RECORD NUMBER:

United States Supreme Court

MATTHEW WILLIAM GEORGE,
Petitioner,

- V. -

COMMONWEALTH OF VIRGINIA,
Respondent

PETITION FOR CERTIORARI FROM JUDGMENT OF THE VIRGINIA SUPREME COURT

PETITION FOR CERTIORARI

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Questions Presented for Review

A. Does a Virginia Court have the authority to extinguish a defendant's post commitment First Amendment Rights?

B. Can a Virginia Court subject a defendant to cruel and unusual punishment in post commitment probation?

C. Does any court have the authority to extinguish a defendant's Fifth Amendment rights?

List of All Parties to the Proceeding

All parties are as listed in the caption hereof. Matthew William George is an individual for which no corporate disclosure statement is required by Rule 29.6.

TABLE OF CONTENTS
Page

TABLE OF CASES

Constitution

Statutes

Secondary Sources

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

On or about December 7, 2017, documents of the Circuit Court of Frederick County (the "Circuit Court") purported to indict George on one count of distribution of child pornography; one count of possession of child pornography; and two counts of possession of child pornography, 2nd or subsequent offense.

On or about October 12, 2018, George entered a guilty plea to two counts of possession of child pornography and one count of reproduction of child pornography in violation of Va. Code § 18.2-374.1:1.

On or about February 1, 2019, George was sentenced to a total of twenty years for these convictions with eighteen years and two months suspended. The Order was not entered into an

official report.

On September 6, 2019, the Virginia Court of Appeals denied George's Petition for Appeal.

George timely noticed his appeal to the Order of the Virginia Court of Appeals. The Virginia Court of Appeals entered its Order finally dismissing the Petition for Appeal on September 6, 2019. The Order was not entered into an official report.

The Virginia Supreme Court entered its Order finally dismissing the Petition for Appeal on April 24, 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 April 24, 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 First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution are involved in this case.

The First Amendment to the United States Constitution provides:

> 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.

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 Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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

> 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 …

George'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.

Va. Code § 17.1-123(A) states:

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

Va. Code § 17.1-124 states in pertinent part:

> each circuit court clerk shall keep order books or, in lieu thereof, an automated system recording all proceedings, orders and judgments of the court in all matters, all decrees, and decretal orders of such court and all matters pertaining to trusts, the appointment and qualification of trustees, committees, administrators, executors, conservators and guardians shall be recorded, except when the same are appointed by the clerk of court, in which event the order appointing such administrators or executors, shall be made and entered in the clerk's order book. In any circuit court, the clerk may, with the approval of the chief judge of the court, by order entered of record, divide the order book

> into two sections, to be known as the civil order book and the criminal order book.

Va. Code § 17.1-240 states in pertinent part:

> A procedural microphotographic process, digital reproduction, or any other micrographic process that stores images of documents in reduced size or in electronic format may be used to accomplish the recording of writings otherwise required by any provision of law to be spread in a book or retained in the circuit court clerk's office, including the civil and criminal order books, the Will Book or Fiduciary Account Book, the Juvenile Order Book, the Adoption Order Book, the Trust Fund Order Book, the Deed Book, the Plat Book, the Land Book, the Bond Book, the Judgment Docket Book, the Partnership or Assumed Name Certificate Book, marriage records, and financing statements.

George was convicted pursuant to Va. Code § 18.2-374.1:1, which is involved in this case. Va. Code § 18.2-374.1:1 states, in pertinent part:

> Any person who knowingly possesses child pornography is guilty of a Class 6 felony … Any person who knowingly (i) reproduces by any means, including by

> computer, sells, gives away, distributes, electronically transmits, displays, purchases, or possesses with intent to sell, give away, distribute, transmit, or display child pornography or (ii) commands, entreats, or otherwise attempts to persuade another person to send, submit, transfer or provide to him any child pornography in order to gain entry into a group, association, or assembly of persons engaged in trading or sharing child pornography shall be punished by not less than five years nor more than 20 years in a state correctional facility. Any person who commits a second or subsequent violation under this subsection shall be punished by a term of imprisonment of not less than five years nor more than 20 years in a state correctional facility, five years of which shall be a mandatory minimum term of imprisonment. The mandatory minimum terms of imprisonment prescribed for violations of this section shall be served consecutively with any other sentence.

IV. Statement of the Case

A. Procedural Posture

George was sentenced by the Frederick County Circuit Court (the "Circuit Court") on two counts of possession of child pornography and one

count of reproduction of child pornography in violation of Va. Code § 18.2-374.1:1. No court order signed by any Circuit Court judge was ever entered confirming that a grand jury had been convened on open court or acted according to law. Accordingly, George was never indicted by a grand jury such that the Circuit Court had jurisdiction over George.

George appeared in the Circuit Court and entered guilty pleas to the charges. On October 12, 2018, George was sentenced to a total of twenty years for these convictions with eighteen years and two months suspended.

George timely appealed his convictions, which appeals were denied by the Virginia Court of Appeals and the Virginia Supreme Court. Each federal question referenced herein was raised in George's Petitions for Appeal to the Court of Appeals of Virginia and the Virginia Supreme Court. Exh. D;

Exh. G. All constitutional rights violations by the courts of Virginia were dismissed on procedural grounds. Exh. B; Exh. C. However, such constitutional violations cannot be cured by any procedural grounds that may occur in a state court proceeding. *Jackson v. Denno*, 378 U.S. 368, 370 n.1, 84 S. Ct. 1774, 1777 (1964) (citing *Fay v. Noia*, 372 U.S. 391, 426-27, 83 S. Ct. 822, 842 (1963)).

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

B. Statement of Facts

George was arrested on child pornography charges. George enters guilty pleas to certain of those charges.

A detailed review of Circuit Court records has

revealed that no order signed by a judge was ever entered indicting George that stated that the grand jury indictment was returned in open court.

On or about February 14, 2019 the Circuit Court entered the Sentencing Order, which provided *inter alia*, "Defendant shall have no access for personal use to computers, electronics, smart phones, or social media. He is able to have supervised access for employment purposes only."

Unconfirmed records in the files of the Circuit Court allege that a grand jury indicted George on two counts of possession with intent to distribute a controlled substance, one count of possession with intent to distribute marijuana, and one count of selling drugs on or near certain properties. 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 George

was ever indicted.

V. Argument

The Virginia Supreme Court erred by failing to correct the Constitutional errors of this case and denying George's appeal on procedural grounds.

An unconstitutional restraint cannot be cured by any procedural grounds that may occur in a state court proceeding. *Denno*, 378 U.S. at 370 n.1, 84 S. Ct. at 1777 (citing *Fay v. Noia*, 372 U.S. at 426-27, 83 S. Ct. at 842.

A. Discussion of Questions Presented

1. Does a Virginia Court have the authority to extinguish a defendant's post commitment First Amendment Rights?

The Sentencing Order states in pertinent part, the "Defendant shall have no access for personal use

to computers, electronics, smart phones, or social media. He is able to have supervised access for employment purposes only."

This post commitment ban on personal use of computers, electronics, smart phones, or social media violates the First Amendment.

The courts of Virginia erred by failing to correct the Constitutional errors of this case.

The arguments advanced in the post-trial motion hearing in the Circuit Court proceeding were irrelevant because the order contains a facially unconstitutional restraint. Any reasoning that might have been advanced by the Circuit Court simply cannot legitimize or cure the unconstitutional restraint. *Denno*, 378 U.S. at 370 n.1, 84 S. Ct. at 1777.

The referenced provision of the Sentencing Order is unconstitutional and should be corrected

forthwith. Such overly broad restrictions on access to "computers, electronics, smart phones, or social media" was recently found to be violative the First Amendment and, therefore, unconstitutional. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017) (holding "[i]t is well established that, as a general rule, the Government "may not suppress lawful speech as the means to suppress unlawful speech"). Yet, that is exactly what the Sentencing Order does. The Sentencing Order completely bars George from ever using for personal purposes any and all "computers, electronics, smart phones, or social media."

Packingham is binding authority that applies here (8-0 decision).

Packingham focused on First Amendment issues – applied to the states through the due process clause of the Fourteenth Amendment.

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. *Packingham*, 137 S. Ct. at 1735. The United States Supreme Court has sought to protect the right to speak in this spatial context. *Id.* A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. *Id.* (citing, *Ward v. Rock Against Racism*, 491 U. S. 781, 796, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)). Even now, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire. *Packingham*, 137 S. Ct. at 1735.

While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the

answer is clear. *Id.* It is cyberspace—the "vast democratic forums of the Internet" in general, *Reno v. American Civil Liberties Union*, 521 U. S. 844, 868, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), and social media in particular. *Packingham*, 137 S. Ct. at 1735. Seven in ten American adults use at least one Internet social networking service. *Id.* One of the most popular of these sites is Facebook, the site used by the petitioner in *Packingham* that led to his conviction. *Id.* According to sources cited to the Court in the Packingham case, Facebook had 1.79 billion active users at that time. *Id.*, at 6. This is about three times the population of North America. *Id.* The number of active users has doubtlessly increased since that time.

Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." *Id.* (citing, *Reno*, 521 U. S. at 870, 117 S. Ct. 2329, 138

L. Ed. 2d 874). On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. *Packingham*, 137 S. Ct. at 1735. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. *Id.* On Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. *Id.* Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. *Id.* In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought." *Packingham*, 137 S. Ct. at 1735-736 (citing, *Reno*, 521 U. S. at 870, 117 S. Ct. 2329, 138 L. Ed. 2d 874).

Social media allows users to gain access to information and communicate with one another

about it on any subject that might come to mind. *Packingham*, 137 S. Ct. at 1737. Just as in issuing the Sentencing Order of George's case utterly prohibits his use of social media, by prohibiting sex offenders from using those websites, North Carolina with one broad stroke barred access to what for many was the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. *Id.* These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox." *Id.* (citing, *Reno*, 521 U. S., at 870, 117 S. Ct. 2329, 138 L. Ed. 2d 874). The

Sentencing Order prevents George from any lawful speech on social media whatsoever.

In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. *Packingham*, 137 S. Ct. at 1737. The *Packingham* Court found it unsettling to suggest that even persons who have completed their sentences could only use a limited set of websites. *Id.* Here, George is not even permitted to use a computer or access any website whatsoever. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives. *Id.*

It is well established that, as a general rule, the Government "may not suppress lawful speech as

the means to suppress unlawful speech." *Packingham*, 137 S. Ct. at 1738 (citing, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255, 122 S. Ct. 1389, 1404 (2002)).

The Sentencing Order violates George's First Amendment by suppressing his lawful speech.

Furthermore, It has been said that an agreement is unconscionable if no person in his senses would make it on the one hand and no fair and honest person would accept it on the other. *Hume v. United States*, 132 U.S. 406 (1889).

The scope of the exclusions in the sentencing order facially so overly broad that they are unconscionable. The exclusions are not limited in time and apply even after George has served his sentence and completed probation. Not only does the Sentencing Order completely ban any personal use of equipment used to access the Internet, but it also

purports to prohibit any use of electronics. Electronics are pervasive today. The plain language of the Sentencing Order provides an outright prohibition, inter alia, to George having personal use of most analog wrist watches, any household thermostat, a digital kitchen stove, a microwave oven, a radio, a television set, any type of motor vehicle, any type of computer or tablet, many tools (e.g., battery chargers, power saws, and power drills, etc.), or any telephone. The Sentencing Order places George in a position that he would have to have someone with him virtually all of the time in order for him to avoid violating the order by his use of simple everyday things, the use of which poses no risk to anyone else. As just a single example, prohibiting George from having personal use of a television to watch the evening news is facially

unconstitutional and has no benefit to the Commonwealth of Virginia.

No person in his senses would agree to the onerous plea agreement provision, which provision is reflected in the Sentencing Order, on the one hand and no fair and honest person would have accepted it on the other. *Hume*, 132 U.S. 406.

It has been pointed out that courts indulge ***every reasonable presumption against waiver of fundamental constitutional rights***. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S. Ct. 809, 812 (1937); *Hodges v. Easton*, 106 U.S. 408, 412, 1 S. Ct. 307, 311 (1882). Courts "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Pub. Utils. Com.*, 301 U.S. 292, 307, 57 S. Ct. 724, 731 (1937). A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S.

458, 464, 58 S. Ct. 1019, 1023 (1938).

The Commonwealth has contended that the plea agreement signed by George in conjunction with his entry of his guilty pleas waived his First Amendment rights.

However, George did not waive his First Amendment rights anywhere in that agreement. If the Commonwealth wanted to include such a waiver, it should have explicitly included it in the plea agreement. Not such waiver was in the agreement or ever agreed to by George. The presumption against waiver makes such a contention unavailing to the Commonwealth pursuant to *Aetna Ins. Co., Hodges, Ohio Bell Tel. Co., and Zerbst*.

2. Can a Virginia Court subject a defendant to cruel and unusual punishment in post commitment probation?

The courts of Virginia upheld and affirmed a facially unconstitutional Sentencing Order as stated regarding the First Amendment error, *supra*. Accordingly, George incorporates by reference the discussion concerning errors of the Virginia courts.

George never waived any of his First or Eighth Amendment rights in this case.

The Eighth Amendment, in only three words, imposes the constitutional limitation upon punishments: they cannot be "cruel and unusual." The Court has interpreted these words "in a flexible and dynamic manner," *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (joint opinion), and has extended the Amendment's reach beyond the barbarous physical punishments at issue in the Court's earliest cases. See *Wilkerson v. Utah*, 99 U.S. 130 (1879); *In re Kemmler*, 136 U.S. 436 (1890). Today the Eighth Amendment prohibits punishments which, although

not physically barbarous, "involve the unnecessary and wanton infliction of pain," *Gregg*, supra, 428 U.S. at 173, or are grossly disproportionate to the severity of the crime, *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544 (1910).

Among "unnecessary and wanton" inflictions of pain are those that are "totally without penological justification." *Gregg*, 428 U.S. at 183; *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). *Rhodes v. Chapman*, 452 U.S. 337, 345-46, 101 S. Ct. 2392, 2398-99 (1981).

The Eighth Amendment to the United States Constitution prohibits "excessive" sanctions. U.S. Const., Amend. VIII; *Atkins v. Virginia*, 536 U.S. 304, 311, 122 S. Ct. 2242, 2246, 153 L. Ed. 2d 335, 343 (2002). The Eighth Amendment is applicable to Virginia through operation of the Fourteenth

Amendment to the United States Constitution. *Estelle*, 429 U.S. at 101; *Edwards v. Whitlock*, 57 Va. Cir. 337 (2002).

In *Weems*, 217 U.S. at 349, the Supreme Court held that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive. The Court explained, "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.* at 367. Thus, even though "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," it may not be imposed as a penalty for; "'the status' of narcotic addiction," *Robinson v. California*, 370 U.S. 660, 666, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962), because such a sanction would be excessive. As Justice Stewart explained in *Robinson*: "Even one day in prison would be a cruel and unusual

punishment for the 'crime' of having a common cold." *Id.* at 667.

The Sentencing Order states in pertinent part, "[t]he Defendant shall have no access for personal use to computers, electronics, smart phones, or social media. He is able to have supervised access for employment purposes only."

Not only does the Sentencing Order completely ban any personal use of equipment used to access the Internet, but it also purports to prohibit any use of electronics. Electronics are pervasive today. The plain language of the Sentencing Order provides an outright prohibition, *inter alia*, to George having personal use of most analog wrist watches, any household thermostat, any electrical kitchen stove, any microwave oven, any radio, any television set, any type of motor vehicle, any type of computer or tablet, many tools (e.g., battery chargers, power

saws, and power drills, etc.), or any telephone. The Sentencing Order places George in a position that he would have to have someone with him virtually all of the time in order for him to avoid violating the order by his use of simple everyday things, the use of which poses no risk to anyone else. As just a single example, there is simply no justification for prohibiting George from having personal use of a television to watch the evening news as required by the Sentencing Order. As another example, George cannot drive a car. Each and every car made has electronics, the use of which the Sentencing Order forbids.

Forbidding George from using any electronics is facially excessive. Forbidding George from using any electronics involves the unnecessary and wanton infliction of pain. Forbidding George from using any electronics is totally without penological justification.

As a result, the Sentencing Order violates George's Eighth Amendment rights and should be declared void.

3. Does any court have the authority to extinguish a defendant's Fifth Amendment rights that have not been waived?

The courts of Virginia never established jurisdiction over George.

Article V of the U.S. Constitution establishes the only process via which amendments can be made.

As such, no Court, including this Court can unilaterally amend the U.S. Constitution by judicial fiat.

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

to Virginia via the Fourteenth Amendment

The right to a grand jury indictment is guaranteed by the Fifth Amendment, which applies to Virginia via the Fourteenth Amendment. Past legal error by courts, including this Court should not be allowed to stand under the plain language of the U.S. Constitution.

This Petition should be granted because George was never properly indicted by a grand jury. Pursuant to the Fifth Amendment, an indictment is a bedrock requirement for a court to have jurisdiction to enter a valid criminal judgment under the U.S. Constitution.

Documents of the Frederick County Circuit Court (the "Circuit Court") alleged that a grand jury was convened to hear allegations against George, but those documents show that alleged grand jury did not indict George according to Virginia law.

Indictments were never stated to have been returned in open court and a record of that return in open court entered in an Order Book via a judge signed order in compliance with Va. Code §§ 17.1-123(A), 17.1-124, and 17.1-240.

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

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

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 either clarify or overrule that opinion.

State courts, such as those of Virginia in this case, operate in violation of the Fifth Amendment's long-standing grand jury law and rights of defendants and then claim that defendants effectively have no recourse. It might be arguable, albeit without constitutional authority, 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 have never been 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.

Virginia courts err by claiming that any defective grand jury indictment is a waivable procedural matter and was not jurisdictional. See, e.g., *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 legally erroneous 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.

George avers that Justice Black's theory is substantively correct and the Bill of Rights is not an *ala carte* menu for courts to pick and choose from. No court, including this Honorable Court, has constitutional authority to pick and choose which rights of the Bill of Rights citizens have and which they do not have. If this Court desires to eliminate the grand jury right for citizens, its justices have the right to petition political leaders to make such amendment. Article V explicitly prohibits this Court from excising citizen's substantive constitutional rights outside of the Article V process. Such authority is solely within the province of the people through their states to amend the Constitution if they believe that such is warranted. George

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 views.

George 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 was legally erroneous by stopping 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 George's case. The due process requirement needed to be met under *Hurtado* and to the extent that this Court wishes to perpetuate prior errors and does not wish to 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 George's case.

If this Honorable Court wishes to continue to follow the erroneous "selective incorporation" doctrine, George 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 I 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***. … 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*** … ***No one can be prosecuted for a felony except on an indictment by a Grand Jury***..

App. I at § 4.

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.

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

Section 1 of the Fourteenth Amendment requiring that the privileges and immunities of the Fifth Amendment should apply to Virginia in George's case. The argument for applicability of the privileges and immunities section of the Fourteenth Amendment is at least equally compelling.

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

The Fifth Amendment to the United States Constitution states in pertinent part (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*** … 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 George's Petition 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).

George avers that there is simply no valid reason why Virginia should be allowed to violate George's 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*, 561 U.S. at 813, 130 S. Ct. at 3063 (Thomas. J., concurring) (citing, *District of Columbia v. Heller*, 554 U.S. 570, 576, 128 S. Ct. 2783, 2783 (2008)). Thus, in determining the scope of the Fourteenth Amendment, it is pertinent to discern what "ordinary citizens" at the time of ratification of the Fourteenth Amendment would have understood the Privileges or Immunities Clause to mean. *Id.*

At the time that the Fourteenth Amendment, the terms "privileges" and "immunities" had an established meaning as synonyms for "rights." *Id.* The two words, standing alone or paired together, were used interchangeably with the words "rights," "liberties," and "freedoms," and had been since the time of Blackstone. *Id.* 561 U.S. at 814 (citing, 1 W. Blackstone, Commentaries, which described the "rights and liberties" of Englishmen as "private

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

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

These principles arose from our country's English roots. *Id.* Fundamental rights, according to English traditions, belonged to all people but became legally enforceable only when recognized in

legal texts, including acts of Parliament and the decisions of common-law judges. *Id.* (citing, B. Bailyn, The Ideological Origins of the American Revolution 77-79 (1967)).

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

Several years later, the Bill of Rights was adopted to amend the Constitution to expressly protect the fundamental rights of citizens against interference by the Federal Government. *Id.* 561 U.S. at 818. Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in these amendments

as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text. *Id.*, 561 U.S. at 818-819 (citing, *inter alia*, 1 Annals of Cong. 431-432, 436-437, 440-442 (1789) (statement of Rep. Madison) (proposing Bill of Rights in the First Congress).

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

Section 1 of the Fourteenth Amendment protects the rights of citizens "of the United States". Id. 561 U.S. at 823. In *McDonald*, Justice Thomas provided evidence that overwhelmingly demonstrated "that the privileges and immunities of

such citizens included individual rights enumerated in the Constitution". *Id.* Those individual rights also include those enumerated in the Fifth Amendment, including the right requiring a grand jury indictment before being made to answer for any infamous crime.

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

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

In this case, George 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 George 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 George without proper indictments. There was no proper judge signed order indicting George.

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

C. George's defective grand jury indictments deprived the Circuit Court of Jurisdiction

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

It is long-standing law in Virginia 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).

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

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

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

VI. Overall Conclusion

For all of the reasons stated herein, George's Petition for Certiorari should be granted and his

convictions vacated.

Dated: June 16, 2020

by */s/ Dale R. Jensen*

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