IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below,
Respondent,

v. **Docket No. 19-0777**

DAVID HIRAM WALKER, JR.,
Defendant Below,
Petitioner.

On Petition for Appeal from
the Circuit Court of Preston County,
West Virginia
Case No. 17-F-42

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

The circuit court erred by not awarding Petitioner credit for time he spent on home confinement as a condition of probation.

STATEMENT OF THE CASE

The circuit court erred by not granting Petitioner Walker credit for time he spent on home confinement as a condition of his probation. The circuit court ordered that Petitioner be sentenced to a one-to-ten-year penitentiary sentence for his conviction for grand larceny, but suspended the sentence for three years of probation. (A.R. at 11.) In its July 31, 2018 sentencing order, the circuit court ordered "that the first year of his probation shall be served on Home Confinement." (A.R. at 11, 47-48.)

Petitioner Walker was ultimately not successful on probation. On June 19, 2019, the circuit court conducted a hearing on the State's motion to revoke his probation. (*See* A.R. at 63.) The State prepared the sentencing order after that hearing that gave Petitioner 16 days credit for time served. The order was sent to counsel for Defendant for approval.[1] Counsel reviewed the timesheet and determined that the State had shorted Petitioner at least 60 days that he had actually served as a "shocker," *see* W. Va. Code § 62-12-10(a)(2) (providing for a sanction of up to 60 days for a first violation of probation). (A.R. at 59.) Upon further investigation, counsel discovered that Petitioner Walker had also been on home confinement from August 27, 2018, to June 19, 2019, pursuant to the circuit court's July 31, 2018 sentencing order. (A.R. at 60.)[2]

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[1] The undersigned was hired by the Public Defender Corporation for the 18th Judicial Circuit on July 1, 2019, and had not been involved in the case prior to his review of the proposed order.

[2] Mr. Walker signed the form used by the Preston County Home Confinement Officer entitled the "*Division of Corrections Home Confinement Program Participant Conditions Aggreement* (sic)" on August 30, 2019, which would indicate that he was hooked up on home confinement on that date. (A.R. at 78-80.) This document was not made part of the official record below, and the consideration of that document by this Court is subject to a ruling on Petitioner's "*Motion to Supplement the Record on Appeal.*"

An agreement was not reached between the State and Petitioner Walker regarding whether he was entitled to credit for time he served on post-conviction home confinement as a condition of his probation. Petitioner Walker filed a "*Rule 35(a) Motion to Correct Illegal Sentence*," (A.R. at 4-8), which was heard by the circuit court on August 16, 2019 (A.R. at 57-74.)

At the hearing on the Rule 35(a) motion, Petitioner argued that he was entitled to credit for post-conviction time spent on home confinement. (A.R. at 61-63.) Petitioner cited West Virginia Code § 62-11B-9 and the most recent discussion by this Court on the issue of credit for time spent on home confinement in *State v. Jedediah C.*, 240 W. Va. 534, 814 S.E.2d 197 (2018). (A.R. at 61-62.) Petitioner asked that he be given credit for 76 total days of incarceration, but the time that he was on home confinement. (A.R. at 63.)

The State, without citing a single piece of law, argued that Petitioner should not be given credit for time spent on home confinement because he was not compliant. (*See* A.R. at 63-65.) Instead, the State argued that he should not be given credit for the time for the same reasons that he was revoked. (*Id.*)[3]

The circuit court did not adopt the State's reasoning. Instead, the circuit court stated that it was not sure that West Virginia Code § 62-11B-9(b) applied because Petitioner was not sentenced to home confinement as an alternative sentence to another form of incarceration. (A.R. at 67-69.) The circuit court explicitly explained: "Now, if I would have just sentenced him to home confinement as in the alternative of sentencing him to jail, then I believe that he would receive credit for that." (A.R. at 69.) Thereafter, the circuit court used the example of the case

[3] In fact, such an argument renders meaningless West Virginia Code § 62-11B-9(b)'s provision that a person whose home confinement is revoked is still credited for the time spent on home confinement. *See* W. Va. Code § 62-11B-9(b) (2017) ("*Provided*, That the participant shall receive credit towards any sentence imposed after a finding of violation for the time spent in home incarceration" after a finding by the circuit court that the individual "has violated the terms and conditions of the court's order of home incarceration . . . ."). The State's argument flies in the face of the statute.

that had just preceded the Rule 35(a) hearing on the lower court's docket that morning in which the defendant was sentenced to home incarceration for third offense driving while license suspended for DUI. (A.R. at 69-70.) Notably, in that case the circuit court could not have placed that defendant on probation because of the charge.[4]

Near the conclusion of the hearing, the lower court reiterated this reasoning:

> I think it's 76 days, and I will give him credit for that because I – I mean, yes, he does deserve that, but as far as the other [time on home confinement], my reading of the statute is that if I impose home incarceration as an alternative to sending the person to prison, then they would receive credit for the time they spend on home confinement. However, if home confinement is a condition of probation, then I don't think he receives credit for it . . . .

(A.R. at 70-71.)

Due to the circuit court's interpretation of the statute, Petitioner did not get credit for the approximately 230 days he spent on home confinement as a condition of probation.

SUMMARY OF ARGUMENT

The lower court erred by refusing to give Petitioner David Walker credit for the approximately 230 days he had spent on home confinement as a condition of his probation. The circuit court erroneously construed West Virginia Code § 62-11B-9(b) to only allow credit for time served postconviction on home confinement when the offender is actually sentenced to home confinement as the sole sentence, as opposed to when it is ordered as a condition of probation.

The plain language of the statute does not require such a result. Further, the circuit court's reasoning undermines the Legislature's intent in requiring that probation not be allowed for certain crimes. The caselaw promulgated by the Supreme Court of Appeals of West Virginia draws a distinction between home incarceration as a condition of pretrial bail and post-conviction home

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[4] *See* W. Va. Code § 17B-4-3(b) (2017) (providing for a mandatory prison sentence) and § 17B-4-3(e) (2017) (providing that an order for home detention may be used as an alternative sentence to any period of incarceration required by that section).

incarceration. Because post-conviction home incarceration is penal, Petitioner was entitled to credit for time he spent on home confinement as a condition of his probation.

Finally, placing Petitioner on home confinement as a condition of probation with the substantial restrictions imposed upon his liberty and failing to grant him credit for time served for that home incarceration is a violation of the double jeopardy principles in the State and Federal constitutions.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Rule 20 oral argument is appropriate in this instance because whether an offender is entitled to credit for time served on home confinement as a condition of probation has not explicitly been decided by this Court, and thus it is an issue of first impression. Further, denial of credit for time served on home confinement as a condition of probation is a violation of the Double Jeopardy Clauses of both the Constitution of the State of West Virginia and the Constitution of the United States. Accordingly, Petitioner believes Rule 20 oral argument is appropriate in this case.

ARGUMENT

I. Standard of Review

The circuit court's error stems from an erroneous reading of West Virginia Code § 62-11B-9. As this Court has often stated, "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 3, *Steager v. Consol Energy, Inc.*, No. 18-0121 (W. Va. June 5, 2019); Syl. pt., *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). Similarly, "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. pt. 2, *In re A.P.-1*, 241 W. Va. 688, 827 S.E.2d 830 (2019); Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

This case involves purely a question of law regarding the interpretation of West Virginia Code § 62-11B-9. As such, this Court's review is plenary and *de novo*.

II. The circuit court erred by not awarding Petitioner credit for time Petitioner spent on home confinement as a condition of probation.

A. West Virginia Code § 62-11B-9(b) requires that an offender be given credit for time spent on post-conviction home confinement regardless of whether it was imposed as an alternative sentence to another form of incarceration or whether it was imposed as a condition of post-conviction bail or as a condition of probation.

The circuit court erred by making a distinction between offenders who are placed on home confinement as an alternative sentence to another form of incarceration and offenders who are placed on home confinement as a condition of probation when determining how much credit Petitioner should be awarded after the underlying penitentiary sentence was imposed. The circuit court stated at the Rule 35(a) hearing that his reading of West Virginia Code § 62-11B-9

> is that if I impose home incarceration as an alternative to sending the person to prison, then they would receive credit for the time they spend on home confinement. However, if home confinement is a condition of probation, then I don't think he receives credit for it . . . .

(A.R. at 71.)

West Virginia Code § 62-11B-9, when reviewed in its entirety, does not make the distinction the lower court made. It states, in its entirety:

> (a) If, at any time during the period of home incarceration, there is reasonable cause to believe that a participant in a home incarceration program has violated the terms and conditions of the circuit court's home incarceration order, he or she is subject to the procedures and penalties set forth in section ten, article twelve of this chapter.
>
> (b) If, at any time during the period of home incarceration, there is reasonable cause to believe that a participant sentenced to home incarceration by the circuit court has violated the terms and conditions of the court's order of home incarceration and the participant's participation was imposed as an alternative sentence to another form of incarceration, the participant is subject to the same procedures involving confinement and revocation as would a probationer charged with a violation of the order of home incarceration. Any participant under an order of home incarceration is subject to the same penalty or penalties, upon the circuit court's finding of a

> violation of the order of home incarceration, as he or she could have received at the initial disposition hearing: *Provided,* That the participant shall receive credit towards any sentence imposed after a finding of violation for the time spent in home incarceration.
>
> (c) If, at any time during the period of home incarceration, there is reasonable cause to believe that a participant sentenced to home incarceration by a magistrate has violated the terms and conditions of the magistrate's order of home incarceration as an alternative sentence to incarceration in jail, the supervising authority may arrest the participant and take the offender before a magistrate within the county of the offense. The magistrate shall then conduct a prompt and summary hearing on whether the participant's home incarceration should be revoked. If it appears to the satisfaction of the magistrate that any condition of home incarceration has been violated, the magistrate may revoke the home incarceration and order that the sentence of incarceration in jail be executed. Any participant under an order of home incarceration is subject to the same penalty or penalties, upon the magistrate's finding of a violation of the order of home incarceration, as the participant could have received at the initial disposition hearing: *Provided,* That the participant shall receive credit towards any sentence imposed after a finding of violation for the time spent in home incarceration.

W. Va. Code Ann. § 62-11B-9 (West 2019).

First, subsection (a) sets forth the procedure and the possible penalties for a violation of the terms and conditions of home confinement. Subsection (a) directs courts to West Virginia Code § 62-12-10 for both the procedure and the penalties. The procedure states that the probation officer (and in the home confinement context, the home confinement officer) can arrest the individual and bring them before the court for a prompt and summary hearing. *See* W. Va. Code § 62-12-10(a) (setting forth the procedure if reasonable cause exists to believe that a probationer has violated the conditions of probation).

After the hearing, if the court finds reasonable cause exists to believe that the probationer has violated a condition of probation (or in this case home confinement), the court has several options, including actual incarceration for a sixty day "shocker," or for a second violation, a 120 day "shocker." *See* W. Va. Code § 62-12-10(a)(2). In certain cases, and for enumerated violations (absconding, new criminal conduct other than minor traffic violations or simple possession, or

violations of a special condition designed to protect the public or the victim), the court can revoke probation (or home confinement, as the case may be) and order the underlying jail or penitentiary sentence imposed. *See* W. Va. Code § 62-12-10(a)(1).

West Virginia Code § 62-11B-9(b) contains two parts. The first sentence sets forth that if a

> participant sentenced to home incarceration by the circuit court has violated the terms and conditions of the court's order of home incarceration and the participant participation was imposed as an alternative sentence to another form of incarceration, the participant is subject to the same procedures involving confinement and revocation as would a probationer charged with a violation of the order of home incarceration.

W. Va. Code Ann. § 62-11B-9(b) (West 2019). As can be clearly seen from the first sentence, a person under a sentence of home incarceration is treated the same as a probationer on home confinement, and is subject to the same procedure involving an arrest and a prompt and summary hearing on the violations.

The second sentence, which is the operative sentence at issue here, states:

> **Any** participant under an order of home incarceration is subject to the same penalty or penalties, upon the circuit court's finding of a violation of the order of home incarceration, as he or she could have received at the initial disposition hearing: *Provided*, That the participant **shall** receive credit towards any sentence imposed after a finding of violation for the time spent in home incarceration.

W. Va. Code Ann. § 62-11B-9(b) (West 2019) (emphasis added).

The use of the word "any" modifies the first sentence of subsection (b), which sets forth that persons sentenced to straight home incarceration are treated the same as persons who have violated home incarceration as a condition of probation. "Any" is defined by Merriam-Webster's as, *inter alia*, "EVERY – used to indicate one selected without restriction[.]" *Merriam-Webster's Collegiate Dictionary* 56 (11th ed. 2003). This means that in either case, whether home confinement as an alternative sentence to another form of incarceration or home confinement as a

condition of probation (or, as a condition of post-conviction bail), the participant shall receive credit towards any sentence imposed for the time spent in home incarceration.

The lower court disregarded the use of the word "any" in the particular context of subsection (b). Instead, the lower court found that subsection (b) only applied to persons who are ordered to home incarceration as an alternative to another form of incarceration. In other words, the lower court ruled that subsection (b)'s mandatory requirement that the participant receive credit for time served only applied to those who had received straight home incarceration as a sentence. (*See* A.R. at 69-71 (circuit court explaining that offenders are entitled to credit for time spent on home confinement but only if it is as an alternative sentence to sending the person to prison as opposed to those on home confinement as a condition of probation).)

Petitioner in this case was placed on probation, with a requirement that he serve the first year of his probation on home confinement. Pursuant to the plain language of West Virginia Code § 62-11B-9(b), he should have received credit for time he was on home incarceration as a condition of his probation.

B. Caselaw in West Virginia supports the proposition that post-conviction home incarceration entitles a defendant to credit for that time towards the underlying sentence.

The proposition that a court does not have to grant credit for pre-trial home incarceration is now well settled. *See* W. Va. Code § 62-11B-11(b) (stating that a court "may, in its discretion, grant credit for time spent on home incarceration as a condition of bail"); *State v. Jedediah C.*, 240 W. Va. 534, 536-40, 814 S.E.2d 197, 199-203 (2018) (discussing the difference between home incarceration as a condition of pre-trial bail and post-conviction bail); *State v. Hughes*, 197 W. Va. 518, 476 S.E.2d 189 (1996) (same); *see also* W. Va. Code § 62-11B-3(3) (defining an offender, to

which the Home Incarceration Act is applicable, as "any adult *convicted* of a crime punishable by imprisonment or detention in a county jail or state penitentiary . . . .").

However, the nondiscretionary nature of credit for time served on home incarceration post-conviction is equally well settled. The Home Incarceration Act is penal in nature. *See* Syl. pt. 3, *State v. Hughes*, 197 W. Va. 518, 476 S.E.2d 189 (1996) ("Due to the penal nature of the Home Confinement Act . . . ."). Accordingly, this Court has found that offenders shall be entitled to credit for time served on post-conviction home incarceration.

In *State v. Long*, 192 W. Va. 109, 450 S.E.2d 806 (1994), Justice Miller, writing for the Court, stated that the "entire statutory scheme indicates that home confinement is designed to place substantial restrictions on the offender. . . . The penal nature of home detention is recognized under W.Va.Code, 62-11B-9(b), as it provides credit for time spent in home confinement towards the imposition of any sentence following a violation of home confinement." 192 W. Va. at 111, 450 S.E.2d at 808.

In *State v. Hughes*, 197 W. Va. 518, 476 S.E.2d 189 (1996), this Court considered the issue of home confinement as a condition of *pretrial* bail, and held that the Home Incarceration Act (then called the Home Confinement Act) only applied to post-conviction situations. This Court held the following in the syllabus:

> Due to the penal nature of the Home Confinement Act, West Virginia Code §§ 62-11B-1 to -12 (1993), when a circuit court, in its discretion, orders an offender confined to his home as a condition of bail, the offender must be an adult convicted of a crime punishable by imprisonment or detention in a county jail or state penitentiary or a juvenile adjudicated guilty of a delinquent act that would be a crime punishable by imprisonment or incarceration in the state penitentiary or county jail, if committed by an adult.

Syl. pt. 3, *State v. Hughes*, 197 W. Va. 518, 476 S.E.2d 189 (1996).

In the body of the opinion, the Court reviewed the definition of "offender," *see* W. Va. Code § 62-11B-3(3), and stated that "it is apparent that the legislative intent was for this statutory provision, including the imposition of bail, to be used only in post-conviction situations." *Hughes*, 197 W. Va. at 526, 476 S.E.2d at 197.

Also, in *Hughes*, this Court considered the "statutorily mandated" restrictions that the circuit court must impose on an individual under the Home Incarceration Act. *See Hughes*, 197 W. Va. at 526-27, 476 S.E.2d at 197-98. This Court stated that, in the context of pretrial bail, "the lack of the mandatory statutory requirements that the circuit court is required to place in the order allowing for home detention" was a further indication that home confinement as a condition of pretrial bail was not meant to be penal. 197 W. Va. at 528, 476 S.E.2d at 199.

In contrast to *Hughes* and pretrial bail, this Court in *State v. McGuire*, 207 W. Va. 459, 533 S.E.2d 685 (2000) held that

> [p]ursuant to the provisions of the Home Incarceration Act, West Virginia Code §§ 62–11B–1 to –12 (1997 & Supp.1999), when an offender is placed on home incarceration as a condition of post-conviction bail, if the terms and conditions imposed upon the offender are set forth fully in the home incarceration order and encompass, at a minimum, the mandatory, statutory requirements enunciated in West Virginia Code § 62–11B–5, then the offender is entitled to receive credit toward any sentence imposed for time spent on home incarceration, whether or not the offender violates the terms and conditions of home incarceration and whether or not the order specifically references the Home Incarceration Act.

Syl. pt. 3, *State v. McGuire*, 207 W. Va. 459, 533 S.E.2d 685 (2000).

Thus, as a condition of *post-conviction* bail, an "offender" who is subject to home incarceration under an order that contains the minimum mandatory statutory requirements under West Virginia Code § 62-11B-5 is entitled to credit for time served.

This particular issue reared its head again in *State v. Jedediah C.*, 240 W. Va. 534, 814 S.E.2d 197 (2018). In that case, the petitioner sought credit for the time served on home

confinement while he was on pretrial bail, which pursuant to West Virginia Code § 62-11B-11 is a discretionary decision with the court. This Court again discussed the distinctions between home confinement post-conviction and home confinement as a condition of pretrial bail. 240 W. Va. at 536-39, 814 S.E.2d at 199-202.

Jedediah C. adds something new to the analysis. It is true that West Virginia Code § 61-11B-5 sets forth mandatory minimum requirements to be included in an order imposing home confinement. However, this legislative directive is not directed at criminal defendants; instead, it is directed at courts who place people on home confinement.

It should be incontrovertible that a criminal defendant who is placed on home confinement by a court that fails to enter an order with the mandatory minimum requirements should not suffer for the court's failure. Surely, a defendant who spends time on home incarceration as an alternative sentence to actual incarceration and finishes that sentence would be entitled to credit for that time even in the face of the court's failure to enter an order that complies with West Virginia Code § 62-11B-5.

It is uncontested that the lower court failed to enter an appropriate order in this case setting forth the mandatory minimum requirements. However, in *Jedediah C.*, this Court addressed and assumed for the sake of argument that the home incarceration agreement in that case set forth the same restrictions. *Jedediah C.*, 240 W. Va. at 539-40, 814 S.E.2d at 202-03. Critically, the Court noted, that "[a]lthough Petitioner contends, and the State does not dispute, that the rules set forth in his home incarceration agreement are the same as those provided under West Virginia Code § 62-11B-5, Petitioner failed to provide a complete copy of the agreement in the appendix for this Court's review." 240 W. Va. at 540 n.20, 814 S.E.2d at 203 n.20.

This is a substantial issue that needs addressed by this Court. The common practice in Preston County seems to be to order a defendant to be placed on home confinement. Thereafter, the home confinement officer has the individual sign an agreement that sets forth several of the requirements contained in West Virginia Code § 62-11B-5 – but not all. (*See* A.R. at 78-80.)[5] When combined with the rules and regulations of probation, almost all of the requirements are met, but they do not appear in the order actually signed by the court.

This Court has touched upon the problem to some degree. In *Elder v. Scolapia*, 230 W. Va. 422, 738 S.E.2d 924 (2013), the petitioner filed a petition for writ of habeas corpus alleging, *inter alia*, that his religious freedom was violated by the home incarceration order's failure to include an authorization for him to attend worship services three times per week. Because the introductory language of West Virginia Code § 62-11B-5 provides that the home incarceration order "is to include," the petitioner contended that he had a statutory right to attend religious services. 230 W. Va. at 430, 738 S.E.2d at 932.

This Court disagreed. In analyzing the statute, the Court first found that the "core directive" is "that an offender must be confined to his or her home at all times unless a designated exception is applicable." *Id.* Regarding the petitioner's contention that he had a right to attend worship services, this Court stated that he "overlook[ed] an implied need to determine whether those exceptions apply to the particular offender." *Id.*

In this case, Petitioner Walker, by the terms of his home incarceration agreement, was subject to the core directive that he be confined to his home. (A.R. at 78-79.) He was only allowed

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[5] As can be seen from the certified copy of the complete docket sheet, (A.R. at 81-82), the home confinement agreement is not part of the record below and is subject to this Court ruling on Petitioner's "*Motion to Supplement the Record on Appeal.*" The same is true for the Rules and Regulations of Probation, (A.R. at 75-77). However, both are used by the Circuit Court of Preston County, and the lower court is either aware of these documents, or, at a minimum, should be.

to leave his home to go to his specified place of employment, and any deviation from that schedule required prior approval from the home confinement officer. (*Id.*) Further, he was charged a daily fee to be on home incarceration. (*Id.* at 78.) The agreement informed Petitioner Walker that his failure to abide by the conditions could cause his removal from the Preston County Home Confinement Program and could result in Petitioner Walker being sent back to the sentencing court for further action. (*Id.* at 80.) The core directives were met, and in conjunction with the rules and regulations of probation – to which he was also subject – Petitioner Walker had a substantial impairment of his liberty.

Finally, in *State v. Lewis*, 195 W. Va. 282, 465 S.E.2d 384 (1995), this Court dealt with home incarceration as a condition of probation. In that case, the appellant was convicted of third-offense shoplifting. The circuit court in that case sentenced her to one to ten years in the penitentiary, but suspended the sentence and placed the appellant on probation for five years. As a condition of that probation, the circuit court ordered that she serve four months of incarceration at the regional jail followed by an eight-month period of home incarceration.

The issue in that case was whether home incarceration was the same as actual incarceration under the probation statute, which allows for "confinement in the county jail" for a period not to exceed one-third the minimum sentence in an indeterminate sentence. *Lewis*, 195 W. Va. at 286-87, 465 S.E.2d at 388-89. This Court found that home incarceration was not "confinement in the county jail" for purposes of West Virginia Code 62-12-9 (1994). 195 W. Va. at 288, 465 S.E.2d at 390. Accordingly, the Court held that "time spent in home incarceration does not necessarily count toward the one-third time of the minimum sentence, which can be ordered under the probation statute as a condition for probation." 195 W. Va. at 288-89, 465 S.E.2d at 390-91.

At the end of the *Lewis* opinion, this Court discussed the relationship between home incarceration and confinement in a county jail as a condition of probation. After first stating that "home incarceration in the context of the probation statute is essentially analogous to probation[,]" the Court further explained:

> In the present case, the maximum amount of time Ms. Lewis could be required to spend in home incarceration was eight months. That eight-month period plus the four-month county jail sentence equals the one year minimum sentence for shoplifting, third offense. Any additional time in home incarceration would have violated section 4(b) of the home incarceration statute (*W.Va.Code* 62–11B–4(b) (1994)), which limits the time spent in home incarceration to the term prescribed for the offense.

Lewis, 195 W. Va. at 289, 465 S.E.2d at 391.

This Court explained that the four months in the county jail must be added to the additional eight months on home incarceration to reach the minimum indeterminate sentence of one year.[6] Thus, the *Lewis* Court implicitly held that a defendant who is subject to home incarceration as a condition of probation must receive credit for that time – otherwise there is no need to add the actual confinement and the home incarceration together to reach the minimum sentence.

In the case *sub judice*, Petitioner Walker spent 76 days actually confined in the Regional Jail, and he spent an additional approximately 230 days in home incarceration as a condition of his probation. His total credit for time served should have included the time he spent on home confinement at the time of the revocation of his probation and imposition of the underlying sentence.

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[6] West Virginia Code § 62-11B-4(b) states now, as it did under the 1994 version when *Lewis* was decided, that "the aggregate time actually spent in home incarceration may not exceed the term of imprisonment or incarceration prescribed by this code for the offense committed by the offender." W. Va. Code Ann. § 62-11B-4(b) (West 2019).

C. The lower court's ruling and reasoning does not make sense as it pertains to home confinement as a sentence for a crime for which probation is not statutorily authorized.

The lower court ruled specifically that probationers who are placed on home confinement as a condition of probation are not entitled pursuant to West Virginia Code § 62-11B-9(b) to credit for time served on home incarceration. Such a ruling flies in the face of legislative intent as it pertains to offenses for which probation is not authorized. For instance, third-offense shoplifting carries a possible penalty of one to ten years, at least one year of which must be spent in confinement and is not subject to probation. W. Va. Code § 61-3A-3(c) (1994). However, a court can place the offender on home incarceration pursuant to West Virginia Code § 62-11B-1, *et seq*. *Id*. Under the lower court's ruling in this case, that offender is entitled to credit for time served on home confinement unlike an offender who is serving the same home confinement as a condition of probation when probation is authorized.

Similarly, driving under the influence crimes, to the extent that they carry mandatory minimum imprisonment penalties, "are mandatory and are not subject to suspension or probation . . . ." W. Va. Code Ann. § 17C-5-2(r) (West 2019). However, "[a]n order for home detention by the court pursuant to the provisions of § 62-11B-1 *et seq*. of this code may be used as an alternative sentence to any period of incarceration . . . ." *Id*.

The legislature has clearly stated that certain crimes require periods of incarceration and are not subject to probation. Under the lower court's ruling in this case, these offenders will get credit for time served on home confinement after a revocation. However, offenders who commit crimes for which our legislature has authorized probation, if placed on home incarceration as a condition of that probation, will not receive credit for time served. Such a ruling makes no sense and turns the legislative intent behind prohibiting probation in certain cases upside down.

D. Denying an offender credit for time served on home confinement as a condition of probation but allowing it for an offender who is placed on home confinement as an alternative sentence violates the Double Jeopardy clauses of the Constitution of the State of West Virginia and the Constitution of the United States.

The Fifth Amendment to the United States Constitution no person "be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. Similarly, the Constitution of the State of West Virginia states that no person shall "be twice put in jeopardy of life or liberty for the same offence." W. Va. Const. art. III, § 5.

"The purpose of the Double Jeopardy Clause is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." Syl. pt. 3, *State v. Sears,* 196 W.Va. 71, 468 S.E.2d 324 (1996). "A claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment." Syl. pt. 7, *State v. Gill,* 187 W.Va. 136, 416 S.E.2d 253 (1992).

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989), the Supreme Court of the United States held that the guarantee in the Double Jeopardy clause "has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Pearce*, 395 U.S. at 717 (footnotes omitted).

The principle that no person can be punished twice for the same offense is ancient in Anglo-American jurisprudence:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Ex parte Lange, 85 U.S. 163, 168 (1873).

The prohibition against multiple punishments for the same offense is clearly implicated under this set of facts. Petitioner Walker was sentenced to a one-to-ten-year penitentiary term, which was suspended for three years of probation. As part of that probation, he was also sentenced to serve one year of the probationary term on home confinement. After his probation was revoked, his underlying sentence was imposed. However, he was not given credit for the time he spent on home confinement; thus, his parole eligibility date and his ultimate discharge date do not adequately reflect the previous punishment he received. Clearly, this constitutes multiple punishments for the same offense.

The legislative intent as to punishment is clear. As discussed in Part II(A), *supra*, the legislature has already determined that an offender shall be given credit for time served on home confinement when it stated that "[a]ny" participant under an order of home incarceration "shall receive credit towards any sentence imposed after a finding of violation for the time spent in home incarceration." W. Va. Code § 62-11B-9(b) (West 2019). Further, the legislature, perhaps recognizing that a double jeopardy problem exists if the courts could place people on home incarceration beyond the statutorily-prescribed sentence for the crime, has mandated that "[t]he aggregate time actually spent in home incarceration may not exceed the term of imprisonment or incarceration prescribed this coder for the offense committed by the offender." W. Va. Code § 62-11B-4(b) (West 2019).

The Double Jeopardy Clause of the Constitution of the State of West Virginia, by the specific language employed, actually speaks directly to the heart of the problem here. It states that no person shall "be twice put in jeopardy of life or *liberty* for the same offence . . . ." W. Va. Const. art. III, § 5 (emphasis added).

In this case, the lower court's ruling, if left intact, allows the lower court to impose an additional restriction on an offender's liberty by imposing home incarceration as a condition of probation. By way of hypothetical, under the lower court's ruling, it could sentence a person convicted of felony conspiracy under West Virginia Code § 61-10-31 to a term of imprisonment in the penitentiary to not less than one nor more than five years. *See* W. Va. Code § 61-10-31 (providing the penalty for violation of felony conspiracy). Pursuant to West Virginia Code § 62-12-11 (2017), the lower court could then suspend the sentence and place the offender on a period of probation for up to seven years.

Pursuant to West Virginia Code § 62-11B-4(a), the lower court could then place the offender on home confinement as a condition of that probation. *See* W. Va. Code § 62-11B-4(a) ("As a condition of probation or bail or as an alternative sentence to another form of incarceration for any criminal violation of this code over which a circuit court has jurisdiction, a circuit court may order an offender confined to the offender's home for a period of home incarceration."). Pursuant to West Virginia Code § 62-11B-4(b) provides that "the aggregate time actually spent in home incarceration may not exceed the term of imprisonment or incarceration prescribed by this code for the offense committed by the offender."). Thus, for felony conspiracy, the lower court could order that the offender-probationer spend up to five years on home incarceration as a condition of the probation.[7] An offender-probationer could

[7] Several discrete questions arise under that statute, which are not involved in this case. For instance, what is the actual term of imprisonment – the minimum of one year, or the maximum of five years, or 2.5 years if given good

have a substantial impairment of his or her liberty for perhaps up to five years. Thereafter, hypothetically, the probationer could have his or her probation revoked near the end of the seven-year-probationary period. The lower court could then impose the one-to-five-year penitentiary sentence. Under the lower court's ruling in this case, the offender-probationer is not entitled to credit for time served on home incarceration as a condition of the probation. Such a hypothetical logically follows from the circuit court's erroneous construction of West Virginia Code § 62-11B-9. Clearly, the person would suffer multiple punishments for the same offense. However, if the lower court were to sentence him or her to home incarceration as an alternative to another form of incarceration, under the circuit court's ruling in this case, the double jeopardy problem does not exist.

The circuit court's construction of the Home Incarceration Act simply makes no sense, cannot be squared with this Court's caselaw, creates constitutional problems, and flies in the face of the legislative intent behind the Home Incarceration Act.

CONCLUSION

For the reasons explained in this brief, Petitioner respectfully requests that this Court review the circuit court's construction of and ruling on West Virginia Code § 62-11B-9 *de novo*, reverse the circuit court's ruling, and remand the case back to the Circuit Court of Preston County to enter an amended sentencing order in which Petitioner Walker is given credit for the time he has served on home incarceration as a condition of his probation.

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time credit, which would under normal circumstances be given if actually incarcerated? Does good time credit, which is waived if sentenced to home incarceration, *see* W. Va. Code § 62-11B-4(c), apply to the time period set forth in subsection (b)? Although these issues are not presented in this case, these issues are present if the lower court's ruling and reasoning are taken to their extreme.

Respectfully submitted,

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