No. 24 - 23-7500

IN THE

SUPREME COURT OF THE UNITED STATES

Jonathan E. Pendleton,

Petitioner,

v.

Jason S. Miyares, Attorney General of Virginia, et al,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 14th, 2024

QUESTIONS PRESENTED

I. Whether and to what extent Virginia's "not guilty by reason of insanity" (NGRI) statutes, Va. Code § 19.2-182.2, *et seq.*, are facially unconstitutional, in violation of the equal protection and due process holdings in *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992).

II. Whether Virginia's NGRI statutes, together with the "customs, policies, and practices" of various State and local agencies, constitute "deliberate indifference" to cruel and unusual punishment within the meaning of *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

LIST OF PARTIES

JASON S. MIYARES, Attorney General of Virginia; LOUISE DIMATTEO, Virginia Circuit Court Judge serving Arlington County; NELSON SMITH, Commissioner of the Virginia Department of Behavioral Health and Developmental Services (DBHDS); ARLINGTON COUNTY COMMUNITY SERVICES BOARD; ARLINGTON COUNTY DEPARTMENT OF HUMAN SERVICES (DHS); DIRECTOR OF CENTRAL STATE HOSPITAL; SUPERINTENDENT OF NORTHERN VIRGINIA MENTAL HEALTH INSTITUTE (NVMHI); COURTNEY NOBLES, NGRl coordinator; GRACE GUERRERO, psychologist for DHS; KELLY NIEMAN, NGRI coordinator; ANGELICA TORRES-MANTILLA, NGRI coordinator; MARK DOERING, supervisor for DHS; THOMAS WALLACE, compliance officer for DHS; JAN LONGMAN, compliance officer for DHS; RICHARD WRIGHT, forensic psychiatrist on the DBHDS Forensic Review Panel; ANITA FRIEDMAN, Director of Arlington DHS; JENNIFER ANGLIN, Virginia Office of Human Rights; MICHAEL WESTFALL, Virginia State Inspector General; OSIG JANE DOE #1; KLI KENZIE, Executive Secretary for the Virginia Office of Human Rights; ANN PASCOE, Virginia Office of Human Rights; SARAH DAVIS, Forensics Operations Manager for DBHDS; CHRISTINE SCHEIN, Deputy Director for Forensic Services at DBHDS; OSIG JANE DOE #2; PAUL FERGUSON, Clerk of the Circuit Court of Arlington County; all those who have known or should have known.

RULE 14(B) STATEMENT

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii), listed chronologically:

- *Commonwealth v. Pendleton*, Nos. CR14000918-00 - 09; CR14000922-00 - 05, Va. Circuit Court, Arlington County. Acquitted NGRI Dec. 15, 2014, final order revoking release entered May 26, 2021.
- *Pendleton v. Commonwealth*, No. CL20000332-00, Va. Circuit Court, Arlington County. Petition for expungement denied Mar. 13, 2020.
- *Pendleton v. Clerk of Arlington County Circuit Court, et al*, No. CL22003186-00, Va. Circuit Court, Arlington County. Petition for a writ of habeas corpus filed Aug. 22, 2022, summary judgement entered Mar. 21, 2023.
- *Pendleton v. DiMatteo, et al,* No. CL22003186-00, Record 230161, Supreme Court of Virginia. Petition for a writ of habeas corpus filed Mar. 13, 2023, dismissed for failure to provide proof of service Jun. 29, 2023.
- *Pendelton[sic] v. Miyares, et al*, No. 1:23-cv-446, U.S. District Court for the Eastern District of Virginia, Alexandria Division. Complaint filed Apr. 5, 2023, dismissed Oct. 3, 2023.
- *In re: Jonathan Pendleton*, No. 23-1987, United States Court of Appeals for the Fourth Circuit. Petition for a writ of mandamus filed Sep. 20, 2023, dismissed Oct. 23, 2023.
- *Pendleton v. DiMatteo, et al*, No. 3:23-cv-734, U.S. District Court for the Eastern District of Virginia, Richmond Division. Petition for a writ of habeas corpus filed Nov. 1, 2023, dismissed Nov. 30, 2023.
- *Pendleton v. Miyares, et al*, No. 23-7039, United States Court of Appeals for the Fourth Circuit. Filed Nov. 6, 2023, dismissed February 21, 2024, rehearing *en banc* denied March 19, 2024.
- *Pendleton v. DiMatteo, et al,* No. 23-7293, United States Court of Appeals for the Fourth Circuit. Filed Dec. 21, 2023, still under consideration.
- FCRA employment suit in the U.S. District Court for the Western District of Texas, Austin Division (proceeding anonymously). Filed Nov. 2023. Currently on appeal in the United States Court of Appeals for the Fifth Circuit.
- *Pendleton v. United States*, 1:24-cv-656, United States Court of Federal Claims. APA passport suit filed Apr. 25, 2024.

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TABLE OF AUTHORITIES

Cases

Statutes

Va. Code

PETITION FOR WRIT OF CERTIORARI

Jonathan E. Pendleton, continuing to seek relief from his unlawful detention in Virginia, respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Supreme Court of Virginia dismissed Mr. Pendleton's petition for a writ of habeas corpus on June 29th, 2023, Appendix ("App.") G. The U.S. District Court in Alexandria dismissed Mr. Pendleton's complaint (the "Complaint") on October 3rd, 2023, App. B. The U.S. District Court in Richmond dismissed Mr. Pendleton's petition for a writ of habeas corpus on November 30th, 2023, App. E. The U.S. Court of Appeals for the Fourth Circuit dismissed Mr. Pendleton's appeal on February 21st, 2024, App. A.

JURISDICTION

The Fourth Circuit entered its unpublished *per curiam* opinion on February 21st, 2024, and rehearing *en banc* was denied March 19th, 2024, App. C. Mr. Pendleton timely filed this petition for a writ of certiorari within 90 days, invoking this Court's jurisdiction under 28 U.S.C. § 1254.

Petitioner believes an equitable tolling exception to 28 U.S.C. § 1257 would also be appropriate here because the Supreme Court of Virginia dismissed this statutory challenge on procedural grounds that are themselves unconstitutional, e.g. *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971); *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990), and no federal court has since reached the merits of the Complaint. Cf. *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946).

To avoid the possibility of conflicting judgments, this Court should also assume jurisdiction over the pending habeas petition before the Fourth Circuit in keeping with 28 U.S.C. § 2101(e), e.g. *United States v. Nixon*, 418 U.S. at 692, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), and issue an original writ pursuant to 28 U.S.C. § 2241(c)(3).

RELEVANT CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment VII:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

STATEMENT OF THE CASE

Petitioner Jonathan Eric Pendleton was found not guilty by reason of insanity (NGRI) in the Circuit Court of Arlington County in December 2014 (CR14000918-00, CR14000922-00) for attempting a citizen's arrest of a university professor for felony computer crimes, a practice that is legal in Virginia. See *Burke v. Com.*, 515 S.E.2d 777, 30 Va. App. 89 (Ct. App. 1999); *Tharp v. Com.*, 270 S.E.2d 752, 221 Va. 487 (1980). Mr. Pendleton denied having any mental illness during testimony and his primary defense was not adequately presented, making this case a likely candidate for mistrial.[1]

Despite a recommendation of release from the evaluating psychologist at Central State Hospital, Mr. Pendleton was committed under Va. Code § 19.2-182.3 by the Arlington Circuit Court in May of 2015, though it is now apparent the evidence could not have met the due process standards set forth in *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). Petitioner does not have any history of mental illness and is in fact innocent of both "insanity" and the original charges.

After Mr. Pendleton was conditionally released from the hospital in 2017, his first motion for unconditional release in March 2019 pursuant to Va. Code § 19.2-182.11 was denied without

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[1] See "Emergency Petition For Writ of Mandamus," E.D.Va. No. 1:23-cv-446, ECF 12 at 16.

any relevant evidence being presented. The NGRI coordinator explained that she would like to see Mr. Pendleton find a job after graduating from college. The court then announced that it simply "hasn't been long enough."

When Pendleton graduated from college in 2019 with a degree in cybersecurity, his first job offer as a software test analyst was rescinded when the employer learned of the 2014 arrest incident. His background check had reported acquittals for "abduction by force" and "malicious injury by acid" (see USCA4 No. 23-7293, ECF 14, exhibit A). Pendleton filed a petition in 2020 to expunge the trial records in Arlington County but was told the Supreme Court of Virginia had foreclosed this remedy for persons still on NGRI conditional release in *Eastlack v. Com.*, 710 S.E.2d 723, 282 Va. 120 (2011).

These circumstances caused an intractable problem during the coronavirus shutdowns in 2020: social workers at Arlington DHS began retaliating when Mr. Pendleton was obliged to object that they had violated agreements, abandoned case management guidelines, and were withholding favorable evidence from the court. After Petitioner was denied a meaningful hearing in Arlington's Circuit Court in August 2020, and the compliance officer at DHS had failed to respond to a formal complaint, Mr. Pendleton decided to refuse any further participation and moved back to Seattle where he had been living prior to his arrest.

In February 2021 Mr. Pendleton received a confusing letter from the Bureau of Consular Affairs saying that his passport had been revoked because of "a felony warrant for ... the underlying charge of assault and battery." See USCA4 No. 23-7039, ECF 9, exhibit A. The bench warrant is actually for "did not appear for a SHOW CAUSE hearing on October 23, 2020," which is a "civil proceeding" according to Va. Code § 19.2-182.8. See E.D.Va. No. 1:23-

cv-446, ECF 12, exhibit A. However, when Pendleton moved from Seattle to Texas in 2022 and needed to renew his identification to obtain a security badge at work, he was arrested by a State Trooper at DPS because Texas authorities — seeing a bench warrant that lists the "original charges" Pendleton was tried and acquitted of in 2014, and criminal records that describe him as a "fugitive"[2] — had the impression Petitioner was currently charged with those same felonies. Petitioner was held in solitary confinement for 10 days before being released and told he needed to file, without assistance, something called "a petition for a writ of habeas corpus." It was only at this point that Mr. Pendleton discovered that Virginia's NGRI statutes had been unconstitutional for many decades.

The first habeas petition was filed in the Circuit Court of Arlington County on August 22nd, 2022 (CL22003186-00) and challenged the entirety of Petitioner's detention since 2015 as unconstitutional. It says:

> "a. EQUAL PROTECTION: A verdict of NGRI ... is an acquittal in the sense that the defendant is absolved of criminal responsibility, the sentence intends no punitive disposal, and the matter is thereafter treated as a civil process of rehabilitation. The US Supreme Court has made it clear in Baxstrom v. Herold (1966) and Foucha v. Louisiana (1992) that defendants found NGRI in the United States are entitled to the same protections afforded individuals facing purely civil commitment proceedings under Virginia code § 37.2-800, consistent with the Equal Protection Clause of the Fourteenth Amendment. This makes the separate NGRI commitment and release process in Virginia plainly unconstitutional. This petitioner seeks an order from this court declaring my continued and prolonged detention unlawful and ordering my immediate release, since § 37.2-817.4 caps mandatory outpatient treatment at 180 days."
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> Complaint, ECF 1-1 at 2.

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[2] "A person who, having committed a crime, flees ..." Black, H.C., 1968. *Law Dictionary, Revised Fourth Edition* (p. 800). St. Paul, Minn.: West Publishing Company.

As alleged in the Complaint below, the Clerk of the Circuit Court of Arlington County, Defendant Paul Ferguson, who was named as a respondent in the initial petition, then began retaliating by refusing to complete service on any of the orders or judgments of the court (though he did once return an acceptance of service when a motion for default judgment was filed — the joke being that petitioners can default but state officials cannot). Ferguson's office also refused to respond to FOIA requests and began repeatedly delaying Petitioner's employment background checks for up to a month. See E.D.Va. No. 1:23-cv-446, ECF 10-1 at 4-6.

A second petition was filed in the Supreme Court of Virginia in March 2023, which was eventually dismissed in June 2023 after respondents twice refused to accept service because, as he informed the court, Petitioner could not afford process service on the three respondents, the Attorney General, and his assistant. See E.D.Va. No. 1:23-cv-446, ECF 1-2, 8-1, 10-1.[3]

Meanwhile, the Complaint was filed on April 5th, 2023, in the Alexandria Division of the U.S. District Court for the Eastern District of Virginia, alleging, *inter alia*, a continuing violation of false imprisonment, and requesting equitable relief under 28 U.S.C. § 2201, *et seq.*

Thereafter, Ferguson's office began erroneously reporting on Mr. Pendleton's employment background checks that he has a *criminal* record for a *misdemeanor* "VIOLATION OF INSANITY CONDITIONAL RELEASE," a crime that doesn't exist, and is a "fugitive." This caused Petitioner's only professional job offer in June 2023 to be suspended and has spurred an FCRA employment suit in Texas that is now on appeal in the Fifth Circuit. These retaliatory disclosures also prompted a Rule 65 request in the District Court in Alexandria for a preliminary injunction to prevent further irreparable harm, along with a petition for a writ of habeas corpus

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[3] Cf. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969).

under 28 U.S.C. § 2254 because the high court in Virginia had just dismissed the same petition. See E.D.Va. No. 1:23-cv-446, ECF 8 (July 7, 2023).

When the motions in Alexandria went unanswered for several months, a petition for a writ of mandamus was filed in the Fourth Circuit on September 20, 2023. See No. 23-1987. The District Court then responded on October 3rd, 2023, by dismissing the Complaint based on errors of material fact and law, triggering direct appeal No. 23-7039 which is the subject of this Petition.

Since the District Court in Alexandria had denied the habeas petition as "moot" without consideration, Petitioner filed a reformatted petition in the Richmond Division which erroneously found no custody on November 30, 2023. App. E. And since the informal brief in the appeal below had already been filed at that point, a request was made for a certificate of appealability based on Alexandria's denial, pursuant to 28 U.S.C. § 2253 and Fourth Circuit Rule 22(a). The clerks regarded that request as untimely and it was rerouted to yet another appeal still under review in No. 23-7293.

In January of this year, finally compelled to respond to the petition for writ of habeas corpus before the Fourth Circuit, Defendant Nelson Smith, Commissioner of DBHDS, represented by Defendant Jason Miyares, Attorney General of Virginia, and others in his office, have deliberately misrepresented both the bench warrant and Mr. Pendleton's repeated attempts to secure State remedies. App. F. It remains to be seen whether the Fourth Circuit panel will hold the signatories of the response in contempt, but Petitioner could not have asked for better evidence of a statewide conspiracy against rights. It seems we are a far cry from *Ex parte Virginia*, 100 U.S. 339, 25 L. Ed. 676, 25 L. Ed. 2d 676 (1880).

The Fourth Circuit panel has now dismissed the original appeal with reference to 28 U.S.C. § 1915 without explanation, affirming all of several errors of material fact and law addressed in the informal brief. See USCA4 No. 23-7039, ECF 11. No vote for a rehearing *en banc* was called. Given the "duty to decide the appropriateness and the merits of the declaratory request ..." in *Zwickler v. Koota*, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967), Petitioner does not think the panel's response meets the expectations of the Petition Clause of the First Amendment that has been part of our jurisprudence since *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60, 2 L. Ed. 2d 60 (1803). And because this case involves issues of exceptional public importance, the Court is implored to grant this Petition for certiorari.

REASONS FOR GRANTING THE WRIT

I. Systematic Wrongful Commitments.

Virginia's NGRI statutes under Va. Code § 19.2-182.2, *et seq.*, differ in almost every conceivable way from the State's civil commitment statutes under Va Code § 37.2-817, *et seq.* The two statutory schemes are substantively and procedurally unequal at every stage. The Virginia NGRI statute governing the initial commitment hearing for insanity acquittees, for example, Va. Code § 19.2-182.3, describes a lesser standard of evidence and lesser burden of proof than this Court has required on equal protection and due process grounds in *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992), and affords no right of appeal to a jury available under the State's analogous civil commitment statute § 37.2-814(D)(v).[4] Petitioner believes the State's NGRI statutes are likely to be found responsible for many

[4] "A written explanation of the involuntary admission process and the statutory protections associated with the process shall be given to the person, and ... shall describe, at a minimum, the person's rights to ... (v) have a jury trial on appeal."

wrongful commitments in the Virginia courts. This case is therefore distinct from either *Foucha* or *Revels v. Sanders*, 519 F.3d 734 (8th Cir. 2008), where petitioners conceded the adequacy of their initial commitment, and more like *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974), a wholesale challenge to commitment statutes containing ill-defined standards alleged to be "unconstitutional both on their face and as applied." *Id.* at 385. It is no exaggeration to say that everything about the NGRI process in Virginia is illegal.

A. Equal Protection.

The Court in *Baxstrom v. Herold*, 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966) definitively outlawed "criminal commitment" in the United States, reasoning that "[a] person with a past criminal record is presently entitled to a [civil] hearing on the question whether he is dangerously mentally ill ... [and thus], all semblance of rationality of the [civil vs criminal] classification, purportedly based upon criminal propensities, disappears." That is, "[e]qual protection demands that [a convict] receive the same [civil proceeding]." *Id.* at 115. The majority in *Foucha* later reiterated what the Court had effectively been saying for decades: following an insanity verdict, the state has "no punitive interest" because "[acquittee] was not convicted, he may not be punished," and "keeping [acquittee] against his will in a mental institution is improper absent *a determination in civil commitment proceedings* of *current* mental illness and dangerousness." *Id.* at 80 (emphasis supplied).

The majority's primary concern in *Foucha* was prohibiting statutory schemes that allow for indefinite detention without evidence. The decision was based on the Equal Protection Clause, as it had been in *Baxstrom*, to enforce substantive and procedural due process rights, and place

the evidentiary burden firmly on states to establish current behavioral evidence of mental illness and dangerousness in keeping with the state's civil commitment processes.

The Virginia statute used for NGRI commitments, Va. Code § 19.2-182.3, does not mention the heightened due process standard of "clear and convincing" evidence — the burden of proof required for civil commitments which tends to be closer to "beyond a reasonable doubt" than the civil "preponderance of the evidence" standard. Moreover, § 19.2-182.3 is defective because (1) mental illness and dangerousness are described as "factors" rather than strictly coextensive requirements, (2) it explicitly allows a finding of mental illness that is "in a state of remission," and (3) considers only the "likelihood" of dangerousness in the "foreseeable future." *Ibid.* This language plainly does not describe the minimum constitutional standards for involuntary commitments from *Addington*, and it means that insanity acquittees in Virginia can be held indefinitely based on a *presumed* mental illness and the *prospect* of future dangerousness — and these are the same statutory criteria used to continue confinement in § 19.2-182.5(C). This is a condition that has gone on indefinitely in this case.

While *Foucha* does allow NGRI acquittees to be treated differently immediately following the verdict — just as in *Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983), Petitioner believes this is (a) wrong, because legal insanity at the time of the offense is necessarily unrelated to mental illness at the time of the plea[5] — to say nothing of dangerousness, and (b) moot, because Virginia's NGRI scheme proceeds directly from the verdict to an initial commitment hearing to decide, as soon as practicable, whether the acquittee

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[5] "This circumstance should come as no surprise, since petitioner was competent at the time of his plea, ... and indeed could not have entered a plea otherwise, see *Drope v. Missouri*, 420 U. S. 162, 171 (1975)." *Foucha, supra* at 97 (Justice Kennedy, dissenting).

may be released with or without conditions. See Va. Code § 19.2-182.2. In other words, Virginia does not automatically commit insanity acquittees. In Petitioner's view, this is the only thing Virginia gets right about the NGRI process — and it is something this Court has misunderstood in past decisions: a certifiably sane and competent defendant entering an insanity plea is not volunteering for commitment to a mental hospital, and it does not follow that "it could be properly inferred that at the time of the verdict, the defendant was still mentally ill and dangerous and hence could be committed." *Foucha* at 76.

Virginia's statutes are careful to distinguish between evaluating whether a defendant "may have had a significant mental disease or defect which rendered him insane at the time of the offense," Va. Code § 19.2-169.5, and a necessary finding of competence before a defendant may stand trial: "No person shall, while he is insane or feebleminded, be tried for a criminal offense." § 19.2-167. Just as in this case, many defendants who enter insanity pleas have experienced a drug-induced psychosis or had an unfortunate response to a traumatic event and are not pleading that they currently have a mental illness. The insanity acquittee might also have been charged with a non-violent property crime: stealing a jacket, kiting checks, burglary, grand larceny, etc, where it would be unreasonable to assume dangerousness following the verdict. Like most other states, Virginia requires defendants to show insanity at the time of the offense by the "greater weight" of evidence, also known as preponderance of the evidence, or a 51% standard of more likely than not. *Price v. Com.*, 323 S.E.2d 106, 228 Va. 452 (1984). Thus, the heightened "clear and convincing" standard of *both mental illness and dangerousness* from Va. Code § 37.2-817(C) must apply at initial commitment hearings on equal protection and due process grounds since it cannot have been properly established at the time of the verdict.

Even more fundamentally, the liberty interest at stake in the initial commitment proceeding should implicate the Sixth (or Seventh) Amendment jury right. See *Callan v. Wilson*, 127 U.S. 540, 8 S. Ct. 1301, 32 L. Ed. 223 (1888); cf. *Ludwig v. Massachusetts*, 427 U.S. 618, 96 S. Ct. 2781, 49 L. Ed. 2d 732 (1976) (Justice Stevens, dissenting).

Though Mr. Pendleton has still been unable to retrieve his psychiatric evaluations, his recollection is that the one evaluator who recommended commitment found that his alleged mental illness was in remission at the time of the 2015 hearing. Considering that this was part of a split decision between the evaluators — the other recommending release, this could hardly be "clear and convincing" evidence of either mental illness or dangerousness. There are of course many other procedural problems with Virginia's NGRI statutes, but the burden of proof used to declare people insane and have them sent to a mental hospital, given that these decisions are significantly more traumatic and stigmatizing than a criminal conviction followed by detention in the general population of a jail or prison, are in need of renewed constitutional scrutiny. See *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

B. When "Not Guilty" Is A Life Sentence.[6]

NGRI commitment orders in Virginia are effectively ~2-year "criminal insanity" sentences in most cases because, while the State does review continuation of confinement after 12 months under Va. Code § 19.2-182.5, the courts typically give deference to the DBHDS mandated "graduated release process" which takes a minimum of 16 months to complete after the acquittee

[6] The title of a New York Times Magazine exposé, well worth reading: https://archive.fo/NreEo

spends several months getting to the civil hospital.[7] By contrast, the analogous civil commitment statute, *Addington* compliant § 37.2-817(C), caps the inpatient review period at 180 days. In Petitioner's case, at the time of the review hearing in 2016 pursuant to § 19.2-182.5, Pendleton had already been coerced into taking the required medications and telling the doctors whatever they wanted to hear. Mr. Pendleton does not recall ever seeing the 2016 review evaluation, has since been unable to retrieve it, and cannot imagine what relevant behavioral evidence it might have contained. Thus, after arriving at Central State in February 2015, Pendleton was released with conditions from Northern Virginia Mental Health Institute in Fairfax in January of 2017 — about as fast as it can be done.

Focusing now just on the salient post-release NGRI statute, Va. Code § 19.2-182.7, and setting aside the fact that it departs significantly from the civil outpatient process, the basic constitutional defect is that there are no explicit evidentiary requirements for continued supervised detention in Virginia. The closest § 19.2-182.7 comes to an evidentiary standard is: "The court shall subject a conditionally released acquittee to such orders and conditions it deems will best meet the acquittee's need for treatment and supervision and best serve the interests of justice and society." *Ibid.* It also says: "The community services board or behavioral health authority ... shall submit written reports to the court on the acquittee's progress and adjustment in the community no less frequently than every six months." *Ibid.* Va. Code § 19.2-182.11, which allows a conditionally released acquittee to petition for release only annually, uses the same language regarding a report. But these statutes do not specify what evidence is needed

[7] See https://www.townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\720\GDoc_DBHDS_1989_v5.pdf

from such a report to continue mandatory treatment and supervision, and are thus impermissibly vague because they fail to "establish standards ... sufficient to guard against the arbitrary deprivation of liberty interests." *Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999).

The result is that Mr. Pendleton has been detained for years without evidence, and the onus has inevitably fallen on the petitioner to attempt to prove a negative, whereas the civil statutes cap mandatory outpatient treatment at 180 days unless specific criteria according to subsection B, C, or D of Va. Code § 37.2-817.01 are met.[8] As practiced, the NGRI post-release hearings under §§ 19.2-182.7, 11 in the Circuit Court of Arlington County from 2017 to 2020 fail the Goldberg-Mathews test of due process because they lacked "(5) a decision resting solely on the legal rules and evidence adduced at the hearing; (6) a statement of reasons for the decision and the evidence relied on." *Mathews v. Eldridge*, 424 U.S. 350 at *4, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The August 2020 hearing, wherein Pendleton petitioned for release a second time under § 19.2-182.11 and was "threatened with jail for attempting to present evidence" and "not allowed to speak and not permitted to present other evidence he had prepared that day" (Complaint ¶ 96-101), succeeded only in providing advance notice. Pendleton was then recommitted *in absentia* on May 26, 2021, after having moved to another state. Cf. *Evans v. Paderick*, 443 F. Supp. 583 (E.D. Va. 1977); *Schmidt v. Goddin*, 297 S.E.2d 701, 224 Va. 474 (1982).

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[8] See § 37.2-817.4. Prior to the expiration of a previous mandatory outpatient order, "if the judge or special justice finds by *clear and convincing evidence* that (a) the person has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future, (1) cause serious physical harm to himself or others *as evidenced by recent behavior causing, attempting, or threatening harm* ... the judge or special justice shall by written order and specific findings so certify and order that the person be admitted involuntarily to mandatory outpatient treatment." Va. Code § 37.2-817.01(B) (emphasis added).

Virginia officials have now indicated they would like to see Mr. Pendleton charged with escape under Va. Code § 19.2-182.15, which would be a clear violation of the Equal Protection Clause after *Foucha* since declining to participate in mandatory outpatient treatment under Virginia's civil commitment statutes is not a crime at all. See Va. Code § 37.2-817.1(F). Neither is civil contempt a crime under § 16.1-69.24. To make escape from conditional release a felony under Va. Code § 19.2-182.15 is yet another facially unconstitutional example of Virginia turning a civil process of rehabilitation into a criminal prosecution,[9] and would certainly be "harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction." *Perez v. Ledesma*, 401 U.S. 82, 91 S. Ct. 674, 27 L. Ed. 2d 701 (1971). Hence the request for declaratory relief under 28 U.S.C. § 2201.

C. Importance of Access To Federal Forums For Equitable Relief.

As quoted in the New York Times, W. Lawrence Fitch, a consultant to the National Association of State Mental Health Program Directors and former director of forensic services for Maryland's Mental Hygiene Administration, has remarked that "states have ignored *Foucha* to a pretty substantial degree." *New York Times Magazine, supra* note 6. When the Complaint was filed on April 5, 2023, State habeas default was strongly implied if not already apparent. *Id.* ¶ 117-123. In circumstances such as these, where a plaintiff requesting declaratory relief is in custody under the color of statutes known for decades to be in violation of *settled* constitutional law — where bias, bad faith, and irreparable harm has been shown or is implicit, it should

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[9] Code of Virginia § 19.2-182.15. "Escape of persons placed on conditional release; penalty: Any person placed on conditional release pursuant to § 19.2-182.7 who leaves the Commonwealth without permission from the court which conditionally released the person shall be guilty of a Class 6 felony." *Ibid.*

always be an abuse of discretion for a district court to abstain from its duty to vindicate constitutional rights. Petitioner is asking this Court to consolidate precedent on this issue along the lines of *U.S. v. South Carolina*, 720 F.3d 518 (4th Cir. 2013) so that other plaintiffs similarly situated are not unjustifiably damaged "while waiting to raise their claims in an uninfected forum." *Gibson v. Berryhill*, 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973).[10]

The case law from *Baxstrom* first appears in Virginia in 1977 in *Evans v. Paderick, supra* (no rational basis for distinguishing between the "civilly and criminally insane."). At that point, the Court in *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972) had already noted that the "*Baxstrom* principle also has been extended to commitment following an insanity acquittal" *Id.* at 724 (citing cases). Following the *Foucha* decision, the Virginia Court of Appeals acknowledged the statutory deficiencies directly challenged in *Williams v. Com.*, 444 S.E.2d at 19, Va. App. 384 (Ct. App. 1994) ("Similar to the statute in *Foucha*, the statute under which Williams was denied her release also required her to bear the burden of proving that she was not dangerous, even if she was not mentally ill ... That statutory scheme is contrary to the rule announced in *Foucha*, designed to enforce the protections of the Due Process Clause."). This is the only case in Virginia to decide the issue somewhat faithfully. As mentioned at the

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[10] That is, where "it plainly appears that [state remedies] would not afford adequate protection" as in *Fenner v. Boykin*, 271 U.S. 240, 46 S. Ct. 492, 70 L. Ed. 927 (1926), because "the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims" *Moore v. Sims*, 442 U.S. 415, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979), and because plaintiffs should not be required to place themselves "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in [another] criminal proceeding." *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (citing *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)).

bottom of the *Williams* decision, there were contemporaneous attempts by the legislature to amend the NGRI statutes in 1993 that apparently failed.

Subsequently, the Supreme Court of Virginia has been confronted with the holdings in *Foucha* many times, studiously avoiding the issue in *Mercer v. Com.*, 523 S.E.2d 213, 259 Va. 235 (2000), and directly contradicting the equal protection holding in 2011 in *Eastlack, supra,* which declined to allow expungement of trial records resulting in acquittal, saying "a person found not guilty by reason of insanity is not discharged from the constraints imposed upon him by law as a result of his criminal act." *Id.* at 725. Cf. *Gibson v. Com.*, 756 S.E.2d 460, 287 Va. 311 (2014).

The historical survey in *Davis v. United States*, 160 U.S. 469, 16 S. Ct. 353, 40 L. Ed. 499 (1896) is illustrative of the fact that an insanity verdict has always been a *mens rea* test of intent and has always equated to "not criminally responsible" and "[n]either in the adjudged cases nor in the elementary treatises upon criminal law is there to be found any dissent from these general propositions." *Id.* at 485. This Court earlier this year upheld NGRI acquittals as dispositive under the Double Jeopardy Clause in *McElrath v. Georgia*, 144 S. Ct. 651, 601 U.S. (2024), even where the verdict was, perhaps, illogical.

The Anti Injunction Act provides exceptions "as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283, and the Declaratory Judgement Act provides one such exception under 28 U.S.C. § 2202 for the "creation of a remedy." Petitioner believes Complaints such as this one should be likened to *Doe v. Gallinot*, 657 F.2d 1017 (9th Cir. 1981), where the district court exercised its jurisdiction to grant "[f]urther necessary or proper relief to effectuate the [declaratory] judgment

[because] the challenged provisions were not unconstitutional as to Doe alone, but as to any to whom they might be applied." *Id.* at 1025.

D. Habeas Jurisdiction Under 28 U.S.C. § 2241(c)(3).

Many of the same equitable exceptions to abstention doctrine also apply in the context of habeas exhaustion, which may be found to be futile if the state's highest court has already reached a decision contrary to the petition (*Lynce v. Mathis*, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997)), or where state petitions did not receive a "full and fair" adjudication — or were thwarted by the conduct of another (*Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000)), and ultimately resting on whether the state's highest court has been given an opportunity to "pass on the matter." *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). All of these exceptions are satisfied.

On account of the ineffective assistance claim in the original August 2022 petition in Arlington, Petitioner believes an equitable tolling exception is appropriate in this case and relies on the *Maples v. Thomas*, 565 U.S. 266, 132 S. Ct. 912, 181 L. Ed. 2d 807 (2012) conception of "fundamental fairness," and the Court's desire in *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. at 1926-7, 185 L. Ed. 2d 1019 (2013) to avoid a "miscarriage of justice" through an "actual innocence gateway." *Id.* at 1927. The decision in *Magwood v. Patterson*, 561 U.S. 320, 130 S. Ct. 2788, 177 L. Ed. 2d 592 (2010) challenging resentencing orders based on prior errors that would otherwise be untimely is also applicable to granting *de novo* review here. See *Martin v. Bartow*, 628 F.3d 871 (7th Cir. 2010).

Virginia has never met the due process burden of "clear and convincing" evidence to justify Mr. Pendleton's detention since May 2015, and the civil commitment statutes, Va Code §§

37.2-817(C), 37.2-817.01(B)&(C), cap both inpatient and outpatient review periods at 180 days. Since the required continuation orders based on *some evidence* beginning 180 days from Petitioner's commitment in May 2015 are not on the record as of November 2015 onward, Pendleton's continued custody in Virginia cannot possibly be consistent with the equal protection and due process holdings in *Foucha*. And because the issues of habeas corpus overlap to a large extent with the request for declaratory relief in the Complaint on appeal here, to avoid the possibility of a judgment that conflicts with the Fourth Circuit in No. 23-7293, Petitioner asks this Court to assume jurisdiction over that pending habeas petition under 28 U.S.C. § 2101(e) and issue an original writ pursuant to 28 U.S.C. § 2241(c)(3) in the same manner as *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001).

II. Deliberate Indifference To Cruel and Unusual Punishment.

This Court has previously explained that the Eighth Amendment is fundamentally concerned with evolving standards of decency and human dignity, and that while imprisonment itself is neither cruel nor unusual it may not, for reasons of culpability, be imposed simply because a person is judged to have an illness. *Atkins v. Virginia*, 536 U.S. at 311, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

Since at least the *Evans* case in 1977, Virginia officials have either known or should have known that the State's NGRI procedures were in violation of the Fourteenth Amendment. The Evans court quoted *Matthews v. Hardy*, 420 F.2d 607 (D.C. Cir. 1969) in its decision, warning that "we are concerned that a person mistakenly placed in a mental hospital might suffer severe emotional and psychic harm." *Evans, supra* at 585-86. It has been documented that Virginia courts, State officials, and the State legislature, are familiar with the *Foucha* decision and have

avoided compliance. This Court has addressed what it loosely termed "stigma" and "grievous loss" in *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980), and has cited with approval *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969) whose language is factually pleaded in the Complaint below:

> "In considering the problem posed we are faced with the obvious but terrifying possibility that the transferred prisoner may not be mentally ill at all. Yet he will be confined with men who are not only mad but dangerously so. As the New York Courts have themselves indicated, he will be exposed to physical, emotional and general mental agony."
>
> *Id.* ¶ 37.

The Complaint alleges that Va. Code § 19.2-182.2, which sends insanity acquittees to Virginia's maximum security forensic facility, Central State Hospital in Petersburg, for evaluations following the verdict, is not appropriate in consideration of the Eighth Amendment. When Pendleton arrived at Central State in February 2015 and passed the intake evaluation, one of the lead psychiatrists at the hospital advised him to "play along" because the judge had already decided he was mentally ill. Complaint ¶ 36. Pendleton was later "attacked early one morning by another patient who thought he was Jesus Christ." *Id.* ¶ 38. Pendleton was also told that he would be medicated against his will and would "never get out" until he agreed to take the prescribed medication (Zyprexa) which immediately caused serious health problems. *Id.* ¶ 39, 40. Cf. *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990). All this occurred *before* Mr. Pendleton was committed. When he was released from the civil hospital almost 2 years later, he was 70 pounds heavier and sleeping 16 hours a day.

While Petitioner is able to joke now about being sent to the hospital where the exterior shots for Silence of the Lambs were filmed — where Hannibal Lecter was kept, it is impossible

to overstate how traumatic this experience was. Without delving into the personal details, the whole experience has gratuitously destroyed Petitioner's life several times over. He is now professionally unemployable because of what is being reported on his background checks in retaliation for filing the civil rights lawsuits against Virginia, and *this* may prove to be a permanent condition. Among the many layers of bitter irony is the recognition that Mr. Pendleton would have been better off convicted. It would have saved him from years of incessant gaslighting and coercive medical treatment.[11]

In sum, knowing the State's NGRI process to be unconstitutional and clearly regarding it as punitive even now, Petitioner believes Virginia's NGRI statutes, together with the State's customs, policies, and practices, should be considered "deliberate indifference" to cruel and unusual punishment, violating the Eighth Amendment within the meaning of *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). See also *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); *Olmstead v. LC*, 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999).

As the Court will have gathered, there are some common misperceptions about the type of people that find themselves mixed up in a criminal insanity beef. At the time of the 2014 incident Mr. Pendleton was an economics student who had just enrolled at the University of Washington in Seattle. He was studying property taxes. Next thing you know he is spending more than a year in a Virginia hospital with many people that no jury would ever condemn as

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[11] For perspective, some states have decided to abolish the insanity defense altogether, which may be the most logically consistent approach. See IDAHO CODE § 18-207(a) (1987) ("Mental condition shall not be a defense to any charge of criminal conduct.").

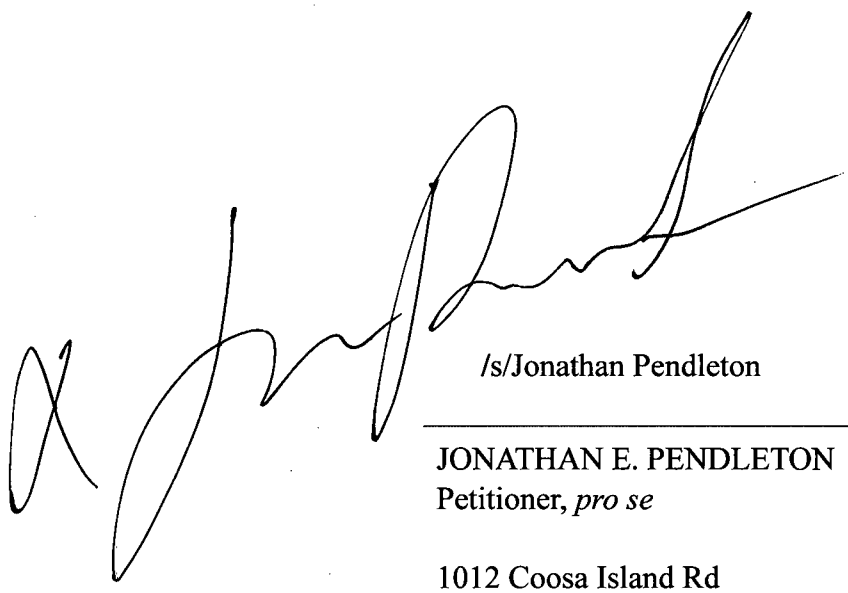
dangerously ill. Ms. Day, for example, was a Japanese woman of about retirement age. From being in groups with Ms. Day, Petitioner understood that she had had some problems with depression and had been involved in an altercation that must have resulted in her being charged with a felony — not too difficult in Virginia. She spent most of her time power-walking the hallways and taking full advantage of the salad bar; the most normal and polite person you would ever care to meet. She had also been coerced into taking SSRIs that will probably make whatever condition she might have had worse in the long run. Such is the price of admission. Then there was Mr. Eddie who had been in the hospital for around 6 years, longer than anyone else there at the time. On a regular basis Eddie was being ambushed in his room by psych techs who would hold him down and jam a needle in his leg while he screamed in protest. Just the fact that Eddie was stable enough to be in the civil hospital at all should give him an unimpeachable right to refuse treatment. Petitioner has no idea what Eddie did to deserve this since he would not attend groups, but from sharing many hundreds of meals with him Petitioner never had any reason to think Eddie was mentally ill or dangerous. He seemed like a defeated man. It should go without saying that none of these people have received effective assistance. And then there was Bob, one of Petitioner's best friends at both Central State and NVMHI. Bob was born in Tehran, went to high school in India, and attended college in the States. Based on Petitioner's understanding, Bob, who is in his 50s, was involved in a sexual assault and had been incarcerated for more than 20 years, which he would indicate with a laconic snapping of his fingers. Bob is obviously schizophrenic and would sporadically attack other patients even when medicated. He is also witty, charming in an unassuming way, often funny, and will probably need to be under supervision for most of his life, though he is part of a small minority.

CONCLUSION

The petition for a writ of certiorari should be granted and an original writ of habeas corpus should issue.

Respectfully submitted,

Dated May 14th, 2024.



/s/Jonathan Pendleton

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APPENDIX