

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

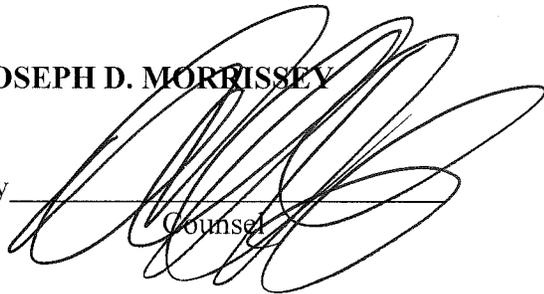
THE COMMONWEALTH OF VIRGINIA)	
)	
v.	)	Case Nos. CR14001785
	)	CR14001786
	)	CR14001787
JOSEPH D. MORRISSEY	)	CR14001788
<hr/>	)	CR14001789

NOTICE OF HEARING

PLEASE TAKE NOTICE that on August 29, 2014, defendant Joseph D. Morrissey (“Morrissey”), by counsel, will bring on for hearing his Motion to Dismiss Indictments and to Disqualify Prosecutor William F. Neely. The hearing will take place together with the Commonwealth’s Motion to Determine Legislative Privilege/Re-set Trial Date in the Circuit Court for the County of Henrico, 4301 East Parham Road, Henrico, Virginia 23273.

JOSEPH D. MORRISSEY

By _____
Counsel



Amy L. Austin (VSB No. 46579)
The Law Office of Amy L. Austin, P.L.L.C.
101 Shockoe Slip, Suite O
Richmond, Virginia 23219
804.343.1900 Telephone
804.343.1901 Facsimile

Anthony F. Troy (VSB No. 05985)
Eckert Seamans Cherin & Mellott, LLC
707 East Main Street, Suite 1450
Richmond, Virginia 23219
804.788.7751 Telephone
804.698.2950 Facsimile

William M. Stanley (VSB No. 37209)
Aaron B. Houchens (VSB No. 80489)
Stanley, Houchens & Griffith
13508 Booker T. Washington Highway
Moneta, Virginia 24121
540.721-6028 Telephone
540.721.6405 Facsimile

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was sent via regular mail, first-class, postage prepaid, to the following on this 8th day of August, 2014:

William F. Neely, Esquire
Office of the Commonwealth's Attorney
PO Box 2629
Spotsylvania, Virginia 22553

A large, stylized handwritten signature in black ink, appearing to be 'W. Neely', written over a horizontal line.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

THE COMMONWEALTH OF VIRGINIA)	
)	
	)	Case Nos. CR14001785
v.	)	CR14001786
	)	CR14001787
	)	CR14001788
JOSEPH D. MORRISSEY	)	CR14001789
<hr/>)	

MOTION TO DISMISS INDICTMENTS AND TO DISQUALIFY
PROSECUTOR WILLIAM F. NEELY

Defendant Joseph D. Morrissey (“Morrissey”), by and through his undersigned counsel, respectfully moves this Court to dismiss the indictments against Morrissey and to disqualify special prosecutor William F. Neely (“Neely”).

In further support of this Motion, Morrissey relies upon its Memorandum in Support filed herewith.

JOSEPH D. MORRISSEY

By _____

Counsel

Amy L. Austin (VSB No. 46579)
The Law Office of Amy L. Austin, P.L.L.C.
101 Shockoe Slip, Suite O
Richmond, Virginia 23219
804.343.1900 Telephone
804.343.1901 Facsimile

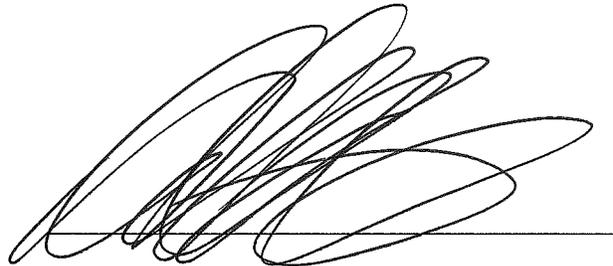
Anthony F. Troy (VSB No. 05985)
Eckert Seamans Cherin & Mellott, LLC
707 East Main Street, Suite 1450
Richmond, Virginia 23219
804.788.7751 Telephone
804.698.2950 Facsimile

William M. Stanley (VSB No. 37209)
Aaron B. Houchens (VSB No. 80489)
Stanley, Houchens & Griffith
13508 Booker T. Washington Highway
Moneta, Virginia 24121
540.721-6028 Telephone
540.721.6405 Facsimile

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was sent via regular mail,
first-class, postage prepaid, to the following on this 8th day of August, 2014:

William F. Neely, Esquire
Office of the Commonwealth's Attorney
PO Box 2629
Spotsylvania, Virginia 22553

A handwritten signature in black ink, appearing to be 'William F. Neely', written over a horizontal line.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

THE COMMONWEALTH OF VIRGINIA)		
)		
v.	)	Case Nos.	CR14001785
	)		CR14001786
	)		CR14001787
JOSEPH D. MORRISSEY	)		CR14001788
<hr/>	)		CR14001789

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENTS
AND TO DISQUALIFY SPECIAL PROSECUTOR WILLIAM F. NEELY**

Joseph D. Morrissey (“Morrissey”), by counsel, respectfully moves this Court to dismiss the indictments against Morrissey and to disqualify special prosecutor William F. Neely (“Neely”).

BACKGROUND

Since approximately September 2013, the Commonwealth has been investigating Morrissey concerning an alleged “relationship” with M.P., a then seventeen-and-a-half year-old female previously employed by Morrissey’s law firm. This investigation presents a unique set of circumstances because Neely was appointed as a special prosecutor in November 2013 after the Office of the Commonwealth Attorney of Henrico County determined that it had a conflict requiring recusal. Thus, Neely’s appointment was made to preserve the independent and unbiased workings of the criminal justice system. Morrissey, however, had reason to believe that Neely also had a conflict of interest due to his personal animus against Morrissey. That conflict results from Neely’s involvement, in 2011, vehemently objecting to the reinstatement

request of Morrissey's law license. Specifically, Neely was one of only two prosecutors¹ who wrote a letter to the Virginia State Bar, strongly advocating against reinstatement of Morrissey's license to practice law and outlining two cases in which Morrissey, as defense counsel against Neely, purportedly acted unethically.² Morrissey's license to practice law in Virginia was, in fact, reinstated by decision of the Supreme Court of Virginia. As will be made clear *infra*, Neely is still "gunning" for Morrissey.

Despite the fact that both Morrissey and M.P. repeatedly denied the existence of any inappropriate relationship, and both have confirmed that M.P. represented and maintained her age as twenty-two, Neely nonetheless, petitioned the Court to impanel a special grand jury pursuant to Virginia Code § 19.2-206(A)(iii). The Court granted Neely's petition by Court Order dated December 4, 2013. Neely's decision to impanel the special grand jury, despite the alleged victim's steadfast denial of any improper relationship, confirmed Morrissey's belief that Neely still harbored a grudge against Morrissey and could not carry out his duties as special prosecutor in an impartial manner. Accordingly, on January 29, 2014, Morrissey filed a motion to disqualify Neely as special prosecutor. Neely, however, assured the Court that he had put his previously known animus and public disdain for Morrissey aside and further represented that he was able to carry out the duties of special prosecutor in a fair and impartial manner. The Court accepted Neely's assurances and ruled that the letter alone was not grounds for disqualification and that the motion was nonetheless premature because, at that time, the matter was still in the investigative stage.

¹ There are over 765 prosecutors in this Commonwealth, 120 of which are elected. Only two Commonwealth attorneys, Mr. Neely being one, felt so strongly about Morrissey that they wrote letters to the Virginia State Bar ("VSB") objecting to the reinstatement of his law license. The other one, Denise Lunsford of Albemarle County was, as will be discussed, recently disqualified due to the appearance of bias when trying to prosecute a speeding charge against Morrissey.

² As to be discussed, there are now serious questions regarding the accuracy of Neely's 2011 written assertions to the Virginia State Bar.

The special grand jury convened on or about June 1, 2014. On June 30, 2014, the special grand jury indicted Morrissey on four felony charges and one misdemeanor charge. The indictments were released to the public on that same day, as was a bill of particulars³ issued by Neely, purportedly in accordance with Virginia Code § 19.2-230. There was no report issued by the Special Grand Jury as required by statute.⁴

ARGUMENT

Morrissey now moves this Court to dismiss the indictments of the special grand jury on the grounds that a special grand jury, created by statute to investigate conditions in a community that would tend to promote crime, was not the appropriate vehicle through which to conduct the investigations against Morrissey, an individual. Assuming *arguendo*, the special grand jury was appropriate, both the special grand jury as well as Neely failed to comply with statutory requirements, and lastly, Neely's bias and animus so tainted the special grand jury process that the indictments should be dismissed and Neely disqualified as the special prosecutor.

As stated *supra*, Neely petitioned the Court to impanel the special grand jury. Pursuant to Virginia Code § 19.2-206(A)(iii), a Commonwealth's Attorney can petition the Court to impanel a special grand jury to investigate and report on "*any condition* that involves or tends to promote criminal activity." Morrissey's alleged criminal conduct is not a "condition" under 19.2-206(A)(iii). Rather, it is alleged criminal conduct of an individual that should have been presented to a regular grand jury pursuant to Virginia Code § 19.2-191(1), not investigated by a special grand jury. If a special grand jury could somehow investigate Morrissey as a "condition," then the required statutory provisions have not been met, as there was no report

³ Neely's inexplicable decision to release a Bill of Particulars was not consistent with Virginia law and inconsistent with the secrecy requirements surrounding Special Grand Jury proceedings (*infra*).

issued, as required by Virginia Code § 19.2-206 (A)(iii) on any conditions that were found. In fact, the very “report” of the special grand jury points out that they were convened not to “investigate and report on any conditions” as is required by statute, but rather were convened to investigate the alleged crimes of Morrissey. A copy of the Report of Special Investigative Grand Jury has been filed under seal with the Court in accordance with Va. Code § 19.2-212(B) as **Exhibit A**. The admitted investigation of a single individual stands in stark contrast to the statutorily mandated functions of a special grand jury under Virginia Code § 19.2-206 (A)(iii), to investigate conditions. Additionally, there were no determinations presented to a regular grand jury as required by Virginia Code § 19.2-214 (providing that “**any bill of indictment**” which flows from a special grand jury shall be presented to a regular grand jury).⁵

Morrissey further moves to dismiss the indictments and disqualify Neely as special prosecutor in this matter because Neely’s previous and current unabashed bias against Morrissey has permeated the investigation, the special grand jury proceedings, the resulting indictments and the public announcements of the charges, such that Morrissey did not receive an impartial investigation and is not likely to receive the fair trial to which he is entitled. These arguments are outlined in detail below.

I. Neely’s Use of the Special Grand Jury Contravened Virginia Code § 19.2-206 Warranting Dismissal of the Indictments

A. A Special Grand Jury Can Only Investigate a Condition, Not an Individual

Neely, on December 4, 2013, petitioned the Court to impanel a special grand jury pursuant to Virginia Code § 19.2-206(A)(iii) to “investigate and report on any *condition* that involves or tends to promote criminal activity and to consider bills of indictment related to such

⁵ See also Va. Code Ann. § 19.2-217 (2014).

criminal activities – specifically as such activity relates to the criminal investigation into the *conduct* of Delegate Joe Morrissey.”

See Petition attached as **Exhibit B**. Virginia Code § 19.2-206 states:

A. Special grand juries may be impanelled by a circuit court (i) at any time upon its own motion, (ii) upon recommendation of a minority of the members of a regular grand jury that a special grand jury be impanelled, to perform the functions provided for in subdivision (2) of § 19.2-191, or (iii) upon request of the attorney for the Commonwealth to investigate and report on any condition that involves or tends to promote criminal activity and consider bills of indictment to determine whether there is sufficient probable cause to return each such indictment as a "true bill."

B. A special grand jury shall be impanelled by a circuit court upon the recommendation of a majority of the members of a regular grand jury if the court finds probable cause to believe that a crime has been committed which should be investigated by a special grand jury impanelled to perform the functions provided for in subdivision (2) of § 19.2-191.

Va. Code Ann. § 19.2-206 (2014).

Virginia Code § 19.2-191, (the regular grand jury provisions) which is incorporated by reference into Virginia Code § 19.2-206, outlines the dual functions of a regular grand jury as follows:

(1) To consider bills of indictment prepared by the attorney for the Commonwealth and to determine whether as to each such bill there is sufficient probable cause to return such indictment "a true bill."

(2) To investigate and report on any condition that involves or tends to promote criminal activity, either in the community or by any governmental authority, agency or official thereof. These functions may be exercised by either a special grand jury or a regular grand jury as hereinafter provided.⁶

⁶ Under the provisions of Virginia Code § 19.2-191(2), there is no authority to indict or return a true bill, which would also be true as to the performance or function of a special grand jury. That is because under the provisions of § 19.2-214, all bills for any criminal offense that follow a report of a special grand jury must be prepared for presentation to a regular grand jury. See also Virginia Code §19.2-217.

Va. Code Ann. § 19.2-191 (2014).

These statutory provisions relating to regular and special grand juries are the result of various legislative amendments. When first enacted in 1975, a special grand jury could be empaneled only by motion of the Court. *See* House Doc. 20, 1975 Acts of Assembly. Subsequently, the ability to empanel a special grand jury was extended to a request made by a minority of members of a regular grand jury (Virginia Code § 19.2-206(A)(ii)) and then to a request made by a majority of the members of a regular grand jury, (Virginia Code § 19.2-206(B)), where a court shall, rather than may, impanel a special grand jury. In all such instances there is a cross reference to the provisions of Virginia Code § 19.2-191(2) allowing a grand jury (regular or special) to investigate and report on conditions that would promote or involve criminal activity, but not the ability to indict, which would be left to the regular grand jury under the provisions of Virginia Code § 19.2-191(1).

In 2001, Virginia Code § 19.2-206(A) was specifically amended to add subsection (iii), which allows a special grand jury to be impaneled “upon request of the attorney for the Commonwealth to investigate and report on *any condition* that involves or tends to promote criminal activity”. *See* Va. Code Ann. § 19.2-206(A)(iii) (emphasis added). Though regular grand juries can both indict (under the provisions of § 19.2-191(1) and investigate certain types of conditions (under the provisions of § 19.2-191(2)), special grand juries cannot indict for individual crimes but rather can only investigate and report regarding certain conditions prevalent in the community and recommend indictments regarding their findings.⁷ Even under the provisions of Virginia Code §§ 19.2-206(A)(ii) or 206(B) where a recommendation is made by either a minority or a majority of the members of a regular grand jury, and the circuit court finds probable cause to believe that a crime has been committed that warrants investigation, the

⁷ *See* Va. Code Ann. § 19.2-214 (2014).

special grand jury is nonetheless limited to investigating conditions rather than an individual. In short, the purpose and preservation of the regular grand jury has been maintained and still exists in the Commonwealth—to stand between the King and individual citizens. Citizens can only be indicted by a regular grand jury. Special grand juries—whether (i) pursuant to the provisions of Virginia Code §19.2-206(A) or (ii) pursuant to the provisions of Virginia Code § 19.2-206(B)—are limited to investigating and reporting on certain conditions that would tend to promote or involve criminal activity. A special grand jury can investigate certain conditions and report on and suggest true bills but, under the provisions of either Virginia Code § 19.2-206(A) or (B) it is not empowered to indict individual citizens. This is also true when considering the specific provisions of Virginia Code § 19.2-206(A)(iii) since, the provisions of that section also limit any inquiry, only to conditions prevalent in the community that promote or involve criminal activity and secondly, as discussed *infra*, the provisions of Virginia Code § 19.2-214 as well as Virginia Code § 19.2-217, still mandate that a regular grand jury must consider all indictments flowing from a special grand jury.

In this instant case, no regular grand jury was involved. As is evident in Neely’s petition, the special grand jury in Morrissey’s case was impanelled at Neely’s request purportedly pursuant to Virginia Code § 19.2-206(A)(iii). As indicated, that provision does not allow a special grand jury to simply investigate and indict an individual but, rather, they are required to “investigate and report on any condition that involves or tends to promote criminal activity.” While “condition” is not defined in Title 19.2,⁸ common sense dictates that a “condition that involves or tends to promote criminal activity” involves criminal activity that is more prolific and affects the community at large—such as drug rings, gang infiltration,

⁸ A “condition” is defined, in the dictionary, as among other things, something essential to the appearance or occurrence of something else. Webster’s Ninth New Collegiate Dictionary, (1987) at 273. The condition is thus something essential to promoting criminal activity-not whether an individual committed a crime.

prostitution rings, prescription “pill mills”—as opposed to a private citizen who is alleged to have committed a crime. This position is bolstered by reading Virginia Code § 19.2-206(A)(iii) together with § 19.2-206(B), which provides that a special grand jury “shall be impanelled...upon the recommendation of a majority of the members of a *regular grand jury*” if the court believes there is probable cause “*that a crime has been committed* which should be investigated by a special grand jury impanelled to perform the functions provided for in subdivision (2) of § 19.2-191”—investigating and reporting on conditions that tend to promote or involve criminal activity. Va. Code Ann. § 19.2-206(B) (2014) (emphasis added).⁹ When reading these statutory provisions together, it is evident that a regular grand jury—not a special grand jury—is the proper vehicle through which to conduct an investigation into individual criminal conduct. A special grand jury on the other hand, is the appropriate vehicle to conduct an investigation into a “condition” that tends to promote criminal activity. It is a well-known canon of statutory construction that every word of a statute is to be given meaning. *See Barr v. Town & Country Properties, Inc.*, 240 Va. 292, 295 (1990) (“We must ... assume ... the legislature chose, with care, the words it used when it enacted the relevant statute.”). *See also Moyer v. Commonwealth*, 33 Va. App. 8, 35 (2000) (en banc) (because we assume the legislature carefully chose the words used, it is a Court’s duty “to give reasonable effect to every word”). Accordingly, it is evident that the legislature intended for the term “condition” to signify something other than “a crime” that has been committed. *Benson v. Commonwealth*, 190 Va. 744 (1950), a case involving a prevalent “numbers racket” in the City of Norfolk, where over

⁹ The same is true under the provisions of § 19.2-206(A)(ii) where a request to the Court is made by a minority of a regular grand jury in which instance a special grand jury, by cross reference to § 19.2-191(2) investigates conditions, not individuals. The only difference between a request by a minority versus a majority of a regular grand jury is that in the former instance the Court *may* convene a special grand jury whereas in the latter the Court *shall* convene the special grand jury. In either instance the investigative powers are limited to investigating conditions, not individuals.

forty indictments were returned, supports the understanding that special grand juries are not formed to investigate an individual crime but rather are “chosen to investigate unlawful conditions which have become prevalent in a community.” 190 Va. at 748.

This understanding of the differences between the functions of a regular and special grand jury is further supported by the Virginia Juror Handbook, which gives Virginia jurors an overview of the civil and criminal procedures in place in the Commonwealth, including those pertaining to grand juries. The Virginia Juror’s Handbook explains that the function of a special grand jury is “to investigate a narrow special condition believed to exist in the community.” Examples might, as indicated, include a drug, gambling or prostitution ring. Morrissey’s alleged inappropriate relationship with a receptionist at his law office is not a “narrow special condition believed to exist in the community.” Accordingly, a regular grand jury is and was the only appropriate vehicle through which to investigate the allegations against Morrissey.

Additionally, criminal statutes are to be strictly construed in favor of the accused. *See, e.g., Lovisi v. Commonwealth*, 212 Va. 848 (1972). *See also McSwane v. State*, 200 Ind. 548 (1929) (overruled on other grounds) (“It is essential that there shall be a strict compliance with legislative requirements concerning commencement of a criminal action.”). In failing to strictly comply with Virginia Code § 19.2-206, Neely contravened the procedural safeguards intended by the legislature in enacting that Code section and violated Morrissey’s constitutional right to due process of law. The error is particularly egregious in Morrissey’s case where the resulting indictments involve felony charges that have significant implications on Morrissey’s interests in life and liberty. *See, e.g., Spurgeon v. Commonwealth*, 86 Va. 652, 655 (1890) (“That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with....”) (citation and internal quotation marks omitted).

“[T]he whole theory of [the grand jury’s] function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.” *United States v. Williams*, 504 U.S. 36, 47 (1992) (citations omitted). That function has been frustrated in Morrissey’s case, because Neely, a Commonwealth’s Attorney, was permitted to conduct his own investigation into Morrissey’s private life.¹⁰ He was not investigating a “condition” that promotes criminal activity in the community as limited by Virginia Code § 19.2-206(A)(iii). Rather, through the use of “his” special grand jury there was an investigation to fulfill his own vendetta against Morrissey, discussed in detail below.

B. The Special Grand Jury Erred in Indicting Morrissey

Assuming that the special grand jury could in fact investigate Morrissey as a “condition,” their indictments in this instance are nonetheless improper. Under the provisions of Virginia Code § 19.2-206(iii), the special grand jury, formed on the request of the Commonwealth’s Attorney, had to investigate “**and**” report on any condition that promoted or involved criminal activity “**and**” then consider bills of indictment. The conjunctive use is mandatory and not permissive which would be the case if the term “or” was used. Here, there was no meaningful report and thus the statutory requirements were not met. Indeed, the only “report” was simply that the special grand jury investigated Morrissey, handed down five (5) indictments and, thereafter, asked to be dissolved. If there was some type of prevalent condition in the community that would tend to involve or promote criminal activity, this special grand jury has not articulated what it is or what if anything was found. The public has not and will not be informed of any prevalent conditions or concerns. The special grand jury has simply stated that

¹⁰ Virginia Code § 19.2-210 makes clear that a Commonwealth’s Attorney may not be present before any special grand jury unless invited to participate. The exception to that exclusion is when the special grand jury is empanelled upon the request of the Commonwealth’s Attorney, where he can be and is present, and conducts the entire proceeding, including the examination of witnesses and the introduction of exhibits.

a certain individual—Morrissey—is alleged to have committed a crime. That is far from reporting on any existing “condition” existing that would promote criminal activity.

Accordingly, the Special Grand Jury failed to comply with its statutory mandate “to report on any condition that promoted or involved criminal activity.”

Additionally, as explained *infra*, Neely’s “Bill of Particulars” was not asked for and cannot be the equivalent of the statutorily required report. The statute does not allow a special grand jury to simply hand down indictments. Rather, the mandate of the Special Grand Jury is to investigate conditions, report **and** then consider bills of indictment. There was no report in the instant case and without any report it is impossible to understand whether what was handed down was in fact the work of the special grand jury itself or the work of Neely who had and has such animus against Morrissey that the entire grand jury process is impugned and tainted

Lastly, if there is any doubt whether a regular grand jury must be involved in the indictments of a citizen, the very provisions of the special grand jury article itself makes clear what must transpire once a special grand jury has acted. Under the provisions of § 19.2-214

Any bill of indictment for alleged criminal offenses, which may follow as a result of the report of the special grand jury, shall be prepared ... for presentation to a regular grand jury[.]

Va Code Ann. § 19.2-214 (2014) (emphasis added). The provisions of this section, by the very language, apply to “any bill of indictment” flowing from a special grand jury. Here, there was no proper report and nothing was presented to a regular grand jury. A report would allow Morrissey to defend himself and understand what was considered and deliberated by the members of the special grand jury. Any suggested “true bills” would then be brought before the regular grand jury pursuant to their traditional role, prior to the King reaching out, and would be duly considered. That did not happen in this case.

In viewing the provisions of Virginia Code § 19.2-214, this Court must consider, not only normal provisions of statutory construction, but additionally, *i.*) the fact that it must be assumed the General Assembly intends what it says; *ii.*) that with respect to criminal statutes, any construction has to follow the rule of lenity and be construed against the Commonwealth; and, *iii.*) more importantly, as to this issue, that the provisions of the 5th Amendment to the Constitution of the United States come into play, that “[n]o person shall be held to answer for a capital or otherwise infamous crime,¹¹ unless on a presentment or indictment of a grand jury.” While that provision of the 5th Amendment has not been made applicable to the states, it is part of the required due process that is owed under the 14th amendment. More importantly, it has been statutorily implemented in this Commonwealth through the provisions of Virginia Code § 19.2-217 which provide that “...no person shall be put on trial for any felony, unless an indictment or presentation shall have first been found or made by a grand jury.” There can be no doubt, based on a number of factors, including simply that this Code provision is not part of the special grand jury Article, that the “grand jury” referenced in this statutory provision is a regular grand jury, and not a special grand jury. Accordingly, Morrissey’s statutory rights have been violated.

Lastly, and as the Court knows, in interpreting statutes, it is necessary and proper to consider the overall statutory scheme to ensure that there is a consistency and harmony that effectuates the legislative goal. *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425 (2012). It would be ironic and inconsistent to interpret the provisions of the special grand jury article in such a manner that every charge or indictment must be presented to a regular grand jury, other than ones flowing from the provisions of Virginia Code § 19.2-206(A)(iii) where the

¹¹ Defined as crimes punishable by imprisonment for more than one year. *Green v. United States*, 356 U.S. 165, 183 (1958).

special grand jury was convened upon the application of the Commonwealth's Attorney. The very purpose of a grand jury—a right recognized by the United States Constitution and provided for statutorily in this Commonwealth—is to create a buffer between the King and the citizens. As indicated above, in all the variations regarding special grand juries, the provisions of subpart (iii) in Virginia Code § 19.2-206(A) allow the prosecutor to have the most sway over the grand jury. Indeed, in subpart (iii), it is the prosecutor that examines and presents exhibits, evidence and testimony. In all other investigations, the prosecutor cannot even appear before the special grand jury unless invited. Va. Code Ann. § 19.2-210 (2014). To allow “his” special grand jury to avoid the regular grand jury procedures would not be consistent with the legislative goal of ensuring that the proper buffer between King and citizen is maintained, consistent with the imposed statutory safeguards¹² and would be contrary to the very language of Virginia Code § 19.2-214, where the General Assembly, while enacting various amendments to the special grand jury provisions, left intact, the requirement that “**any bill of indictment**” following a report of the special grand jury must be presented to a “regular grand jury.”¹³

Accordingly, because the special grand jury was not the appropriate vehicle to investigate the allegations against Morrissey, its actions failed to comply with the statutory requirements for a report and presentation to a regular grand jury, and there was no presentation to a regular grand jury, the indictments issued therefrom must be dismissed.

II. Neely's Unabashed Bias Against Morrissey Has Tainted the Investigation Such That Dismissal of the Indictments and Neely's Disqualification Is Warranted.

Despite Neely's assurances to the Court that he put aside his bias against Morrissey,

¹² Va. Code Ann. §§ 19.2-214 and 19.2-217.

¹³ Though the “report” of the special grand jury, applied for by Neely, failed to conform to the statutory requirements of reporting on the condition investigated, it nonetheless did indicate that it had issued or recommended five (5) indictments. As set forth in Virginia Code § 19.2-214 those “...bill[s] of indictment for alleged criminal offenses, which ...follow as a result of the report of the special grand jury, shall be prepared...for presentation to a regular grand jury”. There are no exceptions in that statute and it is presumed that the legislature intends what it said.

(vividly conveyed in his 2011 letter to the Virginia State Bar), Neely's conduct throughout the course of the investigation and special grand jury proceedings, demonstrate that Neely's bias remains unabated. In fact, it is apparent that Neely's ultimate aim is to accomplish in 2014, what he was not able to accomplish in 2011. As will be shown, it is now clear that Neely has never put the letter behind him and the circumstances of this investigation, as will be shown, go beyond a mere appearance of impropriety and in fact have been and are motivated by an animus—one that infected the investigation and the special grand jury.

The broad discretionary power prosecuting attorneys have over criminal defendants throughout the criminal process carries with it the potential for individual and institutional abuse. *See Williams v. Commonwealth*, No. 1380-09-2, 2010 Va. App. LEXIS 402, at *10 (2010) (unpublished opinion) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978)) (internal quotation marks omitted). In order to safeguard the due process rights of a criminal defendant and to protect prosecutorial impartiality, a trial court has the power to disqualify a commonwealth's attorney from overseeing a criminal prosecution if the court determines that the evidence supports a finding of a conflict of interest such that the prosecutor's objectivity and impartiality are called into question. *See Powell v. Commonwealth*, 267 Va. 107, 138 (2004) (citation omitted).

In determining whether a conflict exists, there is the “the broader consideration of whether, on the facts of a particular case, the adversarial nature of the judicial process has resulted in such enmity toward the defendant on the part of the prosecutor that it will overbear his professional judgment in seeking fairly and impartially to see justice done.” *Id.* at 139 (citation omitted). *See also Berger*, 295 U.S. at 88 (stating that a prosecutor's duty is “to use every legitimate means to bring about a just [result] and ensure that ‘justice shall be done’”).

Under this broader category, the party seeking disqualification must demonstrate that the prosecutor is pushing the boundaries of the law in furtherance of a personal animus against the defendant such that the defendant “will probably not receive a fair trial [or the fair process] to which he is entitled.” *See Williams*, 2010 Va. App. LEXIS 402, at *10–11 (citation omitted); *see also Powell*, 267 Va. at 139; *Lux v. Commonwealth*, 24 Va. App. 561, 569 (1997) (stating that a prosecutor should be disqualified if he “has some direct personal interest *arising from animosity*...such that his objectivity and impartiality are called into question.” (emphasis added)).

Neely’s actions demonstrate a continuing bias against Morrissey sufficient to compromise Neely’s ability to act fairly and impartially, to see that justice is done, and thus pose an imminent threat to Morrissey’s right to a fair trial. Further, the entire special grand jury process and resulting indictments are tainted with Neely’s animosity. The specific actions Neely has taken reveal his extreme prejudice against Morrissey, warranting his disqualification as special prosecutor, as well as a dismissal of the criminal indictments, are discussed in detail below.

Neely’s 2011 Letter to the Virginia State Bar

Though Neely’s letter to the Virginia State Bar was previously addressed in Morrissey’s first Motion to Disqualify, and though this Court determined that the letter standing alone, together with Neely’s assertions that he had put the letter behind him, did not demonstrate bias sufficient to warrant disqualification, such 2011 letter must, along with the newly developed facts, be taken into account since (i) it provides the relevant context in which to view Neely’s actions and mindset throughout the course of this investigation, and (ii) it is now clear that the

animus set forth in that letter has been the motivating factor throughout.¹⁴

In Neely's 2011 letter to the Virginia State Bar advocating against reinstatement of Morrissey's law license, Neely relayed his belief that Morrissey was "notoriously unethical" as a Commonwealth's Attorney for the City of Richmond; that Morrissey was "a disgrace to all Virginia prosecutors"; and that Morrissey has acted "even more outrageously deceitful" as a criminal defense attorney. He went on to state that Morrissey has engaged in "highly [] unethical conduct" and that it would be a "disgrace if he were ever again licensed to practice law in Virginia." Thus, the contents of Neely's letter reveal not only his then unabashed bias and prejudice against Morrissey, but, as will be discussed, this mindset continued throughout the course of the current investigation—a mindset that would ensure Morrissey loses his law license. Despite Neely's campaign against Morrissey, Morrissey's law license was, in fact, reinstated in 2012, by a ruling of the Supreme Court of Virginia.

While Neely's letter, read in the context of his assurances, may not have then (i.e. back in January 2014) been sufficient to disqualify him, the 2011 letter coupled with both Neely's conduct throughout the course of the investigation the special grand jury proceedings, the improper public pronouncements, as well as newly discovered facts, mandates his disqualification; conduct that centered, as will be explained, on ensuring that regardless whether a true bill issued or not, that a record would be compiled that could be turned over to the VSB to accomplish in 2014 what Neely was unable to accomplish in 2011-- that Morrissey lose his law license.

¹⁴ As will also be made clear [at the hearing on this matter], the allegations by Neely in his 2011 letter to the Virginia State Bar regarding Morrissey's alleged conduct and "throwing out the rule book," "engaging in deceitful tactics" and "falsely accusing me [Neely] of hiding discovery materials" seem to have been fabricated by Neely, thus, placing in further doubt the true motivation of Neely.

It is now clear that Neely's animus shown in the 2011 letter, was ever present, and such animus and conduct continued through the investigation. A shocking example of Neely's improper conduct is when, *before the members of the Special Grand Jury*, he provided them with the 1994 Virginia Supreme Court opinion of *Joseph D. Morrissey v. Virginia State Bar*, 248 Va. 334 (1994) describing certain conduct of Morrissey as dishonest and suspending his license for a period of six months. One must ask: What does Morrissey's 1994 disciplinary record have to do with his alleged behavior in 2014 with an under-aged girl? Equally shocking was what Neely did next. In an effort to show his own prominence, Neely provided the special grand jurors with information regarding his reputation with the Bar and sterling standing as a member of a district disciplinary committee.

Further, Neely, also in front of the special grand jury, not only belittled Morrissey's known defense, that a friend of M.P. admitted "hacking into" and sending false text messages, but after the indictments, went further, making public statements asserting that there was absolutely no evidence of any hacking; thus tainting any perspective jurors. This belittling and these pronouncements were made with the specific knowledge that his investigation had in fact determined that the "friend" indeed had in fact purchased a device for the specific purpose of hacking and supposedly returned it to Best Buy where it was purchased. That known fact from his investigation is completely inconsistent with his public assurance that there was no evidence of any hacking. That false statement flowed from bias and animus and, like the taint in the special grand jury, the tainting of the public began. It needs to end and that means the Court should disqualify Neely.

Importantly, another trial court in Virginia has already determined that conduct similar to Neely's (i.e. writing a letter opposing Morrissey's reinstatement to the practice of law), is

sufficient to create a conflict of interest warranting disqualification of a commonwealth's attorney. As noted above, Morrissey was recently issued a summons for a speeding ticket in Albemarle County. Denise Lunsford ("Lunsford") is the Commonwealth's Attorney for Albemarle County. Lunsford is the only other prosecutor who wrote a letter to the Virginia State Bar advocating against reinstatement of Morrissey's law license. A copy of this letter, dated March 28, 2011, is attached as **Exhibit C**. Morrissey's attorney moved to disqualify Lunsford's office and to appoint a special prosecutor on the basis that Lunsford's letter to the Virginia State Bar, coupled with what appeared to be a still current belief of existing bias against Morrissey, created a conflict of interest. In an Order dated June 12, 2014, Judge Peatross, finding a conflict of interest, granted the motion and appointed a special prosecutor to handle Morrissey's traffic case. A copy of the Order is attached as **Exhibit D**. Additionally, the Court ordered that Lunsford refrain from any communication with the Special Prosecutor so as to insulate the investigation from any further exposure to bias.

Just as the Court held that Lunsford had a conflict of interest due to Lunsford's continued perceived animosity towards Morrissey from the time she wrote the letter to the Virginia State Bar to the present, so too is there a conflict of interest in this investigation due to Neely's letter to the Virginia State Bar and his continuing current existing bias against Morrissey. In fact, in comparing the two letters, Neely's letter clearly conveys his position that Morrissey should not be reinstated with much more zeal and biting language than does Lunsford's rather pedestrian letter. Accordingly, Neely's "professional judgment in seeking fairly and impartially to see justice done" is undoubtedly clouded by his desire to see Morrissey lose his law license. It explains why, despite the fact that Morrissey, M.P. and M.P.'s mother all adamantly deny allegations of a sexual relationship, Neely continues to pursue this investigation. As Neely is

well-aware, a criminal conviction would surely strip Morrissey of his law license—a felony conviction would not only strip Morrissey of his law license, but also his right to vote and thus, his right to hold public office. Though Neely assured the Court that, despite the sentiments expressed in the 2011 letter, he carries no bias against Morrissey and is able to perform his duties as special prosecutor, Neely’s actions since then¹⁵ continue to bolster Morrissey’s position that Neely’s professional judgment has been compromised to the extent that his disqualification is necessary to uphold the integrity of the criminal process.

Neely’s Comments During May 14, 2014 Meeting with Morrissey’s Defense Team

Morrissey’s defense team met with Neely in Spotsylvania County on May 14, 2014 for a status update on the investigation prior to the impaneling of the special grand jury and a request to review the file. Morrissey’s attorneys became concerned, however, when, as soon as they sat down in Neely’s office, Neely immediately turned the discussion to the status of Morrissey’s license to practice law in Virginia, rather than the upcoming special grand jury proceedings. Neely reiterated his strong conviction that Morrissey should not have a law license because Morrissey is generally a “rule-breaker.” Neely further opined that the Virginia State Bar never wanted Morrissey to be reinstated, and that, somehow the Supreme Court of Virginia ignored the Virginia State Bar’s recommendation. Inexplicably, Neely further discussed conversations, which appeared to be recent, with members of the Bar who served on disciplinary committees, describing their views on Morrissey’s licensure reinstatement. He then also expressed relief when he learned that Morrissey still could not practice in federal court, and explained to Morrissey’s attorneys that, whatever the outcome of the criminal investigation—true bill or not—he intended to pass everything on to the Virginia State Bar to again put Morrissey under

¹⁵ And now even the allegations and motives in the 2011 letter are in doubt and further question Neely’s motives in communicating with the VSB—see *infra* fn. 14.

investigation. Counsel were there to discuss the investigation, not Neely's remonstrations, yet the approximate first ten (10) minutes of the meeting were solely on the issue of Morrissey's license status together with continued complaints that Morrissey was unfortunately now able to try cases "up and down I-95," harking back to his 2011 letter to the VSB about Morrissey's tactics.¹⁶ Following that meeting, representations have been reported that visitors to Neely's office would be shown the Morrissey investigative notebooks while Neely would brag about prosecuting Morrissey.

While Neely previously assured the Court that he holds no bias against Morrissey and is more than capable of performing his duties as special prosecutor, it is clear that, seven months later, Neely's only objective is to get Morrissey disbarred. The sentiments expressed by Neely at the May 14th meeting are not those of a fair and impartial prosecutor. Rather, they are the sentiments of a prosecutor whose professional judgment has clearly been overcome by a personal desire to see Morrissey lose his law license through either a criminal conviction or a criminal charge. Neely was emphatic that indictment or no indictment, guilty verdict or acquittal, his entire file was going to be presented to the Virginia State Bar. This is the same prosecutor whose investigators tried to get M.P.'s mother to change her story by falsely informing her that Morrissey was seen and photographed in the company of prostitutes in Richmond and also discussed civil suits for monetary damages against Morrissey. Such fabrications demonstrate the

¹⁶ It appears, when considering the facts, that Neely's assertions in his 2011 letter to the VSB are not factually accurate. Though there is no need to delve into a collateral issue, one case, for example, resulted in a dismissal when Morrissey was able to derive testimony that a Breathalyzer was calculated at a .10 level rather than the required .08 level. Apparently, Neely was not paying attention to the examination and failed to impose any objection. The other case, where Neely pursued felony charges against a mother of four small children for her failure to return a movie cassette "Sleeping Beauty," was amicably resolved through an agreed disposition that Neely agreed to. **See Exhibit E attached, re agreed disposition.** How those matters justified the assertions to the VSB of deceitful and highly unethical conduct are beyond comprehension. In fact, a transcript of the proceedings in general district court (which is available to the Court if it so desires) reveal no "unethical" behavior by Morrissey and no evidence of him "throwing out the rule book." Indeed, Neely's 2011 letter to the Virginia State Bar appears to be replete with misrepresentations, outright falsehoods and defamatory comments.

great lengths Neely is willing to go—or allow his agents to go—to ensure that Morrissey loses his license to practice law. And, it is further evident that Neely has abused his position in this investigation by permitting the investigators to fabricate such stories in hopes of getting a cooperative witness for the prosecution.

Mr. Neely's Misconduct and Bias Continued During the Special Grand Jury Proceedings

Neely's unabashed bias against Mr. Morrissey continued with conduct that can only be described as a lapse in professional judgment that calls into question the fairness of the special grand jury proceedings, as well as the legitimacy of the resulting criminal indictments.

Language in the Witness Subpoenas

Morrissey's attorneys discovered in their debriefing of certain witnesses called to testify before the special grand jury that Neely was conducting the proceedings in a less than professional manner. First, the language of the subpoenas served on the witnesses amounts to an improper attempt by the Commonwealth's attorney to own the testimony of a witness. The subpoena contains the following language in bold and underlined font: "No person shall disclose this subpoena's command for documents or the existence of this investigative grand jury unless authorized by the court or by the grand jury." The subpoena's gag order obstructs Morrissey's right to prepare a defense and, whether intentional or not, misleads witnesses into believing that they might not be able to consult with an attorney about their testimony.

While Morrissey understands the Court's ruling on this issue, he maintains the position that none of the statutes cited by Neely authorize Neely to silence a witness to the grand jury proceedings as to the contents of his or her own testimony. Neely also cited § 19.2-215.9 in support of his contention that witness testimony shall remain confidential. However, that Code

provision applies to multi-jurisdictional grand jury proceedings, not special grand jury proceedings. The analog provision that applies to special grand jury proceedings is § 19.2-212. That section, however, addresses the secrecy of the tapes and transcriptions taken at the special grand jury proceeding and instructs that they be sealed. It says nothing about the ability of a witness to discuss his or her own testimony at the grand jury proceeding.

Also cited were Code §§ 19.2-208 and 19.2-210 in support of the position that witness testimony shall remain secret during the special grand jury proceeding. Code § 19.2-208 merely authorizes the special grand jury to subpoena witnesses and protects witnesses from self-incrimination. Similarly, § 19.2-210 is silent as to the ability of a witness to discuss the contents of his or her own testimony. Section 19.2-210 permits the commonwealth's attorney to examine witnesses at the request of the grand jury.

Accordingly, notwithstanding the Court's ruling on the issue of the language in the witness subpoena, Morrissey preserves his position that such language is improper and is not authorized by Virginia law.

Neely Exceeded His Authority Under Virginia Code § 19.2-210

Neely's use of special grand jury was not only improper, but his conduct before the special grand jury was also highly prejudicial and exceeded his authority under Virginia Code § 19.2-210. On June 2, 2014, Neely presented evidence to the special grand jury regarding confidential plea negotiations, explaining that he had offered to let Morrissey plea to a misdemeanor charge. A redacted copy of the special grand jury transcript from June 2, 2014 has been filed with the Court under seal pursuant to Va. Code § 19.2-212(B) as **Exhibit F**. Neely's statement had no probative value in determining whether a crime was in fact committed. Rather,

it is evident that Neely likely informed the special grand jury of these plea discussions in order to set the bar higher for the indictment.¹⁷ This Court is well-aware of the longstanding public policy regarding plea negotiations—that they are to remain confidential and not to be disclosed. *See, e.g., United States v. Ross*, 588 F. Supp. 2d 777, 781 (E.D. Mich. 2008) (noting that under Federal Rules of Evidence, plea discussions in which an attorney for the government is present are protected as confidential). Neely’s revelation of these discussions to the special grand jury is highly prejudicial and inevitably tainted the special grand jury’s perception of the trial.

Next, in the course of debriefing a special grand jury witness, it came to Morrissey’s attention that Neely was testifying as to Morrissey’s theory of the case. Not only was Neely opining as to defense strategy, he was dismissing the defense’s theory of the case as being without merit. While Morrissey concedes that Neely may be present during the investigatory stages of the special grand jury and even interrogate witnesses pursuant to Virginia Code § 19.2-210, nowhere in the Virginia Code is a prosecutor authorized to present or testify as to the defense’s theory of the case, much less belittle it. Neely attempted to take advantage of his position as special prosecutor by taking the wind out of the sails of Morrissey’s theory of the case, not only before the special grand jury, but now publically, before he has even had the opportunity to present it.

Conduct of Neely’s Investigators

It has come to Morrissey’s attention that the same investigators who attempted to get M.P.’s mother to change her story by fabricating rumors about Morrissey have been present in the courtroom throughout the course of the special grand jury proceedings. While Morrissey

¹⁷ The Court will see in the transcript exactly what Neely was urging—that Morrissey suffer punishment, not whether there was evidence of a crime.

understands that their presence is perhaps permitted under Virginia Code § 19.2-211, the investigators, in perfect line with Neely's bias, were, through their body language, improperly "signaling" to the members of the grand jury during witness testimony as to the credibility of testimony. Such conduct is improper and taints the special grand jury deliberations.

Neely's Failure to Consider Exculpatory Evidence

Evidence exists in this case that demonstrates that Brittany McKinney hacked into M.P.'s phone with an iPod Touch to send text messages and "spoofed" text messages on numerous occasions. For example, a recorded conversation among Brittany, M.P. and Kaylah that occurred at Planet Fitness was transcribed by a court reporter on December 5, 2013. During this conversation, Brittany admits to the hacking and acknowledges that the hacking was illegal. Despite the existence of this exculpatory evidence, Neely and his investigators, like ostriches with their heads in the sand, have yet to seize and review the evidence which Neely himself admitted they should do in an email to Morrissey's attorneys dated July 10, 2014. ("[Morrissey's attorney] demands that we seize this IPod as 'exculpatory evidence' – which we should do if it really exists... (Prior evidence / investigation suggested that this device was returned to Best Buy for credit...)"). Thus despite his acknowledgement of this evidence in the email, he belittled it to the special grand jury and then publically has now adamantly denied the existence of any evidence of hacking to the press. *See, e.g., After Indictment Morrissey Again Fighting for his Political Life*, Wash. Post (July 5, 2014) ("The police and I found no evidence of any hacking. Period.").¹⁸ Most likely, this is because evidence that tends to negate Morrissey's guilt would frustrate Neely's objective in seeing Morrissey disbarred.

¹⁸ On July 18th, the date of the arraignment, Neely, together with Shannon Taylor, the Commonwealth's Attorney of Henrico County, who disqualified herself from this matter, presented yet another order entered that day expanding

Neely's conduct violates Virginia Rule of Professional Conduct 3.8(d). Rule 3.8(d) states in pertinent part that a prosecutor shall "make timely disclosure to counsel for the defendant...of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused...[.]" In other words, while a commonwealth's attorney has a duty to "prosecute with earnest vigor," he must simultaneously serve as a "minister of justice" and ensure that "the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Virginia Rules of Professional Conduct 3.8, cmt. 1; *see also Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that a prosecutor must prosecute with "a twofold aim...that guilt shall not escape nor innocence suffer"). Neely's refusal to investigate and consider exculpatory evidence is further evidence of his bias against Morrissey and his end goal—to ensure that Morrissey loses his law license.

Neely's Conduct During Defense's Presentation of its Case

Neely, at the end of the grand jury session, agreed to let the defense present evidence to the special grand jury. However, Neely did not inform Morrissey's attorneys of this fact until Wednesday, June 25, 2014. Neely further informed them that their case would have to be presented on Monday, June 30, 2014 because that was the last day the special grand jury was scheduled to convene. Accordingly, Neely only gave Morrissey's defense team two business days to prepare its case to present to the special grand jury. When, on Monday, June 30th, Morrissey's defense team called a character witness to testify on Morrissey's behalf, Neely refused to permit the character testimony, suggesting probably correctly, that such testimony was

the powers of Neely as a special prosecutor. ***See Exhibit G attached.*** As explained the purpose of this order was to ensure that Neely would have all the powers of a regular prosecutor, including the power to grant immunity, which he stated he intended to extend to Ms. McKinney. Thus, after publically announcing that there was no evidence of any hacking "period", Neely is intending to extend immunity to the very person who admitted hacking. These are not only actions that are inconsistent, it is action that clearly calls into question the impartiality of Neely as a prosecutor.

not part of any grand jury process. Yet, Neely went on to present *his own* evidence to the special grand jury as to Morrissey's character and as to his own character. Specifically, Neely introduced to the special grand jury the 1994 Supreme Court of Virginia opinion in which the Court disbarred Morrissey and further told the special grand jury that Morrissey lost his law license for "committing a fraud upon the Court."

Not only did Neely present his own evidence of Morrissey's character despite his refusal to let Morrissey's attorneys do the same, but Neely also testified as to *his own* reputation. Neely commented that he has been practicing law in Virginia for over 30 years, that he is regarded as an ethical attorney who has never had a bar complaint filed against him, and that he was a member of the Virginia State Bar Disciplinary Committee. Despite Neely's elevated opinion of his own character, his conduct is ethically questionable under Virginia Rule of Professional Conduct 3.8. Comment 1 to Rule 3.8 states: "A Commonwealth's Attorney is not just an advocate but has a sworn obligation to ensure that a defendant is accorded procedural justice." Neely denied Morrissey procedural justice in, among other things, prohibiting Morrissey from presenting character evidence, yet presenting his own evidence of Morrissey's "bad" character, and even evidence of Neely's "good" character. Neely's bolstering of his credibility, over that of Morrissey and his trial team, in front of the special grand jury, was highly improper and was aimed at destroying the credibility of any of the evidence Morrissey's attorneys placed before the special grand jurors.

Neely's conduct grew even more egregious and contentious when Morrissey's attorneys called their private investigator ("PI") to testify as to the hacking of M.P.'s cell phone. Specifically, Neely did the following:

- When the PI mentioned that there was a transcript of a recorded conversation between M.P. and the individual who hacked M.P.'s cell phone in which the individual admitted to the hacking, Neely asked why the PI didn't have the transcript with him and why the hacking was not reported to the police. Neely's commentary was disingenuous because Neely was aware that Morrissey's defense team wrote a letter to him asserting that her actions violated the Virginia wiretapping statute, Virginia Code § 19.2-62.
- When the special grand jury inquired as to why the police never received Morrissey's cell phone, and the PI attempted to explain that the police never asked for Morrissey's phone, Neely quickly quipped that the PI's comments amounted to "third-hand hearsay and legal dribble."

In short, Neely's snide, demeaning and analytically irrelevant comments throughout the course of the special grand jury proceedings resonate in political debate and commentary but not in any legitimate investigatory conclusions. Neely's commentary illustrates not only his extreme bias against Morrissey, but also that his bias has been transposed onto the special grand jury and the indictments issued therefrom.

Neely's Statements to the Press and Bill of Particulars Following the Issuance of Indictments

The indictments were released on Monday June 30, 2014. They were accompanied by a bill of particulars issued by Neely. Virginia Code § 19.2-230 provides the authority for a bill of particulars. Specifically, Virginia Code § 19.2-230 provides that a trial court "may direct the filing of a bill of particulars at any time before trial. A motion for a bill of particulars shall be made before a plea is entered and at least seven days before the day fixed for trial and the bill of particulars shall be filed within such time as fixed by the court." Morrissey is unaware of any direction from the Court or motion by Neely that requested him or authorized him to release a

bill of particulars. Accordingly, Morrissey can only conclude that Neely released the bill of particulars in direct contravention of Virginia Code §§ 19.2-230 and 19.2-192, and in violation of his ethical duties as a prosecutor under Virginia Rules of Professional Conduct 3.6 and 3.8.

Neely's bill of particulars, which contains detailed information of the alleged facts the special grand jury purportedly considered in indicting Morrissey, was made available to the public. Those particulars, that Morrissey did not request, are damaging to him. Virginia Code § 19.2-192 states in pertinent part: "Except as otherwise provided in this chapter, every attorney for the Commonwealth...shall keep secret all proceedings which occurred during sessions of the grand jury...[.]" **[emphasis added]** In releasing the bill of particulars to the public without any authority under Virginia Code § 19.2-230, Neely violated this secrecy provision, and further tainted and undermined the efficacy of the proceedings.

Moreover, it is not clear how Neely even became aware of the alleged facts the special grand jury considered in indicting Morrissey because Neely, even though the special grand jury was empanelled on his application, is not supposed to be present during the deliberations of the special grand jury. See Virginia Code § 19.2-210 ("the attorney for the Commonwealth shall not be present...while the special grand jury...is deliberating in order to...prepare its report"). It becomes evident then, that one of the following must be true: (1) either Neely issued the bill of particulars despite having no actual knowledge of the evidence the special grand jury considered in their deliberations indicting Morrissey, though Neely claims the bill "particularizes the criminal indictments handed down...by the special grand jury"; or (2) Neely somehow gained access to the special grand jury during its deliberative stage in violation of Virginia Code § 19.2-210. Under either scenario, Neely's unlawful conduct in issuing the bill of particulars tainted

public perception warranting disqualification of Neely as special prosecutor and dismissal of the indictments.

It is common knowledge that the evidence presented to the special grand jury, and on which an indictment may be founded, can be based on hearsay and other evidence that would not be admissible in trial. Neely's bill of particulars is rife with hearsay and biased commentary that could not have been included in the indictments themselves. Accordingly, the extremely prejudicial evidence contained in Neely's bill of particulars, together with his voluntary public comments, has poisoned the well of public perception and, unfortunately, has severely damaged Morrissey's ability to receive a fair trial.

Moreover, in releasing the bill of particulars without any statutory basis for doing so, Neely has violated his ethical duties under Rule 3.6. That Rule prohibits a lawyer involved in the investigation or prosecution of a criminal matter that may be tried by a jury from "making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury." Neely knew the statements contained in the bill of particulars would taint public perception of the investigation. He knew his public comments denigrating Morrissey's defense would have a substantial likelihood of impacting potential jurors. Morrissey is a public figure and a high-profile defense attorney—the investigation received a lot of media attention at its inception in August 2013, and it is evident from the most recent media frenzy following the release of the indictments and accompanying bill of particulars, that the bill of particulars and Neely's extrajudicial statements to the press concerning the bill of particulars has poisoned the proverbial well.

Accordingly, Neely's gross misconduct throughout the investigation and special grand jury proceedings as a result of his bias against Morrissey mandates his disqualification. Moreover, the release of the bill of particulars in contravention of Virginia Code §§ 19.2-230, 19.2-192 and Virginia Rule of Professional Conduct 3.6 mandates that the criminal indictments against Morrissey be dismissed. The entire investigation has been tainted with Neely's bias such that Morrissey's constitutional rights have been violated and cannot now be restored. Removing Neely alone is not sufficient. Neely's outrageous and egregious behavior during the special grand jury proceedings so badly prejudiced Morrissey, that this Court should have no choice but to remove Neely and dismiss the indictments.

CONCLUSION

Given the dynamics of this case, the nature of the investigation and the documented prejudice and bias of Mr. Neely that has now manifested itself in prosecutorial and ethical misconduct in overseeing the special grand jury proceedings, this Court must disqualify him and dismiss the indictments that are tainted with his bias and that do not conform to statutory requirements.

Presentation of evidence to a special grand jury by a Commonwealth attorney whose objectivity and impartiality are unequivocally compromised, and who has transcended the confines of the law to ensure that Mr. Morrissey loses his law license, interrupts the fair administration of justice and strips the grand jury process of the safeguards it was designed to protect. For the aforementioned reasons, Mr. Morrissey respectfully requests that this Court disqualify Mr. Neely as special prosecutor and dismiss the indictments resulting from Neely's supervision of the special grand jury proceedings.

JOSEPH D. MORRISSEY

By

Counsel

Amy L. Austin (VSB No. 46579)
The Law Office of Amy L. Austin, P.L.L.C.
101 Shockoe Slip, Suite O
Richmond, Virginia 23219
804.343.1900 Telephone
804.343.1901 Facsimile

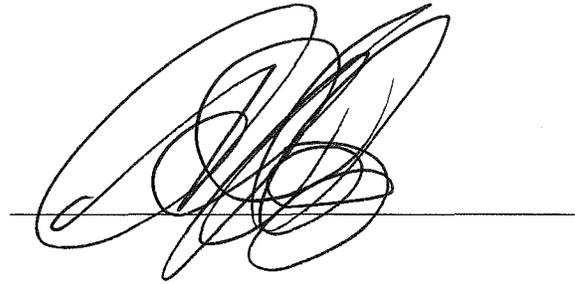
Anthony F. Troy (VSB No. 05985)
Eckert Seamans Cherin & Mellott, LLC
707 East Main Street, Suite 1450
Richmond, Virginia 23219
804.788.7751 Telephone
804.698.2950 Facsimile

William M. Stanley (VSB No. 37209)
Aaron B. Houchens (VSB No. 80489)
Stanley, Houchens & Griffith
13508 Booker T. Washington Highway
Moneta, Virginia 24121
540.721-6028 Telephone
540.721.6405 Facsimile

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was sent via regular mail,
first-class, postage prepaid, to the following on this 8th day of August, 2014:

William F. Neely, Esquire
Office of the Commonwealth's Attorney
PO Box 2629
Spotsylvania, Virginia 22553

A handwritten signature in black ink, consisting of several overlapping loops and flourishes, is written over a horizontal line.