

23-6377
No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED

DEC 19 2023

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Ryan F. Duncan — PETITIONER
(Your Name)

vs.
Florida Commission on
Offender Review — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

First District Court of Appeal, State of Florida
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ryan F. Duncan
(Your Name)

Jefferson C.I., 1050 Big Joe Rd.
(Address)

Monticello, FL 32344
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Is the prohibition against Double Jeopardy a form of constitutional immunity that is secured against state actions under the 14th Amendment's Privileges or Immunities clause?
2. Does Double Jeopardy apply only in judicial proceedings, or is it implicated whenever the government seeks to impose additional sanctions to a court-imposed punishment via administrative action?
3. Can a person, while under punishment for a crime, invoke Double Jeopardy protections when the government failed to provide a timely or adequate notice of additional and mandatory sanctions so as to deprive him of a meaningful opportunity to raise his objections?
4. Is a citizen deprived of the equal protection of the law if the government employs a weaker standard of protection for a fundamental right, rather than its usual standard, in a proceeding that has substantial implications upon a person's liberty and property interests?

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:

RELATED CASES

Duncan v. State of Florida, petition for writ of certiorari to Florida's Fifth District Court of Appeal, filed December 11, 2023.

Duncan v. State, Fifth District Court of Appeal case no. 5023-827; per curiam affirmed trial court dismissal on September 12, 2023

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

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

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ 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.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix I 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 Second Judicial Circuit court appears at Appendix G to the petition and is

☐ 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 _____.

☐ 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 September 20, 2023
A copy of that decision appears at Appendix I.

☐ 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

U.S. Constitution:

- Article IV, section 2: The citizens of each state shall be entitled to all privileges or immunities of citizens in the several states
- 5th Amendment: Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.
- 14th Amendment, section 1: 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 to any person within its jurisdiction the equal protection of the laws.

Florida Statute 947.1405. See Appendix J for text.

Statement of the Case

In 2011, Petitioner Ryan F. Duncan pled guilty to one count of unarmed robbery before Florida's 4th Judicial Circuit Court in Duval county; case no. 2010-CF-8276. He was classified as a habitual felony offender ("HFO"), and sentenced to an extended prison term of 20 years. Mr. Duncan was never informed that any HFO sentence would carry with it a mandatory term of supervision^①, or that additional sanctions can be imposed as conditions of that supervision. For more information about these original proceedings, please see Mr. Duncan's companion petition; *Duncan v. Florida*, petition for a writ of certiorari to Fifth District Court of Appeal, State of Florida (filed December 11, 2023).

Upon reception into Florida Department of Corrections ("FDC"), Petitioner was informed of only his maximum release date (April 11, 2030) and his earliest release date (April 11, 2027). There was no notice given that his "early release date" would be subjected to mandatory supervision, despite FDC's role in its implementation. See e.g. Fla. Stat. 944.291(2) and 947.1405(5). It would not be until a June 10, 2020 letter from the Florida Commission on Offender Review ("Commission", "FCOR", or "Respondent") that informed Mr. Duncan that, not only was he eligible for supervised release, but he will be required to participate in the program. Appx. A.

Between 2020 and 2022, Petitioner corresponded with the Commission to inquire about the supervision, and the conditions that will likely be imposed. Appx. B. The Commission responded with general statements, references to its rules and governing statutes, as well as providing limited data on violations.^② Appx. C.

① See Fla. Stat. 947.1405(2)(b) of the Conditional Release Program Act.

② According to the Commission's own statistics, provided in a letter dated September 21, 2021, stated that only 58% of releasees complete their supervision without revocation (note the omission of how many complete the supervision without any violations), and that 27.2% of revocations are for technical violations.

On June 8, 2022, Mr. Duncan filed a petition to Florida's 2nd Judicial Circuit Court in Leon County for a writ of prohibition against the Commission; case no. 2022-CA-1005. See Appx. D. He contended that certain terms and conditions of supervision, if imposed, would render his sentence more onerous than his current state of incarceration^①, thereby (A) violating his double jeopardy protections; which ~~(B)~~ constitutes an abridgement of his 14th Amendment rights under the Privileges or Immunities clause; and (C) will deprive him of the equal protection of the law by a state agency doing what a court is constitutionally prohibited from doing. Id. pg. 6.

The petition did not attack Mr. Duncan's "guilty plea, or the ... judgment and sentence" that gave rise to his eligibility for post-prison supervision. Id. pg. 3. Instead, he relied upon his sentence - as imposed - as "being legal and final, thereby binding upon him and the government". Id. However, to address the sentencing court's failure to advise him of the mandatory obligation of post-prison supervision - the due process violation - Petitioner filed a postconviction motion with that court. See the companion petition for that argument.

On July 25, 2022, FCOR filed its response to the petition. Appx. E. The Commission's position was that Mr. Duncan's claims

- ③ On July 5, 2022, the circuit court entered an order deeming the petition as one seeking mandamus relief based on a misconception that Petitioner was challenging his eligibility for supervision, rather than as a challenge to the potential terms and conditions of his supervision.
- ④ Some of the conditions Mr. Duncan challenges includes polygraph testing at his own expense (i.e. a financial sanction); payment for supervision with electronic monitoring for 3 years - the length of his supervision - resulting in a steep cost to Mr. Duncan at approximately \$16,000 for "earning" his good-time credits by being productive, taking classes, and staying out of trouble; and any other special condition the Commission may impose - a term that is vague.

were either (1) unripe because he was still years away from being placed on supervision; or (2) meritless because his sentence had always included a period of supervision. *Id.* Petitioner filed a reply to the Commission's response, Appx. F.

On September 21, 2022, the circuit court denied Mr. Duncan's petition. Appx. G. The court found the claims to be premature because the Commission had not yet determined "that Petitioner is subject to release on conditional release supervision ... [a]s such there is no present controversy". *Id.* pg. 3. Nevertheless, the court denied the claims as meritless. The court denied Petitioner's double jeopardy under the state supreme court's decision in *Duncan v. Moore*, 754 So. 2d 708 (Fla. 2000).^⑤ Appx. G pg. 5. The court then denied Mr. Duncan's 14th Amendment Privileges claim by finding that (1) there is no double jeopardy with conditional release supervision, and (2) asserting that the U.S. Supreme Court in *McDonald v. City of Chicago*, 561 U.S. 742 (2010) reaffirmed its prior, narrow interpretation of the clause under the Slaughterhouse cases, 83 U.S. 36 (1873), and declined to accord it anymore weight. Appx. G pg. 7-9. Finally, the court denied Petitioner's equal protection claim by applying a rational basis test, rather than a strict-scrutiny test, and citing to *Duncan*, 754 So.2d at 711. Appx. G pg. 9.

On October 21, 2022, Petitioner Duncan filed a petition for a writ of certiorari to Florida's First District Court of Appeal,

- ⑤ Under Florida Supreme Court's decision in *Duncan v. Moore*, conditional release supervision does not violate double jeopardy because his sentence, by statute, included a period of supervision. What the Court did not address, and what Petitioner has asserted, is whether certain conditions - distinct from the act of supervision - run afoul of double jeopardy principles by rendering Petitioner's sentence more onerous than actually imposed. See Section II of the Reasons for Granting the Petition below.

to review the circuit court's order of denial; case no. 17-02-3407.
Appx. H. The state appellate court denied the petition on
September 20, 2023. Appx. I.

Reasons for Granting to Petition

I This Court's Slaughter-house decision is inconsistent with this Court's jurisprudence on fundamental rights and incorporation against state infringement

In its first case to decide the reach of the 14th Amendment, and what its "Privileges or Immunities" Clause entails, this Court in the Slaughter-house cases restricted its meaning to barely more than what the clause means under Article IV section 2 of the U.S. Constitution; That is :

To come to the seat of government to assert any claim [a citizen] may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions ... [and to] become a citizen of any State of the Union ...

Slaughter-house cases, 83 U.S. at 79-80. In evaluating the definition of "Privileges or Immunities" under the 14th Amendment, the Court considered the clauses under the Articles of Confederation, and Article IV of the current constitution. *Id.*, 83 U.S. at 75. The Court recognized its prior adoption of another court's definition :

What are the privileges or immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental : which belong of right to the citizens of all free governments ... [W]hat these fundamental principles are, it would be more tedious than difficult to enumerate.

Id., 83 U.S. at 76 (quoting Ward v. Maryland, 12 Wall. 430, 20 L. Ed. 452 (1864)).

Despite recognizing that "immunities and privileges" are fundamental rights of citizens of all free governments, the Court feared that the 14th Amendment would allow Congress to pass laws in advance to limit or restrict the state's legislative powers. Further, the Amendment would allow the Supreme Court to act as a perpetual censor ^⑥ upon all state legislation. In order to curb that potential consequence, the Court applied a bit of *ex vi termini* ^⑦ logic to its reasoning:

It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the words "Citizen of the State" should be left out when it is so carefully used, and used in contradistinction to "citizens of the United States" in the very sentence which precedes it.

Slaughterhouse, 83 U.S. at 74. But the Court's logic is refuted by the Amendment's text: "No state shall make or enforce any law..." 14th Amendment, sect. 1. Who makes a state law? The legislature does. Who enforces the law? The state executive branch does. Thus, by its very text, the Amendment does restrict the state's legislative power - a recognition given by this Court's later precedents. See e.g. *Fulton v. City of Philadelphia*, 141 S. Ct. 1806, 210 L. Ed. 2d 137, 166 fn. 27 (2021) (Alito, J. concurring). Moreover, the Court's logic is contradictory:

⑥ The Court's fear, however, materialized under the Due Process Clause. See e.g. *Lochner v. New York*, 198 U.S. 45 (1905).

⑦ Similar logic was applied in *Hurtado v. California*, 110 U.S. 516 (1884) where the Court found that the 5th Amendment's grand jury clause did not apply to the states under the 14th Amendment because it was not included in the Amendment, as Due Process was. This reasoning has been swept away by later court precedents that have incorporated parts of the Bill of Rights under the Due Process Clause; see e.g. *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy).

how can a person be a citizen of a state, but not a citizen of the United States? A person can be a citizen of the United States without being a citizen of a particular state, but the opposite is not true.

Given this Court's history of incorporating fundamental rights against state actions, specifically those found within the Bill of Rights, Petitioner prays that this Court grant his petition to reconsider its prior holding in the Slaughter-house cases, and the logic therein.

II. The Court should adopt a holistic approach to the 14th Amendment as it pertains to incorporating fundamental rights, and their application against State infringement.

In *McDonald v. City of Chicago*, 561 U.S. 742, 177 L.Ed. 2d 894 (2010), this Court considered a petitioner's argument that the 2nd Amendment was secured under the 14th Amendment's Privileges or Immunities Clause against state/city actions. However, the court declined to recede from its narrow decision in *Slaughterhouse* cases because the "petitioners were unable to identify the clause's full scope", and that "[f]or many decades, the question of the rights protected by the [14th] Amendment... has been analyzed under the Due Process Clause". *McDonald*, 561 U.S. 742, 177 L.Ed. 2d 894, 908^⑥

Mr. Duncan prays that this Court grant his petition, and to consider and adopt a "whole" body approach to considering and applying the 14th Amendment's protections. In *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), this Court first recognized that there was a "synergy" between the Due Process and Equal Protection clause, but could not define it. Petitioner contends that this "synergy" actually exists between all three clauses. Particularly so, given that all three clauses are contained within the same section of the Amendment, and are separated only by a semi-colon, and not a period. This indicates that there is a continuing thought or statement between the three clauses, demonstrating that there is a correlation between the clauses, and should be applied in such a manner. Mr. Duncan provides a sample:

1. The Privileges or Immunities Clause - This would be the substantive component of whether a fundamental right is protected against state infringement. In order for the right to be secured against state infringement under the 14th Amendment, the right must

⑥ The state circuit court erroneously found that this Court in *McDonald* reaffirmed its narrow holding of the 14th Amendment's Privileges or Immunities Clause under *Slaughterhouse*. See Appx. G.

be as a citizen of the United States. To meet this standard, the right must derive from the U.S. Constitution, an Amendment to the U.S. Constitution, an act of Congress (within its constitutional authority),^⑨ a lawful executive order by the President of the United States, or a recognition of a right by a super-majority of states (ie. enough to have constituted a ratification of the right as an amendment to the Constitution).

2. Due Process Clause - While the 14th Amendment does prohibit the State from making or enforcing any law that abridges fundamental rights, this prohibition is not absolute. There are times when the State has a legitimate interest that involves the infringement upon a citizen's rights. In those situations, the Due Process clause provides the mechanism by which the State and the citizen can address the abridgement. Accordingly, if the State fails to adhere to, or interferes with, the process due to the citizen, then the right may not be abridged. This clause is the road.

3. Equal Protection Clause - Because due process is not a rigid or a static command, and it depends upon individualized factors of a particular situation, then the Equal Protection Clause provides the room necessary for states to maneuver without violating the Constitution. At the heart of equal protection is the notion that the government should treat similarly situated parties alike, within certain core perimeters. While the State may enact greater protections - or not - than what the Constitution demands, it may not create and apply a higher standard, and then infringe upon those rights by asserting a lesser standard outside the normal course of due process. This clause is the guardrails.

This is just a small sample of what he perceives to be the synergy between these vital clauses.

^⑨ ie. ratification of a treaty.

III Double Jeopardy is a constitutional immunity that should be secured against state abridgement under the 14th Amendment's Privileges or Immunities clause.

In Benton v. Maryland, 395 U.S. 784 (1969), this Court held that the 5th Amendment's Double Jeopardy clause is applicable to the states under the 14th Amendment. Id., 395 U.S. at 787. The Court, however, did not articulate under which clause the protection was incorporated. Id., 395 U.S. at 801 (Harlan, J. dissenting). Based on the line of cases from that time period, it can be presumed that it was incorporated under the 14th Amendment's Due Process clause. Id., 395 U.S. at 808 (Harlan, J. dissenting) ("the ... unchecked march toward 'incorporating' much, if not all, of the Federal Bill of Rights into the Due Process Clause"). A mistake precipitated by the Court's erroneous ruling on the 14th Amendment's Privileges or Immunities Clause in the Slaughterhouse cases.

Petitioner asserts that double jeopardy is a form of constitutional immunity that protects "the finality ... or the integrity of judgment". United States v. DiFrancesco, 449 U.S. 117, 128 (1980) (quoting Crist v. Bretz, 437 U.S. 28, 33 (1978), and United States v. Scott, 437 U.S. 82, 97 (1978)) (internal quotation marks omitted). While there are limited exceptions to this protection, where it is applicable, "its sweep is absolute". Burks v. United States, 437 U.S. 1, 11 (1978).

Applying double jeopardy under the 14th Amendment's Due Process Clause is contradictory. Where double jeopardy implies that a judgment is final, and thus, the process is finished; due process gives a different impression: that the process due is not yet complete, and therefore, the judgment is not final. However, if double jeopardy is secured under the 14th Amendment's Privileges or Immunities Clause, then a State's abridgement of that immunity must follow the process

due^⑩ prior to that judgment becoming final.^⑪ To deprive a citizen of a constitutional immunity via the enforcement of a "long-standing statutory law"^⑬ is precisely the kind of actions the 14th Amendment's Privileges or Immunities should restrict^⑬.

Therefore, Petitioner Duncan prays that this Court grant his petition, and consider whether double jeopardy is a constitutional immunity that is secured against the states under the 14th Amendment's Privileges or Immunities Clause, rather than the Due Process Clause.

- ⑩ That includes a fair notice and a meaningful opportunity to present his objections to that infringement.
- ⑪ Even after the state court rendered its decision and imposed its judgment, there is no justifiable reason for FDx or the Commission to not have notified him about his mandatory supervision within the time-frame for him to have raised his objections under the state's postconviction procedures.
- ⑬ See Companion Petition's Appx. H pg. 2.
- ⑬ i.e., "No state shall make or enforce any law ..." (emphasis added).

IV The Commission will deprive Petitioner of the equal protection of the law by violating his double jeopardy rights through the imposition of special conditions that will render his sentence more onerous.

When this Court holds a fundamental right to be applicable to the States, the 14th Amendment requires, at a minimum, that the State live to the federal standard. Of course, the State may grant additional protection for those rights. In context to double jeopardy, Florida provides greater protection than that of the federal standard by recognizing a greater degree of finality to a sentence. Under State law, a sentence is deemed final - and therefore entitled to double jeopardy protections - when it is (1) orally pronounced, (2) legal, and (3) defendant begins to serve the sentence. See e.g. *Ashley v. State*, 850 So.2d 1265 (Fla. 2003), and *Dunbar v. State*, 89 So.3d 901 (Fla. 2012). Accordingly, Mr. Duncan's 20 year sentence meets all three conditions. See companion petition's appendix D.

Petitioner's double jeopardy argument is not about the supervision itself; it is, after all, a legitimate form of punishment. Accord *Samson v. California*, 547 U.S. 843, 850 (2006), and *Duncan v. Moore*, *supra*. Rather, his argument is about the conditions that will render his sentence more onerous. This argument is akin to an argument regarding conditions of confinement. That while confinement is a legitimate punishment, certain conditions, "alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency". *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). If Mr. Duncan's trial court were to do what the Commission is, by statute, permitted to do - that of imposing any condition regardless of its relevancy to the crime - and

it renders the sentence more onerous⁽¹⁴⁾, the court's actions would be deemed unconstitutional because it would violate Petitioner's double jeopardy protections. Yet, the Commission is somehow not bound by this same constitutional limitation, until it imposes its own form of punishment. See Fla. Admin. Code Chapt. 23-23.010(10)

Because the 14th Amendment "references the entire 'State', not just [a particular branch]", then the rights secured by the Amendment apply "to actions taken by those enforcing the law". *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 210 L. Ed. 2d 137, 166 fn. 27 (2021) (Alito, J. concurring opinion). Petitioner asserts that since Florida courts employ a heightened standard of double jeopardy protection, then the Amendment's Equal Protection Clause demands that the Commission, as the agency responsible for enforcing the law, must apply this same standard to its decision-making process. Instead, the Commission may impose any special condition⁽¹⁵⁾ it deems warranted. See Fla. Stat. 947.1405(6).

While this Court in *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256 (1979) recognized that the 14th Amendment's promise of equal protection must coexist with the reality that legislation will classify certain groups or persons with a resulting disadvantage; *Id.*, 442 U.S.

(14) What constitutes a "more onerous" sentence, may be more subjective, as it depends upon the offender's history. For Mr. Duncan, supervision is a harsher punishment than incarceration, a view based on his problematic history with various supervisory punishments. But see Appx. B pg. 3-5

(15) While Fla. Stat. 947.1405(7)-(10) lists some "special" conditions - legislatively created - nothing in the law defines or limits the Commission's power to create new "special" conditions. Because the "Commission may impose any special condition it deems warranted" is such a broad and vague power, it should be held unconstitutional. See e.g. *Johnson v. United States*, 576 U.S. 591, 595-96 (2015).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Ryan F. Duncan DC# J31447

Date: 19 December 2023