

RECORD NUMBER:

United States Supreme Court

JOSEPH LOUIS PADUANO,
Petitioner,

- V. -

COMMONWEALTH OF VIRGINIA,
Respondent

**PETITION FOR CERTIORARI FROM JUDGMENT
OF THE VIRGINIA SUPREME COURT**

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

Questions Presented for Review

- A. Should *Hurtado v. California* be overruled?
- B. Does the right to a grand jury indictment conferred by the Fifth Amendment to the United States Constitution apply to state indictments via the Fourteenth Amendment?
- C. Does a defective grand jury indictment in a state court criminal case deprive the state court of jurisdiction in such a case?

List of All Parties to the Proceeding

All parties are as listed in the caption hereof. Joseph Louis Paduano is an individual for which no corporate disclosure statement is required by Rule 29.6.

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I. Citations of the Official and Unofficial Reports of the Opinions and Orders Entered in this Case by Courts

On December 16, 2019, the Circuit Court for the County of Pittsylvania entered its Order denying a Motion to Vacate (the “Motion”) filed by Joseph Louis Paduano (“Paduano”). The Order was not entered into an official report. Paduano timely appealed the denial of the Motion to the Virginia Court of Appeals, which subsequently transferred the case to the Virginia Supreme Court.

The Virginia Supreme Court entered its Order finally dismissing the Petition for Appeal on November 17, 2020. The Order was not entered into an official report.

II. Statement of the Basis of Appellate Jurisdiction

The Virginia Supreme Court entered its Judgment on November 17, 2020.

This Court has appellate jurisdiction in this appeal pursuant to 28 U.S.C. § 1257.

III. Constitutional Provisions and Statutes Involved in the Case

The Fifth Amendment and the Fourteenth Amendments to the United States Constitution are involved in this case.

Paduano's indictments were defective pursuant to Va. Code §§ 17.1-123(A) and 17.1-124 and 17.1-240, which are involved in this case, which implicate the Fifth Amendment and the Fourteenth Amendments to the United States Constitution.

Paduano was convicted pursuant to Va. Code § 18.2-63(A), VA Code §18.2-308.2(A), which are involved in this case.

IV. Statement of the Case

A. Procedural Posture

Unconfirmed records allege that a grand jury indicted Paduano in the Pittsylvania County Circuit Court (the “Circuit Court”) on one count of sexual intercourse with a child in violation of VA Code §18.2-63 and one count of unlawful and intentional possession of a firearm in violation of VA Code §18.2-308.2(A). In addition, to these two charges, Paduano was allegedly indicted for one count animate object sexual penetration in violation of VA Code §18.2-370(A), and one count felony sexual abuse in violation of VA Code §18.2-370.1. No court order signed by any Circuit Court judge was ever entered confirming that a grand jury had been convened or acted. Accordingly, Paduano was never indicted by a grand jury such that the Circuit Court had

jurisdiction over Paduano.

Paduano appeared in the Circuit Court and entered not guilty pleas to the charges. Paduano was tried by a jury and found guilty of two counts of carnal knowledge, second or subsequent felony sexual assault, in violation of Code § 18.2-65(A), and one count of possession of a firearm after having been convicted of a violent felony, in violation of Code § 18.2-308.2. On April 28, 2014, Paduano was sentenced to a total of thirty years for these convictions with twenty-two years suspended.

Paduano appealed his convictions. On December 30, 2014, the Virginia Court of Appeals affirmed Paduano's convictions. On February 5, 2016, the Supreme Court of Virginia issued a final refusal of Paduano's appeal.

The Virginia Supreme Court denied Paduano's Petition for Writ of Habeas Corpus on August 16,

2017.

The U.S. District Court for the Western District of Virginia denied Paduano's Petition for Writ of Habeas Corpus on September 27, 2018, also on procedural grounds.

On or about November 27, 2019, Paduano moved to vacate the judgments against him because he was never indicted, which deprived the Circuit Court of jurisdiction.

On or about December 16, 2019, the Circuit Court denied Paduano's motion to vacate.

The Virginia Supreme Court denied Paduano's appeal of the Circuit Court decision on November 17, 2020.

This Petition for Writ of Certiorari is filed seeking reversal of the decisions of the Circuit Court and the Virginia Supreme Court.

B. Statement of Facts

Unconfirmed records in the files of the Circuit Court allege that a grand jury indicted Paduano on one count of sexual intercourse with a child in violation of VA Code §18.2-63 and one count of unlawful and intentional possession of a firearm in violation of VA Code §18.2-308.2(A). In addition, to these two charges, Paduano was allegedly indicted for one count animate object sexual penetration in violation of VA Code §18.2-370(A), and one count felony sexual abuse in violation of VA Code §18.2-370.1. No court order signed by the Circuit Court judge was ever entered regarding the grand jury that indicates that any such proceeding ever took place or that Paduano was ever indicted.

V. Argument

A. Discussion of Questions Presented

1. Should *Hurtado v. California* be overruled?

Hurtado was decided in 1884 while this Court was still adhering to an unconstitutional failure to apply the Bill of Rights to the States.

The Bill of Rights originally applied only to the Federal Government, not to the States, see, e.g., *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833).

However, constitutional Amendments adopted in the Civil War's aftermath fundamentally altered the federal system. Four years after the adoption of the Fourteenth Amendment, this Court held in the *Slaughter-House Cases*, that the Privileges or Immunities Clause protects only those rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws.” *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36,

79 (1872). However, the *Slaughter-House Cases* incorrectly held that the fundamental rights predating the creation of the Federal Government were not protected by the Clause. *Id.*, at 76. Under that incorrect narrow reading, the Court held that the Privileges or Immunities Clause of the Fourteenth Amendment protected only very limited rights. *Id.*, at 79-80, 83 U.S. 36, 21 L. Ed. 394.

The *Hurtado* opinion implicitly relied upon the legally incorrect principles of the *Slaughter-House Cases* and did not analyze whether the grand jury right of the Fifth Amendment applied to the states under the Fourteenth Amendment.

Instead, the *Hurtado* Court merely performed a flawed analysis that focused on whether practices adopted in California for criminal prosecution satisfied due process provisions of the Fourteenth Amendment.

The flawed analysis in *Hurtado*, contrary to seminal binding precedent, rendered the grand jury right of the Fifth Amendment meaningless and without effect to the citizens of the States.

“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.).

In the *Hurtado* opinion, the due process right of the Fourteenth Amendment was alleged to completely subsume the Fifth Amendment right to a grand jury and render that grand jury right to be without effect.

The *Hurtado* opinion was wrong when it was rendered and it continues to be wrong today. As discussed in additional detail, *infra*, all rights of the Bill of Rights were explicitly applied to the states via the Fourteenth Amendment notwithstanding this

Court's ongoing reluctance to acknowledge that premise.

This Court's continued reluctance to acknowledge that each and every right of the Bill of Rights applies to the states via the Fourteenth Amendment exceeds the constitutional authority of this Court and should be ended.

To be clear, the United States Supreme Court does not have the authority or ability to unilaterally amend the United States Constitution by ignoring the grand jury right of the Fifth Amendment. Instead, the authority of the United States Supreme Court is governed by the United States Constitution and should explicitly acknowledge that the grand jury right of the Fifth Amendment applies to the states via the Fourteenth Amendment.

Accordingly, for reasons stated throughout this Petition, Paduano requests that this Court

explicitly overrule *Hurtado* and acknowledge that *Hurtado* was incorrectly decided.

**2. Does the right to a grand jury
indictment conferred by the Fifth
Amendment to the United States
Constitution apply to state
indictments 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;

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. Given changes in constitutional law that have occurred since *Hurtado v. California*, 110 U.S. 516, 519 (1884) was decided over 130 years ago, it is time to overrule that opinion.

It should not be the case that state courts, such as those of Virginia in this case, are allowed to ignore the grand jury rights of defendants conferred by the Fifth Amendment and then claim that defendants effectively have no recourse. It is certainly possible to hold that states can have indictment methods that have equivalent protections to the federal grand jury system, the grand jury system of Virginia, and the grand jury systems of other states. What should not be allowed is for a fundamental constitutional right, such as the Fifth Amendment right to a grand jury indictment be violated with impunity, and state courts then to be

able to claim that right to be “merely procedural” and subject to waiver.

The Circuit Court and the Virginia Supreme Court each implicitly denied Paduano’s motion to vacate based upon a case decided over 70 years ago by the Virginia Supreme Court. In that case, the Virginia Supreme Court made an erroneous determination that any defective grand jury indictment was a waivable procedural matter and was not jurisdictional. *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 false premise that the Fifth Amendment to the Federal Constitution did not apply to Virginia under the equal protection clause of the Fourteenth Amendment. However, since *Hanson* was decided, this Honorable 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); this Honorable 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 this 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, this Honorable 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*, this 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.

Paduano avers that Justice Black's reasoning is substantively correct and the Bill of Rights is not an *ala carte* menu for courts to pick and choose from. No court, including this Honorable Court, should purport to have authority to pick and choose which rights of the Bill of Rights to enforce and which not to enforce. Such authority is solely within the province of the people through their states to amend the Constitution if they believe that such is warranted. Paduano 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 by this Court should be

incorporated as jurisprudence moves forward in accordance with Justice Black's reasoning.

Paduano 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 any and all indictment procedures established under California law as Virginia courts did pursuant to Virginia law in Paduano's case. The due process requirement needed to be met under *Hurtado* and to the extent that this Court does not revisit *Hurtado*, this Court should still hold that the right to a grand jury indictment or its equivalent is jurisdictional rather than procedural. Virginia still must meet the due process requirement. That requirement has simply not been met in Paduano's case.

If this Honorable Court wishes to continue to follow "selective incorporation", Paduano 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. *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.*

Exhibit H at § 5. 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 this

Honorable 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.

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.

3. The Grand Jury Right Should Apply to the States Under the Fourteenth Amendment Privileges or Immunities Clause

Moreover, Section 1 of the Fourteenth Amendment requiring that the privileges or immunities of the Fifth Amendment should apply to Virginia in Paduano' case. The argument for applicability of the privileges or 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, 5 U.S. 137, 174.

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 Paduano’ 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).

Paduano avers that there is simply no valid reason why Virginia should be allowed to violate Paduano' 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 (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 or 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, Paduano 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 Paduano 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 Paduano without proper indictments. There was no proper judge signed order indicting Paduano.

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 Paduano' right to a presentment or indictment from a Grand Jury and then for Paduano 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.

**4. Does a defective grand jury
indictment in a state court criminal
case deprive the state court of
jurisdiction in such a case?**

Paduano 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 Paduano in this case, the defendant in *Simmons* was convicted based upon a grand jury document, just as in Paduano's 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 Paduano 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, this Honorable 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.

Paduano 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 this Honorable 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 although it was not properly entered in open court. *Id.* In Paduano's case, no order of any form was ever entered.

In the case at bar, Paduano 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 Paduano

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 Paduano, is a fatal defect in the indictment process. Paduano 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, Paduano requests that this Honorable Court grant this Petition and rule that the failure to indict Paduano are fatal defects that render his indictments nullities and his convictions void for lack of jurisdiction.

C. Paduano's further defective grand jury
indictment deprived this Court of
jurisdiction as to the alleged violation
of Va. Code §18.2-63 (A)

Jurisdiction is the power to adjudicate a case
upon the merits and dispose of it as justice may
require. *Shelton v. Sydnor*, 126 Va. 625, 629, 102
S.E. 83, 85 (1920). This necessarily involves the
idea that there must be jurisdiction of the subject-
matter of the litigation, and also over the parties
thereto. If either is wanting, the resulting judgment
is void. *Evans v. Smith-Wythe Airport Comm'n*, 255
Va. 69 (1998).

“It is essential to the validity of a judgment
or decree, that the court rendering it shall have
jurisdiction of both the subject-matter and parties.
But this is not all, for both of these essentials may
exist and still the judgment or decree may be void,

because 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." *Id.*, (quoting, *Anthony v. Kasey*, 83 Va. 338, 340, 5 S.E. 176, 177 (1887)).

Paduano's 5th, 6th and 14th Constitutional Rights were violated denying him due process and the right to be informed of the nature and cause of the accusations against him.

Virginia statutory law recognizes that a judgment in any criminal case is subject to being arrested or reversed upon if it is so defective as to be in violation of the Constitution. Va. Code § 19.2-227.

"In order for an indictment to be "so defective as to be in violation of the constitution" so that a final judgment in a criminal case will be declared

void, the defect must have deprived the defendant of the ability to defend against the charge, this depriving him of due process as required by the 6th and 14th Amendments.” *Reed v. Commonwealth*, 281 Va. 471, 481, 706 S.E. 2d 854, 860 (2011).

Va. Code § 18.2-63 (A) states, “If any person carnally knows, *without the use of force*, a child thirteen years of age or older but under fifteen years of age, such person shall be guilty of a Class 4 felony.”

“The function of an indictment is to give an accused notice of the nature and character of accusations against him so that he can prepare an adequate defense.” *Reed*, 281 Va. at 481, 706 S.E. 2d at 860.

Paduano has identified a legally required matter that was left out of the indictments that resulted in depriving him of a substantial right and

subjected him to the danger of being tried upon a charge for which he was not properly indicted.

In the language of Code of Virginia §18.2-63

(A) “...*without the use of force*...” is an essential element of the offense that would adequately apprise Paduano with nature and cause of the accusation. The indictment(s) must contain every essential element of the crime alleged. “The Fifth Amendment guarantees that an individual cannot be prosecuted for a capital or infamous offense except on presentment or indictment of a Grand Jury.” U.S. Constitution Amendment V. In addition, the Sixth Amendment requires that a defendant must “be informed of the nature and cause of the accusation” against him. U.S. Constitution Amendment VI. The criteria against which the sufficiency of an indictment is judged reflects these guarantees. See *Russell v. United*

States, 369 U.S. 749, 760-64, 8 L. Ed. 2d 240 (1962).

“An indictment must contain the elements of the offense charged, fairly inform a defendant of the charge, and enable the defendant to plead double jeopardy as a defense in a future prosecution for the same offense.” *United States v. Hooker*, 841 F. 2d 1225, 1234 (4th Cir. 1988) (en banc) (citing, *Hamling v. United States*, 418 U.S. 87, 117, 41 L. Ed. 2d 590 (1974); *Russell v. United States*, 369 U.S. at 763-64.

By leaving out or not meeting the language of “*without the use of force*” from the indictment(s), the indictment(s) did not fairly inform Paduano of the charge. “*Without the use of force*” is an element of the crime or alleged offense that should have been proven at trial in order to convict under the Code of Virginia §18.2-63 (A).

“As long as an indictment sufficiently recites the elements, the Commonwealth is not

required to include all evidence upon which it plans to rely to prove a particular offense.” *Sims v. Commonwealth*, 28 Va. App. 611, 619-620 (1998). However, in the subject cases, Paduano’s lawyer requested a Bill of Particulars which request was denied. The elements of this particular offense(s) were not recited sufficiently enough, denying Paduano his Constitutional Rights and causing the judgments of the offense of §18.2-63(A) for Indictment numbers CR 12000592-00 and CR 12000477-00 to be void. Indictment numbers CR 12000592-00 and CR 12000477-00 are invalid indictments being used to obtain a conviction, the character of the judgment was not such as the court had the power to render.

VI. Overall Conclusion

For all of the reasons stated herein, Paduano’s

Petition for Certiorari should be granted and his
convictions vacated.

Dated: February 1, 2021

by */s/ Dale R. Jensen*

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