

AUG 19 2022

OFFICE OF THE CLERK

No. 22-6238

IN THE
SUPREME COURT OF THE UNITED STATES

David N. Firewalker-Fields PETITIONER
(Your Name)

vs.

Harold w. Clarke — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fourth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David N. Firewalker-Fields #1147520
(Your Name)

1821 Estaline Valley Road
(Address)

Craigsville, Va 24430
(City, State, Zip Code)

(Phone Number)

ORIGINAL

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QUESTION(S) PRESENTED

- I. did the District Court and Court of Appeals err in not grantin a certificate of appealability due to a procedural default caused by the Circuit Court withholding evidence.
- II. Does the conditions of supervision as applied violate the First Amendment of the United States Constitution

LIST OF PARTIES

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:

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Fazili v. Commonwealth, 71 VA. App. 239 (2019.)
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Packingham v. North Carolina, 137 S.Ct 1730 (2017)
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United States v. Johnson, 138 F.3d 115 (4th Cir. 1998)
United States v. Van Donk, 961 F.3d 314, 325-326
Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977)
Withrow v. Williams, 507 U.S. 680, 716 (1993)

Statutes and Rules

28 U.S.C § 2244(d)(1)(A)

28 U.S.C § 2253(c)

28 U.S.C § 2254

Fed. R. Civ. Proc. Rule 60(b)(2)

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 A 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 is unpublished.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 B 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 is unpublished.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 _____ 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 _____ appears at Appendix _____ to the petition and is _____ court

reported at _____; 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 August 3, 2022.

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).

For cases from **state courts**:

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

A timely petition for rehearing was thereafter denied 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Case involves the First Amendment to the United States Constitution as well as the First Amendment to the Virginia Constitution. It also involves 28 U.S.C. §2253(c) of the United States Code.

STATEMENT OF THE CASE

The petitioner, David N. Firewalker-Fields, pro se, filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C §2254. The petitioner is challenging a revocation of his probation from 2018. This revocation hearing stems from an order dated in 2007 from the Page County Circuit Court which states "the defendant is not to use or have access to the internet or smartphones" during the term of his probation. The petitioner has asserted a First Amendment Freedom of Speech claim throughout the entirety of his proceedings.

On December 15, 2020 the petitioner was advised by the District Court that his petition appeared to be untimely and gave him time to respond with further evidence. At that time the petitioner did not know about the 2018 Amended Revocation Order. Upon learning about the Amended Revocation Order in 2021 the petitioner sought relief from the judgment due to the fact that this Amended Revocation Order made the petitioner's petition in fact timely under the Federal Rules of Civil Procedure.

I. THIS COURT HAS LONG RECOGNIZED THAT FACTORS EXTERNAL
TO THE PETITIONER PROVIDE CAUSE TO EXCUSE A
PROCEDURAL DEFAULT

" The writ of habeas corpus is one of the centerpieces of our liberties." McCleskey v. Zant, 499 U.S. 467,496 (1991). From chief justice Marshall to Chief Justice Roberts, this court has recognized the availability of the writ ultimately is governed by equitable principles. See Ex Parte Watkins, 28 U.S. (3 Pet 193) 193,201(1830) (Marshall,C.J.)(" No doubt exists respecting the power [of the Court to issue the writ]; the question is, whether this be a case in which it ought to be exercised."); Munaf v. Green, 533 U.S. 674,693 (2008)(Habeas is " governed by equitable principles'") (Roberts,C.J.)(citation omitted). The focus on equity not only reflects "a long standing historic tradition," but also congress's express statutory command. Withrow v. Williams, 507 U.S. 680, 716 (1993)(scalia,J., concurring in part dissenting in part); see ID.(noting that " The text of the federal habeas statute... enjoins the court to 'dispose of the matter as law and and justice require.'") (quoting 28 U.S.C §2243)

This Court has limited adjudication in federal habeas corpus in state court because of concerns surrounding the "costs of federal habeas review in such circumstances. McCleskey, 499 U.S. at 490-91. At the same time, however this Court has ~~also~~ stressed that the federal courts have the "power to excuse.... defaulted claims" in exercising their "equitable discretion" in administering the writ. Id. at 490; see Reed v. Ross, 468 U.S. 1,9 (1984)(this Courts decisions have "uniformly acknowledged that federal courts are empowered under §2254 to look beyond a

state procedural forfeiture and entertain a prisoners contention that his constitutional rights have been violated."); Withrow 507 U.S. at 717-18 ("equitable principles" govern whether a state procedural default should be excused so that a petitioner may obtain review of his habeas claims in federal court)(Scalia.J concurring in part and dissenting in part).

When a habeas petitioner's claims are procedurally defaulted pursuant to an adequate state rule, federal habeas review is available to petitioners who can demonstrate "cause" for and "prejudice" from the default. Coleman v. Thompson, 501 U.S. 722, 750 (1991); See Wainwright v. Sykes, 433 U.S. 72, 90-91(1977). Consistent with equitable principles, this Courts inquiry into cause has focused on whether the cause of the procedural default may be "fairly attributable" to the petitioner or to some "external" factor.

In our federal system, states have undeniable leway in fashioning and implementing their systems of criminal justice. The choices made by the Commonwealth of Virginia to not only hold a "secretive Closed door amended revocation hearing" a year after the initial probation revocation hearing not only violated Double Jeopardy it was also a blatant slap in the face of this and all Honorable Courts to fail to disclose the "Amended Revocation order" when the District Court requested the case file.

On December 15, 2020 the petitioner was advised by the District Court that his petition appeared to be untimely filed and gave him the opportunity to respond with further evidence. At the time Mr. Firewalker-Fields did not know about the

"Amended Revocation Hearing". It was not until he had an attorney appointed (Ms. Laura Bateman, Georgetown University Appellate Clinic) by the Court of Appeals for the Fourth Circuit in Firewalker-Fields v. Albertson ,et al, Record NO:20-6884 that the Amended Revocation Order was discovered through the compilation of the joint appendix with the Attorney Generals Office.

The District Court stated on page 3 of the Memorandum opinion dated March 19, 2021 that "For the purposes of this opinion, the Court will use the most recent sentence, the August 28, 2017 sentence imposed upon his second probation violation, as the appropriate judgment for purposes of calculating the limitation period.

Under §2244(D)(1)(A), Firewalker-Fields's conviction became final on June 27, 2018 when the Amended Revocation Order was signed by Page County Circuit Court Judge Clarke Ritchie and not the September 17, 2017 revocation order signed by Judge Ritchie (see case no: 7:20-cv-00745 Document 18-1 Pg. 3 of 6)

The Fourth Circuits own reasoning in the context of supervised release conditions suggests that the later date may be appropriate, depending on the nature of the challenge to the condition. Cf. United States v. Van Donk, 961 F.3d 314, 325-326 (4th Cir 2020)(recognizing prior case law including United States v. Johnson, 138 F.3d 115(4th Cir 1998), holds that a defendant may not challenge the special conditions of his original term of supervised release during revocation proceedings, but that concluding that an as-applied challenge may be brought as part of revocation proceedings. Mr. Firewalker-Fields's whole

habeas petition is centered around the fact that the condition as applied is Unconstitutional and requests a modified application of the conditions.

In January 2022 after learning about the "secretive Amended Revocation Order". Mr. Firewalker-Fields filed a Fed.R.Civ.Proc Rule 60(b)(2) Motion for relief from the District Court order dismissing his 28 USC §2254 petition. The Court of Appeals erred in determining that Mr. Firewalker-Fields had not shown that the District Courts assessment of the Constitutional claims were debatable or wrong. For this reason Certiorari should be granted.

REASONS FOR GRANTING THE PETITION

II. Violates the First Amendment.

The Free Speech Clause of the First Amendment permits a State to "enact specific, Narrowly- tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime". Packingham v. North Carolina, 137 S.Ct 1730(2017). Neutral state action that implicates a speech interest, like probation conditions limiting a sex offenders access to the internet, is therefore subject to intermediate scrutiny, and must be narrowly tailored to serve a significant governmental interest. See Packingham, 137 S.Ct. at 1737; see also McCullen v. Coakley, 573 U.S. 464,486 (2014). The Virginia Court of Appeals held in Fazili v. Commonwealth, 71 Va. App. 239 (2019) that " the circuit court articulated no justification for how imposing that restriction (ie. Same total internet ban as petitioners) on defendant fundamental right to free speech under the First Amendment and Va. Const. Art I. §2 would serve any rehabilitative or public safety purpose; and that restriction burdened substantially more speech than is necessary to further the governments legitimate interests and was not narrowly tailored." In Packingham v. North Carolina, the Supreme Court struck down a North Carolina law that made it a felony for registered sex offenders to access social media websites. Packingham, 137 S. Ct at 1738. The Court found that the statute was a "complete bar to the exercise of First Amendment rights on websites integral to the fabric of modern society and culture" and that North Carolina had not "met its burden to show that [the total ban] is necessary or legitimate" to serve the preventative purpose of keeping convicted sex

offenders away from potential victims. Packingham, 137 S. Ct. at 1737. Mr. Firewalker-Fields was told by his probation officers Travis Hopkins and Joseph Smith that Judge Albertson had completely banned him from accessing the internet and possessing a smart phone. In doing so, Mr. Firewalker-Fields has stated a plausible Free Speech claim because a total internet ban is even more of a "complete bar" to the exercise of his First Amendment rights than the social media ban invalidated in Packingham. The Commonwealth Defendants must now meet their burden of showing that a total ban is narrowly tailored to serve either a rehabilitative or public safety purpose. See Id. at 1737; see also McCullen v. Coakley, 573 U.S. 464, 486 (2014)

III. The Court of Appeals erred in not granting a
Certificate of Appealability

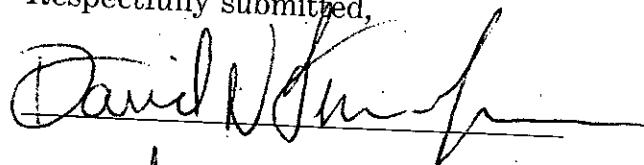
The Fourth Circuit has held in Grueninger v. Dir., Va. Deptt of Corr, 813 F.3d 517,523 (4th Cir 2016) that "We review the district courts denial of a habeas petition de novo." In her dismissla order Judge Dillon states " Because Firewalker-Fields has failed to make a substantial showing of the denial of a constituitonal right as required by 28 u.s.c §2253(e), a certificate of appealability is denied." In 28 U.S.C§2253(c) it states in (2) that " A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right. Mr. Firewalker-Fields's entire Petition for a Writ of HAbeas Corpus is based on the premise and evidentiary case law that the "Total Internet Ban" Violates The First Amendment of the United States Constitu-

tion. Therefore the Court of Appeals erred in not following the prescribed Statutory requirements for granting a certificate of Appealability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David W. Johnson". The signature is fluid and cursive, with "David" and "Johnson" being the most distinct parts.

Date: August 25, 2022