

18-8222 ORIGINAL
No. 1017-17-2 Circuit Court
CR96-711 & 712

FILED

DEC 28 2018

OFFICE OF THE CLERK
SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Desi A. Lewis — PETITIONER
(Your Name)

vs.

Circuit Court — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

In the Court of Appeals of Virginia on Friday the 2nd day 11, 2018
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Desi A. Lewis

(Your Name)

21360 Deerfield Drive
(Address)

Capron, Virginia 23829
(City, State, Zip Code)

(434) 658-4368
(Phone Number)

IV QUESTION (S) PRESENTED RULE 14. 1 (a)

Was the Trial Court in error ; when the Court therefore find that it is without jurisdiction to conduct a resentencing or modify the Defendant's sentence base on as a matter of law, as required to pursuant to VA.Code 53.1-165. and UNITED STATES FOURTEEN AMENDMENT CONSTITUTIONAL RIGHT TO DUE PROCESS.

Where appellant's United States Constitutional right to do process was denied, VA. CODE 19.2-303 et seq.

RESPECTFULLY,

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from federal courts:

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

reported at _____; or,

has been designated for publication but is not yet reported; or,

is unpublished.

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

reported at _____; or,

has been designated for publication but is not yet reported; or,

is unpublished.

For cases from state courts:

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

reported at Supreme Court of Virginia; or,

has been designation for publication but is not yet reported; or,

is unpublished.

The opinion of the Supreme Court of Court of Virginia; court appears at Appendix C to the petition and is

reported at Supreme Court Building; or,

has been designated for publication but is not yet reported, or,

is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was
N / A

No petition for rehearing was timely filed in my case.

A timely ; petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.
 An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

For cases from **state courts**:

The date on which the highest state court decided my case was
02 November 2018. A copy of that decision appears at Appendix
A.

A timely petition for rehearing was thereafter denied on the following date: 30 August 2018, and a copy of the order denying rehearing appears at Appendix B.

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

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

LIST OF PARTIES

All parties appear in the caption of the cover page.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

VIRGINIA:

Desi A. Lewis, filed on the 26th of September 2018, In the Court of Appeal of Virginia. A Petition for a Resentencing Hearing, Record No. 1448-18-2 (Appeal of June 14, 2018 order) Circuit Court of the City of Petersburg- The record reflects that the notice of appeal in this case was not timely filed with the clerk of the trial court. Accordingly, this case is dismissed. See Turner V. Commonwealth, 2 Va. App. 96, 341 s.e. 2d 400 (1986). The record shown Commonwealth shall recover of the appellant the costs in the trial court. This order shall be certified to the trial court. It was error on the Circuit Court when during the sentencing phase of appellant's trial that, as a matter of law, the jury was not informed that appellant would not be eligible for parole, as required, pursuant to Va. Code 53.1-165.1 For the Court's failure to instruct the jury the appellant would not be eligible for parole, thereby, denied him due process, " which prevented a fair submission of controversy", Jones V. Willard, 224 Va 602 (1983), and violated appellant's United States Fourteenth Amendment, rendering any judgment against him void. The jury in appellant's case, they being " the judges of law, as well as of fact", was entitled to be properly instructed of the no parole law, which the Court has perjudiced appellant by failing to do so , thereby, denying him a fair trial. Brady V. State of Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). Where appellant's United States Constitutional right to due process was denied, he is not bound by Va. Code 19.2-303 et seq., and any judgment obtained is void resulting from the denied. Harris V. Deal, 189 Va. 675 (1949).

The Court , in accepting the Commonwealth's reply motion, stating that there were no supporting circumstances and grounds upon which no relief could be sought was in error. Supporting circumstances and grounds upon for relief, in addition to the judgment against appellant being void , is in the judgment of Fishback V. Commonwealth, 260 Va. 104, 532 S.E. 2d 629(2000), where the Virginia Supreme Court made the mandatory ruling that juries be instructed of the no parole law . Va. Code 53.1-165.1 The judgment against your appellant's U.S. Constitutional right motion, to due process, thus, rendering judgment against him void. A void judgment is a legal nullity, and by such no rights are divested and from

CONT: CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

VIRGINIA:

such no rights are obtained and all claims flowing out of such are void and such judgment may be attacked in any proceeding by any person whose rights are affected. " Harris V. Deal, 189 Va. 675 (1949). In addition to the judgment against your appellant being void, as discussed, Supreme Virginia Courts retain the right to correct unlawful sentences.

DARGAN V. COMMONWEALTH, 27 Va. App. 495,497 (1998). It is axiomatic that [i]t belongs to the [trial] court to instruct the jury as to the law, whenever they require instruction, or either of the parties request it to be given." THORNTON V. COMMONWEALTH, 65 Va. (Gratt) 657,662 (1874) " When the principle of law is materially vital to a Defendant in a criminal case, it reversible error for the trial court to refuse a defective instruction instead of correcting it and giving it in the proper form. A jury should not be left in the dark on the subject."

WAHLEY V. COMMONWEALTH, 214 Va. 353, 355-56,200 S.E. 2d 556,558 (1973).

STATEMENT OF THE CASE

The Commonwealth , on September 26,2018; submitted to the Circuit Court of Petersburg its reply to the appellant's Petition for a Resentencing Hearing. With its reply petition, the Commonwealth stated that the Defendant does not have jurisdiction in the Circuit Court, pursuant to Va. Code 19.2-303 et seq., due to the fact that more than twenty-one (21) days have elapsed since the defendant has been sent to the department of corrections. The Circuit Court no longer has jurisdiction to hear any motion regarding his sentence. The Commonwealth avers that the defendant has shown no changes in circumstances supporting his motion to reduce and states no grounds upon which any relief may be sought, and that the defendant's motion appears to be composed of conclusory allegations of misconduct and error by the Commonwealth. Appellant avers the judgment entered by the Circuit Court in this case are void because they violated appellant's United States Fourteenth Amendment right to due process when the Defendant would not be eligible for parole as required pursuant to Va. Code 53.1-165.1: " Any person sentenced to a term of incarceration for a felony offence committed on or after January 1, 1995, shall not be eligible for parole upon that offence."

A " void judgment, judgment is legal nullity, and by such no rights are divested and from such are void, and from such no rights are obtained and all claims flowing out of such are void, and such judgment may be attacked in any time, directly or collaterally. " Rook V. Rook, 233 Va. 92,95. As with all void judgments, a void criminal conviction may be attacked collaterally or directly in any court at any court at any time. Humphreys V. Commonwealth, 186 Va. 765, 772 (1947); Slaughter V. Commonwealth, 222 Va. 787, 793 (1981); Broyhill V. Dawson, 168 Va. 321, 326 (1937).

REASONS FOR GRANTING THE PETITION

The trial judge has a judicial responsibility to instruct the jury on the applicable law so as to aid the jury in arriving at a proper verdict and sentence. This is a reversible error when the Court failed to instruct the applicable law when the jury may make findings based on a mistaken belief about the law.

When mistaken beliefs about the law or 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 the Defendant, if convicted, will be ineligible for parole. Code 1950, 19.2-295.1.

Because the trial court did not instruct the jury that parole had been abolished, the Defendant was denied his right to have a fully informed jury determine his sentence.

Defendant was entitled to have jury instructed in penalty phase that parole had been abolished. The Defendant has the right of access to the Courts Due Process of law and equal protection under the law, secure by the Fourteenth Amendment to the Constitution. For a resentencing jury to do its job intelligently, it certainly must have before it enough information so that this newly impaneled jury does not blindly sentence a Defendant. The Supreme Court of Virginia has stated in a different context that a jury must be afforded " the benefit of all significant and appropriate information when determining a Defendant sentence , as a properly informed jury ensures a fair trial both to the Defendant and the Commonwealth." *Fishback V. Commonwealth*, 260 Va 104, 113, 532 S.E. 2d 629, 632 (2000). As a properly informed jury is also necessary for resentencing, it is appropriate for a Circuit Court to permit a resentencing jury to hear the same evidence , to which the original sentencing jury was privy through the evidence admitted at trial.

Failure to grant and hold a resentencing, hearing would essentially " result in a manifest absurdity"-- a result that the legislature clearly did not intend. *Kozmina*, 281 VA. at 349-50, 706 S.E. 2d at 852 (citing) *Conyers*, 273 Va. at 104, 639 S.E. 2d at 178). Furthermore, our decision is bound by the Supreme Court's truth in sentencing, by removing the possibility that a jury will act upon misconceptions, and those instructions that have the improper effect of inviting the jury to speculate concerning the likelihood of future actions that may ultimately affect the length of a Defendant's incarceration.

See - *Bell V. Commonwealth*, 264 Va. 172, 207,-08,563 S.E. 2d 695,718(2000)

REASONS FOR GRANTING THE PETITION

A JURY instruction regarding a Defendant's ineligibility for parole is proper, because it serves to eliminate a common misconception that a Defendant may only serve a small portion of a jury's sentence. (See Fishback, 260 Va. at 113, 532 S.E. 2d at 633.

The trial judge has a responsibility to instruct the jury on the applicable law so as to aid the jury in arriving at a proper verdict. It is reversible error to fail to instruct the jury on the applicable law when the jury may make findings based on a mistaken belief about the law recently, The Supreme Court ruled that [i]t is manifest that the concern for avoiding situations where juries speculate to the determine of a Defendant on post- sentencing procedures and policies of the executive branch of government requires that the absence of the such procedures or policies favoring the defendant be disclosed to the jury.

Yarbrough V. Commonwealth, 258 Va. 347, 372, 519 S.E. 2d 620,615 (1999)

Although the Court limited its decision in Yarbrough to the effect of Code 53.1-165.1 on sentencing in capital murder cases, it acknowledged that the limitations placed upon the availability of parole by Code 53.1-40.01 and 53.1-165.1 may call into question the continued viability of the Coward rule in a non-capital felony cases, as where for example a Defendant subject to a maximum term of years for a specific crime would serve that entire sentence before being eligible for geriatric parole.Yarbrough, 258 Va. at 373, 519 S.E. 2d 406 (1999).

This is a reversible error where the Trial Court failed to instruct the jury on the applicable law when the jury may make finding based on a mistaken belief about the law.

This is not a harmless error when the jury was not instructed during sentencing that parole had been abolished, Lewis was entitled to have the jury fully informed during sentencing that parole had been abolished.

CONCLUSION

The conviction against the appellant, Lewis became unlawful when the Court failed to inform the jury, as required by law, that he would not be eligible for parole. Not only by the Court's failure to do so violate appellant's UNITED STATES FOURTHNTH AMENDMENT CONSTITUTIONAL RIGHT TO DUE PROCESS, but rendered judgment against him void and reversible error. For all of the foregoing reasons, Desi A. Lewis, appellant, respectfully that this Honorable Court grant his appeal and resentence, his sentence, his sentence, his sentence to be at most time served, and order his immediate release.

WHEREFORE, The Defendant respectfully requests that this Honorable Court grant a resentencing to correct this due process violation and the miscarriage of justice.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Desi Lewis

Desi A. Lewis, per se,.

Desi A. Lewis, per se,.
Deerfield Correctional Center
21360 Deerfield Drive
Capron, Virginia 23829

Subscribed and sworn to before me on
this 27th Day of December, 2018

Diana Turner
Notary Public

