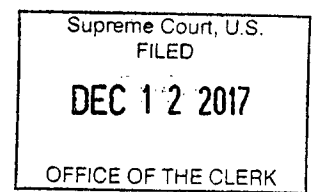


No. **18-7382**



**ORIGINAL**

**IN THE  
SUPREME COURT OF THE UNITED STATES  
JANUARY TERM 2018**

**JERVON L. HERBIN- PETITIONER *PRO SE***

**Vs.**

**THE COMMONWEALTH OF VIRGINIA-RESPONDENT(S)**

**ON PETITION FOR A WRIT OF CERTIORARI TO  
SUPREME COURT OF VIRGINIA**

**PETITION FOR WRIT OF CERTIORARI**

**JERVON L. HERBIN  
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### **QUESTION(S) PRESENTED**

- 1. Did the Lower Court(s) Err in refusing to grant retroactive application to Fishback v. Commonwealth?**
- 2. Did the Virginia Supreme Court Err in holding the Pro Se Petitioner to a procedural standard inconsistent with Estelle v. Gamble?**
- 3. Did the Lower Court(s) Deprive of Petitioner his right to Due Process, Equal Protection under the Laws in violation of Amendment Fourteen to the U.S. Constitution?**
- 4. Did the Lower Court(s) Deprive Petitioner of his right to Trial by Fair and Impartial Jury?**
- 5. Did the Lower Court(s) Deprive Petitioner of his rights under the Sixth Amendment?**
- 6. Did the Lower Court(s) subject Petitioner to Cruel and Unusual Punishment in Violation of Amendment Eight to the U.S. Constitution?**
- 7. Did the Lower Court(s) refusal to Charge the jury with the current state of the law constitute a "Structural Defect" in the Trial Mechanism? And did that structural defect in the trial mechanism deprive the Petitioner of Fundamental**

**Fairness, Due Process, Equal Protection, and the rights  
guaranteed under the Sixth Amendment for a fair trial?**

- 8. Did the Lower Court(s) violate the "Ex Post Facto Clause?"**
- 9. Did the Trial Court err in refusing to charge the jury with the  
current state of the law when the jury asked for instruction  
on the matter?**
- 10. Was Petitioner subjected to Ineffective Assistance of  
Counsel both actual and constructive at the trial and post  
conviction stages?**

#### **LIST OF PARTIES**

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

**Jervon L. Herbin, Petitioner Pro Se**

**Vs.**

**The Commonwealth of Virginia, Respondent**

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#### **OTHER:**

### **OPINIONS BELOW**

**[ ] The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.**

### **JURISDICTION**

**The Virginia Supreme Court issued its decision refusing to hear this case on 6 October 2017 a copy is attached at appendix B. The jurisdiction of this Honorable Court is invoked under 28 U.S. C. §1257(a).**



## **CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED**

### **U.S. Const. Amend. VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

### **U.S. Const. Amend. VII**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### **U.S. Const. Amend. XIV, sec, 1:**

**All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

## **STATEMENT OF THE CASE**

**THE LOWER COURTS REFUSED TO CHARGE JURIES WITH INSTRUCTION ON VIRGINIA'S ABOLISHMENT OF PAROLE DURING PENALTY PHASE DELIBERATION. THEY LATER HELD IT UNCONSTITUTIONAL TO NOT INFORM JURIES OF VIRGINIA'S ABOLISHMENT OF PAROLE, YET REFUSED TO APPLY THE HOLDING RETROACTIVELY TO APPROXIMATELY 490 DEFENDANTS WHO RECEIVED INFLATED SENTENCES.**

**THIS IS A CASE RELATED TO THE RENDERING OF INFLATED SENTENCES UPON CRIMINAL DEFENDANTS BY THE COMMONWEALTH OF VIRGINIA. THE COMMONWEALTH OF VIRGINIA FAILED TO PROPERLY CHARGE PETITIONER'S JURY WITH INSTRUCTION ON THE CURRENT STATE OF THE LAW AT THE TIME OF HIS SENTENCING.**

## **STATEMENT OF THE CASE**

**This is an appeal from judgment entered in the Circuit Court of Loudoun County on 6 July 2016. Petitioner Jervon L. Herbin Proceeding Pro Se filed a motion to " Vacate, Amend or Set Aside Sentence Nunc Pro Tunc" before the Circuit Court of Loudoun County on or about 20 June 2016.**

**Petitioner's motion was denied on 6 July 2016 by Honorable Thomas D. Horne, who appeared to come out of retirement to rule upon Petitioner's motion. Judge Horne also presided over Petitioner's trial.**

**Though the said motion was denied on 6 July 2016 Mr. Herbin did not receive notice of the motion's denial until 11 August 2016 because the Order was not mailed until 8 August 2016 which was well after the time to notice appeal had elapsed. Mr. Herbin Petitioned the Virginia Supreme Court for an extension of time to**

**notice appeal on or about 22 August 2016. On 26 August 2016 the Virginia Supreme Court granted Mr. Herbin's motion for an extension to notice appeal allowing him to timely notice appeal.**

### **Background:**

**Petitioner Jervon L. Herbin after a three day trial by jury was convicted of five felony counts stemming from a malicious wounding case. Prior to jury Voir Dire, Mr. Herbin through trial counsel moved to have the jury informed of Virginia's abolishment of Parole in the event that he was convicted. The trial court denied Petitioner's motion to inform the jury of Virginia's Abolishment of Parole.**

**During penalty phase deliberations the jury sent question to the trial Judge Honorable Thomas D. Horne asking "*What is the minimum number of years that the Defendant will be required to serve before he is eligible for parole if the jury recommends the maximum sentence on each count?*" At this time Petitioner's defense counsel immediately renewed Mr. Herbin's motion to inform the jury of Virginia's Abolishment of Parole. The said motion was again denied. Judge Horne instructed the jury to not concern themselves**

**with what would happen to the defendant after sentencing. The jury returned with a sentence of ninety-two years imprisonment.**

**Mr. Herbin pursued the matter on Direct Appeal, the Virginia Court of Appeals refused to hear the issue of failure to charge the jury with instruction on Virginia's abolishment of parole. As did the Supreme Court of Virginia. Petitioner then pursued matter via Habeas Corpus in Federal Court; again Mr. Herbin was unable to attain relief due to being procedurally barred. Mr. Herbin then appealed to the Fourth Circuit and again was denied opportunity to be heard, resulting in the denial of relief.**

**Next Mr. Herbin filed a Motion to Vacate, Correct or Amend Sentence Nunc Pro Tunc in the Circuit Court of Loudoun County where it appears Hon. Thomas D. Horne, came out of retirement to rule upon Mr. Herbin's petition which was erroneously denied. Mr. Herbin then sought relief from the Supreme Court of Virginia who denied certiorari due to procedural error. Mr. Herbin now seeks relief from this Honorable Court.**

**REASONS FOR GRANTING THE PETITION**

**I.**

**THE COURT SHOULD GRANT THE WRIT TO DECIDE  
WHETHER A STATE COURT CAN GRANT A RIGHT  
GARAUNTEED BY THE U. S. CONSTITUTION TO SOME AND  
DENY JUSTICE TO SOME BASED UPON REFUSAL TO  
RETROACTIVELY EXTEND THAT SAME RIGHT TO OTHERS  
SIMULARILY SITUATED.**

## **II.**

**THIS COURT SHOULD GRANT THE WRIT TO  
DETERMINE IF FISHBACK'S HOLDING APPLIES TO  
PETITIONER'S CASE, WHICH IS BASED UPON THE  
IDENTICAL ISSUE PRESENTED IN PETITIONER'S  
CASE.**

## **ARGUMENT**

**The term "Due Process of Law" is a direct descendant of Magna Charta's promise of a trial according to the "law of the land" as it has been established by the law making agency, constitutional or legislative. No one has ever been able to point to a word in our constitutional history that shows the Framers ever intended that the Due Process Clause of the Fifth or Fourteenth Amendment was designed to mean any more that the defendants charged with crimes should be entitled to a trial governed by the laws, constitutional and " *Statutory*," that are in existence at the time of the commission of the crime and of the trial. The concept of Due Process under which Court's purport to decide questions is that Court's look at " the Totality of the circumstances" of a particular case to determine in its own judgment whether they comport with the Notions of decency, fairness, and fundamental justice, and if so declares they comport with the Constitution, and if not declares that they are forbidden by the Constitution.**

**It is well settled that in cases where a criminal defendant has demanded exercising of his right to trial by jury of his peers that it**



**belongs to the Trial Court to instruct the jury on the current state of the law. It is further well settled that proper instruction to the jury is consistent to the rudimentary standards of "Fundamental Fairness, Due Process, and Equal Protection of the Laws."**

**One of the "Fundamental American Concepts" is that no man be deprived of "Life, Liberty, or Property" without "Due Process of Law." Due Process, and Equal Protection are fundamental tenants of the American Jurisprudence system, both of which ensure the Right to Trial by Fair and Impartial Jury. The achievements of these objectives are essential to the Ends of Justice. The Right to Jury Trial guaranteed by Amendments Six, and Fourteen to the Constitution of these United States, and Article One of Section Eight of the Constitution of Virginia is a Fundamental Right Essential to the preventing of Miscarriages of Justice, and the assurance of fair trials provided to all defendants. Duncan v. Louisiana, 391 U.S. 145, 158, 88 S. Ct., 1444, 1452, 20 L. Ed. 491 (1968)**

**In Duncan the High Court held " Trial by jury in serious criminal cases has long been regarded as an Indispensable Protection against the possibility of governmental oppression;" the history of jury's development demonstrates " a long tradition attaching great importance to the concept of relying on a jury of one's peers to determine guilt or innocence as a safeguard against arbitrary law**

enforcement." ***Williams v. Florida***, 399 U.S. 78, 87, 90 S. Ct. 1893, 1899, 26 L. Ed. 2d 446 (1970)

**In Virginia criminal trials are bifurcated, the jury that renders the verdict of guilty or not guilty tenders the defendant's sentence. It is the jury in Virginia, not the Judge that hands down the sentence of a convicted defendant. See Code of Virginia 19.2-295**

**In the early 1990's Virginia adopted the "Truth in Sentencing Policy" that was instrumental in the abolishment of parole. Truth in Sentencing in part was adopted because of the public's confusions as to how much time a convicted criminal defendant would actually serve in prison. Many citizens who are jury service eligible believed that upon conviction, a defendant sentenced to prison would only actually serve about 20% (twenty percent) of the sentence handed down. Truth in Sentencing instituted the 85% (eighty-five percent) rule otherwise known in Virginia as the "New Law." The New Law went into effect January 1, 1995. However, the rules of jury instruction were not amended or modified to accommodate the New Law in trial by jury. The Court's in Virginia steadfastly and unconstitutionally refused to inform sentencing juries of Virginia's abolishment of parole during penalty phase deliberations of criminal trials. This steadfast refusal to charge juries with the current state**

of the law was based upon an outdated holding in Coward v. Commonwealth, 178 S.E. 797, 164 Va. 639 (1935).

Mr. Herbin sought to have the jury that convicted him instructed on the law concerning Virginia's abolishment of parole thrice to no avail. He properly preserved the issue and then perused the matter vigorously of collateral review. He now petitions the High Court to settle this matter.

In June 2000 the Supreme Court of Virginia changed course on the matter of informing juries of Virginia's abolishment of parole during the penalty phase of trials. In Its consideration The Court concluded by acknowledging that "*Truth in Sentencing is a goal to be desired in the Judicial Process.*" The Court further reasoned that "a jury should not be required to perform the critical and difficult responsibility of fixing a defendant's specific term on confinement without the benefit of all significant and appropriate information that would avoid the necessity that the jury speculate or act upon misconceptions concerning the effect of their decision." See; Fishback v. Commonwealth, 260 Va. 104, 116, 532 S.E. 2d 629, 634 (2000)

Under the American system of Jurisprudence the functions of the judge and jury are separate. The jury must perform its function

in accordance with the law. However, if the judge refuses to afford the jury with the tools required to serve its function, thus refusing to tell the jury what the law mandates, that judge is in effect nullifying the jury of its function absolving them of the constitutional duty they were sworn to do. In doing so the judge is making the proceedings of bifurcated trial by jury a "Bench Trial." How can laymen/laywomen be expected to perform the duty of deciding whether and how long a defendant is to be stripped of his liberty if they are not charged with the current state of the law applicable at that particular time? Or how can that same jury render an appropriate decision at a particular time if they are charged with "outdated" law?

Refusal to submit a sentencing factor to a jury constitutes a "Structural Error." See; Washington v. Rencuenco, 546 U.S. 960, 163 L.Ed.2d 362, 74 USLW 3050, 74 USLW 3246. A jury instruction regarding the matter of parole is proper, because it serves to eliminate a common misconception that a defendant will only serve a small portion of a jury's sentence. See; Fishback *Supra*. This holds true in Herbin, it is obvious that Herbin's jury sentenced him under the misconception that he'd only serve a small portion of the sentence handed down. It speaks volumes to this fact that the jury sent question to the trial judge during penalty phase deliberations

**asking..... *"What is the minimum number of years that the Defendant will be required to serve before he is eligible for parole if the jury recommends the maximum sentence Sentence?"*** That same jury never imposed any life sentence. It is obvious that the jury felt that Mr. Herbin should at some point in his life reenter society, that he is redeemable.

**In Virginia, when a defendant is arraigned, when he is brought before the Court on a plea of guilty, the Court upon that plea by virtue of the Supreme Court of Virginia Instruction, routinely ask "Do you know that if you are sentenced to time served, you must serve at least eighty-five percent of that." To give that information to a defendant but not to the jury, the very people who are going to impose a sentence upon a defendant who chose to exercise his right to trial by jury is a violation of the Equal Protection and Due Process Clauses because he is being treated differently for exercising his right. That is a constitutional issue deserving of relief from this Court.**

**A "Structural Error" is a" Defect in a trial mechanism or framework that, by deprivation of basic Constitutional Protections, taints the trial process, making it unreliable, and rendering any**

**punishment fundamentally unfair.” This effort is prejudicial. It is well settled that in Virginia criminal trials by jury are bifurcated. Thus the penalty phase of a jury trial is indeed part of the trial itself. See; Young v. Commonwealth, 643 S.E. 2d 491, 273 Va. 528**

**This is not a question of the instant action being meritorious, because it is “Prima Facie.” The legal issue(s) here are of constitutional magnitude. Chief among them is “Retroactivity” as a means of attaining “The Ends of Justice.” Justice empowers this Honorable Court to reach and serve the “Ends of Justice” even in matters that call for “Nunc Pro Tunc” application of Justice. The Trial Court in response to Petitioner’s Motion to Vacate, Correct or Amend Sentence Nunc Pro Tunc, never held or denied the fact that it is within the Authority and Power of the Court to remedy the unconstitutionality in this matter. When a jury has no sentencing function, it should be admonished to reach its verdict without regard to what sentence might be imposed. But when the jury does have a sentencing function then what? Necessity, Requisites, and Sufficiency are matter of law in general. “ Regardless of how overwhelming the evidence may point in a particular direction, the Trial Judge is... barred from attempting override or interfere with the “Jurors” independent judgment in a manner contrary to the interest of the accused.”**

**The Trial Court interfered with the jury in Herbin by failing to properly and adequately charge them with the current state of the law on Virginia's abolishment of parole at the Jury's independent request to be informed of what the law mandated. In refusing to charge the jury with the current applicable state of the law, no instruction had the same effect as a defective instruction and for constitutional purposes is one in the same.**

**The rationale given for the Trial Court's refusal to inform Herbin's jury of Virginia's abolishment of parole was base on Coward v. Commonwealth, 178 S.E. 797, 164 Va. 639 (1935). The Coward rule though longstanding is not without exception. Indeed in Fishback v. Commonwealth, 260 Va. 104, 116, 532 S.E. 2d 629, 634 (2000) The Supreme Court of Virginia reconsidered the policy underlying the Coward Rule in light of statutory enactments. These separate holdings in Fishback illustrate an import between instructions that properly further the goal of "*Truth in Sentencing*" removing the possibility that a jury will act upon misconceptions, and those instruction that have the improper effect of inviting the jury to speculate concerning the likelihood of future action that may ultimately affect the length of a defendant's incarceration.**

**If jurors are potentially misled concerning their role in sentencing, the " Eighth Amendment's heightened " Need for**

Reliability” may require relief because the sentencing jury does not have before it all possible relevant information about the individual whose fate it must determine. Case.” Caldwell v. Mississippi, 472 U.S. 320, 340 (1985); See also Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944; See also; California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171. For the jury to possess all relevant information, it must receive an accurate description of its role in the sentencing process. Jurek v. Texas, 428 U.S. 262, 276 (1976) See also; Code of Virginia 53.1-165.1

The right to have the jury perform both the determination of guilt and the fixing of punishment is part of the “Right to Trial by Jury” as proscribed by Amendment Six to the Constitution of these United States. Webb v. Commonwealth, 768, S.E. 2d 696, 64 Va. App. 371 (2015). Indeed , it is highly questionable that the practices used during the Herbin trial to sentence Mr. Herbin is anything like the Framers of the U.S. Constitution envisioned. It is difficult to believe that James Madison and his colleagues would have gone through all the trouble of placing the “Trial Rights” at the heart of the “Bill of Rights” if they knew that the invocation of those rights would be the [rare] exception rather than the rule in the penalty phase of the trial(s) of Mr. Herbin and others.



**Virginia's sentencing practices applicable at the time of the Herbin trial in part come from the "Virginia Sentencing Commission" and their genesis can be traced back to a 1983 Governor's Task Force on unwarranted Sentencing disparities. Eventually, the task force was formed in 1994. The purpose of this system was to achieve the goals of certainty, consistency, and adequacy of punishment. Code of Virginia Annotated 17.1-801 (2011). The General Assembly, to ensure the imposition of appropriate and just criminal penalties enacted these measures. It is unconstitutional to steadfastly refuse to allow jurors access to the law on the abolishment of parole, then conclude this as true, yet deprive those who have suffered this constitutional infirmity no relief due to any retroactive application of the holding.**

**According to the U.S. Supreme Court, the unconstitutional conditions doctrine "vindicates the Constitution's enumerated right by preventing the Government from alienating people from them." "Even if a state has absolute discretion to grant or deny a privilege, or benefit, it cannot grant the privilege subject to conditions that improperly "coerce," "pressure," or induce the waiver of constitutional rights." Stated another way, "The Government may not grant benefit on the condition that the beneficiary surrenders a constitutional right, even if the government may withhold that**

**benefit altogether.” In other words it holds the proverbial carrot and stick in equal regard- the government may not indirectly do what they cannot through force or punishment.” Mr. Herbin was punished by the Trial Court’s refusal to charge the jury with the state of the law on the abolishment of parole despite the jury and Mr. Herbin so asking they be instructed on the matter.**

**The application of the “Constitutional Conditions Doctrine” in this area is indeed fitting and appropriate. It is well settled which right(s) the Commonwealth of Virginia violated in Herbin and how they were violated. The obvious right(s) here are Amendment(s) Six, Eight, and Fourteen to the Constitution of these United States, Article II Clause III, and Article One Section Eight Constitution of Virginia. “Ironically, The trial Judge Hon. Thomas D. Horne penned legal article on the “penalty phase of the jury trial’ prior to his presiding over the Herbin trial. Judge Horne’s article appears to pose ambiguity with his practices during the Herbin trial. Though one may attempt to argue that Judge Horne was following the *Coward* rule (See *Coward v. Commonwealth supra*) , Judge Horne in his article stated the exact opposite of what he ruled Petitioner’s trial when the question of charging the jury with the current and applicable state of the law on Virginia’s abolishment of parole. Judge Horne at one point said that he would leave the matter up to**

**Richmond to resolve. In the same spirit in conjunction with his article Judge Horne's refusal to charge the jury with instruction on the law and leave the matter up to Richmond ( the Virginia Supreme Court) is one indicator of his extreme prejudice against Mr. Herbin.**

**To quote Hon. Thomas D. Horne, "The Punishment stage of a jury trial poses a difficult test for the conflicting attitudes and opinions of individual jurors." "In the search for a mature, well – reasoned, and 'educated' verdict, (How can any jury reach an educated verdict if they are not educated by instruction from the trial court on what the law mandates?) an understanding of the sentencing process by those controlling the flow of information is the best insurance against decisions which spring from "passion, prejudice, and personal bias."**

**It stands to reason that Judge Horne either lacked the very same understanding of the law that he writes about or that his decisions springs from personal bias as he so eloquently put it. (See: *Some Thoughts on Bifurcated Sentencing in Non Capitol Felony Cases in Virginia* 30 Rich. L. Rev. 465 March 1996) It is important to note that Judge Horne penned the above cited article exactly one year before presiding over Petitioner's trial. Moreover, Judge Horne was well aware of the fact that once Mr. Herbin's prior criminal convictions were introduced into evidence Mr. Herbin was**

**constitutionally entitled to have the jury charged with instruction on Virginia's abolishment of parole.**

**Judge Horne further goes on to advance that " Any criticism of jury sentencing because it lacks the objectivity and principled decision of a judge is thus overcome by the existence of the power of the trial judge to bring his so-called superior judgment to bear upon the issue of proper punishment in reaching his decision whether to suspend the sentence or not." Simply stated, Judge Horne wrongly concludes that at the end of the day he the trial judge, not the U. S. Constitution and the Constitution of Virginia is the ultimate authority in the/his courtroom.. this is made evident by the ambiguity in what he pens and what he actually did in the Herbin case. In the Herbin case it is obvious that Judge Horne had apprehensions about the jury being what he felt was too or even lenient in the sentence that they would hand down to Jervon L. Herbin. He then writes that "Only relevant admissible evidence related to punishment may be considered by the jury." Is not the current state of the law in Virginia abolishing parole to a defendant's pending sentencing relevant? Especially in lieu of the fact that the jury asked for instruction on the law concerning the matter?"**

**The application of Coward to the penalty phase of Mr. Herbin's trial a clear violation of the "Due Process and Equal Protection**

**Clause(s) of the United States Constitution as well as the Prohibition of Cruel and Unusual Punishment, and the Sixth Amendment's Rights associated with the trial process?"**

**Mr. Herbin was entitled to have the jury instructed during the penalty phase of his trial that Virginia had abolished parole; the introduction of Mr. Herbin's prior felony convictions ( one of which was under Federal Seal because Mr. Herbin was sentenced under the Federal Youth Corrections Act 18 U.S.C.A. § 5010, obtained in an improper manner.) may have led the jury that sentenced him to believe that he would be eligible for parole, and as was the case in his previous conviction that he would only serve a portion of his sentence and be paroled. It is well settled that juries are not to be left to speculation when determining the length of a defendant's imprisonment or sentence in general. Evidence of prior sentences may lead the jury to speculate that parole is still available to the defendant; a trial judge is "*Required to instruct the jury that Virginia has abolished parole.*"**

**It is indeed a maxim of the law, almost coeval with the institution of juries, that it is the office of the judge to respond as to the law, and the jury as to the facts. And few rules are more essential in the administration of justice. It is sufficient for the trial court to give such instructions as are necessary or proper to enable**

the jury to arrive at a just conclusion. A party can only require the court to pass upon the propositions of law that he or she submits. If the instruction asked for is so equivocal that to refuse to charge the jury with it might mislead the jury; in such a case it is proper for the courts to rectify this omission. "The duty of the court in trial by jury to instruct the jury 'PROPERLY' is, however, broader in criminal cases." If a principal of law is vital to a criminal defendant, the trial court has an affirmative duty to instruct the jury properly about the matter. Thus even if a defendant's instruction is defective, the court may not merely ignore the instruction but must amend it and give it to the jury in proper form. Bryant v. Commonwealth, 216 Va. 390,393,219 S.E. 2d 669, 671 (1975).

Moreover, the fact that the defendant did propose an instruction and did not object to the instruction given does not necessarily preclude the defendant from raising the issue on appeal, if the lack of instruction clearly led to an unjust holding.

Jimenez v. Commonwealth 241, Va. 244,251, 402 S.E. 2d 678, 681 (1991). It is error to devolve the determination of a mixed question of law and fact upon the jury without sufficient instruction on the law. Inter-Ocean Cas. Co. v Smith, 167, Va, 246,253 188 S.E. 210 213, (1936). It is then for the jury after proper instruction on the law to make its determination concerning the length of a defendant's

**sentence without misconceptions as to how much time he will actually serve in prison.**

**Any rule that raises substantial doubt about the reliability of the jury's conclusions should be applied "Retroactively" see; Brown v. Louisiana, 100 S. Ct. 2214,477, U.S. 23 (1980) \_The retroactive application of Fishback will not have a devastating impact upon administration of justice in criminal law, since it appears that the class of defendant's is relatively small. Moreover, favorable ruling in the instant action will not affect the validity of all similar matters obtained under the previous unconstitutional sentencing practices during the period of 1995-2000.**

**The constitutional principle announced in holding that juries in Virginia must be told of Virginia's abolishment of parole for penalty phase deliberation purposes held it to be "Unconstitutional" to not do so. Petitioner asserts that failure to charge his jury with the current and applicable state of the law violates his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. Therefore, *Fishback supra* must be given retroactive application in the instant action to remedy the constitutional infirmity. See; Brown v. Louisiana, 100 S. Ct. 2214 447 U.S. 323, 65 L.Ed.2d 159(1980); See also; Montgomery v. Louisiana, 577 U.S. 136 S.Ct. 718, 193 L. Ed. 2d 599 (2016)**

**To withhold the fact that the law mandated the abolishment of parole from a sentencing jury who asked the Trial Court for instruction on the matter for the purpose of determining the parameters of parole concerning how long Jervon L. Herbin should or would be deprived of his liberty clearly does not convey accurately the state of the law. The jury clearly thought or felt Mr. Herbin should be sentenced to less than the maximum sentences and less than he actually received, and is actually serving. In senescence the jury was deceived or rather mislead. They assumed parole would be available to Mr. Herbin.**

**The holding in *Fishback v. Commonwealth*, led to disparate treatment of similarly situated defendant's in that some received the benefit of *Fishback's* holding, while others were left subjected to "Prejudicial Error." Refusal to give *Fishback* retroactive effect resulted in "Unequal Treatment" of those who are similarly situated. Instructing the jury on the law is implicit to the concept of "Ordered Liberty." Here liberty is indeed at stake; certainly the penalty phase of criminal trial by jury is strictly about liberty. The Framers of the Constitution placed emphasis on the value of a man's liberty, in one way or another most of the assurances in the Bill of Rights, and the Constitutions are related to liberty. When liberty is at stake it must**



**be protected, restored where necessary and honored at all times. There must be a mechanism to ensure that a man's liberty is not arbitrarily deprived.**

## **RETROACTIVITY**

**In the instant action that mechanism in "Retroactive" application of the HOLDING in Fishback v. Commonwealth. Consideration for retroactive application is far from novel. Retroactivity is properly treated as a threshold question, for once a new rule is applied to the defendant in the case announcing the rule, and even handed justice requires that it be applied to all who are similarly situated. Here the very fabric of the institution of trial by jury has not just been torn; it has been shredded by the Trial Court's refusal to instruct the jury on the law. No instruction is tantamount to defective instruction; defective instruction does not accurately state the law in effect at the time in question. In Herbin, the instruction given by the trial court did not accurately state the law in effect applicable to Mr. Herbin's sentencing....The operative word here is " Accurate:" which is defined as " Being in Exact Conformity to Fact, Precise, and Errorless."**

**In the instant action, Mr. Herbin has been deprived of his liberty and is in custody in violation of the Constitution, Laws, or Treatise of the United States. Mr. Herbin's liberty is being unconstitutionally restrained, as concluded in *Fishback*. This Court has within Its Jurisdiction, and power to remedy the unconstitutionality of this matter. Petitioner offers/advances here that the better or more fusible course is to GRANT Certiorari in the instant action and resolves the question after full briefing, and oral argument. This matter not only affects Mr. Herbin, it also affects hundreds of other defendants similarly situated. Moreover, Virginia is not the only state in which juries sentence convicted defendants. Constitutional adjudications don't stand as "Mere Dictum." Because Mr. Herbin's claim(s) here are indeed meritorious," Prima Facie," the "Retroactivity" question must be addressed. To not fully hear the instant action will result in the continued ambiguity and leave hundreds of other defendants without justice.**

## **CONCLUSION**

**In this country man walks with dignity and without fear. His profound love for freedom and the rights of all men is imbedded in the foundation of his government. The Constitution of these United**

**States. It guarantees certain fundamental rights and liberties to every human being under its jurisdiction. It is a flexible document designed to meet the needs and "ever changing conditions of American Life."**

**Each year in December our Nation honors a part of the Constitution known as the "Bill of Rights," the first ten amendments to the constitution of these United States, guarantees of individual liberty. To appreciate the interpretation places upon some of the Amendments by the U.S. Supreme Court, knowledge of the facts of history are indispensable.**

**In 1787 when the constitution was first adopted there was no Bill of Rights. Many people believed that there were not enough specific limitations on the power of the central government. As a result of these demands the states were assured that if they would ratify the constitution as it then stood amendments would be forthcoming, guaranteeing addition of individual rights. Thus the constitution was ratified. On December 15, 1791 the "Bill of Rights" Became part of the "Law of the Land, the price of ratification. It must however, be emphasized that the "Bill of Rights" did not protect the people against abuses by state government; it protected them only against Federal abuses.**

**In 1833 U.S. Supreme Court Justice Hon. John Marshall in referring to the first ten amendments made it clear that the amendments did not apply to local governments. The Amendments at that time only protected against "Federal" encroachments, thus the High Court was powerless to enforce them upon the state government. Chief Justice Marshall held that Amendments contained no expression indicating any intention to make the enforceable upon state government. Thus making the High Court powerless to enforce them due to lack of jurisdiction.**

**When the "Fourteenth Amendment" became law many decades later, it applied restriction on state government. (Due Process has never been fully defined in regards to just what it means. Its most literal meaning would probably be "Reasonable and Proper Procedure" in meting out justice.)**

**Can it honestly be said that refusal and failure by the trial court to charge the jury with exactly what the law states despite that jury asking the trial court for instruction on the law regarding a specific area of the law was reasonable, proper and in compliance with " Due Process?"**

**When the Framers of America's Constitution commenced to drafting the glorious ideals that serve as a blue print for our Democracy, a democracy that has become a beacon of light upon the**

hill of the world serving as a lighthouse guiding not only men, women, citizens, aliens and all, but nations, colonies, territories and dwellings as well. The Framers of our constitution were guided by the Hand of God in part and the tyranny of England that the original settlers sought to escape by come to this the new world. They left England in search of freedom, liberty, democracy, judicial fairness, the right to develop and peruse their God given talents and rights. All of which they were deprived of before founding this nation. It was and still is that yearning for these God given rights that permeate all that America is, has been, and will be for generations to come.

This search no doubt influenced the conception of the " Bill of Rights," the assurances of " Due Process, Equal Protection of the Laws, Fundamental Fairness, the Right to Trial by fair and impartial Jury," inter alia. These and all of the assurances of the Constitution of these United States are deemed " Inalienable Rights," that must be respected, honored and upheld no matter what. They must be respected in times of trouble, and periods of calm. These rights are not timid nor are they fair weather assurances; they stand on an unshakeable foundation as the backbone of all that America stands for. Without their assurances, the United States of America would

be no different that the communist nations She so adamantly has for centuries distinguished Herself as different from.

No one is free to circumvent the guarantees that were handed down to each generation of "American Citizens, "no matter how that individual feels about a set of given circumstances. NEMO EST SUPRA LEGIS! In this country the Constitution is the Supreme Law of the Land. The very constitution whose ideals many have fought for, bled for, died for gladly giving their lives to protect and defend.

If jurors are potentially misled concerning their role in sentencing, the Eighth Amendment's heightened " Need for Reliability" *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985); See also; *Woodson v. N.C.*, 428 U.S.280, 304 (1976) which may require relief because the jury does not have before it all possible relevant information about the individual whose fate it must determine. For the jury to Posses all relevant information, it must receive an accurate and adequate description of its role in the sentencing process. *Jurek v. Texas*, 428 U.S. 262, 276 (1996); See also *Caldwell supra*.

In Herbin the jury did not receive an accurate description of its role in the sentencing process when the trial judge erroroniously refused to charge the jury with instruction on the abolishment of parole in Virginia. This caused or rather led the jury to believe that

the responsibility for determining when or whether Mr. Herbin would get out of prison rested elsewhere. Charging Mr. Herbin's jury with the current and accurate state of the law was " Constitutionally Indispensible." Juries must receive instruction(s) that accurately characterize their sentencing choices. California v. Ramos, 463 U.S. 992, 1004 103 S. Ct. 3446, 77 L.Ed.2d 1171 (1983); See also; Gardner v. Florida, 430 U.S. 349, 361-62 (1977)


If circumstances make a defendant ineligible for parole, however, accurate characterization of sentencing choices requires juror's awareness of eh circumstances. See; Simmons v. South Carolina, 512 U.S. 154, 161-62 (1994); See also; Kelly v. South Carolina, 534 U.S. 246, 250-51 (2002) In Herbin, the New Law made him ineligible for parole. The Trial Judge's refusal to instruct the jury on the abolishment of parole "Had the effect of creating a false perception of parole being available to Mr. Herbin. Because this inaccurate information concerning the abolishment of parole led the jury to believe parole was available to Mr. Herbin inducing the jury to impose a sentence greater than they intended Mr. Herbin actually and truly serve. A harsher sentence based upon misconception resulting in violation of Due Process.

**This Court should make sure that Fundamental Fairness, Due Process, and the Equal Protection of the Laws be afforded to Mr. Herbin as assured by the U. S. Constitution by ensuring that the Virginia Supreme Court knows to what extent they are free to interpret Her own rulings to provide greater protection to Her citizens.**

**The primary purpose behind Teague was to limit the scope of federal habeas review of state criminal convictions. It was not to achieve uniformity of results among the fifty states. See; Mary C. Hutton, Retroactivity in the States: The Impact of Teague v. Lane on State Post conviction Remedies, 44 Ala. L. Rev. 421, 449-58 (1993)(arguing that states should follow broader retroactively principles than those announced in Teague; describing the notion that states are bound to follow Teague as "mistake"). The Teague standard was not designed for state courts, and it certainly was not designed to bind state courts. The Court should grant the petition for writ of certiorari on this issue and the issues set forth in this petition.**

**Respectfully submitted,**

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 *Jervon L. Herbin*  
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