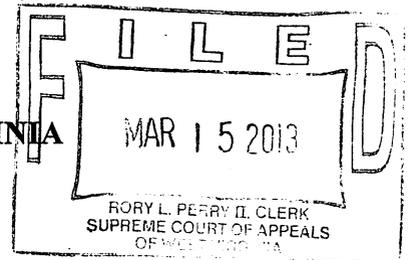


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1352



CARLOS A. LEEPER-EL,

*Petitioner Below,  
Petitioner,*

v.

ADRIAN HOKE, WARDEN,  
HUTTONSVILLE CORRECTIONAL CENTER,

*Respondent Below,  
Respondent.*

---

SUPPLEMENTAL BRIEF ADDRESSING LEGAL QUESTIONS  
PRESENTED BY THE COURT

---

PATRICK MORRISEY  
ATTORNEY GENERAL

MARLAND L. TURNER  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 11734  
E-mail: [mlt@wvago.gov](mailto:mlt@wvago.gov)

*Counsel for Respondent*

## TABLE OF CONTENTS

	Page
I. QUESTIONS PRESENTED .....	1
II. SUMMARY OF ARGUMENT .....	1
III. ARGUMENT .....	2
A. Pursuant to the plain language of West Virginia Code § 53-4A-1, the Legislature elected to limit habeas corpus relief to persons incarcerated. ....	3
B. A petition for post-conviction habeas corpus relief is rendered moot if the defendant is paroled because the parolees are not deemed as “incarcerated” under W. Va. Code § 53-4A-1. ....	5
IV. CONCLUSION .....	12

**TABLE OF AUTHORITIES**

<b>CASES</b>	<b>Page</b>
<i>Bartles v. Hinkle</i> , 196 W. Va. 381, 472 S.E.2d 827 (1996) .....	2
<i>Bostick v. Weber</i> , 692 N.W.2d 517 (S.D. 2005) .....	11
<i>Carlsbad Technology, Inc. v. HIF Bio, Inc.</i> , 556 U.S. 635 (2009) .....	2
<i>Crockett v. Andrews</i> , 153 W. Va. 714, 172 S.E.2d 384 (1970) .....	3
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006) .....	2-3
<i>Dunlap v. Friedman's, Inc.</i> , 213 W. Va. 394, 582 S.E.2d 841 (2003) .....	10
<i>Elder v. Scolapia</i> , No. 11-1156, 2013 WL 656833 (February 13, 2013) .....	7
<i>Ex parte Davis</i> , 146 P. 1085 (Okla. Crim. App. 1915) .....	11
<i>Greenspring Racquet Club, Inc. v. Baltimore County</i> , 232 F.2d 887 (4th Cir. 2000) .....	3
<i>Harshbarger v. Gainer</i> , 184 W. Va. 656, 403 S.E.2d 399 (1991) .....	3
<i>Hinkle v. Bauer Lumber &amp; Home Building Center, Inc.</i> , 158 W. Va. 492, 211 S.E.2d 705 (1975) .....	5
<i>Hoover v. Blankenship</i> , 199 W. Va. 670, 487 S.E.2d 328 (1997) .....	4, 8
<i>Johnston v. Hunter</i> , 50 W. Va. 52, 40 S.E. 448 (1901) .....	2
<i>Jones v. Cunningham</i> , 371 U.S. 236 (1963) .....	7, 9
<i>Jones v. Hoke</i> , No.11-0396 (W. Va. Supreme Court, September 4, 2012) .....	6
<i>Kemp v. State</i> , 203 W. Va. 1, 506 S.E.2d 38 (1997) .....	5-6
<i>Kessel v. Monongalia County, General Hospital</i> , 220 W. Va. 602, 648 S.E.2d 366 (2007) .....	9
<i>McClenny v. Murray</i> , 431 S.E.2d 330 (Va. 1993) .....	9
<i>McCoy v. Siefert</i> , No. 11-1636 (W. Va. Supreme Court, February 11, 2013) .....	5

*McGloin v. Warden of Maryland House of Correction*, 137 A.2d 659 (Md. 1958) ..... 11

*People ex rel. Wilder v. Markley*, 255 N.E.2d 784 (1970) ..... 11

*People ex rel. Williams v. Morris*, 357 N.E.2d 851 (Ill. App. Ct. 1976) ..... 7, 8, 11

*People v. Kuhns*, 866 N.E.2d 1181 (Ill. App. Ct. 2007) ..... 8

*Sorrow v. Vickery*, 184 S.E.2d 462 (Ga. 1971) ..... 11

*State ex rel. Crupe v. Yardley*, 213 W. Va. 335, 582 S.E.2d 782 (2003) ..... 4, 10

*State ex rel. Goff v. Merrifield*, 191 W. Va. 473, 446 S.E.2d 695 (1994) ..... 4

*State ex rel. McCabe v. Seifert*, 220 W. Va. 79, 640 S.E.2d 142 (2006) ..... 6

*State ex rel. Richey v. Hill*, 216 W. Va. 155, 603 S.E.2d 177 (2004) ..... 4-5, 6, 10

*State ex rel. Strogen v. Trent*, 196 W. Va. 148, 469 S.E.2d 7 (1996) ..... 9-10

*State ex rel. Valentine v. Watkins*, 208 W. Va. 26, 537 S.E.2d 647 (2000) ..... 4, 10

*State Road Commission v. Hereford*, 151 W. Va. 526, 153 S.E.2d 501 (1967) ..... 6

*State v. Ballard*, 83 A.2d 539 (NJ Super. Ct. App. Div. 1951), *aff'd*, (NJ Super. Ct. App. Div. 1952) ..... 11

*State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968) ..... 3

*State v. General Daniel Morgan Post No. 548*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ..... 3-4

*State v. Hodges*, 172 W. Va. 322, 305 S.E.2d 278 (1983) ..... 10-11

*State v. Richards*, 206 W. Va. 573, 526 S.E.2d 539 (1999) ..... 10

*Taylor v. State*, 187 P.3d 1241, 1244 (Idaho App. Ct. 2008) ..... 8

*Thoresen v. State*, 239 A.2d 654 (Me. 1968) ..... 6

*Umanzor v. Lambert*, 782 F.2d 1299 (5th Cir. 1986) ..... 3

*Valone v. Valone*, 80 Va. Cir. 45 (City of Norfolk 2010) ..... 3

<i>Watt v. Brookover</i> , 13 S.E. 1007 (W. Va. 1891) .....	6
<i>White v. Gladden</i> , 303 P.2d 226 (Or. 1956) .....	11
<i>Williams v. State</i> , 155 So. 2d 322 (Al. Ct. App. 1963) .....	11

**STATUTES**

28 U.S.C. §§ 2254 and 2255 .....	8
28 U.S.C. § 2254(d) .....	9
W. Va. Code § 53-4A-1 .....	<i>Passim</i>
W. Va. Code § 61-7-1 .....	10
W. Va. Code § 62-11B-3 .....	9

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1352

CARLOS A. LEEPER-EL,

*Petitioner Below,  
Petitioner,*

v.

ADRIAN HOKE, WARDEN,  
HUTTONSVILLE CORRECTIONAL CENTER,

*Respondent Below,  
Respondent.*

---

SUPPLEMENTAL BRIEF ADDRESSING LEGAL QUESTIONS  
PRESENTED BY THE COURT

---

I.

QUESTIONS PRESENTED

- A. Whether, under W. Va. Code § 53-4A-1. *et seq.* or under the common law, relief in habeas corpus is available to persons who are no longer incarcerated?
- B. Whether a petition for post-conviction habeas corpus relief is rendered moot if the defendant is paroled at any point after the petition has been filed?

II.

SUMMARY OF ARGUMENT

First, pursuant to the plain language of W. Va. Code § 53-4A-1, West Virginia courts lack the necessary subject matter jurisdiction to grant habeas relief to persons who are not incarcerated. Further, an unbroken line of cases from this Court have held that under the clear, unambiguous

language of West Virginia's post-conviction statute, W. Va. Code § 53-4A-1, habeas relief is available only to one "incarcerated under sentence of imprisonment."

Second, a petition for post conviction habeas relief is rendered moot upon a person's release on parole. The West Virginia legislature declined to draft W. Va. Code § 53-4A-1 as broadly as the federal habeas statute. Therefore, this Court is not bound to federal authority on this issue and is free to interpret the State's habeas remedy in accord with the intention of the Legislature which is clearly manifested in the plain language of the West Virginia habeas statute.

### III.

#### ARGUMENT

In order for a court to rule, it must have jurisdiction, "the power to hear and determine a cause." *Johnston v. Hunter*, 50 W. Va. 52, 40 S.E. 448, 449 (1901). An aspect of jurisdiction is subject-matter jurisdiction. "Subject matter jurisdiction defines the court's authority to hear a given type of case,' [representing] 'the extent to which a court can rule on the conduct of persons or the status of things.'" *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (citations omitted).

Subject-matter jurisdiction consists of two elements, (1) constitutional subject-matter jurisdiction; and, (2) statutory subject-matter jurisdiction. *See, e.g., Bartles v. Hinkle*, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996) ("a trial court cannot write its own jurisdictional ticket, but it must act within the confines of constitutional as well as statutory limits on its jurisdiction."). Constitutional subject-matter jurisdiction exists only when there is a case or controversy between the parties. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the

course of doing so.”); *Harshbarger v. Gainer*, 184 W. Va. 656, 659, 403 S.E.2d 399, 402 (1991) (“the actual dispute or controversy rule applies to all West Virginia judicial proceedings”). Without a case or controversy, the court lacks subject-matter jurisdiction. *Greenspring Racquet Club, Inc. v. Baltimore County*, 232 F.2d 887 (4th Cir. 2000) (Table) (text available at 2000 WL 1624496, at \*4) (because “no case or controversy presently exists, . . . the district court was without subject matter jurisdiction over that claim.”).

Statutory subject matter jurisdiction “consists of the authority the legislature has given a particular court to hear the type of controversy involved in the action.” *Valone v. Valone*, 80 Va. Cir. 45 (City of Norfolk 2010). “Whether there exists . . . Constitutional subject-matter jurisdiction, is analytically distinct from whether the pertinent habeas statutes confer statutory subject-matter jurisdiction.” *Umanzor v. Lambert*, 782 F.2d 1299, 1301 n.5 (5th Cir. 1986).

Notwithstanding the existence of constitutional subject matter jurisdiction, West Virginia courts lack the necessary subject matter jurisdiction to grant habeas relief to persons who are not incarcerated: including persons released on parole.<sup>1</sup>

**A. Pursuant to the plain language of West Virginia Code § 53-4A-1, the Legislature elected to limit habeas corpus relief to persons incarcerated.**

In addressing the meaning of a statute, “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). See also Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548*, 144 W. Va. 137, 107 S.E.2d 353 (1959) (“When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts,

---

<sup>1</sup>In the case *sub judice*, it’s arguable whether the petitioner even satisfies Constitutional subject matter jurisdiction because he is not currently restricted by any action of the State.

and in such case it is the duty of the courts not to construe but to apply the statute.”); Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970) (“Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.”). “[West Virginia Code] § 53-4A-1(a) (1967) (Repl. Vol. 1994) explains to whom a post-conviction writ of habeas corpus is available[.]” *State ex rel. Valentine v. Watkins*, 208 W. Va. 26, 31, 537 S.E.2d 647, 652 (2000), as well as delineating the “circumstances under which a post-conviction writ of habeas corpus is available.” *State ex rel. Crupe v. Yardley*, 213 W. Va. 335, 337, 582 S.E.2d 782, 784 (2003) (per curiam).

West Virginia Code § 53-4A-1(a) (emphasis added) provides, in pertinent part, “*Any person convicted of a crime and incarcerated under sentence of imprisonment . . . may, . . . file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, . . .*” The predicate for filing and pursuing, and thus for vesting the circuit court with jurisdiction, is the petitioner’s incarceration. Pursuant to West Virginia law, an incarcerate may file a petition for habeas corpus and that same person may prosecute a petition, but only so long as that person remains incarcerated, that is ““shut up in prison, . . . in confinement; . . . imprison[ed].”” *Hoover v. Blankenship*, 199 W. Va. 670, 673, n.2, 487 S.E.2d 328, 331 n.2 (1997) (citation omitted). *See also State ex rel. Goff v. Merrifield*, 191 W. Va. 473, 477, 446 S.E.2d 695, 699 (1994) (citation omitted) (emphasis deleted) (“Incarceration is defined as ‘confinement in a jail or [in a] penitentiary.’”). Indeed, in *State ex rel. Richey v. Hill*, 216 W. Va. 155, 160-61, 603 S.E.2d 177, 182-83 (2004), this Court observed that West Virginia Code § 53-4A-1(a) creates a jurisdictional predicate for habeas relief, “habeas lies only for one ‘convicted of a crime and incarcerated under sentence of imprisonment therefore[.]’” *See also id.* at 173, 603 S.E.2d at 195 (Maynard, C.J., concurring) (“The requirement that a post-conviction DNA

petitioner be incarcerated is the standard applied to ordinary petitioners by the West Virginia Habeas Corpus Act”). Recently, in a memorandum decision this Court wrote:

Pursuant to West Virginia Code § 53-4A-1, the right to post-conviction habeas corpus relief is limited to “[a]ny person convicted of a crime and incarcerated under sentence of imprisonment therefor . . . .” Moreover, West Virginia Code § 53-4A-3(b) states that any writ issued “shall be directed to the person under whose supervision the petitioner is incarcerated.” As there is no dispute that petitioner is not incarcerated, this Court finds that the circuit court order granting the State’s motion for summary judgment is proper.

*McCoy v. Siefert*, No. 11-1636 (W. Va. Supreme Court, February 11, 2013)(memorandum decision).

And, as this Court has held, “[w]henver it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.” Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.* 158 W. Va. 492, 211 S.E.2d 705 (1975).

Therefore, the law is clear on this issue; relief in habeas corpus is unavailable to persons who are no longer incarcerated.

**B. A petition for post-conviction habeas corpus relief is rendered moot if the defendant is paroled because the parolees are not deemed as “incarcerated” under W. Va. Code § 53-4A-1.**

A review of West Virginia case law compels one to infer that a petition for post conviction habeas relief is rendered moot upon a person’s release on parole.

Consistent with the language of the statute and the general legal principles derived therefrom, this Court held in *Kemp v. State*, 203 W. Va. 1, 2, 506 S.E.2d 38, 39 (1997) that “because the appellant has already been released, his request for a writ of habeas corpus is moot.” The Court did note that *coram nobis* may be an available remedy, in limited circumstances, when a defendant is

no longer incarcerated. *Id.* at 2 n.4, 506 S.E.2d at 39 n.4, citing 2 Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure II-508 to 509 (2d 1993).<sup>2</sup>

Similarly, this Court wrote in *State ex rel. Richey v. Hill*, 216 W. Va. 155, 164, 603 S.E.2d 177, 186 (2004) that “the general nature of habeas corpus, our own post-conviction habeas corpus statute, and the views of other jurisdictions establish that a post-conviction petitioner seeking DNA testing must be incarcerated.” The Court noted, once again, the possible availability of *coram nobis* as a remedy. *Id.*, 216 W. Va. at 159 n.3, 162 n.10, 603 S.E.2d at 181 n.3, 184 n.10.

In *State ex rel. McCabe v. Seifert*, 220 W. Va. 79, 85, 640 S.E.2d 142, 148 (2006), where the petitioner was released on parole during the pendency of his appeal, this Court held that

in view of McCabe’s release from incarceration in combination with: (1) his withdrawal of a substantial portion of the appeal from this Court’s consideration and (2) the fact that he raises no issues concerning the terms of his parole agreement . . . this Court concludes that this appeal is moot and should be dismissed from the docket of this court.

And, finally in *Jones v. Hoke*, No.11-0396 (W. Va. Supreme Court, September 4, 2012) (memorandum opinion), where this Court affirmed the circuit court’s order dismissing the habeas petition as moot because the petitioner was released on parole after the petition had been filed.

---

<sup>2</sup>This Court has not definitively settled whether such writs still exists in the criminal law in West Virginia. *State ex rel. Richey v. Hill*, 216 W. Va. 155, 162 n.10, 603 S.E.2d 177, 184 n.10 (2004) (“We have noted that even though *coram nobis* is abolished in purely civil cases, it may still be available in a post-conviction context when the petitioner is not incarcerated.”). However, the writ *coram nobis* has been controlled by statute in this State under West Virginia Code § 58-2-3, see, e.g., *State Road Comm’n v. Hereford*, 151 W. Va. 526, 533, 153 S.E.2d 501, 506 (1967); *Watt v. Brookover*, 13 S.E. 1007, 1008 (W. Va. 1891), but that statute was repealed in 1998. 198 W. Va. Acts ch. 110. Since no court in West Virginia enjoys specific constitutional authority over the *coram nobis/vobis* writs, with the repeal of the *coram nobis* statute, the legislature has repealed the writ. See *Thoresen v. State*, 239 A.2d 654, 655 (Me. 1968).

Admittedly, the Court's recent holding in *Elder* interpreting the word "incarceration" pursuant to the habeas statute to include "home incarceration" signaled, at least, a minor retreat from the Court's prior rulings. See Syl. Pt. 2, *Elder v. Scolapia*, No. 11-1156, 2013 WL 656833 (February 13, 2013) (citation omitted) (holding "an offender who has been sentenced pursuant to the Home Incarceration Act and is accordingly subject to substantial restrictions on his or her liberty by virtue of the terms and conditions imposed by a home incarceration order . . . is 'incarcerated under sentence of imprisonment' for purposes of seeking post conviction habeas corpus relief . . ."). The Court relied primarily on federal authority interpreting the federal habeas statute to extend to any situation where there are "significant restraints on an individual's liberty." *Id.*; also see *Jones v. Cunningham*, 371 U.S. 236, (1963) (holding that persons on parole are in custody pursuant the federal habeas statute).

However, the holding in *Elder* was motivated, in part, by the Legislature's decision to retitle the Home Confinement Act to the Home Incarceration Act. (*Id.*) Moreover, parole is different from home incarceration. "A parolee is not imprisoned and is subject to reimprisonment only if he violates a condition of his parole." *People ex rel. Williams v. Morris*, 357 N.E.2d 851, 852 (Ill. App. Ct. 1976). Also "no one has actual custody or physical control of the parolee." (*Id.*) Unlike a person on home incarceration, a parolee is at "liberty to do [most of] those things . . . free men are entitled to do." See *Jones*, 371 U.S. at 243. (reaching a contrary conclusion). Simply put, a parolee is not restrained to such a degree to warrant relief under the extraordinary writ of habeas corpus under West Virginia law.

The language in *Jones* is consistent with the Court's subsequent decisions concerning the mootness doctrine in federal habeas corpus proceedings, but was not in any way grounded in the Due

Process Clause of the United States Constitution, either expressly or by implication. *See generally Williams*, 357 N.E.2d 851 (noting “*Jones* is an interpretation of a specific federal habeas corpus statute (28 U.S.C. par. 2241) on a nonconstitutional basis, and although persuasive authority, is not binding on this court.”) To the contrary, the mootness doctrine developed under 28 U.S.C. §§ 2254 and 2255 is different from that developed in West Virginia habeas corpus proceedings under West Virginia Code § 53-4A-1 because the statutes at issue are materially different and thus lend themselves to differing statutory analysis. In relevant part, the federal statutes both provide an avenue of relief for an individual in custody; in contrast, the West Virginia statute provides an avenue of relief for an individual incarcerated.

Indeed, incarceration is not synonymous with custody. Thus, while all incarceration is a form custody, *Hoover v. Blankenship*, 199 W. Va. 67, 70 n.3, 487 S.E.2d at 331 n.3, the converse is not true, “anyone who has been incarcerated is necessarily also in custody. However, someone who is in custody has not necessarily been incarcerated.” *People v. Kuhns*, 866 N.E.2d 1181, 1189 (Ill. App. Ct. 2007) (Johnson, J., concurring in part and dissenting in part). *See also Taylor v. State*, 187 P.3d 1241, 1244 (Idaho App. Ct. 2008) (“It is clear that under Idaho law, ‘incarceration’ and ‘custody’ are not synonymous—a defendant can remain under the custody of the Board, but not be incarcerated.”)

Custody has been termed an “elastic concept,” and this Court has noted that “[w]hat constitutes ‘custody’ for various purposes, and when custody begins and ends, has been litigated extensively in the criminal law area.” *Hoover v. Blankenship*, 199 W. Va. 67, 70 n.3, 487 S.E.2d 328, 331 n.3 (1997), citing *Craig v. Legursky*, 183 W. Va. 678, 680 n.3, 398 S.E.2d 160, 162 n.3 (1990) and *State v. Jones*, 193 W. Va. 378, 456 S.E.2d 459 (1995). Simply put, the elastic concept

of “custody” may encompass collateral consequences such as legal authority and control, parole, and the like, while the concept of incarceration means one thing . . . incarceration.<sup>3</sup> See W. Va. Code § 62-11B-3; see also *Elder v. Scolapia*, No. 11-156, 2013 WL 656833 (Feb. 13, 2013.)

Contrarily, at the time the Legislature enacted West Virginia Code § 53-4A-1 with its “incarcerated” language in 1967, the United States Supreme Court had already interpreted the “in custody” language in the federal habeas statute, 28 U.S.C. § 2254(d), broadly to extend beyond immediate, physical confinement. See *Jones v. Cunningham*, 371 U.S. 236, 240 (1963). The Legislature must be presumed to have known of the *Jones* decision. See *Kessel v. Monongalia County Gen. Hosp.*, 220 W. Va. 602, 611, 648 S.E.2d 366, 375 (2007) (Legislature is presumed aware of the century of federal interpretation of the federal Sherman Anti-Trust Act when enacting West Virginia Anti-Trust Act). The West Virginia Legislature specifically decided to draft the State’s habeas statute less broadly than its federal counterparts. Consequently, the term “incarcerated” pursuant to the habeas statute cannot be read to include persons on parole without doing significant violence to the meaning of the terms incarcerated and custody.<sup>4</sup>

This Court has considered itself and the lower courts as bound by the strictures of the Post-Conviction Habeas Corpus Act. See *State ex rel. Stroger v. Trent*, 196 W. Va. 148, 150 n.1, 469 S.E.2d 7, 9 n.1 (1996) (per curiam) (refusing to apply W. Va. Code § 53-4A-1(a) to an original

---

<sup>3</sup>As previously noted incarceration, also means home confinement/incarceration due to the Legislature’s retitle of W. Va. Code 62-11B-1

<sup>4</sup>It also appears that at common law in Virginia actual physical restraint was a jurisdictional predicate for habeas corpus relief. *McClenny v. Murray*, 431 S.E.2d 330, 330-31 (Va. 1993) (noting that in “applying common law, [the Court] ha[s] held that the purpose of the writ of habeas corpus is to test the legality of a prisoner’s detention [and such detention means] ‘actual physical restraint[.]’”).

jurisdiction habeas petition only because the State did not raise the issue of *res judicata*). *Accord State ex rel. Richey v. Hill*, 216 W. Va. 155, 171, 603 S.E.2d 177, 193 (2004) (Maynard, C.J., concurring); *State ex rel. Valentine v. Watkins*, 208 W. Va. at 31, 537 S.E.2d at 652 (“[West Virginia Code] § 53-4A-1(a) (1967) (Repl. Vol. 1994) explains to whom a post-conviction writ of habeas corpus is available”); *State ex rel. Crupe v. Yardley*, 213 W. Va. at 337, 582 S.E.2d at 784 (West Virginia Code § 53-4A-1 delineates the “circumstances under which a post-conviction writ of habeas corpus is available.”).

This Court has “stressed on numerous occasions, ‘[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]’” *State v. Richards*, 206 W. Va. 573, 577, 526 S.E.2d 539, 543 (1999) (quoting *State v. General Daniel Morgan Post No. 548*, 144 W. Va. 137, 145, 107 S.E.2d 353, 358 (1959) (citation omitted)). “[T]his Court cannot substitute its own judgment for that of the legislature and significantly rewrite the statute.” *Dunlap v. Friedman’s, Inc.*, 213 W. Va. 394, 398, 582 S.E.2d 841, 845 (2003).

Cases from other jurisdictions interpreting statutes with language different from West Virginia Code § 53-4A-1 are of little utility in interpreting that Code provision. *See State v. Richards*, 206 W. Va. 573, 577 n.6, 526 S.E.2d 539, 543 n.6 (1999) (“The State also cites several cases from other jurisdictions in support of its argument that [West Virginia Code] § 25-4-6 can be construed to permit imposition of a harsher sentence upon revocation of probation. However, these cases involved markedly different statutory language, which clearly authorize such action[.]”); *State v. Hodges*, 172 W. Va. 322, 328 n.1, 305 S.E.2d 278, 284 n.1 (1983) (“We are aware that there is authority to the contrary, however some of those cases consider statutory language quite different

from that contained in W. Va. Code, 61-7-1.”). Consequently, “[w]e need not consider the broader language of other state habeas remedies in light of the narrower language used in our habeas statutory scheme.” *Bostick v. Weber*, 692 N.W.2d 517, 521 (S.D. 2005).<sup>5</sup>

However, it is worth noting that West Virginia is not the only State to draft and interpret its habeas statute to read less broadly than the federal statute. Indeed, numerous jurisdictions have found that “the restraints imposed on a parolee are not such as to enable him to maintain a State habeas corpus action.” *See Id.*; also see *People ex rel. Williams v. Morris*, 357 N.E.2d 851 (Ill. App. Ct. 1976); *Sorrow v. Vickery*, 184 S.E.2d 462 (Ga. 1971); *People ex rel. Wilder v. Markley*, 255 N.E.2d 784 (N.Y. 1970); *Williams v. State*, 155 So.2d 322 (Al. Ct. App. 1963), *cert denied*, 155 So.2d 323 (Al. 1963); *McGloin v. Warden of Maryland House of Correction*, 137 A.2d 659 (Md. 1958); *White v. Gladden*, 303 P.2d 226 (Or. 1956); *State v. Ballard*, 83 A.2d 539 (NJ Super. Ct. App. Div. 1951), *aff’d* 88 A.2d 537 (NJ Super. Ct. App. Div. 1952); and *Ex parte Davis*, 146 P. 1085 (Okla. Crim. App. 1915).

In summary, a petition for post conviction habeas relief is rendered moot upon a person’s release on parole. The federal habeas corpus mootness doctrine developed under 28 U.S.C. §§ 2254 and 2255 does differ from West Virginia’s jurisprudence under West Virginia Code § 53-4A-1. However, the federal doctrine is not constitutionally grounded; rather, it is based upon the differing

---

<sup>5</sup>In *Bostick*, the South Dakota Court recognized the legislature’s freedom in crafting the State’s habeas remedy noting the following:

Our state habeas remedy is not as broad as the federal habeas corpus remedy . . . Our remedy extends only as far as the language used by our legislature allows, as federal decisions on the application of the federal habeas statute do not control the interpretation of our state habeas remedy. . . We need not consider the broader language of other state habeas remedies in light of the narrower language used in our habeas statutory scheme. (citations omitted.)

statutory language in the federal habeas statutes. Therefore, this Court is not bound to federal authority on this issue and is free to interpret the State's habeas remedy in accord with the intentions of the Legislature which is clearly manifested in the plain language of the West Virginia habeas statute.

IV.

CONCLUSION

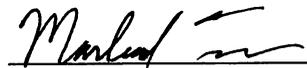
Under W. Va. Code § 53-4A-1. *et seq.* and under the common law, relief in habeas corpus is available only to persons in incarceration. Also, a petition for post-conviction habeas corpus relief is rendered moot if the defendant is paroled at any point after the petition has been filed.

Respectfully submitted,

STATE OF WEST VIRGINIA  
*Respondent,*

By counsel

PATRICK MORRISEY  
ATTORNEY GENERAL

  
MARLAND L. TURNER  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 11734  
E-mail: [mlt@wvago.gov](mailto:mlt@wvago.gov)

*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, MARLAND L. TURNER, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *SUPPLEMENTAL BRIEF ADDRESSING LEGAL QUESTIONS PRESENTED BY THE COURT* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 15 day of March, 2013, addressed as follows:

To: Christopher J. Prezioso, Esq.  
Luttrell & Prezioso, PLLC  
116 West Washington Street, Suite 2E  
Charles Town, WV 25414

  
\_\_\_\_\_  
MARLAND L. TURNER