24-5833

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IN THE

SUPREME COURT OF THE UNITED STATES

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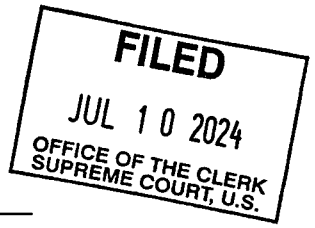

Douglas Leigh Fauconier,

Petitioner,

v.

State of Virginia,

Respondent.

PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Douglas Leigh Fauconier #1068864
Pocahontas State Correctional Center
P.O. Box 518
Pocahontas, Virginia 24635

Petitioner, pro se

QUESTIONS PRESENTED

A. Did the substantive component of the Fifth and Fourteenth Amendments' Due Process Clauses require the United States Court of Appeals for the Fourth Circuit to use the strict scrutiny standard in its review of the District Court's Denial of the Petitioner's 42 U.S.C. § 1983 Complaint in which Petitioner alleged that he was denied equal protection under the law when the Virginia General Assembly amended the statute, which had been enacted in that State to abolish parole, enacted under Code of Virginia § 53.1-165.1?

B. Based on the United States Supreme Court precedent established in **McGowan v. Maryland**, 81 S. Ct. 1101 (1961), the United States Court of Appeals for the Fourth Circuit erred in affirming the judgment of the District Court which had decided that the Petitioner's 42 U.S.C. § 1983 Complaint did not state an equal protection claim.

PARTIES

The Petitioner, Douglas Fauconier, prison identification number 1068864, files this Petition for a Writ of Certiorari pro se. He is a prisoner in the Virginia Department of Corrections, and is incarcerated at Pocahontas State Correctional Center, P.O. Box 518, Pocahontas, Virginia 24635. The Respondent is the State of Virginia.

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FEDERAL

42 U.S.C. § 1983

DECISIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit affirming the decision of the District Court for the Eastern District of Virginia is unpublished. (No. 23-6116). A copy is attached as **Appendix A** to this Petition. (A.1). The Order of the Fourth Circuit denying the Petitioner's request for a rehearing en banc is attached at Appendix A to this Petition. (A.4). The Order of the District Court and its accompanying Memorandum Opinion is attached to this Petition as **Appendix B**. See B.1 and B.2 respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 5, 2024. The Petition for rehearing en banc was denied March 12, 2024. The Honorable Court has jurisdiction to decide this matter under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Constitutional provisions of the Fifth, Sixth, and fourteenth Amendments to the United States Constitution.

In addition, it involves State statutory provisions enacted under Va. Code §§ 53.1-165.1, 19.2-295, 19.2-295.1, and 8.01-654.

STATEMENT OF THE CASE

In a ruling from an appeal issued June 9, 2000, the Virginia Supreme Court overruled its prior precedent it had established in **Coward v. Commonwealth**, and held in **Fishback v. Commonwealth**, that the trial court in that case "erred in refusing to give a proper instruction to the jury on the abolition of parole including the availability of geriatric release." See **Fishback v. Commonwealth**, 260 Va. 104, 117, 532 S.E.2d 629 (2000). See also **Coward v. Commonwealth**, 164 Va. 639, 178 S.E. 797 (1935). To remedy the trial court's error, the Virginia Supreme Court vacated Fishback's sentences and remanded his case to the Virginia Court of Appeals with directions that the Virginia Court of Appeals remand the case to the Circuit Court for a new sentencing hearing.

In its **Fishback** ruling, the Virginia Supreme Court stated that it is a fact that the average juror is aware that some type of further consideration will usually be given to the sentence that they impose on a defendant. **Fishback**, 260 Va. At 112. Also, that though juries frequently have no understanding of the current state of parole eligibility in Virginia, they nonetheless are concerned that their sentencing decisions will be deeply affected by extensive reductions attributable to executive action. **Id**. The Virginia Supreme Court further held, that due to the significant statutory limitations which presently restrict the executive branch's ability to modify the sentence of defendants, including through the abolition of parole, in overruling **Coward**, **supra**, the Court decided that moving forward, it shall be required that juries be properly appraised that parole has been abolished in Virginia and of the availability of geriatric release when carrying out their sentencing duties. **Id**. At 113 and 117.

In response to the ruling in **Fishback**, twenty years after the case was decided, the Virginia General Assembly amended Va. Code § 53.1-165.1.[1] Va. Code § 53.1-165.1 was enacted in 1995 to abolish parole in Virginia, and it prohibited all persons convicted of felony offenses committed on or after January 1, 1995, from being eligible for parole.[2] See Va. Code § 53.1-165.1. The Virginia General Assembly made statutory changes to § 53.1-165.1 ending the State's absolute prohibition on all opportunities for new-law prisoners to earn release through parole. Va. Code § 53.1-165.1 (B) through (E). Effective April 22, 2020, the General Assembly reinstated parole eligibility to a small subset of Virginia's new-law prisoners (hereinafter referred to as the "parole eligible" class).[3] See Va. Code § 53.1-165.1 (B) through (E).

To become eligible for parole under the amended statute, a new-law prisoner must have been sentenced by a jury (during the penalty phase of his/her trial in the period between January 1, 1995 and June 9, 2000) that was not properly instructed that Virginia had abolished parole for felony offenses committed in that State, and about the availability of geriatric release. See Va. Code § 53.1.-165.1 (B) through (E). The Petitioner entered a guilty plea to offenses committed in 1996 and was sentenced by a judge in 1998 and 1999. This made him a new-law prisoner ineligible to benefit from The General

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[1] According to the Case Notes on Jury Instructions, pursuant to the legislative summary, the 2020 amendments to Va. Code § 53.1-165.1 by Acts 2020, cc. 1200 and 1272 were conducted in response to **Fishback v. Commonwealth**, **supra**. See **Appendix C**, at C.2.

[2] Persons convicted of felony offenses committed on or after, January 1, 1995, are commonly known as, or referred to as "New-law" prisoners.

[3] In amending 53.1-165.1, the Virginia General assembly added subsections B-E. Subsection B states in pertinent part that, "The provisions of this article shall apply to any person who was sentenced by a jury prior to June 9, 2000, for any felony offense committed on or after January 1, 1995, and who remained incarcerated for such offense on July 1, 2020," but with some exceptions. See Va. Code § 53.1-165.1 (B). And, subsection C mandates the Parole Board "establish procedures for consideration of parole of persons entitled under subsection B..." See § 53.1-165.1(C).

Assembly's amendment, like the tens of thousands of other new-law prisoners who were either sentenced by a judge between January 1, 1995 and June 9, 2000, or were sentenced by juries but after June 9, 2000; a class of prisoners hereinafter referred to as the "parole ineligible" of which the Petitioner is a member.

The statutory discrimination suffered by the Petitioner through the General Assembly's amendment of Va. Code § 53.1-165.1 led him to file a 42 U.S.C. § 1983 Complaint in the United Stated District Court for the Eastern District of Virginia. In his Complaint the Petitioner alleged that the Virginia General Assembly violated the Equal Protection Clause of the United States Constitution when it amended Va. Code § 53.1-165.1 because the amendment has caused his disparate treatment under the law.

BASIS FOR FEDERAL JURISDICTION

This case involves the important Federal question of whether the Equal Protection Clause of the United States Constitution may permit a state to justify statutory discrimination against one class of prisoner even though the legislative action taken to redress a violation of the Constitutional rights of another class of prisoner appears to be unnecessary (because the State already had enacted statutory laws to address such violations); violates already established State law; and failed to achieve the State's objective (because the class of prisoner the legislation was intended to benefit continues to suffer from the prejudice that was born of the initial Constitutional violation).

REASONS FOR GRANTING WRIT

A. Did the substantive component of the Fifth and Fourteenth Amendments' Due Process Clauses require the United States Court of Appeals for the Fourth Circuit to use the strict scrutiny standard in its review of the District Court's denial of the Petitioner's 42 U.S.C. § 1983 Complaint in which the Petitioner alleged that he was denied equal protection under the law when the Virginia General Assembly amended the statute, which had been enacted in that state to abolish parole, enacted under Code of Virginia § 53.1-165.1?

The question is, would the State's encroachment upon the Petitioner's fundamental right to be treated equally under the law trigger the substantive due process protection of the Fifth and Fourteenth Amendments to the United States Constitution (which provides heightened protection against governmental interference with fundamental rights), and therefore, require a Court reviewing his equal protection claim to utilize the highest standard of review--the strict scrutiny review standard.

Incorporated Bill of Rights protections are "enforced against the States under the Fourteenth Amendment according to the same standards that protect personal rights against federal encroachment." **McDonald v. City of Chicago**, 561 U.S. 742, 765, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (citation omitted). Further, whether particular Bill of Rights guarantees may apply to States turn on whether they are "incorporated in the concept of due process." **McDonald**, 561 U.S. at 767. That is, whether the right "is fundamental to our scheme of ordered liberty, or...is deeply rooted in this Nation's history and tradition." **Id**. (citation omitted). Analysis of claims under the equal protection component of the Fifth Amendment's Due Process Clause is treated the same as the analysis of equal protection under the Fourteenth Amendment. See **Adarand Constructors v. Pena**, 515 U.S. 200, 217, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

"Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked...and a decision on the latter point advances both interests. "**Lawrence v. Texas**, 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). It is this substantive component which "provides heightened protection against government interference with certain fundamental rights and liberty interests." **Troxel v. Granville**, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

Courts of the United States have established standards for determining the validity of state legislation or other official acts that are challenged as denying equal protection of the law. **City of Cleburne v. Cleburne Living Center**, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). Laws are subject to strict scrutiny review when "state laws impinge on personal rights protected by the Constitution." **Id**., "**Under such circumstances laws are deemed unconstitutional unless they serve a compelling state interest**." **Id**.

"[M]atters of discretion are reviewable for abuse of discretion." See **Dart Cherokee Basin Operating Co., LLC v. Owens**, 574 U.S. 81, 90, 135 S. Ct. 547, 190 L. Ed. 2d 495 (2014), citing **Highmark Inc. v. Allcare Health Management System, Inc.**, 572 U.S. 559, 563, 134 S. Ct. 1744, 188 L. Ed. 2d 829 (2014). A Court would certainly abuse its discretion, "if it based its ruling on an erroneous view of the law." **Id**. At 91, citing **Cooter & Gell v. Hartmarx Corp.**, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990).

ANALYSIS

In the instant case, the United States Court of Appeals for the Fourth Circuit abused its discretion in failing or refusing to use the strict scrutiny review standard in deciding the Petitioner's equal protection claim. The Petitioner's equal protection claim is, that he is being denied equal treatment under the law because of the official action taken by the Virginia General Assembly to amend that state's statute it had enacted to abolish parole, by reinstating parole eligibility but to a small number of similarly situated new law prisoners while maintaining the no-parole status of the Petitioner under the statute. The United States Court of Appeals affirmed the District Court's order after finding no reversible error. See **Appendix A.1**. In dismissing the Petitioner's 42 U.S.C. § 1983 Complaint, the District Court stated,

> **In sum, plaintiff falls outside the plain language of the 2020 Amendment which therefore has no application to his case. Moreover, plaintiff cannot state an equal protection claim based on his exclusion from the remedy provided by the 2020 Amendment because the General Assembly had a rational basis to distinguish between those inmates sentenced by juries, who would not have been aware of the unavailability of parole, and those inmates sentenced by judges, who are presumed to be aware of changes to the law such as the unavailability of parole. Accordingly, plaintiff cannot state an equal protection violation and the motion to dismiss must be granted**.

District Court Memorandum Opinion, at 9. **Appendix B at B.10**.

The Petitioner believes the District Court erred by failing to apply the proper standard of review in this case, that is, the strict scrutiny standard of review instead of the standard it applied--the rational basis standard. And thus, the United States Court of Appeals for the Fourth Circuit abused its discretion in failing to reverse the decision of the

District Court, where the Court of Appeals' finding no reversible error was based on an erroneous view of the law.

United States Court of Appeals decision is contrary to this Honorable Court's precedents, and it holding in City of Cleburne v. Cleburne Living Center, supra.

The Honorable Court has specifically stated in **Cleburne** that strict scrutiny review is necessary when state laws impinge on personal rights protected by the Constitution.[4] The Petitioner has alleged his right to equal protection of the law was violated by the action of the Virginia General Assembly amending of § 53.1-165.1 which has caused his disparate treatment under the law. The Petitioner's right to equal treatment under the law is protected by the equal-protection component of the Fifth Amendment's Due Process Clause. His right is incorporated in the Bill of Rights protections that are enforced against the States under the Fourteenth Amendment according to the same standards that protect personal rights against federal encroachment.

The Petitioner's right to be treated equally under the law is a personal right accorded him by the equal protection component of the Fifth Amendment's Due Process Clause incorporated in the Bill of Rights protections. Thus, it is a basic right similar in the nature of other fundamental rights incorporated in the Bill of Rights protections. The Petitioner's personal right to equal protection under the law is just as consequential as, for example, his First Amendment right to freedom of speech or religion; his Second Amendment right to keep and bear arms; his Fourth Amendment right against unreasonable searches and seizures; his Fifth Amendment right not to be compelled to

[4] 473 U.S. at 440.

be a witness against himself; or his Eighth Amendment right to be protected from cruel and unusual punishments, and so forth.[5]

Thus, like for instance, his Second Amendment right to keep and bear arms, the Petitioner's Fifth Amendment right to equal protection of the law is incorporated in the concept of due process, because, equal treatment under the law is fundamental to ordered liberty in the United States. Further, equality of treatment under the law and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked, and, are deeply rooted in the history and tradition of the United States.

Thus, the Petitioner's right to equal protection should be enforced against the State of Virginia under the Fourteenth Amendment, because it's incorporation in the Due Process Clauses of both the Fifth and Fourteenth Amendments triggered the substantive component of the Clauses requiring heightened protection against governmental interference with the Petitioner's fundamental equal protection right.

Thus, judicial review of the Petitioner's equal protection claim required the heightened protection of strict scrutiny review, whereby, under the circumstances, the Amendment to Va. Code § 53.1-165.1 could be sustained only if it were suitably tailored to serve a compelling state interest.

Hence, in the instant case, the Petitioner believes the lower Court abused its discretion in failing to review his equal protection claim under the heightened strict scrutiny review standard as mandated by this Honorable Court's holding in **Cleburne**, **supra**, because the amended Va. Code § 53.1-165.1 impinged on the Petitioner's personal right to be treated equally under the law as is protected by the Bill of Rights of

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[5] United States Constitution, Amendments One through Ten.

the Constitution. The Petitioner, therefore, requests that the Honorable Court remand his case to the lower Court requiring that that Court apply the proper standard in its review of his appeal from the District Court.

B. **Based on the United States Supreme Court precedent established in McGowan v. Maryland, 81 S. Ct. 1101 (1961), the United States Court of Appeals for the Fourth Circuit erred in affirming the judgment of the District Court which had decided that the Petitioner's 42 U.S.C. § 1983 Complaint did not state an equal protection claim.**

The issue is, did the Petitioner state an equal protection claim because the classifications created by the Virginia General Assembly's 2020 Amendment of the statute which had been enacted in that State to abolish parole, Va. Code § 53.1-165.1, rest on grounds wholly irrelevant to the achievement of the State's objective. The issue that the actions of the Virginia General Assembly rested on grounds wholly irrelevant to the achievement of the State's objective has arisen, because the remedial actions taken by the State does not reverse the harm that was caused to prisoners the Amendment was intended to benefit, and, because the Amendment violates Virginia law.

The Equal Protection Clause of the Fourteenth Amendment prohibits any State from denying "to any person within its jurisdiction the equal protection of the laws." **Cleburne**, 473 U.S. at 439. It is, therefore, "a direction that all persons similarly situated should be treated alike." **Id**. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." **Id**. at 440. See also **McGowan v. Maryland**, 366 U.S. 420, 425, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961) (holding, "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens

differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.").

ANALYSIS

Petitioner was similarly situated to prisoners who benefitted from the Amendment.

The Petitioner was treated differently from the other similarly situated prisoners (the parole eligible) made eligible for parole by the amendment to Va. Code § 53.1-165.1. The Petitioner is similarly situated to the parole eligible because, prior to the amendment of Va. Code § 53.1-165.1, all new law prisoners were classified as being parole ineligible regardless of the types of crimes they were convicted of committing. Therefore, no new law prisoner could have been distinguished from the other if it were only their parole ineligibility status being considered under the original iteration of Va. Code § 53.1-165.1.[6]

Classifications created by the Virginia Assembly's Amendment of Va. Code § 53.1-165.1.

As has been identified in the "Statement of the Case," supra, the actions of the legislature in amending Va. Code § 53.1-165.1 led to the splitting of the new-law class of prisoners (prisoners convicted of offenses committed on or after January 1, 1995) into two distinct classes--the parole eligible class and the parole ineligible class. As a person who was sentenced by a judge, the Petitioner belongs to the latter class, the parole class ineligible class.

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[6] See **Nordlinger v. Hahn**, 505 U.S. 1, 10, 112 S. Ct. 2326 (1992) (holding that the Equal Protection Clause keeps "governmental decision makers from treating differently persons who are in all relevant respects alike.").

The Constitutional violation that occurred which prompted the Virginia General Assembly to act to amend Va. Code § 53.1-165.1.

The parole eligible class of prisoner was deprived of due process in exercising their Constitutional right to trial by an impartial jury at sentencing because their individual sentencing juries were not adequately appraised of the law to permit the juries to properly carry out their duty to ascertain each parole eligible prisoner's sentence fairly. The parole eligible prisoners' juries were deprived of materially vital jury instructions that, Virginia had abolished parole and of the availability of geriatric release; information that those juries needed to fairly ascertain the parole eligible prisoners punishment at sentencing.[7]

In Virginia's system of bifurcated trials, if a defendant demands a jury, the jury both tries the issues of guilt and fixes the penalty. **Webb v. Commonwealth**, 64 Va. App. 371, 376, 768 S.E. 2d 696 (2015). The right to have the jury perform both of these functions "is a part of the right of trial by jury." **Id**. In performing its responsibility in sentencing a defendant, the jury must "consider a broad range of punishment in terms of years of confinement statutorily established by the legislature." **Fishback**, 260 Va. at 113. And, "within the permissible range of punishment a jury is required to determine a specific term of confinement that it considers to be an appropriate punishment under all the circumstances revealed by the evidence in the case." **Id**. Therefore, to insure that the sentencing hearing is fair, the jury cannot be "left in the dark on the subject" of the abolition of parole including the availability of geriatric release. **Fishback**, 260 Va. At 114 and 117. Also see generally, **Simmons v. South Carolina**, 512 U.S. 154, 164, 129 L. Ed. 2d 133, 114 S. Ct. 2187 (1194) (holding "[t]he trial court's refusal to apprise the jury of information

[7] See **Samia v. U.S.**, 635, 608, 145 S. Ct. 2004, 216 L. Ed. 2d 597 (2023) (holding that our legal system presumes that jurors will attend closely to the particular language of a judge's instructions in a criminal case and strive to understand, make sense of, and follow them.).

so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause."), and, **United States v. Haymond**, 588 U.S. 634, 640-641, 139 S. Ct. 2369, 204 L. Ed. 2d 897 (2019) (indicating an inextricable link between the Sixth Amendment's right to trial by an impartial jury and the Fifth Amendment's Due Process Clause which prohibits the deprivation of liberty without due process of law.).

Prejudice suffered

The parole eligible suffered significant damage to their substantial rights. Inadequate jury instructions affected the impartiality of the jury. Consideration that Virginia abolished parole and of the availability of geriatric release was well within the province of the sentencing juries in deciding the parole eligible class' sentences. Keeping the jury in the dark regarding these state laws prevented them from weighing these laws, among other factors, in ascertaining a fair sentence for each member of the parole eligible class.

Not being informed that parole had been abolished and of the availability of geriatric release could have led the juries to speculate that parole was still available. Once the juries decided on what they believed was a just sentence for a defendant, it would be reasonable to believe that the juries might then reasonably conclude that the only way to insure that the defendant served the sentence they believed was just in numerical years (given Virginia juries concerns that the sentences they imposed on defendants are subject to extensive reductions due to parole and other executive action) would be to enlarge that defendant's sentence by a specific number of years or even decades in contemplation that even though the terms of confinement they fixed would be significantly reduced by

parole or other executive action, the defendant would ultimately still serve the numerical sentence they had believed was just in spite of any substantial reductions.

There is a very real danger that every prisoner of the parole eligible class suffered this type of prejudice that resulted in them receiving an enlarged sentence. Whatever-the-case, what each member of the parole eligible class' sentencing jury actually did is impossible to gauge. However, being given an enlarged sentence by an inadequately instructed jury cannot be fixed by granting this parole eligible class the option of discretionary parole.

Parole eligibility in the State of Virginia is not a guarantee to automatic release. The parole eligible must still meet the criteria established by the Virginia parole board prior to being released on parole, and, there is no guarantee that some prisoners of the parole eligible class will ever meet the parole boards criteria that makes them suitable for release. According to Virginia Cure, in 2022, of all prisoners receiving parole hearings, including those receiving consideration for geriatric release, only 33 prisoners were released.[8] If a parole eligible prisoner does not make parole, depending on the penal statute under which that prisoner was convicted, they could be required to complete between 65% and 85% of the imposed penalty.[9]

Thus, members of the parole eligible class could be forced to complete the mandatory term of imprisonment set by their juries. Granted their individual sentences might very likely have been improperly enlarged, this would mean that some, if not all members of the parole eligible class would have to serve a longer time in prison before they would be released, being that their sentences would be longer than if not properly

[8] See Virginia Cure at www.vacure.org.
[9] See Va. Code § 53.1-202.3.

lengthened by their sentencing juries. That being, that even if the parole eligible class' individual juries may not have exceeded the statutory maximum sentences they would have been legally allowed to impose for a particular crime, their lack of adequate instruction may have caused them to swell the punishment of the parole eligible extraordinarily even though the sentence they imposed did not exceed the maximum punishment prescribed by the statute under which a particular parole eligible prisoner was convicted. Such an enlargement of a sentence for improper reasons would indicate that the jury was no longer impartial and that the parole eligible's sentences were imposed in violation of the Constitution's Due Process Clause.

State statutory remedies in existence prior to the 2020 Amendment purposed to protect a defendant's Constitutional rights during sentencing.

The question is, given that it is undisputed the parole eligible class suffered an egregious violation of their Fifth and Sixth Amendment rights which robbed them of a fair sentencing hearing, what remedies would this class of prisoner have under then existing State law, prior to the General Assembly's Amendment, to vindicate their rights.[10] The remedies that would have been available under Virginia law to the parole eligible that are available even today, would depend on the serious nature of the Constitutional deprivation, whether it prejudiced the parole eligible, or, resulted in a complete miscarriage of justice.[11]

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[10] See **Fishback**, at 115 (stating that "speculating by the jury is inconsistent with a fair trial both to the defendant and the Commonwealth.").

[11] See generally, **U.S. v. Timmreck**, 441 U.S. 780, 784, 99 S. Ct. 2085, 60 L. Ed. 2d 634 (1979) (holding that a formal violation of Rule 11 that was neither Constitutional nor jurisdictional, and that neither resulted in a "complete miscarriage of justice" nor in a proceeding "inconsistent with the rudimentary demands of fair procedure" was insufficient to set aside a guilty plea.). See also **U.S. v. Olano**, 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (holding that a plain forfeited error affecting substantial rights should be corrected if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.") (citing **U.S. v. Atkinson**, 297 U.S. 157, 160, 80 L. Ed 555, 56 S. Ct. 391 (1936).

Based on the nature of the harm done to the parole eligible's Constitutional rights accorded them at sentencing, the damage done was significant and prejudicial. Because the parole eligible class' juries were not instructed on the abolition of parole and of the availability of geriatric release, the juries could not weigh this information against other factors in each individual case in deciding the sentences of the parole eligible.[12] This omission deprived the parole eligible of an impartial jury at sentencing as it impeded the juries' ability to fully carry out their duty and deprived the parole eligible of a fair sentencing hearing.

Without instruction on parole eligibility, it is possible the juries could have believed parole was still available, and, that it might lend to members of the parole eligible class being released earlier than the juries might have believed was just. Thus, it is reasonable that the juries might have believed that to compensate for the potential early release of the parole eligible, they would have take steps to enlarge the parole eligible's sentences to offset possible reductions in the time to be served on the imposed sentences due to parole or some other executive action.[13]

Structural Error

The omission of the proper jury instructions at the parole eligible's sentencing constituted a structural error at sentencing because the interest protected by the right to trial by an impartial jury at sentencing is to insure that all sentencing proceedings are fair.[14] It was also structural error because the effect of the omission is immeasurable, in

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[12] **Simmons**, 512 U.S. at 162

[13] See example of sentence enlargement by a jury given in **Coward v. Commonwealth**, 164 Va. at 642.

[14] **McCoy v. Louisiana**, 138 S. Ct. 1500, 1511, 200 L. Ed. 2d 821 (2018) (holding that "[a]n error may be ranked structural...'if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,' such as 'the fundamental legal principle that a defendant must be allowed to make

that, how pervasive the problem of juries enlarging the sentences of the parole eligible class was, is impossible to measure.[15] In addition, how much extra time these juries may have been induced to add on to the sentences of each parole eligible prisoner to compensate for what the juries may have anticipated would be the very likely substantial reduction of the sentences they had imposed due to parole is itself impossible to gauge.

The violation of the parole class' protected Sixth Amendment right to trial by an impartial jury at sentencing became complete when the trial courts in each individual case failed to instruct, or failed to give a proper instruction to the juries of the abolition of parole and of the availability of geriatric release. Furthermore, where the purpose of the Sixth Amendment guarantee is to protect defendants' right to have a fair sentencing proceeding, to nullify this guarantee because the parole eligible ignorantly failed to invoke it, would remove the protection of the Constitution.[16] Thus depriving the parole eligible class of a fair sentencing hearing was a jurisdictional bar to a valid sentence that has deprived them of liberty.[17]

Va. Code § 19.2-295.1

In Virginia's system of bifurcated trials, the penalty phase is governed by Va. Code § 19.2-295.1.[18] Enacted in 1994, Va. Code § 19.2-295.1 has established the procedure to be followed when sentencing a defendant by jury following conviction.[19]

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his own choices about the proper way to protect his own liberty.'") (citing **Weaver v. Massachusetts**, 137 S. Ct. 1899, 1908, 198 L. Ed. 2d 420 (2017).

[15] **Id.** ("An error might also count as structural when its effects are too hard to measure... or where the error will inevitably signal fundamental...").

[16] **Johnson v. Zerbst**, 304 U.S. 458, 465, 82 L. Ed. 1461 (1938).

[17] **Id.** At 468.

[18] See **Hill v. Commonwealth**, 262 Va. 807, 810, 553 S.E. 2d 722 (2002).

[19] **Id.**

In its third and final paragraph, the statute mandates in unequivocal terms resentencing before a different jury if the sentence imposed by the first impaneled jury was "set aside or found invalid solely due to an error in the sentencing proceeding..." [20] Under no circumstances does Va. Code § 19.2-295.1 authorize any other remedy but resentencing before a new jury if a defendant's sentence imposed was found to be invalid due to an error in the sentencing proceeding.[21] Thus, the availability of Va. Code § 19.2-295.1 provided a possible remedy to the parole eligible to vindicate the violation of their Sixth Amendment right to trial by an impartial jury at sentencing prior to the General Assembly's Amendment of Va. Code § 53.1-165.1.

Va. Code § 8.01-654

Further, Va. Code § 8.01-654 is available to the parole eligible to collaterally attack their sentences under state habeas corpus rules.[22] The error that resulted in the violation of the parole eligible class' constitutional rights was both jurisdictional and structural. It was also a statutory violation of Va. Code § 19.2-295.1. Thus, the parole eligible class has the option to seek redress of this fundamental defect under a writ of habeas corpus at any time to prevent a complete miscarriage of justice.

The Equal Protection Clause has been violated because the classifications created by the General Assembly's Amendment of Va. Code § 53.1-165.1 rests on grounds wholly irrelevant to the achievement of the State's objective.

The General Assembly's Amendment of Va. Code § 53.1-165.1 created two new classes of prisoners out of one. It created a parole eligible class and maintained the status

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[20] Va. Code § 19.2-295.1.

[21] Id. See also **Hill**, 262 Va. at 810 (holding that for an error occurring in the sentencing proceeding, Va. Code § 19.2-295.1 "requires only a new sentencing hearing.").

[22] See **Elliot v. Warden**, 652 S.E. 2d 465, 487 (2207) (holding that the role of habeas corpus is to inquire into jurisdictional defects amounting to the lack of legal authority for the detention of a person on whose behalf it is asked.).

quo of parole ineligibility for the other (the parole ineligible class) from the single group of new law prisoners (those prisoners convicted of offenses committed on or after January 1, 1995). The Petitioner's classification, due to the Amendment, which classifies him as a member of the parole ineligible class has caused him to suffer substantial disparate treatment in relation to his similarly situated peers, the parole eligible class.

This statutory discrimination being experienced by the Petitioner absolutely offends the equal protection component of the Fifth Amendment's Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment because there are no set of facts that may be reasonably conceived to justify it. First, as mentioned above, the State of Virginia already had statutory options in existence prior to the 2020 Amendment, that if used, will allow the parole eligible to vindicate the violation of their constitutional rights. The mere existence of these statutory remedies renders the Amendment unnecessary, and shows that it is not rationally related to a legitimate State interest. Only through the use of these statutory options, Va. Code § 19.2-295.1 and Va. Code § 8.01-654 can the parole eligible mount a proper collateral attack to vindicate the violation of their constitutional rights and assuage the prejudice they continue to suffer from the violation.

Second, due to the express language of Va. Code § 19.2-295.1, it renders the Amendment by the General Assembly unlawful. In its interpretation of Va. Code § 19.2-295.1, the Virginia Supreme Court interpreted the literal meaning of its text, stating in **Hills**, **supra**, that regarding errors that took place during sentencing proceedings "the statute requires only a new sentencing hearing."[23] This, therefore, also clearly

[23] Hills, 262 Va. at 810.

demonstrates that the Amendment is not rationally related to a legitimate state interest as it promotes interests contrary to state law.

Third, the Amendment rests on grounds wholly irrelevant to the achievement of the State's objective because it can neither cure nor reverse the prejudice the parole eligible are suffering due to the violation of their rights at sentencing. Though the Amendment was enacted to vindicate the parole eligible class' deprivation of due process in exercising their Sixth Amendment right to trial by an impartial jury during sentencing, there is no reasonable basis for this Amendment because it completely has failed to achieve the State's objective. In that, all remaining incarcerated parole eligible prisoners are still being grievously affected by the enlarged sentences they are currently serving. The only way the State may truly achieve its objective would be to resentence the parole eligible.

The statutory distinctions between the parole eligible and the Petitioner (a member of the parole ineligible class) are invidious. The Petitioner suffers substantial unequal treatment because he is in essence being penalized for following State law which requires a judge sentencing once a defendant waives their right to a trial by an impartial jury or their right to have a trial. This automatically disqualified the Petitioner from the opportunity to regain his freedom through the option of parole.[24] Thus, the Petitioner's equal protection rights have been violated because the General Assembly did not have a rational basis to amend Va. Code § 53.1-165.1 that would justify the disparate treatment of the Petitioner and the parole ineligible by the State. The Amendment rests on grounds wholly irrelevant to the State achieving its objective of vindication of the parole eligible

[24] See Va. Code § 19.2-295.

constitutional right as required by **McGowan v. Maryland**, because the parole eligible are still affected by the prejudice caused by the constitutional violation.

The Equal Protection Clause thus requires the State to restore equity to the application of parole eligibility. Under the circumstances, the Equal Protection Clause requires the State to restore equity to the application of parole eligibility by extending parole to the Petitioner and the parole ineligible class. Or, in the very least require all prisoners sentenced by a judge between January 1, 1995 and June 9, 2000 receive parole eligibility.

CONCLUSION

WHEREFORE, for the reasons stated above the Petitioner requests that the Honorable Court grant a writ of certiorari in this case.

Submitted this 7th day of ~~September~~ October, 2024, by

/s/ Douglas Fauconier

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