

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Joseph Okoh – PETITIONER
(Your Name)

vs.

Commonwealth of Virginia – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Supreme Court of Virginia
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joseph Okoh
(Your Name)

P.O. Box 129, Haynesville Correctional Center
(Address)

Haynesville, VA 22472
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- 1.) Were Petitioner's Due Process rights violated when the state failed to follow its own state procedural rule requiring a post-trial hearing for Petitioner's motion to suppress, where Petitioner has a property interest in a lawfully-conducted criminal proceeding?
- 2.) Did the state trial court violate indigent Petitioner's Sixth Amendment right to counsel by denying appointment of counsel for his post-trial Motion to Suppress?
- 3.) Did the state appellate courts violate indigent Petitioner's Sixth Amendment right to appellate counsel during the appeal of the denial of his post-trial Motion to Suppress?

LIST OF PARTIES

[**x**] All parties appear in the caption of the case on the cover page.

[] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3
INTRODUCTION / STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	6
<i>Question 1</i>	
Considerations Governing Review on Certiorari – QUESTION 1.....	6
Statement / Introduction – QUESTION 1.....	6
Reasons why the petition should be granted – QUESTION 1.....	7
Conclusion – QUESTION 1.....	9
<i>Question 2</i>	
Considerations Governing Review on Certiorari – QUESTION 2.....	10
Statement / Introduction – QUESTION 2.....	10
Reasons why the petition should be granted – QUESTION 2.....	11
Conclusion - QUESTION 2.....	15
<i>Question 3</i>	
Considerations Governing Review on Certiorari – QUESTION 3.....	15
Statement / Introduction – QUESTION 3.....	16
Reasons why the petition should be granted – QUESTION 3.....	16
Conclusion - QUESTION 3.....	17
CONCLUSION.....	18

INDEX TO APPENDICES

APPENDIX A – Order of Louisa County Circuit Court, dated 2-22-16, denying *Motion to Suppress*.¹

APPENDIX B – Order of Court of Appeals of Virginia, dated 7-26-16, denying *Petition for Appeal*.²

APPENDIX C – Order of Court of Appeals of Virginia, dated 5-16-17, denying *Demand for Three-Judge Panel Consideration*.

APPENDIX D – Order of Supreme Court of Virginia, dated 2-7-18, summarily denying *Petition for Appeal*.³

APPENDIX E – Order of Supreme Court of Virginia, dated 5-10-18, summarily denying *Petition for Rehearing and Clarification*.

APPENDIX F – Petitioner's original *Motion to Suppress*, filed in the Louisa County Circuit Court, dated 9-22-15.

¹ Case # CR08000169-00

² Case # 0409-16-2

³ Record # 170714

TABLE OF AUTHORITIES CITED

Cases

<i>Coleman v. Thompson</i> , 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).....	12
<i>Dawan v. Lockhart</i> , 980 F.2d 470 (C.A.8 (Ark.) 1992).....	12
<i>District Attorney’s Office for Third Judicial Dist. v. Osborne</i> , 557 U.S. 52, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009).....	8
<i>Frasch v. Peguese</i> , 414 F.3d 518 (C.A.4 (Md.) 2005).....	13
<i>Henderson v. Frank</i> , 155 F.3d 159 (C.A.3 (Pa.) 1998)	11
<i>Huusko v. Jenkins</i> , 556 F.3d 633, 635 (C.A.7 (Wis.) 2009).....	12
<i>London v. Clements</i> , 600 Fed.Appx. 462 (C.A.7 (Wis.) 2015)	12
<i>Mathis v. Bruce</i> , 148 Fed.Appx. 732 (C.A.10 (Kan.) 2005).....	12
<i>Medina v. California</i> , 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992).....	8
<i>Michigan v. Harvey</i> , 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990).....	11
<i>Montejo v. Louisiana</i> , 556 U.S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009).....	10
<i>Olney v. United States</i> , 433 F.2d 161 (C.A.9 (Wash.) 1970)	11
<i>Pennsylvania v. Finley</i> , 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).....	12
<i>Raleigh & G.R. Co. v. Reid</i> , 80 U.S. 269, 20 L.Ed. 570 (1871)	8
<i>Robinson v. Norris</i> , 60 F.3d 457 (C.A.8 (Ark.) 1995)	12
<i>Town of Castle Rock, Colo. v. Gonzalez</i> , 545 U.S. 748, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005).....	7
<i>United States ex rel. Thomas v. O’Leary</i> , 856 F.2d 1011 (7th Cir.1988).....	11
<i>United States v. Hamilton</i> , 391 F.3d 1066 (C.A.9 (Cal.) 2004).....	10
<i>United States v. Wade</i> , 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).....	10
<i>Williams v. Pennsylvania</i> , 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016)	12

Statutes

18 U.S.C. § 2518(10)(a)	11
18 U.S.C. § 2818(10).....	6
28 U.S.C. § 1254(1).....	2
28 U.S.C. § 1257(a).....	2
Va. Code § 18.2-374.3	4
Va. Code § 19.2-62.....	8
Va. Code § 19.2-67.....	8
Va. Code § 19.2-68(G).....	8
Va. Code § 19.2-68(H)	4, 6-14, 17
Va. Code § 8.01-428.....	13
Va. Code § 8.01-654.....	13
Wis. Stat. § 974.02.....	12

Other Authorities

Black's Law Dictionary (Tenth Edition 2014).....	8
--	---

Rules

Rules of the Supreme Court of the United States, Rule 10(a)	6, 9, 14, 15, 16
Rules of the Supreme Court of the United States, Rule 29.....	18

Constitutional Provisions

Constitution of Virginia, Article 6, § 5	14
U.S. Constitution, Sixth Amendment	10, 11, 13, 14, 16, 17

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the _____ Louisa County Circuit court appears at Appendix _____ A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts:**

The date on which the highest state court decided my case was 2-7-18.
A copy of that decision appears at Appendix D.

☒ A timely petition for rehearing was thereafter denied on the following date: 5-10-18, and a copy of the order denying rehearing appears at Appendix E.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory and rule provisions involved include Va. Code § 19.2-68(H), listed in relevant part as follows:

H. Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the Commonwealth, or a political subdivision thereof, may move to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom, on the grounds that:

1. The communication was unlawfully intercepted, or was not intercepted in compliance with this chapter; or

2. The order of the authorization or approval under which it was intercepted is insufficient on its face; or

3. The interception was not made in conformity with the order of authorization or approval; or

4. The interception is not admissible into evidence in any trial, proceeding or hearing in a state court under the applicable rules of evidence.

Such motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted pursuant to subdivision 1, 2 or 3 of this subsection, the contents of the intercepted wire, electronic or oral communication or evidence derived therefrom shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, shall make available to the aggrieved person, or his counsel, for inspection the intercepted communication.

INTRODUCTION

Virginia statute (under Va. Code § 19.2-68(H)) expressly provides that any person may file a post-trial suppression motion under certain conditions (met by Petitioner in this case). The intent of this statute is to protect a person's substantive interest in receiving a fair trial with proper evidentiary rules. Unfortunately, Virginia has ignored its own statute, thus violating Petitioner's fundamental due process property interest against illegally-entered evidence.

Moreover, Petitioner's right to counsel in this continuation of his criminal proceedings has been violated, as has his right to counsel in the appellate proceedings regarding this continuation of his criminal proceedings.

STATEMENT OF THE CASE

1. Joseph Okoh, Appellant, was convicted under Va. Code § 18.2-374.3, and sentenced to 14 years in Louisa County Circuit Court ("trial court") on 3-16-09.
2. On 9-22-15, and pursuant to the provisions of Va. Code § 19.2-68(H), Appellant filed a *Motion to Suppress* with the trial court to have certain evidence suppressed as a result of the illegal disclosure of said evidence arising from a lawful interception, and sought correctional action taken upon suppression. Petitioner also sought counsel for this motion, as it was a continuation of his criminal proceedings.
3. The trial court denied the motion on Feb. 22, 2016, holding, *inter alia*, that that the court had no basis to hear the motion (which was interpreted by both Petitioner and higher state courts as a [Rules of the Supreme Court of Virginia]

Rule 1:1 violation – that is, the court no longer had jurisdiction more than 21 days after conviction). The trial court also denied Appellant’s motion for court appointed counsel.⁴

4. An appeal was timely taken to the Court of Appeals of Virginia. The appeal was denied by a single-Judge on 7-26-16, upholding the trial court’s implied finding of lack of jurisdiction pursuant to Rule 1:1. A *Demand for Three-Judge Panel Consideration* in the Court of Appeals was filed on 8-4-16, and denied on 5-16-17.

5. An appeal was then timely taken to the Supreme Court of Virginia. The appeal was refused on 2-7-18. A Petition for Rehearing was filed on _____ and was denied on _____.

6. This Petition for Writ of Certiorari follows.

⁴ This *Motion for Appointment of Counsel* was filed on 9-28-15 in the trial court, and was denied because the underlying *Motion to Suppress* was denied, thereby making it moot. (Obviously, the trial court put the cart before the horse by deciding the *Motion to Suppress* before deciding the *Motion for Appointment of Counsel*).

REASONS FOR GRANTING THE PETITION

QUESTION 1⁵

Considerations Governing Review on Certiorari – QUESTION 1

Pursuant to the Rules of the Supreme Court of the United States, Rule 10, this Court is not bound by the reasons provided under this Rule for granting certiorari, so long as the reason provided is compelling: Petitioner submits that the state's violation of its own mandatory criminal state procedural rule (§ 19.2-68(H)), a process which would give careful and prompt consideration of Petitioner's claims that the prosecution illegally entered evidence, is so egregious to fundamental fairness that Due Process is implicated for all persons who would use the statute and its nearly identical federal counterpart (18 U.S.C. § 2818(10)). This question should be decided by this Court to protect the due process rights of all persons who would file post-trial motions under § 19.2-68(H) and 18 U.S.C. § 2818(10) to protect fundamental property interests against illegally-entered evidence.

Statement / Introduction – QUESTION 1

Under the state procedural rule in this case, Code of Virginia, § 19.2-68(H), any aggrieved person is statutorily entitled to file a 'motion to suppress' on certain delineated grounds after any trial, hearing, or proceeding, if applicable. Pursuant to this statute, Petitioner filed a post-trial *Motion to Suppress*, claiming that the prosecution illegally entered evidence, (a) without following mandatory procedures

⁵ Question 1 is: "Were Petitioner's Due Process rights violated when the state failed to follow its own state procedural rule requiring a post-trial hearing for Petitioner's motion to suppress, where Petitioner has a property interest in a lawfully-conducted criminal proceeding?"

required for disclosure of electronic communications, and (b) while committing a felony in its disclosure of the evidence. The motion was denied in the state trial court for lack of jurisdiction under Virginia's Rule 1:1 (21-day time-limit after final order), contradicting § 19.2-68(H)'s time limitation bypass.

However, Petitioner has an entitlement to the property created by state law: a prosecution free from illegally-entered evidence. The Due Process clause thus extends procedural protections mandated under § 19.2-68(H) to guard against the unfair deprivation by state officials of this substantive state-law property right. Petitioner's due process rights should protect his statutory right to file his post-trial motion under § 19.2-68(H), as required to guard against the deprivation of his substantive entitlement to be free from the illegally-entered evidence in his criminal trial.

Reasons why the petition should be granted – QUESTION 1

"The Due Process Clause [Amendments V and XIV of the U.S. Constitution] extends procedural protection to guard against unfair deprivation by state officials of substantive state-law property rights or entitlements; the federal process protects the property created by state law," *Town of Castle Rock, Colo. v. Gonzalez*, 545 U.S. 748, 771, 125 S.Ct. 2796, 2812, 162 L.Ed.2d 658 (2005) (Souter and Breyer, concurring).

There is little doubt that Petitioner has a fundamental⁶ entitlement:⁷ to be free from illegally-disclosed evidence (as the sole basis of conviction). Moreover, this entitlement amounts to a state-created property interest,⁸ and the statutes meaningfully limit the discretion of those entrusted to follow them. In the instant case, Petitioner claimed that the prosecution in his criminal case [A] disclosed (on multiple occasions) intercepted electronic communications without following the required procedure under Va. Code § 19.2-68(G),⁹ and [B] committed a felony (multiple times) in making those disclosures under Va. Code §19.2-62 (A)(3) and (4) (without the statutory exceptions provided in §19.2-67 and §19.2-68(G)).¹⁰ If either of these claims are heard on the merits, Petitioner's conviction using the illegally-entered evidence would be prohibited and his indictment dismissed.

Because of Petitioner's state-law-created entitlement in this case (that is, to be free from illegally-disclosed evidence), due process applies to Petitioner through its procedural protections to guard against unfair deprivation of this entitlement by state officials. In the instant case, the procedural protection provided by the state is found under Va. Code § 19.2-68(H), where any aggrieved person is statutorily

⁶ Petitioner notes that if he is required to show a deprivation under the *Medina* standard of review (see *Medina v. California*, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992)), his deprivation here is 'fundamental.'

⁷ "Entitlement" as that term is used in the due process context, is interchangeable with "liberty interest" See *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67, 129 S.Ct. 2308, 2319, 174 L.Ed.2d 38 (2009) ("a necessary premise...is... an entitlement (what our precedents call a 'liberty interest')").

⁸ A property interest is defined as "[a] legitimate claim of entitlement to some legal or contractual benefit that cannot be taken away without due process." Black's Law Dictionary 935 (Tenth Edition 2014).

⁹ It is a basic rule of statutory construction that "when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode," *Raleigh & G.R. Co. v. Reid*, 80 U.S. 269, 270, 20 L.Ed. 570, 570 (1871).

¹⁰ It is also axiomatic under state law that a party cannot commit a felony to obtain a criminal conviction, even if not explicitly stated under statute. If the prosecution feloniously discloses intercepted electronic communications to obtain an indictment and later, a conviction, both were obviously obtained against any concept of fundamental fairness.

entitled to file a 'motion to suppress' on certain delineated grounds after any trial, hearing, or proceeding, if applicable.

State officials unfairly deprived Petitioner of his 'Motion to Suppress' under § 19.2-68(H) by claiming he was untimely under the Rules of the Supreme Court of Virginia, Rule 1:1. However, by using this rule in contravention to the text of the statute, state officials have unfairly deprived Petitioner's use of § 19.2-68(H) after his trial, as the statute explicitly permits. Procedural due process protections provide that Petitioner must be allowed to use § 19.2-68(H) to protect his right to be free from illegally-disclosed evidence submitted by the state (prosecution) during Petitioner's criminal proceedings that were disclosed not only contrary to statute, but were done so feloniously.

Conclusion – QUESTION 1

The state of Virginia failed to follow its own laws under Va. Code § 19.2-68(H). This particular failure is a violation of Petitioner's substantive due process right to be free from illegally-disclosed evidence submitted by the state (prosecution) during Petitioner's criminal proceedings, and § 19.2-68(H) was designed to procedurally protect those rights. The state's failure in implementing this statute violated Petitioner's due process rights as guaranteed by the U.S. Constitution. This issue should be addressed by this Court to protect substantive due process rights.

QUESTION 2¹¹

Considerations Governing Review on Certiorari – QUESTION 2

Pursuant to the Rules of the Supreme Court of the United States, Rule 10(c), Petitioner seeks review of this question on a writ of certiorari, as “a state court... has decided an important question of federal law that has not been, but should be, settled by this Court.”

Statement / Introduction – QUESTION 2

Under the Code of Virginia, § 19.2-68(H), any aggrieved person is statutorily entitled to file a ‘motion to suppress’ on certain delineated grounds after any trial, hearing, or proceeding, if applicable. Pursuant to this statute, Petitioner filed a post-trial *Motion to Suppress*, which was denied for lack of jurisdiction in the trial court. Petitioner appealed this denial, which was upheld by the Virginia appellate courts. Throughout all proceedings, Petitioner requested, and was never assigned, counsel.

Importantly, this *Motion to Suppress* was a post-trial motion, not a post-conviction motion. The distinction is critical in determining whether Petitioner had a Sixth Amendment right to counsel throughout the proceedings of this motion. Because a motion filed under § 19.2-68(H) is a post-trial motion, Petitioner’s ‘motion to suppress’ was a critical stage of his criminal proceedings, even post-trial, and his right to counsel under the Sixth Amendment should have attached. However,

¹¹ Question 2 is: “Did the state trial court violate indigent Petitioner’s Sixth Amendment right to counsel by denying appointment of counsel for his post-trial Motion to Suppress?”

Petitioner was denied counsel at all stages of the proceedings concerning his post-trial 'motion to suppress.'

Reasons why the petition should be granted – QUESTION 2

The Sixth Amendment of the U.S. Constitution provides that “once the adversary judicial process has been initiated..., a defendant [is guaranteed] the right to have counsel present at all 'critical' stages of the criminal proceedings.” *Montejo v. Louisiana*, 556 U.S. [778, 786], 129 S. Ct. 2079, 2085, 173 L. Ed. 2d 955, 963 (2009) , quoting *United States v. Wade*, 388 U.S. 218, 227-228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

A ‘motion to suppress’ is widely known to be a ‘critical stage’ of any criminal proceeding. *See, e.g., United States v. Hamilton*, 391 F.3d 1066, 1070 (C.A.9 (Cal.) 2004) (quoting *Olney v. United States*, 433 F.2d 161, 163 (C.A.9 (Wash.) 1970) (“it is quite clear that a pretrial motion to suppress evidence is a critical stage... requiring the presence of counsel for the accused,’ because in many cases the crucial issue is the admissibility of evidence”).¹²

In the instant case, Petitioner’s ‘motion to suppress’ was atypical because it was filed, as statutorily allowed, after trial rather than before or during. Code of Virginia, § 19.2-68(H),¹³ states that any “aggrieved person... may move to suppress the contents of any intercepted... electronic... communication... before the trial,

¹² Also see *Henderson v. Frank*, 155 F.3d 159, 166 (C.A.3 (Pa.) 1998) (quoting *Michigan v. Harvey*, 494 U.S. 344, 358 n.5, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990) (“A pretrial hearing considering the suppression of the [] confession is... a critical stage”)); Also see *United States ex rel. Thomas v. O’Leary*, 856 F.2d 1011, 1016-17 (C.A.7 (Ill.) 1988) (determining that counsel’s failure to file a responsive brief in the State’s appeal from the grant of a pretrial motion to suppress constituted absence of counsel during a ‘critical stage’)

¹³ This statute is modeled after the United States Code, 18 U.S.C. § 2518(10)(a).

hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.” In other words, by the plain reading of the statute, that person is statutorily entitled to file a ‘motion to suppress’ on specific grounds after any trial, hearing, or proceeding, if he meets the qualifying criteria.

Petitioner filed a ‘motion to suppress’ after his trial under this statute. As a ‘motion to suppress’ is a ‘critical stage’ for Sixth Amendment purposes, the right to counsel should attach. The only difference here is that Petitioner was allowed to file his motion after trial, rather than before or during. The question for this court is whether this changes the Sixth Amendment analysis.

This Court has previously held that “[t]here is no constitutional right to an attorney in state post-conviction proceedings,” *Coleman v. Thompson*, 501 U.S. 722, 725, 111 S.Ct. 2546, 2552, 115 L.Ed.2d 640 (1991). However, the lower courts have since, and often, made a distinction between ‘postconviction’ and ‘post-trial’ motions, where the latter are ‘critical stages’ of the proceeding and the right to counsel attaches.¹⁴ See, e.g., *Robinson v. Norris*, 60 F.3d 457, 459–60 (C.A.8 (Ark.) 1995) (quoting *Dawan v. Lockhart*, 980 F.2d 470, 474 n.5 (C.A.8 (Ark.) 1992) (*Coleman*’s holding that “there is no constitutional right to postconviction counsel did not limit

¹⁴ Note that ‘post-conviction’ motions are sometimes referred to as ‘collateral,’ while ‘post-trial’ motions are sometimes referred to as ‘non-collateral.’ See, e.g., *Huusko v. Jenkins*, 556 F.3d 633, 635 (C.A.7 (Wis.) 2009) (“Matters that precede the direct appeal may not be ‘collateral’ for federal purposes, even though they present issues normally entertained on collateral attack—but if a [Wis. Stat.] § 974.02 proceeding is deemed non-collateral, then Wisconsin’s prisoners will enjoy a right to effective assistance of counsel”). Also see *London v. Clements*, 600 Fed.Appx. 462, 466 (C.A.7 (Wis.) 2015) (recounting that § 974.02 does, indeed, require counsel, even though characterized by state statute as a ‘postconviction’ proceeding).

the right of effective trial counsel post-trial, ‘as distinct from postconviction’”) (emphasis added). And ‘post-trial’ motions entail the right to counsel.¹⁵

Moreover, “[a] postconviction proceeding ‘is not part of the criminal proceeding itself’ but ‘is in fact considered to be civil in nature,’ *Pennsylvania v. Finley*, 481 U.S. 551, 556-557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), and brings with it fewer procedural protections,” *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1917, 195 L.Ed.2d 132 (2016) (Thomas, dissenting).

Petitioner’s ‘motion to suppress’ was decidedly post-trial (not postconviction) and was filed as a continuing part of his criminal proceeding (using his criminal docket #'s). The filing of the motion as a continuation of a criminal proceeding was not done on a whim. Virginia’s General Assembly specifically placed Va. Code § 19.2-68(H) under “Title 19.2 – **Criminal Procedure**” (emphasis added). This is in stark contrast to other typical postconviction civil remedies, such as, e.g., Va. Code § 8.01-428 (independent actions), or § 8.01-654 (habeas corpus), which fall under Va. Code, “Title 8.01. – **Civil Remedies And Procedure**” (emphasis added).

Moreover, that same statute also allows filing of this same motion before trial, rendering the idea of it being a postconviction civil remedy impossible. There is little question that the state legislature intended a ‘motion to suppress’ filed under § 19.2-68(H) to be filed as part of an ongoing criminal case, and not a separate civil remedy. Finally, the nature of Petitioner’s motion¹⁶ challenged the

¹⁵See, e.g., *Mathis v. Bruce*, 148 Fed.Appx. 732, 737 (C.A.10 (Kan.) 2005) (“The Kansas courts have decided, based on both state law and the federal Constitution, that there is a right to counsel for timely post-trial motions”).

¹⁶ “[T]he nature of the review is the key to determining whether it was collateral or direct,” *Frasch v. Peguese*, 414 F.3d 518, 522 (C.A.4 (Md.) 2005).

prosecution's illegal disclosure of evidence from a legal interception of an electronic communication, especially during the grand jury proceeding, and would have been filed exactly the same way if it had been filed before trial; thus, the motion can only be characterized as a continuation of the criminal proceedings, in no way dissimilar to other pre-trial criminal-case-filed motions to suppress.

Petitioner's 'motion to suppress' was decidedly a post-trial (and not post-conviction) motion filed as part of the criminal proceedings against him, and he was entitled to an attorney under the Sixth Amendment.

Note: the Virginia Court of Appeals upheld the denial of counsel in the trial court because "the trial court lacked authority to entertain [the] motion to suppress" under Virginia's 21-day rule, Rule 1:1. However, Petitioner's argument had been that conflicting court rules (such as Virginia's Rule 1:1) were overcome by the text of Va. Code § 19.2-68(H), which allows for filing beyond 21 days.¹⁷ While Virginia's courts may have disagreed with Petitioner on the matter, that is not the point; Petitioner should have been provided with counsel to make this argument from the beginning. If anything, the outcome of the case proves the point. Had Petitioner been provided with counsel to which he was entitled, counsel could have more ably argued that Virginia's Rule 1:1 was overcome by Va. Code § 19.2-68(H), and therefore inapplicable. As a *pro se* litigant, Petitioner's arguments fell on deaf ears.

¹⁷ Virginia's Constitution, Article 6, § 5, provides that Virginia Court "rules shall not be in conflict with the general law."

Conclusion – QUESTION 2

Pursuant to the Rules of the Supreme Court of the United States, Rule 10(c), this Court should grant certiorari review because the trial court erred in denying Petitioner counsel to which he was entitled under the Sixth Amendment for his statutorily-permitted post-trial ‘motion to suppress.’ This denial essentially (*sub silentio*) decides an important question of federal law – whether Petitioner is entitled to counsel under the Sixth Amendment for a statutorily-enabled post-trial (non-postconviction) motion. And this question has not been decided by this Court, but should be. State courts do not yet seem to be aware of their obligations in providing counsel under the Sixth Amendment to criminal defendants for post-trial motions. The increasing prevalence of post-trial motions means this problem will only get worse until resolved by this Court, and any delay means only more criminal defendants losing their most critical right – the right to counsel.

QUESTION 3¹⁸

Considerations Governing Review on Certiorari – QUESTION 3

Pursuant to the Rules of the Supreme Court of the United States, Rule 10(c), Petitioner seeks review of this question on a writ of certiorari, as “a state court... has decided an important question of federal law that has not been, but should be, settled by this Court.”

¹⁸ Question 3 is: “Did the state appellate courts violate indigent Petitioner’s Sixth Amendment right to appellate counsel during the appeal of the denial of his post-trial Motion to Suppress?”

Statement / Introduction – QUESTION 3

This issue is essentially the same as that in Question 2, with one large exception. In Question 2, Petitioner was denied appointment of counsel by the trial court, because the trial court believed Petitioner did not have jurisdiction to file a ‘motion to suppress.’ This belief was upheld by the Virginia appellate courts. However, when Petitioner asked for appellate counsel to represent him on his appeal of his post-trial ‘motion to suppress,’ there was no question that the Virginia Court of Appeals and Virginia Supreme Court had jurisdiction to hear Petitioner’s appeal. Therefore, the excuse that Petitioner was not entitled to appellate counsel because of a lack of jurisdiction would not have been feasible. Instead, the Virginia appellate courts merely denied appointment of counsel for their own proceedings without explanation.¹⁹

Petitioner was appealing a denial of his post-trial ‘motion to suppress’ for his criminal case, for which he was entitled to have appellate counsel provided under the Sixth Amendment.

Reasons why the petition should be granted – QUESTION 3

The reasons Petitioner was entitled to appellate counsel for the appeal of the trial court’s denial of his post-trial ‘motion to suppress’ are exactly the same as those put forth in Question 2, and are incorporated herein. Notably, if a non-collateral post-trial motion would require counsel in the trial court, so would the

¹⁹ The appointment of appellate counsel was denied by the Virginia Court of Appeals in a 4-5-17 Order, which reads, in its entirety: “On August 11, 2016 came appellant, in proper person, and filed a motion requesting that the Court appoint counsel to represent him on appeal. [¶] Upon consideration whereof, the said request hereby is denied.” The Virginia Supreme Court refused Petitioner’s appeal and did not address his right to counsel in either the Court of Appeals or its own court.

ensuing appeal. As noted above, the purported ‘lack of jurisdiction’ reason given by the state trial and appellate courts is irrelevant to the question of the Sixth Amendment right to counsel during the proceeding (even if the outcome ultimately would be a finding of lack of jurisdiction).

Conclusion - QUESTION 3

Pursuant to the Rules of the Supreme Court of the United States, Rule 10(c), this Court should grant certiorari review because the state appellate courts erred in denying Petitioner appellate counsel to which he was entitled under the Sixth Amendment during the appeal of the denial of his statutorily-permitted post-trial ‘motion to suppress.’ The denial of counsel without explanation amounts to a decision of an important question of federal law – whether Petitioner is entitled to counsel under the Sixth Amendment for a statutorily-enabled post-trial (non-postconviction) motion. This question has not been decided by this Court, but should be. State courts do not yet seem to be aware of their obligations in providing appellate counsel under the Sixth Amendment to criminal defendants for appeals of post-trial motions. The increasing prevalence of post-trial motions means this problem will only get worse until resolved by this Court, and any delay means only more criminal appellants losing their most critical right – the right to counsel.

CONCLUSION

Petitioner's procedural due process right was violated where the fundamental right to not be convicted on illegally-entered evidence was procedurally safeguarded by Va. Code § 19.2-68(H), which the state failed to follow. The state may refuse to follow its own laws only when not in violation of Petitioner's constitutional due process rights. Moreover, as Petitioner's motion and appeal were criminal in nature, he was entitled to counsel from the beginning under the Constitution, which was also denied by the state.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



, *pro se*

Date: MAY 22, 2018