VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

IN RE: A PETITION TO IMPANEL A SPECIAL GRAND JURY TO INVESTIGATE THE ADMINISTRATION OF THE OFFICE OF THE COMMONWEALTH'S ATTORNEY OF THE CITY OF NORFOLK

Civil No.: CL23-403

ORDER

This petition under *Code of Virginia* § 48-1 came to be heard on February 6, 2023. The petitioners appeared in person and by counsel, Amina Matheny-Willard, Esq. and Zachary T. P. Lawrence, Esq. Ramin Fatehi, Esq. appeared *pro se.*

The petitioners complain that as Commonwealth's Attorney for the City of Norfolk, Mr. Fatehi and those in his employ have failed to: (1) disclose *Brady* materials timely to defense counsel, (2) prepare adequately for trials, (3) prosecute wrongdoers competently, and (4) keep victims and witnesses informed of proceedings pursuant to *Code* § 19.2-11.01.

Mr. Fatehi has filed a motion to dismiss on two grounds. First, not all of the petitioners are residents of Norfolk. Second, the matters complained of do not constitute a public nuisance in law. He has also filed a motion for sanctions.

Residency

In his amended brief in support of his motion to dismiss, Mr. Fatehi questioned the residence of two of the petitioners. Evidence at the hearing established both were residents of Norfolk.

Motion to Dismiss

The petitioners are correct that *Code* § 48-1 *et seq.* make no provision for the filing of a motion to dismiss by a person to be investigated by a special grand jury. They note an

accused in a criminal prosecution cannot make a motion to dismiss before a grand jury returns an indictment. They argue that allowing Mr. Fatehi to move to dismiss this proceeding could be precedent for allowing those accused of crimes to try to prevent being indicted. They further note that *Code* § 48-4 only allows defense to be made after service of the presentment. By letter of February 7, Ms. Matheny-Willard wrote to clarify her position "that Mr. Fatehi had no standing to participate in the hearing or file a motion to dismiss or for sanctions."

However, nothing in these statutes prohibits the filing of a motion to dismiss, and *Code* § 48-4 only allows defense to be made to a proceeding *in rem* "upon presentment." When the proceeding is, as here, *in personam*, may the person presented make no defense?

This proceeding differs from a criminal prosecution by indictment in at least one significant particular. Unless the accused in a felony prosecution waives indictment, this Court has no jurisdiction over him until a grand jury returns an indictment "a true bill."[1] *Code* §§ 19.2-216, 217; *Triplett v. Commonwealth,* 212 Va. 649, 186 S.E.2d 16 (1972). The Court would thus have no jurisdiction to entertain a motion to dismiss a non-existent indictment or to prevent a grand jury from considering an indictment. By contrast, the Court probably obtains jurisdiction over this proceeding upon the filing of the complaint, and certainly upon a general appearance by a person the petitioners seek to have presented. Furthermore, if, as petitioners concede, the Court can *sua sponte* dismiss a petition as insufficient, why should the person they seek to have presented be prohibited from making a defense?

[1] Or a presentment, which for a felony is based on the knowledge or observation of the grand jury. *Code* § 19.2-216. A presentment in a proceeding such as this is made "upon a full investigation of the complaint, *Code* § 48-2, which necessarily would require the grand jury's receipt of evidence.

Nuisance

In common parlance, a busybody or other bothersome or dangerous person is sometimes called a "public nuisance." Virginia law defines "nuisance" in very general terms, but the courts' application of the term over centuries – both here and in England, whence we derive our law of nuisance – has, with few exceptions, limited it to dangers on public ways and activities conducted upon or conditions existing upon land.

Blackstone defined a nuisance as "any thing that worketh hurt, inconvenience, or damage." 3 *Commentaries on the Laws of England* 216 (1768). He divided nuisances into two classes: public or common and private. He described the former as those "which affect the public, and are an annoyance to *all* the king's subjects." *Id.* (emphasis in original).

He further defined a public nuisance as "a species of offence against the public order and oeconomical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires." 4 *Commentaries* 166 (1769). In the nature of public nuisances he included: 1. annoyances in highways, bridges, and public rivers by rendering them inconvenient or dangerous either positively, by obstruction, or negatively, by want of repair, 2. offensive trades and manufactures, 3. disorderly inns, ale-houses, bawdy-houses, booths and stages for rope-dancers, mountebanks[2], and the like, 4. the making, keeping, or carriage of too large a quantity of gunpowder and the making and selling of fireworks and squibs and throwing

[2] "1. A doctor that mounts a bench in the market, and boasts his infallible remedies and cures. 2. Any boastful and false pretender." S. Johnson, *Dictionary* (1755).

them about in any street (which were made nuisances by statutes), 5. eavesdroppers, and 6. common scolds.[3] 4 *Commentaries* 167-68.

Unless altered by the General Assembly, repugnant to our republican institutions, or incompatible with our circumstances, the common law of England at the time of our Independence remains the law of Virginia. *Code* § 1-200; *White v. U.S.*, 300 Va. 269, 863 S.E.2d 483 (2001). Judge St. George Tucker, in his oft cited edition of Blackstone[4], appears not to have seen any reason preventing the English law of public nuisance from being in force in Virginia. 5 *Commentaries* 166-68 (1803).

In his list of public nuisances, Blackstone did not include negligence by a public officer charged with the administration of justice. He noted elsewhere that negligence by such as sheriffs, constables, and coroners was an offense subjecting the offender to a fine "and in very notorious cases will amount to a forfeiture of his office, if it be a beneficial one." 4 *Commentaries* 140-41. The Court makes this last point to show that in England - at the time of our Independence - the law provided a remedy for neglect of duty by a public officer charged with the administration of justice,[5] and it was not in nuisance.

The decisions of the English courts since our Independence on questions of common law are persuasive, but not binding, authority. *Baring v. Reeder,* 11 Va. (1 Hen. & M.) 154, 158, 162-3 (1806); *See also, Long v. Vlasic Food Products Co.,* 439 F.2d 229, 231 (4th Cir.

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[3] If this category of public nuisance has not fallen into desuetude, it might today run afoul of the Equal Protection Clause as it seems only women could be common scolds.

[4] Tucker pointed out differences between the monarchical institutions of Great Britain and the republican ones of Virginia and the resulting incompatibility of some English laws with conditions here. The U.S. Supreme Court has cited the work "in more than forty cases as authority for eighteenth century understanding of certain points of law ..." D. Douglas, "The Legacy of St. George Tucker," 47 *William and Mary Law Review* 1111, 1115 (2006).

[5] Judge Tucker noted "This, as a public offence, remains as at common law in Virginia." 5 *Commentaries* at 140. Whether *Code* § 24.2-230 *et seq.* supplant or supplement this common law remedy, whether the common law remedy still exists, and whether it would apply to Commonwealth's Attorneys are questions not before the Court.

1971). The Court has found no English decision since our Independence that extends the doctrine of public nuisance to the petitioners' complaints. *See* 34 *Halsbury's Laws of England,* "Nuisance," (4th ed. reissue 2004).

The *Code of Virginia* contains two statutes giving examples of public nuisances, both in the context of the authority of local governments to abate them, but no definition.

> The term 'nuisance' includes, but is not limited to, dangerous or unhealthy substances which have escaped, spilled, been released or which have been allowed to accumulate in or on any place and all unsafe, dangerous, or unsanitary public or private buildings, walls, or structures which constitute a menace to the health and safety of the occupants thereof or the public.

Code § 15.2-900, and

> A municipal corporation may compel the abatement or removal of all nuisances, including but not limited to the removal of weeds from private and public property and snow from sidewalks; the covering or removal of offensive, unwholesome, unsanitary or unhealthy substances allowed to accumulate in or on any place or premises; the filling in to the street level, fencing or protection by other means, of the portion of any lot adjacent to a street where the difference in level between the lot and the street constitutes a danger to life and limb; the raising or draining of grounds subject to be covered by stagnant water; and the razing or repair of all unsafe, dangerous or unsanitary public or private buildings, walls or structures which constitute a menace to the health and safety of the occupants thereof or the public.

Code § 15.2-1115(A). These lists do not contain any condition that materially differs from what the common law deems a nuisance.

In the absence of a statutory definition, "public nuisance" is defined by the common law. *Tisdale v. Commonwealth,* 114 Va. 866, 868, 77 S.E. 482, 483 (1913). Virginia common law defines a public nuisance as an "annoyance ... common to the public generally," *City of Virginia Beach v. Murphy,* 239 Va. 353, 356, 389 S.E.2d 462, 463 (1990), or "a condition that is

a danger to the public," *Taylor v. City of Charlottesville*, 240 Va. 367, 372, 397 S.E.2d 832, 835 (1990).

Among the activities and conditions Virginia's appellate courts have found or suggested to be public nuisances are: decrepit and dangerous buildings, *Lee v. City of Norfolk*, 281 Va. 423, 706 S.E.2d 330 (2011); continuously barking dogs, *Patterson v. City of Richmond*, 39 Va. App. 706, 576 S.E. 2d 759 (2003); loud businesses, *Virginia Beach v. Murphy, supra*; disorderly houses, *Flannery v. City of Norfolk*, 216 Va. 362, 218 S.E.2d 730 (1975); obstructions on public highways, *Price v. Travis*, 149 Va. 536, 140 S.E. 644 (1927); gambling houses, *Tisdale, supra;* a dam creating stagnant water and impure air near a public highway, *Commonwealth v. Webb*, 27 Va. (6 Rand.) 726 (1828).

The Supreme Court has also recognized the common law of public nuisances is not static. In *Stickley v. Givens*, 176 Va. 548, 557, 11 S.E.2d 631, 636 (1940), the Court ruled cattle with contagious diseases were no less a public nuisance "because of the later discovery of its danger or the earlier failure to denominate it." However, the Supreme Court has never expanded nuisance to include the petitioners' complaints.

Extensive lists of hundreds of annoyances and conditions American and English courts have deemed to be or not to be nuisances can be found in 66 *C.J.S.*, "Nuisances," §§ 28-62; 46 *Corpus Juris*, "Nuisances," §§ 60-214 (1928); 10 *Encyclopedic Digest of Virginia and West Virginia Reports*, "Nuisances" at 503-16 (1908). Maladministration by a public officer is not among them.

Mr. Lawrence conceded at the hearing he was not aware of any decision of any court in the United States holding maladministration by a public officer to be a public nuisance.

Code § 48-1 provides:

> When complaint is made to the circuit court of any county, or the corporation court[6] of any city of this Commonwealth, by five or more citizens of any county, city or town, setting forth the existence of a public or common nuisance, the court ... shall summon a special grand jury, in the mode provided by law, to the next term of such court, to specially investigate such complaint.

Mr. Lawrence also conceded at the hearing that the Court could refuse to summon a special grand jury if it determined from the face of the complaint that the condition complained of was a private nuisance or no nuisance at all.

This Court did state in *In re Public Nuisance Complaint of Allen R. Gregory, et al.*, 98 Va. Cir. 104 (2018), that it was "aware of no authority that would allow it to ignore the command of *Code* § 48-1 and *not* summon a grand jury." (emphasis in original). However, the condition complained of there was the obstruction of a public highway – the quintessential public nuisance.[7]

"[W]hat is a public nuisance is a question of law for the court, but the existence of facts which the court may declare sufficient to constitute a public nuisance is a question of fact for the jury." *Price v. Travis,* 149 Va. at 546, 140 S.E. at 647. Regardless of what the petitioners may think of Mr. Fatehi's discharge of his duties, it cannot be said to be an "annoyance" or a "condition" within the law of nuisance.

The Court is only required to summon a grand jury when there is a complaint "setting forth the existence of a public or common nuisance." The present petition merely

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[6] Corporation courts were abolished by 1973 *Acts of Assembly*, c. 544 and became circuit courts.
[7] The City of Norfolk abated the condition before a special grand jury was summoned.

alleges the existence of a public or common nuisance. The Court finds as a matter of law it does not set forth the existence of one. The Court orders the petition DISMISSED.

Sanctions

As pertinent here, *Code* § 8.01-271.1(B) provides:

> The signature of an attorney ... constitutes a certificate by him that (i) he has read the pleading ..., (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass ....

At the outset, the Court would be remiss not to observe that some of Mr. Fatehi's comments during the argument were most unprofessional. He was, at times, condescending and insulting to Ms. Matheny-Willard and Mr. Lawrence. To their credit, they did not respond in kind. The Court twice called him on this behavior. His conduct proved the wisdom of the adage that no man should be counsel in his own cause.[8]

The Court has already determined the petition is not warranted by existing law. The Court also finds the petition is not warranted by a good faith argument for the extension or modification of existing law. The petitioners cite the extensions of nuisance law in some states to opioid production and the manufacture of firearms. These could, at least, be argued here based on statutory or common law analogies. Blackstone, *supra,* listed "offensive trades and manufactures" as nuisances. *Code* § 18.2-258 declares drug houses to be public nuisances. The manufacture or storage of explosives has been held to be a nuisance in

[8] The oath attorneys take on being admitted to the bar of the Supreme Court of Virginia provides, in part: "I will faithfully, honestly, professionally, and courteously demean myself in the practice of law."

several cases. *See Davenport & Morris v. Richmond,* 81 Va. 636, 642 (1886); *Wilson v. Phoenix Powder Mfg. Co.,* 40 W.Va. 413, 21 S.E. 1035 (1895); *Rex v. Taylor,* 2 Str. 1167, 93 Eng. Rep. 1104 (K.B. 1742); *see also,* Blackstone, *supra.*

Petitioners suggested no such analogy for this case. They rely instead on the general and vague definitions of "nuisance" and the proposition it should be broadened to include special relationships to the public. Were this the law any public official in Virginia might be haled into court on the complaint of five people.

The Court also finds the petition was filed for an improper purpose: political publicity. On January 10, 2023, two days before she filed the petition, Ms. Matheny-Willard announced her candidacy for Commonwealth's Attorney in 2025. In her Facebook post announcing her candidacy, she also stated: "I am trying to file a document in order to hold the Commonwealth's Attorney accountable ... I need plaintiffs ... I only need five people."[9] Exhibit B to Mr. Fatehi's amended motion. Five citizens were necessary to file the present petition. She succeeded in her wish for publicity. At least two local television news stations reported the hearing. The Court does not appreciate being used by an attorney for political advertising.

Mr. Fatehi requests a sanction of $ 1,000 payable to the Clerk of the Court. The Court imposes a sanction of $ 500 on Ms. Matheny-Willard, who signed the petition, payable to the Clerk of the Court within sixty days.

Nothing further remaining to be done herein, this matter is ended and stricken from the docket.

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[9] At argument, Mr. Fatehi suggested this constituted barratry. *Code* § 18.2-451 *et seq.* This is an issue the Court need not decide.

Endorsements are waived pursuant to Rule 1:13.

The Court has emailed copies of this order to Ramin Fatehi, Esq. and Amina Matheny-Willard, Esq.

ENTER: **February 10, 2023**

Judge