No. 19-7551

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD A. HERRINGTON — PETITIONER PRO SE
(Your Name)

vs.

THE COMMONWEALTH OF VIRGINA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Stafford Circuit Court in part and The Supreme Court Of Va. in part.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Donald A. Herrington 1463390
(Your Name)
Derfield Correctional Center
21360 Deerfield Dr.
(Address)

Capron, Va. 23829
(City, State, Zip Code)

(434) 658-4368
(Phone Number)

QUESTION(S) PRESENTED

1. "Was Petitioner's conviction a result of a procedure, **§17.1-293.1** that violates **1st Amendment U.S. Constitutional Civil Rights** to access correct court information, assemble, and free speech of the defendant, public and press? Did the Supreme Court of Virginia create case law for all Virginia courts to do the same by publishing a ruling **Herrington v. Comm.** 291 Va. 181 (2016) affirming these same procedures without recognizing the incompatibility with the Executive Secretary Of The Supreme Court of Virginia licensed software, that caused the Online Case Information System to publicizes false information to all interested parties about what charge a defendant is indicted, arranged, tried convicted and sentenced, at each stage, on each date and beyond, when there is no other source to get the information?" [See Pg.17;]

2. "Dose this procedure violate the defendants, **U.S. Constitutional ,6th &14th Amendment right** to a public trial, from the violation of press and publics **1st Amendment right** to assemble, free speech and access to the courts, due to the pervasive reliance on software and the internet, when the Governments software and Online Case Information System publicizes false information about what charge a defendant is indicted, arraigned, tried, convicted and sentenced to, when the interested parties get their information exclusively from these vast networks? Has constructive denial of a public trial occurred?" [See Pg.20;]

3. "Does this procedure also hide, mislead or confuse the Jude, Clerk, Defendant and his counsel, about the charge one is to be tried on, so as to make a defendant unable to know the cause and nature of the charge, nor give adequate time to prepare a defense in violation of **5th, 6th & 14th Amendment U.S. Constitutional** rights, due to software that spreads false information in the Circuit Case Management System?" [See Pg.23;]

4. "Does the published case law **Herrington v. Comm.** 291 Va. 181 (2016) violate the separations of powers doctrine of the **U.S. Constitution 10th & 14th Amendment,** by broadening the authority of prosecutors in Va. giving them more power than a Judge? Can a prosecutor maintain a Judges certified charge/case number and write back in what the Judge just struck from the charge, and present the struck portion as if certified by the Judge? Does a court have subject-matter jurisdiction through a fraudulently conveyed charge, from a procedure that violates fundamental rights? Do these actions raise issues of Collateral Estoppel or Res Judicata?" [See Pg.25;]

5. "Was the Petitioner's **U.S. Constitutional 6th & 14th Amendment** rights to have counsel and be present violated, where the Judge issued a new sentences order ex parte 4 years later, when the petitioner was sentenced to 5 years past the statutory maximum listed in the controlling section of the sentence order? Can a court rule "Scribner's" error to a contested matter ex parte when the error is a direct result of fundamental rights being violated as stated (Supra)?" [See Pg.30;]

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The Attorney for the parties involved is The Attorney General For Virginia, Mark Herring, 202 Nth 9th, St. Richmond Va. 23219.

Pursuant to Rules Of the Supreme Court Of The U.S. Rule 14 1 (b)(iii):

"A list of all proceedings...that are directly related the case.."

General District Court Of Stafford, Docket number C12-9958, certified to, Staford Circuit Court, Case number CR12000-857-00, Appealed to, The Va. Court of Appeals, Record No. 1083-13-4, 2014 Va. App. LEXIS 371, Appealed The Supreme Court Of Va. Record No. 150085 published ruing and the subject of much of this certiorari 291 Va. 181, 781 S.E. 2d 561 (2016).

A Writ of Certiorari on a differnt subject then in this one, filed to, The Supreme Court Of The U.S. No. 16-6144, 137 S. Ct 509 (2016).

Habeas Courpus to the Supreme Court Of Virginia Record No. 170372

A motion for delyed appeal filed to The Va. Court of Appeals, when Petitioner was informed of the ex parte new sentenceing order Record No. [Not assigned]

A §2254 Habeas Corpus filed to the 4th Cir. District Court Case No. 1:19-cv-215 (AJT/IDD).

A motion to vacate the Judgement to The Stafford Circuit Court Case No CR12000-857.

Appeal to the Supreme Court of Va. of the denial of the motion Case No. 181594.

The petition for Writ Of Certiorari filed hearin now.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

STATUTES AND RULES CONTINUED PAGE NUMBER

OTHER PAGE NUMBER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished. But a published ruling is involved and subject of the Motion and Appeal that was denied. Appendix C.

The opinion of the The Supreme Court Of Virginia court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was 9-24-19. A copy of that decision appears at Appendix B.

[X] A timely petition for rehearing was thereafter denied on the following date: 11-21-2019, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"

U.S. Constitutional Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor be deprived of life, liberty, or property, without due process of law..."

U.S. Constitutional Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

U.S. Constitutional Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U.S. Constitutional Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28. U.S.C. §1257 State Courts; certiorari:

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of state statute is drawn in question on the ground of its repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the U.S."

STATEMENT OF THE CASE

1. NOW COMES DONALD A, HERRINGTON the Petitioner, Pro se with a petition for Writ of Certiorari and asks the Justices to grant the writ on one or part of the five questions presented. Or as many this Court finds worthy of consideration.

2. On 5-26-12 the Petitioner, Donald A. Herrington (DH Hereafter) went to meet a drug dealer to pay his girlfriend's debt, from having pills fronted to her. When DH and his girlfriend showed up at the meet, the police put DH in hand cuffs and asked if he had any drugs. DH stated he had some prescription medication and motioned where to find it. The police stated DH was there to sell pills and arrested DH by way of a swearing document, issuing a warrant for Possession With Intent To Distribute, a violation of **Va. Code §18.2-248** (PWI hereafter).

3. On 8-28-12 DH had a preliminary hearing to determine probable in General District Court (GDC hereafter). After hearing witness and seeing evidence, the GDC Judge made a factual ruling of no probable cause for PWI. DH's attorney did not make an effort to get the proof of a valid prescription. This being the case the GDC did find probable cause for Simple Possession a violation of **Va. Code §18.2-250** (SP hereafter).

4. The GDC reduces the warrant/swearing document, and certified SP to the Stafford Circuit Court (SCC hereafter) by way of two orders for the charge to be presented to a Grand Jury on 10-1-12, see [App. E-19 Pg.2, & App. E-24].

5. The SCC Clerk on 8-29-12 received and filed the SP charge/orders of the GDC in the Circuit Case Management System (CCMS hereafter) [an electronic order book to comply with **Va. Code §17.1-123, 124, 240, 293.1** to have an order book. These now violate the constitution] and created the case number of CR12000857-00 to go before the Grand Jury on 10-1-12, see [App. E-25].

6. When an account is created in the CCMS, the Online Case Information System (OCIS hereafter) for Defendants, press, and public to access judicial records, and for the state to publicize the proceedings, copies the CCMS every 15 minutes see **Daily Press v. Office of the Executive Secretary of the Supreme Court of Virginia** 293 Va. 551 (2017):

> "The Executive Secretary of the Supreme Court of Virginia serves as the administrator of the circuit court system...the Circuit Case Management System (CCMS), an electronic case management database. CCMS can be used to monitor the status of cases, prepare orders and forms, prepare civil and criminal reports...
> The Online Case Information System, or OCIS, is a database...designed to provide broader public access to case information through the internet...To create the OCIS database, the Executive Secretary licenses database software which replicates information contained in the CCMS database and creates a new, second database. OCIS is an exact copy of the CCMS database. The copying process automatically occurs every 15 minutes."
>
> [Note, a government website, see (www.courts.state.va.us)]

7. The prosecutor Tara Mooney (TM hereafter) decided to maintain the certified charges case number with the GDC's order of no probable cause for PWI attached to the swearing document/warrant of SP, see [App. E-19 Pg.2, E-24,25 & E-28]. TM had the option to Nolle prosequie the SP and direct indict on PWI to get a new case number and dispose of the GDC orders as if they never happen. See **Va. Code §19.2-265.3**: ("Nolle prosequi shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown."); this is the procedure spelled out in the Va. Code. TM would have had to put in a "motion" and show "good cause". Moreover DH would of have been released. TM wanting to manipulate the detention of DH and OCIS/CCMS, [i.e. the OCIS/CCMS was going to state SP by her keeping the case number and keep interested parties out of the proceedings] decides to cut out the SCC by overruling the GDC's two orders writing back into CR12000857-00, PWI. TM presents CR12000857-00 to the Grand Jury by using the sworn document/warrant that has been lowered to SP, presenting only the front that stated PWI. Thus informing the Grand Jury that the GDC certified

a PWI charge, when the inverse happened. DH is indicted on PWI, see [App. E-12]. TM gains an unconstitutional advantage by spreading false information, committing fraud on the court.

8. The CCMS and OCIS software is no set up for TM to deviate from the approved procedure spelled out in the VA. Code. Due to TM actions the CCMS and OCIS both state DH was indicted on SP, see [App. E-28]. This pervaded through all stages misinforming the press, public, unknown witnesses, DH's family and DH by way of his family. Even if one called or went to the court house and asked the SCC clerks, who rely on the CCMS, they would look at it and inform you DH was only in danger of a SP charge. This was a seemingly insignificant charge to the parties that would have been interested, compared with them being informed of a PWI charge where DH was in danger of up to 40 years in prison. Friends, family and witnesses to the events knew DH had a valid prescription and felt the SP charge had no chance of surviving. Their conscious was shocked when they learned of the conviction where the OCIS, clerk and even circuit court judge told false information that DH was only in danger of SP, see [App. E-2 affidavits]. See also 10 continued custody orders after indictment all state SP, [App. E-26].

9. On 10-31-12 DH's defense attorney Ron Hur (RH hereafter) files a motion to quash or amend the indictment for it not being properly before the court, see [App. E-21 Pg.1 & E-29]. On 11-1-12 at Tr. 4-12, the SCC Judge Charles Sharp (JS hereafter) after hearing tenuous excuses contrary to law, that amounted to nothing more than hyperbole by TM. JS admonishes the prosecutor and states the proper procedure. See [App. F transcripts (11-1-12)]. Foot Note 1 (FN hereafter).

FN. 1: At Tr. 7 Ln. 8-10 (11-1-12) JS:

> "[b]ut why didn't you just bring a direct indictment and submit an order to nol-pros the certified charge."
> Tr. 11 Ln. 7-11 (11-1-12) JS;

> "I would not of done it this way. I would of have done has I suggested earlier, submitted a nol-pros order with respect to the file number so-and-so, and submitted a direct indictment for the charge the Commonwealth seeks to proceed on."

JS even recognized the disrespect "to the file number". This in turn disrespected the CCMS/OCIS violating the interested parties' fundamental constitutional rights to access correct court information, assemble, free speech and right to a public trial, which JS did not recognize. JS ultimately rules TM actions did not "violate substantial rights" in error, resulting in an absurdity cannon. JS does not rule on the motion to amend the indictment back to proper charge of SP listed in the swearing document associated with case number. The court has the power to amend by Va. **§19.2-231.** Had JS amended PWI back to SP, TM could motion to Nolle prosequi & direct indicted, or gone forward with the SP charge, eliminating all constitutional violations that manifested. DH is arraigned, the court does not read the indictment. DH assumed the charge is PWI.

10. After 11-1-12, friends and family talking to the SCC clerks and through the OCIS [App. E-2, 28], inform DH he was arraigned on SP. DH's continued custody order state SP [App. E-26]. This made it unclear to DH what the charge was. DH figures the Judge must have amended the charge down to SP consistent with the motion that was filed. RH also informed DH the speedy trial clock was running from the time of the preliminary hearing, because the preliminary hearing case number CR12000857-00 was being maintained for the probable cause of SP and no probable cause for PWI. See finding of fact order 5-29-18 of JS [App. E-59 Pg. Par.4]. RH withdraws and Andrew Cornick is appointed and one discussions held where he agrees about the start time for the speedy trial clock. Mr. Cornick withdraws without discussing the case again. DH is appointed Joe Brown (JB hereafter) and he also tells DH the speedy trial clock was running from the preliminary hearing, see [App. E-59 Pg.3 Par.1]. The only way this advice by 3 attorneys could be true is if DH was facing trial for SP, because for the clock to running from the preliminary hearing it would have to

be for the charge probable cause was found. That was SP, [App. E-19]. See the law regarding a finding of probable cause starts the speedy trial clock. **Va. Code §19.2-243:**

> "Where a **district court** has found that there is probable cause to believe that an adult has committed a felony, the accused, if he is held continuously in custody thereafter, shall be forever discharged from prosecution for such offense if no trial is commenced in the circuit court within five months from the date such probable cause was found by the district court"

The advice by the attorneys helped mislead DH about the charge he was facing. The CCMS /OCIS had a direct result in misleading defense attorneys and interested parties. JB and DH discussed plea deals and DH thinks he is in danger of only SP. JB tells DH of one year on a SP or no time if the charge is raised to PWI. See Tr. 199 Ln. 7-13 (4-24-18) where JB reads a letter I wrote him: "can you ask Tara to put offer on paper". JB could not get a plea deal agreed as no client is going to accept a PWI plea deal when he thinks his charge is SP. This demonstrates the spread of false information infiltrated the plea process. It is also evidenced that JB did not know his client was on trial for PWI in the transcripts where he remains silent when SP is read by the Judge. DH is set for trial, JS looking at the CCMS informs DH, see [App. F (2-20-12)] Tr. 5 Ln. 20, 21 Tr.6 Ln. 1-4 (2-20-13):

> "Mr. Herrington you are before the court charged with the felony possession of a schedule one or two controlled substance, you are aware of the charge?"
> DH: "Yes your honor."

This cleared up any remaining vacillation DH may have had. DH believed the charge was SP constant with the OCIS, attorneys advise about when the speedy trial clock was running, friends, family, ten continued custody orders, Judge and counsel remaining silent during judges' comments. It is unclear when JB figured out DH was in danger of PWI. We do know that on (2-20-12) JB thought it was SP as he remained silent, trial was continued to 19 days later. Moreover

DH agrees it is SP and the case in continued. The procedure now accepted state wide, by the ruling **Herrington v. Commonwealth** 291 Va. 181 (2016) tricks the clerks, Judge, attorneys, public, press, witness and defendant. It is noteworthy that subpoenaed witness Julie Trembley was giving the bailiff a tie while JS was stating DH was on trial for SP. Mrs. Tremblay is led astray by four instances. **(1).** JT knew the PWI was reduced to SP at the preliminary hearing. **(2).** The clerk informed her DH was on trial for SP, see [App. E-2 Pg. 1] **(3).** OCIS stated DH was indicted and arraigned on SP. **(4).** JT was present in the court giving the Bailiff a tie for DH when the court stated DH was on trial for SP, see [App. F] Tr. 5 Ln. 9-21 Tr. 6 (2-20-13) all of which she reported back to friends, family and unknown witnesses keeping them in the dark of the real charge from the persuasive falsities, much to her consternation now. See affidavits [App. E-2] for unknown witnesses that would have come to the trial and sentencing but for the spread of false information.

11. DH goes to trial on 3-11-12 and JB starts to inform DH they are there for PWI stating that the motion to quash was denied. DH asks about the motion to amend the indictment to SP. JB states the motion to amend was denied. DH was not prepared for this. Once the proceedings commenced JS again, looking at the CCMS, states SP, see [App. F] at Tr. 6 Ln.2-6 (3-11-12) JS:

> "You're set for trial today on a charge of possession of a schedule on or two"

JB shakes his head no at DH, and DH replies "No" and JB replies back "it's possession with intent". DH was not prepared for this charge. DH did not subpoena witness for this charge or help JB make a defense for such a charge.

12. DH tries to accept plea deals due to this surprise, see [App. F] Tr. 77 Ln. 1-8 (3-11-12) JS:

> "[a]re you declining any offered plea and exercising you're right to go forward on your not guilty plea today?" DH: "No."

JS states my "responses are unresponsive" and moves on to trial. DH is convicted for PWI.

13. No one showed up for trial, as they were all relying on the OCIS, or persons were using the OCIS and sharing that information, and trust DH is on trial for SP. Everyone who was a witness or could have provided evidence towards innocence, knew or where told DH had a valid prescription for the charge that was publicized, see [App. E-2 affidavits]. Moreover when DH is before the Jury for sentencing he has no character witnesses. The only light that is cast on DH is a bad one by the prosecution. DH is sentenced to 15 years and a $200.000 fine. It is noteworthy that when DH was arrested he was not a felon. DH is sentenced to 10 to 20 times the guidelines, see [App. 20, E-27]. Also in the controlling prescribed statutory section of the sentence order it stated a violation of **§18.2-250** [that is SP]. This further shows how incompatible the procedure is with the CCMS, or **§18.2-250** would not of ended up on the sentence order. DH is sentenced to 5 years past the statutory maximum. This happened because the SCC Clerk also relies on the CCMS to make orders like continued custody order and sentence orders. See **Daily Press v. Office of the Executive Secretary of the Supreme Court of Virginia** (Supra):

> "CCMS can be used to monitor the status of cases [i.e. how JS did], prepare orders and forms..." [i.e. how the SCC clerk did].

These manifested Constitutional violations and errors pervade thorough the whole process/trial revealing where the error occurred. The error occurred when TM maintained the SP case number/swearing document, and wrote back in what the GDC just struck. Then TM committed fraud on the Grand Jury and SCC. This was the intent of the licensed software from the Executive Secretary of the Supreme Court OF Virginia (ESOTSCOV hereafter), to provide information in compliance with Fundamental rights, and when those rights are violated the error can be found efficiently and corrected. It also acts as check on the prosecution along with **§19.2-265.3** Nolle Prosequi. **Herrington v. Comm.** (Supra) disposes with those checks and protections. Now all

prosecutors in Virginia can have a charge of assaults go before the GDC, get it certified, maintain that case number and indict on a higher charge like rape or attempted murder. All while hiding the higher charge from the public and press through the OCIS, or even if you contacted the clerk of the court, they would read you the certified charge in their own CCMS. Cf. DH had a factual ruing from the GDC judge of no probable cause for PWI attached to the swearing document/certified charge [App. E-19], and TM is able to present the higher charge through CR12000857-00. If that is ok, it stands to reason that the example of a certified charge without a judge's ruling of no probable cause attached to the certified charge, would make it ok to maintain the case number and raise the charge manipulating the CCMS/OCIS in violation of several Constitutional rights.

14. It is also noteworthy that the Supreme Court of Virginia (SCV hereafter) is aggressively implementing this procedure. If you see the new Va. Code Book in Lexis or Premise and search the Va. Code for **Herrington v. Comm.** (Supra) it will come up 7 times in "GENERAL CONSIDERATIONS" as advice on how a prosecutor can proceed. That is almost as good as statutory law that violates U.S. Constitutional rights by putting it in the Va. Code book.

15. Even after conviction and sentencing the OCIS and CCMS stated DH was convicted and sentenced to SP, see [App. E-28]. This prevented witness from coming forward with new evidence unknown during the trial and from family's help as they live on the west coast, see [App. E-2 & E-58]. No doubt this chilled their rights to access court information, assemble and free speech.

16. DH appeals this process before the Va. Court of appeals, see **Herrington v. Comm.** Va. App. LEXIS 371 (2014). They deny the appeal for reasons that were no sequitur to the claim.

17. DH appeals to the SCV and the chief staff attorney to the SCV who acts as the gate keeper to get an appeal, agrees the case worthy of the rare instances of a discretionally appeal seeing error. The SCV on 2-12-16 affirm the conviction. As a result they publish a ruling that put the procedure

into case law violating several fundamental rights of U.S. citizens. The ruling [see App. C] **Herrington v. Comm.** 291 Va. 181 (2016) fails to address in any form, the incompatibility of the procedure they adopted, and the ESOTSCOV's licensed software, i.e. the CCMS/OCIS. Nor does it recognize the **1st, 5th, 6th, 10th, & 14th Amendment U.S. Constitutional** violations. This failure means that even if one believed everything the SCV ruled was correct, abrogation of **Herrington** (Supra) would still be need to correct what they did not address. While my views of the SCV ruling of what they did address are antithetical. Even if one believed **Herrington** made correct statements of law, [If there was not an issue with the CCMS/OCIS] it would not be dispositive due to the fact the procedure now allowed is not compatible with the CCMS/OCIS and violates U.S. Constitutional rights. Barring that belief, **Herrington** (Supra) subverts Va. Laws.

18. The SCV's published ruling of what they did address are manifest absurdities. The facts are overwhelming and unchallenged. To state the reasons why briefly, see [App. C] **Herrington v. Comm.** (Supra) At Foote note 4 States:

> "[t]he indictment functioned independently of the warrant"

That is directly contradicted by the case number, CCMS, OCIS, Ten continued custody orders, and sentence order that had **§18.2-250** in the controlling section, see [App. E-12,19,24,25,26,27 & 28]. If the SCV Foote note was true, none of these problems or constitutional violations would have manifested. **Herrington** (Supra) at "B" states:

> "The indictment by the grand jury on the charge of possession with intent supplanted the district court's finding of probable cause on the charge of simple possession at the preliminary hearing."

Again this is directly contradicted by the record as just argued. Moreover to "supplant" means to "take the place by superior excellence of power or authority" Black's Law Dictionary. To say this happened, you are saying the prosecutor has "superior excellence of power or authority" over the

GDC judge, can change his orders, and then can have the Grand Jury re-litigate the Judge's determination and over turn them. Giving the grand jury "superior excellence of power or authority" over a Judge. This raises "separation of powers doctrine" issues and violations of the **U.S. Constitutional Amendment 10**. The SCV is also saying that the swearing document that is giving the SCC subject matter jurisdiction does not matter. TM maintained the case number to that swearing document/reduced warrant, now an order of the GDC. TM's actions thereby maintained that ultimate issue of fact, no probable cause for PWI. This raises issue by way of collateral Estoppel or Res Judicata, and violations of the **5th & 14th, Amendments to the U.S. Constitution.** The SCV also in **Herrington** (Supra) States:

> "Herrington's continued incarceration, therefore, was based on the indictment for possession with intent to sell or distribute, rather than the charge of simple possess {781 S.E.2d 565} certified by the district court."

There is no fair support of that in the record. The record in fact directly contradicts this, see [App. E-26] the 10 continued custody orders after indictment that reflect "Herrington's continued incarceration" was based of the SP. See also [App. E-28] through the whole process it states SP. These rulings are based off of preference or prejudice instead of reason or fact. **Herrington** (Supra) quotes case law where in all cases a "direct indictment" was obtained and the charge had its own distinct case number in the Circuit Court with separation form the GDC prior ruling. The SCV focus on what TM could do [direct indict] not what she did do. This was the factual predicate of the claim, that TM never sought a direct indictment. The SCC Judge Sharp admonished TM about this fact as argued **FN. 1**(Supra). The SCV reasoning is non sequitur to the predicate of the claim.

19. Finally the SCV in **Herrington** (Supra) quote **Moore v. Comm.** 237 S.E.2d 187, 192 (1977): [Note a case where a direct indictment was obtained with a separate case number.]

"(had the General Assembly intended to bar the bringing of an {781 S.E.2d 564} indictment after a finding of no probable cause by a district court, it could have easily so provided)"

The General Assembly of Virginia did in fact, bar the brining of an indictment in the manner the SCV has now approved in **Herrington** (Supra). It does not mention **Va. Code §19.2-218:**

> **"Preliminary hearing required for person arrested on charge of felony; waiver.** No person who is arrested on a charge of felony shall be denied a preliminary hearing upon the question of whether there is reasonable ground to believe that he committed the offense and **no indictment shall be returned** in a court of record against any such person prior to such hearing unless such hearing is waived in writing by the accused."

DH did not waive his preliminary hearing and the Code states "no indictment shall be returned". The legislative body could not have meant that you can have the preliminary hearing, maintain the case number to those findings, and a prosecutor can write back in what the GDC struck.

See also **Va. Code §19.2-217 When information filed; prosecution for felony to be by indictment or presentment; waiver; process to compel appearance of accused:**

> "An information may be filed by the attorney for the Commonwealth based upon **a complaint in writing verified by the oath of a competent witness**; but no person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found or made by a grand jury in a court of competent jurisdiction..."

This is what gives the court Subject Matter Jurisdiction by statute. The "writing verified by the oath of a competent witness". When a prosecutor obtains an indictment by way of a certified charge, they rely on the certified warrant/swearing document for this "writing" under oath. That was reduced to SP, see [App. E-19 Pg.2]. Deputy Volpe was not present before the grand jury to testify [hear audio]. They relied on his sworn statement verified under oath in the warrant. The problem is that was reduced to SP by a judge and no amount of want could of changed that.

See also **§19.2-190.1 Certification of ancillary misdemeanor offenses:**

> "Upon certification of any felony offense pursuant to this chapter, the court shall also certify any ancillary misdemeanor offense to the clerk of the circuit court provided that

the attorney for the Commonwealth and the accused consent to such certification. Any misdemeanor offense certified pursuant to this section shall proceed in the same manner as a misdemeanor appealed to circuit court pursuant to 16.1-136."

This code allows for the certified charge or an ancillary offense, i.e. a lessor included offense part of the modus operandi. TM did the inverse of that by maintaining the certified charge case number and seeking a higher charge that changed the cause and nature of the offense.

See also **§16.1-269.1 Trial in circuit court; preliminary hearing; direct indictment; remand.** This statute was created to help guide Juvenile Domestic Relations Court [a part of the GDC] deal with juveniles who have been charged as adults. This is because when the law that allowed them to treat a juvenile as an adult was created, the court was not used to dealings with adults for felonies. As a result the General Assembly lays out exactly what prosecutor can do in, **§16.1-269.1**

"**D.** Upon a finding of probable cause pursuant to a preliminary hearing... Court shall certify the charge, and all ancillary charges, to the grand jury...

If the court does not find probable cause...the Commonwealth may seek a direct indictment in the circuit court."

When a Juvenile is made Adult the treatment and method of bring an indictment must be the same.

See **Cook v. Comm.** 597 S.E. 2d 84 (2011):

" 'Treatment' is a much broader concept than "trial." "Treatment" is defined as "conduct or behavior towards another party." *Webster's Third New International Dictionary* 2435 (1993). By certifying Cook as an adult, then indicting him using a grand jury in the same manner that a grand jury would be used to indict an adult, the Commonwealth and its judicial system have engaged in conduct toward Cook that is the same conduct they would have engaged in if Cook had actually been an adult."

Sense the treatment must be exactly the same, it is clear and unambiguous that **§16.1-269.1 (D)** is spelling out how adults are treated. I.e. the commonwealth can keep the certified charge and ancillary charges, or if no probable cause is found for the charge and TM wish to seek the charge for which no probable cause was found, she must seek a direct indictment. TM again did none of

these, when any one of them would have been compatible with the CCMS/OCIS and stopped the U.S. Constitutional violation that manifest as stated (Supra). The General assembly did in fact "bar the bringing of an indictment" in certain ways so as to protect these substantive rights. **Herington** (Supra) disposes with these protections and make a short cut that is not in the Va. Code.

20. DH recognizes counsel's failure to present these U.S. Constitutional violations and jurisdictional issues in their bare bones arguments on direct appeal. DH files a Habeas Corpus before the SCV raising these issues. One of which that DH was sentenced outside the prescribed statutory range listed in the controlling section of the sentence order, see [App. E-27] as it listed **§18.2-250** and the OCIS stated SP [App. E-28]. The Assistant Attorney General Robert Anderson III, (RA hereafter) for the Respondent seeks the ear of the SCC in secret and ex parte has the contested part of the sentence order changed, about 4 years later, see [App. E-51]. Someone also informs the clerks of the error in the OCIS so they try fix that error. Due to the fact that the procedure is not compatible with CCMS/OCIS a new error manifest, i.e. the CCMS and OCIS is spreading false information to this date. Violating everyone **1st amendment** civil rights to accesses correct court information, assemble and free speech, if they wanted to say something to the court about DH conviction. This is because they are trying to protect the conviction, over U.S. Constitutional rights. The real error came from TM maintaining the case number/swearing document and writing back in what the GDC just struck and committing fraud on the Court/Grand Jury. Now sense they do not want to fix that, they change the CCMS/OCIS to state, on "8-29-12" a charge of "SELL/PROVIDE RESALE SCH I/II" Va. Code "**§18.2-248**" was "filed", see [App. E-50]. That is three lies to the press and public of what was "filed" and listed on "8-29-12".

(1) We know for a fact that it was a charge of "Simple Possession".

(2) We know for a fact that it was "**Va. Code § 18.2-250**".

(3) We know for a fact that there has never been an actual distribution charge as described, of "SELL/PROVIDE RESALE SCH I/II", this is worse conduct than filed or indicted.

See the documents that prove the CCMS/OCIS is spreading false information to this date. [App. E-19, 24, 25, & 28]. Even if one changed the CCMS/OCIS from "SELL/PROVIDE RESALE SCH I/II" to PWI, that would be a lie also, because the spurious indictment was not produced till 10-1-12. You cannot get around the fact that CR12000857-00 was created on "8-29-12" and it was for SP. If the court tried to change PWI was filed on 10-1-12 for CR12000857-00 again we know that is not true, the case # was created on "8-29-12". There is just no way to make the software work with these unlawful actions. The publicizing of the judicial records were and are false to this day, causing ongoing **U.S. Const.** violations of all U.S. citizens **1st Amendment civil rights**.

21. DH recognizing these subject matter jurisdictional and fundamental Constitutional errors, files a Motion to vacate the conviction to the SCC on 10-2-18. The court protects the conviction over constitutional rights by declaring "Scribner's error" by the Clerk, see [App. A]. DH noted an appeal, and timely filed his appeal to the SCV in proper proportion, pursuant to the rules of the SCV on 9-24-19, the Appeal was denied, see [App. B]. DH filed a timely motion for rehearing that was denied on 11-21-19, see [App. D]. DH seeks a petition for writ of certiorari before you now.

QUESTION ONE

22. Was Petitioner's conviction a result of a procedure, **§17.1-293.1** that violates **1st Amendment U.S. Constitutional Civil Rights** to access correct court information, assemble, and free speech of the defendant, public and press? Did the Supreme Court of Virginia create case law for all Virginia courts to do the same by publishing a ruling **Herrington v. Comm**. 291 Va. 181 (2016) affirming these same procedures without recognizing the incompatibility with the Executive Secretary Of The Supreme Court of Virginia licensed software, that caused the OCIS

to publicizes false information to all interested parties about what charge a defendant is indicted, arranged, tried convicted and sentenced, at each stage, on each date and beyond, when there is no other source to get the information?"

APPLICABLE LAW

23. U.S. Constitutional Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"

24. The Supreme Court Of The United States (SCOTUS hereafter) has recognized the U.S. Constitutional rights to access correct court information, assemble, and free speech. "[R]esolution of First Amendment public access claims in individual cases must be strongly influenced", see

FN. 2 **Richmond Newspapers, INC v. Va.** 488 U.S. 555 (1980):

> "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account... **[448 US 570]**...
> [t]he publicity of a judicial proceeding is a requirement of much broader bearing than its mere effect upon the quality of testimony... **[448 US 571]**...
> [t]he Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment... **[448 US 584]**...
> [t]hat the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch... **[448 US 585]**...
> Secrecy is profoundly inimical to this demonstrative purpose of the trial process... **[448 US 596]**...The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power," In re Oliver, 333 US, at 270, 92 L Ed 682, 68 S Ct 499-an abuse that, in many cases, would have ramifications beyond the impact upon the parties before the court. Indeed, '[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.'...A miscarriage of justice that imprisons an innocent accused [can result]... Facilitation of the trial factfinding process, **<*pg. 1003>** therefore, is of concern to the public as well as to the parties.**21** Publicizing trial proceedings aids accurate factfinding. 'Public trials come to the attention of key witnesses unknown **[448 US 597]** to the parties...

As previously noted, resolution of First Amendment public access claims in individual cases must be strongly influenced ...[J]udges bear responsibility for the vitally important task of construing and securing constitutional rights... **[448 US 598]**..."

See Also **Cross Creek Seed Inc. v. Gold leaf Seed Company** Dist. LEXIS 29975 (4th Cir. 2018):

"Columbus-America Discovery Grp. v. Atlantic Mut. Ins. Co., 203 F.3d 291, 303 (4th Cir. 2000) ("Publicity of such records, of course, is necessary in the long run so that the public can judge the product of the courts in a given case. It is hardly possible to come to a reasonable conclusion on that score without knowing the facts of the case."... **Any step that withdraws an element of the judicial process from public view** makes the ensuing decision look more like fiat, which requires compelling justification.'" United States v. Moussaoui, 65 F. App'x 881, 885 (4th Cir. 2003)"

25. SCOTUS also recognized the need for protections **U.S. Const. 1st Amendment** rights with regard to the relationship between the First Amendment and the modern internet in its first case. See **Packingham v. N.C.** 130 S. Ct. 1739 (2017):

"A fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more... Here, in one of the first cases the Court has taken to address the relationship between the First Amendment and the modern Internet, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium."

26. The SCV is exercising no caution. They are not making suggestions, they are publishing case law and injecting it into the **Va. Code** book that do away with these protections. This is especially true sense there is no other source to get the court information, then form the clerk and OCIS. Moreover senses SCC started using the OCIS they stopped reading indictments allowed in court and rely solely on the OCIS to inform the public of the charge by way **§17.1-240**. See [App. F] Tr.2 (10-1-12). See also **Howard v Commonwealth** 63 Va. App. 580 (2014):

"HOLDINGS: [1]-The trial court correctly held that the indictments against defendant were valid because the definitions of "present" and "announce" did not require an oral verbatim reading or a physical order book and the order entered by the trial judge reflected

the grand jury proceedings, and established that the written indictments against defendant were returned by the grand jury in the manner required by Va. Sup. Ct. R. 3A:5(c) and Va. Code Ann. 17.1-240: they were presented in open court, recorded in electronic format...
'Announce" means "to give public notice of; make known officially or publicly; deliver news of; proclaim . . . **to give evidence of especially without oral communication.**'"

The SCV freely admit they rely on the OCIS to inform the public and press. The OCIS spread false information to DH, unknown witnesses and several citizens in multiple states, [App. E-2 & E-58].

27. As argued Par. 2-27 (Supra) DH, Press and publics **1st Amendment U.S. Constitutional** rights were and are being violated to this date. The SCV has adopted and approved all Virginia Courts and prosecutors to use this procedure that violates several U.S. constitutional rights. It is constitutionally imperative that when one's life and liberty is at stake, the access to court information is true and correct. Moreover when a procedure is adopted that violates fundamental rights, whether inadvertently, or deliberate deception to take advantage of the populous and their total dependence on software [CCMS] and the internet [OCIS] through computers or cellphones to get the said information. The Courts are need to protect fundamental rights and prevent wide spread misinformation. Publicizing correct information to insure the public access, is essential, therefore, if the trail adjudication is to achieve the objective of maintaining public confidence on the administration of justice. §17.1-293.1 now violates several Constitutional rights.

QUESTION TWO

Dose this procedure violate the defendant's, **U.S. Constitutional ,6th &14th Amendment right** to a public trial, from the violation of press and publics **1st Amendment right**s to assemble, free speech and access to the courts, due to the pervasive reliance on software and the internet, when the Governments software and Online Case Information System publicizes false information about what charge a defendant is indicted, arraigned, tried, convicted and sentenced to, when the

interested parties get their information exclusively from these vast networks? Has constructive denial of a public trial occurred?

APPLICABLE LAW

28. U.S. Constitutional Amendment I, see Par. 23 (Supra).

29. U.S. Constitutional Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

30. U.S. Constitutional Amendment XIV:

> **"Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

31. Richmond Newspapers, INC v. Va. FN. 2 (Supra).

32. The SCOTUS has recognized Constitutional needs for "publicity", "publicizing trial proceedings" and that "all other checks are insufficient: in comparison of publicity". Moreover that "loss of key witnesses unknown to the parties" **[FN. 2]** can occur, as did here, see Affidavits [App. E-2]. While the courthouse doors were open, the "publicizing" of the seemingly insignificant charge of SP at every stage, the doors might as well have been closed. At the very least constructive denial of a public trial has occurred. In this case if you looked up the charge in the OCIS it stated SP. If you called or asked the clerk what the charge was, they would read the CCMS and tell you SP.

Moreover if anyone was present for trial on (2-20-13) they were all informed by the judge without objection that the charge was SP, see [App. F] Tr. 5 Ln. 9-21 Tr. 6. Even with all the complaints of access to the trials at Guantanamo Bay, the press, public, families. Defendants, unknown key witnesses, defense counsel, Judge and Clerk at all the various stages are given the decency of knowing the seriousness of the charge. When a state adopts a procedure that treats terrorist better than American citizens, and violates Fundamental Constitutional rights, creates a situation where this court's action is warranted. Had interested parties known DH was in danger of up to 40 years in prison they would of at the very least, come to view the proceedings. The overwhelming evidence is that many would have testified during the trial or at sentencing. [App. E-2 Affidavits]

33. When a Court is allowing the changing of a charge in a case number everyone should be told. Just as if you were changing the venue. The public, press and interested parties would need adequate notice. See **Vescuso v. Comm**. 5. Va. App. 59 (1987):

> "the trial court must adopt and implement adequate measures that will not unduly infringe upon the public trial guarantee and will assure freedom of access to the trial. Provision should be made for reasonable notice to the parties and general population who have a right to expect the trial to be held at the courthouse in accordance with the statute."

In DH's case "reasonable notice" was not given. It is even worse because false information was provided by multiple sources. This has parallels to changing the venue and not informing the public, or in fact lying to them about where the trial is to be held and then saying, the doors where open , the public and unknown witnesses could have come forward, families and character witness could have testified at sentencing, or the press could of reported on the trial. Now that **Herrington** (Supra) allows all Va. prosecutors to have a lower charge certified by the GDC, can keep that case number, indict on a higher charge, causing the interested parties to be informed of the lower charge,

and even defenses counsel, clerk and Judge at various stages. The SCV has turned their CCMS/OCIS in to a valuable weapon for prosecutors to keep the interested parties unaware of the charge, out of the proceedings, make a defendant counsel lose days preparing for the wrong charge, and affect the plea process, due to the total reliance of software [i.e. CCMS] and the internet [i.e. OCIS]. If this is allowed through **§17.1-293.1**, then the statute violates the constitution. DH, press, and public were supine denied their **1st, 6th & 14th Amendment U.S. Constitutional** rights to correct court information, assemble, free speech and a public trial.

QUESTION THREE

34. Does this procedure also hide, mislead or confuse the Jude, Clerk, Defendant and his counsel, about the charge one is to be tried on, so as to make a defendant unable to know the cause and nature of the charge, nor give adequate time to prepare a defense in violation of **5th, 6th & 14th Amendment U.S. Constitutional** rights, due to software that spreads false information in the Circuit Case Management System?

APPLICABLE LAW

34. U.S. Constitutional Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor be deprived of life, liberty, or property, without due process of law..."

35. U.S. Constitutional Amendment VI: See Par. 29 (Supra). **36. U.S. Constitutional Amendment XIV:** See Par. 30 (Supra). **37. Va. Article I, Section 8 Criminal Prosecution:**

> "That in criminal prosecution a man hath a right to demand the cause and nature of his accusation..."

38. The SCOTUS has recognized a defendant's constitutional right to be informed of the nature and cause of a charge, and that he must be given adequate time to decide a course of action to

prepare a defense. See **United States Supreme Court Reports Lawyers' Edition, Second Series BRIEFS AND APPEARANCES OF COUNSEL: Paul L. Gualt** 18 L Ed 2d 1522:

> "The first essential of due process, where an individual's liberty is in jeopardy, is that he be **clearly** informed of the nature of the charge against him so that he can prepare his defense. Further, he must be given adequate time and opportunity after notice of charges to decide on his course of action and to prepare that defense. Cole v Arkansas, 333 US 196...No principle of procedural due process is more clearly established than that notice of the specific charge and a chance to be heard in a trial of the issues raised by that charge are among the constitutional rights of every accused in a criminal case in all courts, state or federal. Notice, to be fully effective, must contain at least three ingredients: (1) what acts are complained of, (2) a statement of the statute or applicable rule of law violated by such acts, and (3) some indication of the consequences of a finding against the accused. Cole v Arkansas, 333 US 196, 92 L ed 644, 68 S Ct 514."

See Also **Williford v. U.S.** 469 U.S. 893, 83 L Ed 2d 206, 105 S Ct 270 (1984):

> "Speedy Trial Act, 18 USC 3161(c) (2) [18 USCS 3161(c) (2)]. That provision guarantees an adequate time to prepare a defense to the charge by preventing trial commencement until 30 days from the defendant's first appearance, unless the defendant consents in writing to an earlier date."

39. These concepts include the attorney consulting with the defendant and getting his input. We have no idea when defense counsel JB figured out that DH was on trial for PWI. We do know that on (2-20-13) JB did not know it was SP. This shown by JS stating the charge was SP, DH agreeing and JB remaining silent, see [App. F Tr. 5 Ln. 9-21 Tr. 6 (2-20-13)]. No doubt the CCMS, and Judge misled JB also. Trial was 19 days later on (3-11-13). DH was not "clearly informed" **Gualt** (Supra); till the day trial was held. The procedure now allowed by **Herrington** (Supra) allows the CCMS/OCIS speak a lie. When one is appointed or hire counsel or are given new counsel, when they go to look up the case in the CCMS/OCIS it will lie to them. How many days will defendants lose by these processes before an attorney finds out the real charge? We are not taking about lesser include offenses where attorneys would of prepared for that element of an offense. The raising the

charge to higher then listed, will change the nature and cause the charge. The procedure will hide these facts at various critical stages. The procedure in **Herrington** (Supra) hides, misleads, or confuses all the parties as argued Par. **2-39** (Supra) violating DH's **6th & 14th Amendment U.S. Constitutional rights**. I pray this Court agrees.

QUESTION FOUR

40. Does the published case law **Herrington v. Comm.** 291 Va. 181 (2016) violate the separations of powers doctrine of the **U.S. Constitution 10th & 14th Amendment**, by broadening the authority of prosecutors in Virginia giving them more power than a Judge? Can a prosecutor maintain a Judges certified charge/case number and write back in what the Judge just struck from the charge and present the struck portion as if certified by the Judge? Does a court have subject-matter jurisdiction through a fraudulently conveyed charge, from a procedure that violates fundamental rights? Do these actions raise issues of Collateral Estoppel or Res Judicata?

APPLICABLE LAW

41. U.S. Constitutional Amendment X:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U.S. Constitutional Amendment XIV: See Par 30 (Supra).

42. **Herrington** (Supra) broadened the authority of all prosecutors in Virginia. The ruling disregards The SCOTUS, Constitution of the **U.S. Article VI Clause 2**. The governmental action exceeds the authority that federalism defined when it published ruling and put it in the Va. Code Book that gives prosecutors more power than a Judge. See **Bond V. U.S.** 564 U.S. 211 (2011):

> "9. Federalism protects the liberty of all persons within a state by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life,

federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake...

12. Just as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism. That claim need not depend on the<*pg. 272> vicarious assertion of a state's constitutional interests, even if a state's constitutional interests are also implicated."

Giving the prosecutor more power than a Judge violates the **Va. Const. Art. III §1 Departments to be distinct:**

"The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time; provided, however, administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe. Provision may be made for judicial review of any finding, order, or judgment of such administrative agencies."

43. Subject matter Jurisdiction for PWI was never given to the SCC for TM to present it to the Grand Jury. See. **Va. Pilot Media v. Dow Jones & Co. INC,** 698 S.E. 2d 900 (2010):

"Subject matter jurisdiction exists in the court only when is has been granted by constitution or statute. West V.C.A. Const. Art. 3 §1..."

See also **U.S v. Cotton** 535 U.S. 625 (2002):

"Because subject-matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived, Thus defects require correction, regardless of whether the error was raised in district court... [535 U.S. 634]...the Fifth Amendment grand jury rights serve a vital function in providing as body for citizens that acts as a check on prosecutorial power, No doubt this it true..."

Several statutes that would have gave the SCC jurisdiction were subverted, as stated Par. **7** & **19** (Supra). Moreover TM maintaining CR12000857-00, that has the judge's two orders [App. E-19, 24,] for SP to be presented to the Grand Jury, and being the documents that made the SCC able to create CR12000857-00, provides no path for her to present PWI for a Grand Jury to re-litigate the judge's findings. See **Wright v. Comm.** 667 S.E.2d 787 (2008):

> "We hold that the circuit court is without subject matter jurisdiction to conduct...review to the district court's order...and therefore cannot reverse that court's order...Gilman v. Commonwealth, 275 Va. 22,...(2008). However, in criminal cases, General Assembly has not provided any authorization that would permit a circuit court to review a district court's discretionary decision ending prosecution."

TM did exactly this, she had the Grand Jury review CR12000857-00 [the GDC findings] and reverse the court's orders. **Herrington** (Supra) cuts out the statutes that give the court Subject matter jurisdiction and removes all checks and balances for prosecutors, giving them more power than a Judge. Procedures that give prosecutors and Grand Juries more power than a judge are ones that no court could lawfully adopt. See **Collins v. Shepherd** 649 S.E. 2d 627 (2007):

> "An order is void ab initio, rather than merely voidable, if the character of the judgment was not such as the court had the power to render, or because the mode of procedure employed by the court was such as it might not lawfully adopt. An order that is void ab initio is a complete nullity that may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner."

44. **Herrington** is invalid from the procedure abridging substantive rights, see **Va. §8.01-4:**

> "No rule of any such court shall be prescribed or enforced which is inconsistent with this statute or any other statutory provision, or the Rules of Supreme Court or contrary to the decided cases, or which has the effect of abridging substantive rights of persons before such court. Any rule of court which violates the provisions of this section shall be invalid.
>
> The courts may prescribe certain docket control procedures which shall not abridge the substantive rights of the parties nor deprive any party the opportunity to present its position as to the merits of a case solely due to the unfamiliarity of counsel of record with any such docket control procedures."

The "docket control procedure" allowed by **Herrington** (Supra) violate substantive rights and are contrary to Virginia's own laws and safeguards, essentially eliminating them.

45. TM also presented CR12000857-00 to the Grand Jury as if the GDC judge had certified the PWI when the exact opposite happened. This was fraud on the SCC and the Grand Jury. The

indictment should be void when procured by fraud. Anything obtained by fraud is spurious. The grand jury process is an important one. See **Carpenter v. U.S.** 201 L Ed 2d 507 (2018):

> "the Founders thought the grand jury so essential...that they provide in the fifth amendment that federal prosecution for serious crimes can only be instituted by 'presentment or indictment of a grand jury."

While the indictment in form is not jurisdictional, there still needs to be a valid instrument in which the court can proceed on. There should be a discussion on the substance in an indictment, and if there is no valid instrument, that should be jurisdictional. Unless being tried by indictment is waived and a presentment is obtained. Va. ascribes to **Epps v. Comm.** 293 Va. 403 (2017):

> "'a clear expression of the legislative policy that the requirement of an indictment in the prosecution for a felony may be waived, and hence is not jurisdictional.'...even if the indictment was not valid before the recording order was entered after the trial, the defect in the indictment would not have deprived the circuit court of jurisdiction to try Epps.

DH disagrees that just because you can waive something it is no jurisdiction. E.g. a person can waive their right to counsel and it is jurisdictional. See **Johnson v. Zerbst** 82 L. Ed 1461 (1938). The real problem with **Epps** (Supra) is where they state "even if the indictment was not valid" during the trial they do not lose jurisdiction. You must have a valid instrument with the substance of the charge lawfully in it. DH is not talking about an error in form. I agree that would not be jurisdictional. DH is talking about an error in the substance which has jurisdictional implications. The problem in DH's case is the only valid instrument that was before the SCC was the warrant/swearing document that was ordered to be presented to the grand jury by the judge, [App. E-19, 24]. TM should not be able to overrule the judge and fraud the court to overcome that.

46. The fact is TM maintained CR12000857-00 that was a certified charge with a factual ruling of no probable cause for PWI attached to the ruling of Probable cause for SP. It is misconduct for TM to maintain CR12000857-00 and write back in PWI when the Judge ruled there

was no probable cause in the warrant/swearing document that was used to create CR1200857-00 and is being maintained. See **Garcetti v. Ceballos** 547 U.S. 410 (2006):

> "Exposing governmental inefficiency and misconduct is a matter of considerable significance... 'A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause'"

See also **Rules of Supreme Court of Virginia Part Six Integration of the State Bar Section II Virginia Rules of Professional Conduct:**

> **"Rule: 3.8. Additional Responsibilities of a prosecutor.** A lawyer engaged in a prosecutorial function shall: (a) not file or maintain a charge the prosecutor knows is not supported by probable cause."

TM did exactly that. She maintained CR12000857-00 that she knows is not supported by probable cause by two orders of a judge. By TM maintaining CR12000857-00, she maintained the judge's ultimate findings of no probable cause for PWI. This is as good as stipulating to that ultimate finding. TM is barred by way of Res Judicata or Collateral estoppel. See **JUAN BRAVO-FERNANDEZ AND MARTINEZ-MALDONADO *vs.* UNITED STATES** 196 L Ed 2d 242 (2016):

> "Frank v. Mangum, 237 U.S. 309, 334, 35 S. Ct. 582, 59 L. Ed. 969 (1915) (The principle that 'a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties" applies to ``the decisions of criminal courts.')"

As argued Par. 2-46 the abrogation of **Herington** (Supra) is needed as it allows such massive deviation from the normal course of judicial proceedings, violating several constitutional rights.

QUESTON FIVE

47. Was the Petitioner's **U.S. Constitutional 6th & 14th Amendment rights** to have counsel and be present violated, where the Judge issued a new sentences order ex parte 4 years later, when the petitioner was sentenced to 5 years past the statutory maximum listed in the controlling section of the sentence order? Can a court rule "Scribner's" error to a contested matter ex parte when the error is a direct result of fundamental rights being violated as stated (Supra)?

APPLICABLE LAW

48. U.S. Constitutional Amendment VI, See Par. 29 (Supra).

49. U.S. Constitutional Amendment XIV, See Par. 30 (Supra)

50. SCOTUS recognized a defendant's right to be present in **KY v. Stincer** 482 US 730 (1987):

> "due process requires that the defendant be allowed to be present to the extent that a fair and just hearing would be thwarted by his absence; thus, a defendant is guaranteed the right to be present at any stage of a criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."

There should be no doubt that had DH been able to argue the constitutional violations [stated Supra] and reasons **§18.2-250** ended up on the sentence order at new sentencing hearing, the result of those proceedings would have been different. See **Gramfuller v. Comm.** 290 Va. 525 (2015):

> "held that a defendant convicted of felony has right to be present personally at new sentencing hearing at which his or her sentence is modified so as not to exceed the maximum sentence provided by law... A sentence imposed in violation of a prescribed statutory range of punishment is void ab initio because the character of the judgment was not such as the court had the power to render. Thus, a criminal defendant in that situation is entitled to a new sentencing hearing."

It is undisputed that the "prescribed statutory rage of punishment" in the controlling section of the sentence order for **§18.2-250** was 1 to 10 years, see [App. E-27], DH was sentenced to 15 years. Now the SCC want to claim "scribers error" on the part of the clerk, see [App. A]. This was not

the fault of the clerk, but the incompatibility of the CCMS and actions of TM, as argued (Supra). The SCC clerk relied on the CCMS and the documents in the file that demonstrably stated DH was on trial for **§18.2-250**. See [App. E-19, 24, 25, 26, & 28]. In situations like these the judge cannot declare "Scribner's error", see **Williamsburg v. Philip Richardson Inc.** 270 Va. 566 (2005):

> "Scrivener's error are those which are 'demonstrably contradicted by all other documents.' Id. (citing Zhou v. Zhou, 38 Va. App. 126... (2002)"

In this situation "all other documents" do not reflect the statutory controlling section of the sentence order was wrong. To the contrary the overwhelming majority of the documents reflect **§18.2-250** was the correct charge DH should have been tried on for CR12000857-00. The real error was not that of the clerk, but that of TM writing back in to CR12000857-00 what the judge had just struck and fraudulently conveying it to the court and Grand Jury. This gives rise to the inevitable controversy. DH should have had an opportunity at a new sentencing hearing with counsel to litigate these problems with the CCMS/OCIS, laws/statutes and constitutional violations that manifested. The fact that §**18.2-250** ended up on the sentence order is more evidence the indictment was never properly before the court and how incompatible the procedure is with the CCMS/OCIS. If the error was not substantial, the SCC would not have issued a new sentence order 4 years later.

51. The court only learned of the void sentence order from DH contesting it in his Habeas. The Respondent, Assistant A.G. Robert Anderson III, responding to DH contesting the original sentence order gained the ear of the SCC in secret. Respondent gets a new sentence order ex parte changing the part he wants changed to moot DH's habeas claim. The SCC never sent or informed DH of the new sentence order. DH received a copy of the new sentence order in Respondent's supplemental motion to dismiss DH's Habeas. This was past the 30 days DH had to note an appeal.

This purloined DH's opportunities to litigate the fundamental violation, as argued Par. 2-51 (Supra). None of these actions "contribute to fairness of procedure" **KY v. Stincer** (Supra) nor do they increase the value of the judicial proceedings. **Carroll v. Princes Anne** 393 U.S. 175 (1968):

> "The value of a judicial proceeding...is substantially diluted where the process is ex parte because the court does not have available the fundamental instrument of judicial judgement: an adversary proceeding in which both may participate."

Just the fact alone that the SCC is sought out in response to a habeas, shows that there is obviously a contested matter on party wishes to have changed. When there is a contested matter, there is a requirement that both parties be heard. See **Lewis v. Flynt** 439 U.S. 438, 456 (1979):

> "[r]equirement that a judge's action in a contested matter be predicated on a permissible reason inevitably gives rise to a procedural requirement that the affected litigants have some opportunity to reason with the judge."

Moreover the court can only correct clerical errors past the 21 day deadline when "all other documents in the record" support there is an error, and there is no "contested matters". See **D'Alessandro v. Commonwealth** 423 S.E.2d 199, 202 (1992):

> "Alleged error in sentence...of 15 years, concerned the trail judges reasoning about contested matter and was not subject to rule allowing correction of clerical mistake...**§8.01-428**."

See also **Patterson v. Fauquier County** 1232-00-4, Record 2001 LEXIS 144 (2001):

> "Va. Code Ann **§8.01-428 (B)** has no application to errors and conclusions of the court about contested matters. Similarly, a correction that would require reacquisition by the trial court of jurisdiction over the underlying matter is barred by **Va. Sup. Ct. Rule 1:1**."

The power to declare clerical error is limited and can only be used to make the record speak the truth. See **Ziats v. Commonwealth** 42 Va. App. 133 (2003): "[t]he courts authority extends not further than the power to make the record speak the truth". The action of changing the sentence order did not make the record speak the truth. No in fact it is speaking a lie to this day, as argued

Par. **20** (Supra). The record or CCMS/OCIS will never speak the truth until CR12000857-00 states "SP" filed on "8-29-12" constant with the facts in the record, see [App. E-19, 24, 25, 26 &28].

52. The new sentence order is void for all the reasons stated (Supra). One main and glaring issue is the denial of DH's right to have counsel and be present at a critical stage of the proceedings. When SCC issued a new sentence order 4 years later without defense counsel, the jurisdiction of the court was lost, rendering the sentence order void. **Johnson v. Zerbst** 304 U.S. 458 (1938):

> "If the accused...is not represented by counsel and has not competently and intelligently waived his constitutional rights, the sixth amendment stands as a jurisdictional bar to...sentence...The judgment...pronounced by a court without jurisdiction is void"

DH's **U.S. Constitutional 6th Amendment** right to counsel and **14th Amendment** right to due process have been violated. The procedures adopted by Virginia are not routine, transparent, according to law or the U.S. Constitution. I pray this court agrees.

REASONS FOR GRANTING TH PETITION

(1) The case is an important one for the country, as it involves constitutional rights, computer based software and the internet. Reliance on the modern internet and software has become ubiquitous pervading the world. Screen time has exceeded TV time. When a prosecutor deliberately takes advantage of this to spread false information to the public, press and interested parties as argued (Supra), and the SCV publishes a ruling allowing it, placing such a procedure in their Va. Code book, willfully or inadvertently, this court's action would be warranted. Note this affected DH family who relied on the internet in 3 states, WA, AZ, & VA. A unique time in the U.S. is upon us that crates the need for clear division between what can be trusted on the internet and what should be viewed with skepticism. With what happened in the 2016 election, and the warnings of what is happening now regarding the 2020 election, dealing with the spread of false information on the internet though these vast networks. The need for SCOTUS to be involved in

protecting Constitutional rights and confidence in government websites has never been higher. We are in a day and age where anyone can publicize anything and it looks professional and reputable, as if a legitimate source published it. Worse yet, people almost exclusively rely on the internet to get their information. The spread of false information on the internet comes in various forms, catfishing, false ads, spoofed, and now you can put anyone's face on a video and post it, a "deep fake", just to name a few. While the public has been alerted to some of these nefarious methods, there should never be any parallels between government websites and the spread of false information. When one logs on a government website it is presumed to be trustworthy and reliable. It is of the up-most importance in this day and age that the public never need question the information on a government website and their confidence remain high. When different situations arise that would cause confidence to waiver on such a heavy relied upon medium, and there is no other source to get the information. SCOTUS intervention with these situation are warranted to protect U.S. Constitutional rights, prevent public erosion of the judicial process and highly used medium, or to rehabilitate confidence for those who may have been harmed, see [App. E-2].

(2) The impact that may happen in different situations arising from the spread of false information on a government website should be weighed by this court. Was there other sources to obtain the information, was the false information provided for a large populous, the likelihood the misinformation is to be believed, the strength of the impact the misinformation could have on the individual(s), public or press, any constitutional implications that may occur, amount of trickery and intent. Also is there a danger of the procedure seriously affecting the public's view on the fairness, integrity or public reputation of the judicial proceedings for a large populous.

(3) For rulings to keep up with the times and technology. SCOTUS recognized this need and that the internet may have other implication of **U.S. Constitutional 1st Amendment** rights where

SCOTUS may need to take address in **Packingham v. North Carolina** 137 S. Ct 1739 (2017):

> "A fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more...This is one of the first this court has taken to address the relationship between the **First Amendment** and the modern Internet. As a result, the Curt must exercise extreme caution before suggesting that **First Amendment** provides scant protections for access to vast networks."

First Amendment issue regarding the internet have garnered substantial attention as of late. Whether that is if a few large providers should be stating what your content can be or should be, or when a state such as the SCV crates a huge plat form [CCMS/OCIS] where counties can control what the public sees. The SCV has embraced this manipulation of this platform by the prosecutor that violates several fundamental constitutional rights. SCOTUS has repeatedly recognized that the meaning of a provision of the Bill of Rights remains constant while the fixed legal content is applied to new technologies. See **Kyllo v. U.S.** 533 U.S. 27, 34, (2001); see also **Brown v. Entm't Merch. Ass'n** 564 U.S. 786, 790, (2011); **Carpenter v. U.S.** 138 S. Ct. 2206, 2271, (2018).

(4) To stop the spread of false information over heavily relied upon mediums, i.e. government software based systems and websites, by abrogating **Herrington v. Commonwealth** 291 Va. 181 (2016) and removing it from the 7 places in the Va. Code book "GENERAL CONSIDERATION" where they quote it. This would stop the promoting to all Va. Courts and prosecutors to proceed in a manner that violates several Fundamental Constitutional rights.

(5) To protect **1st Amendment U.S. Constitutional rights** to access correct court information, assemble and free speech. To expose and correct government inefficiency or misconduct

(6) To protect **1st, 6th and 14th Amendment U.S. Constitutional** rights form any procedure that hides, misinforms or confuses the defendant, his attorney, judge, clerk of the court, press and public of the charge one is indicted, arraigned, tried, convicted and sentenced on.

(7) To answer the difficult question of: If the court publicizes a seemingly insignificant lesser charge, in a heavily relied upon medium, the CCMS & OCIS, can a defendant, press, and public be constructively denied their **1st 6th & 14th Amendment** right to assemble, free speech, trial open to the public, access to the courts and for unknown key witnesses to come forward.

(8) A new unique situation is upon the U.S. where 99% of courts have moved away from physical order books. They now rely on licensed software and the internet to manage, publicize charges and trials. Thus creating the need for guidance from this highest court and the Justices where there are fundamental U.S. Constitutional implication being ignored and violated. To stop future or prospective violations of U.S. Constitutional rights and to enjoin judges and prosecutors from pursuing a course of unlawful conduct. This court could prevent so called state patch work remedies to issue that effect the entire country.

(9) To stop any approved procedure, rulings or case law that broadens a prosecutor's or Grand Jury's authority over a Judge. To protect **10th Amendment U.S. Constitutional** rights and separation of powers doctrine and **14th Amendment** due process rights.

(10) To answer the question, can a court gain subject matter jurisdiction through a fraudulently conveyed charge where the prosecutor has maintained the judges factual rulings of no probable cause for the charge sought and case number? Does this violate **14th Amendment U.S. Constitutional** due process rights? To have some discussion regarding the form of an indictment, being none jurisdiction, and the substance of one being jurisdictional, i.e. that there has to be some valid instrument. A constitutional perquisite to gain jurisdiction to put a charge into a class of cases in which the court can hear the case. Does Collateral Estoppel or Res Judicata apply here?

(11) To answer the questions, do defendants have a constitutional right to be personally present with counsel at a new sentencing hearing, when the existing sentence order is void due to being

outside the prescribed statutory maximum listed in the sentence order? Can a court declare "Scribner's error", ex parte to a contested matter, where several constitutional claims are at issue?

(12) The case falls within the parameters on the Rules of **SCOTUS Rule 10 (a):**

> "...state court...has far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power,"

No doubt **Herrington v. Comm.** (Supra) & **§17.1-293.1** as used, falls under **Rule 10 (a)** and is "repugnant to the constitution" [**28 USCS § 1257 (3)** see Page 3 herein] as it promotes, or allows the spread of false information on a government website. With the websites sophistication, standing, and prestige, to be allowed by all Va. Courts, to continue spreading false information will cause deep polarization in the minds of the public when they look at their screens. **§17.1-293.1** needs safeguards written into the statute so the CCMS/OCIS is not abused this way.

CONCLUSION

For the reasons presented in this petition, DH does pray that you find part, one, or more questions presented in the best interest of the U.S. to be answered. A full briefing on the matter with *Amicus Curiae* briefs regarding these national concerns about the constitutional rights, in relation to software and the internet, DH requests to be allowed. The Petition for writ of certiorari should be granted.

I Donald A. Herrington hereby do declare under penalty of perjury that all the statements and exhibits are true to the best of my knowledge and understanding of the facts.

Respectfully submitted,

Donald A. Herrington 1-27-2020