

**VIRGINIA:**

*In the Circuit Court of the City of Virginia Beach*  
*Hearing Date: November 6, 2015*

Judge: Hanson

Commonwealth of Virginia,

against Case No. CR12-1865, CR12-2017,  
CR12-3195

Micah Patterson,

Defendant.

**SENTENCING ORDER**

Attorney for the Commonwealth:  
K. Paulding/P. Hollowell

Attorney for the Defendant:  
M. DelDuca/S. Cline

Court Reporter:  
Fiduciary Reporting, Inc.

The defendant was present and represented by  
counsel.

On August 15, 2013, a jury found the defendant  
GUILTY of the following offense(s):

Offense Description	Offense Date	Code Section	VA. Crime Code Reference
Murder- 1 <sup>st</sup> Degree	01/10/12	18.2-32; 18.2-10	999-9999-99
Murder- 2 <sup>nd</sup> Degree	01/10/12	18.2-32; 18.2-10	999-9999-99

Object Sexual Penetration	01/10/12	18.2-67.2	999-9999-99
Child Neglect	01/10/12	18.2- 371.1(A); 18.2-10	FAM-3806-F4

The presentence report was considered and filed as part of the record in accordance with the provisions of Code §19.2-299.

Upon the agreement of counsel, the Court VACATED the Murder-2nd Degree conviction and sentence imposed by the jury and dismissed the charge.

Pursuant to the provisions of Code § 19.2-298.01 the applicable discretionary sentencing guidelines and the guidelines worksheets were reviewed and considered by the Court and are ordered filed as part of the record.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court, this day, affirmed the jury's verdicts and SENTENCES the defendant to:

Incarceration in the Virginia Department of Corrections for the term of: LIFE on the charge of Murder-1st Degree; 30 YEARS on the charge of Object Sexual Penetration; and 10 YEARS on the charge of Child Neglect.

The total sentence imposed is LIFE PLUS 40 YEARS.

**Credit for time served.** The defendant sentenced to a term of confinement in a correctional facility shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187.

**Costs.** The defendant shall pay costs pursuant to statute.

**Distribution of copies:**

The Clerk shall send a copy of this order to the:

Sheriff

Department of Corrections

Probation Office of this Court

Defendant Identification

SSN: redacted

DOB: redacted

Enter: 11/12/13

SEX: Male

Judge: Edward W. Hanson

**VIRGINIA:**

*In the Circuit Court of the City of Virginia Beach*

Commonwealth of Virginia,

against        Case No. CR12-1865, CR12-2017,  
                    CR12-3195

Micah Patterson,

Defendant.

**ORDER**

This matter comes before the Court upon the defendant's postconviction motion to vacate. Motion and memorandum in support of motion to vacate filed April 20, 2020 by counsel for the defendant.

The attorney for the Commonwealth has filed a response.

Final judgment was imposed on November 6, 2013.

The Court dispenses with a hearing in this matter because the facts and legal contentions are adequately developed in the record before the Court. The defendant's factual claims are all

contradicted by the record and his legal claims are all without merit. A hearing, therefore, would not aid in the decisional process under those circumstances.

*Analysis and Ruling*

The defendant claims his convictions are void *ab initio* on two grounds: (1) no indication that grand jury indictment was properly recorded and (2) defective language in the indictment (did not contain language "without the use of force").

Defendant's allegation that he was not properly indicted by a grand jury is belied by the record. The indictments are marked a true bill and signed by the foreman. Contrary to defendant's allegations, as to each indictment, the Court recorded the fact of the indictment in a grand jury order. The Court has taken judicial notice of its Grand Jury Orders dated May 21, 2012, June 4,

2012 and September 4, 2012 (the date of the indictments). Such orders establish beyond peradventure that the indictments against the defendant were returned in the manner provided by law. Howard v. Commonwealth, 63 Va. App. 580, 584 (2014).

Facial challenges to an indictment must be made prior to trial as required by the statute of jeofails, Code § 19.2-227, and Rule 3A:9. The Virginia Supreme Court has "consistently and repeatedly held that generally a defendant must challenge the sufficiency of an indictment before the jury's verdict, or the alleged defect is waived." Wolfe v. Commonwealth, 265 Va. 193, 224, (2003). There is no showing that the defendant was deprived of the ability to defend against the charge. The defendant therefore has waived or Jacks standing to now collaterally attack the indictment on those grounds.

McDougal v. Commonwealth, 212 Va. 547, 549 (1972). The Court had jurisdiction of the crimes charged. Code § 17.1-513. “As long as the indictments were not so defective so as to deprive the court of jurisdiction to render the judgments of conviction, a petitioner may not collaterally attack the sufficiency of the indictments.” Abney v. Warden, Mecklenburg Correctional Center, 1 Va. App. 26, 29 (1985).

In addition to the foregoing, the defendant's claims are non-jurisdictional. The time for raising those claims was during the pendency of the trial proceedings and on direct appeal. Hanson v. Smyth, 183 Va. 384, 390 (1944). Hanson v. Smyth remains the law in Virginia, notwithstanding the invitation by counsel for the defendant to disregard it.

Accordingly, the motion to vacate is DENIED.



The circuit court clerk shall forward a copy of this Order to counsel for the defendant and to the attorney for the Commonwealth.

ENTER: June 12, 2020

JUDGE: signature

**VIRGINIA:**

*In the Supreme Court of Virginia held at the  
Supreme Court Building in the City of Richmond on  
Wednesday the 19<sup>th</sup> day of May, 2021.*

Micah James Patterson,

Appellant,

against

Record No. 201186  
Circuit Court Nos. CR12-1865; CR12-  
2017; and CR12-3195

Commonwealth of Virginia,

Appellee.

From the Circuit Court of the City of Virginia Beach

Upon review of the record in this case and  
consideration of the argument submitted in support  
of and in opposition to the granting of an appeal, the  
Court is of the opinion there is no reversible error in  
the judgment complained of. Accordingly, the Court  
refuses the petition for appeal. The rule to show  
cause previously entered herein is discharged.

A Copy,

Teste: Douglas B Robelen (S), Clerk

By: signature

Deputy Clerk

**VIRGINIA**

**IN THE CIRCUIT COURT OF VIRGINIA  
BEACH**

COMMONWEALTH OF  
VIRGINIA,

Petitioner,

v.

MICAH JAMES  
PATTERSON,

Defendant.

Cases Nos.

CR12003195;

CR12002017;

CR12001865;

---

**MOTION TO VACATE JUDGMENT**

Comes now the Defendant, Micah James Patterson (“Patterson”), by counsel, and hereby respectfully moves this Honorable Court to issue an Order granting his Motion to Vacate the Judgment (the “Motion”) of convictions rendered in the above styled criminal cases, on the grounds that those convictions were void ab initio and null because this Court never established jurisdiction.

Long-standing binding legal precedent requires proper grand jury proceedings to have been followed in order for a court to have jurisdiction in a criminal case. In order for this Court to have had

jurisdiction, Patterson had to have been properly indicted by a grand jury, the indictment must be presented in open court, and the indictment properly recorded. A detailed review of the records of this Court show no indication that Patterson's grand jury indictment was ever properly recorded.

Moreover, the improper "indictment" was further defective because the language of Code of Virginia §18.2-63 (A) "...*without the use of force...*" is an essential element of the offense that would adequately apprise Patterson with nature and cause of the accusation. The indictment(s) must contain every essential element of the crime alleged.

Accordingly, the convictions in the above styled cases are void ab initio and legal nullities for want of jurisdiction and should be declared as such.

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.

Likewise, 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 rule that be forever discharged for the crimes charged and immediately released from incarceration.

### CONCLUSION

Wherefore, for the foregoing reasons, Micah James Patterson prays that this Honorable Court Grant his Motion to Vacate Judgments and issue an Order discharging those judgments and ordering his immediate release from incarceration.

RESPECTFULLY SUBMITTED,

By: 

Dale Jensen  
Counsel  
Dale R. Jensen (VSB 71109)  
Dale Jensen, PLC  
606 Bull Run, Staunton, VA 24401  
(434) 249-3874  
(866) 372-0348 facsimile

[djensen@dalejensenlaw.com](mailto:djensen@dalejensenlaw.com)

Certificate of Service

I hereby certify that the original of the foregoing was, on the 15th day of April, 2020, sent via US Mail to the Office of the Clerk for the Circuit Court of Virginia Beach and a true copy thereof was served by US Mail to the following:

Virginia Beach Commonwealth's Attorney  
2425 Nimmo Pkwy.  
Virginia Beach, VA 23456

RESPECTFULLY SUBMITTED,

A handwritten signature in dark ink, appearing to read "Dale R. Jensen", written over a light blue horizontal line.

Dale R. Jensen  
Counsel for Micah James Patterson



**VIRGINIA**

**IN THE CIRCUIT COURT OF VIRGINIA  
BEACH**

COMMONWEALTH OF  
VIRGINIA,

Petitioner,

v.

MICAH JAMES  
PATTERSON,

Defendant.

Cases Nos.

CR12003195;

CR12002017;

CR12001865;

---

**MEMORANDUM IN SUPPORT OF MOTION  
TO VACATE JUDGMENT**

Comes now the Defendant, Micah James  
Patterson (“Patterson”), by counsel, presents this  
Memorandum in Support of his Motion to Vacate  
Judgment (the “Motion”) of convictions rendered in  
the above styled criminal cases; and in support of  
the Motion states:

**I. Introduction**

The Motion should be granted because Patterson was not properly indicted by a grand jury according to required procedures in violation of his Fifth Amendment rights. Long-standing binding legal precedent requires proper grand jury proceedings to have been followed in order for a court to have jurisdiction in a criminal case. In order for this Court to have had jurisdiction, Patterson had to have been properly indicted by a grand jury, the indictment must be presented in open court, and the indictment properly recorded. A detailed review of the records of this Court show no order shows that Patterson was ever indicted by a grand jury.

Accordingly, this Motion should be granted and the judgment entered against Patterson should be vacated.

## **II. Background**

On January 11, 2012 Aubrey Hannsz died of severe brain injuries. TT at p. 515. The injuries were determined to have been caused by abusive head trauma. TT at p. 516. There was no forensic evidence proving who inflicted the injuries. TT at p. 29.

On August 12, 2013 Patterson was tried by jury in the Circuit Court for the City of Virginia Beach with the Honorable Edward W. Hanson, Judge, presiding. Patterson was convicted of object sexual penetration; child neglect, and murder in the first degree. TT at p. 736-737.

On May 21, 2012, a Grand Jury is alleged to have indicted Patterson for 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, a Grand Jury is alleged to have indicted Patterson for one (1) count of child neglect in violation of VA Code §18.2-371.1. On September 4, 2012, a Grand Jury is alleged to have 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 indictments has been found.

Patterson was subsequently convicted of one count of murder first degree – case number CR12003195, one count of child neglect – case number CR12002017; and one count of object sexual penetration – case number CR12001865.

### **III. Argument**

#### **A. Void Judgments – Long Standing Law**

A void judgment, and not subject to time

limitation and can be challenged at any time.

*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.*

An order of a court of the Commonwealth can be “*void ab initio*,” meaning it was without effect from the moment it came into existence. In that respect it is “void.” Such a void order is a nullity without force or effect and may be collaterally challenged. *Kelley v. Stamos*, 285 Va. 68 (2013).

The Virginia Supreme Court held in Kelley:

[A]n order is void ab initio if entered by a court in the absence of jurisdiction of the subject matter or over the parties, if the character of the order is such that the court had no power to render it , or if the mode of procedure used by the court was one that the court “could not lawfully adopt.”

*Id.* at 75.

**B. 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.

**1. The Grand Jury Right Applies to the  
States Under the Fourteenth  
Amendment Due Process Clause**

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 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; *Gwynn 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 an incorrect 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 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 (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. Wainwright*, 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 is substantively correct and the Bill of Rights is not an à la carte menu from which courts are allowed to pick and choose which rights apply to United States citizens. 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 has the authority take it upon itself to judicially amend the Constitution by purporting to pick and choose which rights of the Bill of Rights apply and which do not. All of those constitutional rights are guaranteed to all citizens at both state and federal levels of government. The

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 must 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 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 in Patterson's case. The due process requirement had to be met even under *Hurtado*. 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 Patterson's case.

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 even under the selective incorporation doctrine if that standard is used.

*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.

**2. 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 Patterson'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 Patterson’s Petition 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 United States Supreme 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 v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062 (1969).

Likewise, the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States. *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492 (1964).

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. As such, 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 legal justification 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 enumerated constitutional right to a grand jury presentment is without legal 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. *Barron v. Baltimore*, 32 U.S. 243, 247 (1833).

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, this Court chose to ignore the mandated grand jury indictment process and proceeded to try Patterson without proper indictments. There was no 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. This Court 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.

The Fifth Amendment right to a grand jury indictment applies to the states including, without limitation, the Commonwealth of Virginia and this Court.

**C. Patterson's defective grand jury  
indictments deprived this Court of  
Jurisdiction**

Patterson avers that the lack of an order of this Court indicting him, this 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 Patterson in this case, the defendant in *Simmons* was convicted and sentenced based upon a grand jury document, just as in Patterson'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 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.

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.

Patterson 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 Patterson's case, no proper order of any form was ever entered for his indictments.

In the case at bar, Patterson 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, this Court has no record of any indictment against Patterson having been entered in the Order Book. The failure of this Court to record in the Order Book, that the Grand Jury had returned into open court and presented true bill indictments against Patterson, is a fatal defect in the indictment process. Patterson contends that the failure of this 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, 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.

**IV. Conclusion**

Wherefore, for the foregoing reasons, Patterson prays that this Honorable Court grant this Motion in its entirety and issue an Order vacating the judgments against him.

RESPECTFULLY SUBMITTED,

By:



44

MOTION TO VACATE

Dale Jensen

Counsel  
Dale R. Jensen (VSB 71109)  
Dale Jensen, PLC  
606 Bull Run, Staunton, VA 24401  
(434) 249-3874  
(866) 372-0348 facsimile  
djensen@dalejensenlaw.com

Certificate of Service

I hereby certify that the original of the foregoing was, on the 15th day of April, 2020, sent via US Mail to the Office of the Clerk for the Circuit Court of Virginia Beach and a true copy thereof was served by US Mail to the following:

Virginia Beach Commonwealth's Attorney  
2425 Nimmo Pkwy.  
Virginia Beach, VA 23456

RESPECTFULLY SUBMITTED,

signature

Dale R. Jensen  
Counsel for Micah James Patterson

VIRGINIA

IN THE CIRCUIT COURT OF VIRGINIA  
BEACH

COMMONWEALTH OF  
VIRGINIA,

Petitioner,

v.

MICAH JAMES  
PATTERSON,

Defendant.

Cases Nos.

CR12003195;

CR12002017;

CR12001865;

---

**Response to Motion to Vacate**

The Commonwealth moves to dismiss the motion to vacate filed by the defendant.

In support of this motion, the Commonwealth avers the following:

1. The defendant was found guilty by jury of one count of First Degree Murder, one count of Second Degree Murder, one count of Object Sexual Penetration, and one count of Child Abuse.
2. The Honorable Judge Hanson in the Virginia Beach Circuit Court vacated the conviction of Second Degree Murder.

3. The defendant was sentenced by Jury recommendation to Life plus 40 years.
4. The defendant seeks to vacate his convictions based on a lack of jurisdiction due to indictments being improperly recorded. This is not the case.
  - a. Defendant claims that a search of the record of this Court shows that “the indictments were never properly recorded.”
  - b. This is patently false as the Trial Transcript Volume 1 pgs. 3-5, indicate that in open court the Grand Jury Indictments were read aloud as true bills.
  - c. The defendant acknowledge under oath that he was the person who stood indicted for the charged crimes. (Trial Transcript VI, pg. 6).
  - d. Further different indictments were returned as true bills on 5/21/12, 6/4/12, and 9/4/12 as indicated by the Courts capias in furtherance of indictment form, all of which are in



the courts record and certified copies have been presented.

- e. Lastly the defendant filed a writ of Habeas Corpus, and all indictments were provided to the Office of the Attorney General on December of 2016.

5. The defendant argues that the indictment for Object Sexual Penetration was deficient because it did not contain “without force” as an essential element.

- a. The victim in this case was less than 13, meaning any penetration of the labia majora constitutes the offense regardless of consent, or force.
- b. The defendant was on proper notice, as indictments are merely required to place the defendant on notice of the nature of the accusations.
- c. Short-form indictments and technical defects claimed after conviction have long been held as waived, and immaterial. See: *Livingston v. Commonwealth*, 184

Va. 830 (1946).

6. The defendant argues that Va. Code 19.2-242 requires his release.
  - a. Va. Code 19.2-242 requires a trial within a set number of terms of court. Here the defendant has had his trial, been arraigned, and been sentenced, rendering Va. Code 19.2-242 irrelevant.
7. The defendant argues that *Hanson v. Smyth*, 183 Va. 384 (1944) is incorrectly decided.
  - a. The Supreme Court of Virginia has upheld *Hanson* for the 76 years. The case is still the controlling case in matters of indictments concerning jurisdiction.
  - b. The applicable law can be pulled directly from the defendant's supporting brief: "While the Fifth Amendment to the federal constitution requires a presentment or indictment in prosecution under federal statutes for a capital, or

otherwise infamous crime the Virginia Constitution contains no such requirement. Farewell v. Commonwealth, 163 Va. 1042. In this state it is merely statutory... .Since the 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 at 390-391.

8. Lastly the defendant's reliance on improper recording of the indictments is misplaced.
  - a. The fact that order recording the presentation of defendant's indictment had not been entered prior to his trial did not deprive the trial court of jurisdiction over the prosecution, and the defendant waived his right to object to indictment by failing to challenge it

within seven days before his trial.

Epps v. Commonwealth, 293 Va. 403,  
(2017).

For the above reasons, the Commonwealth  
respectfully requests that the Motion to Vacate be  
dismissed.

RESPECTFULLY SUBMITTED,

By: signature

C. Andrew Rice  
Assistant Commonwealth's Attorney

CERTIFICATE

This is to certify that a copy of this Motion to Dismiss was faxed and mailed to Dale R. Jensen, at Dale Jensen PLC, 606 Bull Run, Staunton, VA, 24401, this 20<sup>th</sup> day of May 2020.

signature

C. Andrew Rice

**VIRGINIA SUPREME COURT**

MICAH JAMES  
PATTERSON,

Petitioner,

v.

COMMONWEALTH OF  
VIRGINIA,

Respondent.

SCV Record No.  
0788-20-1

Appealed From The  
Circuit Court of  
Virginia Beach Case  
Nos. CR12003195;  
CR12002017;  
CR12001865

MICAH JAMES  
PETITION FOR  
APPEAL

---

Counsel  
Dale Jensen  
Dale R. Jensen (VSB 71109)  
Dale Jensen, PLC  
606 Bull Run, Staunton, VA 24401  
(434) 249-3874  
(866) 372-0348 facsimile  
djensen@dalejensenlaw.com

TABLE OF CONTENTS

	<u>Page</u>
I. Assignments of Error.....	1
II. Nature of the Case and Material Proceedings Below.....	1
III. Statement of Facts.....	2
IV. Authorities and Argument.....	3
V. Conclusion.....	27

**TABLE OF AUTHORITIES**

**Page**

United States Constitution

U.S. Const., Amend. V.....passim

U.S. Const., Amend. XIV.....passim

Virginia Statutory Law

Va. Code § 17.1-123.....4, 23

Va. Code § 17.1-124.....4, 23

Va. Code § 17.1-240.....4, 23

Va. Code § 18.2-31.....2

Va. Code § 18.2-32.....1

Va. Code § 18.2-67.2.....1

Va. Code § 18.2-371.1.....1

Va. Code § 19.2-202.....22

Va. Code § 19.2-242.....24

Virginia Court Rules

Supreme Court Rule 3A:5.....24



Page

Case Law

Ashcroft v. Free Speech Coal., 535 U.S. 234	
(2002) .....	29
Adamson v. California, 332 U.S. 46 (1947).....	16-17
Adcock v. Commonwealth, 49 Va.	
(Gratt.) 661 (1851).....	24
Barron v. Baltimore, 32 U.S. 243 (1833).....	5, 19
Benton v. Maryland, 395 U.S. 784 (1969).....	15
Branzburg v. Hayes, 408 U.S. 665 (1972).....	7
Chi., B. & Q. R. Co. v. Chicago, 166	
U.S. 226 (1897).....	16
Commonwealth v. Cawood, 4 Va.	
527, 541 (1826).....	22-24, 26-27
Costello v. United States, 350 U.S. 359	
(1956).....	7
District of Columbia v. Heller, 554 U.S. 570	
(2008).....	17
Epps v. Commonwealth, 293 Va. 405 (2017).....	6

Ex parte Wilson, 114 U.S. 417 (1885).....	7
	<b><u>Page</u></b>
Farewell v. Commonwealth, 167 Va. 475 (1937).....	6
Galpin v. Page, 85 U.S. (18 Wall.) 350 (1873).....	21
Griffin v. California, 380 U.S. 609, 615 (1965).....	6-7
Guynn v. Commonwealth, 163 Va. 1042 (1934).....	6
Hanson v. Smyth, 183 Va. 384 (1944).....	6, 22
Hurtado v. California, 110 U.S. 516 (1884).....	5, 9-10
Magill v. Brown, 16 F. Cas. 408, 428, F. Cas. No. 8952 (CC ED Pa. 1833).....	18
Malloy v. Hogan, 378 U.S. 1 (1964).....	15
Marbury v. Madison, 5 U.S. 137 (1803).....	14, 16
McDonald v. City of Chi., 561 U.S. 742 (2010).....	8-10, 17-20
Pine v. Commonwealth, 121 Va. 812 (1917) .....	6
Renigar v. United States, 172 F. 646 (4th Cir. 1909).....	25-26
Simmons v. Commonwealth, 89 Va. 156 (1892).....	23-24
Slaughter v. Commonwealth, 222 Va. 787	

(1981).....21-22

**Page**

United States v. Calandra, 414 U.S. 338 (1974).....7

United States v. Smyth, 104 F. Supp. 283

(N.D. Cal. 1952).....12-13

**Secondary Authority**

1 Annals of Cong. (1789).....19

1 Chitty on Crim. Law, 324.....25

1 W. Blackstone, Commentaries.....17-18

1 Bishop on Crim. Procedure, § 869.....25

1 Journals of the Continental Congress

1774-1789, (W. Ford. ed. 1904).....18

4 Blackstone, 306.....25

B. Bailyn, The Ideological Origins of the American  
Revolution (1967).....18

Bonner, Lawyers and Litigants in Ancient Athens  
(1927).....10

Constitution of Clarendon.....11

Handbook for Virginia Grand Jurors.....11, 13-14

Magna Carta.....	11
Patterson, The Administration of Justice in Great Britain (1936).....	10
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).....	20
Whyte, Is the Grand Jury Necessary?, 45 Wm. and Mary L. Rev. 462-71 (1959).....	11

**I. ASSIGNMENTS OF ERROR.**

1. The Circuit Court of Virginia Beach (the “Circuit Court”) erred in not reversing its judgment for want of jurisdiction over Micah James Patterson (“Patterson”) 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 August 12, 2013 Patterson was tried by jury in the Circuit Court for the City of Virginia Beach with the Honorable Edward W. Hanson, Judge, presiding. Patterson was convicted of object

sexual penetration; child neglect, and murder in the first degree. TT at p. 736-737.

On May 21, 2012, a Grand Jury is alleged to have indicted Patterson for 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, a Grand Jury is alleged to have indicted Patterson for one (1) count of child neglect in violation of VA Code §18.2-371.1. On September 4, 2012, a Grand Jury is alleged to have 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 indictments has been found.

Patterson was subsequently convicted of one count of murder first degree – case number CR12003195, one count of child neglect – case

number CR12002017; and one count of object sexual penetration – case number CR12001865.

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.

Patterson timely appealed the denial of the Motion to Vacate.

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

### III. STATEMENT OF FACTS

On January 11, 2012 Aubrey Hannsz died of severe brain injuries. TT at p. 515. The injuries were determined to have been caused by abusive head trauma. TT at p. 516. There was no forensic

evidence proving who inflicted the injuries. TT at p. 29.

#### IV. AUTHORITIES AND ARGUMENT

1. The Circuit Court never established jurisdiction over Patterson 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 Patterson.

The Circuit Court Judgment should be vacated because Patterson was not properly indicted by a grand jury according to required procedures in violation of his Fifth Amendment rights. Patterson never waived his Fifth Amendment right to a grand jury indictment and the failure to properly indict Patterson deprived the Circuit Court of jurisdiction.



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.

No Court, including this Court or even the United States Supreme Court can unilaterally amend the U.S. Constitution by judicial fiat.

Moreover, long-standing binding state law precedent also requires proper grand jury proceedings to have been followed in order for a court to have jurisdiction in a criminal case. In order for this Court to have had jurisdiction, Patterson had to have been properly indicted by a grand jury, the indictment must be presented in open court, and the indictment properly recorded. A

detailed review of the records of this Court show no order shows that Patterson was ever indicted by a grand jury.

This Petition should be granted because Patterson 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 Virginia Beach Circuit Court (the “Circuit Court”) purported to indict Patterson, but those documents show that none of Patterson’s indictments were compliant with Virginia law. There is no record that any indictment against Patterson was ever returned in open court or 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.

**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. The plain language of the constitution has been ignored by the United States Supreme Court, notably in *Hurtado v. California*, 110 U.S. 516, 519 (1884). Additionally, over the years the United States Supreme Court has recognized that its prior positions pursuant to *Barron* were in error and has generally recognized

its prior errors in not applying the Bill of Rights to the states.

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; *Gynn 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. Subsequent decisions have been based upon the same erroneous reasoning. See, e.g., *Epps v. Commonwealth*, 293 Va. 405 (2017).

The *Hanson* opinion relied upon a materially false 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 relied upon reasoning of Justice Black, who had properly 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.*

Patterson 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 have and which rights citizens should not have.

The ratification of the Bill of Rights settled the scope of citizen's rights and it exceeds the authority of the judiciary to treat any of those rights, and notably the grand jury right, as a legal nullity. If members of the judiciary disagree with the presence of the grand jury right in the constitution, such members can petition their representatives in Congress to amend the Bill of

Rights. The judiciary simply lacks constitutional authority to pretend any of those rights don't exist.

All of those rights should be guaranteed to all citizens at both state and federal levels of government 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 should be incorporated as jurisprudence moves forward in accordance with Justice Black's views and the plain language of the Constitution.

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 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.*

As with any other court, the Court in *Hurtado* did not have the authority to judicially amend the grand jury clause of the Fifth Amendment to merely

require “due process of law”. Such an amendment was beyond the authority of the Court.

Moreover, 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 Patterson’s case. The due process requirement had to be met even under the erroneous reasoning of *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 Patterson’s case.

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 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 well 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 Applies 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 Patterson’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 Patterson'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 v. Maryland*, 395 U.S. 784, 794 (1969).

Likewise, the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

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

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, Patterson 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 Patterson 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 Patterson is a fatal defect in the indictment process. Patterson 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, 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.

## **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 Patterson's immediate release.

Dated: September 28, 2020

RESPECTFULLY SUBMITTED,

By: 

Dale Jensen  
Counsel  
Dale R. Jensen (VSB 71109)  
Dale Jensen, PLC  
606 Bull Run, Staunton, VA  
24401  
(434) 249-3874  
(866) 372-0348 facsimile  
djensen@dalejensenlaw.com

Certificate

The undersigned counsel certifies:

1. that the name of the Appellant is Micah James Patterson;
2. that contact information of counsel is:  
  
Dale R. Jensen (VSB 71109)  
Dale Jensen, PLC  
606 Bull Run, Staunton, VA 24401  
(434) 249-3874  
(866) 372-0348 facsimile  
djensen@dalejensenlaw.com
3. the name of the Appellee is the Commonwealth of Virginia;
4. the name, address, and contact information of counsel for the Appellee is:  
  
Virginia Beach  
Commonwealth's Attorney  
2425 Nimmo Pkwy.  
Virginia Beach, VA 23456
5. that a copy of the petition for appeal has been mailed on September 28, 2020 to all opposing counsel known to Appellant;
6. that the page count for this Petition is 27;
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: September 28, 2020

By: signature

Dale Jensen  
Counsel  
Dale R. Jensen (VSB 71109)  
Dale Jensen, PLC  
606 Bull Run, Staunton, VA  
24401  
(434) 249-3874  
(866) 372-0348 facsimile  
djensen@dalejensenlaw.com

Certificate of Service

I certify that on the 28th day of September 2020, I mailed, postage prepaid, a true copy of the foregoing document to:

Virginia Beach Commonwealth's Attorney  
2425 Nimmo Pkwy.  
Virginia Beach, VA 23456

Dated: September 28, 2020

By: signature

Dale Jensen  
Counsel  
Dale R. Jensen (VSB 71109)  
Dale Jensen, PLC  
606 Bull Run, Staunton, VA  
24401  
(434) 249-3874  
(866) 372-0348 facsimile  
djensen@dalejensenlaw.com

IN THE  
SUPREME COURT OF VIRGINIA

---

Record No. 201186

---

MICAH JAMES PATTERSON

Appellant,

V.

THE COMMONWEALTH OF VIRGINIA

Appellee

---

BRIEF IN OPPOSITION TO SUPPLEMENTAL  
PETITION FOR APPEAL

---

Colin D. Stolle  
Commonwealth's Attorney  
City of Virginia Beach  
2425 Nimmo Parkway  
Virginia Beach, Virginia 23456-9050

C. Andrew Rice  
Assistant Commonwealth's Attorney  
City of Virginia Beach  
2425 Nimmo Parkway  
Virginia Beach, Virginia 23456-9050  
Bar Number: 84361  
Email: CRice@vbgov.com

**TABLE OF CONTENTS**

STATEMENT OF THE PROCEEDINGS.....1

ASSIGNMENTS OF ERROR.....3

    I. THE VIRGINIA BEACH CIRCUIT COURT  
        DID NOT ERR IN DENYING THE  
        DEFENDANT’S MOTION TO VACATE  
        BECAUSE IT HAD PROPER JURISDICTION  
        OVER THE DEFENDANT AS THE  
        INDICTMENTS WERE LAWFULLY  
        RETURNED, THE DEFENDANT’S  
        CHALLENGE IS UNTIMELY, AND THE  
        DEFENDANT’S CLAIMS ARE NON-  
        JURISDICTIONAL.....3

STATEMENT OF FACTS.....3

STANDARD OF REVIEW AND ARGUMENT.....5

    I. THE VIRGINIA BEACH CIRCUIT COURT  
        DID NOT ERR IN DENYING THE  
        DEFENDANT’S MOTION TO VACATE  
        BECAUSE IT HAD PROPER JURISDICTION  
        OVER THE DEFENDANT AS THE  
        INDICTMENTS WERE LAWFULLY  
        RETURNED, THE DEFENDANT’S  
        CHALLENGE IS UNTIMELY, AND THE  
        DEFENDANT’S CLAIMS ARE NON-  
        JURISDICTIONAL.....5

CONCLUSION.....11



## TABLE OF AUTHORITIES

### Cases

Epps v. Commonwealth, 293 Va. 403 (2017) .....	9
Farewell v. Commonwealth, 163 Va. 1042 (1937).....	8
Flanary v. Commonwealth, 133 Va. 665, 667–68, (1922).....	7
Hanson v. Smyth, 183 Va. 384 (1944).....	8
Howard v. Commonwealth, 63 Va. App. 580, 583, 584 (2014) .....	5, 6
McDougal v. Commonwealth, 212 Va. 547, 549 (1972) .....	8
Prieto v. Commonwealth, 283 Va. 149, 181–82, (2012) .....	10
Wolfe v. Commonwealth, 265 Va. 193 (2003) .....	7
Woodard v. Commonwealth, 287 Va. 276, 280, (2014).....	5

### Statutes

Va. Code § 18.2-31 .....	3
Va. Code§ 18.2-32 .....	3
Va. Code§ 18.2-67.2 .....	3
Va. Code§ 18.2-216.....	5

**IN THE SUPREME COURT OF VIRGINIA**

MICAH JAMES PATTERSON,

Appellant,

v.

THE COMMONWEALTH OF VIRGINIA,

Appellee,

**BRIEF IN OPPOSITION TO PETITION FOR  
APPEAL**

**STATEMENT OF THE PROCEEDINGS**

Micah James Patterson, hereinafter the defendant, was tried by a jury in the Virginia Beach Circuit Court beginning August 12, 2013. (Trial Transcript, hereinafter TT. at pg. 146). The Honorable Judge Edward Hanson presided. The defendant was found guilty at the conclusion of the

trial of second degree murder, first degree murder, object sexual penetration, and child neglect. (TT. 736-737). Honorable Judge Edward Hanson vacated the second degree murder conviction at the sentencing hearing conducted on November 6, 2013, and affirmed the convictions of first degree murder, object sexual penetration, and child neglect. (Sentencing Transcript, hereinafter ST. at pg. 3). The defendant was sentenced in accordance with the jury recommendation to a term of life plus forty (40) years. (ST. at 9-10).

On April 20, 2020 the defendant filed a post-conviction motion to vacate and memorandum of support in the Virginia Beach Circuit Court. The Virginia Beach Circuit Court allowed the Commonwealth to file a response within 30 days, and the Commonwealth timely did so.

The Virginia Beach Circuit Court denied the defendant's motion to vacate on June 12, 2020 through written order by the Honorable Stephen C. Mahan. (Court Order dated 6/12/20 pg. 2).

The defendant appealed the denial of the post-conviction motion to vacate through petition for appeal to the Virginia Court of Appeals on July 6, 2020. The Virginia Court of Appeals, not having jurisdiction to hear the matter, transferred the petition for appeal to the Virginia Supreme Court on August 10, 2020. (Virginia Court of Appeals Letter dated August 10, 2020).

The Virginia Supreme Court, upon receipt of the transfer, granted the defendant until September 24, 2020 to file his petition. (Virginia Supreme Court Letter dated August 25, 2020). The defendant failed to comply with the filing deadline, and filed a motion to allow the petition for appeal to be filed late. The

Commonwealth did not object, and the petition for appeal was subsequently filed on September 28, 2020.

### **ASSIGNMENTS OF ERROR**

- I. THE VIRGINIA BEACH CIRCUIT COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO VACATE BECAUSE IT HAD PROPER JURISDICTION OVER THE DEFENDANT AS THE INDICTMENTS WERE LAWFULLY RETURNED, THE DEFENDANT'S CHALLENGE IS UNTIMELY, AND THE DEFENDANT'S CLAIMS ARE NON-JURISDICTIONAL.

### **STATEMENT OF FACTS**

The defendant was indicted on May 21, 2012 by the Grand Jury of the City of Virginia Beach for one (1) count of murder in violation of Virginia Code Section 18.2-32, and one (1) count of object sexual penetration in violation of Virginia Code Section 18.2-67.2. The defendant was indicted on June 4, 2012 by Grand Jury in the City of Virginia Beach for

one (1) count of child neglect in violation of Virginia Code Section 18.2-371.1. The defendant was indicted by Grand Jury in the City of Virginia Beach on September 4, 2012 of one (1) count of capital murder being a person twenty-one (21) years or older and killing a child under the age of fourteen (14) in violation of Virginia Code Section 18.2-31, and one (1) count of capital murder, committing a killing while performing object sexual penetration in violation of Virginia Code Section 18.2-31. (Grand Jury Action Report; and Grand Jury Orders 5/21/12, 6/4/12, 9/4/12).

The defendant was brought to trial on August 12, 2013 for the aforementioned indictments. The defendant was tried by a jury beginning on August 12, 2013 and concluding on August 15, 2013. (TT. at 146-737). Prior to commencement of the proceedings the clerk of court read the indictments and formally

arraigned the defendant. (TT. 3-4). The clerk stated the “grand jurors of the Commonwealth of Virginia and of the City of Virginia Beach, attending the court aforesaid, upon their oaths present that in the city of Virginia Beach...” before formally reading each indictment that was returned a true bill and taking the defendant’s plea. (TT. 3-5). The defendant acknowledged that he was the person who stood indicted for the crimes. (TT. at 6)

The defendant did not raise any objections to the indictments prior to his motion to vacate. (TT. Volumes 1-4).

The defendant was found guilty of second degree murder, first degree murder, object sexual penetration, and child neglect. (TT. 736-737). Judge Hanson vacated the conviction for second degree murder, and imposed the remaining jury

recommendations for all other charges. (ST. at 3, 9-10).

## **STANDARD OF REVIEW AND ARGUMENT**

### **II. THE VIRGINIA BEACH CIRCUIT COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO VACATE BECAUSE IT HAD PROPER JURISDICTION OVER THE DEFENDANT AS THE INDICTMENTS WERE LAWFULLY RETURNED, THE DEFENDANT'S CHALLENGE IS UNTIMELY, AND THE DEFENDANT'S CLAIMS ARE NON-JURISDICTIONAL.**

The validity of [an] indictment is a question of law which we review de novo.” Howard v.

Commonwealth, 63 Va. App. 580, 583, (2014).

Similarly, we review compliance with statutes and this Court’s Rules de novo. Woodard v.

Commonwealth, 287 Va. 276, 280, (2014).

(A) The defendant’s claim that he was not properly indicted is factually false.



There is no evidence to support the defendant's claim that he was not properly indicted by the Grand Jury of Virginia Beach. Virginia Code Section 19.2-216 states that "an indictment is a written accusation of a crime, prepared by the attorney for the Commonwealth and returned a "true bill" upon oath or affirmation of a legally impaneled grand jury." The Virginia Beach Circuit Court's records provide evidence contrary to the defendant's claims. The Virginia Beach Circuit Court received indictments all marked true bills, and signed by the foreman concerning the defendant. These indictments were recorded in the Virginia Beach Circuit Court's Grand Jury Orders, dated May 21, 2012, June 4, 2012, and September 4, 2012, which were the corresponding grand juries that were convened and presented with information concerning the defendant. (Grand Jury Order 5/21/12, 6/4/12,

9/4/12). Rule 3A: 5 (c) states that “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.” The Virginia Beach Grand Jury Orders establish the fact that the indictments against the defendant were returned in a manner prescribed by law and in accordance with Rule 3A: 5(c). Howard at 584 (2014).

**(B)** The defendant’s challenge to the indictments is untimely.

The defendant did not make a timely challenge to the indictments. Virginia Code Section 19.2-227 states “judgement in any criminal case shall not be arrested or reversed upon any exception or objection made after a verdict to the indictment or other accusation, unless it be so defective as to be in violation of the Constitution.” “This section was

intended to meet cases, and to require persons charged with crime to assert their rights and to make their defenses before verdict, and thereafter to cut off all defenses not made before verdict unless prohibited by the Constitution. The Constitution gives to the accused the right to demand the cause and nature of his accusation, and this right cannot be taken away from him, but there is no inhibition on the Legislature to fix a stage of the procedure beyond which he cannot go in the assertion of his constitutional right. He must be given a full and fair opportunity of asserting his right, but after this has been afforded him, and he has failed to avail himself of it, he cannot complain.” *Flanary v.*

*Commonwealth*, 133 Va. 665, 667–68, (1922).

Accordingly, the Legislature has fixed a stage of procedure beyond which the defendant cannot attack the indictment.

Rule 3A:9 indicates that defenses and objections based on defects in the institution of the prosecution or in the written charge upon which the accused is to be tried, other than that it fails to show jurisdiction in the court or to charge an offense, must be raised within seven (7) days before the day fixed for trial. The Virginia Supreme Court has “consistently and repeatedly held that generally a defendant must challenge the sufficiency of an indictment before the jury’s verdict, or the alleged defect is waived.” *Wolfe v. Commonwealth*, 265 Va. 193 (2003).

The record is barren as to any evidence which shows that the defendant was deprived of the ability to defend against the charges for which he stood accused. (Court Order dated 6/12/20 pg. 2). The defendant had notice of the alleged location and date, and nature and consequences, of the charges

indicted. The defendant was formally arraigned on all charges and tendered a plea of not guilty before being tried by a jury. (TT. 3-4). The defendant therefore has waived or lacks standing to now collaterally attack the indictment on these grounds. *McDougal v. Commonwealth*, 212 Va. 547, 549 (1972).

(C) The defendant's claims are non-jurisdictional.

In addition, the defendant's claim of improper recording of the indictments is non-jurisdictional. Assuming *arguendo* that the indictment was not properly recorded, which is not supported by the Virginia Beach Circuit Court's Grand Jury Orders from May 21, 2012, June 4, 2012, and September 4, 2012, the defendant's claims are still without merit. *Hanson v. Smyth*, 183 Va. 384 (1944) remains the law in Virginia, despite defendant's invitation for the

Court to disregard it. (Court Order dated 6/12/20 pg. 2).

Hanson states “[w]hile the Fifth Amendment to the federal constitution requires a presentment or indictments in prosecution under federal statutes for a capital, or otherwise infamous crime, the Virginia Constitution contains no such requirement. *Farewell v. Commonwealth*, 163 Va. 1042 (1937). In this state it is merely statutory....Since the 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 the court by the grand jury is not such a defect as will render null and void the judgment of conviction based thereon.” Hanson at 390-391. This Court has consistently held Hanson as the law for the last 76 years.

This Court recently took up issues of jurisdiction regarding improperly recorded

indictments in *Epps v. Commonwealth*, 293 Va. 403 (2017). In *Epps*, the accused raised an objection to the indictment based on there being no order recording the indictment in open court. The accused did so fifty-one (51) days after he had entered pleas and been convicted. *Id.* at 407. This Court stated “accordingly, 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*.” *Id.* at 409. The Court reasoned that “Rule 3A:9(b)(1) and (c) provide that objections based on defects in the institution of the prosecution or in the written charge upon which the accused is to be tried, other than that it fails to show jurisdiction in the court or to charge an offense, must be raised by motion.... filed or made before a plea is entered and, in a circuit court, at least 7 days before the day fixed for trial.” *Id.* at 409-

410. The Court upheld Hanson and stated that “subsequent amendments to the Code showed ‘a clear expression of the legislative policy that the requirement of an indictment in the prosecution for a felony may be waived, and hence is not jurisdictional.’” *Id.* In reasoning that the claim of faulty indictments was non-jurisdictional the Court held that “[f]ailure to comply with these requirements constitutes a waiver” citing *Prieto v. Commonwealth*, 283 Va. 149, 181–82, (2012).

In the present case, the record indicates that the indictments were properly recorded. (Grand Jury Orders 5/21/12, 6/4/12, 9/4/12). Assuming *arguendo* they were not, the defendant’s claim of faulty indictments was made over six (6) years after he entered pleas and was convicted. The defendant’s claim is non-jurisdictional pursuant to the holdings rendered in *Hanson* and *Epps*. Rule 3A: 9 requires



the defendant to make facial challenges to the indictments at least seven (7) days before the affixed trial date. The defendant, in waiting over six (6) years to raise such claims, has failed to meet the requirement prescribed by the Rules. This failure to comply constitutes a waiver of his right to attack the indictments.

### CONCLUSION

For the foregoing reasons the Commonwealth respectfully requests that this Honorable Court affirm the ruling of the Virginia Beach Circuit Court, and deny the defendant's petition for appeal.

Respectfully Submitted,

s/C. Andrew Rice  
C. Andrew rice  
Assistant Commonwealth's Attorney

**STATEMENT UNDER RULES 5:28**

I, C. Andrew Rice, as counsel for the Commonwealth of Virginia, and duly qualified to practice in the Supreme Court of Virginia, do hereby certify:

1. That the name of the appellant is Micah Patterson and the name of the appellee is The Commonwealth of Virginia.
2. That the name and address of counsel for the appellant is Dale Jensen, Esquire Law Offices of Dale Jensen PLC, 606 Bull Run, Staunton, VA 24401. The email address is djensen@jensenjustice.com, the telephone number is 434-249-3874, and the facsimile number is 1-866-372-0348. The bar number is 71109.
3. That the name and address of counsel for the appellee is C. Andrew Rice, Assistant

Commonwealth's Attorney, Office of the  
Commonwealth's Attorney, 2425 Nimmo  
Parkway, Virginia Beach, VA 23456. The  
email address is CRice@vbgov.com, the  
telephone number is 757-385-8645, and the  
facsimile number is 757-385-1288. The bar  
number is 84361.

4. That the appellee does not desire to adopt this  
Brief in Opposition as its opening brief in this  
case, should a Petition for Appeal be awarded.
5. That the foregoing Brief in Opposition has  
been filed electronically with the Court of  
Appeals of Virginia.
6. Rule 5:26(d) has been complied with and  
counsel does not waive oral argument.
7. Pursuant to Rule 5A:4(d) and 5A:13 the word  
count for this document is 2,073.

s/ C. Andrew Rice

C. Andrew Rice

Assistant Commonwealth's Attorney

**CERTIFICATE OF SERVICE**

I certify that I have sent an electronic copy of foregoing Brief in Opposition to Petition for Appeal to Dale Jensen, Esquire, counsel for the defendant at djensen@jensenjustice.com, on this 19th day of October, 2020.

s/ C. Andrew Rice

C. Andrew Rice

Assistant Commonwealth's Attorney

## 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 has 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 inquiries 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](http://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.

Web site revision 5/13