No. 19-8321

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLIE RAY CARNEY - PETITIONER
(Your Name)

VS.

STATE OF VIRGINIA - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI

SUPREME COURT OF VIRGINIA
(NAME OF COURT THAT LAST RULED ON THE MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CHARLIE RAY CARNEY
(Your Name)
GREENSVILLE CORRECTIONAL CENTER
901 CORRECTIONS WAY
(Address)

JARRATT, VA 23870
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

QUESTION #1:

WHETHER A STATE PRISONER'S RIGHT TO DUE PROCESS, SECURED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND MADE OBLIGATORY TO THE STATES THROUGH THE FOURTEENTH AMENDMENT, REQUIRES THE STATE TRIAL COURT TO INSURE CORRECT AND ACCURATE INFORMATION IS RELIED UPON WHEN SENTENCING A DEFENDANT TO SERVE PRISON TIME?

QUESTION #2:

WHETHER A DEFENDANT"S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND MADE OBLIGATORY TO THE STATES THROUGH THE FOURTEENTH AMENDMENT, IS VIOLATED WHEN INCORRECT, INACCURATE, AND FALSE RECORDS ARE USED AT SENTENCING BY THE STATE TRIAL COURT?

QUESTION #3:

DID THE VIRGINIA STATE COURTS VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW, GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND MADE OBLIGATORY TO THE STATES THROUGH THE FOURTEENTH AMENDMENT, WHEN REFUSING TO CORRECT COURT RECORDS AFTER PETITIONER SOUGHT RELIEF IN ACCORDANCE WITH THE PROVISIONS OF STATE LAW?

QUESTION #4:

WHETHER A STATE COURT VIOLATES A DEFENDANT'S RIGHT TO BE FREE OF DOUBLE JEOPARDY, AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEN THE STATE TRIAL COURT CITES A PREVIOUSLY SERVED SENTENCE AS BEING A "SUSPENDED SENTENCE" AND SUBSEQUENTLY SENTENCES THE DEFENDANT TO 20 YEARS IMPRISONMENT WITH 10 YEARS SUSPENDED?

LIST OF PARTIES

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

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

TABLE OF CONTENTS

Section:	Page:
TABLE OF CONTENT	i
TABLE OF AUTHORITIES CITED	ii
LIST OF PARTIES	iii
LIST OF PROCEEDINGS	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	5
QUESTIONS PRESENTED	15
REASONS FOR GRANTING THE WRIT	16
CONCLUSION	30

INDEX TO APPENDICES

Designation:	Descriptions:
APPENDIX A	Trial Court Dismissal of Motion To Vacate
APPENDIX B	Refusal of Appeal by Virginia Supreme Court
APPENDIX C	Denial of Petition For Rehearing by Virginia Supreme Court
APPENDIX D	Motion To Obtain Evidence filed by Petitioner
APPENDIX E	Denial of Motion To Obtain Evidence by Virginia Supreme Court
APPENDIX F	Denial of Direct Appeal from Criminal Conviction Virginia Court of Appeals
APPENDIX G	Sentencing Order, F-86-1360, F-86-1361 Richmond City Circuit Court
APPENDIX H	Sentencing Order, F-86-1530, F-86-1531 Richmond City Circuit Court
APPENDIX I	Trial Disposition Form, January 5, 1994
APPENDIX J	Trial Transcript of December 21, 1993 Richmond City Circuit Court
APPENDIX K	Trial Transcript of September 14, 1993 Richmond City Circuit Court

TABLE OF AUTHORITIES CITED

CASES: PAGE(S):

ACCARDI v. SHAUGHNESSY, 347 U.S. 260, 74 S.Ct. 499 98 L.Ed. 681 (1954).....22

FARROW v. UNITED STATES, 580 F.2d 1339 (9th Cir. 1978).....19

FINLEY v. STATON, 542 F.2d 250 (5th Cir. 1976).....22

GORE v. UNITED STATES, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958).....18

JONES v. UNITED STATES, 783 F.2d 1477 (9th Cir. 1986).....19

PACIFIC MOLASSES COMPANY v. FTC, 356 F.2d 386 (5th Cir. 1966).....22

ROBERTS v. UNITED STATES, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980).....21

SERVICE v. DULLES, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957).....22,23

TOWNSEND v. BURKE, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948).....18,19,20,21

UNITED STATES v. HEFFNER, 420 F.2d 809 (4th Cir. 1969).

UNITED STATES v. JAMES GOOD REAL PROPERTY, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).....17

UNITED STATES v. LEE, 540 F.2d 1205 (4th Cir. 1976).....21

UNITED STATES v. MILLER, 588 F.2d 1256 (9th Cir. 1978), cert. denied 440 U.S. 947 (1979).....19

UNITED STATES v. MORGAN, 595 F.2d 1134 (9th Cir. 1979).....19

UNITED STATES v. POWELL, 487 F.2d 325 (4th Cir. 1973).....18

UNITED STATES v. TUCKER, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed. 2d 592 (1972).....19

UNITED STATES v. WESTON, 448 F.2d 626 (9th Cir. 1971).....19

UNITED STATES v. WILLIAMS, 668 F.2d 1064 (9th Cir. 1981).....22

VITARELLI v. SEATON, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959).....22

WILLIAMS v. NEW YORK, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949).....18.19.21

STATUTES AND RULES: PAGE(S):

§8.01-428, Code of Virginia (1950, as amended).....16

§8.01-677, Code of Virginia (1950, as amended).....16

L I S T O F P R O C E E D I N G S

Date of Judgment:	Court of Judgment and Caption:	Case Number/ Record No.:
07/22/1986...	Richmond City Circuit Court.... COMMONWEALTH v. CHARLIE RAY CARNEY	F-86-1360, F-86-1361
07/22/1986...	Richmond City Circuit Court.... COMMONWEALTH v. CHARLIE RAY CARNEY	F-86-1530, F-86-1531
12/21/1993...	Richmond City Circuit Court.... COMMONWEALTH v. CHARLIE RAY CARNEY	F-93-3216 thru 3223, F-93-3225, 3226, F-93-3410.
11/18/1994...	Virginia Court of Appeals..... CHARLIE RAY CARNEY v. COMMONWEALTH	0063-94-2
10/09/2018...	Richmond City Circuit Court..... CHARLIE RAY CARNEY v. COMMONWEALTH	F-86-1530
11/25/2019...	Supreme Court for Virginia..... CHARLIE RAY CARNEY v. COMMONWEALTH	190595

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[ ] For cases from **federal courts**:

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

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

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

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

[X] For cases from **state courts**:

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

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

The opinion of the CIRCUIT court appears at Appendix A to the petition and is

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

JURISDICTION

[ ] For cases from **federal courts**:

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

[ ] No petition for rehearing was timely filed in my case.

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

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

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

[x] For cases from **state courts**:

The date on which the highest state court decided my case was 11/25/2019. A copy of that decision appears at Appendix B.

[X] A timely petition for rehearing was thereafter denied on the following date: 02/14/2020, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

FIFTH AMENDMENT:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of property, without due process of law; nor shall private property be taken for public use, without just compensation."

SIXTH AMENDMENT:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury if 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 accusation; 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."

FOURTEENTH AMENDMENT:

"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 any person within its jurisdiction the equal protection of the laws.

S T A T E M E N T O F T H E C A S E

1. According to circuit court records, on July 22, 1986 the Petitioner, Charlie Ray Carney, appeared before the Circuit Court of the City of Richmond, Virginia. The Commonwealth being represented by James C. Wicker, Jr., and the Petitioner being represented by Cary Bowen. On the advice of counsel Petitioner entered into a plea agreement and pleaded guilty to one count of attempted rape, amended from one count of abduction (F-86-1360), and one count of use or display of a firearm in a threatening manner during the commission of rape, amended from possession of a firearm by a convicted felon (F-86-1361) These alleged events having occurred on March 25, 1986. Petitioner was sentenced to "confinement in the Penitentiary at Eight Years in the case of F-86-1360; and Two Years in the Penitentiary in the case of F-86-1361." (See APPENDIX G)

2. Court records further reflect that on July 22, 1986 the Petitioner appeared before the Circuit Court of the City of Richmond, the Commonwealth being represented by James C. Wicker, Jr., and the Petitioner being represented by James Willett. Petitioner entered into a plea agreement, based upon the advice of counsel, to one count of burglary (F-86-1530), and one count of possession of burglary tools (F-86-1531), which allegedly occurred on May 6, 1986. According to a sentencing order submitted as an exhibit in the State court proceedings, the trial court sentenced the Petitioner "in accordance with a plea agreement filed herin, the Court doth suspend the imposition of sentence during the defendant's good behavior in the case of F-86-1530. In the case of F-86-1531 the Court doth ascertain the defendant's term of confinement in the City Jail at Twelve Months." (See APPENDIX H)

3. Petitioner's total sentence, calculated by the Circuit Court of the City of Richmond and the Virginia Department of Corrections, was 10 years and 12 months. Based upon the Petitioner's good behavior he served a total of 5 years and 4 months in prison, and was released from Greensville Correctional Center (State Id. #148941) in September of 1991. NOTE: State officials claim there is no record of this release, and the Assistant Commonwealth's Attorney was unable to provide a specific release date in the lower court proceedings. (See Commonwealth's Motion To Dismiss, Page 2, Paragraph 2)

4. On June 5, 1993 the Petitioner was arrested on felony warrants charging him with (1) having abducted Martha Paschke with intent to defile, (2) raping Martha Paschke, and (3) forcible sodomy.

5. On August 16, 1993 the Grand Jury issued the following indictments against the Petitioner;

a) F-93-3216, Rape
b) F-93-3217, Use or Display of a Firearm
c) F-93-3218, Rape
d) F-93-3219, Use or Display of a Firearm
e) F-93-3220, Rape
f) F-93-3221, Use or Display of a Firearm
g) F-93-3222, Sodomy
h) F-93-3223, Use or Display of a Firearm
i) F-93-3224, Rape
j) F-93-3225, Use or Display of a Firearm
k) F-93-3226, Transport or Possession of a Firearm as a convicted felon

(Copies of these indictments were presented in Circuit Court proceedings as "Petitioner's Exhibit 3, Pages 1-13)

6. On September 14, 1993, at a "Motions Hearing," the Commonwealth's Attorney moved to dismiss Indictment F-93-3224, Rape, and reindicted as F-93-3410, Abduction with intent to defile.

Additionally, the Circuit Court cited, "a capias outstanding on an abduction charge," referring to the conviction from 1986. (See Motions Hearing Transcript, September 14, 1993, Page 8, ATTACHED AS APPENDIX K)

7. On October 27, 1993 Petitioner appeared before the Circuit Court of the City of Richmond, and being represented by Scott I. Pickus, was heard by a jury of his peers. The jury FOUND Petitioner **NOT GUILTY** on all charges for possession or use of a firearm, Indictment Nos. 3217, 3219, 3221, 3223, 3225, and 3226. However, the jury did find Petitioner GUILTY on three counts of rape, one count of sodomy, and one count of abduction with intent to defile.

8. Additionally, on October 27, 1993, the Circuit Court issued a "Show Cause Order" pursuant to the Commonwealth Attorney's request stating that the Petitioner had been convicted of Burglary (F-86-1530) and possession of burglary tools (F-86-1531) in 1986. The Petitioner was required to show cause why his "suspended sentence" for Burglary (F-86-1530) should not be revoked. ("Show Cause Order included in State Circuit Court proceedings as Commonwealth's Exhibit 2)

9. On December 21, 1993 Petitioner appeared before the Circuit Court of the City of Richmond, with counsel, Scott I. Pickus, the Honorable Thomas N. Nance, Judge, presiding. With regard to the three (3) counts of rape, one (1) count of sodomy, and one (1) count of abduction, the court followed the jury recommendations and sentenced Petitioner to seven (7) years on each count of rape, five (5) years for one count of sodomy, and twenty (20) years of incarceration for one count of abduction with intent to defile.

10. In addition to the sentence stated in the previous paragraph, the court then "revoked the suspended imposition of sentence given in this court on July 22, 1986." Relying upon Indictment **F-86-1360, Abduction**, the court then sentenced Petitioner to a twenty (20) year sentence of confinement with ten (10) years of that sentence suspended for life. The total sentence awarded on December 21, 1993, by the Circuit Court of the City of Richmond, was fifty-six (56) years of confinement in the penitentiary. (See Sentencing Transcripts, Pages 22-27, ATTACHED AS APPENDIX J, and Trial Disposition Form ATTACHED AS APPENDIX I, both included in State Court proceedings as exhibits)

11. On December 21, 1993 the Circuit Court of the City of Richmond appointed Susan D. Hansen to represent Petitioner on a "direct appeal" of his convictions. On November 18, 1994 the Virginia Court of Appeals entered an opinion denying the direct appeal. In this opinion the Court of Appeals referred to the revocation of a suspended sentence from July 22, 1986 and concluded, "Moreover, the trial judge stated that he revoked appellant's suspended sentence not only because of the convictions, but also because of evidence in an earlier rape and abduction case." (See Opinion of the Virginia Court of Appeals, Record No. 0063-94-2, ATTACHED AS APPENDIX F)

12. On March 22, 2017 Appellant wrote a letter to James Willett, Assistant Commonwealth's Attorney, requesting copies of the plea agreements and sentencing orders for the trial of July 22, 1986. According to Circuit Court records Mr. Willett was appointed by the trial court to represent the Petitioner, and did so on July 22, 1986 in accepting a plea agreement for the charges of Burglary

(F-86-1530) and possession of burglary tools (F-86-1531). No response was received from Mr. Willett. (A copy of Petitioner's letter to Mr. Willett was included as "Appellant's Exhibit 4," in State Court proceedings.)

13. On March 24, 2017 Petitioner wrote a letter to Edward F. Jewett, Clerk of the Circuit Court of the City of Richmond, and requested copies of the plea agreements from the trial of July 22, 1986. Petitioner did not receive a response to this letter. (A copy of Petitioner's letter to the court clerk was included as "Appellant's Exhibit 5, in State Court proceedings.)

14. On March 26, 2017 Petitioner wrote a letter to Cary Bowen, the attorney retained by Petitioner's mother in 1986 to represent the Petitioner on the charges of Burglary (F-86-1530), possession of burglary tools (F-86-1531), attempted rape (F-86-1360), and possession of a firearm (F-86-1361). Petitioner requested copies of the plea agreements and sentencing orders from his trial of July 22, 1986. Petitioner did not receive a response to this letter. (A copy of Petitioner's letter to Cary Bowen was included as "Appellant's Exhibit 6" in State Court proceedings.)

15. On September 30, 2018, Appellant mailed to the Circuit Court of the City of Richmond a "Motion To Vacate/Set Aside" after inquiring about his sentence, sentence calculation, and release date established by the Virginia Department of Corrections ("VADOC"). In reviewing the court's documentation the Appellant discovered discrepancies within the proceedings and sought what he saw as errors, omissions, and fraud. It was, and is, Appellant's contention that the trial court did not have authority or jurisdiction to

revoke a sentence for attempted rape (F-86-1360) as the sentence had already been served. In support of his argument the Peititioner submitted a "Trial Disposition Form" (See APPENDIX I). Furthermore, the Petitioner directed the court to the "Motions Hearing Transcripts" recorded on September 14, 1993, specifically "Page 8," in which the trial court referred to the conviction for "abduction" as the authority for issuing a capias. (See APPENDIX K, Page 8)

16. On, or about, January 3, 2019 the Commonwealth's Attorney for the City of Richmond filed with the State circuit court a pleading titled, "Commonwealth's Motion To Dismiss Patitioner's Motion To Vacate/Set Aside." The Commonwealth submitted three (3) exhibits as part of the Motion To Dismiss, which included a Sentencing Order allegedly entered in the trial court on July 22, 1986 against the Petitioner for indictments of Burglary and Possession of burglary tools (tire iron). (See APPENDIX H)

17. It was the Commonwealth's contention that the trial court had retained jurisdiction to revoke Petitioner's sentence, that the Petitioner's case did not suffer from fraud upon the court, and that Petitioner's case did not suffer from a double jeopardy violation. In proffering the argument, the Commonwealth contended that the "Trial Disposition Form" is a clerical error committed by an entity other than the court and stated, "The Trial Disposition Form is completed by a third party, and is not an order through which the court speaks." (See Commonwealth's Motion To Dismiss, Page 7, Paragraph 2)

18. The Commonwealth did, however, concede that there were errors in the records of the court, and that pursuant to §8.01-428(B), Code of Virginia (1950, as amended), the trial court had authority to correct these errors. The Commonwealth then moved the court to dismiss Petitioner's Motion To Vacate/Set Aside.

19. On January 15, 2019 the Petitioner mailed to the State circuit Court, and the Commonwealth's Attorney, a pleading titled, "Petitioner's Response To Respondent's Motion To Dismiss." It was this Petitioner's contention that the circuit court had failed to assign a correct case number as the "Motion To Vacate/Set Aside" was an "independent action" requiring relief. Petitioner further contended that there were many errors contained within the trial court's records. Petitioner outlined these errors as;

a) The name of counsel representing Petitioner at trial on July 22, 1986 was Cary Bowen, a retained attorney. The Sentencing ORDER submitted as an Exhibit by the Commonwealth stated James Willett as defense counsel. (See APPENDIX H)

b) The presiding Judge on July 22, 1986 was James M. Lumpkin not Thomas N. Nance, and therefore the sentencing ORDER should have been signed by Judge Lumpkin. (See APPENDIX H)

c) The sentence received by Petitioner for pleading guilty to the charge of burglary (F-86-1530) was a one (1) year sentence, and had been served prior to Petitioner's release in September of 1991. (See APPENDIX H)

20. Additionally, Petitioner outlined the completion of his parole from the 1986 convictions, release from Greensville Correctional Center in September of 1991, and discharge from his sentences

after having completed the conditions of his parole. Petitioner submitted to the State circuit court that if there had been a suspended sentence, or further probation, the parole officer would have stated such in open court on December 21, 1993. Court records show that the Probation and Parole officer testified that the Petitioner was, "...not on probation or anything" at the time of his arrest in 1993. (See APPENDIX J, Page 9)

21. Additionally, in his response the Petitioner agreed with the Commonwealth's Attorney, in that the errors in the record may be corrected at any time pursuant to Virginia Code §8.01-428, as well as §8.01-677. Petitioner moved the State circuit court to grant further proceedings to develop the record and allow for the presentation of more evidence. (See "Petitioner's Response To Respondent's Motion To Dismiss" filed in State Court proceedings.)

22. On February 11, 2019 the Honorable C. N. Jenkins, Judge, signed an ORDER dismissing Petitioner's "Motion To Vacate/Set Aside," specifically stating, "Whereas the petitioner has failed to show that the judgment was void due to extrinsic fraud or structural error, it is ORDERED that the petitioner's Motion To Vacate is dismissed." (See APPENDIX A)

23. On February 18, 2019 the Petitioner mailed to the State circuit court a handwritten "OBJECTION" directing the court's attention to the many flaws, errors, and omissions established within the pleadings filed before the court, and imploring the court to grant further proceedings to allow the Petitioner to

obtain further evidence which support his claims. (See Petitioner's "OBJECTION" made a part of the record in State circuit court proceedings.)

24. On March 1, 2019, having not received any further communication from the State circuit court, the Petitioner filed a Notice of Appeal with the State circuit court. On May 7, 2019 Petitioner mailed to the Virginia Supreme Court a perfected "Petition For Appeal." In this appeal the Petitioner listed four (4) Assignments of Error, that being;

> #1. THE CIRCUIT COURT ERRED, AND ABUSED ITS DISCRETION, WHEN SUMMARILY DISMISSING APPELLANT'S MOTION TO VACATE/ SET ASIDE WITHOUT RESOLVING FACTUAL DISPUTES BETWEEN THE PARTIES.
>
> #2. THE CIRCUIT COURT ERRED, AND ABUSED ITS DISCRETION, WHEN SUMMARILY DISMISSING APPELLANT'S MOTION TO VACATE/ SET ASIDE WITHOUT CORRECTING SIGNIFICANT ERRORS IN THE RECORDS THAT WERE EVIDENCED BY BOTH PARTIES TO THE ACTION.
>
> #3. THE CIRCUIT COURT ERRED IN ITS DETERMINATION THAT APPELLANT FAILED TO SHOW THE JUDGMENT COMPLAINED OF WAS VOID DUE TO EXTRINSIC FRAUD OR STRUCTURAL ERROR WITHOUT ALLOWING THE APPELLANT AN OPPORTUNITY TO PRESENT FURTHER EVIDENCE AND CAUSE THE RECORD TO BE FULLY DEVELOPED.
>
> #4. THE CIRCUIT COURT ERRED WHEN FAILING TO REACH A LEGAL DETERMINATION AS TO APPELLANT'S CLAIM OF HIS CONSTITUTIONAL RIGHT TO BE FREE OF DOUBLE JEOPARDY BEING VIOLATED BY THE COURT.

25. On November 25, 2019 the Virginia Supreme Court issued a decision and refused the Petitioner's appeal in a two (2) sentence opinion. (See APPENDIX B)

26. On December 4, 2019 Petitioner mailed to the Virginia Supreme Court a "Petition For Rehearing" pursuant to Rule 5:20 of the Virginia Supreme Court Rules.

27. On February 14, 2020 the Virginia Supreme Court rendered a decision which denied the Petition For Rehearing of Petitioner's Appeal. (Record No. 190595) (See APPENDIX C)

THIS SPACE INTENTIONALLY

LEFT BLANK

REASONS FOR GRANTING THE PETITION

1. This matter comes before this Honorable Court to challenge the Constitutionality of the Virginia State court proceedings in which the Petitioner clearly demonstrated the errors in the court records, but the State courts refuse to address those errors even though State law provides for remedies without time limitations. Specifically, Petitioner refers to the remedies provided in §8.01-677 and §8.01-428 of the Code of Virginia (1950, as amended). These statutes state as follows;

> **§8.01-677. Errors corrected on motion instead of writ of error coram vobis.**
> For any clerical error or error in fact for which a judgment may be reversed or corrected on writ of error coram vobis, the same may be reversed or corrected on motion, after reasonable notice, by the court.
>
> **8.01-428. Setting aside default judgments; clerical mistakes; independent actions to relieve party from judgment or proceedings; grounds and time limitations.**
> A. Default judgments and decrees pro confesso; summary procedure. Upon motion of the plaintiff or judgment debtor and after reasonable notice to the opposite party, his attorney of record or other agent, the court may set aside a judgment by default or a decree pro confesso upon the following grounds: (i) fraud on the court, (ii) a void judgment, (iii) on proof of an accord and satisfaction, or (iv) on proof that the defendant was, at the time of service of process or entry of judgment, a service member as defined in 50 U.S.C. § 3911. Such motion on the ground of fraud on the court shall be made within two years from the date of the judgment or decree.
> B. Clerical mistakes. Clerical mistakes in all judgments or other parts of the record and errors therein arising from oversight or from an inadvertent omission may be corrected by the court at any time on its own initiative or upon the motion of any party and after such notice, as the court may order. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending such mistakes may be corrected with leave of the appellate court.

C. Failure to notify party or counsel of final order. If counsel, or a party not represented by counsel, who is not in default in a circuit court is not notified by any means of the entry of a final order and the circuit court is satisfied that such a lack of notice (i) did not result from a failure to exercise due diligence on the part of that party and (ii) denied that party an opportunity to pursue post-trial relief in the circuit court or to file an appeal therefrom, the circuit court may, within 60 days of the entry of such order, modify, vacate, or suspend the order or grant the party leave to appeal. Where the circuit court grants the party leave to appeal, the computation of time for noting and perfecting an appeal shall run from the entry of such order, and such order shall have no other effect.

D. Other judgments or proceedings. **This section does not limit the power of the court to entertain at any time an independent action to relieve a party from any judgment or proceeding,** or to grant relief to a defendant not served with process as provided in §8.01-322, **or to set aside a judgment or decree for fraud upon the court.** [Emphasis added]

E. Nothing in this section shall constitute grounds to set aside an otherwise valid default judgment against a defendant who was not, at the time of service of process or entry of judgment, a service member as defined in 50 U.S.C. §3911.

The language, and intent of the Virginia legislature, is clear, in order to preserve the integrity of the courts, errors in the record may be corrected at any time by the Virginia courts. The petitioner further relies upon the interpretations and legal reasoning presented in the following cases to support his claims.

2. In the present matter Petitioner raises claims of multiple errors in the State court criminal proceedings which constitute multiple violations of his rights under multiple Constitutional Amendments, and in doing so relies upon this Honorable Court's determination in the matter of UNITED STATES v. JAMES DANIEL GOOD REAL PROPERTY, et al., 510 US 43, 126 L Ed 2d 490, 114 S Ct 492 (1993), in which the Court stated,

"Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Federal Constitution's

commands; where such multiple violations are alleged, the courts will not identify as a preliminary matter the claim's "dominant" character, but rather will examine each constitutional provision in turn; thus, with respect to a seizure of property that implicates two explicit textual sources of constitutional protection-namely, the Fourth and Fifth Amendments-the proper question is not which amendment controls but whether either amendment is violated." Id. 126 L.Ed.2d at 494

3. Specifically, Petitioner believes, claims, and alleges that the multiple errors in State court records deprived him of his right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, and deprived him of a fair trial in violation of his Sixth Amendment Rights secured by the Constitution.

4. With regard to this Petitioner's claims of inaccurate information in the sentencing process, there are differing applications of law among the Circuits for the United States Courts of Appeals. In the matter of UNITED STATES v. POWELL, 487 F.2d 325; 1973 US App LEXIS 7019 (4th Cir. 1973) the court reasoned,

"The law applicable to this case is now fairly well settled. generally, federal sentences are not reviewable, GORE v. UNITED STATES, 357 U.S. 386, 393, 2 L.Ed.2d 1405, 78 S.Ct. 1280 (1958), and the sentencing judge may draw on varied sources of information that will assist him in determining appropriate punishment. See WILLIAMS V. NEW YORK, 337 U.S. 241, 246, 93 L.Ed. 1337, 69 S. Ct. 1079 (1949). While not every type of misinformation will justify relief, a sentence cannot stand if it is based on assumptions concerning the defendant's criminal record that are "materially false," TOWNSEND v. BURKE, 334 U.S. 736, 741, 92 L.Ed. 1690, 68 S.Ct. 1252 (1948), or if it is founded "in part upon

misinformation of constitutional magnitude." United States v. Tucker, 404 U.S. 443, 447, 30 L.Ed.2d 592, 92 S.Ct. 589 (1972)."

5. In the matter of JONES v. UNITED STATES, 783 F.2d 1477; 1986 US App LEXIS 22739 (9th Cir. 1986) the court reasoned and iterated,

> "Jones is correct that a sentence is predicated on material false information denies due process. See TOWNSEND v. BURKE, 334 U.S. 736, 741, 92 L.Ed. 1690, 68 S.Ct. 1252 (1948). But Townsend is an exception to the genral rule that due process does not require sentencing information to meet the same rigorous evidentiary standards required at trial. See WILLIAMS v. NEW YORK, 337 U.S. 241, 250-51, 93 L.Ed. 1337, 69 S.Ct. 1079 (1949); UNITED STATES v. MORGAN, 595 F.2d. 1134, 1136 (9th Cir. 1979) (judges have discretion to consider a wide variety of information from various sources to tailor punishment to the criminal). Where a §2255 petition alleges reliance on materially false sentencing information, the sentence will be vacated on appeal only if the challeneged information is (1) false or unreliable and (2) demonstrably made the basis for the sentence. FARROW v. UNITED STATES, 580 F.2d 1339, 1359 (9th Cir. 1978) (en banc)."

Ultimately the JONES court determined that Jones had failed to demonstrate that the sentencing judge relied on the challenged information. The court further determined that neither prong of the Farrow test had been satisfied and affirmed the denial of his §2255 motion to set aside the sentence. Id. 1986 U.S. App. LEXIS 14

6. In UNITED STATES v. WESTON, 448 F.2d 626 (9th Cir. 1971) (sentence vacated where the presentence report was not supported by the underlying confidential report), cert. denied, 404 U.S. 1061, 92 S.Ct. 748, 30 L.Ed.2d 749 (1972) the court stated, "A rational

penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process.". Information in the presentence report may be relied on in sentencing if it "is amplified by information such as to be persuasive of the validity of the charge there made." Id. 448 F.2d at 634 (emphasis added) The WESTON decision also held it improper to require the defendant to refute statements where the burden of disproving was "intolerably high," UNITED STATES v. MILLER, 588 F.2d 1256, 1266 (9th Cir. 1978), cert. denied, 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979), and where the report rested on only the "barest factual foundation."

7. In the matter of TOWNSEND v. BURKE, 92 L.Ed 1690, 334 US 736-741 (1948) this Honrable Court iterated the importance and Constitutionality of accurate and reliable court records in stating,

> "We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere in they persisted. Consequently, on this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand. We would make clear that we are not reaching this result because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less

on review of the State court's denial of habeas corpus. It is not the duration or the severity of this sentence that renders it consitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

Nor do we mean that mere error in resolving a question of fact on a plea of guilty by an uncounseled defendant in a non-capital case would necessarily indicate a want of due process of law. Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. But even an erroneous judgment, based on a scrupulous and diligent search for truth, may be process of law.

In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner."

Id. at 1693-94

8. There are constitutional limitations on the scope of information a court may consider in the sentencing phase of a criminal trial. There are Supreme Court precedents which "recognize a due process right to be sentenced only on information which is accurate." UNITED STATES v. LEE, 540 F.2d 1205, 1211 (4th Cir. 1976) (citing United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); WILLIAMS v. NEW YORK, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed 1337 (1949); TOWNSEND v. BURKE, supra; see also ROBERTS v. UNITED STATES, 445 U.S. 552, 556, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980) ("We have...sustained due process objections to sentences imposed on the basis of misinformation of constitutional

magnitude."); United States v. Williams, 668 F.2d 1064, 1072 (9th Cir. 1981) ("Where...the trial judge relies on materially false or unreliable information, there is a violation of defendant's due process rights.")

9. Finally, in the State post-conviction proceedings, in which Petitioner sought to correct the errors in court records, and some errors being admitted to by the Assistant Attorney General for Virginia, Petitioner submitted a claim of "double jeopardy," as well as claim of "fraud upon the court." Petitioner relied upon State statutes and State court interpretations of their own law, as well as clearly established federal law, and asked the Virginia Supreme Court to provide Petitioner a copy of the court transcripts from July 22, 1986 to prove the claims of error he submitted to the court. The Virginia Supreme Court denied Petitioner's request thus depriving Petitioner of the evidence necessary to prove his claims, and denying him the right to due process of law. (See APPENDICES D and E) When an entity or governmental agency creates rules with an expectation they will be followed by those affected by the rules, then there is a reasonable expectation that the entity or governmental agency will also abide by those rules. This would follow the principles of law as determined in VITARELLI v. SEATON, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); SERVICE v. DULLES, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); U.S. ex rel. ACCARDI v. SHAUGHNESSY, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); FINLEY v. STATON, 542 F.2d 250 (5th Cir. 1976); PACIFIC MOLASSES COMPANY v. FTC, 356 F.2d 386, 387-90 (5th Cir. 1966) in which it was determined

that the failure of a government entity to abide by the rules created by that entity constitutes an independent violation of due process. This holds true, even if the rules and regulations provide protections beyond those which are constitutionally required. SERVICE v. DULLES, supra; UNITED STATES v. HEFFNER, 420 F.2d 809 (4th Cir. 1969).

10. In submitting the Petition for Rehearing to the Virginia Supreme Court, the Petitioner relied upon clearly established Federal law as the basis of the foundation to argue for the reconsideration and reversal of the decision to dismiss Petitioner's appeal. As he has done here, Petitioner relied upon the rulings of ROBERTS v. UNITED STATES, supra; TOWNSEND v. BURKE, supra. Petitioner also relied upon UNITED STATES v. WILLIAMS, 668 F.2d 1064 (9th Cir. 1981) in which the Federal Court of Appeals determined that "Where the trial judge relies on materially false or unreliable information, there is a violation of defendant's due process right." Id. at 1072

11. It is clear that there are multiple errors in the State court records with regard to Petitioner's two criminal trials, the first on July 22, 1986 and the second on December 21, 1993, and that these errors created confusion among the state courts that adversely affected the sentence which was awarded by the trial court. The errors, as presented and established in State court proceedings are;

a). It is plain and clear from the court transcripts that on September 14, 1993, the trial court mistakenly relied upon the July 22, 1986 conviction for attempted rape

(F-86-1360), and wrongly referred to the conviction as "Abduction," when determining probable cause to issue a capias against the Petitioner. (See APPENDIX E, Pretrial Motions Hearing Transcripts, September 14, 1993, Page 8, this page from the transcripts was included as "Appellant's Exhibit 1, Page 1" in State court post-conviction proceedings.) In addition, a "Trial Disposition Form" filed in the trial court also refers to a suspended sentence for an attempted rape conviction, and this document was included as Petitioner's Exhibit 5 in State court post-conviction proceedings. (APPENDIX I) It was the Commonwealth's position that the "Trial Disposition Form" was generated by a "third-party" and therefore did not have any effect on the trial court proceedings, and that the court did not rely on the attempted rape (F-86-1360) conviction for the revocation of a suspended sentence, but did so for a conviction of Burglary (F-086-1530), as stated in a "Show Cause Order" presented as Commonwealth's Exhibit 2. In his response to the Motion to Dismiss, filed by the Commonwealth, the Petitioner argued that the "Trial Disposition Form" being generated by a "third-party" demonstrated that extrinsic fraud had been committed upon the court, and more importantly, this Petitioner has contended that he had served the sentence for the charge of Burglary and was released from prison on September of 1991.

In fact, a probation officer testified at the Petitioner's sentencing trial that the Petitioner, "...He's not on probation or anything" at the time of his arrest in 1993. (See APPENDIX J, 1993, Page 9, Lines 2-5) To sentence Petitioner twice

for the same offense is a violation of Petitioner's Constitutional right to be free from double jeopardy and the State court failed to properly adjudicate this Constitutional violation.

b). There are two "Sentencing Orders" from the July 22, 1986 trial: one for the attempted rape (F-86-1360) charge and the use of a firearm charge (F-86-1361), and another for the burglary charge (F-86-1530) and posession of burglary tools (F-86-1531). Both of these Sentencing Orders are factually flawed and incorrect. As Petitioner presented to the state courts in post-conviction proceedings, the first Sentencing Order incorrectly lists the indictment for "Abduction," but this had been amended to a lesser included offense of "Attempted Rape." Also, it is stated in the first paragraph that as the "Defendant" this Petitioner was represented by "Cary Bowen, retained counsel," but the second Sentencing Order states that he was represented by "Attorney James Willett, appointed counsel."
Anyone in the courtroom on July 22, 1986 would know that Petitioner was represented by a retained attorney, Cary Bowen, on all four charges. While James Willett was initially appointed by the trial court in the first matter, with regard to the charges of attempted rape and use of a firearm, Mr. Willett NEVER appeared in the trial court on behalf of the Petitioner, and was never appointed for the charges of burglary and posession of a burglary tool. Therefore, James Willett should never have even been mentioned in a legitimate sentencing order from the trial court.

Furthermore, the Sentencing Orders were signed by Thomas N. Nance, Judge, but the presiding Judge for the case on July 22, 1986 was the Honorable James M. Lumpkin, Judge. Both of these Sentencing Orders were introduced in post-conviction proceedings as "Petetioner's Exhibit 1" and "Commonwealth's Exhibit 1" and are submitted as APPENDICES G and H in the present petition.

NOTE: On April 15, 2019 Petitioner filed with the Virginia Supreme Court a Motion To Obtain Evidence in an attempt to obtain a copy of the trial transcripts from July 22, 1986 and support his claims. On May 7, 2019 the Virginia Supreme Court issued an order denying the Petitioner's Motion. (See APPENDICES "D" and "E") In his appeal to the Virginia Supreme Court the Petitioner outlined his many attempts to obtain a copy of the trial transcripts from the trial of July 22, 1986 prior to filing a Motion To Vacate/Set Aside, and his attempts to write his previous attorneys to obtain records, but was denied access to the transcripts at every turn.

c). The errors, inaccuracies, and omissions of the trial court record from July 22, 1986 not only infected the trial and sentencing in 1993, but also became an issue in the appellate court when the Virginia Court of Appeals incorrectly referred to the 1986 convictions as "abduction and rape" charges. The Court of Appeals stated, "Moreover, the trial judge stated that he revoked appellant's suspended sentence not only because of the convictions, but also because of evidence in an earlier rape and abduction case. Thus, the record establishes that the court had sufficient cause to revoke the suspension of sentence." (APPENDIX F, Page 3, Paragraph 2) Petitioner adamantly contends that he

DID NOT HAVE a conviction for either abduction or rape, it was an "attempted rape" charge that was amended from a charge of abduction, and without any evidence to support it. Again, the errors in the Sentencing Orders from the trial court created confusion as to what charges the court had convicted the Petitioner of.

Moreover, with regard to the conviction of attempted rape mentioned above, and incorrectly referred to by the Virginia Court of Appeals, defense counsel, Scott Pickus, addressed the lack of evidence for these convictions before the trial court on December 21, 1993. Defense counsel stated to the trial court, "I did read a summary provided to me by Mr. Scott and that contained, at least from the summary I read judge, contained no indications of any kind of sexual matters whatsoever." Defense counsel further offered to the trial court, "...there is absolutely nothing in there that suggested any attempts to commit rape of any sort."

(See APPENDIX J, Page 22)

12. Relying on the principles established in TOWNSEND v. BURKE, supra, Petitioner submits that on December 21, 1993 the trial court did not have accurate, correct, and reliable information and records upon which to base its judgment of the Petitioner for sentencing, and the court proceedings were contrary to, and a violation of, the Fifth and Sixth Amendments to the United States Constitution.

13. It is also the Petitioner's contention that upon his release from Greensville Correctional Center, in September of 1991, he had completed the active sentence for all four convictions from

July 22, 1986 in the Circuit Court for the City of Richmond. This includes the one (1) year sentence for burglary (F-86-1530), 12 month sentence for possession of burglary tool, a tire iron, (F-86-1531), the eight (8) year sentence for attempted rape (F-86-1360), and the two (2) year sentence for use of a firearm (F-86-1361). While the Assistant Attorney General for Virginia could not provide evidence of the Petitioner's release from the Virginia Department of Corrections in September of 1991, they did not dispute that Petitioner was released from prison prior to his arrest in 1993.

14. As Petitioner argued before the State Courts, he had served his sentences for the convictions of July 22, 1986, and therefore there was no "suspended sentence" for the trial court to revoke on December 21, 1993. In revoking this alleged suspended sentence, and sentencing Petitioner to twenty years of incarceration, with ten years suspended, the trial court violated Petitioner's right to be free from double-jeopardy. Moreover, while the Sentencing Order submitted by the Assistant Attorney General states that therre was a "suspended imposition of sentence," the Petitioner challenged the validity and authenticity of the documents by directing the trial court's attention to the many factual errors contained in the Sentencing Orders, as previously outlined in the preceding paragraph 11(b), Pages 25-26. It is this Petitioner's contention that the Sentencing Orders are void due to the numerous errors, flaws, and misrepresentations of fact, and for any court to rely upon them is a violation of Petitioner's right to due process of law under the United States Constitution.

15. Additionally, Petitioner submits that when a trial court is presented with evidence of an error in its own records, and both parties to an action agree that there is error, the court should not ignore the error, or errors, to the detriment of either party. As a branch of the government, the courts are endowed with the public trust, and when the integrity of any court is called into question by the presentation of some evidence, a thorough investigation must be conducted by the court to determine the validity of said claims. Allowing for errors to remain in the court records not only constitutes a breach o fprofessional ethics and invites disrespect for the integrity of the court, but it also erodes the public trust and is detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the proceedings in his own court. In drafting legislation, the Virginia General Assembly sought to preserve the integrity of the courts and address errors in court records by affording the authority to correct such errors at any time. These provisions are clearly stated in Code of Virginia, §§8.01-428 and 8.01-677, 1950 as amended. (See Pages 16 and 17 of this pleading for a complete quotation of the statutes.)

16. In the present matter, however, the Virginia State courts refused to afford Petitioner the opportunity to obtain evidence necessary to support his claims, and failed to investigate the accuracy and validity of court records beyond accepting pleadings from both parties and rendering a summary judgment against the pro se Petitioner. Even when the Assistant Attorney General admitted there were errors in the record, and cited §8.01-428(B), Code of Virginia, as authority to correct the errors, the courts

refused to pursue the matter any further than issuing a summary dismissal. (See APPENDIX A) Petitioner contends that "every defendant" before a trial court deserves a full and fair trial, one which adheres to the basic tenets of due process, and is based upon true, accurate, and correct factual foundations. In the present matter Petitioner's Constitutional Rights to a fair trial were violated by the state trial court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Charlie Ray Carney

Date: March 23, 2020