

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT EUGENE AYERS

-- PETITIONER

vs.

COMMONWEALTH OF VIRGINIA,

-- RESPONDENT.

On Petition for a Writ of Certiorari to
The Supreme Court Of Virginia

PETITION FOR WRIT OF CERTIORARI

**PETITIONER'S MOTION TO PROCEED ON WRIT OF
CERTIORARI *IN FORMA PAUPERIS***

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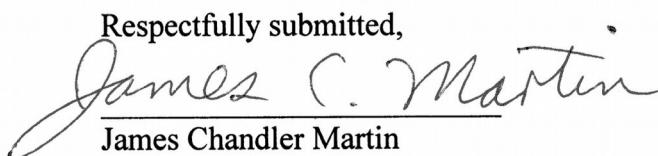
Attorney for the Petitioner & Counsel of Record

**MOTION TO PROCEED ON WRIT OF CERTIORARI
*IN FORMA PAUPERIS***

Pursuant to Rule 39 of this Court, Petitioner Robert Eugene Ayers requests leave to file the accompanying Petition for Writ of Certiorari without prepayment of fees or costs, and to proceed *in forma pauperis*.

Petitioner has previously been granted leave to proceed *in forma pauperis* by the appointment of James Chandler Martin, Esq. as counsel in this matter by the Circuit Court of the City of Danville, Virginia pursuant to Va. Code § 37.2-906, for representation in that court and in the Supreme Court of Virginia, through an order entered in the Circuit Court of the City of Danville, Virginia on August 13, 2014, with the counsel appointment provision in said Order being made continuing in nature by subsequent orders entered by that court on October 6, 2015, July 27, 2016, November 6, 2017, and December 30, 2019.

Dated: March 1, 2021

Respectfully submitted,

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QUESTION PRESENTED

The common law of England, as transplanted to Virginia and the government of the United States, provided for trial by jury to decide whether a man should be committed to a mental institution. This Court has ruled that a variation of mental commitment known in several states as a “sexually violent predator” commitment proceeding can be constitutional under certain circumstances. Petitioner has been previously committed under such a statute, which however provided for a periodic redetermination that Petitioner remains a “sexually violent predator”. Almost all of the Bill of Rights has been incorporated into the Fourteenth Amendment and applied to the states, and Petitioner respectfully asks this Court to rule that the Jury Trial Clause of the Seventh Amendment should be so incorporated as to involuntary commitment proceedings such as the “sexually violent predator” laws. The question presented is:

Was Petitioner entitled by the Incorporation of the Seventh Amendment’s Jury Trial Clause into the Fourteenth Amendment to Trial By Jury in a State Civil Recommitment Proceeding in which he was alleged to remain a “Sexually Violent Predator?”

LIST OF PARTIES TO THE PROCEEDING

The Petitioner (the respondent-appellant below) is Robert Eugene Ayers, an involuntarily committed resident of the Virginia Center for Behavioral Rehabilitation, a mental health facility of the Virginia Department of Behavioral Health and Developmental Services, on the basis of a state court declaration that he is a “sexually violent predator”.

The Respondent (the defendant-appellee below) is the Commonwealth of Virginia, which runs the Virginia Center for Behavioral Rehabilitation, a mental health facility of the Virginia Department of Behavioral Health and Developmental Services.

RELATED PROCEEDINGS

Circuit Court of Danville, Virginia (No. CL07000431-00)

Commonwealth of Virginia v. Robert Eugene Ayers, Order of Recommitment (December 30, 2019) (unpublished)

Supreme Court of Virginia (No. 200472)

Robert Eugene Ayers v. Commonwealth of Virginia, Order Refusing Petition for Appeal (October 2, 2020) (unpublished)

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT EUGENE AYERS

-- PETITIONER

vs.

COMMONWEALTH OF VIRGINIA,

-- RESPONDENT.

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PETITION FOR WRIT OF CERTIORARI

**TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS / ORDERS BELOW

The final order of the highest state court to deny discretionary review of this case, the Supreme Court of Virginia, appears at Appendix A to the petition and is unpublished.

The final order of the trial court, the Circuit Court of the City of Danville, appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided this case, the Supreme Court of Virginia, was October 2, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the Constitution provides that “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

The Fourteenth Amendment to the Constitution provides in pertinent part that “No state shall *** 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

In a “sexually violent predator” recommitment hearing held on December 18, 2019 pursuant to Va. Code § 37.2-910, Ayers was recommitted by a state trial judge to the custody of the Virginia Center for Behavioral Rehabilitationa state mental health facility of the Virginia Department of Behavioral Health and Developmental Services – without the

participation of a jury, which Ayers had demanded *in limine* (with a copy emailed to opposing counsel the previous day) in a written Demand for Jury filed with the trial court on December 10, 2019, which raised *inter alia* procedural due process, the Seventh Amendment and the Fourteenth Amendment as reasons for the jury right – and in a written Memorandum on Demand for Jury filed with the trial court on December 12, 2019, which raised as additional authorities Blackstone, *see infra at 7*, and the *Ingram* case, *infra at 7*.

After the Demand for Jury ¹ was overruled by the trial judge *in limine*, with Ayers's objection being noted, the court proceeded with the recommitment hearing. ² It was established that Ayers had been previously convicted of the predicate crime of rape in the Circuit Court of the City of Danville in 1987 and sentenced to 30 years in prison, and that Ayers was initially declared a “sexually violent predator” in that same court on June 27, 2008 and received an in-patient commitment to the Virginia Department of Behavioral Rehabilitation on August 27, 2008, which was renewed through recommitment hearings under § 37.2-910 on November 23, 2010, June 11, 2014 (1 year), October 6, 2015 (1 year), July 28, 2016 (1 year),

¹ The jury was demanded for the purpose of deciding whether petitioner remained a “sexually violent predator,” but not whether he was amenable to conditional release.

November 6, 2017 (1 year), and December 30, 2019 (2 years, until November 2, 2021), the last hearing being the subject of this appeal. For each recommitment, the government must prove that Ayers remains a “sexually violent predator”. Va. Code § 37.2-910.

The testimonial evidence on the merits of the case then proceeded, with Ayers and the two doctors being present by videoconferencing.

Dr. Mario Dennis, the state expert, testified and opined that that Ayers, who has been at the Virginia Center for Behavioral Rehabilitation since September of 2008, remains a “sexually violent predator”.³ He diagnosed Ayers, *inter alia*, with antisocial personality disorder.

Dr. Alan von Kleiss testified as the second-opinion expert and opined that Ayers no longer remained a “sexually violent predator”, citing “protective factors” warranting such a conclusion including Ayers’ age of 61, and that Ayers’ condition of antisocial personality disorder, whilst still present in some aspects according to Dr. von Kleiss, had been “substantially diminished”, and he was not engaging in any behaviors that indicated his personality disorder was significantly active or would give any indication

² The Virginia statute in question, Va. Code § 37-2-910, provides for annual recommitment hearings for the first five years, and biennial hearings thereafter.

³ Dr. Dennis also opined that Ayers needed further in-patient treatment and was thus not presently amenable to conditional release.

that he was unable to control it, and was also interacting with his peers in an appropriate fashion.⁴

On the Static 99-R test, both doctors gave Ayers a score of 4, placing him in an above average risk category. Dr. von Kleiss also used the Brief Actuarial Rating Scale (“BARS”) test, on which he also scored a 4, but von Kleiss opined that the Static 99 is obsolete and no longer supported by the existing research.

Mr. Ayers, who was 61 years old at the time of the 2019 bench trial recommitment hearing, testified on his own behalf at the hearing.

The trial court that Ayers remained a “sexually violent predator”, and he was therefore recommitted until November 2, 2021, with a further biennial recommitment hearing being set on that date.

On appeal to the Supreme Court of Virginia, Ayers assigned error to the refusal of a jury trial by the trial court, on the basis (*inter alia*) that he had a common law right to a jury in such a proceeding as well as a federal constitutional right under the Seventh Amendment as incorporated under the Fourteenth Amendment. The supreme court refused discretionary review of the case on October 2, 2020. *See* Appendix B.

⁴ Dr. von Kleiss further testified that Ayers was amenable to conditional release assuming *arguendo* that he remained a “sexually violent predator”.

REASONS FOR GRANTING THE PETITION

This Court has held that civil commitment constitutes a significant deprivation of liberty which requires due process protection, *see, e.g.*, *Addington v. Texas*, 441 U.S. 418, 425 (1979)(citations omitted), and has also upheld the “sexually violent predator” type of commitment laws against certain challenges. *See Kansas v. Hendricks*, 521 U.S. 346 (1997); *cf. Kansas v. Crane*, 534 U.S. 407 (2002).

The Virginia courts have insisted the implementation of proper procedural due process protections in the “sexually violent predator” context. *See, e.g., Hood v. Commonwealth*, 701 S.E.2d 421 (Va. 2010) (extending right to counsel in Virginia “sexually violent predator” civil commitment proceedings to right to consult with counsel before deciding whether to cooperate with doctor appointed by the state to examine respondent), and *Jenkins v. Director of the Virginia Center for Behavioral Rehabilitation*, 624 S.E.2d 453 (Va. 2006) (right to counsel established in “sexually violent predator” civil commitment proceedings).

It is respectfully submitted that the Seventh Amendment’s Jury Trial Clause should be considered as incorporated into the Fourteenth Amendment and thus applicable to the states, at least to the extent of

involuntary mental health commitments – including “sexually violent predator” proceedings, which are obviously a sub-set of involuntary mental commitments in that they require proof of a “mental abnormality or personality disorder.” *See* Va. Code § 37.2-900.

Under the common law of England, codified as still in effect by Va. Code § 1-200, jury trials in mental health cases were held pursuant to a writ *de idiota inquirendo* and under a writ *non compos mentis* to decide if a man was a lunatic who had lucid intervals. As Blackstone explained:

By the old common law there is a writ *de idiota inquerendo*, to inquire whether a man be an idiot or not: **which must be tried by a jury of twelve men *****

1 William Blackstone, *Commentaries on the Law of England* 303-04 (italics in original; bold emphasis added). This passage of Blackstone was cited cited in *Ingram v. Commonwealth*, 741 S.E.2d 62 (Va.App. 2013), which rejected a right to jury in cases involving judicial authorization of medical treatment, on ground that no legal proceeding for forced medical treatment existed at common law.

Blackstone is corroborated in his discussion of the common law mental commitment jury requirement by John Brydall, Esq. (1635?-1705?), of Lincoln’s Inn, in one of his treatises which was written in 1700:

When the King is informed that one, who hath lands and Tenements, is a natural Fool from his Birth, the King may award his writ, called *Idiota inquirendo vel examinando*, which directed to the Escheator, or Sheriff of any County, where the King hath information, or understanding that there is an Idiot naturally so Born, so weak of understanding that he cannot govern or manage his Inheritance, to call before him the Party suspected of Idiocy and examine him; and also **to inquire by the Oaths of twelve Men, whether he be sufficiently witted** to dispos[e] ... his own Lands with discretion or not *** For in this case the Idiot in no Plea that he can plead, shall disable, or stultifie himself; but all is found by Office of the Inquisition, and **Verdict of twelve men, at the King's Suit ***** Altho' Mad-men themselves cannot be received to disable themselves, yet **twelve Men, upon their Oaths, may find the Truth of the Matter *****

Brydall, John, *Non compos mentis, or, The law relating to natural Fools, Mad-folks, and lunatic Persons inquisited and explained for common Benefit* (1700) 15, 39, 61 (italics in original; bold emphasis added).

This jury right travelled to America with the common law, and should be applicable to all involuntary mental health commitments, whether “sexually violent predator” cases or not.

Ayers submits that his jury demand in a “sexually violent predator” recommitment proceeding is covered by the writs discussed by Blackstone and Brydall, *supra*. In a regular (non-“sexually violent predator”) involuntary commitment hearing in Virginia under Va. Code § 37.2-814 *et seq.*, there is a right to trial by jury in both commitments and recommitments

– but the “sexually violent predator” law under Va. Code § 37.2-900 *et seq.* provides for juries in original commitments but does not mention a jury right for recommitments.

Why should “sexually violent predator” committees be deprived of their jury rights, and particularly for recommitments – which can continue indefinitely and amount to lifetime detention? Although “sexually violent predator” recommitments are annual for the first five years and biennial thereafter under Va. Code § 37.2-910, there is apparently no limit as to how long the cumulative recommitments can go on.

Since “sexually violent predator” commitment is for a “mental abnormality or personality disorder”, Va. Code § 37.2-900, making them a sub-species of general involuntary mental health commitments – for which there is a jury right in Virginia at original commitments and at recommitments.

Ayers thus submits that he has a Seventh Amendment right, which should be incorporated into the Fourteenth Amendment for application to the states, to demand a jury in this matter.

This is an issue of national importance because several states have special procedures for the civil commitment of “sexually violent predators” – and these raise numerous serious legal and societal issues, including the

pretext use of civil commitment to in effect increase “incarceration”, the unfair use of polygraphs and plethysmographs, as well as treatment issues like over-medication. If a medieval English “idiot” had the right to a jury in this context but a modern American mental patient apparently does not, certainly this Court should take up the debate to the extent permitted by the Constitution.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT EUGENE AYERS

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& Counsel of Record*

Dated: March 1, 2021

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 2nd day of October, 2020.

Robert Eugene Ayers, Appellant,

against Record No. 200472
Circuit Court No. CL07-431

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Danville

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

The said circuit court shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the court below.

Justice Mims took no part in the resolution of the petition.

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorney's fee \$950.00 plus costs and expenses

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:


Deputy Clerk

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF DANVILLE

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

Case No.: CL07-431

ROBERT AYERS.
Respondent.

RECOMMITMENT ORDER

On the 18th day of December 2019, came the Petitioner, by counsel, and the Respondent, who appeared by video in accordance with Virginia Code § 37.2-910(A) and who was represented by counsel, and the Court took evidence and heard argument concerning the biennial review of the Respondent's civil commitment as a sexually violent predator pursuant to Virginia Code § 37.2-910.

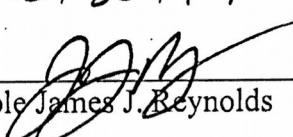
Upon careful consideration of the reports of Dr. Mario Dennis and Dr. Alan von Kleiss filed in accordance with Virginia Code §37.2-910(B), evidence introduced, and arguments of counsel, the Court hereby FINDS:

1. the Commonwealth has proven by clear and convincing evidence that the Respondent's mental abnormalities and personality disorder have not so changed that he no longer presents an undue risk to public safety. Respondent thus remains a sexually violent predator; and
2. the Commonwealth has proven by clear and convincing evidence that the Respondent does not meet all 4 criteria for conditional release set forth at Virginia Code § 37.2-912; thus, there is still no suitable less restrictive alternative to involuntary secure inpatient treatment.

It is further ADJUDGED, ORDERED AND DECREED that:

- 1) the Respondent, Robert Ayers, be recommitted to the custody of the Department of Behavioral Health and Developmental Services ("DBHDS") for appropriate treatment and confinement in a secure facility designated by the Commissioner of DBHDS;
- 2) the Respondent's next biennial review shall be scheduled at docket call held on **November 2, 2021**.
- 3) the Commissioner of DBHDS shall provide a report to the Court, the Office of the Attorney General, and Respondent's counsel no later than sixty (60) days prior to the biennial review hearing, reevaluating the Respondent's condition and recommending treatment pursuant to Virginia Code § 37.2-910(B);
- 4) the appointment of counsel for the Respondent shall be deemed continuing in nature;
- 5) the Respondent remains under the jurisdiction of this Court and shall not be released from custody and inpatient hospitalization until further order of this Court.

ENTERED: 12/30/19


The Honorable James J. Reynolds

Endorsements of counsel are on the following page.

SEEN AND AGREED:

Susan Barr

Susan Barr
Senior Assistant Attorney General
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VSB#: 30379

SEEN AND objected to: for the reasons argued at the hearing, to-wit
trial by jury was denied & there was no clear & convincing
James C. Martin proof that Respondent remained
James Martin a sexually violent predator
Martin & Martin Law Firm
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Danville, VA 24543-0514
Counsel for Respondent
VSB# 27968