App. No. ___

IN THE

SUPREME COURT OF THE UNITED STATES

DEMMERICK ERIC BROWN,
Petitioner,

v.

KAREN D. BROWN, HAROLD CLARKE, WENDY BROWN,
Respondents.

PETITIONER'S APPLICATION TO EXTEND TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN J. KORZEN
Counsel of record
WAKE FOREST UNIVERSITY SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
P.O. Box 7206
Winston-Salem, NC 27109
336-758-5832
korzenjj@wfu.edu

Counsel for Petitioner

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To the Honorable Chief Justice John G. Roberts, Jr., as Circuit Justice for the United States Court of Appeals for the Fourth Circuit.

Petitioner Demmerick Eric Brown respectfully requests that the time to file a petition for a writ of certiorari in this case be extended for 45 days, to and including September 29, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1). A copy of the opinion of the court of appeals of which review will be sought, *Demmerick Eric Brown v. Karen D. Brown et al.*, No. 20-6448 (4th Cir. 2022), is attached hereto. The judgment of the United States Court of Appeals for the Fourth Cicuit was entered on April 20, 2022. Petitioner timely sought rehearing en banc, which was denied by order entered on May 17, 2022, a copy of which is attached hereto. Absent an extension of time, the petition would be due on August 15, 2022. Petitioner is filing this application well before the ten-day deadline. *See* S. Ct. R. 13.5.

BACKGROUND

Petitioner intends to seek a writ of certiorari on the grounds that the decision below is in conflict with decisions of this Court and of other circuits and that this case involves an important, recurring issue concerning whether changes to state statutes and probation board policies that eliminate good-time credits previously earned by paroled prisoners violate the Ex Post Facto Clause.

Petitioner is a sixty-three-year-old Black male. In January 1984 and several dates in 1987, while in his twenties, he committed a string of larceny and other

offenses. JA 147-48. He received consecutive sentences, due to the offenses being committed in different counties on different dates. *See* JA 152-54. He was eligible for discretionary parole for the one offense committed in 1984 but not eligible for discretionary parole for the offenses committed in 1987. JA 15-16.

Brown was eligible to earn "good time" credit for his behavior while incarcerated. JA 143. Good time is used to reduce a prisoner's time of confinement. JA 143. From the 1980s through October 2013, Brown earned more than twenty-three years of good time credit. JA 150. He earned the good time credit by participating in rehabilitation, therapeutic, and vocational programs; performing certain work duties; and maintaining good behavior. JA 95.

When Brown was sentenced back in the 1980s, the then-existing Virginia Parole Board policy entitled a prisoner to complete the service of each consecutive sentence one at a time once he had served the required term for that sentence less good time credit. *Woodley v. Dep't of Corr.*, 74 F. Supp. 2d 623, 629 (E.D. Va. 1999). After one sentence was complete, the prisoner would begin serving the next sentence, which would similarly be completed when he served the term imposed less good time credit, "and so on" until the prisoner began serving the last sentence imposed. *Id.* After a sentence was completed, "it was treated as though the inmate had served it in its entirety when he was paroled." *Id.*

In 1942, the Virginia General Assembly had enacted the state's first parole system, which was discretionary parole. JA 101. Procedures for revocation of discretionary parole were set out in a statute. *See* VA. CODE ANN. § 53.1-165.

The Virginia General Assembly later created "mandatory parole." *See* VA. CODE ANN. § 53.1-159. Unlike discretionary parole, which depends on subjective evaluations and predictions of future behavior, "mandatory parole" provides that every inmate "shall be released on parole by the Virginia Parole Board six months prior to his date of final release." *See id.*

In 1994, the Virginia General Assembly abolished discretionary parole for felonies committed in and after 1995. Michael A. Fletcher, *Virginia attacks crime by abolishing parole, lengthening prison sentences*, The Baltimore Sun (Oct. 2, 1994), https://www.baltimoresun.com/news/bs-xpm-1994-10-02-1994275041-story.html.

Along with abolishing *discretionary* parole for felonies committed in or after 1995, the Virginia General Assembly also amended the *mandatory* parole statute, section 53.1-159. The amendment stated that, for persons released on mandatory parole whose parole is subsequently revoked, "[f]inal discharge may be extended to require the prisoner to serve the full portion of the term imposed by the sentencing court which was unexpired when the prisoner was released on parole." VA. CODE ANN. § 53.1-159. The amendment defined "final discharge" to mean that a prisoner had to serve "the full term imposed by the sentencing court *without regard to good conduct credit*." *Id.* Unlike the amendment to the discretionary parole statute, which was expressly limited to felonies committed in the future (in or after 1995), the amendment to the mandatory parole statute was not limited to prospective application.

In 1995, the Virginia Parole Board adopted a new policy regarding mandatory parole pursuant to the amended section 53.1-159. The new parole board policy provided as to mandatory parole that:

> The Virginia Parole Board shall upon revocation of parole pursuant to 53.1-159, require the prisoner to serve the full portion of the term imposed by the sentencing court which was unexpired when the prisoner was released on parole without regard to good conduct credit.

Virginia Parole Board Policy Manual, Part II.J.4 (July 1997). The effect of the statutory amendment and new parole board policy was that the parole board would require prisoners violating conditions of mandatory parole to serve time previously credited to them for good conduct, which the board had not previously required.

Brown became eligible for discretionary parole on his sentence dating back to 1984 in October 2011, the only sentence for which he was eligible for discretionary parole, which indicates that he had served the six consecutive sentences for which he was not eligible for discretionary parole. *See* JA 60-62, 87-88, 118, 149, 181, 441. He was denied discretionary parole from the 1984 sentence in 2011 and again in 2012. JA 289.

On October 2, 2013, Brown was released from the custody of the Virginia Department of Corrections pursuant to mandatory parole under section 53.1-159. JA 64-65, 123-24, 130-31.

On January 25, 2015, following Brown's mandatory parole, the Chesapeake Circuit Court sentenced Brown to a term of three years for a grand larceny he committed in March 2014 and was arrested for in November 2014. JA 150.

On August 3, 2015, Brown's mandatory parole was revoked due to that latest conviction, a violation of his parole conditions. JA 155-56. At the same time, all the accumulated good time credit Brown had earned since the 1980s was imposed on his period of incarceration—23 years, 8 months, and 11 days. JA 155-56, 396, 406.

The reason for imposing 23 years, 8 months, and 11 days of earned good time on Brown's incarceration was the Virginia Parole Board policy that took effect on May 11, 1995—after Brown's sentences in the 1980s. *See* JA 156, 165. That policy was adopted pursuant to Virginia Code § 53.1-159, the mandatory parole statute amended in 1994. *See* JA 156, 165.

Four months after the parole board had revoked his mandatory parole and imposed more than twenty-three years of previously earned good time on his time to serve, Brown filed a *pro se* habeas petition in the Virginia Supreme Court on December 10, 2015. JA 278.

The crux of Brown's claims—the "fulcrum" as he put it, JA 335—was that the Virginia Parole Board had violated his constitutional rights when it revoked his mandatory parole and forfeited all the earned good time he had accumulated over the years. *See* JA 317, 384.

The Virginia Supreme Court dismissed Brown's state habeas petition in a summary order giving two reasons for the dismissal. JA 408. Neither basis for dismissal reached the merits of Brown's constitutional claims that the parole board's application of laws adopted in 1994 and 1995 to forfeit the earned good time

he had accumulated since the 1980s violated Brown's rights under the Ex Post Facto Clause. JA 408.

Fewer than eight months after the Virginia Supreme Court dismissed his state habeas petition, Brown filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Virginia. JA 6. Respondents conceded that he had exhausted his state remedies. JA 132.

After briefing, the district court entered a memorandum opinion and order allowing Respondents' motion to dismiss, on March 18, 2020. JA 440-59. In a separate order, the district court "expressly decline[d] to issue" a certificate of appealability on any issue. JA 458. Petitioner timely filed a notice of appeal and sought a certificate of appealability. JA 461-62.

The Fourth Circuit appointed counsel and granted a certificate of appealability on four issues, three procedural issues regarding the timing of Brown's petitions and one on the constitutional violations he alleged. *See* CM/ECF Fourth Circuit Case No. 20-6448, Doc. 20.

After briefing and oral argument, the Fourth Circuit held that Petitioner's habeas corpus action was not untimely or otherwise procedurally barred, *see* Slip Op. at 10-13, but held that his *ex post facto* claim was "meritless" because of an on-point previous Fourth Circuit decision that the Court held was not "untenable with Supreme Court decisions." *See* Slip Op. at 13-17. The Fourth Circuit followed its previous decision in *Warren v. Baskerville*, 233 F.3d 204 (4th Cir. 2000).

Petitioner contends that *Warren* is inconsistent with decisions of this Court and other circuits. In particular, the court below held in *Warren* that "[a] change in an administrative policy that was in effect at the time of a criminal's underlying offenses does not run afoul of the prohibition against ex post facto laws." *Id.* at 207. The court also held that the parole board already had discretion, before 1995, to revoke good time credit upon parole violations, but that holding was based on an inapplicable statute (section 1-165 governing discretionary parole), not the statute applicable to mandatory parole that had been amended in 1994, section 1-159.

Petitioner contends that *Warren*, and the court below's application of it, is inconsistent with decisions of this Court and other circuits. *See Peugh v. United States*, 569 U.S. 530, 544 (2013) (rejecting government's argument that sentencing guidelines lack sufficient legal effect to attain the status of a law within the meaning of the Ex Post Facto Clause); *Garner v. Jones*, 529 U.S. 244, 245-50 (2000) (holding that controlling inquiry is whether retroactive application of parole changes creates a sufficient risk of increasing punishment attached to covered crimes); *Johnson v. United States*, 529 U.S. 694, 700-01 (2000) (stating that post-revocation penalties are part of the original offense for *ex post facto* analysis); *Greenfield v. Scarfati*, 277 F. Supp. 644 (D. Mass. 1967) (three-judge court) (holding that statutory amendment providing individuals would lose good-conduct credit after parole violation was unconstitutional *ex post facto* law), *summarily affirmed*, 390 U.S. 713 (1968); *Michael v. Ghee*, 498 F.3d 372, 383 (6th Cir. 2007) (stating issue is not whether parole guideline is a law but whether guideline presents a

significant risk of increasing amount of time served); *Fletcher v. Dist. of Columbia*, 391 F.3d 250, 251 (D.C. Cir. 2004) (holding that under *Garner* either measure with force of law or guidelines that are merely policy statements can support *ex post facto* claim); *Mickens-Thomas v. Vaughn*, 321 F.3d 374, 386 (3d Cir. 2003) (holding parole board policy is subject to *ex post facto* analysis when sufficiently discernible criteria suggest to reviewing body that new retroactive policies are being applied against offender's interest).

REASONS FOR GRANTING AN EXTENSION OF TIME

Petitioner requests a 45-day extension of time in order to prepare an adequate petition for certiorari. The undersigned counsel was appointed by the Fourth Circuit in his role as Director of the Appellate Advocacy Clinic at Wake Forest University School of Law. Three soon-to-be third-year law students will assist in the research and drafting of the petition. Their law school semester does not start until August 22, 2022. The three law students are new to this case, because other now-graduated law students worked on the briefs (and orally argued) in the Fourth Circuit. All three of the students who will be working on the petition for certiorari have full-time summer employment: one at a law firm in Charlotte, North Carolina; one at a law firm in Denver, Colorado; and one at a law firm in Tampa, Florida. Due to their full-time employment in different states, they have little time to work on the petition for certiorari before the current deadline. In addition, the undersigned counsel has several time conflicts over the next two

months, including two oral arguments tentatively scheduled during the week of September 12, one in the Fourth Circuit and one in the Eleventh Circuit.

CONCLUSION

For the foregoing reasons, Petitioner asks for the time to file a petition for a writ of certiorari to be extended by 45 days, to and including September 29, 2022.

Respectfully submitted,

JOHN J. KORZEN
Counsel of record
WAKE FOREST UNIVERSITY SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
P.O. Box 7206
Winston-Salem, NC 27109
336-758-5832
korzenjj@wfu.edu

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