the States. 32 U.S. at 469, 7 Pet., at 247, 8 L. Ed. at 751.

Section 1 of the Fourteenth Amendment protects the rights of citizens "of the United States". Id. 561 U.S. at 823. In McDonald, Justice Thomas provided evidence that overwhelmingly demonstrated "that the privileges and immunities of such citizens included individual rights enumerated in the Constitution". Id. Those individual rights also include those enumerated in the Fifth Amendment, including the right requiring a grand jury indictment before being made to answer for any infamous crime.

Notably, when the Fourteenth Amendment was recommended for adoption, the Joint Committee on Reconstruction argued "adequate security for future peace and safety . . . can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic." Id. 561 U.S. at 827 (citing, Report of the Joint Committee on Reconstruction, S. Rep. No. 112, 39th Cong., 1st Sess., 15 (1866); H. R. Rep. No. 30, 39th Cong., 1st Sess., p. XXI (1866).

Justice Thomas' concurring analysis in McDonald cited to a large body of evidence including numerous speeches, publications, and legal decisions as proving that the privileges and immunities clause of section 1 of the Fourteenth Amendment was intended and understood to have the purpose to enforce the Bill of Rights against the states. Id. 561 U.S. at 827-835.

In this case, Williams had a fundamental right to constitutionally mandated grand jury indictments in his case. Indeed, the law of Virginia is fully compatible with the Fifth Amendment provision in requiring Grand Jury indictments for crimes such as those for which Williams was convicted. This is not a case where Virginia had any reliance on an alternate procedure that could be claimed to provide equivalent privileges and immunities to a grand jury indictment.

Instead of acting properly, the Circuit Court chose to largely ignore the mandated grand jury indictment process and proceeded to try Williams without proper indictments. There was no proper judge signed order indicting Williams.

In summary, the grand jury right of the Fifth Amendment should apply to the states through the Fourteenth Amendment for the reasons stated

herein. The Commonwealth of Virginia should not be allowed to violate Williams' right to a presentment or indictment from a Grand Jury and then for Williams to have no recourse.

Thus, the Fifth Amendment right to a grand jury indictment or its functional equivalent should apply to the states including, without limitation, the Commonwealth of Virginia.

This Petition should be granted to affirm that right.

B. Williams' defective grand jury indictments deprived the Circuit Court of Jurisdiction

Williams avers that the lack of an order of the Circuit Court indicting him, the Circuit Court had no jurisdiction over his case.

A void judgment, is a judgment not subject to time limitation and can be challenged at any time.

See, e.g., Galpin v. Page, 85 U.S. (18 Wall.) 350, 366 (1873); Slaughter v. Commonwealth, 222 Va. 787, 793 (1981). A judgment entered by a court without jurisdiction is void. Id. A void judgment may be attacked collaterally or directly in any court at any time. Id.

The Virginia legislature has placed statutory requirements on grand jury procedures in addition to the long-standing common law and constitutional requirements. Among other provisions, it is required that grand jury indictments list the name of the witness relied upon by the grand jury. Va. Code § 19.2-202.

It has also generally been long-standing law in Virginia, until Hanson was incorrectly decided in 1948, that a failure to record a proper grand jury indictment in a court's order book deprived a court trying a case of jurisdiction. Commonwealth v.

Cawood, 4 Va. 527, 541 (1826). In Cawood, the Virginia Supreme Court held:

> It is undoubtedly true, that before any person can have judgment rendered against him for a felony, they must be regularly accused by the Grand Jury of his country, and his guilt must be established by the verdict of a jury. The accusation in due and solemn form, is as indispensable as the conviction. What, then, is the solemnity required by Law in making the accusation? The Bill Indictment is sent or delivered to the Grand Jury, who, after hearing all the evidence adduced by the Commonwealth, decide whether it be true Bill, or not. If they find it so, the foreman of the Grand Jury endorses on it, 'a true Bill,' and signs his name as foreman, and then the Bill is brought into Court by the Whole Grand Jury, and in open Court it is publicly delivered to the Clerk, who records the fact. It is necessary that it should be presented publicly by the Grand Jury; that is the evidence required by Law to prove that it is sanctioned by the accusing body, and until it is so presented by the Grand Jury, with the endorsement aforesaid, the party charged by it is not indicted, nor is he required, or bound, to answer to any charge against him, which is not so presented.

Id., 4 Va. at 541-542.

Thus, in order for a judgment based upon an indictment to be valid, an indictment must be proper, and must be "delivered in court by the grand jury,

and its finding recorded." Simmons v. Commonwealth, 89 Va. 156, 157 (1892). Failure to deliver the indictment in court and record the finding is a "fatal defect". Id.

These long-standing principles have been embodied in both Virginia statutory law and the Virginia Supreme Court Rules. For example, Virginia Supreme Court Rule 3A:5(c) requires that a Grand Jury return and presents their indictment findings in open court and that the indictment be endorsed 'A True Bill' or 'Not a True Bill' and signed by the foreman. Virginia statutes require the Clerk of the Court to record the Grand Jury indictment findings in the Order Book in compliance with Va. Code §§ 17.1-123(A) and 17.1-124 and 17.1-240.

A court speaks only through its orders. In those cases where the jurisdiction of the court depends upon compliance with certain mandatory

provisions of law, the court's order, spread upon its order book, must show such compliance or jurisdiction is not obtained. See, e.g., Simmons, 89 Va. at 159; Cawood, 4 Va. at 542.

The Simmons case is particularly pertinent authority. In Simmons, the defendant was convicted of first degree murder. Simmons, 89 Va. at 157. Like Williams in this case, the defendant in Simmons was convicted and sentenced based upon a grand jury document, just as in Williams' case, that had allegedly been signed by a grand jury foreman, but had not been recorded in any order book of the circuit court. Id. The Lee County Virginia Circuit Court had found the defendant in Simmons guilty and did not grant him relief based upon a lack of any recording of grand jury indictment. Id. However, the Virginia Supreme Court reversed the conviction and found that the failure to record the grand jury

indictment in an order book of the circuit court was a fatal defect. Id.

Under Virginia law, although a prisoner has in fact been arraigned on, and has pleaded to, an indictment not appearing by the record to have been found by the Grand Jury, and if a third actual term has passed without such record of the findings, he is entitled under Va. Code § 19.2-242 to be discharged from the crime. Cawood, 4 Va. at 546; Adcock v. Commonwealth, 49 Va. (Gratt.) 661, 671 (1851).

In this case Williams should be forever discharged of the crimes charged because three (3) or more terms of the Circuit Court have passed without a trial on valid indictments that were presented in open court by the Grand Jury and recorded.

Federal Courts have generally fully complied with the requirements of the Fifth Amendment concerning grand jury indictments. As a result, the

United States Supreme Court does not appear to have previously addressed a case in which no order was entered indicting a defendant in a criminal matter. In a rare occurrence of non-compliance, the Fourth Circuit Court of Appeals found that a failure to properly record a grand jury indictment was a fatal defect. In its opinion, the Fourth Circuit Court of Appeals stated concerning proper procedures for grand jury indictments and their importance:

> 1 Chitty on Crim. Law, 324, describes the mode in which the grand jury returns the results of their inquiries to the court, by indorsing "A True Bill" if found, and "Not a True Bill" if rejected; and says:
>
> "When the jury have made these indorsements on the bills, they bring them publicly into court, and the clerk of the peace at sessions, or clerk of assize on the circuit, calls all the jurymen by name, who severally answer to signify that they are present, and then the clerk of the peace or assize asks the jury whether they agreed upon any bills, and bids them present them to the court, and then the foreman of the jury hands the indictments to the clerk of peace or clerk of assize."

> 4 Blackstone, 306, also describes the functions of the grand jury and the methods of its proceedings, the necessity of 12 at least assenting to the accusation, and adds:
>
> "And the indictment when so found is publicly delivered into court."
>
> A later text-writer (1 Bishop on Crim. Procedure, § 869) says:
>
> "When the grand jury has found its indictments, it returns them into open court, going personally in a body."
>
> Renigar v. United States, 172 F. 646, 648 (4th

Cir. 1909). The importance of following proper constitutionally based processes was particularly emphasized in Renigar:

> Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty, nor ought the courts in their abhorrence of crime, nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused, are often prepared …
>
> Illegitimate and unconstitutional practices get their first footing in that way, namely, by

> silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance. It is the duty of all the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments. Their motto should be Obsta principiis.'"

Renigar, 172 F. at 652, 655.

Williams recognizes that Renigar has been criticized and claimed by lower courts to have been abrogated. See, e.g., *United States v. Lennick*, 18 F.3d 814, 817 (9th Cir. 1994). However, *Renigar* has not been deemed invalid law by a ruling of the United States Supreme Court, which is the only court having authority to do so. It is also the case that *Lennick* specifically is distinguishable in that there was actually an order entered in that case that was compliant other than not being properly entered

in open court. *Id.* In Williams' case, no proper order of any form was ever entered for his indictments.

In the case at bar, Williams avers that his constitutional rights were violated as to never being properly indicted. There is nothing in the court's records that show that a clerk called each of the grand jurors by name to signify that they were present or asked the grand jury whether they agreed on any bills. Moreover, the Circuit Court has no record of any indictment against Williams having been entered in the Order Book. The failure of the Circuit Court to record in the Order Book, that the Grand Jury had returned into open court and presented true bill indictments against Williams, is a fatal defect in the indictment process. Williams contends that the failure of the Circuit Court to record the Grand Jury's indictment findings in an Order Book in a judge signed order is a fatal defect

that rendered his indictments a nullity and his convictions void ab initio for lack of jurisdiction. *Cawood*, 4 Va. at 541.

Accordingly, Williams requests that this Honorable Court grant this Motion and rule that the failure to indict Williams are fatal defects that render his indictments nullities and his convictions void for lack of jurisdiction.

V. Conclusion

For all of the reasons discussed herein, Inman respectfully and humbly requests that this Court grant this Appeal, reverse the decision of the Circuit Court, grant the Motion in its entirety, and order Williams' immediate release.

Dated: July 26, 2018

RESPECTFULLY SUBMITTED,

By: 

Dale Jensen
Counsel
Dale R. Jensen (VSB 71109)
Dale Jensen, PLC

606 Bull Run,
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Certificate

The undersigned counsel certifies:

1. that the name of the Appellant is Dwayne Lamar Williams, Sr..

2. That contact information of counsel is:
Dale R. Jensen (VSB 71109)
Dale Jensen, PLC
606 Bull Run, Staunton, VA 24401
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(866) 372-0348 facsimile
djensen@dalejensenlaw.com

3. that a copy of the petition for appeal has been mailed on July 26, 2018 to all opposing counsel known to Appellant;

4. that the page count for this Petition is 30;

5. that counsel has not been retained; and

6. that appellant does not desire to state orally to a panel of this Court the reasons why the petition for appeal should be granted.

Dated: July 26, 2018

By: 

Dale Jensen
Counsel
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Dale Jensen, PLC
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Certificate of Service

I certify that on the 26th day of July 2018, I mailed, postage prepaid, a true copy of the foregoing document to:

Chris Billias
Commonwealth's Attorney
Rockbridge County
20 S Randolph St.
Lexington, VA 24450

Dated: July 26, 2018

By: 

Dale Jensen
Counsel
Dale R. Jensen (VSB 71109)
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VIRGINIA SUPREME COURT

DWAYNE LAMAR WILLIAMS, SR., Petitioner, v. HAROLD W. CLARKE, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS, Respondent.	Record No. 180984 PETITION FOR REHEARING OF DISMISSAL OF PETITION FOR APPEAL

Counsel
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PETITION FOR REHEARING OF DISMISSAL OF PETITION FOR APPEAL

Pursuant to Va. Sup. Ct. R. 5:20, Dwayne Lamar Williams, Sr. ("Williams"), by counsel, respectfully submits this Petition for Rehearing of the Dismissal of his Petition for Appeal dated January 16, 2019 (the "Dismissal"), and in support thereof states the following:

I. Argument

A. The "Selective Incorporation" Approach is Unconstitutional

Article V of the United States Constitution provides the only available means to amend the United States Constitution. Article V provides:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments,

> which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

Notably, Article V provides no authority for any court, including this Honorable Court to amend the United States Constitution by judicial fiat.

By denying review and failing to reverse, abrogate, or otherwise revisit Hurtado v. California, 110 U.S. 516, 519 (1884), such amendment by judicial fiat is the direct and unmistakable result.

"It cannot be presumed that any clause in the constitution is intended to be without effect." Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 174, 2 L. Ed. 60 (1803) (opinion for the Court by Marshall, C. J.).

By denying review and failing to reverse, abrogate, or otherwise revisit Hurtado v. California, 110 U.S. 516, 519 (1884), this Court has rendered the Grand Jury clause of the Fifth Amendment a nullity that is without effect.

There is no basis, and no court including this Honorable Court has ever even attempted to argue that the Grand Jury right of the Fifth Amendment to the United States Constitution is somehow less valid and binding on United States courts than the other provisions of the Fifth Amendment.

The Fifth Amendment to the United States Constitution states (emphasis added):

> ***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 offence 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.

The Grand Jury right is the very first right stated in the Fifth Amendment.

It is fully dispositive to this case that all other rights conferred by the Fifth Amendment other than the Grand Jury right have been specifically held by this Court to apply to the states by the United States Supreme Court. The double jeopardy prohibition of the Fifth

Amendment has been held to apply to the States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062 (1969).

Likewise, the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States. Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492 (1964).

Further, by using comparable language to that of the Fifth Amendment, the Fourteenth Amendment specifically decreed that no person can be deprived of "life, liberty, or property, without due process of law". Therefore, that provision of the Fifth Amendment also applies to the states.

Finally, the taking of private property for public use without just compensation also applies to the states through the Fourteenth Amendment. See, e.g., Chi., B. & Q. R. Co. v. Chicago, 166 U.S. 226, 234, 17 S. Ct. 581, 583-84 (1897).

The perfunctory denial of Williams' Petition does not even attempt to justify why this Court believes that his has the authority to remove the Grand Jury right from the Fifth Amendment as it applies to the states by judicial fiat. Williams and other similarly situated individuals should have at least some explanation as to why this Court believes that such a doctrine is in any way lawful.

Williams respectfully submits that the so-called "selective incorporation" doctrine is unconstitutional on its face and should be

acknowledged as such by reconsidering and granting his Petition.

B. The Grand Jury Right of the Fifth Amendment is Applicable to Virginia via the Privileges and Immunities Clause of the Fourteenth Amendment

"It cannot be presumed that any clause in the constitution is intended to be without effect." Marbury, 5 U.S. 137.

The denial of Williams' Petition effectively and unlawfully renders his Grand Jury right guaranteed by the Fifth Amendment without effect. This is error and should be reconsidered.

Williams avers that there is simply no valid reason why Virginia should be allowed to violate Williams' constitutional right to a presentment or indictment by a grand jury prior

to answering for crimes. It is erroneous for this Court to take the position that the grand jury provision is without effect while enforcing all other Fifth Amendment rights. Marbury, 5 U.S. 137.

Concerning the importance of enforcing the Bill of Rights, Justice Black has stated (emphasis added):

> The first ten amendments [the Bill of Rights] were proposed and adopted largely because of fear that Government might unduly interfere with prized individual liberties. The people wanted and demanded a Bill of Rights written into their Constitution. The amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments -- Legislative, Executive, and Judicial. The Fifth, Sixth, and Eighth Amendments were pointedly aimed at confining exercise of power by courts and judges within precise boundaries, particularly in the procedure used for the trial of criminal cases. Past history provided strong reasons for the

> apprehensions which brought these procedural amendments into being and attest the wisdom of their adoption. For the fears of arbitrary court action sprang largely from the past use of courts in the imposition of criminal punishments to suppress speech, press, and religion. Hence the constitutional limitations of courts' powers were, in the view of the Founders, essential supplements to the First Amendment, which was itself designed to protect the widest scope for all people to believe and to express the most divergent political, religious, and other views.

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As noted by Justice Thomas, constitutional provisions are "written to be understood by the

voters." McDonald v. City of Chi., 561 U.S. 742, 813, 130 S. Ct. 3020, 3063 (2010) (Thomas. J., concurring) (citing, District of Columbia v. Heller, 554 U.S. 570, 576, 128 S. Ct. 2783, 2783 (2008). Thus, in determining the scope of the Fourteenth Amendment, it is pertinent to discern what "ordinary citizens" at the time of ratification of the Fourteenth Amendment would have understood the Privileges or Immunities Clause to mean. Id.

At the time that the Fourteenth Amendment , the terms "privileges" and "immunities" had an established meaning as synonyms for "rights." Id. The two words, standing alone or paired together, were used interchangeably with the words "rights," "liberties," and "freedoms," and had been since

the time of Blackstone. Id. 561 U.S. 814 (citing, 1 W. Blackstone, Commentaries, which described the "rights and liberties" of Englishmen as "private immunities" and "civil privileges"). A number of antebellum judicial decisions used the terms in this manner. Id. (citing, Magill v. Brown, 16 F. Cas. 408, 428, F. Cas. No. 8952 (No. 8,952) (CC ED Pa. 1833) ("The words 'privileges and immunities' relate to the rights of persons, place or property; a privilege is a peculiar right, a private law, conceded to particular persons or places"). Id.

By the time of the adoption of the Fourteenth Amendment, it had long been established that both the States and the Federal Government existed to preserve their citizens' inalienable rights, and that these rights were

considered "privileges" or "immunities" of citizenship. Id.

These principles arose from our country's English roots. Id. Fundamental rights, according to English traditions, belonged to all people but became legally enforceable only when recognized in legal texts, including acts of Parliament and the decisions of common-law judges. Id. (citing, B. Bailyn, The Ideological Origins of the American Revolution 77-79 (1967)).

Notably, concerning such rights, the First Continental Congress declared in 1774 that the King had wrongfully denied the colonists "the rights, liberties, and immunities of free and natural-born subjects . . . within the realm of England." Id. (citing, 1 Journals of the

Continental Congress 1774-1789, p. 68 (W. Ford. ed. 1904)).

Several years later, the Bill of Rights was adopted to amend the Constitution to expressly protect the fundamental rights of citizens against interference by the Federal Government. Id. 561 U.S. 742, 818. Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text. Id., 561 U.S. 818-819 (citing, inter alia, 1 Annals of Cong. 431-432, 436-437, 440-442 (1789) (statement of Rep. Madison) (proposing Bill of Rights in the First Congress).

This Court's subsequent decision in Barron, however, held at the time it was rendered that the codification of these rights in the Bill of Rights made them legally enforceable only against the Federal Government, not the States. 7 Pet., at 247, 32 U.S. 469, 8 L. Ed. 751.

Section 1 of the Fourteenth Amendment protects the rights of citizens "of the United States". Id. 561 U.S. at 823. In McDonald, Justice Thomas provided evidence that overwhelmingly demonstrated "that the privileges and immunities of such citizens included individual rights enumerated in the Constitution". Id. Those individual rights also include those enumerated in the Fifth Amendment, including the right requiring a

grand jury indictment before being made to answer for any infamous crime.

Notably, when the Fourteenth Amendment was recommended for adoption, the Joint Committee on Reconstruction argued "adequate security for future peace and safety . . . can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic." Id. 561 U.S. at 827 (citing, Report of the Joint Committee on Reconstruction, S. Rep. No. 112, 39th Cong., 1st Sess., 15 (1866); H. R. Rep. No. 30, 39th Cong., 1st Sess., p. XXI (1866).

Justice Thomas' concurring analysis in McDonald cited to a large body of evidence including numerous speeches, publications, and legal decisions as proving that the privileges and

immunities clause of section 1 of the Fourteenth Amendment was intended and understood to have the purpose to enforce the Bill of Rights in its entirety against the states. Id. 561 U.S. at 827-835.

In this case, Williams had a fundamental right to constitutionally mandated grand jury indictments in his case. Indeed, the law of Virginia is fully compatible with the Fifth Amendment provision in requiring Grand Jury indictments for crimes such as those for which Williams was convicted. There is simply no alternate process to the grand jury that is provided by the Fifth Amendment. Even if the Fifth Amendment allowed deviation from the grand jury procedure, which it does not, this is not a case where Virginia had any reliance on an

alternate procedure that could be claimed to provide equivalent privileges and immunities to a grand jury indictment.

Instead of acting properly, the Circuit Court for the County of Rockbridge (the "Circuit Court") simply chose to ignore the mandated grand jury indictment and proceeded to try Williams without such. There was simply no Circuit Court order indicting Williams for any crime whatsoever.

In summary, the grand jury right of the Fifth Amendment should apply to the states through the Fourteenth Amendment for the reasons stated herein (as well as those in Williams' original Petition for Writ of Certiorari). Williams should be granted recourse for the courts of Virginia violating his Fifth Amendment

right to a presentment or indictment from a Grand Jury.

Accordingly, Williams requests that this Honorable Court reconsider its prior ruling, grant Williams' Petition and rule that the failure to properly indict Williams are fatal defects that render his indictments nullities and his convictions void for lack of jurisdiction.

II. Conclusion

For all of the reasons stated herein, Williams' Petition for Appeal should be granted and his convictions ultimately vacated.

Dated: January 30, 2019

RESPECTFULLY SUBMITTED,

By:

Dale Jensen
Counsel
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Certificate
The undersigned counsel certifies:

1. that a copy of the petition for appeal has been e-mailed on January 30, 2019 to all opposing counsel known to Appellant; and

2. that the page count for this Petition is 10.

Dated: January 30, 2019

By:

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Certificate of Service
I certify that on January 30, 2019, I e-mailed a true copy of the foregoing document to:

Chris Billias
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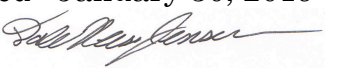
Dated: January 30, 2019
By: 

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Handbook for Virginia Grand Jurors

FOREWORD

This handbook is intended for citizens who have been selected as members of the Grand Jury and are about to report to the court to perform their duties. It does not purport to be a complete statement of the law affecting the Grand Jury and its work. The court itself is the sole authority in its charge to the Grand Jury and in any later instructions, as to these governing principles of law. This handbook merely attempts to give a Grand Juror an understanding of the general nature of his functions, with some practical suggestions as to how best he can carry them out.

In order that each Grand Juror may perform his or her duties as intelligently and efficiently as possible, it is suggested that the contents of this handbook be studied carefully before the term of service begins. Also, this handbook should be kept available for ready reference during the period of service.

1. NATURE OF THE GRAND JURY

1. Types

There are three types of Grand Juries - Regular, Special and Multi-Jurisdiction. A Regular Grand Jury is convened at each term of the Circuit Court of each city and county, to attend to the usual matters needing Grand Jury action. On infrequent occasions a court will convene a

Special Grand Jury to investigate some particular matter. Multi-Jurisdiction Grand Juries involve more than one jurisdiction and are primarily used to investigate drug law violations.

2. Function of a Regular Grand Jury

A regular Grand Jury is composed of from five to seven citizens of a city or county, summoned by the Circuit Court of that city or county, to consider bills of indictment and to hear witnesses and determine whether there is probable cause to believe that a person accused of having committed a serious crime did commit the crime and should stand trial at a later date. The Court may summon up to nine people to ensure a sufficient number.

The Grand Jury does not hear both sides of the case and does not determine the guilt or innocence of the accused person. This is determined by a "petit (trial) jury" if and when the accused is tried later. The Grand Jury only determines whether there is probable cause that the accused committed the crime and should stand trial.

3. Function of a Special Grand Jury

A Special Grand Jury is composed of from seven to eleven citizens of a city or county, summoned by a Circuit Court to investigate and report upon any condition which tends to promote criminal activity in the community or by any governmental authority, agencies, or the officials thereof.

If a majority of the regular grand jurors so request, and if the judge finds probable cause to believe that a crime has been committed which should be investigated by a special grand jury, a special grand jury must be empanelled to be composed of the grand jurors so requesting and willing and such additional members as are necessary. If a minority so requests, a Special Grand Jury may be empanelled.

The function and duties of a Special Grand Jury are set forth in detail in Part III of this Handbook.

4. Importance of the Grand Jury

As Harlan Fiske Stone, late Chief Justice of the United States Supreme Court, said:

・Jury service is one of the highest duties of citizenship, for by it the citizen participates in the administration of justice between man and man and between government and the individual.

・In time of peace a citizen can perform no higher public duty than that of Grand Jury service. No body of citizens exercises public functions more vital to the administration of law and order. The Grand Jury is both a sword and a shield of justice-a sword, because it is a terror of criminals; a shield, because it is a protection of the innocent against unjust prosecution. No one can be prosecuted for a felony except on an indictment by a Grand Jury. With its extensive powers, a Grand Jury must be motivated by the highest sense of justice, for otherwise it might find indictments

not supported by the evidence and thus become a source of oppression to our citizens, or on the other hand, it might dismiss charges against those who should be prosecuted.

5. Origin

The Grand Jury had its origin more than seven centuries ago in England from which, in large part, this country inherited its legal system. Many legal historians trace its origin to events in the reign of Henry II and to one of the articles of the Constitution of Clarendon in 1164. It was recognized in Magna Carta granted by King John at the demand of the people

in 1215. One of its earliest functions was to protect citizens from despotic abuse of power by

the king; its other function was to report those suspected of having committed criminal offenses.

These two functions are carried forward today in the work of the Grand Jury, and its importance in controlling the start of prosecutions for serious crimes is recognized in both the Constitution of the United States and the Constitution of Virginia.

6. Preliminary Criminal Process

(a) Initial Proceedings. A person suspected of having committed a crime is usually arrested and charged in a written accusation called a Warrant or Summons.

Crimes of a serious nature are classified as "felonies," which are punishable by confinement in the penitentiary. Crimes of a less serious nature are classified as "misdemeanors," and are punishable by confinement in jail for a period not to exceed twelve months and/or by a fine not to exceed $2,500.

A person held on a Warrant is brought to trial in a District Court. The trial is conducted before a judge without a jury. (1) If the judge determines that the accused is not guilty of any criminal offense, he or she dismisses the case. (2) If the judge determines that the accused is guilty of a misdemeanor only, the judge will assess the punishment. (3) If, however, the judge determines that a felony may be involved, the judge will certify (send) the case to the Circuit Court for

presentation to a Regular Grand Jury to determine whether there is probable cause to believe that a felony has been committed by the accused person. This procedure is used because a District Court has no authority to try a person for a felony.

The District judge will fix the terms on which the accused may be released on bail while waiting for action on the case in the Circuit Court.

(b) Bills of Indictment. After a case has been certified to the Circuit Court, the Commonwealth's Attorney will prepare a written document called a "bill of indictment," in which the accused is charged in a legal and formal manner with having committed a specified felony.

As will be described in greater detail later in this handbook, it is this "bill of indictment" that the Regular Grand Jury considers to determine if probable cause exists to require that the person accused stand trial at a later date in the Circuit Court.

(c) Misdemeanors. A Grand Jury usually does not deal with minor crimes (misdemeanors) or with traffic offenses. Prosecution of these offenses usually is begun by the police or the Commonwealth's Attorney on a Warrant or a Summons. Indeed, were this not so, a Grand Jury would be so overloaded with the volume of such complaints that it could not perform its more important duties.

II. THE REGULAR GRAND JURY

7. Qualifications

A Grand Juror must have been a resident of Virginia for at least one year and a citizen of the city or county in which he or she is to serve for at least six months, and must be "eighteen years of age or older, of honesty, intelligence and good demeanor and suitable in all respects to serve" as a Grand Juror.

8. Selection; Summons; Size

Each year the judge of the Circuit Court of each city and county selects at least sixty and not more than one hundred and twenty citizens from the city or county to serve as Grand Jurors during that year.

Not more than twenty days before the beginning of the term of court, the Clerk of the Circuit Court summons from the Grand Jury list, not less than five nor more than nine persons to serve as Grand Jurors for that term of court. The judge may dismiss several jurors to assure a jury of not more than seven.

The Clerk directs the sheriff to summon the persons selected to appear at the court on the first day of the term to serve as Grand Jurors for that term.

9. Exemptions and Excuses

Any person who has legal custody of a child 16 years of age or younger or of a person having a

mental or physical impairment requiring continuous care during normal court hours, any mother who is breast-feeding a child, any person over 70 years of age, any person whose spouse is summoned to serve on the same jury panel, any person who is the only person performing essential services for business, commercial or agricultural enterprise without which the enterprise would close or cease to function, a mariner actually employed in maritime service, and several categories of legislative branch employees during specified times must be excused from jury service upon request.

If you are exempt from jury service for either of the foregoing reasons or, if you have some other good reason to be excused from Grand Jury service, you should contact the judge of the

Circuit Court to which you have been summoned immediately and in person (or if the judge is not available, contact the Clerk of that Court). DO NOT WAIT UNTIL THE DAY ON WHICH YOU HAVE BEEN SUMMONED, because if you are excused, this may cause serious inconvenience to the court and a delay in the administration of justice while another Grand Juror is procured.

Your service as a Grand Juror ordinarily will require only part of one day. In view of the high privilege of service as a Grand Juror and of the importance of the public service rendered, you should not ask to be excused unless it is absolutely necessary.

10. First Appearance in Court

You will report for service at the courtroom of the Circuit Court to which you have been summoned on the date and at the hour stated in the summons.

The Clerk of the Circuit Court will call your name and you will take your place in the jury box (the name applied to the area at which jury chairs are located).

The judge will appoint one of you to be Foreman (your presiding officer). The Foreman will then be sworn in under an oath that states your important powers and responsibilities. The remaining members of the Grand Jury are then sworn to observe the conditions of the same oath.

11. Oath

The oath taken by each Grand Juror is as follows:

• You shall diligently inquire, and true presentment make, of all such matters as may be given you in charge, or come to your knowledge, touching the present service. You shall present no person through prejudice or ill will, nor leave any unrepresented through fear or favor, but in all your presentments you shall present the truth, the whole truth, and nothing but the truth. So help you God.

To "diligently inquire" means to make an honest and earnest consideration of all the circumstances involved in the matter, and a common sense decision based upon the facts.

Your oath requires you to be impartial (fair to both sides)-the foundation of justice and equality.

The requirement for "truthfulness" is a pledge of honesty in the performance of your duties.

If you follow the conditions of your Oath of Office, you will have met your full requirement as a member of the Grand Jury, and you will have performed your responsibilities in accordance with the law.

12. Charge by the Court

After you have been sworn, the judge will address you formally, and in greater detail, as to how you are to perform your duties and responsibilities.

This address is called "The Charge to the Grand Jury." This Charge, plus any other instructions given to you by the judge, together with your Oath are your controlling guides. After receiving the Charge to the Grand Jury, you will be escorted to the Grand Jury Room, where you will receive the bills of indictment you are to consider, and you will hear witnesses in the cases brought to your attention.

13. Procedure in the Jury Room

(a) Quorum. A Regular Grand Jury consists of not less than five members. At least four must concur (agree) in returning "A True Bill" on an indictment.

Should an emergency arise necessitating the absence of a Grand Juror, the Grand Jury should cease deliberations while this fact is reported to the judge.

Business of the Grand Jury should be conducted only when all members are present in the jury room. If it is necessary for a member to be temporarily absent, a recess should be declared by the Foreman until the member rejoins the group.

(b) Hearing Witnesses. The bills of indictment you are to consider will be delivered to you. It is your duty to determine if probable cause exists to require the person accused of a crime in a bill of indictment to stand trial. You will determine this from the testimony of witnesses.

The names of available witnesses in a given case will appear on the bill of indictment. These witnesses will have been sworn by the judge to tell the truth while they are in the jury room. You will notify the judge when you are ready to call a witness.

If any person who is not listed on the bill of indictment, or is listed but not called to testify by the Grand Jury, wants to testify he or she must obtain permission from the judge. Even then, the Grand Jury may refuse to hear this testimony unless the judge orders that it be heard.

Witnesses should be examined one at a time. There is no set manner in which a witness is examined. One appropriate way is for the

Foreman to ask the witness to tell what he or she knows about the charge against the accused, after which questions may be asked of the witness by any member of the Grand Jury if additional testimony is desired.

All questioning should not show any viewpoint on the part of the questioner.

It is not necessary to call or hear every witness listed on the bill of indictment, to approve it ("A True Bill"). It is only necessary to hear as many (one or more) as it takes to satisfy four members of the Grand Jury that probable cause exists to require the party accused to stand trial.

On the other hand, a bill of indictment should not be disapproved ("Not a True Bill"), unless every witness listed on the bill of indictment who is available has been examined.

(c) Witness Refusal to Testify .If a witness refuses to answer a question, the Grand
Jury should not press the question or attempt on its own to compel an answer. The reason for the refusal by the witness may involve the technical issue of whether the question asked violates this witness's constitutional privilege against self-incrimination. If the jury desires to press the matter further, the question should be written out on a sheet of
paper, a recess declared, and the matter reported to the judge orally in open court, whereupon the

judge will determine if the witness is compelled to answer.

(d) Accused as a Witness. The accused person named in the bill of indictment will not be listed as a witness, nor will any witnesses favorable to him probably be listed. This is because the Grand Jury does not determine the guilt or innocence of the accused, but only determines whether the testimony of the witnesses produced by the State establishes probable cause to require the accused to stand trial.

If an accused desires to testify, he or she must obtain permission from the judge, who will tell the accused of the privilege against self-incrimination. And even if the judge permits her or him to testify, the Grand Jury may refuse to

hear the testimony unless it is ordered to do so by the judge.

14. Determination to Indict or Not

As has been repeatedly stated, the Grand Jury does not sit to determine the guilt or innocence of the accused. The function of the Grand Jury is to determine whether there is probable cause to require the accused to stand trial.

Only members of the Grand Jury are in the jury room while it is deliberating and voting.

When the Grand Jury has heard all necessary or available witnesses in a given case, the Foreman will ask the members to discuss and vote on the question of whether or not "A True Bill" should be

found on the charge. Every Grand Juror may now comment on the sufficiency of the evidence and express an opinion on the matter.

After each member who desires to speak has been heard, the Foreman will call for a formal vote to find out if there is the required number of four affirmative (yes) votes.

15. Finding of Indictment

An indictment may be found "A True Bill," only upon the affirmative vote of four or more members of the Grand Jury.

If there are enough affirmative votes in favor of finding an indictment, the Foreman will endorse

(write) the phrase "A True Bill" on the back of the bill of indictment and sign it.

If there are insufficient affirmative votes, the Foreman will endorse the phrase "Not a True Bill" and sign it.

16. Special Findings, If Any

After all the bills of indictment have been considered, the judge will ask if any member of the Grand Jury believes that a Special Grand Jury should be called to investigate any condition which tends to promote criminal activity in the community or by any governmental authority, agency or official.

This power should be used with extreme caution, because it can be a weapon of oppression. It should not be used upon gossip or rumor. On the other hand, if there is a rational basis to believe that any such condition exists the Regular Grand Jury should report its view to the judge.

17. Return of Indictment

After all of the bills of indictment have been considered and the Grand Jury has determined if it wants to report on any special matter, it will inform the judge that it has ended its deliberations. It will then present its findings in open court. This will be done by the Clerk of the court reading the names of the accused persons and, after each name, reading the words "A True

Bill" or "Not a True Bill" as endorsed on the indictment by the Foreman of the Grand Jury.

18. The Commonwealth's Attorney

To keep the Grand Jury free from any pressure from the State, Virginia makes it illegal for any attorney representing the State to appear before the Grand Jury except as a witness.

If, however, members of the Grand Jury have questions about their duties, they may ask the Commonwealth's Attorney for advice.

Except for these two cases, if a Commonwealth's Attorney appears in the Grand Jury Room while

the Grand Jury is there, any indictment returned "A True Bill" by the Grand Jury is invalid (no good). Therefore, while a Grand Jury may request the appearance of the Commonwealth's Attorney to testify as a witness or to explain some principle of law about the discharge of their duties, they cannot seek his advice as to whether they should return an indictment as "A True Bill. " If a Grand Jury finds that it is in need of advice as to its duties but doesn't know if it can invite the Commonwealth's Attorney into the Grand Jury Room to explain, it should notify the judge that it desires further instructions, and it will receive such instructions in open court.

19. Secrecy

The law provides that "every member of a regular or special grand jury must keep secret all proceedings which occurred during sessions of the grand jury."

The secrecy of Grand Jury proceedings is important because:

1.Secrecy protects Grand Jurors from being subjected to pressure by persons who may be interested in the outcome of Grand Jury action.
2.Secrecy may prevent the escape of persons against whom an indictment is under consideration.
3.Secrecy encourages witnesses to speak the truth freely before the Grand Jury.
4.Secrecy as to what witnesses testified to before the Grand Jury prevents the witnesses from being

tampered with between that time and the time they testify at the trial of the accused.

20. Protection of Grand Jurors

The Grand Jury is an independent body answerable to no one except the judge. No inquiry may be made to learn what a Grand Juror said or how he or she voted. The secrecy surrounding Grand Jury proceedings is one of the major sources of this protection. The law gives Grand Jurors complete immunity for official acts within their authority as Grand Jurors, regardless of the result of an indictment found by the Grand Jury.

21. Practical Suggestions

Witnesses summoned to testify before the Grand Jury are present frequently at personal, business or official inconvenience.

They sometimes come from a distance. Police officers often are called on their "off hours. " It is important, therefore, that the business of the Grand Jury be carried on in an expeditious manner-not too slow but not too fast. Some cases may require only one witness and take only a few minutes; others will require much more attention.

The following suggestions are offered to assist you in carrying out your duties in a fair and expeditious manner.

Pay close attention to the testimony of the witnesses. The reputation or freedom of someone depends on what is being told.

Be courteous to the witnesses and do not cut off their testimony unless it becomes needlessly repetitious.

Listen to the opinions of your fellow jurors, but do not be a rubber stamp. On the other hand, do not try to monopolize the hearing or the deliberations. Be independent, but not stubborn.

Express your opinion, but don't be dictatorial. You may try to persuade other jurors, but do not try to force them to change their minds. After all, they may be right and you may be wrong.

Each juror is entitled to be satisfied with the evidence before being called upon to vote. Although your mind may be made up, if others wish to pursue the matter further, do not try to shut off additional testimony or deliberation.

Do not keep silent when the case is under discussion, and then begin to talk about it after the vote is taken.

Do not discuss cases with your fellow Grand Jurors outside the jury room.

Maintain dignity in the proceedings at all times. Moderation and reason, rather than emotion and passion, lead to justice.

22. Compensation

The State does not compensate (pay) Grand Jurors in proportion to the valuable service they render. There are several reasons for this. One thing to be avoided is the so-called "professional juror"-a person, usually unemployed, who welcomes (and sometimes even solicits) jury duty solely for the compensation and with little or no regard for civic responsibility. Another reason is the cost to the taxpayer. When one recalls that Grand Juries meet in every city and county in the State from four to twelve times a year, it is readily seen that a large expense could result.

While the State hopes that Grand Jurors will serve as a matter of public pride and civic duty, it does not want Grand Jury duty to be a financial cost to the Grand Juror. The law provides for the

compensation of Grand Jurors for each day of attendance. The amount of this compensation is changed from time to time by action of the General Assembly. Each Grand Juror should report attendance and mileage to the Clerk of Court.

III. THE SPECIAL GRAND JURY

23. Function of a Special Grand Jury

As has been set out in Section 3, a Special Grand Jury is composed of from seven to eleven citizens of a city or county, selected by the Circuit Court and summoned to investigate any condition which tends to promote criminal activity in the community or by any governmental authority, agency or official.

The Special Grand Jury, composed entirely of private citizens, is the one non-political body with legal authority to make such investigations.

24.Characteristics

While the function and powers of the Special Grand Jury and those of the Regular Grand Jury differ, many of the observations made earlier concerning the Regular Grand Jury are applicable to the Special Grand Jury. Some of these are its Importance (see Section 4); Origin (see Section 5); Qualifications (see Section 7); Oath (see Section I 1); Secrecy (see Section 19); Protection (see Section 20); and Practical Suggestions (see Section 21).

Other similarities will be noted later.

25. Scope of Investigation

The responsibility of a Special Grand Jury ordinarily will be to investigate a narrow special condition believed to exist in the community. On the one hand, its duty is to make a full and complete investigation and report on that condition; on the other hand, it is not convened to go on a fishing expedition with respect to other possible illegal conditions which may exist. If during the course of its authorized investigation, some other illegal condition comes to light which the Special Grand Jurors feel needs investigation, the Special Grand Jury should call attention to it in its report.

The investigation is to ascertain whether alleged criminal or corrupt conditions exist under present law. The investigation is not to determine if the law is good or bad, or if it needs to be changed. It is possible, indeed, that as a result of the investigation, the law may need to be changed, but that is a legislative matter and a conclusion for the General Assembly of Virginia to make.

There are no time limitations on an investigation by a Special Grand Jury. The complexity of the condition being investigated will dictate the length of time needed.

26. Convening

A Circuit Court may, on its own motion, convene a Special Grand Jury. Frequently, the

Commonwealth's Attorney will make the request. Also, as noted in Sections 3 and 18, the request may come from a Regular Grand Jury.

If the judge of the Circuit Court decides that a Special Grand Jury should be convened, he or she will select the names of those to serve, and they will be summoned to appear at a specified time. What was said in Section 9 regarding Exemptions and Excuses from Grand Jury duty is the same for Special Grand Jury service.

On the day appointed, the Judge will swear in the Special Grand Jury and will then charge it with the subject it is to investigate. The Judge will appoint one of those selected to serve as Foreman.

The Special Grand Jury is now ready to begin its work.

27. The Commonwealth's Attorney

If the Special Grand Jury was convened at the request of the Attorney for the Commonwealth, he may be present at all times during the investigatory stage of the proceedings. If the Special Grand Jury was convened at the request of someone else, the Attorney for the Commonwealth may be present only if requested by the Special Grand Jury.

In either event, if the Attorney for the Commonwealth is present, he or she may question witnesses only if the Special Grand Jury requests or consents to such questioning.

The Attorney for the Commonwealth shall not be present, however, at any time while the Special Grand Jury is discussing or evaluating the testimony of a witness among themselves or while the Special Grand Jury is deliberating in order to reach a decision or prepare its report. However, he or she may be present during this period if legal advice is requested by the Special Grand Jury. The Grand Jurors should not permit the Commonwealth's Attorney, while he or she is giving legal advice, to join in any determination by them of the weight to be given to the testimony of a witness.

The foregoing limitations are in the law to insure the complete independence of the Special Grand

Jury and to protect it against any undue influence from an official of the Commonwealth.

28. Special Counsel

At the request of the Special Grand Jury, the judge may appoint special counsel to assist it in its work.

29. Special Investigative Personnel

The Special Grand Jury may call upon any state or local agency or officer to assist it in its investigation. The type of condition being investigated will dictate the type of investigative personnel needed. If required, the Special Grand Jury may request the judge to provide other

specialized personnel to assist it in the investigation.

30. Court Reporter

A court reporter will record and transcribe all oral testimony given by witnesses before the Special Grand Jury. The transcript is for the sole use of the Special Grand Jury and its contents must not be revealed by anyone.

In a lengthy investigation it would be difficult to remember exactly what earlier witnesses said, so it is appropriate for the Special Grand Jury to have a transcript (written record) of all testimony available to which it may refer during later stages of its work.

31. Subpoena Power

The Special Grand Jury may have a summons issued ordering a person to appear before it to testify and to produce specified records, papers and documents for examination by the Special Grand Jury. Any desired papers or records must be described with reasonable accuracy in the summons. The Special Grand Jury is not engaged in a witch hunt or a fishing expedition hoping that a document may turn up; it must have a reasonable belief that a particular record, paper or document does, in fact, exist.

When a summons is desired, the Special Grand Jury may notify the Clerk of the Circuit Court, giving the Clerk the name (and address if known) of the person to be summoned, the date and hour

set for his appearance, and if papers are desired, a description of them.

32. Warnings Given to a Witness

Before witnesses testify, they must be advised by the Special Grand Jury Foreman that:

• the witnesses do not have to answer any questions nor produce any evidence that would tend to incriminate them; and
• the witnesses may hire their own counsel and have them present while they testify;
and
• the witnesses may be called upon later to testify in any case that may result from the investigation and report of the Special Grand Jury.

33. Counsel for the Witness

Witnesses appearing before a Special Grand Jury have the right to have counsel of their own present when testifying. Such counsel shall have the right to consult with and advise the witness during the examination, but the counsel does not have the right to conduct an examination of his or her own witness, unless, the Special Grand Jury requests or permits it.

34. Oath of Witness

After the witness has been given the warnings set forth in Section 32, the Foreman will administer the following oath to the witness (an affirmative answer is required):

Do you solemnly swear (or affirm) that the evidence you are about to give before the Grand Jury is the truth, the whole truth, and nothing but the truth, so help you God?

35. Examination of Witness

If the Special Grand Jury was convened at the request of the Commonwealth's Attorney, he or she will have a list of the witnesses to present. It would be appropriate, therefore, for the Special Grand Jury to invite the Commonwealth's Attorney to examine these witnesses. After this examination, members of the Special Grand Jury

should then ask any further questions of the witness that are appropriate.

If the Special Grand Jury was convened at the request of someone other than the Commonwealth's Attorney, the Special Grand Jury may still ask the Commonwealth's Attorney to be present and conduct the examination, or the Special Grand Jury may request the judge to designate special counsel to assist it and to conduct the examination, or the Special Grand Jury may conduct the examination itself without aid of counsel.

If examination of a witness leads the Special Grand Jury to believe that the testimony of other witnesses may be desirable, a request for a summons for such other witnesses should be

made to the Clerk of the Circuit Court as specified in Section 31 of this Handbook.

The questioning of a witness should not indicate any viewpoint on the part of the questioner.

36. Witness Refusal to Testify

If a witness refuses to answer a question, the Special Grand Jury should follow the procedures specified in Section 13 (c) of this handbook.

37. Deliberation

After all witnesses have been heard, the Special Grand Jury is now ready to deliberate and make its findings on the matter submitted to it by the court. Only the members of the Special Grand Jury are to be present during this stage of the proceeding, unless at intervals the Special Grand Jury desires the temporary presence of the Commonwealth's Attorney or Special Counsel to advise it on some legal matter.

Again it should be emphasized that the Special Grand Jury has been convened to investigate and report its findings on some specific isolated condition believed to exist in the community. Its findings and recommendations, if any, should relate specifically to the subject committed to it. It is not involved in a general moral crusade.

At the conclusion of its investigation and deliberation, a Special Grand Jury impaneled by the court or on recommendation of a Regular Grand Jury shall file a Report of its findings with the court, including any recommendations that the Special Grand Jury deems appropriate, including any finding that a person ha committed a criminal offense, with or without a recommendation that such a person be prosecuted. It is then the duty of the Commonwealth's Attorney, after the Report of the Special Grand Jury, to determine whether a prosecution should begin, and if so, to present a bill of indictment to a Regular Grand Jury. A Special Grand Jury convened at the request of the Commonwealth's
Attorney may return a "true bill" of indictment upon the testimony of or evidence produced by

any witness who was called by the grand jury, if a majority of not fewer than five of the members of the Special Grand Jury agree.

38. Findings

Findings should be findings of facts which the Special Grand Jury reasonably believes to exist. It is entirely possible that several or many of such facts are to be considered by the Special Grand Jury and that a vote needs to be taken on each such fact. A majority vote in the affirmative on each such fact is necessary to include it in the Report the Special Grand Jury will make to the court.

While no particular procedure need be followed, one way to proceed would be for individual

members to submit to the Foreman such findings as he or she may think appropriate, and then the Foreman (or some member designated by him) could prepare a list of the proposed findings, following which a vote should be taken on each such proposed finding.

39. Report

At the end of its deliberation the Special Grand Jury must prepare a written Report of its findings, including any recommendations it may deem appropriate. This Report will be the finding of the majority of the Special Grand Jury.

The Court Reporter may be used to prepare the Report.

Members who do not agree with the findings of the majority may file a minority report on any finding with which they disagree.

When the Special Grand Jury is ready to file its Report, the Report should be dated and signed by the Foreman.

40. Transcript, Notes, etc.

After the Special Grand Jury has completed its use of the transcripts prepared for it by the Court Reporter, the Foreman must direct the Court Reporter to turn over to him or her all of the notes, tapes or records from which the transcripts

were made. The Foreman shall then place the transcripts, notes, tapes, and records in a container and seal it. The date on which the Report is filed should then be placed on the sealed container.

41. Filing of Report

When the Special Grand Jury is ready to make its Report, it should notify the judge, and in open court hand in its Report and the sealed container.

42. Secrecy

It is highly important that the members of the Special Grand Jury should not reveal any of their proceedings nor any contents of their Report. Publication of the Report itself is a matter for the court.

43. Compensation

See section 22 of this handbook.

IV THE MULTI-JURISDICTION GRAND JURY

44.Function of a Multi-Jurisdiction Grand Jury

Multi-Jurisdiction Grand Juries, sometimes called Multi-District Juries, are summoned to investigate drug law violations, consider bills of indictment prepared by special counsel

and determine whether probable cause exists to justify returning the indictment as a "true bill" against the accused. The Multi-Jurisdiction Grand Jury reports its findings to state and federal prosecutors.

45.Selection and Size

Like Special Grand Juries, Multi-Jurisdiction Grand Juries are composed of not less than seven not more than eleven members. Multi-Jurisdiction Grand Jury's inquires typically focus on drug law violations which may have occurred in many different Virginia localities and court jurisdictions. Accordingly, to the extent partially possible, the presiding judge
will try to draw a Grand Jury from each jurisdiction in which the alleged violation

occurred. However, the maximum number of jurors will always be eleven. Juror's qualifications are similar to those described in section 7 of this handbook.

46.Proceedings

To convene a Multi-Jurisdiction Grand Jury, two or more Commonwealth's Attorneys from different jurisdictions, after receiving approval from the Attorney General of Virginia, may apply to the Supreme Court of Virginia. The term of the Multi-Jurisdiction Grand Jury shall be twelve months but may be extended up to an additional six months. However, the presiding judge may discharge the jurors at any point the presiding judge believes the Multi-Jurisdiction Grand Jury is no longer needed. The presiding judge

determines the time, date and place the Multi-Jurisdiction Grand Jury will be convened. Jurors are compensated according to statute. The secrecy provisions also apply to Multi-Jurisdiction Grand Juries. This type of Grand Jury has statewide subpoena power. Although witnesses appearing before the Multi-Jurisdiction Grand Jury are entitled to the presence of their attorney during the proceedings, the attorney may not participate in the proceedings. A

majority of the Multi-Jurisdiction Grand Jurors must agree to return a "true bill" of indictment and in no instance can the majority be less than five jurors. The "True Bill" must state each and every jurisdiction in which the offenses occurred.

CONCLUSION

Membership on a Grand Jury, Regular or Special, is a high honor. Your service is of great value to your fellow citizens and your time is devoted to one of the worthiest of causes: justice.

It is hoped that this Handbook will make your work easier, more understandable, and more pleasant.

General Information for Individuals With Disabilities

In accordance with the Americans with Disabilities Act, Virginia's Judicial System has adopted a policy of non-discrimination in access to its facilities, services, programs, and activities. Individuals with disabilities who need

accommodation in order to have access to court facilities or to participate in Judicial System functions are invited to request assistance from court staff. Individuals who need printed material published by the Judicial System in another format or who have general questions about the Judicial System's non-discrimination policies and procedures may contact the ADA Coordinator, Department of Human Resources, Office of the Executive Secretary, Supreme Court of Virginia, 100 North Ninth Street, Third Floor, Richmond, Virginia 23219, (804) 786-6455. Detailed information on this policy is available on Virginia's Judicial System Web site, www.courts.state.va.us. Individuals with disabilities who believe they have been discriminated against may file a complaint in accordance with the Judicial System's ADA

Grievance Procedure, which is available from the ADA Coordinator and on Virginia's Judicial System Web site. Virginia's Judicial System does not discriminate on the basis of disability in hiring or employment practices.

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