IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.
JOSHUA MILLER

Petitioner,

v.

Supreme Court Case No.: 20-0628

BETSY JIVIDEN, Commissioner,
West Virginia Division of
Corrections and Rehabilitation,

Respondent.

PETITIONER'S REPLY

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PREFATORY

Notably, the *Petition for Writ of Mandamus* related to a discretionary grant of one hundred and twenty (120) days of good time credit to petitioner that was subsequently withdrawn. The *Respondent's Summary Response to Petitioner's Petition for Writ of Mandamus* takes the position that the petitioner is entitled to neither this discretionary grant of good time nor the mandatory good time credit set forth in W. Va. Code §15A-4-17(a) & (c). Essentially, Petitioner is now informed that his originally projected discharge date of October 20, 2020, without the discretionary grant of good time, will be, instead, April 23, 2022, representing every single day of the three (3) year term of his incarceration notwithstanding his exemplary behavior to date. The withdraw of the discretionary grant and the denial of the mandatory good time are based on the same legal reasoning and, therefore, the Court is asked to mould the requested writ to include a mandate that the Division of Corrections and Rehabilitation ("DOCR') give credit to the petitioner for both the discretionary grant of good time and the mandatory good time.[1]

INTRODUCTION

Counsel for DOCR argues that the current imprisonment of Joshua Miller is a "sanction" and not a "sentence." Notably, the *Adjudicatory Supervised Release Revocation and Disposition Order* by which the petitioner was incarcerated states, unambiguously, that as a result of the revocation of his supervised release, "the defendant shall be *sentenced* to the West Virginia Penitentiary."[2] This characterization by the presiding circuit court judge is not addressed nor explained.

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[1] Technically, petitioner will not receive the benefit of the discretionary grant as the mandatory grant will result in his release.

[2] Respondent's Appendix ("R. App."), p. 11 [emphasis added].

Counsel for DOCR attributes its distinction in these terms to this Court's 2013 opinion in *State v. Hargus*.[3] No explanation is given by DOCR as to why it took seven (7) years to make this distinction so that Joshua Miller and a class of other inmates similarly situated would only now be denied the mandatory good time credit.[4] Whatever the reason, this distinction is unwarranted and simply cannot be found in *Hargus* except by a strained reading intended to support a predetermined outcome.[5] While generally describing the imposed term of imprisonment upon revocation of supervised release as a "post-revocation sanction," this Court specifically held that:

> [A] post-revocation sanction simply is a continuation of the legal consequences of a defendant's original crime. In other words, it is part of a *single sentencing scheme* arising from the defendant's original conviction. It is not an *additional penalty* resulting from the defendant's initial conviction.[6]

This Court did not distinguish between "sanction" and "sentence" anywhere in *Hargus*; instead, this Court considered any such sanction as part of the original and singular "sentencing scheme" in order to sustain the constitutionality of such imprisonment.

As the DOCR's entire argument is based on a distinction that is not, and has never been, made by this Court, a writ of mandate should issue to ensure Joshua Miller is given credit for the discretionary and legislatively mandated good time credit that is now denied.

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[3] 232 W. Va. 735, 753 S.E.2d 893 (2013).

[4] Restated, since *Hagus* was decided, good time credit has been given to those serving terms of imprisonment upon revocation of supervised release and, in fact, when Joshua Miller's discharge date was first calculated, DOCR assumed that he would receive such credit. If the DOCR's position is upheld, a multitude of filings can be expected as plea agreements are sought to be withdrawn, equal protection challenges are mounted, and federal petitions for habeas corpus relief are sought.

[5] In the *Background* portion of this reply, the timing suggests that the grant of discretionary good time was laudably made, but then grounds had to be found to withdraw the grant. Thus, the strained reading of *Hargus* comes about with the perhaps unintended result of denying all good time credit to Joshua Miller and those similarly situated.

[6] 232 W.Va., *supra* at 743; 753 S.E.2d, *supra* at 901[emphasis added].

BACKGROUND

On April 17, 2017, Mr. Miller was sentenced upon his voluntary plea of guilty to one count of Sexual Abuse in the First Degree as follows:

> [T]o the West Virginia State Penitentiary for an indeterminate period of not less than one (1) year nor more than five (5) years and shall be fined the sum of three-thousand dollars ($3,000). ... It is further the ORDER and JUDGMENT of this Court that, pursuant to W. Va. Code §62-12-26, the defendant be placed on three (3) years of supervised release once he is released from confinement or parole supervision.[7]

Mr. Miller discharged the original term of imprisonment and started his period of supervised release. On July 29, 2019, Mr. Miller's supervised release from incarceration was revoked based upon violations to which he admitted.[8] Mr. Miller failed to attend a sex offender treatment meeting and engaged in drug use together with his wife.[9] Accordingly, based upon Mr. Miller's admissions, the Court ordered:

> [T]he 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.[10]

Upon Joshua Miller's entry into the custody of the Division of Corrections at the Denmar Correctional Center and Jail[11] on August 9, 2019, he had earned 107 days of good time credit after serving 107 days (including the ninety-seven days' time-served). His discharge date was

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7 R. App., p. 4, 5.
8 R. App., p. 10.
9 R. App., p. 11.
10 R. App., p. 11 [italics added].
11 This would be a date before the reorganization of the Division of Corrections.

then projected to be October 22, 2020, assuming that he earned the potential good time credit of 440.88 days while actually serving 440.88 days.[12]

During the pandemic, Joshua Miller volunteered to assist in cleaning the facility to prevent infection within the facility. His contributions were recognized in an April 24, 2020, correspondence from the DOCR's Commissioner awarding him an additional one hundred and twenty (120) days of good time credit upon the recommendation of the facility's superintendent.[13] The newly calculated discharge date for Joshua Miller was then June 22, 2020. However, Mr. Miller was not discharged on that date and, upon grieving, was informed, in a written decision dated August 7, 2020, that "the issue regarding extra good time being awarded to members of the inmate population is currently under review by the Commissioner's Office."[14] No explanation is given for the review[15] and, consistently, legal counsel for DOCR writes in the response in this matter, without specificity, that:

> Since that time, Commissioner Jividen has engaged in discussions, analysis, and review of the meritorious "good time awards," [and] "good time" eligibility....[16]

The response in this matter also makes clear that, after this review, DOCR is now not only failing to honor the award of meritorious good time for petitioner's exemplary service, but DOCR will not be giving petitioner any legislatively mandate "good time" credit.

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12 *See WV Division of Corrections Inmate Time Sheet* attached to original *Petition for Writ of Mandamus* (the "Petition").

13 Petition, attachment.

14 Petition, attachment.

15 It must be noted that it was during this period that the release of inmates in an attempt to lessen the overcrowding of facilities during a pandemic became a political issue. *See*, e.g., Charleston Gazette-Mail, Lacie Pierson, April 3, 2020, *West Virginia has decreased its jail population by almost 10%; Jails are still overcrowded as state officials and interest groups work on response to pandemic* (Criticism of release of prisoners by Kanawha County Commission and gubernatorial candidate Ben Salango is noted).

16 *Respondent's Summary Response to Petitioner's Petition for Writ of Mandamus* ("Summary Response"), p. 4.

ARGUMENT

1. Legal Standard.

The DOCR's response correctly states the legal standard. In addition, it must be noted that "good time credit is a valuable liberty interest protected by the due process clause, W. Va. Const., Art. III, 10."[17] Moreover, in the interpretation and application of statutes affecting such liberty interests, this Court has stated that "we ultimately rel[y] upon the rule of construction regarding penal statutes which is that '[p]enal statutes must be strictly construed against the State and in favor of the defendant.'"[18] In this matter, the petitioner Joshua Miller has a clear legal right to the good-time credit, both discretionary and mandatory, especially when the statute is strictly construed against the DOCR.

2. *Hargus* does not support the DOCR's distinction of a sentence and sanction and, therefore, does not support, seven years after its issuance, the DOCR's recent administrative actions.

Seven years after its issuance, the DOCR relies on *Hargus* to deny the petitioner any credit for good time, discretionary or mandatory, while an inmate is in a correctional facility.

DOCR's counsel states, correctly, that "in *Hargus,* this Court analyzed whether the imposition of a period of incarceration as a sanction upon an offender for violating the terms and conditions of his extended supervised release ran afoul of certain constitutional principles."[19] However, counsel for DOCR states, incorrectly, that "part in parcel of that analysis was whether

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17 *State ex rel. Goff v. Merrifield,* 191 W. Va. 473, 476, 446 S.E.2d 695, 698 (1994) [quotations and citations omitted].

18 *Id.* quoting Syl. Pt. 3, *State ex rel. Carson v. Wood,* 154 W. Va. 397, 175 S.E.2d 482 (1970).

19 Response, p. 7

a period of incarceration resulting from a revocation pursuant to West Virginia Code § 62-12-26(g)(3) was a new 'sentence' or a 'sanction.'"[20] This analysis never appeared in *Hargus* as the Court never distinguished between a "sentence" or a "sanction." Counsel for DOCR also states, incorrectly, that the defendant's argument in *Hargus* was that any period of incarceration was a "sentence" entitling him to additional due process protections. The defendant never relied in *Hargus* on the label of a "sentence," but, instead, merely focused on the fact of the punishment.[21]

In *Hargus*, the Court confronted the constitutional challenges to imposing additional periods of incarceration for a person convicted of a sex offense when conditions of supervised release were violated. The Court noted that "West Virginia Code § 62-12-26(g)(3) (2011)[22] ... provides for additional *sanctions*, including incarceration, upon revocation of a criminal defendant's period of supervised release."[23] This is the language that seemingly fuels the DOCR's argument that "sanctions" and "sentences" are different concepts.

It must be noted that this language was included in the analysis of whether incarceration for violation of the terms of supervised release constituted "double jeopardy" because, arguably, it represents a second or subsequent punishment for the original offense. The Court opined that this was not a new punishment, but, instead:

> [A] post-revocation sanction simply is a continuation of the legal consequences of a defendant's original crime. In other words, it is part of a *single sentencing scheme* arising from the defendant's

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20 *Id.*

21 "The petitioners first assert that the above provision violates the right to procedural due process under the state and federal constitutions because a defendant's supervised release can be revoked and the defendant can be sentenced to additional incarceration after the court finds by clear and convincing evidence that the defendant violated a condition of his supervised release. Mr. Hargus posits that revocation should require that a jury find the defendant guilty of the violation beyond a reasonable doubt which is required for a finding of guilt in a criminal trial." 232 W.Va., *supra* at 741; 753 S.E.2d, *supra* at 899.

22 The provision is now codified at W. Va. Code §62-12-26(h)(3) after its amendment and reenactment in 2020.

23 232 W.Va., *supra* at 743; 753 S.E.2d, *supra* at 901. Notably, the statute does not refer to a sanction and only provides that a court "may revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release...." W. Va. Code §62-12-26(h)(3).

> original conviction. It is not an *additional penalty* resulting from the defendant's initial conviction.[24]

The single sentencing scheme for the conviction of a sex offense includes the possibility that the defendant will serve additional terms of imprisonment after violating terms of a supervised release from a period of incarceration. Accordingly, no basis exists to claim that the "sanction" is not part of the original "sentence" as this language makes clear that it is not an "additional" penalty, but part of the original sentencing.

A further constitutional challenge made in *Hargus* was that procedural due process is denied to a person who is deprived of liberty upon violation of the terms of supervised released because guilt is not determined beyond a reasonable doubt by a jury. In denying this challenge, the Court adopted the reasoning of the Supreme Court of the United States in *Johnson v. U.S.*,[25] which upheld the constitutionality of the federal supervised release scheme that exists for all felony offenses. Specifically,

> like the statute at issue, the Court in *Johnson* explained that the federal statute gives district courts the power to revoke a defendant's supervised release and impose a prison term.... Significantly, the *Johnson* Court attributed post-revocation penalties to the defendant's original conviction and not to a violation of the conditions of supervised release. In explaining this decision, the Court recognized that construing the revocation of a defendant's supervised release and re-imprisonment as punishment for the violation of the conditions of supervised release would raise serious constitutional questions. The Court initially indicated: "Although such violations [of supervised release] often lead to reimprisonment, the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt....

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24 *Id; see also, State v. James*, 227 W. Va. 407, 414, 710 S.E.2d 98, 105 (2011):

> [F]undamentally, the statute [W. Va. Code §62-12-26] provides that a court impose a period of extended supervision as part of the criminal sentence for certain specified offenses and sets forth the manner in which the supervision is to be administered and enforced.

25 529 U.S. 694, 120 S.Ct. 1795 (2000).

> Where the acts of violation are criminal in their own right, they may be basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense. Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties."[26]

Accordingly, the "sanction" and the "sentence" are not separate concepts. Post-revocation "sanctions" are part of an "unitary" sentencing scheme imposed upon entry of the judgment of a defendant's conviction.[27] This sentencing scheme incorporates the possibility of the further punishment for the original offense of an "additional" term of imprisonment or, as stated in *Johnson* above, "reimprisonment."[28]

Indeed, as previously noted, the circuit court judge's order resulting in Mr. Miller's current incarceration stated that he was "*sentenced* to the West Virginia State Penitentiary for a determinate sentence of three (3) years."[29] Notably, in *State v. Parker-Boling* [30], this Court reviewed the term of the defendant's incarceration upon revocation of her supervised release as a review of a "sentencing order."[31] And, in federal court decisions, it has been reported that the

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[26] 232 W. Va., *supra* at 741, 753 S.E.2d, *supra* at 899, citing 529 U.S. at 700, 120 S.Ct. 1795.

[27] *Cf., United States v. Ketter*, 908 F.3d 61, 65 (4th Cir. 2018) describing the federal system for imprisonment and imposition and potential revocation of supervised release an "unitary sentence."

[28] Because this Court has looked to similar federal law to determine the constitutionality of the state's supervised release statute, it is particularly relevant that the provisions of a similarly worded good time statute, 18 U.S.C. §3583(a), are extended to persons serving a term of imprisonment upon revocation of supervised release. *See U.S. v. Westry*, 613 Fed. Appx. 812, 814 (After being sentenced to a 12 month term for violation of supervised release, "Westry's counsel asked the judge to consider a sentence of 12 months and 1 day, which would allow Westry to qualify for good-time credits."); *U.S. v. Johnson*, 570 Fed. Appx. 611, 612 (7th Cir. 2014)(For the violation of supervised release, "the judge chose a prison term of 12 months and 1 day, noting that a term of that length would make Johnson eligible for good-time credit."); *U.S. v. Eagleman*, 2014 WL 3513238, *2 (D. Mont. 2014)(For the violation of terms of supervised release "a custodial period of 12 months and 1 day would qualify Ms. Eagleman for 'good time" credit in prison...."); and *United States v. Frazer*, 2017 WL 1015338, *5 (E. D. Kentucky 2017)(Judge would not give a 12 month and 1 day sentence because this would result in shorter than 1 year sentence due to good time credit eligibility.).

[29] R. App., p. 11.

[30] 2017 WL 5629689, *3 (2017).

[31] *See also, State v. Payne*, 2012 WL 2892245 (For violation of supervised release, defendant "sentenced" to five years of incarceration.).

judge "sentenced" defendants to terms of imprisonment for violating terms of supervised release.[32]

In *United States v. Ketter,*[33] a defendant challenged his sentence for which he had served the custodial part, but was now serving the supervised part. The government challenged his appeal as mooted because he was no longer incarcerated. The Circuit Court of Appeals found that the defendant "received a unitary sentence and that a challenge to that sentence presents a live controversy, even though he has served the custodial portion of that sentence."[34] As the Circuit Court of Appeals noted:

> Treating custodial and supervised release terms as components of one unified sentence appropriately recognizes the interdependent relationship between incarceration and supervised release. The term of supervised release, the revocation of that term, and *any additional term of imprisonment imposed for violating the terms of the supervised release* are all part of the original sentence.[35]

Indeed, the provisions of the supervised release statute, W. Va. Code §62-12-26 (2020)(the "2020 Supervised Release Statute"), provide the most conceptually cogent manner in which to view the supervised release portion of a sentence. In subsection (e) of the 2020 Supervised Release Statute, the legislature directs that:

> Any person sentenced to a period of supervised release pursuant to the provisions of this section shall be supervised by a multijudicial circuit *probation* officer, if available. Until such time as a multijudicial circuit *probation* officer is available, the offender shall be supervised by the *probation* office of the sentencing court or of the circuit in which he or she resides.[36]

Moreover,

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32 *See U.S. v. Westry,* 613 Fed. Appx. 812 (11th Cir. 2015)(Upon revocation of supervised release, "the judge sentenced Westry to 12 months of imprisonment."); *U.S. v. McBride,* 633 F.3d 1229, 1231 (10th Cir. 2011)("Before deciding whether to revoke a term of supervised release and determining the sentence imposed....").

33 308 F.3d 61 (4th Cir. 2018).

34 *Id.* at 65.

35 *Id.* [quotations and citations omitted][emphasis added].

36 W. Va. Code §62-12-26(e)[italics added].

> a defendant sentenced to a period of supervised release shall be subject to any or all of the conditions applicable to a person placed upon *probation*....[37]

And, again:

> The court may ... terminate a term of supervised release and discharge the defendant released at any time after the expiration of two years of supervised release, pursuant to the provisions of the West Virginia Rules of Criminal Procedure relating to the modification of *probation*....[38]

And, again, the sentencing court may:

> Extend a period of supervised release ... consistent with the provisions of the West Virginia Rules of Criminal Procedure relating to the modification of *probation*....[39]

And, most relevant, the sentencing court may:

> Revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release ... pursuant to the West Virginia Rules of Criminal Procedure applicable to revocation of *probation*....[40]

The legislative intent was that. like probation, supervised release is merely a means of avoiding possible terms of imprisonment. And, like revocation of probation, the revocation of supervised release is part of the original sentencing scheme and not a separate and distinct "sanction." And like inmates serving sentences upon revocation of probation therefore, defendants who violate the terms of supervised release and whose sanction includes additional periods of incarceration are entitled to good-time credit.

Moreover, the comparison to probation emphasizes the flaw in the distinction between a "sanction" and a "sentence."

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37 W. Va. Code §62-12-26(f)[italics added].
38 W. Va. Code §62-12-26(h)(1)[italics added].
39 W. Va. Code §62-12-26(h)(2)[italics added].
40 W. Va. Code §62-12-26(h)(3)[italics added].

State ex rel. Goff v. Merrifield is particularly instructive.[41] The defendant was confined to the county jail for which, at the time, "every prisoner sentenced to the county jail for a term exceeding six months ... shall be entitled to a deduction of five days from each month of his sentence."[42] Defendant pled to two felony counts. Defendant was sentenced to six months on one count and was sentenced to ten years on the second count. However, the second sentence was suspended and defendant was placed on probation for five years, but subject to the condition that he would first serve six months in the county jail. The two six-month terms were to run consecutively.

The defendant claimed good time credit but was denied the credit because his sentence was not for a term exceeding six months as the second six months' term was a condition of probation. The defendant claimed the effect of the sentencing was that he would serve a cumulative period of one year and should be entitled to the good time credit.

This Court agreed with the Defendant. The Court reasoned:

> A careful examination of the definitions of a few key words leads us to our conclusion. Sentence means "[t]he judgment formally pronounced by the court or judge upon the defendant after his conviction ... usually in the form of ... *incarceration* or *probation.*" *Black's Law Dictionary* 1362 (6th ed. 1990)(emphasis added). Incarceration is defined as "*confinement in a jail* or [in a] penitentiary." *Id.* at 760. Moreover, the word sentence encompasses the word probation within its meaning. ... [I]n West Virginia, probation can include incarceration or confinement in the county jail. Clearly, the common thread linking the word "sentence" together with the phrase "confinement as a condition of probation" is the fact that both refer to the person being incarcerated in jail. The meaning of each word and phrase is inextricably intertwined. ... Therefore, for the purpose of earning good time credit under W. Va. Code, 7-8-11 [1986], confinement as a condition of probation is considered a sentence within the meaning of this provision. ... The language within these pertinent provisions does not exclude the cumulation of a term of

41 191 W. Va. 473, 476, 446 S.E.2d 695, 698 (1994).

42 *Id.* citing W. Va. Code §7-8-11 [1986].

> confinement based upon a condition of probation with an ordinary term of confinement based upon a straight sentence.[43]

The Court further held that, even though the defendant was confined for probationary purposes, the defendant was still entitled for credit toward his time for work performed as a trustee. No distinction was made regarding the manner the incarceration was imposed.

Similarly, the DOCR's distinction between a "sanction" and a "sentence" is not supported by *Hargus*, because, in the final analysis, the defendant is incarcerated as a possible additional punishment for the original offense. Accordingly, the DOCR's denial of Joshua Miller's credit for good time is not supported by the *Hargus* decision.

3. The Legislature had ample opportunity to exclude a class of inmates from the mandatory good time credit but did not do so and DOCR cannot do so by administrative action.

Section 17(a) of Article 4 of Chapter 15A of the West Virginia Code, W. Va. Code §15A-4-17(a), effective July 1, 2018[44], states, without any ambiguity or vagueness, that:

> All current and future adult inmates sentenced to a felony[45] and, placed in the custody of the division ... *shall be granted* commutation from their sentences for good conduct.....

(the "2018 Governing Statute")[italics added]. The commutation of a sentence for good conduct is more commonly known as the "good time credit."[46] Moreover section 17(c) of the 2018 Governing Statute provides, without limitation:

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43 *Id.* at 699-701, 477-479.

44 House Bill 4338 consolidated, essentially, the good time provisions separately set forth in W. Va. Code §31-20-5d for the regional jails and W. Va. Code §28-5-7 for correctional facilities. The consolidation reflects the consolidation of the Division of Corrections and the Regional Jail Authority into the Division of Corrections and Rehabilitation.

45 The state statute is based upon the federal statute which provides: "a prisoner who is serving a term of imprisonment of more than 1 year ... may receive credit toward the service of the prisoner's sentence." 18 U.S.C. §3624. The state statute differs in that it replaces the 1 year requirement with the requirement of "convicted to a felony" in order to capture the time period requirement and exclude misdemeanants and it replaces the permissive "may" with the mandatory "shall." Like the federal statute, no exception is made for those incarcerated for reason of the revocation of supervised release.

46 *See* W. Va. Code §15A-4-17(b)("The commutation of sentence, known as 'good time'"....).

> *Each inmate* committed to the custody of the commissioner and incarcerated in a facility pursuant to that commitment *shall be granted* one day good time for each day he or she is incarcerated.... [italics added].

The petitioner Joshua Miller is an inmate. Joshua Miller was convicted of a felony. Due to a violation of the conditions of the mandatory term of supervised release imposed by his sentence, Joshua Miller is, again, in the custody of the Division of Corrections and Rehabilitation ("DOCR"). Accordingly, the 2018 Governing Statute dictates that Joshua Miller be granted good time, including the meritorious good time he earned for his exemplary effort to address the pandemic on behalf of his fellow inmates, the facility's staff, and the citizens of the State of West Virginia.

Until this month, DOCR would have agreed.

However, DOCR is now creating a distinct class of inmates who will not be "granted" good time notwithstanding the legislative mandate of the 2018 Governing Statute. This distinct class of inmates are those whose incarceration is the result of the violation of the terms of supervised release imposed upon individuals convicted of designated sex offenses pursuant to the provisions of Section 26 of Article 12 of Chapter 62 of the West Virginia Code, W. Va. Code §62-12-26 (2020) (the "2020 Supervised Release Statute"). Notably, this Court has recognized that this statute, and its previous enactments, "is silent to credit for time served while incarcerated."[47]

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[47] *State v. Payne*, 2012 WL 2892245, *3 (February 13, 2012)(unpublished opinion)(The complete context is: "As to the petitioner's argument that this statute conflicts with the "good time served" statute ..., this Court finds that the petitioner was only denied credit for the time he spends on supervised release under the statute, and [sic] extended supervised release the statute is silent as to credit for time served while incarcerated.").

So, if the 2018 Governing Statute applies to all "adult inmates" without exception,[48] and if the 2020 Supervised Release is silent on the issue of good time credit when incarcerated, why is the DOCR creating this new class of inmates for disparate treatment when the legislature did not do so?[49] The DOCR should provide an explanation other than the new interpretation and application of a 2013 opinion by this Court that does not say what DOCR wants it to say.

Despite opportunities to do so, the Legislature has not created a class of adult inmates who will be denied the right to earn good time credit while incarcerated. Notably, the "good time" credit is contained in the 2018 Governing Statute for which the heading of the Article containing the statute is "Corrections Management." The "good time credit" has been described by this Court, thusly:

> First we note that good time is designed to advance the goal of improved prison discipline. ... Perhaps no place else are fairness and predictability more valued than within the walls of a prison. Those incarcerated have little to look forward to, and little to motivate them, beyond a return to their normal, free lives on the outside. It is vitally important to the orderly operation of our prisons that inmates believe they will be rewarded for good behavior.[50]

This Court further noted:

> [T]he purpose of awarding good time credit is to encourage not only rehabilitative efforts on the part of the inmate by encouraging the industrious and orderly, but also to aid prison discipline by rewarding the obedient.[51]

And, particularly relevant to this discussion is the Court's admonition that:

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[48] An exception is expressly made for those "committed pursuant to § 25-4-1 et seq. of this code," which relates to youthful offenders. No other exception is expressly stated.

[49] A well-established rule is that "the Legislature is presume to have known and understood the laws they had earlier enacted." *Appalachian Power Co. v. State Tax Dept. of West Virginia,* 195 W. Va. 573, 585, 466 S.E.2d 424, 437 (1995). Accordingly, when the supervised release statute was amended and reenacted in 2020, the legislature could have ended its silence on the subject and exempted Joshua Miller and those similarly situated from the good-time provisions.

[50] *State ex rel. Bailey v. State Div. of Corrections,* 213 W. Va. 563, 566, 584 S.E.2d 197, 200 (2003)[quotations and citations omitted].

[51] *Id.* [quotations and citations omitted].

> This Court has described good time as a purely statutory creation and the Court has often explained that it is the legislative, and not judicial branch that gave life to this practice....[52]

This guidance by the Court leads to several conclusions.

First, the "good time credit" is designed to assist in the oversight of inmates without distinction as to the manner they have been incarcerated. Indeed, creating a class of inmates treated disparately from other inmates would hamper, rather than further, the orderly administration of correctional facilities for hostility would be fostered, tensions would be created, and division would be ensured.

Second, good time credit is also not an "executive" branch concept and, therefore, the Division of Corrections and Rehabilitation cannot administratively thwart the Legislative intent that "all" who are incarcerated are to be encouraged to behave appropriately through earing of good time credit.

Third, as noted by this Court:

> A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law applicable to the subject-matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.[53]

Simply, no reason exists to deviate from the legislative mandate that all inmates are entitled to good-time credit.

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52 *Id.* [quotations and citations omitted].

53 Syl. Pt. , *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908).

And, fourth, the Legislature amended the supervised release statute in 2020, but did not exempt Joshua Miller and those similarly situated from the 2018 Governing Statute. Accordingly, no reason exists for administrative action to do what the Legislature did not choose to do.

CONCLUSION

As set forth above, the petitioner Joshua Miller is entitled to the good-time credit. The DOCR is legislatively mandated to provide the credit. And no other remedy exists to enable Joshua Miller to effectively discharge his current term of imprisonment.

The writ of mandate should issue, but it should be moulded to include the award of the mandatory good-time credit to the petitioner in addition to the discretionary award.[54]

Respectfully submitted

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[54] If DOCR's position is upheld, then the exemption of a class of inmates who are incarcerated for violation of supervised release would be subject to challenge for violation of the "constitutional guarantee of equal protection under the law." *See U.S.Const.*, amend. 14; W. Va. Const., art. III, §10. The petitioner reserves the right to litigate this issue in the proper context.

CERTIFICATE OF SERVICE

I, Dana F. Eddy, counsel for Petitioner, Joshua Miller, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying "*Petitioner's Reply*" to the following:

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by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 25th day of November, 2020.

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