RECORD NUMBER:

United States Supreme Court

JERMEL LEON REED,
Petitioner,

- V. -

COMMONWEALTH OF VIRGINIA,
Respondent

PETITION FOR CERTIORARI FROM JUDGMENT OF THE VIRGINIA SUPREME COURT

PETITION FOR CERTIORARI

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Questions Presented for Review

A. Was Reed's right to a grand jury indictment secured by the Fourteenth and Fifth Amendment to the United States Constitution was violated when Reed was not properly indicted by a grand jury?

B. Was Reed's right to the effective assistance of counsel, secured by the Sixth Amendment to the United States Constitution was violated when Reed's counsel failed to contest jurisdiction due to the lack of proper indictments.

List of All Parties to the Proceeding

All parties are as listed in the caption hereof. Jermel Leon Reed is an individual for which no corporate disclosure statement is required by Rule 29.6.

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

On or about June 1, 2020, the Circuit Court for the King William County (the "Circuit Court") allegedly attempted to indict Reed on two counts of distribution of cocaine, 2nd offense and four counts of distribution of methamphetamine, 2nd offense. A single unconstitutionally vague order was entered by the Circuit Court stating that only one "true bill" was returned against Reed by the grand jury. The referenced order did not state an offense alleged by that one "true bill".

On October 5, 2020, Reed entered into a plea agreement wherein he agreed to enter guilty pleas to one count of distribution of cocaine, 2nd offense and three counts of distribution of methamphetamine, 2nd offense.

The Circuit Court sentenced Reed to twenty years for the count of distribution of cocaine, 2nd offense. The Circuit Court also sentenced Reed to twenty years for each of the three counts of distribution of methamphetamine, 2nd offense. The Circuit Court suspended seventeen years for each of three counts and 20 years for one of the counts of distribution of methamphetamine, 2nd offense. In total, the Circuit Court suspended 71 years of the sentences, which left Reed with an active sentence of nine years. The sentencing order was entered on October 5, 2020. The Order was not entered into an official report.

Reed did not appeal his convictions.

On or about June 21, 2021, Reed filed a Petition for Writ of Habeas Corpus with the Virginia Supreme Court challenging the jurisdiction of the Circuit Court.

The Virginia Supreme Court denied Reed's Petition for Writ of Habeas Corpus on March 10, 2022. The Order was not entered into an official report.

This Petition is filed for review of the aforementioned denial of Reed's Petition for Writ of Habeas Corpus.

II. Statement of the Basis of Appellate Jurisdiction

The Virginia Supreme Court entered its Judgment on March 10, 2022.

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

III. Constitutional Provisions and Statutes Involved in the Case

The Fifth and Fourteenth Amendments to the

United States Constitution are involved in this case.

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

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws …

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

Va. Code § 17.1-123(A) states:

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

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

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

> of the chief judge of the court, by order entered of record, divide the order book into two sections, to be known as the civil order book and the criminal order book.

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

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

Reed was convicted pursuant to Va. Code §18.2-248, which is involved in this case.

IV. Statement of the Case

A. Procedural Posture

No court order signed by any Circuit Court judge was ever entered evidencing that a grand jury had been convened on open court or acted according to law. Accordingly, Reed was never indicted by a grand jury such that the Circuit Court had jurisdiction over Reed.

On October 5, 2020, Reed entered into a plea agreement wherein he agreed to enter guilty pleas to one count of distribution of cocaine, 2nd offense and three counts of distribution of methamphetamine, 2nd offense.

Reed appeared in the Circuit Court and entered guilty pleas to four charges.

The Circuit Court sentenced Reed to twenty years for the count of distribution of cocaine, 2nd offense. The Circuit Court also sentenced Reed to twenty years for each of the three counts of distribution of methamphetamine, 2nd offense.

The Circuit Court suspended seventeen years for each of three counts and 20 years for one of the counts of distribution of methamphetamine, 2nd offense. In total, the Circuit Court suspended 71 years of the sentences, which left Reed with an active sentence of nine years. The sentencing order was entered on October 5, 2020.

Reed did not appeal his convictions.

On or about June 21, 2021, Reed filed a Petition for Writ of Habeas Corpus with the Virginia Supreme Court challenging the jurisdiction of the Circuit Court.

The Virginia Supreme Court denied Reed's Petition for Writ of Habeas Corpus on March 10, 2022.

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

B. Statement of Facts

Between August 7, 2019, and August 22, 2019, Reed was charged with six offenses related to the selling of cocaine and methamphetamines.

A detailed review of Circuit Court records has revealed that no order signed by a judge was ever entered indicting Reed that stated the purported grand jury indictments, what said indictments charged, or that said indictments were returned in open court.

Reed was charged with two counts of distribution of cocaine, 2nd offense and four counts of distribution of methamphetamine, 2nd offense. No court order signed by the Circuit Court judge was ever entered regarding the grand jury that indicates that Reed was ever indicted for those particular offenses.

V. Argument

The Virginia Supreme Court erred by failing to correct the Constitutional errors of this case and denying Reed's Petition for Writ of Habeas Corpus.

A. Discussion of Question A - Was Reed's right to a grand jury indictment secured by the Fourteenth and Fifth Amendment to the United States Constitution was violated when Reed was not properly indicted by a grand jury?

As a result of violation of Reed's Fifth Amendment right to a grand jury indictment, the courts of Virginia never established jurisdiction over Reed.

1) The Constitutional Limitations of the Authority of This Court

The U.S. Constitution is the supreme law of the United States. Article VI, Clause 2.

All courts, including this Honorable Court derive their authority from the U.S. Constitution. Article III.

The U.S. Constitution was ratified on June 21, 1788.

Shortly after ratification, the Bill of Rights was added to amend the U.S. Constitution on December 15, 1791.

Accordingly, the Bill of Rights is a part of the supreme law of the land. Article VI, Clause 2. Consequently, the authority of the plain language of the Bill of Rights is superior authority to that of this Honorable Court. Article VI, Clause 2.

The only authority to amend the U.S. Constitution is established in Article V. Article V

has no provision that allows any court to ignore or abrogate provisions of the U.S. Constitution.

As such, no court, including this Court has legal authority to unilaterally amend the U.S. Constitution by judicial fiat or extinguish basic rights granted to citizens under the Bill of Rights, which is an integral part of the preeminent law of the United States. Article V.

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

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

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

Documents of the King William County Circuit Court (the "Circuit Court") alleged that a grand jury was convened to hear allegations against Reed, but those documents show that alleged grand jury did not indict Reed according to Virginia law. Indictments for the crimes that Reed was charged with were never identified and stated to have been returned in open court and a record of that return in open court entered in an Order Book via a judge signed order in compliance with Va. Code §§ 17.1-123(A), 17.1-124, and 17.1-240.

The Petition relied 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 legally proper indictment was ever signed by a judge or recorded, the judgments against Reed should be vacated.

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

State courts, such as those of Virginia in this case, operate in violation of the Fifth Amendment's long-standing grand jury law and rights of defendants and then claim that defendants effectively have no recourse. It might be arguable, albeit without constitutional authority, that states can have indictment methods that have equivalent protections to the federal grand jury system, the grand jury system of Virginia, and the grand jury systems of other states. What should have never been allowed is for a fundamental constitutional right, such as the Fifth Amendment right to a grand

jury indictment be violated with impunity, and state courts then to be able to claim that right to be "merely procedural" and subject to waiver.

Virginia courts err by claiming that any defective grand jury indictment is a waivable procedural matter and was not jurisdictional. See, e.g., *Hanson v. Smyth*, 183 Va. 384, 390-91 (1944).

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

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

> indictment was returned into court by the grand jury is not such a defect as will render null and void the judgment of conviction based thereon.

Hanson, 183 Va. at 390-91.

The *Hanson* opinion relied upon a legally erroneous premise that the Fifth Amendment to the Federal Constitution did not apply to Virginia under the Fourteenth Amendment. However, since *Hanson* was decided, this Honorable Court has explicitly recognized that the Bill of Rights of the Constitution applies to state law matters under the Fourteenth Amendment. For example; in *Griffin v. California*, 380 U.S. 609, 615 (1965); this Honorable Court specifically held that the self-incrimination provision of the Fifth Amendment applied to the States by reason of the Fourteenth Amendment.

The right to indictment by grand jury was and is a longstanding right established by the law of England. See, e.g., *Ex parte Wilson*, 114 U.S. 417,

423-24, 5 S. Ct. 935, 938 (1885). Without the intervention of a grand jury, trials were not allowed for capital crimes, nor for any felony. *Id.* The right to a grand jury indictment was so fundamental to the criminal justice rights of defendants that rights therefor were placed in the Fifth Amendment of the Bill of Rights. *Id.*; Fifth Amendment of the U.S. Constitution.

As this Court has held (emphasis added):

> In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. **In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury."** Cf. *Costello v. United States*, 350 U.S. 359, 361-362 (1956). The grand jury's historic functions survive to this day. Its responsibilities

> continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972).

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

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

> An alternative theory regarding the relationship between the Bill of Rights and § 1 of the Fourteenth Amendment was championed by Justice Black. **This theory held that § 1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights**. See, *e.g.*, *Adamson*, *supra*, at 71-72, 67 S. Ct. 1672, 91 L. Ed. 1903 (Black, J.,

dissenting); *Duncan*, *supra*, at 166, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (Black, J., concurring). As Justice Black noted, **the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States and, in so doing, overruled this Court's decision in *Barron***. *Adamson, supra,* at 72, 67 S. Ct. 1672, 91 L. Ed. 1903 (dissenting opinion). Nonetheless, the Court never has embraced Justice Black's "total incorporation" theory.

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

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

Id.

Justice Black's "theory", as it was called in *Adamson*, is the only substantively correct view of

applicability of the Bill of Rights to the states. The so-called "selective incorporation doctrine" embraced by this Court as purportedly justifying withholding basic constitutional rights from United States citizens is a "doctrine" that is unconstitutional on its face and claims authority that this Court simply does not have under Article III of the U.S. Constitution. The Bill of Rights is not an *ala carte* menu for courts to pick and choose rights from to grant to citizens. No court, including this Honorable Court, has constitutional authority to pick and choose which rights of the Bill of Rights citizens have and which they do not have. If this Court desires to eliminate the grand jury right for citizens, its justices have the right to petition political leaders to make such amendment. Article V explicitly prohibits this Court from excising citizen's substantive constitutional rights outside of the Article V process. Such

authority is solely within the province of the people through their states to amend the Constitution if they believe that such is warranted. Reed respectfully avers that Bill of Rights applies to the states through the Fourteenth Amendment in its entirety. Accordingly, any remaining provisions of the Bill of Rights not explicitly applied to states via the Fourteenth Amendment heretofore by this Court should be incorporated as jurisprudence moves forward in accordance with the plain language of the U.S. Constitution as noted in Justice Black's views.

Reed acknowledges that *McDonald* referenced the *Hurtado* case from over 130 years ago concerning grand jury indictments standing for the premise that jurisprudence to date had not incorporated the Fifth Amendment's grand jury indictment requirement. *Id.*, 561 U.S. at 765 n.13. However, although the case of *Hurtado*, 110 U.S. at 519 was, and is, legally

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

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

Id. The *Hurtado* Court did not hold that California could ignore any and all indictment procedures established under California law as Virginia courts did pursuant to Virginia law in Reed's case. The due process requirement needed to be met under *Hurtado* and to the extent that this Court wishes to

perpetuate prior errors and does not wish to revisit *Hurtado*, this Court should still hold that the right to a grand jury indictment or its equivalent is jurisdictional rather than procedural. Virginia still must meet the due process requirement. That requirement has simply not been met in Reed's case.

If this Honorable Court wishes to continue to follow the erroneous "selective incorporation" doctrine, Reed avers that the Bill of Rights guarantee of a grand jury indictment is fundamental to our scheme of ordered liberty and system of justice under the selective incorporation doctrine. *McDonald*, 561 U.S. at 761-65.

In order to understand why the right to a grand indictment is fundamental, it is instructive to review the history of grand juries and their equivalents further. The history of grand juries goes back to early Grecian use of "Dicasteries", which

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

> The Grand Jury **had its origin more than seven centuries ago in**

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

Exhibit I at § 5. Thus, the Virginia Supreme Court, which is responsible for the Handbook recognize the fundamental importance of grand juries in controlling the start of prosecutions. The Virginia Supreme Court affirmed this fundamental importance using the Constitution of the United

States and the Constitution of Virginia as primary authorities.

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

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

permit public spirited citizens, chosen by democratic procedures, to attach corrupt conditions. ***A criticism of the action of the grand jury is a criticism of democracy itself.***

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

The institution was thus evolved as an instrument for efficient prosecution of crime, and as such it has remained until this day. The principle of secrecy was developed to protect the King's Counsel and to permit the Prosecutors to have influence with the grand jury, and in modern times it is still useful for the same purpose. By degrees the secrecy of

> proceedings permitted two outstanding extensions in that grand jurors at times refused to indict notwithstanding pressure from the Crown and the Judges. This prerogative stood the people will in hand during the tyranny of the Stuarts, and, as it was eulogized by Coke and Blackstone, ***the institution was encysted with all its characteristics in the Fifth Amendment***. … The Constitution of the United States preserved the grand jury with all its powers and inherent character … ***the grand jury is an essential element in the structure of the federal government now***. ***No other instrument can cope with organized crime which cuts across state lines, conspiracies to overthrow the government of the United States, or alleged deviations from rectitude by those who have been entrusted by the government with public trust*** … The grand jury breathes the spirit of a community into the enforcement of law. ***Its effect as an institution for investigation of all, no matter how highly placed, creates the elan of democracy***. Here the people speak through their chosen representatives.

United States v. Smyth, 104 F. Supp. 283, 288-91 (N.D. Cal. 1952). The opinion in *Smyth* provides

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

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

> In time of peace a citizen can perform no higher public duty than that of Grand Jury service. No body of citizens exercises ***public functions more vital to the administration of law and order*** … ***No one can be prosecuted for a felony except on an indictment by a Grand Jury***.

App. I at § 4.

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

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

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

3) The Grand Jury Right Should Also Apply to the States Under the Fourteenth Amendment Privilege or Immunities Clause

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

"It cannot be presumed that any clause in the constitution is intended to be without effect."

Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 174 (1803) (opinion for the Court by Marshall, C. J.).

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

> ***No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury*** … nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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

It is noteworthy that all other rights conferred by the Fifth Amendment other than the

grand jury right have been specifically held by the Court to apply to the states. The double jeopardy prohibition of the Fifth Amendment has been held to apply to the States through the Fourteenth Amendment. *Benton*, 395 U.S. at 794, 89 S. Ct. at 2062.

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

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

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

Reed avers that there is simply no valid reason why Virginia should be allowed to violate Reed'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"). *McDonald*, 561 U.S. at 813, 130 S. Ct. at 3063 (Thomas. J., concurring).

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, Reed 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 Reed 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 Reed without proper indictments. There was no proper judge signed order indicting Reed.

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 Reed's right to a presentment or indictment from a Grand Jury and then for Reed to have no recourse.

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

This Petition should be granted to affirm that right.

4) Reed's defective grand jury indictments deprived the Circuit Court of Jurisdiction

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

It is long-standing law in Virginia that a failure to record a proper grand jury indictment in a court's order book deprived a court trying a case of jurisdiction. *Commonwealth v. Cawood*, 4 Va. 527, 541 (1826).

Failure to deliver the indictment in court and

record the finding is a "fatal defect". *Simmons v. Commonwealth*, 89 Va. 156, 157 (1892).

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

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

Accordingly, Reed requests that this Honorable Court grant this Motion and rule that the failure to indict Reed are fatal defects that render his

indictments nullities, and his convictions void for lack of jurisdiction.

B. Discussion of Question B - Was Reed's right to the effective assistance of counsel, secured by the Sixth Amendment to the United States Constitution was violated when Reed's counsel failed to contest jurisdiction due to the lack of proper indictments?

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the

defendant by the Sixth Amendment. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.*

The performance prong of *Strickland* requires a defendant to show that counsel's representation fell below an objective standard of reasonableness. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012).

In Reed's case, his trial counsel failed to perform any investigation to make a determination as to whether or not Reed had been properly indicted such that the Circuit Court had jurisdiction over Reed. As a consequence, Reed was never advised concerning his rights to object to the Circuit Court's jurisdiction or appeal his convictions on jurisdictional grounds. This failure to investigate was objectively unreasonable and was so serious that trial counsel did not function in a manner as guaranteed by the Sixth Amendment.

Reed was prejudiced by the ineffective assistance of counsel because he was not advised, nor did he know that he could challenge jurisdiction based upon deficiencies in the grand jury indictments.

But for the errors of Reed's trial counsel, there is a reasonable probability that the convictions of Reed would have been vacated, at least on appeal. *Lafler*, 132 S. Ct. at 1384.

Accordingly, any purported waiver by Reed of the right to contest the jurisdiction of the Circuit Court was not knowing or intelligent, as required by binding precedent. See, e.g., *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (holding that waivers of constitutional rights must be knowing and intelligent).

VI. Overall Conclusion

For all of the reasons stated herein, Reed's Petition for Certiorari should be granted, and his convictions vacated.

Dated: May 18, 2022

by */s/ Dale R. Jensen*

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