

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

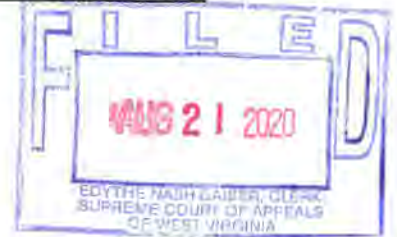
In re, Joshua Miller,
Petitioner,

v.

Betsy C. Jividen, Commissioner,
Respondent.

Civil Action No:

20-0629



PETITION FOR WRIT OF MANDAMUS

AUTHORITY

"A writ of mandamus will not issue unless three elements coexist - (1) a clear right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

JURISDICTION

The Supreme Court's original jurisdiction in mandamus proceedings derives from the **W. Va. Constitution, Article VIII, Section 3**. Its jurisdiction is also recognized in **W. Va. R. App. P. 14** and **W. Va. Code 53-1-2 (1993)**. The purpose of mandamus is to enforce an established right and corresponding imperative duty created or imposed by law. It is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies. Moreover, mandamus lies to control the action of an administrative officer in his or her discretion when such action is arbitrary or capricious.

RELIEF SOUGHT

To have the awarded good time returned to me and be released immediately due to the recalculation of my minimum discharge date.

ISSUES PRESENTED

The Respondent has arbitrarily violated the Petitioner's Due Process and Equal Protection rights by awarding him good time credits, and then taken away those good time credits for no cause or reason.

FACTS NECESSARY TO UNDERSTAND PRESENTED ISSUES

1. On August 6, 2019, Petitioner was sentenced to the West Virginia State Penitentiary for a determinate sentence of three (3) years, with the effective date of sentence to be on April 24, 2019 (Add. 1:3). This made the Petitioner's minimum discharge date of October 22, 2020 (Add.2);
2. During this national emergency of the COVID-19 pandemic, the Petitioner contributed and volunteered towards keeping the facility clean and helping to prevent others from getting sick, or worse;
3. Due to his behavior and actions, On April 24, 2020, Mark Williamson, Superintendent of Denmark Correctional Center, recommended the Petitioner an award of additional good time based on his exceptional work and service towards this pandemic. The Respondent completely agreed with the recommendation and stated in a personal letter. **120 days of additional good time is being awarded to you** (Add. 3);
4. With the additional 120 days of good time, and the recalculations of Petitioner's time sheet, the Petitioner should have discharged his sentence on June 22, 2020 (Add. 2);
5. Shortly after the awarded good time was issued, three inmates from the Denmark Correctional Center were released due to the 120 days; Josh Berryman, Roger Anderson, and Christopher Wells;
6. Petitioner and his family were informed by the Denmark Institutional staff and administration that the

Respondent has pulled the good time credits awarded from the Petitioner. When the Petitioner asked why, no answer or reasoning was given other than it is being reviewed. Petitioner then proceeded with the state exhaustion process and filed a 'Grievance Form' on July 15, 2020 (Add. 4);

7. When the grievance reached the Respondent, the Petitioner received a letter stating that "The issue regarding extra good time being awarded to members...is currently under review..." (Add. 4);
8. Petitioner is entitled to this awarded 120 days of good time and the Respondent has arbitrarily taken away such credits. Commutation of time for good conduct is a right created by the legislature. Statutory creation of good time confers a substantive right. As such, good time credit is a valuable liberty interest protected by the due process clause, W. Va. Const. art. III, § 10. For this reason, such an interest must be rationally based and protected against the arbitrary abrogation thereof by the State. The touchstone of due process is protection of the individual against arbitrary action of government.
9. This Honorable Court has stated that good time credit is a protected liberty interest and cannot be taken away arbitrarily, doing so violates the due process. *State ex rel. Bailey v. Div. of Corrs.*, 213 W. Va. 563, 584 S.E.2d 197 (W. Va. 2003). *State ex rel. Gillespie v. Kendrick*, 164 W. Va. 599, 265 S.E.2d 537 (W. Va. 1980); *State ex rel. Coombs v. Barnette*, 179 W. Va. 347, 368 S.E.2d 717 (W. Va. 1988).

CONCLUSION

Petitioner does not understand how the Respondent can award additional good time credits, allow the release of at least three (3) inmates from the same facility, and then revoke his good time for no reason. The Respondent has arbitrarily revoked the Petitioner's good time through her preference, discretion and abuse of authority.

Therefore, Petitioner request that this Court ORDER the Respondent to return such 120 days of good time credits and grant the immediate release due to the recalculations of his time sheet.

VERIFICATION

The Petitioner named in the foregoing mandamus being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that, so far as they are therein stated to be on information, he believes them to be true.

I declare under that penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Joshua Miller
Joshua Miller, pro-se

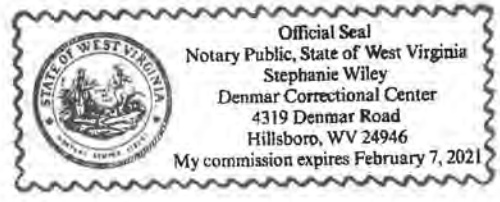
8-15-20
Date

STATE OF WEST VIRGINIA

Subscribed and sworn before me this 19th day of August 2020.

My commission expires: February 7, 2021

Stephanie Wiley
Notary Public



PRAYER FOR RELIEF

WHEREAS, the Petitioner prays that this Honorable Court will grant his petition or grant such other relief as justice requires.

Respectfully Submitted,

Date: 8-19-20

jl mgn

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

In re, Joshua Miller,
Petitioner,

v. Civil Action No: _____

Betsy C. Jividen, Commissioner,
Respondent.

CERTIFICATE OF SERVICE

I, Joshua Miller, the Petitioner, *pro-se*, do hereby certify that I have placed the original and 1 copy of the enclosed Petition for Mandamus in the United States mail, postage prepaid, this 19th day of August, 2020, to the respondent at the following address.

Betsy C. Jividen, Commissioner
1409 Greenbrier Street
Charleston, WV. 25311

Respectfully Submitted,

JK Miller

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**In re, Joshua Miller,
Petitioner,**

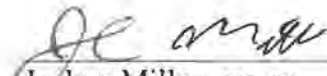
v.

Civil Action No: _____

**Betsy C. Jividen, Commissioner,
Respondent.**

ADDENDUM

Respectfully Submitted,



Joshua Miller, pro-se

INMATE COPY

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VS.

INDICTMENT NO. 16-F-153
PAUL M. BLAKE, JR., JUDGE

JOSHUA I. MILLER
DOB: 05-02-1985

ADJUDICATORY SUPERVISED RELEASE REVOCATION
AND DISPOSITION ORDER

On the 29th day of July 2019, came the State of West Virginia by Jennifer D. Crane, Assistant Prosecuting Attorney; the defendant, Joshua I. Miller, appearing in person and by his counsel, E. Scott Stanton; the Probation Department of this Court appearing by Jerrod White, Probation Officer, for the purpose of an adjudicatory supervised release revocation hearing.

Whereupon, counsel for the defendant informed the Court that it was the defendant's desire to admit to the allegation of violating Rules 7 and 21 by failing to attend the sex offender counseling as instructed, and by using heroin, failing a drug screen, and by having drug paraphernalia.

Whereupon, the defendant was sworn to answer questions before this Court.

The Court, thereupon, inquired of the defendant, regarding his decision to admit to the violation of his supervised release set forth in the Notice of Revocation. The Court having been informed by the defendant that it was his desire to admit to the allegation of violating his supervised release lodged against him, **FINDS** that the defendant has intelligently, knowledgeable, voluntarily, and with a full understanding of the consequences thereof, desired to admit the violations of supervised release lodged against him, to which the defendant admitted to falling to comply with the rules and regulations of his supervised release.

Based upon the responses of the defendant, the Court made the following findings:

1. The defendant has received a copy of the Notice of Revocation containing a certain allegations of violations of extended sex offender supervision, filed by his Probation

59
AUG 7 2019

Officer, and he fully understands the allegations contained therein.

2. The defendant has been represented by competent counsel with whom he is satisfied.
3. The defendant's admission is freely, voluntarily, and knowingly made, and he understands the consequences of his admission.
4. The defendant understands that there is no agreement binding upon the Court as to the disposition of this matter, and the Court may revoke the defendant's supervised release and impose the sentence previously announced.
5. The defendant's admissions are voluntary and based upon facts.

Therefore, the Court accepts the admission made by the defendant in this matter and finds that the defendant, Joshua I. Miller, has violated the terms and conditions of supervised release previously granted.

Based thereon, it is further the **ORDER** and **JUDGMENT** of this Court that the defendant's supervised release is hereby **REVOKED**.

Whereupon, it was announced unto the Court that it was the defendant's desire to proceed to disposition.

The Court having been informed by the defendant that it was his desire to admit to proceed to disposition in this matter, **FINDS** that the defendant has freely and voluntarily waived his right to a separation disposition hearing.

Whereupon, the Court offered all parties, including the defendant, an opportunity to address the Court. The defendant as well as counsel for the defendant addressed the Court.

Whereupon, the Court does hereby find the following:

1. The Court didn't grant the defendant probation initially, and he was sentenced to an indeterminate term of not less than one (1) nor more than five (5) years in prison.
2. The defendant served his sentence and was enrolled in the RSAT program while in prison.

3. The defendant was on parole from February 2018 until February 2019.
4. In April 2019, the probation officer went to the defendant's sex offender treatment meeting and the defendant did not appear.
5. The probation officer tried to call the defendant and his phone had been disconnected.
6. On April 24, 2019, the probation officer went to look for the defendant and found the defendant's car with a female passenger in it, and the defendant was found at the County needle exchange program.
7. The defendant initially denied using any controlled substances although the probation officer suspected otherwise.
8. A pipe and foil were found after the defendant was searched.
9. The defendant had a container with twenty (20) needles inside.
10. The defendant tested positive for Fentanyl, Methamphetamine, and Opiates.
11. The defendant is a convicted sex offender.
12. The defendant has the ability to stay clean.
13. The substance abuse was a factor in the underlying sex offense charges.
14. The defendant made a choice to hang out with his drug affected wife.
15. The defendant's behavior is a threat to the community.
16. To release the defendant would unduly depreciate the seriousness of the crime.

It is further the **ORDER** and **JUDGMENT** of the Court that the previously ordered term of sex offender supervision of three (3) years is hereby **REVOKED**, and the defendant shall be sentenced to the West Virginia State Penitentiary for a determinate sentence of three (3) years.

The effective date of this sentence shall be April 24, 2019, the defendant being credited with ninety-seven (97) days' time served while awaiting disposition of this matter.

It is further the **ORDER** and **JUDGMENT** of this Court that upon release, the defendant shall not be required to undergo any further sex offender supervision.

It is further the ORDER and JUDGMENT of this Court that the defendant is aware that he is required to register as a sex offender for life.

Whereupon, the Court explained to the defendant his right to appeal the Court's judgment to the Supreme Court of Appeals of West Virginia and gave him written notice of the same.

The defendant is hereby remanded to the custody of the Sheriff of Fayette County for further execution of this sentence.

It is further the ORDER and JUDGMENT of this Court that the Clerk of this Court shall complete the Court Disposition Reporting Form, DPS Form 29, and shall send the original of such form to the appropriate agency for recordation. The Clerk is further directed to forthwith send an attested copy of this Order via facsimile machine to Margaret Chico-Eddy, Records Manager, West Virginia Division of Corrections, 304.558.8430, and to Southern Regional Jail, 304.254.2943; and shall forward certified copies of this Sentencing and Commitment Order to the West Virginia Division of Corrections, 1409 Greenbrier Street, Charleston, WV 25311; Jennifer D. Crane, Assistant Prosecuting Attorney, 108 East Maple Avenue, Fayetteville, West Virginia 25840; E. Scott Stanton, Assistant Public Defender, 102 Fayette Avenue, Fayetteville, West Virginia 25840; and Jerrod White, Probation Officer, 100 Court Street, Fayetteville, West Virginia 25840.

ENTERED this 6th day of August 2019.

PAUL M. BLAKE, JR.
JUDGE

PAUL M. BLAKE, JR., JUDGE

A TRUE COPY of an order entered
August 7, 2019
Tate: Gayle A. Grant
Circuit Clerk Fayette County, WV.

WV Division of Corrections Inmate Time Sheet

Inmate Name: MILLER, Joshua I
 DOC#: 3534186-6
 Location: SRJ
 Current Date: 8/8/2019
 HC Credit:
 Max Term In Years: 3.00
 Max Term In Days: 1085.75

YOUR TIME CALCULATION IS BASED ON INFORMATION FROM YOUR COMMITMENT AND/OR SENTENCING ORDERS. IF YOU BELIEVE THERE ARE ERRORS, PLEASE CONTACT YOUR ATTORNEY OR THE CIRCUIT CLERK TO REQUEST AN AMENDED ORDER. THE DIVISION OF CORRECTIONS RECORDS CANNOT BE CHANGED UNTIL THE CERTIFIED AMENDED ORDER IS RECEIVED.

Current Date: 8/8/2019
 ESD: 4/24/2019
 Add'l CS Jail Credit:
 Time Served: 107
 GT Possibly Earned: 107
 GT Earned: 107

THE MINIMUM DISCHARGE DATE IS THE EARLIEST DATE YOU CAN EXPECT TO BE RELEASED FROM WV DIVISION OF CORRECTIONS CUSTODY IF YOU ARE NOT RELEASED ON PAROLE, ESCAPE, OR LOSE GOOD TIME.

HC Credit: 0
 Time Served: 107
 GT Earned: 107
 Total Time Credited: 214
 Time Left To Dis.: 881.75
 Final Time Left w/ GT: 440.88
 Current Date: 8/8/2019

SENTENCES
 A) 3 years

Minimum Dis Date: 10/22/2020

ADJUSTMENTS: Commitment/Sentencing Order received from Fayette County Circuit Clerk on July 30, 2019

PREPARER: Margaret Chico-Eddy, Central Office Inmate Records Manager/MA

QUESTIONS REGARDING THE MINIMUM DISCHARGE DATE SHOULD BE ADDRESSED TO DIANN SKILES, CENTRAL OFFICE RECORDS.

THE WEST VIRGINIA PAROLE BOARD, SUITE B, 1356 HANSFORD STREET, CHARLESTON, WEST VIRGINIA, 25301 WILL PROVIDE YOU YOUR PAROLE ELIGIBILITY DATE ON A SEPARATE DOCUMENT.

ANY QUESTIONS REGARDING YOUR PED OR PAROLE NEEDS TO BE SENT IN WRITING TO THE PAROLE BOARD.

Note: The 1/0/1900 date is a program default for calculation purposes and does not affect actual calculated dates.

INMATE COPY



STATE OF WEST VIRGINIA
DEPARTMENT OF MILITARY AFFAIRS & PUBLIC SAFETY
DIVISION OF CORRECTIONS
AND REHABILITATION



BETSY C. JIVIDEN
COMMISSIONER

JEFF S. SANDY, CFE, CAMS
CABINET SECRETARY

Office of the Commissioner
1409 Greenbrier Street
Charleston, WV 25311
304-558-2036 – Telephone
304-558-5367 – Fax
April 24, 2020

Joshua Miller, #3534186
Denmar Correctional Center and Jail
4319 Denmar Road
Hillsboro, WV 24946

Dear Mr. Miller,

Superintendent Williamson has recommended you for an award of additional good time based on the exceptional work and service you have been performing in the overall effort to assure enhanced facility cleanliness and hygiene as part of the measures to protect against the COVID-19 pandemic. I am in complete agreement with the recommendation, and I want to extend my personal thanks and appreciation to you as well. Accordingly, **120 days of additional good time** is being awarded to you. A copy of this letter is being forwarded to Central Office Records, and you will be issued a new time sheet reflecting your discharge date after calculation of this award. Thank you once again for your contribution to the effort to protect the safety and health of everyone at Denmar Correctional Center.

Sincerely,

Betsy C. Jividen
Commissioner

cc: Superintendent Williamson – DCC
Director of Inmate Records Diann Skiles
Deputy Director of Inmate Records Jonathan Huffman
Offender file of Joshua Miller, #3534186

RECEIVED

JUL 24 2020

ONE STAPLE ONLY

West Virginia Division of Corrections & Rehabilitation

Policy Directive 335.00

01 August 2013

Attachment #1

W.Va. Division of Corrections Inmate Grievance Form

Grievance No. 20 - DCC - 2 - 26

Joshua Miller
Inmate Name

3534186
DOC #

July 15, 2020
Date of Grievance

State Nature of Grievance / Issue to be addressed (Note 1 issue per grievance be concise file with Unit Manager NO WRITING ON BACK):

See Attach

Relief Sought (state what you want): See Attach

[Signature]
Inmate's Signature

(The inmate may attach 1 8.5 x 11 sheet if necessary at this level only)

Unit Manager's Response (attach additional sheet if needed)

Accepted Rejected Reason for rejection: _____ Date: 7/16/2020

Response on Merits if accepted: Grievance Denied. Unable to do anything at this level.

Minnie Dean, UM
Signature

Resolved: _____ (if so initial and give copy to unit manager) Appealed to Warden/Administrator [Signature] (initial) Date: 7-16-20

If no response at initial level is included the inmate certifies that he/she has rendered this grievance as indicated above and no response has been issued at that level within the time frames set forth in Policy Directive 335.00

Inmate's Signature _____ Date _____

Action by Warden/Administrator:

Accepted Rejected Reason for rejection: _____ Date: _____

Response on Merits if accepted: Remand to Unit for further action Affirm unit and/or deny grievance Grant the Grievance as specified

Comments: This is under review by Central Office.

[Signature] 7/20/20 (Attach additional sheet if necessary)
Warden/Administrator's Signature Date

Resolved: _____ (if so initial and give copy to unit manager) Appealed to Commissioner [Signature] (initial)

If no response at Warden/Administrator level is included, the inmate certifies that he/she has rendered this grievance as indicated above and no response has been issued at that level within the time frames set forth in Policy Directive 335.00

Inmate's Signature _____ Date _____

Action by Commissioner:

Accepted Rejected Reason for rejection: _____ Date: _____

Response on Merits if accepted: Affirm Warden/Administrator and deny grievance (Affix final stamp) Other, memo attached.

RECEIVED
JUL 27 2020
WEST VIRGINIA CORRECTIONAL CENTER
OFFICE OF THE WARDEN

RECEIVED

DCC RECORDS

I am writing this grievance on being past my discharge date, yet i am still being held in this facility. As i was given 120 days of additional good time on April 24, 2020, by the Commissioner Betsy Jividen and Superintendent Mark Williamson, for exceptional work, i have discharged my sentence.

I have the letter stating that i was awarded the 120 day good time; the same letter that inmates Christopher Wells, Josh Berryman, and Roger Anderson received and they went home off of those letters. They have received due process while i have not. According to Gillespie v. Kendrick, 164 W. Va. 599 (W. Va. 1980) and Coombs v. Barnette, 179 W. Va. 347 (1998), Good time credit is a valuable liberty interest protected by due process. Furthermore, according to Bailey v. Div. of Corr., 213 W. Va. 563 (W. Va. 2003), pursuant to statutory law, created and granted good time credits to inmates, good time credits cannot be taken away arbitrarily, doing so violates due process. Arbitrary means ones preferences and/or discretion.

Relief

I am being held past my discharge date (June 2nd 2020). My family is in contact with their attorney and he informed us to exhaust this remedy first and keep copies of grievance.



STATE OF WEST VIRGINIA
DEPARTMENT OF HOMELAND SECURITY
DIVISION OF CORRECTIONS
AND REHABILITATION



BETSY C. JIVIDEN
COMMISSIONER

JEFF S. SANDY, CFE, CAMS
CABINET SECRETARY

Office of the Commissioner
1409 Greenbrier Street
Charleston, WV 25311
304-558-2036 – Telephone
304-558-5367 – Fax

TO: Joshua Miller #3534186

THRU: Superintendent of DCC&J Mark Williamson

FROM: Central Office Grievance Review

DATE: August 7, 2020

RE: 20-DCC-2-26

Please be advised that at this time, inmate grievance number 20-DCC-2-26 is denied.

The issue regarding extra good time being awarded to members of the inmate population is currently under review by the Commissioner's Office.

When a decision has been reached, a memo will be issued stating the final decision