VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 1st day of April, 2021.

Present: All the Justices.

Rodolfo Bustos, Appellant,

against Record No. 200160
Court of Appeals No. 1880-18-4

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no error in the judgment of the Court of Appeals.

Rodolfo Bustos ("Bustos") was convicted of two counts of forcible sodomy and three counts of crimes against nature. During the penalty-phase of his trial, Bustos raised an objection to Instruction 12, one of the Commonwealth's proposed jury instructions, which stated:

> Any person sentenced to a term of incarceration for a felony offense (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed, or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release.

Bustos argued that Instruction 12 should not be given because geriatric release was a factual impossibility because only 0.1% of eligible offenders actually receive geriatric release.[1] He claimed that giving the instruction may mislead the jury into believing that he had a higher possibility of release than actually existed. In the alternative, Bustos requested that the trial court amend Instruction 12 to include the 0.1% statistic. Citing *Fishback v. Commonwealth*, 260 Va. 104 (2000), the trial court overruled Bustos's objection, denied his proposed amendment and gave Instruction 12. The jury subsequently recommended that Bustos receive eight years for

[1] Bustos subsequently conceded that this statistic was factually incorrect.

each count of forcible sodomy and one year for each count of crimes against nature for a total sentence of nineteen years.

Prior to his sentencing hearing, Bustos filed a memorandum requesting that the trial court suspend a portion of his sentence to account for the fact that he was unlikely to receive geriatric release. In support of his argument, he again pointed to the fact that only 0.1% of offenders are granted geriatric release. Re-emphasizing his position regarding *Fishback*, he included an affidavit from one of the jurors. The affidavit stated that some of the jurors believed that Bustos would be paroled after five years. According to the juror, the recommended sentence was meant to "send a message," as the sentence imposed, nineteen years, was the age of the victim at the time the crimes occurred. The trial court imposed the jury's recommended sentence of nineteen years but suspended four years.

Bustos appealed the trial court's decision to give Instruction 12 to the Court of Appeals. In his appeal, Bustos argued that the trial court erred in granting Instruction 12 or, in the alternative, it erred in refusing to amend the instruction to inform the jury of the statistical unlikelihood of parole. Relying on *Fishback*, the Court of Appeals determined that the trial court did not err in giving Instruction 12. With regard to amending the jury instruction, the Court of Appeals noted that the statistical probability of someone receiving geriatric release was a statement of fact, not law. As the purpose of jury instructions is to instruct the jury on the law, the Court of Appeals determined that it would be improper to give the amended instruction.

In his appeal to this Court, Bustos argues that *Fishback* was wrongly decided and should be overturned because the Court misinterpreted Code § 53.1-40.01. "'[P]recedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.'" *Hampton v. Meyer*, 299 Va. 121 (2020) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 362 (2010)). As this Court has long recognized, "[t]he rule of *stare decisis* is entitled to the greatest respect, and, under our system of jurisprudence, is an essential feature of the administration of justice." *Postal Tel.-Cable Co. v. Farmville & P.R. Co.*, 96 Va. 661, 662 (1899). Further, the Court is "mindful that 'considerations of *stare decisis* weigh heavily in the area of statutory construction, where [the legislature] is free to change this Court's interpretation of its legislation.'" *Turner v. Commonwealth*, 295 Va. 104, 112 (2018) (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977)).

Here, Bustos's specific issue with *Fishback* involves the Court's interpretation of Code § 53.1-40.01. Since the Court decided *Fishback*, the General Assembly has met 20 times in regular session. Notably, during those 20 sessions, the General Assembly has not taken any action to substantively amend Code § 53.1-40.01 to alter the Court's decision. "Under these circumstances, the construction given to the statute is presumed to be sanctioned by the legislature and therefore becomes obligatory upon the courts." *Daniels v. Warden of Red Onion State Prison*, 266 Va. 399, 401 n.2 (2003) (applying the presumption of legislative acquiescence after only two legislative sessions). In light of the General Assembly's apparent acquiescence to the Court's interpretation of Code § 53.1-40.01, the Court declines Bustos's invitation to revisit the ruling in *Fishback*.

In the alternative, Bustos argues that the trial court should have amended Instruction 12 to inform the jury of the probability of actually receiving geriatric release. "A trial court's decision whether to grant or refuse a proposed jury instruction is generally subject to appellate review for abuse of discretion." *Howsare v. Commonwealth*, 293 Va. 439, 443 (2017). "The purpose of jury instructions is to inform the jury fully and fairly *about the law applicable to the particular facts of a case*." *Hawthorne v. VanMarter*, 279 Va. 566, 586 (2010) (emphasis added). As an initial matter, it should be noted Bustos was not seeking to amend Instruction 12 to fully and fairly inform the jury about the law. Nor could he, as the wording of Instruction 12 is practically a verbatim recitation of the applicable statute. Rather, he was seeking to amend Instruction 12 to inform the jury about a factual matter. Thus, Bustos's attempted amendment was, by definition, improper.[2] Accordingly, the trial court did not abuse its discretion in refusing to amend Instruction 12.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Fairfax County.

A Copy,

Teste:

Clerk

[2] The fact that the information Bustos was seeking to convey was also factually incorrect further compounds the impropriety of the attempted amendment.