THE OPINIONS BELOW

The order of the Circuit Court of Frederick County denying Armel's motion to vacate is reprinted below at Appendix (hereinafter "App.") A. *Commonwealth v. Armel,* Nos. 85-4832(01) through 85-4836(01), 85-CR-4845(01) through 85-4854(01) (Frederick Cty. Cir. Ct., May 26, 2015). The decision of the Supreme Court of Virginia denying Armel's appeal is reprinted at App. B. *Armel v. Commonwealth*, No. 151301 (Sup. Ct. of Va., Jan. 26, 2016).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment's Due Process Clause provides:

> 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

On February 13, 1986, Armel pled guilty to fifteen counts of violating Virginia Code § 18.2-361, based on the alleged offenses of carnally knowing a person by the mouth and engaging in fellatio. Ten of these counts involved minors. On February 13, 1986, Armel was sentenced to five years imprisonment for each count, 2 years run concurrent, with 25 years suspended for the five counts involving a person of majority, resulting in a 48 year active sentence. Armel did not appeal. Armel filed a state habeas petition for a writ of habeas corpus which was denied. Armel then filed a federal habeas petition which was denied on the merits. *Armel v. Johnson*, No. 2:04-cv-600 (E.D. Va. Aug. 29, 2005). Armel appealed and the court denied his appeal. *Armel v. Johnson*, No. 05-7486 (4th Cir., March 29, 2006).

A decade later, on March 12, 2013, the United States Court of Appeals for the Fourth Circuit held that the statute under which Armel had been convicted was unconstitutional on its face. *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013), *cert. denied,* 134 S. Ct. 200 (2013). Accordingly, on September 8, 2014, Armel filed a motion to vacate his conviction in the Circuit Court of Frederick County, contending that under *MacDonald*, his convictions were void. On May 26, 2015, the Circuit Court denied Armel's motion. App. A. Armel then filed a Petitioned for Appeal in the Virginia Supreme Court, but that court refused his petition on January 26, 2016. App. B. Armel now timely petitions this Court for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

In *Lawrence,* this Court struck down as facially invalid the Texas anti-sodomy statute, holding that it violated the Fourteenth Amendment's Due Process Clause. Following *Lawrence*, the United States Court of Appeals for the Fourth Circuit held that Virginia's anti-sodomy statute, Va. Code § 18-2-361(A), is unconstitutional on its face, and that there is no factual circumstance to which the statute might validly be applied. *MacDonald v. Moose*, 710 F.3d 154, 166 (4th Cir. 2013), *cert. denied,* 134 S. Ct. 200 (2013). Even though the alleged criminal conduct in *MacDonald* involved soliciting the sodomy of a minor, the court expressly held that "the anti-sodomy provision, prohibiting sodomy between two persons without any qualification, is facially unconstitutional." *Id.* at 166. *MacDonald* further held that because Va. Code § 18.2-361 was unconstitutional on its face, the defendant's conviction must be reversed. *Id.* at 167.

Here, Armel is in the same position as the petitioner-appellant in *MacDonald*. Yet Armel has served almost thirty years in prison for participating in consensual sodomy, some with adults and admittedly some with consenting teens, with at least eight more years to serve. As in *MacDonald*, Armel's convictions were predicated on Virginia's anti-sodomy statute, § 18-2-361(A).[1] As in *MacDonald*, Armel's convictions must be reversed as having been based on a statute void *ab initio*.

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[1]In 2014, the General Assembly amended § 18.2-361(A) by eliminating the general provisions prohibiting sodomy. Armel, however, was convicted under the statute as it existed when *MacDonald* was decided.

The obstacle to Armel's immediate release is the Virginia Supreme Court's decision in *Toghill v. Commonwealth*, 768 S.E.2d 674 (Va. 2015), which rejected the Fourth Circuit's decision in *MacDonald*. *Toghill* held that the Virginia anti-sodomy statute was not facially unconstitutional or unconstitutional as applied to an adult charged with using the internet to solicit a minor to engage in sodomy. *Id.* at 679. The state court's denial of relief for Armel was based on *Toghill*. App. B. The state court thus erred by failing to follow *Lawrence* and *MacDonald*.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. This Court Should Grant Certiorari Because an Intolerable Conflict Exists *in the same state* Between the Fourth Circuit Court of Appeals and the Virginia Supreme Court Regarding an Important Question of Law, Namely, Whether Virginia's Anti-Sodomy Statute Is Unconstitutional On Its Face. A Proper Resolution of This Conflict Under the Fourteenth Amendment Due Process Clause is Necessary to Prevent the Further Deprivation of Armel's Liberty.

Supreme Court Rule 10 provides that among the factors the Court will consider when deciding whether to grant a petition for a writ of certiorari are these:

- a United States court of appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or

- a state court of last resort has decided an important federal question in a way that conflicts with the decision of a United States court of appeals; or

- a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

All three of these factors are present here.

In *Lawrence*, the appellant was convicted under Texas' anti-sodomy statute, Tex. Penal Code Ann. § 21.06(a) (2003), which provided that "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defined "[d]eviate sexual intercourse" to mean:

> (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or
> (B) the penetration of the genitals or the penetration of the genitals or the anus of another person with an object.

Lawrence, 539 U.S. at 563.

In this case, the Virginia statute that defined the predicate offense for which Armel was convicted is, in all material respects, identical to the statute struck down in *Lawrence*. At the time of Armel's alleged offense, the Virginia statute provided:

> If any person . . . carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a [felony.]

Va. Code § 18.2-361(A).

In 2013, the Fourth Circuit, following *Lawrence*, held that it was "constrained to vacate the district court's judgment and remand for an award of habeas corpus relief because the anti-sodomy provision facially violates the Due Process Clause of the Fourteenth Amendment." *MacDonald,* 710 F.3d at 156. The court accepted MacDonald's argument that although *Lawrence* did not involve minors, "the *Lawrence* Court did not preserve those applications of Texas's [sodomy] law to the extent that it would

apply to 'minors' or in any other circumstance. It invalidated the law *in toto*." *Id.* at 160. The *MacDonald* court reiterated that because "the anti-sodomy provision is unconstitutional when applied to any person, the state court of appeals and the district court were incorrect in deeming the anti-sodomy provision to be constitutional as applied to MacDonald." *Id.* at 162. *MacDonald* stressed that in *Lawrence*, the Court specifically rejected *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld a conviction for sodomy against a challenge to the Georgia sodomy statute *on its face*. *MacDonald* also quoted this Court's holding in *Lawrence* that "[t]he rationale of *Bowers* does not withstand careful analysis. . . . *Bowers* was not correct when it was decided, and it is not correct today. . . . *Bowers v. Hardwick* should be and now is overruled." *Id.* at 163 (quoting *Lawrence,* at 577-78).

Further noting that this Court had avoided deciding *Lawrence* on Equal Protection grounds (to eliminate the litigation that would arise if the statute were re-written so as to bar both sexes from engaging in sodomy), *MacDonald* emphasized that *Lawrence* framed the issue as one of Due Process: "whether the majority may use the power of the State to enforce [its] views [of morality] on the whole society through operation of the criminal law." *Id.* at 571. *MacDonald* then stated: "The *Lawrence* Court thus recognized that the facial due process challenge in *Bowers* was wrongly decided." Finally, *MacDonald* held that "[b]ecause the invalid Georgia statute in *Bowers* is materially indistinguishable from the anti-sodomy provision being challenged here, the latter provision likewise does not survive the *Lawrence* decision." *Id.* at 163. *MacDonald* thus squarely held

that regardless of whether the sodomy prosecuted was between consenting adults or between an adult and a minor, the nature of the proscribed act was the same. Both statutes, therefore — Texas' and Virginia's — have the same infirmity. *MacDonald* also stressed that the Virginia statute is "materially indistinguishable" from the statute in *Bowers*, which this Court disapproved in *Lawrence*. Further, the statute in question here is the same as that found unconstitutional in *MacDonald*.

It is critical to *MacDonald*, and to this case also, that "the anti-sodomy provision does not mention the word 'minor,' nor does it remotely suggest that the regulation of sexual relations between adults and children had anything to do with its enactment." *Id.* at 166. The statute applies without limits, like the statute in *Lawrence*. *Id.* at 165. The *MacDonald* court saw that to judicially re-write the statute would require "drastic action" of the kind prohibited by *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006):

> [W]e restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it . . . [M]aking distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a far more serious invasion of the legislative domain than we ought to undertake. . . . All the while, we are wary of legislatures who would rely on our intervention, for it would certainly be dangerous if the legislature could set a net large enough to catch all possible

> offenders, and leave it to the courts to step inside to announce to whom the statute may be applied. This would, to some extent, substitute the judicial for the legislative department of the government.

Id. at 329–30 (citations, alterations, and internal quotation marks omitted). Thus, to uphold the Virginia anti-sodomy statute as applied would violate not only *Lawrence,* but *Ayotte*.

The Supreme Court of Virginia's construction of the Fourteenth Amendment Due Process Clause and its interpretation of *Lawrence* are incompatible with this Court's decision in *Lawrence* and the Fourth Circuit's decision in *MacDonald*. In *Toghill v. Commonwealth*, 768 S.E.2d 674 (Va. 2015), the Virginia Supreme Court rejected the Fourth's Circuit's holding that Va. Code § 18.2-361(A) is unconstitutional on its face. *Toghill* adverted to the Virginia Supreme Court's decision in "*McDonald [sic]*[2] *v. Commonwealth*," 645 S.E.2d 918 (Va. 2007), where the court ruled that § 18.2–361(A) was *not* unconstitutional as applied to sodomy cases involving an adult with a minor. It was the "*McDonald*" case that the Fourth Circuit overturned in *MacDonald*.

In sum, Virginia incorrectly rejected the Fourth Circuit's interpretation of the Constitution and this Court's precedent in *Lawrence*. The Virginia Supreme Court decided both *McDonald* and *Toghill* on the premise that *Lawrence* did not strike the

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[2] The "McDonald" case was misnamed in the Virginia Supreme Court. The litigant was MacDonald, whose conviction the Fourth Circuit later reversed.

Texas statute on its face. *MacDonald,* however, held that this is precisely what *Lawrence* did. In *Lawrence*, the gravamen of the conduct forbidden by the Texas statute was sodomy. The *Lawrence* Court's sole focus was on the wrongness of the Texas legislature's proscribing that act: The question was "whether the majority may use the power of the State to enforce [its] views [of morality] on the whole society through operation of the criminal law." *Id.* at 571. *Lawrence* answered in the negative. The question is the same here, and the answer remains the same.

MacDonald stressed that the Virginia statute does not mention minors.[3] So unless federal courts are to act like super state legislatures who re-write statutes to fit their moral preferences, the Virginia anti-sodomy law cannot be used to prosecute sodomy. The *MacDonald* court, clearly seeing the boundary of its judicial authority, struck that statute down. Until now, re-writing statutes has not been among the powers of Virginia's judiciary either. *See Starrs v. Commonwealth*, 733 S.E.2d 142 (Va. App. 2012) ("We have previously noted the elementary fact that, in Virginia, '[t]rial and appellate courts 'do not sit as a 'super legislature' to second-guess' legislative choices . . . .'"). It is the province of the judiciary to say what the law *is*, *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), not to re-write it.

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[3] This is not to say that sexual conduct involving minors may not be prosecuted, Virginia has numerous statutes that reach a defendant's sexual conduct with a minor without singling out sodomy. *See e.g.,* Va. Code § 18.2-63; *see also* Va. Code §§ 18.2-61 and 18.2-371. There is no statute of limitations in Virginia for felonies.

MacDonald was correctly decided. *Toghill* was not. The Court should grant Armel's petition for certiorari, and reverse his conviction.

B. This Court Should Grant Certiorari Because, as a Direct Result of *Lawrence* and *MacDonald*, Federal District Courts in the Fourth Circuit Are Required to Grant Habeas Relief by Voiding the Convictions of Those Whose Convictions are Predicated on the Virginia Anti-Sodomy Statute. But for Petitioners such as Armel, who can no longer bring a federal habeas petition, they will be Deprived of Liberty Because of the Virginia Supreme Court's Erroneous Failure to Follow *Lawrence* and *MacDonald*.

The direct result of the conflict between the Fourth Circuit and the Virginia Supreme Court is that petitioners who, like Armel, are prevented from accessing the federal courts because they have already filed a federal habeas petition,[4] will remain incarcerated while those who can file a federal habeas petition will have their convictions overturned. It would be bad enough if a state supreme court outside of the Fourth Circuit

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[4] The rules for filing a second or successive § 2254 petition are extremely stringent. 28 U.S.C. § 2244(b)(2).

disagreed with the Fourth Circuit over this question, but it is intolerable to have a system in which the state and federal courts in the same jurisdiction disagree over the constitutionality of a statute.

Inevitably, some litigants will exhaust their Virginia appeal and/or post-conviction processes and bring habeas claims in the federal district courts of Virginia, which are bound to follow *MacDonald*. And, as in *MacDonald* itself, the petitioners' convictions will be overturned —— eventually —— because the Virginia statute underlying their convictions is void *ab initio*. Habeas petitioners will be awarded habeas relief, but in some cases only after having spent several years in prison. Other petitioners, like Armel, will *never* receive relief unless this Court intervenes. In both situations, this disparity is unjust and intolerable. To deny this petition would not only allow an unseemly rift between the Virginia Supreme Court and the Fourth Circuit to continue, but worse, would unnecessarily deprive prisoners like Armel of their liberty in violation of the Due Process Clause.

CONCLUSION

The Court should grant petitioner's request for writ of certiorari and reverse his conviction.

Respectfully submitted, this 22nd day of April, 2016.

JULIAN KENNETH ARMEL, JR.

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No. _____

In The Supreme Court of the United States

JULIAN KENNETH ARMEL, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

APPENDIX

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APPENDIX A

VIRGINIA: IN THE CIRCUIT COURT OF FREDERICK COUNTY

Criminal Nos. 85-4832(01) through 85-4836(01)
85-4845(01) through 85-4854(01)

COMMONWEALTH OF VIRGINIA

v.

JULIAN KENNETH ARMEL, JR., Defendant

ORDER DENYING MOTION TO VACATE SENTENCES

These cases came before the court on May 21, 2015, on the Defendant's Motion to Vacate his sentences in these cases. Nicholas L. Manthos, Esquire, appeared for the Commonwealth, and Mark Yeager, Esquire, appeared for the Defendant.

Upon consideration whereof, including the Defendant's Supplemental Brief in Support of Motion to Vacate, it appears to the Court that all of the crimes of which the Defendant was convicted were illegal sexual acts involving a minor, which were and remain felonies in the Commonwealth of Virginia and which crimes have not been held to be unconstitutional. See Toghill v. Commonwealth, 289 Va. ___ (2015).

Therefore, for the reasons stated in the Commonwealth's Memorandum in Response to the Defendant's Motion to Vacate, it is ADJUDGED and ORDERED that the Defendant's Motion to Vacate his Sentences in these cases is DENIED.

The Clerk is directed to send a copy of this order to the Commonwealth's Attorney, to the Defendant, and to the Defendant's counsel.

Entered May 26, 2015.

/s/ John E. Wetsel, Jr., Judge

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia at the Supreme Court Building in the City of Richmond on Tuesday the 26th day of January, 2016.

Record No. 151301
Circuit Court Nos. 85-4832(01) through 85-4836(01)
85-4845(01) through 85-4854(01)

Julian Kenneth Armel, Jr.,

against

Commonwealth of Virginia.

From the Circuit Court of Frederick County

Upon Review of the record in this case and consideration of the argument in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

/s/ Ebby Edwards, Deputy Clerk