VIRGINIA:

IN THE CIRCUIT COURT FOR FREDERICK COUNTY

Hearing Date: February 1, 2019 (FIPS) CODE: 069

Presiding Judge: Alexander R. Iden

COMMONWEALTH OF VIRGINIA

V. DOCKET: CR17-1120. 1121. & 1123

Matthew William George

. Defendant'

ADJUDICATION AND FINAL SENTENCING ORDER

Commonwealth Attorney Present: Heather Enloe

Defense Attorney Present: Gerardo Delgado

Defendant personally present

The Defendant previously was arraigned, pled guilty, and adjudicated on October 12, 2018.

COMMONWEALTH OF VIRGINIA V. Matthew

William George, Defendant

Offense Tracking Number	VA Crime Code (For Admin Use Only)	Code Section	Case Number
069CR1700112000	OBS-3680-F9	18.2-374.1:1	CR17001120-00
Offense Date: 07/09/2017	Description: CHILD PORNOGRAPHY: REPRODUCE		FELONY
069CR1700112100	OBS-3731-F6	18.2-374.1:1	CR17001121-00
Offense Date: 08/30/2017	Description: CHILD PORNOGRAPHY: POSSESS		FELONY
069CR1700112300	OBS-3732-F5	18.2-374.1:1	CR17001123-00
Offense Date: 08/30/2017	Description: POSSESS CHILD PORN, 2+ OFF		FELONY

Evidence or proffer and/or Exhibits presented by the Commonwealth: Yes:___X__

Evidence or proffer and/or Exhibits presented by the Defendant: Yes:___X__

COMMONWEALTH OF VIRGINIA V. Matthew William George, Defendant

Presentence Report Requested, med with the Court and with Defense Counsel at least 5 days prior to hearing and made a pan of the record in this case: Yes:___X__

Pursuant to Va. Code 19.2-298.01 Sentencing Guidelines were filed with and reviewed by the Court after guidelines were reviewed by and discussed by Defendant and his/her attorney: Yes:___X__ The Guidelines worksheet and explanation for any departure from the guidelines were made a part of the record in this case.

Argument of counsel was heard and prior to the Court proceeding to sentencing the Defendant was afforded his right of allocution, which he did exercise.

The Court sentences the Defendant as follows:

Case No.: CR17-1120
Description: Reproduce Child Pornography
[X] Incarceration within the Virginia Department of Corrections for a term of ___10__ years;
___8__years___2__months suspended

COMMONWEALTH OF VIRGINIA V. Matthew William George, Defendant

[ ] RESTITUTION. NONE.

Case No.: CR17-1121

Description: Possession of Child Pornography

[X] Incarceration within the Virginia Department of Corrections for a term of ___5___ years;

___5___years_ suspended

[ ] RESTITUTION. NONE.

Case No.: CR17-1123

Description: Possession of Child Pornography Being Second or Subsequent Offense

[X] Incarceration within the Virginia Department of Corrections for a term of ___5___ years;

___5___years_ suspended

[ ] RESTITUTION. NONE.

Consecutive/concurrent

These sentences shall run consecutively with all other sentences.

COMMONWEALTH OF VIRGINIA V. Matthew William George, Defendant

The Defendant is authorized work release if otherwise eligible.

Conditions of Active Incarceration: If active incarceration is imposed, as part of the condition of the suspended sentence, the defendant shall comply with rules and regulations of any penal facility where defendant is incarcerated, and the defendant shall violate no criminal laws of Virginia or any other jurisdiction while incarcerated.

Conditions of Suspended Sentence:

[X) Supervised Probation: The Defendant is placed on probation under the supervision of a Probation Officer of this Court to commence upon release from confinement and to continue for a period of ___3___ years unless sooner released from probation by this Court or the Probation Officer. Defendant shall comply with all rules and requirements of probation as set by his Probation Officer and this Court. Probation shall include substance abuse treatment/ counseling and/or drug and alcohol testing as required by his Probation

Officer or by this Court and such other counseling and/or testing as may be set as a condition of his probation.

The Defendant shall violate no criminal laws of the Commonwealth of Virginia or any other jurisdiction. The Defendant shall maintain gainful employment to the extent he Is able to do so and he shall support legal dependents, if any. The Defendant shall abstain from the use or possession of alcohol and illegal drugs. The Defendant shall pay the fine, if any, and all Court costs imposed to the Frederick County Circuit Court Clerk's Office. The Defendant waived his Fourth Amendment Rights and shall submit to search and seizure of his person, belongings, and residence on a random basis by the Probation Officer or any law enforcement officer without the necessity of there being a warrant, probable cause, or reasonable articulable suspicion.

[X I Good Behavior: The Defendant shall keep the peace , be of good behavior and violate no criminal laws of this or any other Jurisdiction for

COMMONWEALTH OF VIRGINIA V. Matthew William George, Defendant

___2___ years immediately following successful completion of supervised probation.

Registration pursuant to Va. Code 9.1-903 for offenses defined in 9.1-902 is required.

The Defendant shall have no unsupervised contact with minors.

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.

The electronics that were seized in relation to these cases shall be forfeited to the Commonwealth.

Defendant shall provide a DNA sample and legible fingerprints as directed.

The Defendant shall be given credit for the time spent in confinement while awaiting trial pursuant to Va. Code 53.1-187.

The Defendant was remanded to the custody of the sheriff.

COMMONWEALTH OF VIRGINIA V. Matthew William George, Defendant

DEFENDANT IDENTIFICATION:

Name: Matthew William George

SSN: DOB 12/14/1985 SEX M

SENTENCE SUMMARY:

Total incarceration sentence imposed: 20 years

Total incarceration sentence suspended: 18 years 2 months

Total supervised probation term: 3 years

2/14/19 /S

DATE Judge

DCC:

CWA ✓

Def Atty ✓

Probation ✓

Jail ✓

Other ✓ FCSO 02/14/19

VIRGINIA:

In the Court of Appeals of Virginia on **Friday** *the* **6th** *day of* **September, 2019**.

Matthew William George, Appellant,

against Record No. 0444-19-4
Circuit Court Nos. CR17-1120,
CR17-1121 and CR17-1123

Commonwealth of Virginia, Appellee.

From the Circuit Court of Frederick County

Per Curiam

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

I. Appellant pled guilty and was convicted of reproduction of child pornography, possession of

child pornography, and possession of child pornography, second offense. The court sentenced him to a total of twenty years' incarceration but suspended eighteen years and ten months. As a condition of appellant's probation, which was set forth in his plea agreement, he was prohibited from having "access for personal use to computers, electronics, smart phones, or social media." Citing Packingham v. North Carolina, 137 S. Ct. 1730 (2017), he argues on appeal that the condition imposed violates his First Amendment rights.

Appellant did not contest the condition until after he had been sentenced, filing a "Motion to Correct Sentence" on March 18, 2019. The trial court denied the motion "for good cause shown" after a hearing on April 12, 2019. The record does not include a transcript or statement of facts of that hearing. Appellant's motion asserted that the

probation condition banning his personal use of computers and social media was unconstitutional and violated the First Amendment. However, without a transcript of the hearing there is no record of the arguments appellant made in the trial court, and this Court cannot determine if he raised the same arguments that he has raised in his petition for appeal. See Rule 5A:18 (No ruling of the trial court. . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice."). A complete record of what occurred in the trial court is needed for this Court to address the merits of the issue raised. Thus, we find that appellant has waived the issue. See Smith v. Commonwealth, 281 Va. 464, 470 (2011) (holding petition for appeal was properly denied where

appellant waived his suppression claim by failing to timely file the necessary transcript); Rule 5A:8(b)(4)(ii).

II. Appellant also argues that denying him access to computers, other electronic devices, and social media is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. He did not make this same argument at trial. He asserts that this assignment of error is preserved by the ends of justice exception to Rule 5A:18 because the Eighth Amendment is "binding United States Supreme Court precedent." However, procedural default rules apply equally to constitutional questions. See Cortez-Hernandez v. Commonwealth, 58 Va. App. 66, 79-80 (2011) (holding that defendant failed to preserve for appeal his Sixth Amendment right to confrontation); Cottrell v. Commonwealth, 12

Va. App. 570, 574 (1991) (applying Rule 5A:18 to constitutional claim not raised at trial).

"'The ends of justice exception is narrow and is to be used sparingly' and applies only in the extraordinary situation where a miscarriage of justice has occurred." Holt v. Commonwealth, 66 Va. App. 199, 209 (2016) (*en banc*) (quoting Redman v. Commonwealth, 25 Va. App. 215,120-21 (1997)). The Court must determine first if the alleged error occurred and, if so, would "a grave injustice" occur if the exception were not applied. Williams v. Commonwealth, 294 Va. 25, 27-28 (2017) (published order) (quoting Commonwealth v. Bass, 292 Va. 19, 27 (2016)); see Brittle v. Commonwealth, 54 Va. App. 505, 513 (2009). Appellant "must affirmatively show that a miscarriage of justice has occurred," not merely that a miscarriage of justice "*might* have occurred." Redman, 25 Va. App. at 221.

We find that no error occurred in this case because appellant knowingly and voluntarily included the challenged condition in his written plea agreement. See Anderson v. Commonwealth, 256 Va. 580, 582-85 (1998) (holding that defendant could not challenge a condition imposed by his plea agreement that he waived his Fourth Amendment right against unreasonable searches and seizures during a one-year probation period because he had "knowingly and voluntarily agreed" to the condition); cf. Murry v. Commonwealth, 288 Va. 117, 120 (2014) (holding that probation condition imposed *sua sponte* by the trial court and requiring defendant, who had pleaded "not guilty," "to submit to warrantless, suspicionless searches at any time by any probation or law enforcement officer" was not reasonable under the circumstances of the case). Thus, we decline to apply

the ends of justice exception and find that appellant has waived this issue.

III. Finally, appellant contends that his conviction orders are void ab initio because the trial court did not have jurisdiction over his case. He avers that the indictments were not returned in open court or properly entered in an order book pursuant to Code §§ 17.1-123, 17.1-124, and 17.1-240, thus violating his Fifth Amendment right to a proper indictment.

"The validity of [an] indictment is a question of law which we review de novo." Epps v. Commonwealth, 293 Va. 405, 407 (2017) (quoting Howard v. Commonwealth, 63 Va. App. 580, 583 (2014)). We find that the record does not support appellant's claim. The grand jury's indictments were signed by the foreman as "true bills" on December 7,

2017. The trial court entered an order, signed by Judge R. Bryant, on December 7,2017, that stated:

> On the 7 day of December, 2017, the Grand Jury of Frederick County, Virginia, returned true bills on indictments charging the Defendant with one (1) count of distribution of child pornography; one (1) count of possession of child pornography; and two (2) counts of possession of child pornography, 2nd or subsequent offense.
>
> WHEREUPON, after the Grand Jury was excused from the Courtroom, the Attorney for the Commonwealth, in the presence of the Court Reporter, moved the Court that a capias be issued for the arrest of the Defendant, who was not present in person or by counsel.

"A court speaks through its orders and those orders are presumed to accurately reflect what transpired." Howard, 63 Va. App. at 584 (quoting McBride v. Commonwealth, 24 Va. App. 30, 35 (1997)). We conclude that the indictments complied with statutory and constitutional law.

Additionally, even if the record did not affirmatively establish that the indictment was returned in open court by the grand jury, the defect would not "render null and void the judgment of conviction based thereon" because "the statutory requirement for an indictment . . . is not jurisdictional." Epps, 293 Va. at 409 (quoting Hanson v. Smyth, 183 Va. 384, 390-91 (1944)).[1] Accordingly, we find that the trial court had jurisdiction over appellant's case. See id. (finding that "even if the indictment was not valid before the recording order

was entered after the trial, the defect in the indictment would not have deprived the circuit court of jurisdiction to try Epps").

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

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

This Court's records reflect that Dale R. Jensen, Esquire, is counsel of record for appellant in this matter.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:

/S

Deputy Clerk

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[1] Appellant asserts that Hanson is "flawed and should no longer be valid law." However, this Court has no authority to overturn a decision of the Supreme Court of Virginia. See O'Malley v. Commonwealth, 66 Va. App. 296, 301 (2016); Roane v. Roane, 12 Va. App. 989, 993 (1991).

VIRGINIA:

In the Supreme Court of Virginia on Friday *the* 24th *day of* April, 2020.

Matthew William George, Appellant,

against Record No. 191317
Record No. 0444-19-4

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon consideration of the record and the pleadings filed in this case, the Court finds that assignments of error nos. 1 and 2 are insufficient as they do not address any ruling of the Court of Appeals in Matthew William George v. Commonwealth of Virginia, Court of Appeals No. 0444-19-4, from which an appeal is sought.

Accordingly, the petition for appeal is dismissed as to those assignments of error. Rule 5:17(c)(1)(iii).

Upon further consideration whereof, the Court refuses assignment of error no. 3.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: 

Deputy Clerk

VIRGINIA COURT OF APPEALS

MATTHEW WILLIAM GEORGE, Petitioner vs. COMMONWEALTH OF VIRGINIA, Respondent.	COURT OF APPEALS NO. 044419 Appealed From The Circuit Court of Frederick County Case Nos. CR17001120-00, CR17001121-00, CR17001123-00 **MATTHEW WILLIAM GEORGE PETITION FOR APPEAL**

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I. ASSIGNMENTS OF ERROR.

1. The Circuit Court of Frederick County (the "Circuit Court") erred by entering a Sentencing Order (the "Sentencing Order") that violates the First Amendment rights of Matthew William George ("George") as to electronics use. The Sentencing Order forbids George from having any "access for personal use to computers, electronics, smart phones, or social media". This error is preserved pursuant to at least the First Amendment to the United States Constitution and the ends of justice exception stated in Va. Sup. Ct. R. 5A:18, which ends of justice exception is supported by binding United States Supreme Court precedent. *Packingham v. North Carolina* stands for the premise that entirely barring sex offenders after release from incarceration from using the Internet

violates their First Amendment rights. 137 S. Ct. 1730, 1738 (2017).

2. The trial court erred by entering a Sentencing Order imposing cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Sentencing Order forbids George from having any "access for personal use to computers, electronics, smart phones, or social media." This error is preserved pursuant to at least the Eighth Amendment to the United States Constitution and the ends of justice exception stated in Va. Sup. Ct. R. 5A:18, which ends of justice exception is supported by binding United States Supreme Court precedent prohibiting cruel and unusual punishment. *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544 (1910).

3. The trial court erred because it did not have jurisdiction over Matthew George due to its

violation of his rights under the Fifth Amendment to the United States Constitution. Furthermore, the court failed to comply with Virginia law Code §§ 17.1-123(A), 17.1-124, and 17.1-240 by failing to return the indictments in open court, and failing to enter an Order Book requiring a signature from both the Clark and the judge.

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

II. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

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. Those documents show that George's indictments were not compliant with Virginia law. Indictments were never entered in an Order Book via a judge signed order in compliance with Virginia Supreme Court Rule 3A:5(c) pursuant to Va. Code §§ 17.1-123(A), 17.1-124, and 17.1-240.

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.

George timely noticed his appeal to his convictions.

III. STATEMENT OF FACTS

Prior to George's arrest, an Internet Service Provider reported an upload of a known hashtag of child pornography to the National Center for Missing and Exploited Children. TT p. 13. An investigation of the upload led to the home in which George was living. TT p. 14. George admitted to uploading the image as well as possession of two or three additional images. TT p. 14.

George was arrested pursuant to the referenced investigation.

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. A proper Grand Jury indictment was never recorded in an Order Book in compliance with the mandatory provisions of Virginia Supreme Court Rule 3A:5(c),

which states, the "indictment shall be endorsed 'A True Bill' or 'Not a True Bill' and signed by the foreman. The indictment shall be returned by the grand jury in open court." There is no record that the indictment was ever 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."

IV. AUTHORITIES AND ARGUMENT

The Sentencing Order violates George's Constitutional Rights under the First, Eighth and Fourteenth Amendment. 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."

Virginia courts retain the right to correct unlawful sentences. *Dargan v. Commonwealth*, 27 Va. App. 495, 497 (1998). The Virginia Supreme Court explained that where a sentence is in excess of the maximum prescribed by law, the part of the sentence that is excessive is invalid and may be excised by the court. *Crutchfield v. Commonwealth*, 187 Va. 291, 297-98, 46 S.E.2d 340, 343 (1948).

The Petitioner submits that his sentence is in excess of the maximum prescribed by law, in that the sentence issued is in direct violation of the First and Eighth and Fourteenth Amendments to the United States Constitution. As such, the Petitioner requests that his Petition be granted.

1. **First Amendment Challenges to Probation Ban on Personal Use of Computers, Electronics, Smart Phones, or Social Media**

The aforementioned provision of the Sentencing Order in 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*, 137 S. Ct. at 1738 (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 this case, Facebook has 1.79 billion active users. *Id.*, at 6. This is about three times the population of North America. *Id.*

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 only **even persons who have completed their sentences could use a limited set of websites**. *Id.* 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 be 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, how does prohibiting George from having personal use of

a television to watch the evening news benefit the Commonwealth?

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 may contend that the plea agreement signed by George in conjunction with his entry of his guilty pleas waived his First Amendment rights. However, George does not waive his First Amendment rights anywhere in that agreement. 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. **Eighth Amendment Challenges to Probation Ban on Personal Use of Computers, Electronics, Smart Phones, or Social Media**

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*, 217 U.S. at 349. 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, 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 be 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 the Sentencing Order as present drafted does. As another example, George will not be allowed to ever drive a car. Each and every car made

has electronics, the use of which the Sentencing Order forbids.

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

3. **The Circuit Court never established jurisdiction over George under the Fifth Amendment to the United States Constitution.**

This Petition for Appeal (the "Petition") asks this Court to reverse earlier judgments and affirmatively acknowledge that no court, including the United States Supreme Court has the authority to amend the United States Constitution by judicial fiat. The right to a grand jury indictment is guaranteed by the Fifth Amendment, which applies to Virginia via the Fourteenth Amendment. Past legal error by courts, including this Court and the

United States Supreme Court, simply should not be allowed to stand under the plain language of the United States Constitution.

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

Documents of the Frederick County Circuit Court (the "Circuit Court") purported to indict George, but those documents show that none of George's indictments were compliant with Virginia law. Indictments were never 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.

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

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

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

> in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.

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

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

waiver by a defendant's counsel's failure to recognize the violation of the grand jury right and object prior to appeal.

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

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

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

> will render null and void the judgment of conviction based thereon.

Hanson, 183 Va. at 390-91.

The *Hanson* opinion relied upon a premise that the Fifth Amendment to the Federal Constitution did not apply to Virginia under any of the equal protection clause, the privileges and immunities clause, or the due process clause of the Fourteenth Amendment. However, since *Hanson* was decided, the United States Supreme Court has significantly expanded the application of the Bill of Rights of the Constitution to state law matters under the equal protection portion of the Fourteenth Amendment. For example; in *Griffin v. California*, 380 U.S. 609, 615 (1965); the Court specifically held that the self-incrimination provision of the Fifth Amendment applied to the States by reason of the Fourteenth Amendment.

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

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

> In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth

> Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. Costello v. United States, 350 U.S. 359, 361-362 (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. Branzburg v. Hayes, 408 U.S. 665, 686-687 (1972).

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

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

> An alternative theory regarding the relationship between the Bill of Rights and § 1 of the Fourteenth Amendment was championed by Justice Black. This theory held that § 1 of the

Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights. See, e.g., Adamson, supra, at 71-72, 67 S. Ct. 1672, 91 L. Ed. 1903 (Black, J., dissenting); Duncan, supra, at 166, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (Black, J., concurring). As Justice Black noted, the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States and, in so doing, overruled this Court's decision in Barron. Adamson, supra, at 72, 67 S. Ct. 1672, 91 L. Ed. 1903 (dissenting opinion). Nonetheless, the Court never has embraced Justice Black's "total incorporation" theory. While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of "selective incorporation," i.e., the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. See, e.g., Gideon v. Wainright, 372 U.S. 335, 341, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); Malloy v. Hogan, 378 U.S. 1, 5-6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); Pointer v. Texas, 380 U.S. 400, 403-404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); Washington v. Texas, 388 U.S. 14, 18, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Duncan, 391 U.S., at 147-148,

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

Id.

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

incorporated as jurisprudence moves forward in accordance with Justice Black's views and the plain language of the Constitution.

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 stopped short of applying the grand jury provision of the Fifth Amendment to the States via the Fourteenth Amendment, it affirmatively held that the due process requirements had to be met as to indictments. *Id.*, 110 U.S. at 538. The *Hurtado* Court specifically held that:

> we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after

> examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.

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

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 if that standard is deemed applicable to this case. *McDonald*, 561 U.S. at 761-65.

In order to understand why the right to a grand indictment is fundamental, it is instructive to review the history of grand juries and their equivalents further. The history of grand juries goes back to early Grecian use of "Dicasteries", which were tribunals picked from lists of citizens whose duty it was to accuse, try, and convict those alleged to have committed crimes. Bonner, Lawyers and Litigants in Ancient Athens 36 (1927). Roman law utilized "Judices", which functioned similarly. Patterson, The Administration of Justice in Great Britain 200 (1936). Grand juries were subsequently adopted as a part of the English system of law, which then formed a basis for the legal system of most of the United States. See, e.g., Whyte, Is the Grand Jury Necessary?, 45 Wm. and Mary L. Rev.

462-71 (1959). The grand jury system was then brought to Virginia early in the seventeenth century and has been a part of Virginia's legal system since that time. *Id.* As summarized in the Handbook for Virginia Grand Jurors (the "Handbook") that is currently used by Virginia Courts (emphasis added):

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

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

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

> The institution of the grand jury is a development which comes to us out of the mists of early English history. It has undergone changes, but has been remarkable stable because the institution has been molded into an

instrument of democratic government, extraordinarily efficient for reflecting not the desires or whims of any official or of any class or party, but the deep feeling of the people. As such, with its essential elements of plenary power to investigate and secrecy of its deliberations, it was preserved by the Constitution of the United States not only to protect the defendant but to permit public spirited citizens, chosen by democratic procedures, to attach corrupt conditions. A criticism of the action of the grand jury is a criticism of democracy itself.

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

for the King. Vestiges of all these factors still subsist.

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

> instrument can cope with organized crime which cuts across state lines, conspiracies to overthrow the government of the United States, or alleged deviations from rectitude by those who have been entrusted by the government with public trust …
> The grand jury breathes the spirit of a community into the enforcement of law. Its effect as an institution for investigation of all, no matter how highly placed, creates the elan of democracy. Here the people speak through their chosen representatives.

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

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

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

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

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

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

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

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

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

The denial of George's 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).

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

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

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

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

These principles arose from our country's English roots. *Id.* Fundamental rights, according to

English traditions, belonged to all people but became legally enforceable only when recognized in legal texts, including acts of Parliament and the decisions of common-law judges. *Id.* (citing, B. Bailyn, The Ideological Origins of the American Revolution 77-79 (1967)).

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

Several years later, the Bill of Rights was adopted to amend the Constitution to expressly protect the fundamental rights of citizens against interference by the Federal Government. *Id.* 561 U.S. at 818. Consistent with their English heritage,

the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text. *Id.*, 561 U.S. at 818-819 (citing, inter alia, 1 Annals of Cong. 431-432, 436-437, 440-442 (1789) (statement of Rep. Madison) (proposing Bill of Rights in the First Congress).

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

Section 1 of the Fourteenth Amendment protects the rights of citizens "of the United States". Id. 561 U.S. at 823. In *McDonald*, Justice Thomas

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

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

Sess., 15 (1866); H. R. Rep. No. 30, 39th Cong., 1st Sess., p. XXI (1866).

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

In this case, 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, 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 George in this case, the defendant in *Simmons* was convicted and sentenced based upon a grand jury document, just as in George'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 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.

Federal Courts have generally fully complied with the requirements of the Fifth Amendment concerning grand jury indictments. As a result, the United States Supreme Court does not appear to

have previously addressed a case in which no order was entered indicting a defendant in a criminal matter. In a rare occurrence of non-compliance, the Fourth Circuit Court of Appeals found that a failure to properly record a grand jury indictment was a fatal defect. In its opinion, the Fourth Circuit Court of Appeals stated concerning proper procedures for grand jury indictments and their importance:

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

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

Renigar v. United States, 172 F. 646, 648 (4th Cir. 1909). The importance of following proper constitutionally based processes was particularly emphasized in *Renigar*:

> Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty, nor ought the courts in their abhorrence of crime, nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving

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

Renigar, 172 F. at 652, 655.

George recognizes that *Renigar* has been criticized and claimed by lower courts to have been abrogated. See, e.g., *United States v. Lennick*, 18 F.3d 814, 817 (9th Cir. 1994). However, *Renigar* has not been deemed invalid law by a ruling of the United States Supreme Court, which is the only

court having authority to do so. It is also the case that *Lennick* specifically is distinguishable in that there was actually an order entered in that case that was compliant other than not being properly entered in open court. *Id.* In George's case, no proper order of any form was ever entered for his indictments. Moreover, *Lennick* relied upon specific rulings concerning the federal rules of criminal procedure that simply do not apply in this case.

In the case at bar, George 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 George having been returned in open court and the record

thereof having been entered in the Order Book. The failure of the Circuit Court to show entry in the Order Book that the Grand Jury had returned into open court and presented true bill indictments against George is a fatal defect in the indictment process. George 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, 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.

V. CONCLUSION

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

Dated: June 17, 2019

RESPECTFULLY SUBMITTED,

By: 

Dale Jensen
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Certificate

The undersigned counsel certifies:

1. that the name of the Appellant is Mathew William George,

2. That contact information of counsel is:
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3. that a copy of the petition for appeal has been mailed on June 17, 2019 to all opposing counsel known to Appellant;

4. that the page count for this Petition is 31, the word count is 9491;

5. that counsel has been retained; and

6. that appellant desires to state orally to a panel of this Court the reasons why the Petition for Appeal should be granted.

Dated: June 17, 2019

By: 

Dale Jensen
Counsel
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Certificate of Service

I certify that on the 17th day of June 2019, I mailed, postage prepaid, a true copy of the foregoing document to:

Ross Spicer
Commonwealth's Attorney
Fredrick County
107 N. Kent St.
Winchester, VA 22601

Dated: June 17, 2019

By: 

Dale Jensen
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COMMONWEALTH OF VIRGINIA
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July 3, 2019

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Cynthia McCoy, Clerk
Court of Appeals of Virginia
109 North Eighth Street
Richmond, VA23219

RE: Commonwealth's Brief in Opposition to Appellant Matthew William George's Petition for Appeal
Record Number: 0444-19-4

Dear Madam Clerk:

Please find enclosed the Commonwealth's Brief in Opposition to Appellant Matthew William George's Petition for Appeal. I have enclosed an original and four (4) copies. Please feel free to contact me at the above number and address, or by my email address included in the Brief in Opposition, if you should have any questions or need anything additional from this Office.

Very truly yours,
_____s/_____
Heather D. Enloe

Enclosures
cc: Dale Jensen, Counsel for Appellant

IN THE COURT OF APPEALS OF
THE COMMONWEALTH OF VIRGINIA

RECORD NUMBER: 0444-19-4

MATTHEW WILLIAM GEORGE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

APPELLEE'S BRIEF IN OPPOSITION TO APPELLANT'S PETITION FOR APPEAL

Heather D. Enloe, Esquire Assistant
Commonwealth's Attorney for
Frederick County Counsel for Appellee

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Counsel for Appellee

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II. TABLE OF AUTHORITIES

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III. STATEMENT OF THE CASE.

On December 7, 2017, the Grand Jury of Frederick County indicted Appellant with one (1) count of reproduction of child pornography, one (1) count of possession of child pornography, and two (2) counts of possession of child pornography, 2nd or subsequent offense (Manuscript at 1-7), in violation of Section 18.2-374.1:1 of the Code of Virginia, 1950, as amended.

On December 7, 2019, the Court entered an order on the return of the indictments (Manuscript at 7) and entered an order setting bond at $10,000, secured, with conditions which included, "No use of computers, internet or any other electronic devices except for employment purposes" (Manuscript 10).[1]

On May 11, 2018, the parties appeared in the Frederick County Circuit Court ("the Court"), at

1 The transcript for this proceeding was not filed by Appellant in this appeal

which time the cases were set for *venire* to commence on October 12,2018 (Manuscript at 26).[2]

On October 12,2018, the parties appeared before the Court and tendered a written plea agreement which the Court accepted (Manuscript at 33-35). The cases were continued to January 11,2019 for final sentencing.

On January 11,2019, the parties appeared before the Court at which time final sentencing was continued to February 1,2019 (Manuscript 69-70).

On February 1, 2019, following a sentencing hearing where both parties presented evidence, the Court sentenced Appellant to a total of twenty (20) years incarceration with all but one (1) year, ten (10) months suspended. Pursuant to the plea agreement, the Court placed Appellant on supervised probation for a period of three (3) years

---

2 The transcript for this proceeding was not filed by Appellant in this appeal

under the terms and conditions described therein. A final sentencing Order was entered on February 14, 2019 (Manuscript 77- 81).

On April 12, 2019, the parties appeared before the Court on Appellant's Motion to Correct Sentence, which motion was denied (Manuscript 95). No objection appears on the record in this appeal.[3]

3 The transcript for this proceeding was not filed by Appellant in this appeal

IV. ASSIGNMENTS OF ERROR

The Appellant's assignments of error are summarized, sans extraneous language and argument, as follows:

1) The Circuit Court erred by entering a Sentencing Order that violates [Appellant's] First Amendment rights as to electronics use.

2) The Circuit Court erred by entering a Sentencing Order imposing cruel and unusual punishment... [which] forbids [Appellant] from having any "access for personal use to computers, electronics, smart phones or social media."

3) The Circuit Court erred because it did not have jurisdiction over [Appellant] due to its violation of his rights under the Fifth Amendment. Furthermore, the court failed to comply with Virginia law Code 17.1-123(A), 17.1-124, and 17.1-240 by failing to return the indictments in open

court, and failing to enter an Order Book requiring a signature from both the Clark (*sic*) and the judge.

V. STATEMENT OF FACTS

On August 30, 2017, an investigation by law enforcement led the Frederick County Sheriffs Office's Internet Crimes Against Children Investigator ("Investigator") to the Frederick County, Virginia home of Appellant. Prior to this day, the National Center for Missing and Exploited Children contacted the Investigator and advised him that an internet service provider contacted them in reference to an upload of a known image of child pornography from Appellant's IP address (Tr. at 13-14).

The Investigator spoke with Appellant who admitted to uploading the known image of child pornography to a peer-to-peer chat site on July 9,

2017 (Tr. at 14). Appellant further admitted that additional images of child pornography would be located on his electronics, which were seized by law enforcement that day (Tr. at 14). He directed the Investigator to where those images would be found on his computer, and the images were forensically recovered (Tr. at 15). Appellant also advised the Investigator that, while online, he would engage in sexually explicit conversations, which he specifically targeted to females under the age of 18 (Tr. at 15).

On October 12, 2018, the parties appeared before the Court and tendered a written plea agreement, signed by Appellant, the Commonwealth and Counsel for Appellant (Manuscript at 33-35). Following his arraignment and pleas (Tr. at 4-6), the plea colloquy (Tr. at 8-13), the Commonwealth's statement of evidence (Tr. at 13- 17), and the Court's findings of guilt (Tr. at 18), the Court

specifically asked Appellant if he understood the terms and conditions of probation contained in the plea agreement, specifically listing the prohibition for personal use of computers, *electronics*, smart phones or social media (Tr. at 18-19). Appellant acknowledged that he understood "all of that" (Tr. at 19).

On February 14, 2019, the Court entered an Adjudication and Final Sentencing Order which included the verbatim language of the plea agreement concerning special probation terms and conditions (Manuscript at 79).

VI. ARGUMENT

Assignment of Error 1:

The Commonwealth notes that Appellant has not filed transcripts for the April 12, 2019 proceedings that directly relate to this Assignment of Error, which transcripts are indispensable in this

appeal. Further, the record submitted by Appellant to this Appellant Court does not contain a preservation of this issue for appeal purposes. Accordingly, an appellate review of this Assignment of Error as a basis for reversal is properly declined.

> When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues, any assignments of error affected by such omission shall not be considered.
>
> Rule 5A:8(4)(ii) of the Rules of the Virginia Supreme Court

Furthermore, Appellant has not set out the standard of review of his Assignment of Error.

Notwithstanding this fatal deficiency, the Commonwealth does submit a response here to Appellant's argument that a term contained in the plea agreement, mutually agreed to by the parties and affirmed by Appellant on the record, should now be stricken by this Appellant Court. Without

addressing the dicta of his argument, the primary case Appellant relies upon in asking the Appellate Court to redraft the agreement involved a court imposing a probation restriction *sua sponte*.[4] Such scenario is plainly distinguished from the instant cases in that the parties negotiated for and agreed to the terms and conditions contained in the plea agreement, which terms and conditions were acted upon by the Commonwealth (i.e., her motion for Order of *nolle prosequi* on Docket No. CR17-1122), accepted by the Court and reduced to final order *verbatim.*

Virginia Courts have long recognized the ability and viability of defendants in a criminal case to negotiate the waiver of one or more constitutional rights in the course of reaching a plea agreement. Defendants are capable of negotiating for and

---

[4] Packingham v. North Carolina. 137 S. Ct. 1730 (2017)

consenting to the imposition of certain conditions of probation that might not otherwise be imposed by the Court in exchange for leniency or other consideration, such as, in the instant case, the dismissal of one or more charges by the Commonwealth.

> We review conditions of probation imposed by a trial court as part of its sentencing determination for abuse of discretion.
>
> Martin v. Commonwealth, 274 Va. 733, 735, 652 S.E.2d 109, 111 (2007).

> The waiver of constitutional rights in a plea agreement is not an uncommon practice. See *United States v. Keele*, 755 F.3d 752, 756 (5th Cir. 2014) ("Generally, constitutional rights can be waived as part of a plea agreement."); *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999) (same). "[I]t is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights." *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (discussing standards for waiver of such constitutional rights as the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront accusers). Nor is it uncommon for defendants

to agree to search conditions of probation in exchange for a more lenient term of incarceration, as in *Anderson*. See *United States v. King*, 711 F.3d 986,990-91 (9th Cir. 2013) (upholding a search where "the probationer agreed to a search condition that permits warrantless, suspicionless searches of the probationer's 'person, property, premises and vehicle [] [at] any time of the day or night'")...

The waiver of constitutional rights in a plea agreement is not an uncommon practice. See *United States v. Keele*, 755 F.3d 752, 756 (5th Cir. 2014) ("Generally, constitutional rights can be waived as part of a plea agreement."); *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999) (same). M[l]t is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights." *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (discussing standards for waiver of such constitutional rights as the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront accusers). Nor is it uncommon for defendants to agree to search conditions of probation in exchange for a more lenient term of incarceration, as in *Anderson*. See *United States v. King*, 711 F.3d 986, 990-91 (9th Cir. 2013) (upholding a search where "the probationer agreed to a search condition that permits warrantless, suspicionless searches of the probationer's 'person, property,

> premises and vehicle [] [at] any time of the day or night'").
>
> Murry v. Commonwealth, 288 Va. 117, 129, 762 S.E.2d 573, (2014)
>
> [W]e cannot ignore the fact that the waiver was the product of Anderson's voluntary act. As previously noted, its purpose was to ensure Anderson's good conduct. To achieve that end, the scope of the waiver needed to be broad, requiring Anderson to submit his person and property to search or seizure at any time by any law enforcement officer with or without a warrant. The scope of the waiver was broad, but, in the circumstance of the present case, we cannot say the waiver was invalid for its being overly broad. We also cannot say the one-year duration of the waiver, agreed upon by Anderson, invalidated it.
>
> Anderson v. Commonwealth, 256 Va. 580, 586, 507 S.E.2d 339, ____ (1998)

The Commonwealth further notes that Appellant remained out on bond for almost a year under the same electronics restriction/prohibition language without further motion, comment, protest, complaint, or modification and, presumably, compliant.

Appellant has identified no manifest injustices that would warrant application of the ends of justice exception to Rule 5A:18. "'[A]pplication of the ends of justice exception is appropriate when the judgment of the trial court was error and application of the exception is necessary to avoid grave injustice or denial of essential rights.'" Rowe v. Commonwealth. 277 Va. 495, 503, (2009) (quoting Charles v. Commonwealth. 270 Va. 14,17, (2005)). Moreover, the record must "'affirmatively show that a miscarriage of justice has occurred not... that a miscarriage might have occurred.'" Mounce v. Commonwealth. 4 Va. App. 433, 436, 357 S.E.2d 742, 744 (1987). "The burden of establishing a manifest injustice is a heavy one, and it rests with the appellant." Brittle v. Commonwealth, 54 Va. App. 505, 514, 680 S.E.2d 335, 340 (2009).

Assignment of Error 2:

The Commonwealth adopts and incorporates by reference her arguments above.

Assignment of Error 3:

The Commonwealth notes that Appellant has not filed transcripts for the December 7, 2017, February 8, 2018, or May 11, 2018 proceedings that directly relate to this Assignment of Error, which transcripts are indispensable in this appeal. Further, the record submitted by Appellant to this Appellant Court, does not contain a preservation of this issue for appeal purposes. Accordingly, an appellate review of this Assignment of Error as a basis for reversal is properly declined.

> When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues, any assignments of error affected by such omission shall not be considered.

Rule 5A:8(4)(ii) of the Rules of the
Virginia Supreme Court

Furthermore, Appellant has not set out the standard of review of his Assignment of Error.

VII. CONCLUSION

For all of the above-stated reasons regarding all of Appellant's assignments of error, the Commonwealth respectfully requests that this Court deny Appellant's Petition for Appeal

COMMONWEALTH OF VIRGINIA

BY: __s/_____
HEATHER D. ENLOE. ESQUIRE
ASSISTANT COMMONWEALTH'S ATTORNEY FOR FREDERICK COUNTY

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Counsel for Appellee

VIII. CERTIFICATE

1. On July 3, 2019, Rule 5A: 19(f) has been complied with, by filing an original and four (4) copies of Appellee's Brief in Opposition to Appellant's Petition for Appeal by mailing such original and copies to the Clerk via U.S. certified mail, postage prepaid, return receipt requested. Also on July 3, 2019, one copy of Appellee's Brief in Opposition to Appellant's Petition for Appeal was also mailed to Dale R. Jensen., Esq., Counsel for the Appellant, to 606 Bull Run, Staunton, VA 24401.
2. This Brief in Opposition to Appellant's Petition for Appeal contains 2,023 words.
3. Counsel for the Appellee does not waive oral argument.

COMMONWEALTH OF VIRGINIA

BY: __s/_____

HEATHER D. ENLOE. ESQUIRE
ASSISTANT COMMONWEALTH'S
ATTORNEY FOR FREDERICK
COUNTY

VIRGINIA COURT OF APPEALS

MATTHEW WILLIAM GEORGE, Petitioner vs. COMMONWEALTH OF VIRGINIA, Respondent.	COURT OF APPEALS NO. 044419 Appealed From The Circuit Court of Frederick County Case Nos. CR17001120-00, CR17001121-00, CR17001123-00 **MATTHEW WILLIAM GEORGE REPLY BRIEF IN SUPPORT OF PETITION FOR APPEAL**

Counsel
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Petitioner Matthew William George ("George"), by counsel, submits this Reply Brief in response to the Opposition to Appellant's Petition for Appeal (the "Opposition") and in support of his Petition for Appeal (the "Petition"), to wit:

I. INTRODUCTION.

In an attempt to circumvent a proper constitutional review of George's case, the Commonwealth resorts to an attempted procedural artifice that transcripts that have no bearing on this appeal are somehow "indispensable". However, the content of the referenced transcripts could do nothing to change the content of unconstitutional orders.

II. ARGUMENT

A. Assignment of Error 1 - The Circuit Court of Frederick County (The "Circuit

Court") erred by entering a sentencing order (the "Sentencing Order") that violates the First Amendment rights of Matthew William George ("George") as to electronics use. The Sentencing Order forbids George from having any "access for personal use to computers, electronics, smart phones, or social media".

Virginia Supreme Court Rule 5A:8(4)(ii) requires transcripts necessary to permit resolution of appellate issues. Virginia Supreme Court Rule 5A:8(4)(ii) does not require submission of transcripts that have no bearing on resolution of appellate issues. The referenced hearing on April 12, 2019 involved a post trial motion to attempt to get the Circuit Court to correct the Sentencing Order to remove the language from its Sentencing Order

referenced in this Assignment of Error. The relief sought in the post-trial motion was denied, and the unconstitutional provision remains. The presence of the unconstitutional provision in the Sentencing Order and the plea-hearing transcript are the only documents from the Circuit Court that are necessary to resolve this issue. The plea-hearing transcript is only of relevance to show that George never waived his First Amendment free speech rights. It is telling that the Commonwealth does not even hint at a proffer about the April 12th hearing or what it believes it claims occurred in that hearing that is necessary to resolve this case. Instead, the Commonwealth relies entirely upon the content of the plea agreement, which itself is facially unconstitutional for the same reasons as the Sentencing Order.

Accordingly, the Commonwealth's attempts to use a procedural artifice to attempt to avoid removal of the facially unconstitutional provision from the Sentencing Order fails.

The claim of the Commonwealth that George waived his First Amendment rights in the plea agreement of this case is legally incorrect.

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 be 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, how does prohibiting George from having

personal use of a television to watch the evening news benefit the Commonwealth?

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 may contend that the plea agreement signed by George in conjunction with his entry of his guilty pleas waived his First Amendment rights. However, George does not waive his First Amendment rights anywhere in that agreement. The presumption against waiver makes such a contention unavailing to the Commonwealth pursuant to *Aetna Ins. Co.*, *Hodges*, *Ohio Bell Tel. Co.*, and *Zerbst*.

B. Assignment of Error 2 - The trial court erred by entering a Sentencing Order imposing cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Sentencing Order forbids George from

having any "access for personal use to computers, electronics, smart phones, or social media."

See error 1.

No Eighth Amendment waiver.

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 be 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 the Sentencing Order as present drafted does. As another example, George will not be allowed to ever drive a car. Each and every car made has electronics, the use of which the Sentencing Order forbids.

C. Assignment of Error 3 - The trial court erred because it did not have jurisdiction over Matthew George due to its violation of his rights under the Fifth Amendment to the United States

Constitution. Furthermore, the court failed to comply with Virginia law Code §§ 17.1-123(A), 17.1-124, and 17.1-240 by failing to return the indictments in open court, and failing to enter an Order Book requiring a signature from both the Clark and the judge.

Regardless of the content of argument at the hearing, "A court speaks through its orders and those orders are presumed to accurately reflect what transpired." *McBride v. Commonwealth*, 24 Va. App. 30, 35, 480 S.E.2d 126, 128 (1997).

Transcripts are not necessary.

Fully briefed in Petition.

III. CONCLUSION

For all of the reasons discussed herein, George respectfully and humbly requests that this Court

grant this Appeal, reverse the decision of the Circuit Court, grant the Motion in its entirety, and order George's immediate release.

Dated: June 22, 2019

RESPECTFULLY SUBMITTED,

By:
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Certificate

The undersigned counsel certifies:

1. that a copy of the petition for appeal has been mailed on July 22, 2019 to all opposing counsel known to Appellant;

2. that the page count for this Petition is 31, the word count is 9491.

Dated: July 22, 2019

By:
Dale Jensen
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Certificate of Service

I certify that on the 22nd day of July 2019, I mailed, postage prepaid, a true copy of the foregoing document to:

Ross Spicer
Commonwealth's Attorney
Fredrick County
107 N. Kent St.
Winchester, VA 22601

Dated: July 22, 2019

By:
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Counsel
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VIRGINIA SUPREME COURT

MATTHEW WILLIAM GEORGE, Petitioner vs. COMMONWEALTH OF VIRGINIA, Respondent.	SCV Record No. _____ COURT OF APPEALS NO. 044419 Appealed From The Circuit Court of Frederick County Case Nos. CR17001120-00, CR17001121-00, CR17001123-00 **MATTHEW WILLIAM GEORGE PETITION FOR APPEAL**

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Secondary Authority

I. ASSIGNMENTS OF ERROR.

1. Court of Appeals erred by not reversing the error of the Circuit Court of Frederick County (the "Circuit Court") in entering a Sentencing Order (the "Sentencing Order") that violates the First Amendment rights of Matthew William George ("George") as to electronics use. This error is preserved pursuant to at least the First Amendment to the United States Constitution and the ends of justice exception stated in Va. Sup. Ct. R. 5A:18.

2. Court of Appeals erred by not reversing the error of the Circuit Court in entering a Sentencing Order imposing cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. This error is preserved pursuant to at least the Eighth Amendment to the United States Constitution and the ends of justice exception stated in Va. Sup. Ct. R. 5A:18.

3. Court of Appeals erred by not vacating the Circuit Court judgment for want of jurisdiction over Matthew George due to its violation of his rights under the Fifth Amendment to the United States Constitution.

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

II. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

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.

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 Court of Appeals.

III. 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."

IV. AUTHORITIES AND ARGUMENT

The Sentencing Order violates George's Constitutional Rights under the First, Eighth and Fourteenth Amendment. 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."

1. **The Probation Ban on Personal Use of Computers, Electronics, Smart Phones, or Social Media Violates the First Amendment**

The Court of Appeals erred in failing to correct this error. At its core, the Court of Appeals opinion stated that a facially unconstitutional order can be upheld on procedural grounds. However, an unconstitutional restraint 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)).

The unconstitutional restraint in the present case is characteristically different than the suppression of evidence claim of *Smith v. Commonwealth*, 281 Va. 464, 470 (2011), the only case relied upon by the Court of Appeals in denying

this error of the Circuit Court. Smith simply did not include a sentencing order that had a facially unconstitutional restraint.

The arguments advanced in the post-trial motion hearing in the Circuit Court proceeding is 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. *Jackson*, 378 U.S. at 370 n.1, 84 S. Ct. at 1777. The Court of Appeals simply should not have affirmed the Sentencing Order and its facially unconstitutional restraint by attempting to hide behind procedural rules.

Moreover, Va. Sup. Ct. R. 5A:18 should have been applied in this case. It is difficult to imagine something that is more of an extraordinary situation where a miscarriage of justice has occurred than in a

case in which the Sentencing Order includes a facially unconstitutional restraint as in this case. The Court of Appeals erred by not invoking that rule.

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*, 137 S. Ct. at 1738 (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.*

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 only **even persons who have completed their sentences could use a limited set of websites**. *Id.* 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.

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. The Probation Ban on Personal Use of Computers, Electronics, Smart Phones, or Social Media Violates the Eighth Amendment

The Court of Appeals committed the same errors in affirming the facially unconstitutional Sentencing Order as stated regarding the First Amendment error, *supra*. Accordingly, George incorporates by reference the discussion concerning that Court of Appeals error.

The *Anderson v. Commonwealth*, 256 Va. 580, 582-85 (1998) is distinguishable from this case and does not support affirming the Sentencing Order.

The plea agreement that at issue in Anderson had the following explicit provision, which was set forth in large type:

> BY HIS SIGNATURE BELOW, [ANDERSON] ACKNOWLEDGES THAT, IF THIS AGREEMENT IS ACCEPTED BY THE COURT, HE UNDERSTANDS HE IS WAIVING HIS FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES DURING THE PERIOD SPECIFIED ABOVE.

Anderson, 256 Va. at 582-83, 507 S.E.2d at 340.

There was no such explicit waiver (in any typeface) of First or Eighth Amendment rights in this case.

Accordingly, *Anderson* is distinguishable from this case and the Court of Appeals erred in its reliance on *Anderson*.

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*, 217 U.S. at 349. 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, 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, there is simply no justification for prohibiting George from having personal use of a television to watch the evening news as the Sentencing Order as present drafted does. As another example, George will not be allowed to ever drive a car. Each and every car made has electronics, the use of which the Sentencing Order forbids.

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

3. The Circuit Court never established jurisdiction over George under the Fifth Amendment to the United States

Constitution.

The Court of Appeals erred in determining that the Circuit Court had jurisdiction in view of the defective indictment of George.

In affirming the judgment against George, the Court of Appeals relied upon a family of cases (e.g., *Epps v. Commonwealth*, 293 Va. 405, 407 (2017)) in which Virginia courts have asserted authority that they simply do not have under the U.S. Constitution.

No Court, including this Court or even the United States Supreme Court can unilaterally amend the U.S. Constitution by judicial fiat. However, that is exactly what the cases relied upon by the Court of Appeals purport to do (see full argument, *infra*).

The right to a grand jury indictment is guaranteed by the Fifth Amendment, which applies to Virginia via the Fourteenth Amendment. Past

legal error by courts, including this Court and the United States Supreme Court, simply should not be allowed to stand under the plain language of the United States Constitution.

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

Documents of the Frederick County Circuit Court (the "Circuit Court") purported to indict George, but those documents show that none of George's indictments were compliant with Virginia law. Indictments were never 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.

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

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

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

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

defendant's counsel's failure to recognize the violation of the grand jury right and object prior to appeal.

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

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

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

> the grand jury is not such a defect as will render null and void the judgment of conviction based thereon.

Hanson, 183 Va. at 390-91.

The *Hanson* opinion relied upon a premise that the Fifth Amendment to the Federal Constitution did not apply to Virginia under any of the equal protection clause, the privileges and immunities clause, or the due process clause of the Fourteenth Amendment. However, since *Hanson* was decided, the United States Supreme Court has acknowledged the application of the Bill of Rights of the Constitution to state law matters under the equal protection portion of the Fourteenth Amendment. For example; in *Griffin v. California*, 380 U.S. 609, 615 (1965); the Court specifically held that the self-incrimination provision of the Fifth Amendment applied to the States by reason of the Fourteenth Amendment.

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

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

> In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment

> that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. *Costello v. United States*, 350 U.S. 359, 361-362 (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972).

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

In 2010, the Court explained in some detail the history of application of the Bill of Rights to the States via the Fourteenth Amendment. *McDonald v. City of Chi.*, 561 U.S. 742, 761-65, 130 S. Ct. 3020, 3032-35 (2010). In *McDonald*, the Court set forth that Justice Black had advocated for full applicability of the Bill of Rights to the states under § 1 of the Fourteenth Amendment and that, for the most part, that advocacy had resulted in such

applicability. *Id.*

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

incorporated as jurisprudence moves forward in accordance with Justice Black's views and the plain language of the Constitution.

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 stopped short of applying the grand jury provision of the Fifth Amendment to the States via the Fourteenth Amendment, it affirmatively held that the due process requirements had to be met as to indictments. *Id.*, 110 U.S. at 538. The *Hurtado* Court specifically held that:

> we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after

> examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.

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

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 if that standard is deemed applicable to this case. *McDonald*, 561 U.S. at 761-65.

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

been a part of Virginia's legal system since that time. Id. As summarized in the Handbook for Virginia Grand Jurors (the "Handbook") that is currently used by Virginia Courts (emphasis added):

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

Thus, the Virginia Supreme Court, which is responsible for the Handbook recognize the

fundamental importance of grand juries in controlling the start of prosecutions. The Virginia Supreme Court affirmed this fundamental importance using the Constitution of the United States and the Constitution of Virginia as primary authorities.

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

> The institution of the grand jury is a development which comes to us out of the mists of early English history. It has undergone changes, but has been remarkable stable because the institution has been molded into an instrument of democratic government, extraordinarily efficient for reflecting not the desires or whims of any official or of any class or party, but the deep

feeling of the people. As such, with its essential elements of plenary power to investigate and secrecy of its deliberations, it was preserved by the Constitution of the United States not only to protect the defendant but to permit public spirited citizens, chosen by democratic procedures, to attach corrupt conditions. A criticism of the action of the grand jury is a criticism of democracy itself.

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

The institution was thus evolved as an instrument for efficient prosecution of crime, and as such it has remained until this day. The principle of secrecy was

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

> community into the enforcement of law. Its effect as an institution for investigation of all, no matter how highly placed, creates the elan of democracy. Here the people speak through their chosen representatives.

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

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

> In time of peace a citizen can perform no higher public duty than that of Grand Jury service. No body of citizens exercises public functions more vital to the administration of law and order.
> The Grand Jury is both a sword and a shield of justice-a sword, because it is a terror of criminals; a shield, because it is a protection of

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

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

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

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

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

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

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

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

The denial of George's 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).

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, 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 George in this case, the defendant in Simmons was convicted and sentenced based upon a grand jury document, just as in George'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 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.

Federal Courts have generally fully complied with the requirements of the Fifth Amendment concerning grand jury indictments. As a result, the United States Supreme Court does not appear to have previously addressed a case in which no order was entered indicting a defendant in a criminal

matter. In a rare occurrence of non-compliance, the Fourth Circuit Court of Appeals found that a failure to properly record a grand jury indictment was a fatal defect. In its opinion, the Fourth Circuit Court of Appeals stated concerning proper procedures for grand jury indictments and their importance:

> 1 Chitty on Crim. Law, 324, describes the mode in which the grand jury returns the results of their inquiries to the court, by indorsing "A True Bill" if found, and "Not a True Bill" if rejected; and says:
>
> "When the jury have made these indorsements on the bills, they bring them publicly into court, and the clerk of the peace at sessions, or clerk of assize on the circuit, calls all the jurymen by name, who severally answer to signify that they are present, and then the clerk of the peace or assize asks the jury whether they agreed upon any bills, and bids them present them to the court, and then the foreman of the jury hands the indictments to the clerk of peace or clerk of assize."
>
> 4 Blackstone, 306, also describes the functions of the grand jury and the methods of its proceedings, the necessity of 12 at least assenting to the accusation, and adds:
>
> "And the indictment when so found is publicly

> delivered into court."
>
> A later text-writer (1 Bishop on Crim. Procedure, § 869) says:
>
> "When the grand jury has found its indictments, it returns them into open court, going personally in a body."

Renigar v. United States, 172 F. 646, 648 (4th Cir. 1909). The importance of following proper constitutionally based processes was particularly emphasized in *Renigar*:

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

> constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance. It is the duty of all the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments. Their motto should be *Obsta principiis*."'

Renigar, 172 F. at 652, 655.

In the case at bar, George 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 George having been returned in open court and the record thereof having been entered in the Order Book. The failure of the Circuit Court to show entry in the Order Book that the Grand Jury had returned into open court and

presented true bill indictments against George is a fatal defect in the indictment process. George 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, 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.

V. Conclusion

For all of the reasons discussed herein, George respectfully and humbly requests that this Court grant this Appeal, reverse the decision of the Circuit Court, grant the Motion in its entirety, and order

George's immediate release.

Dated: October 7, 2019

RESPECTFULLY SUBMITTED,

By:
Dale Jensen
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Certificate

The undersigned counsel certifies:

1. that the name of the Appellant is Mathew William George,

2. That contact information of counsel is:

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3. the name of the Appellee is the Commonwealth of Virginia;

4. the name, address, and contact information of counsel for the Appellee is:

Ross Spicer
Commonwealth's Attorney
Frederick County
107 N. Kent St.
Winchester, VA 22601

5. that a copy of the petition for appeal has been mailed on October 7, 2019 to all opposing counsel known to Appellant;
6. that the page count for this Petition is 35;
7. that counsel has been retained; and
8. that appellant desires to state orally to a panel of this Court the reasons why the Petition for Appeal should be granted.

Dated: October 7, 2019

By: 

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Certificate of Service

I certify that on the 7th day of October 2019, I mailed, postage prepaid, a true copy of the foregoing document to:

Ross Spicer
Commonwealth's Attorney
Fredrick County
107 N. Kent St.
Winchester, VA 22601

Dated: October 7, 2019

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October 21, 2019

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Douglas B. Robelen, Clerk
Supreme Court of Virginia
100 North Ninth Street, Fifth Floor
Richmond, VA 23219

RE: Commonwealth's Brief in Opposition to Appellant Matthew William George's Petition for Appeal
Record Number: 0444-19-4

Dear Madam Clerk:

Please find enclosed the Commonwealth's Brief in Opposition to Appellant Matthew William George's Petition for Appeal. I have enclosed an original and seven (7) copies. Please feel free to contact me at the above number and address, or by my email address included in the Brief in Opposition, if you should have any questions or need anything additional from this Office.

Very truly yours,
_____s/_____
Heather D. Enloe

Enclosures
cc: Dale Jensen, Counsel for Appellant

IN THE SUPREME COURT OF THE
COMMONWEALTH OF VIRGINIA

RECORD NUMBER: 0444-19-4

MATTHEW WILLIAM GEORGE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

APPELLEE'S BRIEF IN OPPOSITION TO APPELLANT'S PETITION FOR APPEAL

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Frederick County Counsel for Appellee

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III. STATEMENT OF THE CASE.

On December 7, 2017, the Grand Jury of Frederick County indicted Appellant with one (1) count of reproduction of child pornography, one (1) count of possession of child pornography, and two (2) counts of possession of child pornography, 2nd or subsequent offense (Manuscript at 1-7), in violation of Section 18.2-374.1:1 of the Code of Virginia, 1950, as amended.

On December 7, 2019, the Court entered an order on the return of the indictments (Manuscript at 7) and entered an order setting bond at $10,000, secured, with conditions which included, "No use of computers, internet or any other electronic devices except for employment purposes" (Manuscript 10).[1]

On May 11, 2018, the parties appeared in the Frederick County Circuit Court ("the Court"), at

1 The transcript for this proceeding was not filed by Appellant in this appeal

which time the cases were set for *venire* to commence on October 12, 2018 (Manuscript at 26).[2]

On October 12, 2018, the parties appeared before the Court and tendered a written plea agreement which the Court accepted (Manuscript at 33-35). The cases were continued to January 11, 2019 for final sentencing.

On January 11, 2019, the parties appeared before the Court at which time final sentencing was continued to February 1, 2019 (Manuscript 69-70).

On February 1, 2019, following a sentencing hearing where both parties presented evidence, the Court sentenced Appellant to a total of twenty (20) years incarceration with all but one (1) year, ten (10) months suspended. Pursuant to the plea agreement, the Court placed Appellant on supervised probation for a period of three (3) years

---

2 The transcript for this proceeding was not filed by Appellant in this appeal

under the terms and conditions described therein. A final sentencing Order was entered on February 14, 2019 (Manuscript 77- 81).

On April 12, 2019, the parties appeared before the Court on Appellant's Motion to Correct Sentence, which motion was denied (Manuscript 95). No objection appears on the record in this appeal.[3]

On September 6, 2019, the Virginia Court of Appeals, Per Curiam, denied Appellant's petition for appeal finding, *inter alia*, that Appellant (I) had not provided the Court of Appeals with a complete record of what occurred in the trial court, (II) did not raise his appellate complaints to the trial court with respect to probationary terms that were knowingly and voluntarily included as conditions in

3 The transcript for this proceeding was not filed by Appellant in this appeal

his written plea agreement, and (III) was properly under the jurisdiction of the trial court.

IV. ASSIGNMENTS OF ERROR

The Appellant's assignments of error are summarized, sans extraneous language and argument, as follows:

1) Court of Appeals (sic) erred by not reversing the error of the Circuit Court of Frederick County by entering a Sentencing Order that violates [Appellant's] First Amendment rights as to electronics use.

2) Court of Appeals (sic) erred by not reversing the error of the Circuit Court of Frederick County by entering a Sentencing Order imposing cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[4]

3) The Court of Appeals (sic) erred by not vacating the Circuit Court judgment for want of

---

[4] The language of this assignment of error is different from that presented to the Virginia Court of Appeals.

jurisdiction over [Appellant] due to its violation of his rights under the Fifth Amendment to the United States Constitution.[5]

V. STATEMENT OF FACTS

On August 30, 2017, an investigation by law enforcement led the Frederick County Sheriffs Office's Internet Crimes Against Children Investigator ("Investigator") to the Frederick County, Virginia home of Appellant. Prior to this day, the National Center for Missing and Exploited Children contacted the Investigator and advised him that an internet service provider contacted them in reference to an upload of a known image of child pornography from Appellant's IP address (Tr. at 13-14).

---

[5] The language of this assignment of error is different from that presented to the Virginia Court of Appeals.

The Investigator spoke with Appellant who admitted to uploading the known image of child pornography to a peer-to-peer chat site on July 9, 2017 (Tr. at 14). Appellant further admitted that additional images of child pornography would be located on his electronics, which were seized by law enforcement that day (Tr. at 14). He directed the Investigator to where those images would be found on his computer, and the images were forensically recovered (Tr. at 15). Appellant also advised the Investigator that, while online, he would engage in sexually explicit conversations, which he specifically targeted to females under the age of 18 (Tr. at 15).

On October 12, 2018, the parties appeared before the Court and tendered a written plea agreement, signed by Appellant, the Commonwealth and Counsel for Appellant (Manuscript at 33-35). Following his arraignment and pleas (Tr. at 4-6),

the plea colloquy (Tr. at 8-13), the Commonwealth's statement of evidence (Tr. at 13- 17), and the Court's findings of guilt (Tr. at 18), the Court specifically asked Appellant if he understood the terms and conditions of probation contained in the plea agreement, specifically listing the prohibition for personal use of computers, *electronics*, smart phones or social media (Tr. at 18-19). Appellant acknowledged that he understood "all of that" (Tr. at 19).

On February 14, 2019, the Court entered an Adjudication and Final Sentencing Order which included the verbatim language of the plea agreement concerning special probation terms and conditions (Manuscript at 79).

VI. ARGUMENT

Assignment of Error 1:

The Commonwealth notes that Appellant has not filed transcripts for the April 12, 2019 proceedings that directly relate to this Assignment of Error, which transcripts are indispensable in this appeal. Further, the record submitted by Appellant to this Appellant Court does not contain a preservation of this issue for appeal purposes. Accordingly, an appellate review of this Assignment of Error as a basis for reversal is properly declined.

> It is the obligation of the petitioner/appellant to ensure that the record is sufficient to enable the Court to evaluate and resolve the assignments of error. When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues related to the assignments of error, any assignments of error affected by the omission shall not be considered.
>
> Rule 5:11 of the Rules of the Virginia Supreme Court
>
> No ruling of the trial court, disciplinary board, or commission before which the case was initially heard will be considered as a basis for reversal unless an objection was

> stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.
>
> Rule 5:25 of the Rules of the Virginia Supreme Court

Furthermore, Appellant has not set out the standard of review of his Assignment of Error.

Notwithstanding this fatal deficiency, the Commonwealth does submit a response here to Appellant's argument that a term contained in the plea agreement, mutually agreed to by the parties and affirmed by Appellant on the record, should now be stricken by this Appellant Court. Without addressing the dicta of his argument, the primary case Appellant relies upon in asking the Appellate Court to redraft the agreement involved a court

imposing a probation restriction *sua sponte*.[6] Such scenario is plainly distinguished from the instant cases in that the parties negotiated for and agreed to the terms and conditions contained in the plea agreement, which terms and conditions were acted upon by the Commonwealth (i.e., her motion for Order of *nolle prosequi* on Docket No. CR17-1122), accepted by the Court and reduced to final order *verbatim.*

Virginia Courts have long recognized the ability and viability of defendants in a criminal case to negotiate the waiver of one or more constitutional rights in the course of reaching a plea agreement. Defendants are capable of negotiating for and consenting to the imposition of certain conditions of probation that might not otherwise be imposed by the Court in exchange for leniency or other

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[6] Packingham v. North Carolina. 137 S. Ct. 1730 (2017)

consideration, such as, in the instant case, the dismissal of one or more charges by the Commonwealth.

> We review conditions of probation imposed by a trial court as part of its sentencing determination for abuse of discretion.
>
> Martin v. Commonwealth, 274 Va. 733, 735, 652 S.E.2d 109, 111 (2007).

The waiver of constitutional rights in a plea agreement is not an uncommon practice. See *United States v. Keele*, 755 F.3d 752, 756 (5th Cir. 2014) ("Generally, constitutional rights can be waived as part of a plea agreement."); *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999) (same). "[I]t is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights." *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (discussing standards for waiver of such constitutional rights as the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront accusers). Nor is it uncommon for defendants to agree to search conditions of probation in exchange for a more lenient term of incarceration, as in *Anderson*. See *United States v. King*, 711 F.3d 986,990-91 (9th Cir. 2013) (upholding a search where "the probationer agreed to a search condition that

permits warrantless, suspicionless searches of the probationer's 'person, property, premises and vehicle [] [at] any time of the day or night'")...

The waiver of constitutional rights in a plea agreement is not an uncommon practice. See *United States v. Keele*, 755 F.3d 752, 756 (5th Cir. 2014) ("Generally, constitutional rights can be waived as part of a plea agreement."); *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999) (same). M[l]t is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights." *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (discussing standards for waiver of such constitutional rights as the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront accusers). Nor is it uncommon for defendants to agree to search conditions of probation in exchange for a more lenient term of incarceration, as in *Anderson*. See *United States v. King*, 711 F.3d 986, 990-91 (9th Cir. 2013) (upholding a search where "the probationer agreed to a search condition that permits warrantless, suspicionless searches of the probationer's 'person, property, premises and vehicle [] [at] any time of the day or night'").

Murry v. Commonwealth, 288 Va. 117, 129, 762 S.E.2d 573, (2014)

> [W]e cannot ignore the fact that the waiver was the product of Anderson's voluntary act. As previously noted, its purpose was to ensure Anderson's good conduct. To achieve that end, the scope of the waiver needed to be broad, requiring Anderson to submit his person and property to search or seizure at any time by any law enforcement officer with or without a warrant. The scope of the waiver was broad, but, in the circumstance of the present case, we cannot say the waiver was invalid for its being overly broad. We also cannot say the one-year duration of the waiver, agreed upon by Anderson, invalidated it.
>
> Anderson v. Commonwealth, 256 Va. 580, 586, 507 S.E.2d 339, ____ (1998)

The Commonwealth further notes that Appellant remained out on bond for almost a year under the same electronics restriction/prohibition language without further motion, comment, protest, complaint, or modification and, presumably, compliant.

Appellant has identified no manifest injustices that would warrant application of the ends of justice

exception to Rule 5:25. "'[A]pplication of the ends of justice exception is appropriate when the judgment of the trial court was error and application of the exception is necessary to avoid grave injustice or denial of essential rights.'" Rowe v. Commonwealth. 277 Va. 495, 503, (2009) (quoting Charles v. Commonwealth. 270 Va. 14,17, (2005)). Moreover, the record must "'affirmatively show that a miscarriage of justice has occurred not... that a miscarriage might have occurred.'" Mounce v. Commonwealth. 4 Va. App. 433, 436, 357 S.E.2d 742, 744 (1987). "The burden of establishing a manifest injustice is a heavy one, and it rests with the appellant." Brittle v. Commonwealth, 54 Va. App. 505, 514, 680 S.E.2d 335, 340 (2009).

Assignment of Error 2:

The Commonwealth adopts and incorporates by reference her arguments above.

Assignment of Error 3:

The Commonwealth notes that Appellant has not filed transcripts for the December 7, 2017, February 8, 2018, or May 11, 2018 proceedings that directly relate to this Assignment of Error, which transcripts are indispensable in this appeal. Further, the record submitted by Appellant to this Appellant Court, does not contain a preservation of this issue for appeal purposes. Accordingly, an appellate review of this Assignment of Error as a basis for reversal is properly declined.

> It is the obligation of the petitioner/appellant to ensure that the record is sufficient to enable the Court to evaluate and resolve the assignments of error. When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues related to the assignments of error,

> any assignments of error affected by the omission shall not be considered.
>
> Rule 5:11 of the Rules of the Virginia Supreme Court
>
> No ruling of the trial court, disciplinary board, or commission before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.
>
> Rule 5:25 of the Rules of the Virginia Supreme Court

Furthermore, Appellant has not set out the standard of review of his Assignment of Error.

VII. CONCLUSION

For all of the above-stated reasons regarding all of Appellant's assignments of error, the Commonwealth respectfully requests that this Court deny Appellant's Petition for Appeal

COMMONWEALTH OF VIRGINIA
BY: __s/_____
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VIII. CERTIFICATE

1. On October 21, 2019, Rule 5: 18 has been complied with, by filing an original and seven (7) copies of Appellee's Brief in Opposition to Appellant's Petition for Appeal by mailing such original and copies to the Clerk via U.S. certified mail, postage prepaid, return receipt requested. Also on October 21, 2019, one copy of Appellee's Brief in Opposition to Appellant's Petition for Appeal was also mailed to Dale R. Jensen., Esq., Counsel for the Appellant, to 606 Bull Run, Staunton, VA 24401.
2. This Brief in Opposition to Appellant's Petition for Appeal contains 15 pages and 2,023 words.
3. Counsel for the Appellee does not waive oral argument.

COMMONWEALTH OF VIRGINIA

BY: __s/_____
HEATHER D. ENLOE. ESQUIRE
ASSISTANT COMMONWEALTH'S
ATTORNEY FOR FREDERICK
COUNTY

Handbook for Virginia Grand Jurors

FOREWORD

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

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

1. NATURE OF THE GRAND JURY

1. Types

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

more than one jurisdiction and are primarily used to investigate drug law violations.

2. Function of a Regular Grand Jury

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

The Grand Jury does not hear both sides of the case and does not determine the guilt or innocence of the accused person. This is determined by a "petit (trial) jury" if and when

the accused is tried later. The Grand Jury only determines whether there is probable cause that the accused committed the crime and should stand trial.

3. Function of a Special Grand Jury

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

If a majority of the regular grand jurors so request, and if the judge finds probable cause to believe that a crime has been committed which should be investigated by a special grand jury, a special grand jury must be empanelled to be composed of the grand jurors so requesting and

willing and such additional members as are necessary. If a minority so requests, a Special Grand Jury may be empanelled.

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

4. Importance of the Grand Jury

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

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

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

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

5. Origin

The Grand Jury had its origin more than seven centuries ago in England from which, in large part, this country inherited its legal system. Many legal historians trace its origin to events in

the reign of Henry II and to one of the articles of the Constitution of Clarendon in 1164. It was recognized in Magna Carta granted by King John at the demand of the people in 1215. One of its earliest functions was to protect citizens from despotic abuse of power by the king; its other function was to report those suspected of having committed criminal offenses.

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

6. Preliminary Criminal Process

(a) Initial Proceedings. A person suspected of having committed a crime is usually arrested and

charged in a written accusation called a Warrant or Summons.

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

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

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

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

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

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

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

II. THE REGULAR GRAND JURY

7. Qualifications

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

8. Selection; Summons; Size

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

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

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

9. Exemptions and Excuses

Any person who has legal custody of a child 16 years of age or younger or of a person having a mental or physical impairment requiring continuous care during normal court hours, any mother who is breast-feeding a child, any person

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

If you are exempt from jury service for either of the foregoing reasons or, if you have some other good reason to be excused from Grand Jury service, you should contact the judge of the Circuit Court to which you have been summoned immediately and in person (or if the judge is not available, contact the Clerk of that Court). DO NOT WAIT UNTIL THE DAY ON WHICH YOU

HAVE BEEN SUMMONED, because if you are excused, this may cause serious inconvenience to the court and a delay in the administration of justice while another Grand Juror is procured. Your service as a Grand Juror ordinarily will require only part of one day. In view of the high privilege of service as a Grand Juror and of the importance of the public service rendered, you should not ask to be excused unless it is absolutely necessary.

10. First Appearance in Court

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

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

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

11. Oath

The oath taken by each Grand Juror is as follows:

• You shall diligently inquire, and true presentment make, of all such matters as may be given you in charge, or come to your knowledge, touching the present service. You shall present no person through prejudice or ill will, nor leave any

unrepresented through fear or favor, but in all your presentments you shall present the truth, the whole truth, and nothing but the truth. So help you God.

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

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

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

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

12. Charge by the Court

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

13. Procedure in the Jury Room

(a) Quorum. A Regular Grand Jury consists of not less than five members. At least four must concur

(agree) in returning "A True Bill" on an indictment.

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

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

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

indictment to stand trial. You will determine this from the testimony of witnesses.

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

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

Witnesses should be examined one at a time. There is no set manner in which a witness is examined. One appropriate way is for the Foreman to ask the witness to tell what he or she

knows about the charge against the accused, after which questions may be asked of the witness by any member of the Grand Jury if additional testimony is desired.

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

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

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

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

(d) Accused as a Witness. The accused person named in the bill of indictment will not be listed as a witness, nor will any witnesses favorable to

him probably be listed. This is because the Grand Jury does not determine the guilt or innocence of the accused, but only determines whether the testimony of the witnesses produced by the State establishes probable cause to require the accused to stand trial.

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

14. Determination to Indict or Not

As has been repeatedly stated, the Grand Jury does not sit to determine the guilt or innocence of the accused. The function of the Grand Jury is to

determine whether there is probable cause to require the accused to stand trial.

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

When the Grand Jury has heard all necessary or available witnesses in a given case, the Foreman will ask the members to discuss and vote on the question of whether or not "A True Bill" should be found on the charge. Every Grand Juror may now comment on the sufficiency of the evidence and express an opinion on the matter.

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

15. Finding of Indictment

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

If there are enough affirmative votes in favor of finding an indictment, the Foreman will endorse (write) the phrase "A True Bill" on the back of the bill of indictment and sign it.

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

16. Special Findings, If Any

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

community or by any governmental authority, agency or official.

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

17. Return of Indictment

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

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

18. The Commonwealth's Attorney

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

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

Except for these two cases, if a Commonwealth's Attorney appears in the Grand Jury Room while the Grand Jury is there, any indictment returned "A True Bill" by the Grand Jury is invalid (no good). Therefore, while a Grand Jury may request the appearance of the Commonwealth's Attorney to testify as a witness or to explain some principle

of law about the discharge of their duties, they cannot seek his advice as to whether they should return an indictment as "A True Bill. " If a Grand Jury finds that it is in need of advice as to its duties but doesn't know if it can invite the Commonwealth's Attorney into the Grand Jury Room to explain, it should notify the judge that it desires further instructions, and it will receive such instructions in open court.

19. Secrecy

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

The secrecy of Grand Jury proceedings is important because:

1.Secrecy protects Grand Jurors from being subjected to pressure by persons who may be interested in the outcome of Grand Jury action.

2.Secrecy may prevent the escape of persons against whom an indictment is under consideration.

3.Secrecy encourages witnesses to speak the truth freely before the Grand Jury.

4.Secrecy as to what witnesses testified to before the Grand Jury prevents the witnesses from being tampered with between that time and the time they testify at the trial of the accused.

20. Protection of Grand Jurors

The Grand Jury is an independent body answerable to no one except the judge. No inquiry may be made to learn what a Grand Juror said or how he or she voted. The secrecy surrounding

Grand Jury proceedings is one of the major sources of this protection. The law gives Grand Jurors complete immunity for official acts within their authority as Grand Jurors, regardless of the result of an indictment found by the Grand Jury.

21. Practical Suggestions

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

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

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

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

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

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

Be independent, but not stubborn.

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

Each juror is entitled to be satisfied with the evidence before being called upon to vote.

Although your mind may be made up, if others wish to pursue the matter further, do not try to shut off additional testimony or deliberation.

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

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

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

22. Compensation

The State does not compensate (pay) Grand Jurors in proportion to the valuable service they render. There are several reasons for this. One

thing to be avoided is the so-called "professional juror"-a person, usually unemployed, who welcomes (and sometimes even solicits) jury duty solely for the compensation and with little or no regard for civic responsibility. Another reason is the cost to the taxpayer. When one recalls that Grand Juries meet in every city and county in the State from four to twelve times a year, it is readily seen that a large expense could result. While the State hopes that Grand Jurors will serve as a matter of public pride and civic duty, it does not want Grand Jury duty to be a financial cost to the Grand Juror. The law provides for the compensation of Grand Jurors for each day of attendance. The amount of this compensation is changed from time to time by action of the General Assembly. Each Grand Juror should

report attendance and mileage to the Clerk of Court.

III. THE SPECIAL GRAND JURY

23. Function of a Special Grand Jury

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

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

24.Characteristics

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

Other similarities will be noted later.

25. Scope of Investigation

The responsibility of a Special Grand Jury ordinarily will be to investigate a narrow special condition believed to exist in the community. On the one hand, its duty is to make a full and complete investigation and report on that

condition; on the other hand, it is not convened to go on a fishing expedition with respect to other possible illegal conditions which may exist. If during the course of its authorized investigation, some other illegal condition comes to light which the Special Grand Jurors feel needs investigation, the Special Grand Jury should call attention to it in its report.

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

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

26. Convening

A Circuit Court may, on its own motion, convene a Special Grand Jury. Frequently, the Commonwealth's Attorney will make the request. Also, as noted in Sections 3 and 18, the request may come from a Regular Grand Jury.

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

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

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

27. The Commonwealth's Attorney

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

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

The foregoing limitations are in the law to insure the complete independence of the Special Grand Jury and to protect it against any undue influence from an official of the Commonwealth.

28. Special Counsel

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

29. Special Investigative Personnel

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

Jury may request the judge to provide other specialized personnel to assist it in the investigation.

30. Court Reporter

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

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

31. Subpoena Power

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

When a summons is desired, the Special Grand Jury may notify the Clerk of the Circuit Court, giving the Clerk the name (and address if known) of the person to be summoned, the date and hour set for his appearance, and if papers are desired, a description of them.

32. Warnings Given to a Witness

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

• the witnesses do not have to answer any questions nor produce any evidence that would tend to incriminate them; and

• the witnesses may hire their own counsel and have them present while they testify;

and

• the witnesses may be called upon later to testify in any case that may result from the investigation and report of the Special Grand Jury.

33. Counsel for the Witness

Witnesses appearing before a Special Grand Jury have the right to have counsel of their own present when testifying. Such counsel shall have

the right to consult with and advise the witness during the examination, but the counsel does not have the right to conduct an examination of his or her own witness, unless, the Special Grand Jury requests or permits it.

34. Oath of Witness

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

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

35. Examination of Witness

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

If the Special Grand Jury was convened at the request of someone other than the Commonwealth's Attorney, the Special Grand Jury may still ask the Commonwealth's Attorney to be present and conduct the examination, or the Special Grand Jury may request the judge to designate special counsel to assist it and to conduct the examination, or the Special Grand

Jury may conduct the examination itself without aid of counsel.

If examination of a witness leads the Special Grand Jury to believe that the testimony of other witnesses may be desirable, a request for a summons for such other witnesses should be made to the Clerk of the Circuit Court as specified in Section 31 of this Handbook.

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

36. Witness Refusal to Testify

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

37. Deliberation

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

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

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

by the grand jury, if a majority of not fewer than five of the members of the Special Grand Jury agree.

38. Findings

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

While no particular procedure need be followed, one way to proceed would be for individual members to submit to the Foreman such findings as he or she may think appropriate, and then the

Foreman (or some member designated by him) could prepare a list of the proposed findings, following which a vote should be taken on each such proposed finding.

39. Report

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

The Court Reporter may be used to prepare the Report.

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

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

40. Transcript, Notes, etc.

After the Special Grand Jury has completed its use of the transcripts prepared for it by the Court Reporter, the Foreman must direct the Court Reporter to turn over to him or her all of the notes, tapes or records from which the transcripts were made. The Foreman shall then place the transcripts, notes, tapes, and records in a container and seal it. The date on which the Report is filed should then be placed on the sealed container.

41. Filing of Report

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

42. Secrecy

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

43. Compensation

See section 22 of this handbook.

IV THE MULTI-JURISDICTION GRAND JURY

44.Function of a Multi-Jurisdiction Grand Jury

Multi-Jurisdiction Grand Juries, sometimes called Multi-District Juries, are summoned to investigate drug law violations, consider bills of indictment prepared by special counsel and determine whether probable cause exists to justify returning the indictment as a "true bill" against the accused. The Multi-Jurisdiction Grand Jury reports its findings to state and federal prosecutors.

45.Selection and Size

Like Special Grand Juries, Multi-Jurisdiction Grand Juries are composed of not less than seven not more than eleven members. Multi-Jurisdiction Grand Jury's inquires typically focus on drug law violations which may have occurred

in many different Virginia localities and court jurisdictions. Accordingly, to the extent partially possible, the presiding judge will try to draw a Grand Jury from each jurisdiction in which the alleged violation occurred. However, the maximum number of jurors will always be eleven. Juror's qualifications are similar to those described in section 7 of this handbook.

46.Proceedings

To convene a Multi-Jurisdiction Grand Jury, two or more Commonwealth's Attorneys from different jurisdictions, after receiving approval from the Attorney General of Virginia, may apply to the Supreme Court of Virginia. The term of the Multi-Jurisdiction Grand Jury shall be twelve months but may be extended up to an additional six months. However, the presiding judge may

discharge the jurors at any point the presiding judge believes the Multi-Jurisdiction Grand Jury is no longer needed. The presiding judge determines the time, date and place the Multi-Jurisdiction Grand Jury will be convened. Jurors are compensated according to statute. The secrecy provisions also apply to Multi-Jurisdiction Grand Juries. This type of Grand Jury has statewide subpoena power. Although witnesses appearing before the Multi-Jurisdiction Grand Jury are entitled to the presence of their attorney during the proceedings, the attorney may not participate in the proceedings. A majority of the Multi-Jurisdiction Grand Jurors must agree to return a "true bill" of indictment and in no instance can the majority be less than five jurors. The "True Bill" must state each and every jurisdiction in which the offenses occurred.

CONCLUSION

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

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

General Information for Individuals With Disabilities

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

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

ADA Coordinator and on Virginia's Judicial System Web site. Virginia's Judicial System does not discriminate on the basis of disability in hiring or employment practices.

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