

RECORD NUMBER:

United States Supreme Court

MICAH JAMES PATTERSON,
Petitioner,

- V. -

COMMONWEALTH OF VIRGINIA,
Respondent

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

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

Questions Presented for Review

A. Does any court have the authority to amend the United States Constitution by fiat and extinguish a defendant's Fifth Amendment rights?

PETITION FOR CERTIORARIⁱ

List of All Parties to the Proceeding

All parties are as listed in the caption hereof. Micah James Patterson is an individual for which no corporate disclosure statement is required by Rule 29.6.

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PETITION FOR CERTIORARI

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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 May 21, 2012, documents of the Circuit Court for the City of Virginia Beach (the “Circuit Court”) allegedly indicted Patterson one (1) count of murder in violation of VA Code §18.2-32 and one (1) count of object sexual penetration in violation of VA Code §18.2-67.2. On June 4, 2012, the Circuit Court allegedly indicted Patterson on an additional charge of one (1) count of child neglect in violation of VA Code §18.2-371.1. On September 4, 2012, the Circuit Court allegedly indicted Patterson for one (1) count of second-degree murder in violation of VA Code §18.2-31 and one (1) count of murder in violation of VA Code §18.2-31. No record of a court order recording any of these alleged indictments is in any court record.

On August 12, 2013 Patterson was tried by jury in the Circuit Court for the City of Virginia Beach. Patterson was convicted of object sexual penetration; child neglect, second-degree murder, and murder in the first degree.

On November 6, 2013, with the concurrence of both parties, the trial court vacated the conviction and sentence for the second-degree murder charge. For the remainder of the convictions, the circuit court sentenced Patterson to life in prison for murder in the first degree, to 30 years for object sexual penetration, and to 10 years for felony child neglect. The sentencing order was entered on November 12, 2013. The Order was not entered into an official report.

On February 2, 2015, the Virginia Court of Appeals denied Patterson's Petition for Appeal. The Order was not entered into an official report.

On November 20, 2015, the Virginia Supreme Court denied Patterson's Petition for Appeal. The Order was not entered into an official report.

On or about April 15, 2020, Patterson filed a Motion to Vacate in the Circuit Court challenging jurisdiction.

The Circuit Court denied Patterson's Motion to Vacate on June 12, 2020. The Order was not entered into an official report.

Patterson timely appealed the denial of the Motion to Vacate.

On August 25, 2020, the Virginia Court of Appeals transferred jurisdiction to the Virginia Supreme Court. The Order was not entered into an official report.

The Virginia Supreme Court entered its Order finally dismissing the Petition for Appeal on May 19, 2021. The Order was not entered into an official

report.

II. Statement of the Basis of Appellate Jurisdiction

The Virginia Supreme Court entered its Judgment on May 19, 2021.

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 ...

Patterson'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.

Patterson was convicted pursuant to Va. Code §18.2-32, §18.2-67.2, §18.2-371.1, each of 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 confirming that a grand jury had been convened on open court or acted according to law. Accordingly, Patterson was never indicted by a grand jury such that the Circuit Court had

jurisdiction over Patterson.

Patterson appeared in the Circuit Court and entered not guilty pleas to the charges.

On August 12, 2013 Patterson was tried by jury in the Circuit Court for the City of Virginia Beach. Patterson was convicted of object sexual penetration; child neglect, second-degree murder, and murder in the first degree.

On November 6, 2013, with the concurrence of both parties, the trial court vacated the conviction and sentence for the second-degree murder charge. For the remainder of the convictions, the circuit court sentenced Patterson to life in prison for murder in the first degree, to 30 years for object sexual penetration, and to 10 years for felony child neglect. The sentencing order was entered on November 12, 2013.

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On August 25, 2020, the Virginia Court of Appeals transferred jurisdiction to the Virginia Supreme Court.

The Virginia Supreme Court entered its Order finally dismissing the Petition for Appeal on May 19, 2021.

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

On January 11, 2012 Aubrey Hannsz died of severe brain injuries. The injuries were determined to have been caused by abusive head trauma. There was no forensic evidence proving who inflicted the injuries.

A detailed review of Circuit Court records has revealed that no order signed by a judge was ever entered indicting Patterson that stated that the grand jury indictment was returned in open court.

Unconfirmed records in the files of the Circuit Court allege that a grand jury indicted Patterson on three counts of murder, one count of object sexual penetration, and one count of count of child neglect. No court order signed by the Circuit Court judge was ever entered regarding the grand jury that indicates

that any such proceeding ever took place or that Patterson was ever indicted.

V. Argument

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

A. Discussion of Questions Presented

1. Does any court have the authority to amend the United States Constitution by fiat and extinguish a defendant's Fifth Amendment rights?

The courts of Virginia never established jurisdiction over Patterson.

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

As such, no Court, including this Court has legal authority to unilaterally amend the U.S. Constitution by judicial fiat and thereby extinguish basic rights granted to citizens under the preeminent law of the land.

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

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

This Petition should be granted because Patterson was never properly indicted by a grand jury. Pursuant to the Fifth Amendment, an

indictment is a bedrock requirement for a court to have jurisdiction to enter a valid criminal judgment under the U.S. Constitution.

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

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

The Petition relies upon a well-established rule that when a grand jury returns an indictment, the grand jury verdict must be presented in open court and the facts recorded by an order signed by a

judge; and until this is done the accused is not indicted.

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

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

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

The right to a grand jury indictment conferred by the Fifth Amendment to the United States Constitution should apply to state indictments via the Fourteenth Amendment. Given changes in constitutional law that have occurred since *Hurtado v. California*, 110 U.S. 516, 519 (1884) was decided over 130 years ago, it is time to either clarify or

overrule that opinion.

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

Virginia courts err by claiming that any defective grand jury indictment is a waivable

procedural matter and was not jurisdictional. See, e.g., *Hanson v. Smyth*, 183 Va. 384, 390-91 (1944).

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

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

Hanson, 183 Va. at 390-91.

The *Hanson* opinion relied upon a legally erroneous premise that the Fifth Amendment to the

Federal Constitution did not apply to Virginia under the equal protection clause of the Fourteenth Amendment. However, since *Hanson* was decided, this Honorable Court has significantly expanded the application of the Bill of Rights of the Constitution to state law matters under the equal protection portion of the Fourteenth Amendment. For example; in *Griffin v. California*, 380 U.S. 609, 615 (1965); this Honorable Court specifically held that the self-incrimination provision of the Fifth Amendment applied to the States by reason of the Fourteenth Amendment.

The right to indictment by grand jury was and is a longstanding right established by the law of England. See, e.g., *Ex parte Wilson*, 114 U.S. 417, 423-24, 5 S. Ct. 935, 938 (1885). Without the intervention of a grand jury, trials were not allowed for capital crimes, nor for any felony. *Id.* The right

to a grand jury indictment was so fundamental to the criminal justice rights of defendants that rights therefor were placed in the Fifth Amendment of the Bill of Rights. *Id.*; Fifth Amendment of the U.S. Constitution.

As this Court has held (emphasis added):

In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by “a presentment or indictment of a Grand Jury.” Cf. *Costello v. United States*, 350 U.S. 359, 361-362 (1956). The grand jury’s historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408

U.S. 665, 686-687 (1972).

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

In 2010, this Honorable Court explained in some detail the history of application of the Bill of Rights to the States via the Fourteenth Amendment.

McDonald v. City of Chi., 561 U.S. 742, 761-65, 130 S. Ct. 3020, 3032-35 (2010). In *McDonald*, this Court set forth in pertinent part (emphasis added):

An alternative theory regarding the relationship between the Bill of Rights and § 1 of the Fourteenth Amendment was championed by Justice Black. This theory held that § 1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights. See, e.g., *Adamson*, *supra*, at 71-72, 67 S. Ct. 1672, 91 L. Ed. 1903 (Black, J., dissenting); *Duncan*, *supra*, at 166, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (Black, J., concurring). As Justice Black noted, the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the

States and, in so doing, overruled this Court's decision in *Barron*.

Adamson, supra, at 72, 67 S. Ct. 1672, 91 L. Ed. 1903 (dissenting opinion).

Nonetheless, the Court never has embraced Justice Black's "total incorporation" theory.

While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of "selective incorporation," i.e., the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. See, e.g., *Gideon v. Wainright*, 372 U.S. 335, 341, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Malloy v. Hogan*, 378 U.S. 1, 5-6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); *Pointer v. Texas*, 380 U.S. 400, 403-404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); *Washington v. Texas*, 388 U.S. 14, 18, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Duncan*, 391 U.S., at 147-148, 88 S. Ct. 1444, 20 L. Ed. 2d 491; *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

The decisions during this time abandoned three of the previously noted characteristics of the earlier period. The Court made it clear that the governing standard is not whether *any* "civilized system [can] be imagined that would not accord the particular protection."

Duncan, 391 U.S., at 149, n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491. Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice. *Id.*, at 149, and n. 14, 88 S. Ct. 1444, 20 L. Ed. 2d 491; see also *id.*, at 148, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (referring to those “fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions” (emphasis added; internal quotation marks omitted)). The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated.

Id.

Patterson avers that Justice Black’s theory is substantively correct and the Bill of Rights is not an *ala carte* menu for courts to pick and choose from. No court, including this Honorable Court, has constitutional authority to pick and choose which rights of the Bill of Rights citizens have and which

they do not have. If this Court desires to eliminate the grand jury right for citizens, its justices have the right to petition political leaders to make such amendment. Article V explicitly prohibits this Court from excising citizen's substantive constitutional rights outside of the Article V process. Such authority is solely within the province of the people through their states to amend the Constitution if they believe that such is warranted. Patterson respectfully avers that Bill of Rights applies to the states through the Fourteenth Amendment in its entirety. Accordingly, any remaining provisions of the Bill of Rights not explicitly applied to states via the Fourteenth Amendment heretofore by this Court should be incorporated as jurisprudence moves forward in accordance with Justice Black's views.

Patterson acknowledges that *McDonald* referenced the *Hurtado* case from over 130 years ago

concerning grand jury indictments standing for the premise that jurisprudence to date had not incorporated the Fifth Amendment's grand jury indictment requirement. *Id.*, 561 U.S. at 765 n.13. However, although the case of *Hurtado*, 110 U.S. at 519 was legally erroneous by stopping short of applying the grand jury provision of the Fifth Amendment to the States via the Fourteenth Amendment, it affirmatively held that the due process requirements had to be met as to indictments. *Id.*, 110 U.S. at 538. The *Hurtado* Court specifically held that:

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

Id. The *Hurtado* Court did not hold that California could ignore any and all indictment procedures established under California law as Virginia courts did pursuant to Virginia law in Patterson'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 Patterson's case.

If this Honorable Court wishes to continue to follow the erroneous "selective incorporation" doctrine, Patterson avers that the Bill of Rights guarantee of a grand jury indictment is fundamental to our scheme of ordered liberty and system of justice

under the selective incorporation doctrine.

McDonald, 561 U.S. at 761-65.

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

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

The Grand Jury had its origin more than seven centuries ago in England from which, in large part, this country inherited its legal system. Many legal historians trace its origin to events in the reign of Henry II and to one of the articles of the Constitution of Clarendon in 1164. It was recognized in Magna Carta granted by King John at the demand of the people in 1215. One of its earliest functions was to protect citizens from despotic abuse of power by the king; its other function was to report those suspected of having committed criminal offenses.

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

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

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

The institution of the grand jury is a development which comes to us out of the mists of early English history. It has undergone changes, but has been

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

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

early stage of evolution, the body made presentment or presented indictments at the behest of private individuals or the Prosecutor for the King. Vestiges of all these factors still subsist.

The institution was thus evolved as an instrument for efficient prosecution of crime, and as such it has remained until this day. The principle of secrecy was developed to protect the King's Counsel and to permit the Prosecutors to have influence with the grand jury, and in modern times it is still useful for the same purpose. By degrees the secrecy of proceedings permitted two outstanding extensions in that grand jurors at times refused to indict notwithstanding pressure from the Crown and the Judges. This prerogative stood the people will in hand during the tyranny of the Stuarts, and, as it was eulogized by Coke and Blackstone, the institution was encysted with all its characteristics in the Fifth Amendment. ... The Constitution of the United States preserved the grand jury with all its powers and inherent character ... the grand jury is an essential element in the structure of the federal government now. No other instrument can cope with organized crime which cuts across state lines, conspiracies to overthrow the government of the United States, or alleged deviations from rectitude by those

who have been entrusted by the government with public trust ...

The grand jury breathes the spirit of a community into the enforcement of law. *Its effect as an institution for investigation of all, no matter how highly placed, creates the elan of democracy.* Here the people speak through their chosen representatives.

United States v. Smyth, 104 F. Supp. 283, 288-91

(N.D. Cal. 1952). The opinion in *Smyth* provides solid reasoning showing why the Bill of Rights guarantee of a grand jury indictment is fundamental to our scheme of ordered liberty and system of justice.

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

In time of peace a citizen can perform no higher public duty than that of Grand Jury service. No body of citizens

exercises public functions more vital to the administration of law and order ... No one can be prosecuted for a felony except on an indictment by a Grand Jury..

App. I at § 4.

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

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

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

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

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

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

No person shall be held to
answer for a capital, or otherwise
infamous crime, unless on a
presentment or indictment of a
Grand Jury ... nor shall any person
be subject for the same offence to be
twice put in jeopardy of life or limb; nor
shall be compelled in any criminal case
to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The denial of Patterson'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).

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

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 Patterson's right to a presentment or indictment from a Grand Jury and then for Patterson 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. Patterson's defective grand jury indictments deprived the Circuit Court of Jurisdiction

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

VI. Overall Conclusion

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

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