

IN THE
SUPREME COURT OF VIRGINIA

Record No. 160784

WILLIAM J. HOWELL, et al.,

Petitioners,

v.

**TERENCE R. MCAULIFFE, in his official capacity
as Governor of Virginia, et al.,**

Respondents.

**BRIEF OF AMICI CURIAE COMMONWEALTH'S ATTORNEYS
IN SUPPORT OF PETITIONERS**

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June 17, 2016

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INTEREST OF AMICI CURIAE

Amici are a bipartisan group of 43 Democratic, Republican, and Independent Commonwealth's Attorneys who have taken an oath to support and defend the Constitution of Virginia. Amici serve in counties and cities throughout the Commonwealth, and together they represent more than 55 percent of the Commonwealth's residents.¹ The complete list of amici is included at the end of this brief.

Amici are elected officials responsible for prosecuting crimes committed within their jurisdiction. Amici have an interest in this case because Governor Terence R. McAuliffe's executive order affects several important aspects of Commonwealth's Attorneys' duties. First, the order affects the criminal jury selection process, with which Commonwealth's Attorneys are intimately involved, because the order purports to restore the political rights, including the right to serve on criminal juries, of more than 200,000 individuals convicted of felonies. Second, the order allows the 200,000-plus convicted felons to petition a circuit court for the restoration of their firearm rights, and Commonwealth's Attorneys are responsible for

¹ See July 1, 2015 Population Estimates for Virginia and its Counties and Cities, Weldon Cooper Center for Public Serve Demographics Research Group (Jan. 27, 2016), http://www.coopercenter.org/sites/default/files/node/13/July_2015_PopulationEstimates_UVACooperCenter.pdf (compiling Virginia population data by county and city).

deciding whether those petitions should be opposed. And third, the order allows the felons to register to vote, and Commonwealth's Attorneys may become involved in litigation about whether those individuals are validly qualified to do so.

STATEMENT OF THE CASE

On April 22, 2016, Governor McAuliffe issued an executive order restoring certain rights and privileges to all felons who have (1) completed their sentences of incarceration for any and all felony convictions (including both violent and non-violent convictions); and (2) completed their sentences of supervised release, including probation and parole, for any and all felony convictions.² The rights and privileges restored include the right to vote, to serve on a jury, to hold public office, and to act as a notary public. Governor McAuliffe promised to issue similar orders going forward on a monthly basis.

On May 23, 2016, Petitioners filed a verified original petition for writs of mandamus and prohibition along with a memorandum in support of that original petition. The petition argues that Governor McAuliffe's blanket restoration orders are unconstitutional, and it requests that the Court issue

² The Governor's Order restored the rights of unsupervised probationers, a status that can, and often does, carry continued legal restraint, such as fines, court costs, and victim restitution.

writs of mandamus and prohibition directing certain Commonwealth officials to refuse to register to vote, and to cancel the voter registration of, individuals whose rights were purportedly restored by the Governor's blanket restoration orders. On May 24, 2016, Petitioners filed a motion for a special session and expedited consideration. On May 27, 2016, Respondents filed a response to Petitioners' motion for a special session and expedited consideration. On June 1, 2016, this Court issued an order setting an expedited briefing schedule and placing the case on the docket for a special session on July 19, 2016.

SUMMARY OF ARGUMENT

The Constitution and laws of Virginia generally prohibit convicted felons from exercising certain rights and privileges. The Constitution itself prohibits felons from voting, Va. Const. art. II, § 1, and from holding public office, *id.* art. II, § 5. Virginia statutes prohibit felons from serving on a jury, Va. Code § 8.01-338, and from serving as a notary public, *id.* § 47.1-23. The Virginia Constitution, however, vests the Governor with power to remove these political disabilities. Va. Const. art. II, § 1 and art. V, § 12. By statute, felons also may not possess firearms, and they may not petition a circuit court to have their firearm rights restored unless they first obtain an order from the Governor removing their political disabilities. Va. Code

§ 18.2-308.2(C).

Amici support the restoration of political rights to deserving felons who have paid their debt to society and have returned to their communities as law-abiding, contributing members. But the Governor's blanket restoration order makes no distinction among felons, treating the non-violent felon the same as the cold-blooded killer, and the one-time offender the same as the career criminal. The Governor's order thus hinders Commonwealth's Attorneys' ability to discharge their duties.

Prior to April 22, 2016, Virginia law imposed two layers of individualized review before felons could serve on a jury or possess a firearm. First, the Governor would make an individualized determination of whether the felon deserved to have his rights restored. Second, the judicial branch and Commonwealth's Attorneys would determine whether the felon should serve on a particular jury or have his firearm rights restored. Governor McAuliffe's executive order eliminates the first of these two important layers of review, upsetting Virginia's delicate constitutional and statutory scheme and shifting the entire burden to courts and Commonwealth's Attorneys to screen felons properly before seating them in the jury box or restoring their gun rights.

The Governor's executive order has also resulted in the improper

restoration of the rights of individuals who are still in prison or on supervised probation, including some for murder, sex offenses, and other violent felonies. A few of these individuals have been identified, and the Governor has purported to withdraw his restoration of their rights, but his authority to revoke an order restoring political rights is uncertain. And the number of felons who improperly appear on the voter registration list, and who may yet vote, serve on juries, or petition to have their firearm rights restored, is unknown. The surest way for Commonwealth's Attorneys to identify these individuals would be for the Governor to release the list of the 200,000-plus felons whose rights he purports to have restored, but the Governor has refused to release that list despite a request for it under the Virginia Freedom of Information Act.

The issues that amici raise here are largely, and perhaps entirely, obviated when a Governor restores rights on an individualized, case-by-case basis. An individualized process guards against the inadvertent restoration of rights of undeserving felons, and it also provides Commonwealth's Attorneys and circuit courts assurance that the Governor has discharged the first check Virginians have instituted to ensure that individual felons are deserving to serve on juries or possess firearms.

ARGUMENT

I. **Governor McAuliffe’s Executive Order Unilaterally Alters Virginia Law Concerning Jury Selection.**

Virginia law generally prohibits “[p]ersons convicted of treason or a felony” from serving as jurors. Va. Code § 8.01-338.³ Before a convicted felon may serve on a jury, the felon must be vetted by several state officials across multiple branches of Government. First, the Governor must make a threshold finding that restoration of the privilege to serve on a jury ought to be granted to a given felon. See Va. Const. art. II, § 1 and art. V, § 12. Second, once that person’s ability to serve on a jury has been restored, the individual is subjected to the *voir dire* process, i.e., he or she must be called to serve on a jury, and must not be struck either for cause or through a peremptory challenge.

Governor McAuliffe’s order abdicates his responsibility to give individual scrutiny to a given felon in order to determine if they are

³ At least as of 2003, the federal government and 31 States permanently excluded felons from jury service. Brian C. Kalt, *The Exclusion of Felons From Jury Service*, 53 AM. U. L. REV. 65, 67, 150–57 (2003) (hereinafter *Felon Jury Service*) (compiling the laws of the 50 states and the federal Government as of 2003; jury rights generally may be restored to deserving individuals under the clemency power). This nationwide consensus that felons generally should not be eligible for jury service reflects the commonplace view that only law-abiding members of the community should be permitted to serve on juries, whose very purpose is to uphold and enforce the law.

deserving of restoration. The burden now rests entirely on the jury selection process—i.e., on Commonwealth’s Attorneys, defense counsel, and circuit judges—to screen these individuals. This presents not only practical problems in light of Commonwealth’s Attorneys’ limited resources, but it also alters Virginians’ policy judgments about the proper makeup of the jury box.

Potential jurors may be challenged “for cause,” but it is doubtful whether felons whose political rights have been restored may be challenged for cause solely on the basis of their criminal convictions. The Supreme Court of Wisconsin, for example, has held that prosecutors may not strike prospective jurors for cause solely because they have been convicted of crimes, and that trial courts may not enter blanket decisions to strike a class of jurors simply based on the class’s criminal history. *State v. Mendoza*, 227 Wis. 2d 838, 851–53 (1999).

If felons whose rights have been restored may not be struck for cause on the basis of their prior felony conviction, Commonwealth’s Attorneys must use a peremptory strike to disqualify a felon deemed unfit for jury service. But each side generally only has four peremptory strikes in felony cases and three peremptory strikes in misdemeanor cases. Va. Code § 19.2-262(B). Every peremptory strike is valuable because “the

peremptory remains an important litigator's tool and a fundamental part of the process of selecting impartial juries," such that the "increasing limitation of it gives [one] pause." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148 (1994) (O'Connor, J., concurring). If Commonwealth's Attorneys are now required to use peremptory challenges to strike former felons, the peremptory challenge system may be significantly altered. After all, the General Assembly made a policy decision about the number of strikes to be afforded against the background understanding that most felons are *not* eligible for jury service.

Additionally, the *voir dire* process cannot be relied upon to identify every felon who may be summoned for jury service. Although prospective jurors may be asked whether they have previously been convicted of a felony, even a proponent of expanded felon jury service candidly admits that "self-reporting is inadequate." *Felon Jury Service*, *supra* note 3, at 111. "Many jurors may misunderstand the felony/misdemeanor distinction or fail to remember their records in detail," while others "may misunderstand [the effects of] clemency" and may incorrectly believe that a restoration of their rights has expunged their conviction. *Id.* Still "[o]thers may simply lie, for a variety of reasons," such as being ashamed to admit their record in public. *Id.* at 112. Simply put, "the error rate is not negligible," with studies

suggesting that one out of every five individuals with a criminal record may not be identified through self-reporting. *Id.* at 111 n.216.

Commonwealth's Attorneys' resources are stretched thin without the added burden of having to run criminal background checks on every prospective member of a jury. And their resources are zero-sum: redirecting resources to this task leaves fewer resources for other duties. The surest way for Commonwealth's Attorneys to identify whether prospective jurors are felons would be for Governor McAuliffe to release to them the complete list of individuals whose rights have been restored, but Governor McAuliffe has refused a Freedom of Information request that he do so on the ground that the list constitutes the Governor's "working papers." Tom Jackman, *Va. prosecutors seek names of restored felons who may now be jurors, but McAuliffe refuses*, Wash. Post (May 28, 2016), <http://wpo.st/nQSe1>. The Governor's staff has stated that the Governor will not release the list of individuals until 2017, after the upcoming General Election. *Id.*

Notably, some States that have liberal felon jury service rules also allow prosecutors more than Virginia's four peremptory strikes, perhaps in recognition of the fact that prosecutors need these additional strikes to deal with the additional number of felons in the jury pool. See, e.g., Kan. Stat.

§§ 21-6613 and 43-158 (disqualifying from jury service individuals who have been convicted of a felony within the past 10 years or have not yet completed their authorized sentence); *id.* § 22-3412(a)(2) (allowing six to twelve peremptory challenges in felony cases); R.I. Gen. Laws § 9-9-1.1(c) (disqualifying from jury service felons who have not completed their sentence or period of parole or probation); R.I. Super. R. Crim. P. 24(b) (allowing six peremptory challenges for offenses punishable by death or imprisonment for more than one year). Governor McAuliffe's executive order upsets the delicate balance in Virginia law between felon jury service and the number of peremptory strikes.

These are not the only jury-related issues raised by Governor McAuliffe's order. In one recent case, a criminal defendant on trial in Dinwiddie County for the murder of a Virginia State Police trooper argued that the fair cross-section requirement of the Sixth Amendment to the United States Constitution entitles him to have restored felons as part of his jury pool. The defendant's motion was denied on the ground that the Governor's Executive Order does not retroactively affect jury service, but this issue will undoubtedly arise again in the future.⁴

⁴ See Mark Bowes, *Dinwiddie, Augusta judges reject requests seeking felons' eligibility to serve on juries per McAuliffe's order*, Richmond

II. **Governor McAuliffe’s Order Eliminates Executive Scrutiny, Thus Making It Easier for Felons to Regain Firearm Privileges.**

Virginia law generally prohibits felons from possessing firearms. Va. Code § 18.2-308.2. As with jury service, Virginia statutes require a felon to be vetted by Commonwealth officials across multiple branches of government before the felon may possess a firearm. A felon “must first obtain an order from the Governor removing his political disabilities as a condition precedent to his right to petition the circuit court for restoration of his firearm rights.” *Gallagher v. Commonwealth*, 284 Va. 444, 453 (2012). The circuit court then must determine, “in its discretion and for good cause shown,” whether to grant the felon’s petition to have firearm rights restored. Va. Code § 18.2-308.2(C). Commonwealth’s Attorneys play an important role in the circuit courts’ review, because they “shall be entitled to respond and represent the interests of the Commonwealth” in the petition. *Id.*

Governor McAuliffe recently stated that he “didn’t think [his Executive Order] had anything to do with gun rights.” Jenna Portnoy, *In Virginia, felon voting rights mean simpler path to gun ownership*, Wash. Post (May 20,

Times-Dispatch, June 8, 2016, http://www.richmond.com/news/local/article_9c3a80f4-4835-5a02-99f5-af2100a0c64f.html; Mark Bowes, *Attorneys for man accused of killing state trooper seek eligibility of convicted felons to serve on jury*, Richmond Times-Dispatch, May 19, 2016, http://www.richmond.com/news/local/crime/article_4fc693a4-1302-5e1b-afc8-bc266242cd94.html.

2016), <http://wpo.st/33Ve1>. In fact, however, Governor McAuliffe's sweeping executive order eliminated the entire first level of review for *all* felons.

Restored felons under the Governor's April 22, 2016 executive order will now present themselves before circuit courts with the imprimatur of the Governor's office as a legal advantage in their firearm rights petitions, despite the lack of any scrutiny into their particular backgrounds.

As with jury service, Governor McAuliffe's executive order shifts the entire burden of this vital review process onto Commonwealth's Attorneys and circuit courts. It is essential that Commonwealth's Attorneys discharge this burden effectively, given the public safety concerns associated with felon possession of firearms. Their resources will thus be additionally taxed by the firearm restoration process, just as it is with the jury selection process.

III. The Governor Admits That He Violated The Criteria of His Own Order by Restoring Rights to Individuals in Prison and on Supervised Release.

Governor McAuliffe has claimed that he has restored the rights *only* of felons who have (1) completed their sentences of incarceration, and (2) completed their sentences of supervised release, including probation and parole. But the precise scope of the Governor's restoration order is

unclear, and the Governor has mistakenly restored rights to a number of murderers, sex offenders, and other felons who are still in prison or on supervised release, as well as to individuals who may not vote because they are mentally incapacitated or lack United States citizenship.

Governor McAuliffe and Commonwealth election officials have uploaded onto the Virginia Election Registration Information System (VERIS) a list of over 200,000 individuals who are covered by the Governor's order. Anyone whose name appears on this list is eligible to register to vote.

Ronald R. Cloud appeared on the Governor's list of individuals whose rights were restored. But Cloud is currently serving two life sentences, one of which is for committing one of Virginia's most infamous and brutal murders.⁵ On December 31, 1980, Cloud broke into Brad Baker's farmhouse in Fauquier County and shot Baker first in the head, and then again in the groin. Cloud committed the murder out of revenge, because Baker had fired Cloud's stepfather. Baker was found bleeding to death by the woman he was to accompany to a New Year's Eve party. He died the next day, January 1, 1981, at the age of 30. The Baker murder went

⁵ Jenna Portnoy & Tom Jackman, *McAuliffe's clemency order comes under scrutiny*, Wash. Post, June 2, 2014, <http://wpo.st/BKSe1>.

unsolved for many years, and Cloud remained free. Then, in 1988, Cloud was separately convicted and sentenced to life in prison in West Virginia for sexual assault in the first degree, abduction, and conspiracy to abduct with the purpose of defiling. Fifteen years into that prison sentence, Cloud confessed to killing Baker, pleaded guilty, and was sentenced, for a second time, to life in prison.⁶

Yet, as a result of Governor McAuliffe's executive order, Cloud's ability to vote, to serve on a jury, and to seek and hold public office, have all been restored. And Cloud is not alone. Governor McAuliffe's list of restored individuals also includes these felons who are still serving prison sentences or are under supervised release:

- Three members of the Goonz gang: George Theodore Fitzgerald, Warren Edward Lemons, and Kevin Wayne Ferguson. These men pleaded guilty and are currently in prison for committing a series of home invasions. During the course of these home invasions, they and their gang held a gun to the head of an infant, tied an elderly woman to a bathroom doorknob, and tied the elderly woman's husband to a

⁶ See Lawrence Emerson, *Life sentence and 'closure' in Brad Baker murder*, Fauquier Now, Sept. 4, 2014, http://www.fauquiernow.com/index.php/fauquier_news/article/fauquier-life-sentence-brings-closure-in-brad-baker-murder-2014; Susan Svrluga, *W. Va. inmate Ronald Cloud charged in decades-old Va. homicide*, Wash. Post, Jan. 15, 2013, <http://wpo.st/NKSe1>; West Virginia Division of Corrections, OIS Offender Search, <http://www.wvdoc.com/wvdoc/OISOffenderSearch/tabid/200/Default.aspx> (search for Ronald Cloud).

refrigerator handle.⁷

- Cecil Leonard Hopkins, who strangled his girlfriend to death in front of their children. Hopkins is currently on supervised probation in Maryland.⁸
- Daniel Harmon-Wright, a former police officer who “shot [and killed] a Sunday school teacher in her Jeep as the vehicle drove away.” Harmon-Wright is currently on supervised probation in California.⁹
- Virgil J. Dantic, who is serving a prison sentence in Virginia for sex crimes.¹⁰
- Frank Ferrara, who is also serving a prison sentence in Virginia for sex crimes.¹¹

Further, Governor McAuliffe has also restored the rights of individuals who are ineligible to vote in direct violation of the Virginia Constitution due to their mental incapacity or lack of United States citizenship, including:

⁷ Graham Moomaw, *GOP blasts McAuliffe after felons in prison appear to regain voting rights*, Richmond Times-Dispatch, June 3, 2016, http://www.richmond.com/news/virginia/government-politics/article_deb7a952-a751-5e00-ab93-2d4fba33800c.html; Mike Gangloff, *5 Goonz members sentenced in home invasions in Roanoke area*, The Roanoke Times, July 15, 2011, http://www.roanoke.com/webmin/news/goonz-members-sentenced-in-home-invasions-in-roanoke-area/article_2533204d-8221-5323-86fc-bb5d47f7e607.html.

⁸ *McAuliffe’s clemency order comes under scrutiny*, *supra* note 5; Mark Grandstaff, *Fauquier man pleads guilty to killing girlfriend in front of their children*, Fauquier Times, May 31, 2013, http://www.fauquier.com/news/article/fauquier_man_pleads_guilty_to_killing_girlfriend_in_front_of_their_children.

⁹ *McAuliffe’s clemency order comes under scrutiny*, *supra* note 5.

¹⁰ *Id.*

¹¹ *Id.*

- Sahara Clay, who was found not guilty by reason of insanity in Loudoun County Circuit Court and remains hospitalized. See Part V and Exhibit 4.
- Carlos Cerda Maquin, who was deported to Peru during his period of supervised release upon completion of his five year felony prison sentence for aggravated sexual battery. See Part V and Exhibit 5.

Governor McAuliffe has admitted that it was not his intention to restore these individuals' rights but that, if any of them had registered to vote, the Department of Elections database would have allowed them to do so, and they could have voted by absentee ballot.¹²

There are undoubtedly many more incarcerated or supervised felons whose rights have been mistakenly restored under the Governor's order but who have not yet been identified. By virtue of appearing on the Governor's list, these people may yet vote in November, serve on a jury, and exercise their other newly-restored rights.

In a recent interview, Governor McAuliffe attributed these restorations to "data entry errors," and conceded that his list is "an imperfect list" and "a work in progress." He also apparently conceded that some invalid voters may vote in November, stating: "[W]e want to do everything we possibly can to make sure everybody who votes is entitled to vote, but it's 206,000 votes, 17 million bits of information, and this list will be continually updated.

¹² *McAuliffe's clemency order comes under scrutiny, supra note 5.*

But . . . this is a work in progress . . . and we encourage anyone who wants to help us with it, we're looking for [help]."¹³ Despite this call for help, Governor McAuliffe has refused to release to Commonwealth's Attorneys the list of individuals whose rights he has restored so that Commonwealth's Attorneys could most effectively help ensure that the list is purged of felons like Ronald Cloud.

Governor McAuliffe has attempted to revoke his restoration of rights of people like Cloud by removing their names from the list of eligible individuals.¹⁴ But it is not clear that the Governor has the authority to reimpose political disabilities that have been removed. *Cf.* Saikrishna Bangalore Prakash, *The Appointment and Removal of William J. Marbury and When an Office Vests*, 89 Notre Dame L. Rev. 199, 234–35 (2013) (discussing authority suggesting that an unconditional pardon may not be revoked).

Just as the Governor has inadvertently restored the rights of felons not covered by his order, he has also restored the rights of felons who fall within the letter of his order, and yet who undoubtedly could not have been

¹³ *Gov. Terry McAuliffe Responds to Criticism Over Error in Felon Data*, Richmond Times-Dispatch, <http://video.richmond.com/Gov-Terry-McAuliffe-Responds-to-Criticism-Over-Error-in-Felon-Data-30933153>.

¹⁴ *McAuliffe's clemency order comes under scrutiny*, *supra* note 5.

intended beneficiaries of the Governor's restoration. For example, Governor McAuliffe restored the rights of Joshua Testa, a man who technically meets the Governor's requirements but whose criminal record includes over 20 convictions and is currently in police custody for stabbing his brother.¹⁵ Michael Quintana also had his rights restored by the Governor's executive order, despite the fact that he has a lengthy violent criminal history and, at the moment his rights were restored, was sitting in jail awaiting trial for felony firearm possession and brandishing.¹⁶

The work of Commonwealth's Attorneys is directly affected by the fact that the list of restored felons includes (1) felons like Ronald Cloud whose rights should not actually have been restored, and (2) felons like Joshua Testa, who despite falling within the letter of Governor McAuliffe's executive order, are surely not the type of reformed, deserving individuals who, in the normal course, should be welcomed by society back into the voting booth, the jury box, or the community of individuals allowed to possess firearms. In fact, the Governor's order completely ignores the concept of recidivism. As such, the restoration list undoubtedly includes

¹⁵ NBC12 Newsroom, *Gov. McAuliffe: 'We're going to fix it' after restoring rights to violent felons still in prison*, NBC12, June 3, 2016, <http://www.nbc12.com/story/32132687/gov-mcauliffe-were-going-to-fix-it-after-restoring-rights-to-violent-felons-still-in-prison>.

¹⁶ *Id.*

numerous people who may have been restored after serving a prior felony sentence but are currently incarcerated or on bond awaiting adjudication on new crimes.

Commonwealth's Attorneys bear additional burdens from the Governor's blanket restoration order not only in terms of jury and firearm rights, discussed *supra*, but also because they have responsibility for enforcing the election laws and minimizing voter fraud. See, e.g., Va. Code §§ 24.2-427(B2), 24.2-1016. General registrars and other election officials may consult with Commonwealth's Attorneys on election-law issues, and Commonwealth's Attorneys share responsibility for defending general registrars in election-related lawsuits, including in actions where a registrar is sued for declining to register a voter. *Id.* § 24.2-121.

Commonwealth's Attorneys now have to divert additional resources to identify the Ronald Clouds and Joshua Testas in the Governor's order, and to help answer difficult questions about the scope of Governor McAuliffe's order. In fact, in light of recent publicity regarding the numerous errors identified in the list of restored felons, the Governor has deleted various individuals, such as Cloud, who he previously restored. Given this dynamic, Commonwealth's Attorneys are presented with a moving target, never knowing who is on the list or off the list and whether the Governor

has lawful authority to revoke restorations previously granted.

IV. Governor McAuliffe’s Executive Order Creates the Foregoing Problems Due To Lack of Structure and Protocols That Are Present During an Individualized Restoration Process.

The foregoing problems are unlikely to occur when a Governor issues clemency orders on an individualized basis after case-by-case analysis. Most obviously, “data entry errors” like the mistaken restoration of rights to felons like Ronald Cloud will not occur because an individualized look at Cloud and others like him would reveal that they are still serving prison sentences or are on supervised release. Commonwealth’s Attorneys (along with circuit courts and general registrars) will not have to worry about identifying whether these individuals are, in fact, on supervised release, when they appear to vote, serve on a jury, or petition for firearm possession.

When the Governor conducts an individualized review process, he also discharges the first of the two layers of review that Virginians have erected between a convicted felon and the jury box or firearm possession. Undeserving felons like Ronald Cloud or Joshua Testa will be sorted out and excluded at the first stage of review, minimizing the risk that these felons will survive the second layer of review in front of Commonwealth’s Attorneys and circuit courts.

Some supporters of Governor McAuliffe's restoration order have argued that former Governor Robert McDonnell's felon re-enfranchisement reforms are similar to Governor McAuliffe's.¹⁷ That is not so. Governor McDonnell was a champion of felon restoration rights who nevertheless concluded that he lacked the power to issue a blanket restoration of voting rights. He instituted a process that restored more felons' rights than any previous Governor but that also retained an *individualized* process that avoided many of the issues raised by Governor McAuliffe's blanket order.

In May 2013, Governor McDonnell instituted a process to restore, "on an individualized basis, civil rights to non-violent felons." See Press Release, Governor McDonnell Announces Automatic Restoration of Voting and Civil Rights on Individualized Basis for Non-Violent Felons at 1 (attached as Exhibit 1). Governor McDonnell's order applied to a smaller subset of felons than Governor McAuliffe's orders: it applied only to (1) non-violent felons (Governor McAuliffe's order includes violent felons), (2) felons who had paid all court costs, fines, and restitution, and completed other court-ordered conditions, and (3) felons who had no pending felony

¹⁷ See Editorial Board, *The GOP's voting rights lawsuit would perpetuate injustice*, Wash. Post. May 25, 2016, <http://wpo.st/lbze1>.

charges. *Id.* Governor McDonnell also created his own criteria for classifying crimes as violent as opposed to non-violent. *Id.* at 3.

Governor McDonnell's staff conducted an individualized review of whether each non-violent felon satisfied the Governor's criteria. Only after the Governor's staff confirmed that the individual satisfied the Governor's criteria did Governor McDonnell send that person an individualized letter restoring their rights. See Restoration of Voting Rights FAQs – May 29, 2013 at 4 (Governor McDonnell's office explaining that the Governor's order is "not self-executing because someone in the Executive Branch will check each record against the criteria, and an Order will be issued only for those people who meet the criteria") (attached as Exhibit 2).¹⁸

For non-violent felons who had a pending or recently denied application for the restoration of their rights, the Governor would evaluate the application the felon had already submitted to determine whether the felon satisfied the Governor's new criteria. Exhibit 1 at 3–4. If the Governor's staff needed additional information from the applicant, it would contact the applicant for that information. *Id.* at 4.

¹⁸ See also Olympia Meola, *McDonnell to speed rights process for nonviolent felons*, Richmond Times-Dispatch, May 29, 2013, http://www.richmond.com/news/state-regional/government-politics/article_08d1b42c-c80c-11e2-8950-0019bb30f31a.html.

For non-violent offenders who had not recently submitted an application, Governor McDonnell required them to submit a form via mail, online, or telephone, identifying their characteristics and requesting a review of whether they satisfied Governor McDonnell's criteria. *Id.*¹⁹ Only if the felon met the Governor's criteria would he receive a restoration letter. *Id.*

For felons who completed their periods of incarceration or supervised probation after Governor McDonnell adopted his new clemency policy, the Department of Corrections and Secretary of the Commonwealth similarly conducted a records check to ensure that the felon satisfied the Governor's criteria. If he did, Governor McDonnell sent the felon a letter restoring his rights. *Id.*

Under this individualized process, Governor McDonnell *first* ensured that the individual satisfied the appropriate criteria *before* he restored the individual's rights. Governor McAuliffe's *en masse* restoration order reverses the order of operation: he has compiled a list of over 200,000

¹⁹ The form is attached to this brief. See Office of the Secretary of the Commonwealth Non-Violent Restoration of Civil Rights Contact Form (attached as Exhibit 3). See *also* Restoration of Rights, Secretary of the Commonwealth Janet Vestal Kelly, <https://wayback.archive-it.org/1655/20131022125519/http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/restoration.cfm> (click on the link "Contact Form for Non-Violent Felons").

felons whose rights have purportedly been restored, but he has not verified that the list comports with his criteria, and he is now, *ex post*, removing names from that list despite no identifiable authority to do so.

Governor McDonnell's individualized restoration process avoided many of the problems now presented by Governor McAuliffe's blanket order. Governor McDonnell's process ensured that people like Ronald Cloud and Joshua Testa did not have their rights restored, and it ensured that the Governor performed the first of the two layers of individualized review that stand between a felon and the jury box or firearm possession. And by conducting an individualized review, Governor McDonnell was easily able to identify whether individuals had any pending felony charges. Governor McAuliffe's order ignores whether there are pending felony charges, and it is likely that it would be difficult to check for such pending charges through an *en masse* process.

V. The Reasonable Exercise of the Constitutional Authority to Restore Rights Cannot Be Executed Arbitrarily and Capriciously Regardless of Whether the Process Is *En Masse* or Individualized.

One need not even reach the issue of the Governor's constitutional authority to enter a restoration order *en masse* when such an order is enacted in an arbitrary and capricious fashion. The exercise of constitutional power must be reasonable, and the Governor's restoration

order of April 22, 2016 is anything but reasonable. Moreover, the exercise of executive power must not be arbitrary or capricious. See *Wilder v. Attorney Gen.*, 247 Va. 119, 126 (1994). In fact, the many restoration “errors” of prisoners and probationers are manifestations of a clemency order that is arbitrary and unreliable.

The Governor has done multiple things that illustrate the arbitrariness of his restoration order. First, he has restored felons who violate the terms of his own executive order.

Second, he has attempted to revoke the restoration status of those persons after the fact when the errors are brought to his attention on questionable authority to do so.

Third, he has failed to account for recidivism or a program to remove persons from his secret restoration database who have committed new crimes and are potentially incarcerated.

Fourth, he has violated Va. Const. art. II, § 1, which states, “no person adjudicated to be mentally incompetent shall be qualified to vote until his competency has been reestablished,” because he has restored mentally incompetent persons to voter status. See Exhibit 4 (containing the results of a Restoration of Rights Database search for Sahara Clay, an October 2014 court order declaring Clay to be Not Guilty by Reason of

Insanity, and a January 2016 circuit court order concerning Clay's hospitalization).

Fifth, he has violated Va. Const. art. II, § 1, which states that "[e]ach voter shall be a citizen of the United States," because he has placed an individual in the status of a restored felon, despite the fact that the individual is not a United States citizen and thus could not vote even without a prior felony conviction. See Exhibit 5 (containing the results of a Restoration of Rights Database search for Carlos Cerda Maquin, an April 2009 court order sentencing Maquin for a felony conviction, a December 2012 letter from the Division of Probation and Parole Services advising of Maquin's deportation, and a January 2013 court order stating that Maquin has been deported). These failings are symptomatic of an arbitrary mass order that restores first and asks questions later.

From a broader perspective, the Governor's order makes no specific reference to a list of affected felons, but simply a general reference to an estimated 206,000 affected individuals. In order to determine the identity of those felons to whom his order applies, the Governor has improperly delegated his authority to an administrative agency, allowing that agency broad discretion to "undo" the Governor's restoration by removing persons from the list as it deems appropriate.

Such an order is an unreasonable exercise of constitutional authority even if such authority were to exist. The only remedy is to declare the order void *ab initio* and grant the writs prayed for by the petitioners.

CONCLUSION

Amici respectfully request that the Court grants Petitioners' petition for writs of mandamus and prohibition.

Dated: June 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 17, 2016, this document was served by email to counsel of record for both Petitioners and Respondents.

/s/ James E. Plowman

Counsel for Amici Curiae

EXHIBIT 1

Secretary of the
Commonwealth
Kelly Thomasson
(/)

Governor McDonnell Announces Automatic Restoration of Voting and Civil Rights on Individualized Basis for Non-Violent Felons

– Establishes July 15th enactment date –

RICHMOND - Governor Bob McDonnell today announced the procedures for automatically restoring, on an individualized basis, civil rights to non-violent felons. The process was established with the help of multiple recommendations by stakeholder groups and affected agencies.

On May 29th Governor McDonnell announced that he would implement an automatic restoration process, within the confines of Virginia law, to those who meet the following conditions: 1) completion of their sentence, probation or parole; 2) payment of all court costs, fines, restitution, and completion of other court-ordered conditions, and 3) have no pending felony charges.

Speaking about restoration of rights, Governor McDonnell commented, "As a former prosecutor and attorney general, I strongly believe that the foremost priority of government is the safety and protection of our citizens. When people commit crimes, they must be punished in accordance with the law. But once they have served their time and fully paid for their crimes, they should be given an opportunity to return to their lives as full participants in our society. That is why we have implemented an effective statewide prisoner re-entry program to help prepare offenders to return to their communities as productive law-abiding citizens. A critical component of ensuring the security and protection of our citizens is reducing recidivism. Over 90% of inmates will be released from prison back into society. By making sure we have an effective system in place to give past offenders the opportunity to resume their lives as productive citizens, we can better keep them from committing another crime and returning to prison. This reduces victimization and prison expansion and is smart government."

Governor McDonnell continued, "These new procedures announced today govern the logistical and technical processes by which the Secretary of the Commonwealth's office will administer the automatic restoration of rights system."

Governor McDonnell concluded, "Starting today, those who have served their time, paid all fines, costs, and restitution and met other court-ordered conditions, will be able to regain their voting and civil rights as quickly as possible through a process that is automatic and individualized. I want to applaud the great work of the stakeholder working group whose ideas helped us develop this new process, as well as the affected state and local agencies who have worked hard over the last 45 days to implement the new system. Through this

system, those presently being released from incarceration or probation, who qualify, will have their civil rights automatically restored. For past offenders, our goal is to grant civil rights back to as many as possible through the end of this administration. This is the right thing to do for all Virginians to help make the Commonwealth a safer and better place."

At the May announcement, in addition to announcing the general criteria, the governor tasked the Secretary of the Commonwealth to work with stakeholders, affected state agencies and other appropriate organizations to develop a smooth transition from an application system to an automatic system, with an announcement of the administrative processes to be made July 15th.

Secretary of the Commonwealth Janet Kelly added, "Having stakeholder and state agency collaboration was invaluable in solving the complex challenges of transitioning to an automatic restoration of rights system. The Secretary of the Commonwealth's office had been working internally on the transition for several months, but there were several significant obstacles for which we needed creative solutions. The biggest challenge involved locating felons who had been out of the legal system for years or even decades. We could easily find the felons who were currently in the system or who had previously expressed an interest in getting their rights back. However, there is no accurate comprehensive database of felons who are not currently in the legal or corrections system and have been released from probation, and the stakeholder group helped us to find creative solutions to meet that challenge."

"Governor McDonnell's plan creates a path for many people, who have paid their debt to society, to fully participate in society and stand alongside their neighbors at the voting booth," said Advancement Project Co-Director Penda D. Hair. "As we continue outreach work with our partners throughout Virginia, informing eligible individuals about the new rights restoration process and connecting them with the Secretary of the Commonwealth's office, the new policy will go a long way in helping people finally get back their most fundamental of rights. We are pleased to hear the Governor has committed sufficient resources to automatically restore rights to the 500 to 700 eligible people completing their sentences every month. This will help stem the tide of disenfranchisement, while the additional resources he has added chip away at the hundreds of thousands of Virginians who have previously lost their rights." Advancement Project was part of the working group who made recommendations to the new system.

Criteria for Automatic Restoration of Rights

(Announced May 29th)

- Have been convicted of a non-violent felony in a Virginia court, or in a U.S. District Court, military court or a court of another state or territory;
- Have completed serving the prison sentence and been released from probation or parole, and;
- And, have paid all court costs, fines to the Commonwealth and restitution to the victims, satisfied other court-ordered conditions, and have no pending felony charges.

General Process for Automatic Restoration of Rights effective July 15th

- Over the past 45 days, the Secretary of the Commonwealth's Office (SOC) has met with stakeholder groups to get their input and recommendations. Many of their recommendations were implemented through this new process including:
 1. Ways to connect with past felons who have been out of the legal system

for years or decades.

- A contact form is currently on the Secretary of the Commonwealth's website. The form can be mailed to:

- - Office of the Secretary of the Commonwealth
 - Restoration of Rights Division
 - P.O. Box 2454
 - Richmond, VA 23218

- or faxed to (804) 786-9549. Forms will be made available at probation and parole offices as well.
- A web-based form that will allow for direct submission online will be available by August 1st. It will be available at: www.commonwealth.virginia.gov/applications/clemency/restoration (<http://www.commonwealth.virginia.gov/applications/clemency/restoration>)
- A toll free number (1-855-575-9177) is also available for people who do not have access to a computer or would prefer to call and provide the information necessary to ensure the criteria is met.

2. Keeping the majority of statutory burglary and breaking and entering offenses as non-violent crimes eligible for automatic restoration of rights. More serious types of statutory burglary and breaking and entering such as those with the intent to commit serious bodily harm or entering with a deadly weapon will be moved to the violent offenses list.
3. Redirecting resources targeted at state agencies who conduct criminal background checks, and other suggestions for reducing bottlenecks in the process.
4. Upgrading technology at the State Board of Elections to prevent manual data entry and allow for electronic updates each week (to be funded and completed soon).
5. Implementing an advertising and outreach component that will be conducted with the assistance of the stakeholders.
6. Working with clerks of court to ensure that any information needed from them is produced in a timely manner.

2. Due to the increase in requests that the SOC is anticipating, staff will be processing requests just as quickly as possible. SOC has added 4 additional staff and has worked to streamline business processes in preparation for the increased volume of requests. Some limited additional resources have been designated to other state agencies who assist with the ROR process.
3. Individuals must receive their rights restoration order from the Governor before they submit a voter registration application. Individuals who have their rights restored should still register to vote, as non-felon citizens are required to do.
4. SOC will be sending names of those who have had their rights restored on a weekly basis to State Board of Elections.
5. Additional Information, including the Contact Form and FAQ's on the new process can be found at: www.commonwealth.virginia.gov/applications/clemency/restoration (<http://www.commonwealth.virginia.gov/applications/clemency/restoration>)

Pending/Present Offenders:

- For those non-violent offenders who submitted an application prior to or right after the May 29th announcement, the Secretary of the Commonwealth's Office is working

on processing these requests as quickly as possible.

- For those non-violent offenders whose prior application had been denied or deemed ineligible during the McDonnell Administration, Restoration of Rights staff has completed their inventory of those files, and for those who are now eligible, they are working to process those request as quickly as possible.
- These felons do not need to provide the Secretary of the Commonwealth's office any additional information unless they are contacted by the office for clarification.

Past Non-Violent Offenders Whose Rights Have Not Been Restored:

- Virginia does not have an accurate, comprehensive list of all the non-violent felons who are no longer in the legal or corrections system and where they are located - therefore, we have established a mechanism by which individuals can contact the Secretary of the Commonwealth's office.
- For those who have had non-violent felony convictions in the past, they can contact the Secretary's Office by one of three ways:
 - Contact Form (available online (<http://www.commonwealth.virginia.gov/applications/clemeny/restoration>)): An individual can fill out this form and mail it in to the Secretary of the Commonwealth. The contact form has basic information that staff needs to move forward with their request
 - Hotline (1-855-575-9177): Restoration of Rights staff will be able to take down the information needed to move forward with their request
 - Web Portal (<http://commonwealth.virginia.gov/applications/clemency/restoration> (<http://commonwealth.virginia.gov/applications/clemency/restoration>)): The web portal will be active by August 1st. Individuals can submit online the information needed to move forward with their request.

Process for Future Individuals Released from Incarceration:

- These are individuals who are either being released from incarceration under Department of Corrections or being released from supervised probation under Department of Corrections.
- Beginning with May 2013, the Department of Corrections will identify offenders who are to be released that month as indicated above and who may qualify for automatic rights restoration based on the Governor's criteria.
- After ensuring the criteria have been met, SOC will process individual grant orders to either the last known address or the home plan address.

History of Restoration of Rights under Governor McDonnell

- As a candidate for Governor in 2009, Governor McDonnell pledged to implement the fastest and fairest system for the restoration of civil rights in modern Virginia history, with a self-imposed deadline to have decisions made within 90 days.
- In 2010, after reviewing the process, he rolled out a voluntary deadline to have decisions within 60 days of receipt of completed applications and reduce the waiting time from three years to two years.
- Governor McDonnell has already granted rights to 5,235 people. Governor Tim Kaine granted right to 4,402 people; Governor Mark Warner granted rights to 3,486 people.
- Since the May 29th announcement of automatic restoration of rights, 423 rights were granted for felons who had previously applied with the Secretary of the Commonwealth's office.
- Because of the constitutional issues, the new procedures are as automatic as possible

within his authority as governor and within existing Virginia law.

- Governor McDonnell also instituted, in the Department of Corrections and Department of Juvenile Justice, with assistance from several other state agencies, local partners, and private as well as non-profit and faith based organizations, a national model program for prisoner re-entry that centers on preparing offenders for release back into their communities as productive members of society.

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STAY CONNECTED

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Email the Secretariat (<https://governor.virginia.gov/constituent-services/Communicating-with-the-governors-office>)

EXHIBIT 2

RESTORATION OF VOTING RIGHTS

FAQs –May 29, 2013

1. What exactly does today's announcement by Governor McDonnell do?

Today's announcement means that all people convicted of a non-violent felony, as defined by the Governor, will have their civil rights automatically restored by the Governor on an individualized basis as long as they have met the criteria below:

- Have been convicted of a felony in a Virginia court, or if convicted in a U.S. District Court, military court or a court of another state or territory, be a resident of Virginia
- Have completed serving the prison sentence and been released from probation or parole; and
- Have paid all court costs, fines to the Commonwealth and restitution to the victims, satisfied all court-ordered conditions, and have no pending felony charges.

2. Why is this significant?

Prior to this announcement, Virginia was one of only a few states that required that a felon petition the Governor for the restoration of civil rights.

3. What else has the Governor done on restoration of voting rights?

In May of 2010, the Governor instituted the fastest and fairest system in Virginia's history, by establishing a self-imposed deadline of a 60-day decision turnaround on restoration of rights applications. Before the McDonnell administration, decisions often took a year or longer. To date Governor McDonnell has restored rights of 4,843 individuals, more than any other administration in history.

4. Why did Governor McDonnell decide to enact the automatic restoration of civil rights?

- Governor McDonnell believes America is a nation of second chances. All who have made mistakes, fully paid their debt to society and want to be restored to full civic participation should have that opportunity.
- Governor McDonnell believes that a person who is a non-violent felon, and has served his time and fully satisfied all court fees, fines, restitution, and other court-ordered conditions, should be able to regain their constitutional and civil rights and resume their life as a fully participating member of society.
- Governor McDonnell also believes that it is a mark of good government to restore constitutional rights to non-violent felons to provide the opportunity to succeed and become law-abiding citizens again. Having more law-abiding, productive citizens results in lower prison and jail-related costs, but more importantly, , there will be fewer future victims.

5. I am a non-violent felon who meets the Governor's new criteria – were my rights automatically restored by the Governor on May 29?

No – this is not a blanket restoration. The Governor made his announcement on May 29 that he is transitioning from an application based system to an individualized automatic system for non-violent felons. That process will not be in place and announced until July 15.

6. What crimes are considered non-violent felonies?

A list of crimes that the McDonnell administration has considered non-violent felonies since May 2010 can be found on the Secretary of the Commonwealth's website. While we anticipate that the list of non-violent felonies will remain very similar to the current standard, these will be reviewed and changes made at the Governor's discretion as part of the review process before July 15th. <http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/restoration.cfm>

7. Will the Secretary of the Commonwealth's Office continue to accept non-violent applications through July 15th?

We are encouraging those who believe they qualify for automatic restoration to wait until July 15, when the new process and plan is formally announced by the Governor's Office.

8. Why is there an official enactment date of July 15th?

There are significant logistical challenges involving the transition from an application-based system to an automatic system. Secretary Kelly has worked closely with many stakeholders on this issue during the Administration, and we want to include them in developing the appropriate administrative procedures. During this time, we will process pending applications under the new criteria.

9. Can I file my request for automatic restoration now?

We are encouraging those who believe they qualify for automatic restoration to wait until July 15, when the new process and plan is formally announced by the Governor's Office.

10. Does the Governor's Office have a list of all non-violent felons in Virginia who qualify for automatic rights restoration?

Unfortunately, there is not a single database or list of non-violent felons in Virginia who may qualify for automatic restoration. The Secretary of the Commonwealth's Office is working between now and July 15 to develop the appropriate procedures in which to identify those who may be eligible for automatic restoration.

11. Will I have my letter and grant order showing my rights were restored on July 15?

If you were convicted of a non-violent felony and submitted a 2 year application prior to May 29, the Secretary of the Commonwealth's Office will be working diligently during the transition period to mail out grant orders as quickly as possible. We will have additional information on July 15 for those non-violent felons who want to request to have their rights restored.

12. Will I have my rights restored in order to register to vote by October 15?

There are estimates that at least 100,000 people will be impacted by this new change in the restoration of rights process. Once the new process is announced on July 15, the Secretary of the Commonwealth's Office will be working as quickly as possible to grant rights restoration to as many felons as possible.

13. Can I register to vote now that the Governor has announced automatic restoration for non-violent felons?

No. You must receive your letter and grant order from the Governor's Office which will show your date of restoration before you file a voter registration application.

14. Is there a list I can put my name on to get updates on the new automatic restoration process which starts on July 15?

Yes. You may call our Restoration of Rights division at 804.786.2441 and they will take down your contact information. Also, please be checking our website for future updates:

www.commonwealth/virginia.gov/ror

15. Are felons in different circumstances going to be treated differently?

The criteria and result (automatic and individualized restoration) for all non-violent felons will be exactly the same. However, the approach for some felons will differ depending on where they are in their sentence. For purposes of administering the automatic system, it helps to view felons in four categories: past, present, future and miscellaneous.

- The present category includes those who have already submitted a petition to the Governor and are awaiting a decision, those who have previously applied and been denied, and those whose applications have been determined incomplete.
- The future category includes all of those who are currently incarcerated for a non-violent felony offense in state prisons.
- The past category includes those who have completed their incarceration, probation, parole and have fully satisfied all of their court fees, fines, restitution and other court-ordered conditions, but have not applied for their restoration of civil rights.
- The miscellaneous category includes felons who are or were incarcerated in federal prison, a local jail or are otherwise not in the state Department of Corrections system.

16. What are the unique challenges affiliated with each of these categories?

- Present: This category is the simplest to transition because we have a recent address and permission to run a criminal background check.
- Future: This category is also relatively simple because we know their whereabouts and will have an address when they are released.
- Past: This category is the most challenging. There is no comprehensive database of people who have been convicted of a felony in the Commonwealth. We do not have a fool-proof way of knowing where all these individuals reside or how to contact them.

- Miscellaneous: This category is also challenging because we do not have a comprehensive list of felons who have been incarcerated on the federal or local levels.

17. How do you expect to address these challenges?

We are confident that we can develop workable solutions to these challenges and plan to formulate them with the stakeholder groups over the next 45 days.

18. Did the Governor make any changes to the way violent felons' rights are granted?

No, the automatic process applies only to non-violent felons.

19. If I have my rights restored by the Governor, does that remove my conviction(s) from my criminal record?

No. Restoration of rights does not remove or expunge a conviction(s) from an individual's record. Pursuant to Virginia Code, 19.2-392.1 and 19.2-392.2, there are only certain instances when a criminal conviction may be removed from an individual's record.

20. Does restoration of rights give me my firearm rights back?

No. Restoration of rights does not restore the right to possess a firearm. You must petition the appropriate circuit court pursuant to Virginia Code 18.2-308.2.

21. The Attorney Generals' Advisory Committee report says that "The Governor cannot institute by executive order an automatic, self-executing restoration of rights of all convicted felons in the Commonwealth of Virginia." Isn't that what you're doing here?

- This is not a blanket restoration of rights for every convicted felon. I am instructing my administration on the criteria to be used and against which each person's individual record will be compared.
- This is also not self-executing because someone in the Executive Branch will check each record against the criteria, and an Order will be issued only for those people who meet the criteria.

22. Will you be adding any more staff to the ROR staff to handle what will likely be a significant increase in workload?

Yes, the SOC budget allows for the hire of 4 employees above the current 2 full-time staffers. If additional staff is needed due to a significant increase in work, we will reevaluate staffing needs.

EXHIBIT 3



**Office of the Secretary of the Commonwealth
Non-Violent Restoration of Civil Rights Contact Form**

Legal Name: _____ Male _____ Female _____

Name When Convicted: _____

Social Security Number: _____ - _____ - _____ Date of Birth: _____

Mailing Address: _____

Phone Number (if available): _____ Email (if available) _____

Please indicate the court in which you were convicted (circle all that apply):

Virginia Circuit Court Military Court** Out-of-State** Federal Court District if known _____

If you were convicted in Military/Out-of-State Court you must attach copies of the sentencing order or equivalent & proof of payment of all court ordered costs, fines and /or restitution associated with your felony convictions

I meet the following criteria and am eligible for non-violent automatic restoration of civil rights:

_____ Have been convicted of a non-violent felony in a Virginia court, or in a U.S. District Court, military court or a court of another state or territory

_____ Have completed serving the prison sentence and been released from probation or parole; and

_____ Have paid all court costs, fines to the Commonwealth and restitution to the victims, satisfied all court-ordered conditions, and have no pending felony charges.

****SEE REVERSE SIDE****

Persons who have been convicted of any violent offense, any drug manufacturing or distribution offense, any crime involving children, or any election law offense must fill out an application. Call 1-855-575-9177 or go online to www.commonwealth.virginia.gov/ror to get the appropriate form.

The civil rights restored through this process include the rights to:

- Register to vote
- Hold public office
- Serve on a jury
- Serve as a notary public

The restoration of rights does not restore the right to possess a firearm. You must petition the appropriate circuit court pursuant to Va. Code §18.2-308.2. This is not a pardon nor does it expunge a criminal conviction, which can only be done by petitioning a circuit court pursuant to Va. Code §§19.2-392.1 and 19.2-392.2.

Non-violent offenders residing outside the Commonwealth of Virginia must include a certified copy of their Criminal Record from the state in which they reside.

The Secretary of the Commonwealth will request a copy of your criminal record. If you were convicted in a Virginia Circuit or Federal Court and have a copy of your sentencing order(s) and proof of payment of court ordered costs, fines and /or restitution associated with your felony conviction(s), please mail them in with this form. It will expedite the processing of your request. Otherwise, the Secretary of the Commonwealth will request this information from the appropriate Court.

If you have any questions about automatic non-violent felon restoration, please visit www.commonwealth.virginia.gov/ror or call 1-855-575-9177.

**Please complete the top portion of this form and return via mail to:
Office of the Secretary of the Commonwealth
Restoration of Rights Division
P.O. Box 2454
Richmond, VA 23218**

EXHIBIT 4

(<http://www.virginia.gov/>)

Restoration of Rights Searchable Database

This database does not comprise a comprehensive list of all individuals that may have had their rights restored. If your search results in no record found, please email your contact information to: rormail@governor.virginia.gov
(<mailto:rormail@governor.virginia.gov>)

All fields are required.

First Name

Last Name

Date of Birth

Last 4 digits of SSN

The following application was found

First Name	Last Name	Date of Birth	Status	Restoration Date
Sahara	Clay	6/19/1979	Granted	4/22/2016

Your civil rights have been restored. Your prior conviction no longer restricts your right to register to vote.

[Register to Vote \(https://vote.elections.virginia.gov/Registration/Eligibility\)](https://vote.elections.virginia.gov/Registration/Eligibility)

Additional Information

- If you were convicted of a felony after your rights were restored, your rights restoration is invalid. Your rights may be restored again when you meet the eligibility criteria.
- Restoration of Civil Rights includes the right to vote, to run for office, to serve on a jury and to be a notary public.
- The restoration of civil rights does not restore the right to possess a firearm. To regain state firearms privileges, a convicted felon must apply to the circuit court of his or her jurisdiction of residence for a permit to possess or carry a firearm. Circuit courts may consider the restoration of firearms privileges only after civil rights are restored.
- The restoration of civil rights is not a pardon and will not expunge or remove a criminal conviction. You may have a notation added to your Virginia Criminal Record showing your Restoration of Rights. Click here for further instructions.
([//commonwealth.virginia.gov/media/3914/criminal-record-fingerprinting-info-for-ror.pdf](https://commonwealth.virginia.gov/media/3914/criminal-record-fingerprinting-info-for-ror.pdf))

SITE RESOURCES

[Website Feedback \(https://governor.virginia.gov/email-the-webmaster/\)](https://governor.virginia.gov/email-the-webmaster/)

[Web Privacy Policy \(//commonwealth.virginia.gov/web-policy\)](https://commonwealth.virginia.gov/web-policy)

[Accessibility \(http://www.w3.org/WAI/WCAG1A-Conformance\)](http://www.w3.org/WAI/WCAG1A-Conformance)

[Contact Us \(//commonwealth.virginia.gov/about/contact-us\)](https://commonwealth.virginia.gov/about/contact-us)

V I R G I N I A:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

COMMONWEALTH OF VIRGINIA

v. CRIMINAL NO. 26993 & 26994

SAHARA L' BOB CLAY,

DEFENDANT/ACQUITTEE

ORDER

THIS 6th day of October 2014 came the Defendant/Acquittee, Sahara L'Bob Clay, by his counsel, Lorie O'Donnell, and the Commonwealth by Her Assistant, Gigi lawless, for entry of a Not Guilty by Reason of Insanity plea.

WHEREAS the parties agree that the Defendant/Acquittee should be found Not Guilty by Reason of Insanity; and

WHEREAS the parties agree that the Defendant/Acquittee should be placed in the temporary custody of the Commissioner of Behavioral Health and Developmental Services for further evaluation as to appropriate placement and treatment; it is hereby

ORDERED that the Defendant/Acquittee is acquitted and found to be Not Guilty by Reason of Insanity of the offenses of Aggravated Malicious Wounding, as charged in case number 26993 and Felony Speeding to Elude, as charged in case number 26994.

It is further **ORDERED** that the Defendant/Acquittee be placed in the temporary custody of the Commissioner of Behavioral Health and Developmental Services for evaluation as to whether he may be released with or without conditions or requires commitment.

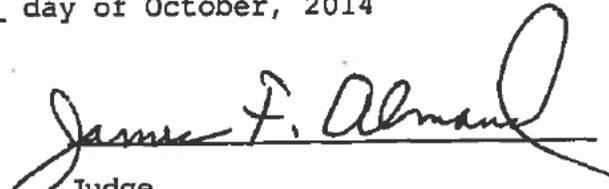
It is further **ORDERED** that the evaluation shall be conducted by one psychiatrist and one clinical psychologist, appointed by the Commissioner

It is further **ORDERED** that the evaluators shall conduct their examinations and report their findings separately within 45 days of the Commissioner's assumption of custody. Copies of the reports shall be sent to the Acquittee's attorney, the attorney for the Commonwealth and to the Court.

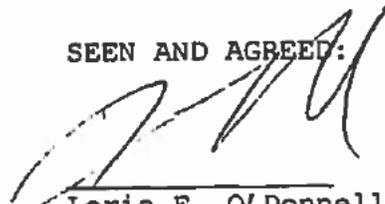
It is further **ORDERED** that the Defendant/Acquittee be taken forthwith into the custody of the Commissioner of Behavioral Health and Developmental Services and transported to Central State Hospital or such as hospital as the Commissioner deems appropriate.

It is further **ORDERED** that this case be placed on the Court's docket for review on November 20, 2014 at 10:00 a.m.

Entered this 7th day of October, 2014


Judge

SEEN AND AGREED:


Lorie E. O'Donnell
Public Defender


Gigi Lewis
Ass't Commonwealth's Attorney

VIRGINIA: IN THE CIRCUIT COURT OF LOUDOUN COUNTY

COMMONWEALTH OF VIRGINIA

:

v.

: CRIMINAL NOS. 26993, 26994, -01 & -02

SAHARA L'BOB CLAY

:

Date of Birth: 06/19/1979
SSN: 439-37-6180

**Not Guilty By Reason Of Insanity
Hearing on Temporary Custody Evaluation Reports and Inpatient Hospitalization**

This 12th day of January, 2016 at 1:00 P.M. came Jason A. Faw, Senior Assistant Commonwealth Attorney. The Acquittee, SAHARA L'BOB CLAY, was present in Court throughout the proceedings and was represented by counsel, Lorie E. O'Donnell.

Based upon the written evaluation(s) submitted by Ashley Harron, Psy.D., J.D., Psychology Associate II at the Northern Virginia Mental Health Institute, and by agreement of counsel, the Court finds that the Acquittee is mentally ill and in need of continued hospitalization based on the factors in Va. Code § 19.2-182.3. Therefore, the Court **ORDERS** that the Acquittee be recommitted to the custody of the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services.

The Court further **ORDERS** that:

1. On January 9, 2017 at 1:00 P.M., a hearing shall be held to review the Acquittee's need for inpatient hospitalization, unless an earlier hearing is scheduled as provided by law.
2. Prior to the hearing, the Commissioner shall provide a report to the Court, evaluating the Acquittee's condition and recommending treatment, as provide in Va. Code § 19.2-182.5, together with a copy of this Order.
3. Copies of the items described in Number Two (2), shall also be sent to the attorney for the Commonwealth for the jurisdiction from which the Acquittee was committed, and the Acquittee's attorney.
4. The Clerk shall notify the Judge of the receipt of the report(s) so that issues regarding the Acquittee's right to counsel may be timely addressed.

5. The Acquittee remains under the jurisdiction of this Court and shall not be released from custody and inpatient hospitalization without further Order of the Court.
6. The Order supersedes the prior Orders of the Court in this case.

ENTERED this 19th day of JANUARY, 2016



BURKE F. MCCAILL, JUDGE

Cc: Commonwealth's Attorney
Acquittee's Attorney, Office of the Public Defender
Victoria Lyly, Ph.D. Loudoun County, NGRI Coordinator
Supervising Community Service Board
Michael Schaefer, Ph.D., ABPP, Assistant Commissioner, Forensic Services
Azure Baron, Psy.D., Licensed Clinical Psychologist, Director of Psychology and Forensic Services, NGRI Unit
Treatment Team Secretary, Forensic Review Panel
Commissioner of DBHDS
Attn: Forensic Services
Office of Mental Health
P.O. Box 1797
Richmond, Virginia 23218

EXHIBIT 5

(<http://www.virginia.gov/>)

Restoration of Rights Searchable Database

This database does not comprise a comprehensive list of all individuals that may have had their rights restored. If your search results in no record found, please email your contact information to: rormail@governor.virginia.gov
(<mailto:rormail@governor.virginia.gov>)

All fields are required.

First Name

Last Name

Date of Birth

Last 4 digits of SSN

The following application was found

First Name	Last Name	Date of Birth	Status	Restoration Date
Carlos	Cerda Maquin	10/1/1955	Granted	4/22/2016

Your civil rights have been restored. Your prior conviction no longer restricts your right to register to vote.

[Register to Vote \(https://vote.elections.virginia.gov/Registration/Eligibility\)](https://vote.elections.virginia.gov/Registration/Eligibility)

Additional Information

- If you were convicted of a felony after your rights were restored, your rights restoration is invalid. Your rights may be restored again when you meet the eligibility criteria.
- Restoration of Civil Rights includes the right to vote, to run for office, to serve on a jury and to be a notary public.
- The restoration of civil rights does not restore the right to possess a firearm. To regain state firearms privileges, a convicted felon must apply to the circuit court of his or her jurisdiction of residence for a permit to possess or carry a firearm. Circuit courts may consider the restoration of firearms privileges only after civil rights are restored.
- The restoration of civil rights is not a pardon and will not expunge or remove a criminal conviction. You may have a notation added to your Virginia Criminal Record showing your Restoration of Rights. [Click here for further instructions. \(//commonwealth.virginia.gov/media/3914/criminal-record-fingerprinting-info-for-ror.pdf\)](http://commonwealth.virginia.gov/media/3914/criminal-record-fingerprinting-info-for-ror.pdf)

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[Accessibility \(http://www.w3.org/WAI/WCAG1A-Conformance\)](http://www.w3.org/WAI/WCAG1A-Conformance)

[Contact Us \(//commonwealth.virginia.gov/about/contact-us\)](http://commonwealth.virginia.gov/about/contact-us)

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF LOUDOUN COUNTY

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 107

Hearing Date: **March 20, 2009**
Judge: **JAMES H. CHAMBLIN**

COMMONWEALTH OF VIRGINIA :

v. : Criminal No. 19845

CARLOS RAUL CERDA MAQUIN :

This case came before the Court for sentencing of the defendant, who appeared in the custody of a Deputy Sheriff, and also came his attorney, **Michael J. Harrington**. The Commonwealth was represented by **Adrianna Eberle**, an Assistant Commonwealth Attorney.

It appearing to the Court that the defendant is a non-English- speaking person who can communicate in the Spanish Language, therefore, the Court appoints, an interpreter who is an English-speaking person fluent in the Spanish Language, as an interpreter for the defendant as provided in Va. Code §19.2-164.

On **June 9, 2008** the defendant was found guilty of the following offense:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
19845	aggravated sexual battery (F)	during the period from on or about 01/01/2006 to 02/22/2008	§18.2-67.3

The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code § 19.2-299.

The §19.2-300 and §19.2-301 Mental Health Evaluation was considered and is Ordered filed as a part of the record in this case.

Pursuant to the provisions of Code §19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

LOUDOUN COUNTY
 CLERK'S OFFICE
 09 APR 15 PM 4:24
AW

The Court **SENTENCES** the defendant to:

Incarceration with the **Virginia Department of Corrections** for the term of: **Ten (10) years.**

The Court **SUSPENDS** five (5) years of the ten (10) year penitentiary sentence imposed for the conviction of Aggravated Sexual Battery, for a period of ten (10) years, upon the defendant's release from confinement, upon the following conditions:

Good behavior. The defendant shall keep the peace and be of general good behavior and violate no laws of this or any other jurisdiction for a period of ten (10) years from the defendant's release from confinement.

Supervised probation. The defendant is placed on intensive supervised probation to commence on his release from incarceration, under the supervision of the Probation and Parole Office of this Court for a period of ten (10) years. The defendant shall comply with all the rules and requirements set by the Probation Officer. Probation shall include substance abuse counseling and/or testing as prescribed by the Probation Officer. Probation shall also include the recommendations from the Multicultural Center, which recommendations are incorporated into this Order and are listed in attachment 1.

Substance Abuse Screening. The Defendant shall complete any substance abuse screening, assessment, testing and treatment as directed by the Department of Corrections. The Defendant may be subject to payment of any fees associated with substance abuse treatment or intervention as required by the treatment or intervention program on an ability to pay basis.

Drug Free. The defendant shall remain drug free and in connection therewith shall submit to such random screens as may be requested by his Probation and Parole Officer and or any Law Enforcement Officer.

Costs. The defendant shall pay the costs of these proceedings, in the amount of **\$ 355.00.** The Court does hereby direct that the Probation and Parole Officer file a payment schedule within thirty (30) days from the date supervised probation commences. The Court further advised the parties that if no exception be filed, then after the aforesaid ten (10) days that the determined payment schedule shall be incorporated into, and made a part of this order. Payment is to be made to the Clerk of this Court, and is **ORDERED** to be paid, in full, prior to the end of the period of probation.

Credit for time served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187.

The Court, finding that this offense occurred after 1 July 2001 does hereby ORDER that, pursuant to §18.2-370.2 of the Code of Virginia, that the defendant be forever prohibited from loitering within one hundred (100) feet from any primary, secondary or high school. The Court advised the defendant that he is presumed to know of the existence of any such school and be cognizance of the existence thereof.

Registration Requirement - The Court does hereby direct that the defendant register and reregister with the Department of State Police in accordance with the provision of §19.2-298.1 of the Code of Virginia. That Code Section states as follows:

D. Every person required to register shall register within ten (10) days of his release from confinement in a state, local or juvenile correctional facility, or if a sentence of confinement is not imposed, within ten (10) days of suspension of the sentence, or in the case of a juvenile, or disposition. In addition, all persons convicted of violations under the laws of the United States, or any other state substantially similar to an offense for which registration is required, shall obtain from the local law-enforcement agency of the jurisdiction in which he has established residence two (2) sets of fingerprints, and two (2) photographs of a type and kind specified by the State Police for inclusion in the Registry and shall provide to the local agency all necessary information for inclusion in the Registry within ten (10) days of establishing a residence within the Commonwealth. The local law-enforcement agency shall advise the person of his duties regarding re-registration, and shall promptly submit all necessary registration information to the State Police. Any person required to register shall also be required to re-register within ten (10) days following any change of residence, whether within or without the Commonwealth. Whenever a person subject to registration changes residence to another state, the State Police shall notify the designated law-enforcement agency of that state.

E. The registration shall be maintained in the Registry established pursuant to §19.2-390.1 and shall include the person's name, all aliases which he has used or under which he may have been known, the date and locality of the conviction for which registration is required, his fingerprints and a photograph of a type and kind specified by the State Police, his date of birth, social security number, current address and a description of the offense or offenses for which he was convicted and shall, if applicable, provide the same information on convictions prior to 1 July 1997, for any of the specified offenses or under a substantially similar law of the United States, or any other state.

F. Every person required to register under this section, other than a person convicted of a sexually violent offense, shall re-register with the State Police on an annual basis from the date of the initial registration. Every person convicted of a sexually violent offense shall reregister with the State Police every ninety (90) days from the date of initial registration. For purposes of this section, re-registration means that the person has notified the State Police, confirmed his then current

address and provided such other information, including identifying information, which the State Police may, pursuant to this section and by regulation, require. Upon registration, and as may be necessary thereafter, the State Police shall provide the person with an address verification form to be used for re-registration. The form shall contain, in bold print, a statement indicating that failure to comply with the registration required is punishable as a Class I misdemeanor or a Class 6 felony.

Accordingly the defendant is remanded to the custody of the Sheriff of Loudoun County, for the purpose of obtaining his fingerprints and photographs of a type and specified by the Department of State Police for inclusion in the Sex Offender and Crimes Against Minor Registry as set forth in §19.2-390.1 of the Code of Virginia. The defendant is ORDERED to provide, to the Sheriff of Loudoun County, all of the information required for inclusion in the Registry.

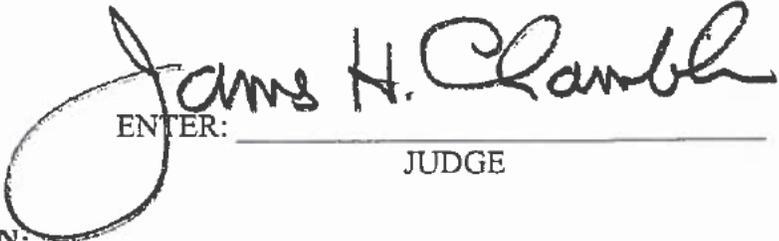
And the defendant is remanded to the custody of the Sheriff to commence serving said sentence.

The Clerk is ORDERED to forward a copy of this Order, forthwith, to the following agencies:

- Commonwealth Attorney's Office
- Michael J. Harrington, defense counsel
- Adult Probation and Parole Office
- Loudoun County Adult Detention Center, Chief Jailer

4-13-09

DATE

ENTER: 

JUDGE

DEFENDANT IDENTIFICATION:

Alias: **unknown**

SSN: 223-67-0619

DOB: 10/01/1955

Sex: M

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: ten (10) years

TOTAL SENTENCE SUSPENDED: five (5) years

TOTAL SENTENCE TO SERVE: **Five (5) years**



COMMONWEALTH OF VIRGINIA

*J. Michael Spory, Chief
James Freeman, Deputy
Chief*

751-D Miller Drive, SE
Leesburg, Virginia 20175
(703) 771-2510

**Department of Corrections
Division of Probation and Parole Services
District 25**

December 21, 2012

FILED
DATE: 12/21/12
TIME: 10:41 AM
TESTE: [Signature]
CIRCUIT COURT CLERK'S OFFICE
LOUDOUN COUNTY, VIRGINIA

The Honorable James H. Chamblin
Loudoun County Circuit Court
18 E. Market St.
Leesburg, Virginia 20178

Re: Cerda Maquin, Carlos R.
CR# 19845-00

Dear Judge Chamblin:

On March 20, 2009 Carlos Cerda Maquin appeared before the Court, after pleading guilty Aggravated Sexual Battery. The Court sentenced the defendant to Incarceration with the Virginia Department of Corrections for the term of: Ten (10) years. The court suspends Five (5) years of the penitentiary sentence imposed for the conviction of Aggravated Sexual Battery. The defendant was placed on Ten (10) years supervised probation.

The purpose of this correspondence is to advise the Court that on December 5, 2012, the aforementioned individual was deported to Peru: therefore, we will be closing interest in this case.

Respectfully,

J. Michael Spory
J. Michael Spory
Chief Probation and Parole Officer

cc: Commonwealth's Attorney's Office
File

VIRGINIA: IN THE CIRCUIT COURT OF LOUDOUN COUNTY

sdb

DATE: January 10, 2013

COMMONWEALTH OF VIRGINIA :
v. : CRIMINAL NO. 19845
CARLOS RAUL CERDA MAQUIN :

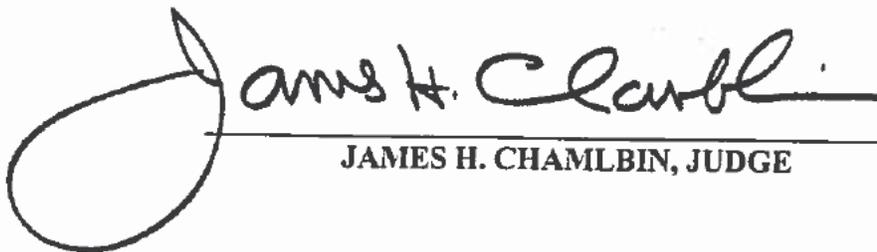
ORDER

It is appears to the Court by a letter dated December 21, 2012, from J. Michael Spory, the Defendant's Probation and Parole Officer, that the defendant has been deported to Peru, therefore it is;

ORDERED that Probation and Parole's interest in this case is closed and this case is removed from the active docket of this Court.

The Clerk is directed to forward a copy of this Order, forthwith, to the Commonwealth Attorney's Office, to Michael J. Harrington, former defense counsel, and to the Adult Probation and Parole Office.

ENTERED THIS 11th DAY OF JANUARY, 2013



JAMES H. CHAMBLIN, JUDGE