

No. \_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**WILL LEE CARTER, PETITIONER**

**vs.**

**COMMONWEALTH OF VIRGINIA, RESPONDENT.**

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On Petition for a Writ of Certiorari to  
The Supreme Court of Virginia

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**PETITION FOR WRIT OF CERTIORARI**

James Chandler Martin  
(Sup. Ct. Bar # 239035)  
Martin & Martin Law Firm  
410 Patton Street, Suite A  
P. O. Box 514  
Danville, Virginia 24543  
Telephone (434) 792-1861  
Facsimile (434) 792-1862  
[martinlawva@verizon.net](mailto:martinlawva@verizon.net)

*Attorney for the Petitioner  
& Counsel of Record*

## QUESTION PRESENTED

This Court has ruled that a variation of mental commitment known in several states as a “sexually violent predator” commitment proceeding can be constitutional under certain circumstances. Petitioner has been committed under such a statute. The question presented is:

Is Virginia’s Sexually Violent Predator Law Unconstitutional, on grounds that the Act: A) Requires an Unconstitutional Use of Polygraphs; B) Requires An Unconstitutional Use Of Penile Plethysmographs; C) Forbids Petitioner From Bringing Up Actual Innocence as to the Underlying Criminal Offense Or Offenses, but Allows the Government to Bring Up Guilt and Unadjudicated Conduct ; D) Allows Defendants To Be Held Past Their Release Dates on Criminal Charges; and E) Petitioner is Unconstitutionally Prevented By State Case Law From the Possibility of Conditional Release Because His Family is Out-Of-State, IN VIOLATION OF:

1. The Right Against Self-Incrimination under the Fifth Amendment to the Constitution, as incorporated by the

Fourteenth Amendment (as to A & B); 2. The Right of Procedural Due Process under the Fifth Amendment to the Constitution, as incorporated by the Fourteenth Amendment, (as to A, C, D & E); 3. The Right to Equal Protection under the Fourteenth Amendment to the Constitution (as to A, C, D & E); 4. The Right to Counsel under the Sixth Amendment to the Constitution, as incorporated by the Fourteenth Amendment (as to A); 5. The Right of Substantive Due Process under the Fourteenth Amendment to the Constitution (as to B & E); 6. The Right to Freedom of Religion under the First Amendment to the Constitution, as applied by the Fourteenth Amendment to the Constitution (as to B); 7. The Right to Compulsory Process for Obtaining Witnesses under the Sixth Amendment to the Constitution, as incorporated by the Fourteenth Amendment (as to C); and 8. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, as being unduly restrictive of the personal interstate movement of persons who have been declared Sexually Violent Predators merely because they are from another State (as to E).

## **LIST OF PARTIES TO THE PROCEEDING**

The Petitioner (the respondent-appellant below) is Will Lee Carter, an involuntarily committed resident of the Virginia Center for Behavioral Rehabilitation (hereinafter “VCBR”), a mental health facility of the Virginia Department of Behavioral Health and Developmental Services (hereinafter “the DBHDS”), on the basis of a state court declaration that he is a “sexually violent predator” (hereinafter SVP).

The Respondent (the defendant-appellee below) is the Commonwealth of Virginia, which runs the VCBR, a mental health facility of the Department.

## **RELATED PROCEEDINGS**

Circuit Court of Pittsylvania County, Virginia (No. CL21000025-00)

*Will Lee Carter v. Commonwealth of Virginia*, Order Refusing Petition for Appeal (September 26, 2022)

*Commonwealth of Virginia v. Will Lee Carter*, Final Order of Trial and Commitment as Sexually Violent Predator (October 5, 2021) (unpublished) Supreme Court of Virginia (No. 220002)

*Will Lee Carter v. Commonwealth of Virginia*, Order  
Refusing Petition for Rehearing (November 21, 2022)  
(unpublished)

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**PETITION FOR WRIT OF CERTIORARI**

**TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED  
STATES:**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in this case.

**OPINIONS / ORDERS BELOW**

The Order of the highest state court to deny the Petition for Appeal of this case, the Supreme Court of Virginia, appears at Appendix A1 to the petition and is unpublished.

The final order of the trial court, the Circuit Court of Pittsylvania County, Virginia appears at Appendix A2 to the petition and is unpublished.

The Order of the Supreme Court of Virginia denying Rehearing appears at Appendix A6 to the Petition.

## **JURISDICTION**

The date on which the highest state court decided this case, the Supreme Court of Virginia, was November 21, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

The Commerce Clause of the Constitution, Art I, § 8, Clause 3, provides in pertinent part that “The Congress shall have power  
\*\*\*\* To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.”

The First Amendment to the Constitution provides in pertinent part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof  
...”

The Fifth Amendment to the Constitution provides in pertinent part that “No person \*\*\*\* shall be 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 ...”

The Sixth Amendment to the Constitution provides in pertinent part that “In all criminal prosecutions, the accused shall

enjoy the right \*\*\*\* to have compulsory process for obtaining witnesses in his favor \*\*\* and to have the Assistance of Counsel for his defence.”

The Fourteenth Amendment to the Constitution provides in pertinent part that “No state shall \*\*\* deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

### **STATEMENT OF THE CASE**

In a jury trial held pursuant to Va. Code § 37.2-908, Petitioner was found to be a “sexually violent predator” (hereinafter SVP”) and committed by the trial judge to the VCBR for in-patient psychiatric treatment.

Prior to and on the day of trial, Petitioner’s counsel filed a Motion to Declare Sexually Violent Predator Law Unconstitutional on four specified grounds and a Motion to Declare Sexually Violent Predator Law Unconstitutional on Additional Conditional Release Ground, all five (5) grounds of which correspond to the Question Presented herein (A through E), and the motions were overruled as to each ground.

On October 5, 2021, prior to the jury trial, the above motions were argued by counsel and denied, with the exception and objection of Petitioner’s counsel being duly noted.

On appeal to the Supreme Court of Virginia, Petitioner assigned error to the refusal of the trial court to declare the Virginia Sexually Violent Predator Act unconstitutional for the reasons argued herein.

The Virginia Supreme Court refused discretionary review of the case in a final rehearing decision on November 21, 2022. *See* Appendix A6.

## **REASONS FOR GRANTING THE PETITION**

This Court has held that civil commitment constitutes a significant deprivation of liberty which requires due process protection, *see, e.g., Addington v. Texas*, 441 U.S. 418, 425 (1979)(citations omitted), and has also upheld the “sexually violent predator” type of commitment laws against certain challenges. *See Kansas v. Hendricks*, 521 U.S. 346 (1997); *cf. Kansas v. Crane*, 534 U.S. 407 (2002).

The Virginia SVP Act, Va. Code § 37.2-900 *et seq.*, must pass the scrutiny of the Fifth and Fourteenth Amendments to the Constitution, as well as the Commerce Clause.

The Fifth Amendment, being applicable to Virginia by its incorporation through the Fourteenth Amendment, states that no person shall be “deprived of life, liberty, or property without due process of law ...”

Petitioner submits that the Virginia SVP Law (Va. Code § 37.2-900 *et seq.*) is unconstitutional in its entirety, as having several specific flaws which are inseparably intertwined and combine to produce an unconstitutional whole, on the four grounds (corresponding to A through D in the Question Presented herein) contained in the Motion to Declare Sexually Violent Predator Law Unconstitutional and on the additional fifth ground (corresponding to E in the Question Presented herein) contained in the Motion to Declare Sexually Violent Predator Law Unconstitutional on Additional Conditional Release Ground, specifically:

#### A) The Act Requires An Unconstitutional Use Of Polygraphs

The polygraph provision of Va. Code §37.2-910(D), applicable to recommitments in which conditional release is being considered, could be constitutional, providing that any polygraphs were limited to questions concerning his activities while a respondent is housed at the VCBR, or on probation or conditional release – commonly referred to as “maintenance polygraphs” or “compliance polygraphs” – and that he not be asked anything concerning any alleged past criminal activity (other than the charges for which he was convicted and placed on probation) – a practice commonly referred to as “full disclosure polygraphs” – said “full disclosure” questioning as to unrelated past activities being in violation of his constitutional rights, both inherently and “as applied”, under the Fifth Amendment to the Constitution, which forbids that he be compelled in any criminal proceeding to give evidence against himself, and of other constitutional provisions as described below. Insofar as Va. Code § 37.2-910(D) requires polygraphs as a part of the SVP process at least as part of conditional release, it is unconstitutional inherently, as applied,

and is overbroad to the extent that it may be unclear what type of polygraph is being required and fails to limit said polygraph examinations to polygraphs that would be constitutional, as well as violating a respondent's Right to Due Process, Equal Protection and Right to Counsel as explained herein.

Va. Code § 37.2-910(D) indeed requires polygraph examinations upon the granting of conditional release in an SVP case:

If the court finds that the respondent remains a sexually violent predator, it shall order that he remain in the custody of the Commissioner for secure inpatient hospitalization and treatment or that he be conditionally released. To determine if the respondent shall be conditionally released, the court shall determine if the respondent meets the criteria for conditional release set forth in § 37.2-912. If the court orders that the respondent be conditionally released, the Court shall allow the Department no less than 30 days and no more than 60 days to prepare a conditional release plan. *Any such plan must be able to accommodate needed and appropriate supervision and treatment plans for the respondent, including but not limited to, therapy or counseling, access to medications, availability of travel, location of residence, and regular psychological monitoring of the respondent if called for, including polygraph examinations, penile plethysmograph testing, or sexual interest testing, if necessary....*

(emphasis added).

Although certain VCBR material asserts that residents are given an opportunity to take full disclosure /sexual history polygraphs as part of their in-patient treatment at the VCBR, the courts need not resolve whether such polygraphs are required by the VCBR or even whether they are administered to residents at all – because the statute requires them in order to gain conditional release. Insistence on these polygraphs, even if only required on conditional releasee, without the offer of any kind of criminal immunity for his statements, can only be interpreted as an absolute demand on either a current resident of the VCBR or a conditional release: that he confess to unknown criminal offenses, without a right to remain silent and without counsel – or suffer consequences such as being denied passage to the Third Phase and/or to conditional release (or continuance thereof) as punishment therefor.

Thus if Petitioner were to somehow attain conditional release – over the VCBR’s objection – without completing a “full disclosure” polygraph to the VCBR’s satisfaction, he would definitely be required to take polygraphs in the community under



the offending statutory provision. This is a clear violation of Equal Protection and other constitutional provisions in that if such a polygraph is refused, he will continue to remain at the VCBR, possibly for that fact alone.

Although the results of polygraph tests are not admissible in court in Virginia, *Turner v. Commonwealth*, 685 S.E.2d 665 (Va. 2009) “[a]ny voluntary statements or admissions made by a person being tested remain admissible subject to the ordinary rules of evidence.” *Turner*, 685 S.E.2d at 667. Therefore, if Petitioner is forced to take polygraphs regarding his alleged past activities, he will be in danger of being prosecuted to the full extent of the law. This is an obvious violation of his right to remain silent as to future charges which may be brought as a result of his alleged past activities.

In a split decision in *McKune v. Lile*, 536 U.S. 24 (2002), this Court upheld a state prison sexual treatment program in which all prior sexual activities were required to be divulged upon pain of being transferred to a maximum security unit with reduced privileges. The prevailing plurality opinion was written by Justice

Kennedy, with Chief Justice Rehnquist and Justices Scalia and Thomas joining. Justice O'Connor concurred in the result, but warned that some penalties for refusing to incriminate oneself that involved "grave" consequences had been ruled by the Court to constitute compulsion for Fifth Amendment purposes, such as termination of employment, loss of a professional license, ineligibility to receive government contracts, and loss of the right to participate in political associations and to hold public office. *McKune*, Concurring Opinion at 49-50. Four justices, Stevens, Souter, Ginsburg and Breyer, dissented.

The possibility of re-incarceration for felonious sexual offenses and/or being held indefinitely in a mental institution such as the VCBR are certainly "grave" consequences that would constitute compulsion for Fifth Amendment purposes, as described by Justice O'Connor. *Cf. United States v. Antelope*, 395 F.3d 1128 (9<sup>th</sup> Cir. [Montana] 2005) (cannot revoke supervised probation for failure to take full disclosure polygraph).

The Fifth Amendment states (*inter alia*) that “no person ... shall be compelled in any criminal case to be a witness against himself ...”

It cannot have been the intent of George Mason and the other framers of the Bill of Rights that a criminal defendant only has a Right Against Self-Incrimination for one offense, and that once he has been convicted he can be compelled to involuntarily disclose every other crime he has ever committed, without any immunity or any effective right to counsel, upon pain of being held indefinitely in a mental institution. Yet this is the only logical conclusion which can be drawn from the combination of the statutory scheme here with the policies of the VCBR, the DBHDS and/or the Virginia Department of Corrections (which administers conditional release). The use of polygraph requirements and polygraph results in this way, which are in any case unreliable and inadmissible, is clearly unconstitutional, not only inherently, insofar as Va. Code § 37.2-910(D) requires polygraphs as a part of the SVP process, at least on conditional release, is overbroad to the extent that it may be unclear what type of polygraph is being

required and fails to limit said polygraph examinations to polygraphs that would be constitutional.

Virginia Code § 37.2-910(D) and the actions of the Commonwealth of Virginia in requiring full-disclosure polygraphs, through the VCBR which is part of the DBHDS, or on an in-patient basis or on conditional release, are and continue to be, both inherently and as applied, in violation of a respondent's Rights as follows:

1. The Right Against Self-Incrimination under the Fifth Amendment to the Constitution, as incorporated by the Fourteenth Amendment, (*see* quoted provisions above);

2. The Right of Procedural Due Process under the Fifth Amendment to the Constitution, as incorporated by the Fourteenth Amendment;

3. The Right to Equal Protection under the Fourteenth Amendment to the Constitution; and

4. The Right to Counsel under the Sixth Amendment to the Constitution, as incorporated by the Fourteenth Amendment.

B) The Act Requires An Unconstitutional Use Of  
Penile Plethysmographs.

The requirement of Va. Code §§ 37.2-908(E) and 910(D) that respondents under the SVP Act, in order to be considered for conditional release, must undergo penile plethysmograph testing, apparently involves viewing some sort of pornography to see what arouses a respondent. *See Billips v. Commonwealth*, 652 S.E.2d 99, 101 (Va. 2007) (penile plethysmograph procedure described as follows: “Visual stimuli are accompanied by audio stimuli describing behavior across a range of different sexual activity.”). To refuse this testing would at best mean that a respondent would likely remain stuck in in-patient treatment at the VCBR.

The above code sections, and the actions of the Commonwealth of Virginia in requiring penile plethysmograph testing, through the VCBR which is part of the DBHDS on an in-patient basis or on conditional release, are and continue to be, both inherently and as applied, in violation of a respondent’s Rights as follows:

1. The Right Against Self-Incrimination under the Fifth Amendment to the Constitution, as incorporated by the Fourteenth Amendment;

2. The Right of Substantive Due Process under the Fourteenth Amendment to the Constitution,; and

3. The Right to Freedom of Religion and basic values under the First Amendment to the Constitution, as applied by the Fourteenth Amendment to the Constitution.

C) The Act Forbids Petitioner From Bringing Up Actual Innocence On The Underlying Criminal Offense Or Offenses, But Allows The Government To Bring Up Guilt And Unadjudicated Conduct.

The following provision in Va. Code §37.2-901 is blatantly unconstitutional:

In no event shall a respondent be permitted, as a part of any proceedings under this chapter, to raise challenges to the validity of his prior criminal or institutional convictions, charges, or sentences, or the computation of his term of confinement.

Since the entire statutory scheme is based on prior finding(s) of criminal guilt, it violates equal protection for the defense to not have a parallel opportunity to contest this – and the provision is so overbroad that it not only includes criminal convictions, but

also even unadjudicated conduct such as “institutional convictions, charges or sentences, or the computation of his term of confinement.” This also violates the right to call for evidence in one’s favor.<sup>1</sup>

Va. Code § 37.2-901 and the actions of the Commonwealth of Virginia in enforcing it in the court system is and continues to be, both inherently and as applied, in violation of Petitioner’s Rights as follows:

1. The Right to Call for Evidence in his Favor under the Fifth Amendment to the Constitution, as incorporated by the Fourteenth Amendment;

2. The Right of Procedural Due Process under the Fourteenth Amendment to the Constitution; and

3. The Right to Equal Protection under the Fourteenth Amendment to the Constitution.

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<sup>1</sup> In the present case the Virginia Attorney General made a partial concession that Carter could in effect testify that he did not do it.

D) The Act Allows Defendants To Be Held Past Their Release Dates On Criminal Charges.

Va. Code § 37.2-906 *et seq.* provides that prisoners convicted of crimes shall be held past their release dates in order to facilitate the implementation of the SVP Act.

Va. Code § 37.2-906 *et seq.* and the actions of the Commonwealth of Virginia in enforcing it in SVP cases, is and continues to be, both inherently and as applied, in violation of a respondent's Rights as follows:

1. The Right of Procedural Due Process under the Fifth Amendment to the Constitution, as incorporated by the Fourteenth Amendment;

2. The Right to Equal Protection under the Fourteenth Amendment to the Constitution; and

E) Mr. Carter is unconstitutionally prevented by Virginia Case Law from the possibility of conditional release because his family is out-of-state.

Va. Code §§ 37.2-910 through 919 deal, *inter alia*, with conditional release which the trial court has the authority to allow under certain circumstances. However, according to *Commonwealth v. Amerson*, 706 S.E.2d 879 (Va. 2011), the Act



makes no provision for conditional release to be allowed outside the Commonwealth of Virginia.

This violates Petitioner's constitutional rights, both inherently and "as applied", specifically:

1. The Right of Procedural Due Process under the Fifth Amendment to the Constitution, as incorporated by the Fourteenth Amendment;

2. The Right of Substantive Due Process under the Fourteenth Amendment to the Constitution;

3. The Right to Equal Protection under the Fourteenth Amendment to the Constitution; and

4. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, as being unduly restrictive of the personal interstate movement of persons who have been declared SVP's merely because they are from another State.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

WILL LEE CARTER

By James C. Martin

James Chandler Martin  
(Sup. Ct. Bar # 239035)  
Martin & Martin Law Firm  
410 Patton Street, Suite A  
P. O. Box 514  
Danville, Virginia 24543  
Telephone (434) 792-1861  
Facsimile (434) 792-1862  
[martinlawva@verizon.net](mailto:martinlawva@verizon.net)

*Attorney for the Petitioner  
& Counsel of Record*

Dated: February 17, 2023