IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 200981

STATE OF WEST VIRGINIA ex rel. DOMINIC L. DAVIS,
Petitioner,

v.

(Under the Original Jurisdiction of the Court)

BETSY JIVIDEN, Commissioner,
Division of Corrections and Rehabilitation,
Respondent.

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

Whether, under the statutory provisions mandating awards of good time and eligibility for parole, the Division of Corrections and Rehabilitation (DOCR) may rescind previously awarded good time, deny future good time, and deny parole hearings for prisoners based solely on their status as inmates returned to DOCR custody upon revocation of their supervised release.

STATEMENT OF THE CASE

[**Note:** On Nov. 16, 2020, the Petitioner filed a Motion to Intervene in the pending case of *State ex rel. Joshua Miller v. Jividen*, No: 20-0628, a case initially filed *pro se* and raising only the issue of the DOCR's denial of good time for a certain class of prisoners. By Order of Dec. 2, 2020, the Court deferred a ruling on the Motion. The Petitioner now files this separate Petition For a Writ of Mandamus in order to bring before the Court not just the issue of the denial of good time, but the equally significant denial of *parole eligibility* for the same class of prisoners, including the Petitioner.]

1. Introduction and Summary.

As documented on the Petitioner's "Inmate Time Sheet" of Nov. 20, 2020, on or before this date the Division of Corrections and Rehabilitation (DOCR) rescinded the Petitioner's previously rewarded good time credits, refused to award current and future credit, and denied the Petitioner the right to appear before the Parole Board. (A.R. 19). The refusal of the DOCR to perform these mandatory duties is based on the DOCR's novel and legally contradictory position that only prisoners serving "sentences" are entitled to good time and eligibility for parole, and that, upon revocation of his release on extended supervision and re-commitment to its custody, the Petitioner is no longer serving a sentence, but is instead serving a "sanction."

The DOCR's position is set forth in its Summary Response to the petition currently pending before this Court in *State ex rel. Joshua Miller v. Jividen*, No. 20-0628, a petition that raises only the denial of good time. As noted above, the present Petition differs from the *Joshua Miller* Petition in that, in addition to the issue of good time, this Petition also involves the equally significant issue of the DOCR's denial of the Petitioner's eligibility for parole.

As set forth herein, all applicable rules of statutory construction, along with all relevant caselaw interpreting the protections set forth in both the West Virginia and United States Constitutions, state precisely the opposite of the DOCR's recently adopted position: that the "sanction" for revocation is not a separate matter from the underlying sentence but is instead a part of it, and that, consequently, the penal statutes authorizing reduction of sentences (good time and eligibility for parole) apply to all prisoners who are otherwise eligible.

2. Statement of Facts and Procedural History.

In the September 2012 Term of Court, the Grand Jury of Kanawha County returned a one-count indictment charging the Petitioner with first degree sexual abuse in violation of W.Va. Code § 61-8B-7. Indictment, *State v. Dominic Davis*, No. 12-F-618 (Kanawha County, 2012). (A.R. 1-2).

On January 7, 2013, the Petitioner entered a plea of guilty as charged. (A.R. 3-5). Upon sentencing on March 5, 2015, the Court ordered that the Petitioner "be committed to the custody of the West Virginia Department of Corrections for an indeterminate term of not less than one (1) nor more than five (5) years." The Court further ordered that the Petitioner "be placed on extended supervision for a period of twenty (20) years to begin upon the expiration of the defendant's incarceration . . . " Order, *State v. Dominic Davis*, No. 12-F-618 (Kanawha County, March 17, 2015). (A.R. 6-8). On the same date, the Court entered an Order of Notification of Supervised Release requiring the Petitioner to report to the Kanawha County Adult Probation Department on "the next business day upon his release from incarceration . . . " (A.R. 9-12).

On July 6, 2017, the Kanawha County Adult Probation Office filed a Notice and Motion to Revoke Supervised Release With Request For Capias. The Notice stated that the Petitioner had completed his term of incarceration and began his supervised release on June 14, 2017. The Notice, addressed to the Petitioner, then stated, "You failed to report to the Union Mission Crossroads Shelter upon your release from Saint Mary's Correctional Center . . . " and that "On or about the 19th day of June, 2017, you absconded the lawful supervision of your supervising ISO Officer . . . " (A.R. 13-14).

On July 24, 2020, the Petitioner entered a plea of guilty to violating the terms of his supervised release as set forth in the Notice. Upon entry of the plea, the Court ordered that the Petitioner "shall be sentenced to the penitentiary of this State for a term of (1) year, with credit for time spent in jail in this violation, which credit so spent incarcerated is forty-one (41) days." The Court further ordered that "upon expiration of said sentence," the Petitioner "shall be reinstated to serve the remainder of the term of the twenty (20) years of supervised release pursuant to W.Va. Code § 15A-4-17, which was previously imposed in this matter." Sentencing Order for Violation of Supervised Release, *State v. Dominic Davis*, No. 12-F-618 (Kanawha County, July 30, 2015). (A.R. 15-17).

Upon his re-commitment to the DOCR, the Petitioner's initial Time Sheet, dated July 31, 2020, provided a Minimum Discharge Date of Dec. 12, 2020. (The "Minimum Discharge Date" is defined on the Time Sheet as "the earliest date you can expect to be released from WV Division of Corrections and Rehabilitation custody if you are not released on parole, escape, or lose good time.")

The relevant portions of the Petitioner's July 31 Time Sheet state:

Max Term in Years:	1.00
Max Term in Days:	365.25
Time Served:	48
GT Earned:	48
Total Time Credited:	96
Time Left to Dis.	269.25
Final Time Left w/GT:	134.63
Current Date:	7/31/2020
Minimum Dis. Date:	**12/12/2020**

(A.R. 18).

On November 10, 2020, however, the DOCR prepared a revised Time Sheet for the Petitioner, stating in the caption "ineligible for GT or Parole," and deleting the 48 days of good time credit previously earned. In the revised time sheet, the Minimum Discharge Date was changed from Dec. 12, 2020, to June 13, 2021 – thereby adding six months of imprisonment to the minimum discharge date.

Additionally, the revised time sheet states that the Applicant is not only ineligible for good time credit, but also, under the same erroneous rationale, is ineligible for parole. As the revised Time Sheet states, "*You are NOT eligible for Parole when serving a sanction for Revocation of Sex Offender/Child Abuse Supervised Release.*" (emphasis in original). (A.R. 19).

As set forth in the Argument below, the position of the DOCR is erroneous in that it is contradicted by all applicable rules of statutory construction and all relevant caselaw in both West Virginia and all other state and federal jurisdictions that have considered these issues.

SUMMARY OF ARGUMENT

Despite statutory mandates to the contrary, the Respondent Commissioner has retroactively rescinded the Petitioner's good time, refuses to award the Petitioner good time in the future, and denies his eligibility for parole based solely on his status as an inmate who has been re-committed to the DOCR upon revocation of his release on extended supervision. The Respondent refuses to grant good time credit or parole hearings under the faulty proposition that the Petitioner is incarcerated and serving time, not as a "sentence," but as a "sanction" – and that the only prisoners entitled to good time and parole are those incarcerated and serving time as a "sentence."

The good time statute for prisoners in West Virginia is set forth in mandatory language. As W.Va. Code § 15A-4-17(a) states: "*All* current and future adult inmates sentenced to a felony and, placed in the custody of the division . . . *shall* be granted commutation from their sentences for good conduct in accordance with this section . . . " (emphasis added)

Similarly, although the granting of parole is discretionary, the statutory right to be considered for parole (for inmates not sentenced to life without parole) is not. The relevant portions of the parole statute, W.Va. Code § 62-12-13(a) and (b), state in mandatory language "The Parole Board, whenever it is of the opinion that the best interests of the state and of the inmate will be served . . . *shall release any inmate* on parole. . . ." and that "*Any* inmate of a state correctional institution is eligible for parole if he or she: (1)(A) Has served the minimum term of his or her indeterminate sentence or has served one fourth of his or her definite term sentence, as the case may be . . . " (emphasis added)

The Respondent's position in denying good time and parole eligibility is further erroneous because, in addition to directly contradicting the statutory mandates, it adopts the contradictory positions that sanctions of imprisonment are *part of the sentence* (in order to comply with West Virginia and federal constitutional law), but then states that sanctions are *not part of the sentence* (in order to avoid the application of good time and parole). For purposes of sentencing and imprisonment, a "sentence" and a "sanction" are not separate matters. As held by this Court in *State v. Hargus*, 232 W.Va. 735, 753 S.E.2d 893 (2013), "a post-revocation sanction simply is *a continuation of the legal consequences of a defendant's original crime* . . . [I]t is *part of a single sentencing scheme* arising from the defendant's original conviction." 232 W.Va. at 743, 753 S.E.2d at 901. (emphasis added)

In contrast to the explicit mandatory language of the good time and parole statutes, the statutory provision regarding the range of penalties upon revocation of supervised release, W.Va. Code § 62-12-26(h)(3), is silent on the subject. As set forth in this Court's principles of statutory construction, legislation that is silent on a matter does not mean that the matter exists (that is, the exclusion of good time and parole for prisoners whose supervised release has been revoked). It means that it does not exist.

Consequently, the Respondent's refusal of its mandatory duty to award good time credit and allow parole hearings for the Petitioner is wholly erroneous. The Petitioner has a clear legal right to the relief sought; the Respondent has a legal duty to award the relief; the issue is currently before the Court in petitions filed by other prisoners; and the Petitioner has no other adequate remedy other than mandamus.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument under Rule 20 is necessary because the issue in this case is one of first impression.

ARGUMENT

I. MANDAMUS UNDER THE ORIGINAL JURISDICTION OF THIS COURT IS THE APPROPRIATE REMEDY IN THIS CASE.

A. Standard of Review.

"Mandamus lies to require the discharge by a public officer of a non-discretionary duty . . . provided the case is appropriate for the consideration of such relief, a writ of mandamus will issue when three elements coexist: (1) a clear legal right to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." *State ex rel. Williams v. Department of Military Affairs and Public Safety*, 212 W.Va. 411, 573 S.E.2d 5 (2002). (internal cites omitted)

B. Original Jurisdiction of the Court.

The original jurisdiction of this Court is authorized in this matter by the provisions of W.Va. Const. Art. VIII, § 3; W.Va. Code § 53-1-2; and Rule 16 of the Rules of Appellate Procedure. The relief sought is not available in any other court or cannot be had through any other process for reasons including:

1. The pendency in this Court of similar petitions filed *pro se* and thereby lacking full presentation of the issues. (This problem is only partially resolved by the appointment of counsel to file a Reply in the related case of *State ex rel. Joshua Miller v. Jividen,* No. 20-0628. Because the petition in *Miller* only raises the issue of good time, and new issues cannot be raised for the first time in a Reply, *Miller* does not include the equally significant issue of eligibility for parole);

2. The system-wide and state-wide impact of the DOCR policy and the number of prisoners, in addition to the Petitioner, who are affected by the DOCR policy;

3. The likelihood of inconsistent and conflicting rulings by the various circuit courts throughout this State if lower court proceedings were required before receiving uniform guidance from this Court; and

4. The unconstitutional loss of liberty that cannot be remedied if the Petitioner, along with other prisoners affected by the DOCR policy, remain incarcerated if required to pursue hearings in circuit court followed by appeal to this Court, when they would have otherwise discharged their sentences with good time credits or been released on parole.

For similar reasons, in previous instances when this Court has received numerous petitions from prisoners, each raising the same or similar issues with each other, this Court has granted the relief requested under its original jurisdiction, often consolidating the petitions into a single case, issuing a Rule to Show Cause and, if a need for further factual development is deemed necessary, remanding the case to Circuit Court with specific guidance regarding the scope and focus of the lower court proceedings.

In *State ex rel. Williams v. Department of Military Affairs and Public Safety*, 212 W.Va. 407, 573 S.E.2d 1 (2002), for example, seven prisoners successfully petitioned the Court, under its original jurisdiction, for a writ of mandamus challenging the good time policies and practices of Division of Corrections' officials then in effect at the Huttonsville Correctional Center. The Court appointed counsel to represent one of the prisoners, permitted six other prisoners to join in the petition, and granted the writ of mandamus as moulded by the Court. 212 W.Va. at 410-11, 573 S.E.2d at 4-5.

This Court has similarly granted writs of mandamus filed by prisoners under the Court's original jurisdiction addressing other matters, including consolidating six petitions into one writ of mandamus in the "prison backlog" case of *State ex rel. Sams v. Kirby*, 208 W.Va. 726, 542 S.E.2d 889 (2000). Under its original jurisdiction, the Court also consolidated 13 petitions into one writ of mandamus in the prison overcrowding case of *State ex rel. Stull v. Davis*, 203 W.Va. 405, 508 S.E.2d 122 (1988).

As recently as May 22 of this year, the Court, under its original jurisdiction, appointed counsel and granted a writ of mandamus, as moulded, to a prisoner in order to compel the respondent to provide the prisoner with a copy of his transcript and other matters of record. *State ex rel. Tackett v. Poling*, 843 S.E..2d 518 (2020).

II. THE STATUTORY PROVISIONS REGARDING "GOOD TIME" AND ELIGIBILITY FOR PAROLE EXPRESSLY AND UNEQUIVOCABLY APPLY TO ALL PRISONERS IN THE CUSTODY OF THE DOCR AND ARE MANDATORY.

A. The Plain Meaning of the Statutory Language.

1. Good Time.

The "good time" statute for prisoners in West Virginia applies to all inmates and is set forth in mandatory language. As W.Va. Code § 15A-4-17(a) states: "*All* current and future adult inmates sentenced to a felony and, placed in the custody of the division . . . *shall* be granted commutation from their sentences for good conduct in accordance with this section . . . " (emphasis added)

In applying the good time statute, neither this Court nor, to the best of Petitioner's knowledge, has any jurisdiction in the nation that provides good time for prisoners ever made a

distinction between prisoners serving a period of confinement as a *sentence* and prisoners ordered to serve a period of confinement as a sanction or for anything else that the State attempts to characterize as something other than a sentence. In *State ex rel. Goff v. Merrifield*, 191 W.Va. 473, 446 S.E.2d 695 (1994), for example, the Court considered a similar issue involving good time credit for misdemeanors, where on one of the counts the prisoner was ordered to spend six months in the county jail *as a condition of probation,* and on a second count ordered to serve another six months to run consecutively with the first term. As the Court framed the issue for the first portion of the inmate's sentence, the eligibility for good time depended upon "whether confinement as a condition of probation in the county jail is tantamount to confinement based upon a straight sentence in the county jail." 191 W.Va. at 477, 446 S.E.2d at 699. The Court rejected any notion that confinement as a condition of probation is something other than a sentence of confinement. The Court held that the prisoner was, in fact, entitled to good time, explaining that *"the word sentence encompasses the word probation within its meaning."* 191 W.Va. at 477, 446 S.E.2d at 699. (emphasis added)

In writing for the unanimous Court in *Goff,* Justice McHugh drew from the long history of decisions involving good time, decisions based on both the West Virginia Constitution and the good time statutes adopted by the Legislature. In discussing the constitutional foundation, the Court emphasized that "[g]ood time credit is a valuable liberty interest protected by the due process clause, W.Va. Const. Art. III, § 10." 191 W.Va at 698, 446 S.E.2d at 476, *quoting* Syl. pt. 2 of *State ex rel. Coombs v. Barnette*, 179 W.Va. 347, 368 S.E.2d 717 (1988), and Syl. pt. 2 of *State ex rel. Gillespie v. Kendrick*, 164 W.V. 599, 265 S.E.2d 537 (1980).

In reviewing the statutory provisions, the Court began its analysis by citing the rule of construction that "[p]enal statutes must be strictly construed against the State and in favor of the defendant." 191 W.Va at 698, 446 S.E.2d at 476, *quoting* Syl pt. 3, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970). The Court then explained that "the common thread linking the word 'sentence' together with the phrase 'confinement as a condition of probation' is that *both refer to the person being incarcerated* in jail." 191 W.Va. at 477, 446 S.E.2d at 699. (emphasis added).

The Court then emphasized the most basic rule of statutory interpretation: plain meaning. As the Court stated, "The importance of giving deference to the plain and simple meaning of words when interpreting statutes was recognized by this Court in syllabus point 4 of *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars of the United States*, 144 W.Va. 137, 107 S.E.2d 353 (1959)." The Court then noted, "Generally, words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use." 191 W.Va at 477-78, 446 S.E.2d at 699-700.

The Court in *Goff* then concluded, "Therefore, for the purpose of earning good time credit under W.Va. Code § 7-8-1 (the good time statute for misdemeanors), confinement as a condition of probation is considered a sentence within the meaning of this provision. Thus, when a person is confined in the county jail as a condition of probation, that person, *in the absence of words in the statute to the contrary*, is considered to be serving a sentence . . . so as to make him eligible for good time credit . . . " (emphasis added).

The Court in *Goff* reached the same conclusion regarding the applicability of additional good time for serving as a trustee. At the risk of sounding repetitious, once again the Court began

its analysis of the award of additional good time by stating the precise language of the extra good time statute, that "*Any* inmate who performs work pursuant to the provisions of this section *shall* receive . . . a reduction in his or her term of incarceration of not more than twenty-five percent of the original sentence . . . in addition to any other reduction of sentence the inmate may accumulate." 191 W.Va at 478, 446 S.E.2d at 700. (emphasis in original, in part, and emphasis added, in part) The Court then explained that "A statute should be so read as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to be 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." (internal cites omitted). 191 W.Va at 479, 446 S.E.2d at 701.

In applying these principles, the Court then stated that "it appears to be quite clear that the legislature intended, through the use of the word "shall," for any and all inmates confined in the county jail, for whatever reason, to receive a reduction in their sentence for work duly accomplished . . . The word 'shall,' in the absence of language in the statute to the contrary showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation." 191 W.Va at 479, 446 S.E.2d at 701, *quoting* Syl. pt. 2, *Terry v. Sencindiver*, 153 W.Va. 651, 171 S.E.2d 480 (1969).

2. Eligibility for parole.

Similar to the good time statutes, the West Virginia statute involving eligibility for parole applies to all prisoners not sentenced to life without parole. (The relationship of the DOCR and

the Parole Board is established in W.Va. Code § 62-12-12(a), stating that the Parole Board is "part of" the DOCR.)

Although the granting of parole is discretionary, the statutory right to be considered for parole is not. The relevant portions of the parole statute, W.Va. Code § 62-12-13(a) and (b), state in mandatory language, "The Parole Board, whenever it is of the opinion that the best interests of the state and of the inmate will be served . . . *shall release any inmate* on parole. . . ." and that "*Any* inmate of a state correctional institution is eligible for parole if he or she: (1)(A) Has served the minimum term of his or her indeterminate sentence or has served one fourth of his or her definite term sentence, as the case may be . . . " (emphasis added)

As pointed out in the discussion of the good time statute, above, "When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the court not to construe but to apply the statute." *State ex rel. Goff v. Merrifield*, 191 W.Va. 473, 479, 446 S.E.2d 695, 701 (1994), *quoting* Syl. pt. 1, *Cummins v. State Workmen's Compensation Comm'r*, 152 W.Va. 781, 166 S.E.2d 562 (1969). For this reason, the statutory analysis set forth by the Court in *Goff*, in mandating the DOCR to provide good time for all inmates who are otherwise eligible, equally mandates the DOCR to allow eligibility for parole.

B. The Absence of Exclusionary Language.

The good time and parole eligibility statutes do not contain an exclusion for prisoners based on their status as inmates whose extended supervision has been revoked, and no such exclusion can properly be read into them. The Court in *Goff* specifically addressed the absence of statutory language excluding a class of prisoners (trustees) from receiving good time. Upon

restating that it is not the Court's duty to construe a statute that is already plain on its face, the Court added "Nor is there language within these statutes precluding a person confined as a condition of probation to serve as a trustee and thus excluding him from receiving a reduction in his sentence for work performed accordingly. *Due to the absence of such exclusionary language* and in light of the principle that penal statutes must be strictly construed in favor of the defendant, we conclude that these provisions were meant to be *all inclusive*." 191 W.Va at 479-80, 446 S.E.2d at 701-02. (emphasis added)

The Court in *Goff* then emphasized that "The legislature is the governmental body empowered to amend the statutory framework regarding confinement as a condition of probation and good time credit thereon." The Court stated "a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten, or given a construction of which its words are not susceptible . . ." The Court then concluded, "if the legislature desires to amend W.Va.Code § 62–12–9, § 7–8–11, or § 17–15–4 [the then-existing good time and probation statutes] in order to prohibit authorization for good time credit, trustee credit or cumulation of sentences, it may specifically do so." 191 W.Va at 480, 446 S.E.2d at 702.

In arguing for the exclusion, the Respondent's Summary Response in the similar case of *State ex rel. Jason Miller v. Jividen*, No. 20-0628, states that "Through its silence the Legislature has spoken volumes." (A.R. 31). Even though the Respondent cites *Goff* for this proposition, *Goff* states precisely the opposite. As *Goff* makes clear, when considering good time, the absence of exclusionary language in a statute doesn't mean the exclusion exists: it means it does not.

III. THE GROUNDS ASSERTED BY THE DOCR IN REFUSING GOOD TIME AND PAROLE ELIGIBLITY FOR INMATES WHOSE SUPERVISED RELEASE HAS BEEN REVOKED ARE IN DIRECT VIOLATION OF THE PROVISIONS OF THE WEST VIRGINIA AND UNITED STATES CONSTITUTIONS.

In *Steager v. Consol Energy, Inc.,* 242 W.Va. 209, 832 S.E.2d 135 (2019), this Court reaffirmed the longstanding principle that, "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." As is apparent from *State v. Hargus*, 232 W.Va. 735, 753 S.E.2d 893 (2013), the principal case cited by the Respondent, the DOCR's interpretation of the statutes in question is not only impermissible, it is in explicit violation of state and federal constitutional law.

In *Hargus*, the Court considered multiple challenges to the "sanction" of imprisonment for revocation of extended supervision, including claims that, by not providing, among other matters, a trial by jury to determine the facts supporting revocation beyond a reasonable doubt, the sanction violates the constitutional requirements of due process, equal protection, and protection against double jeopardy. The Court rejected all of these challenges. Much as in *Goff*, the basis for the Court's holding in *Hargus* is that under the extended supervision statute "a post-revocation sanction simply is a continuation of the legal consequences of a defendant's original crime." Also, as in *Goff*, the Court in *Hargus* then added, "In other words, it is part of a single sentencing scheme arising from the defendant's original conviction." 232 W.Va. at 743, 753 S.E.2d at 901. (emphasis added)

Most significantly, after holding that the post-conviction sanction is part of a single sentencing scheme, the Court in *Hargus* then stated, "For this reason, a post-conviction sanction

does not violate the constitutional guarantee of double jeopardy." The Court concluded, "Accordingly, this Court now holds that West Virginia Code § 62-12-26(g)(3), which provides for additional sanctions, including incarceration, upon revocation of a criminal defendant's period of supervised release, does not violate the prohibition against double jeopardy found in the Fifth Amendment of the United States Constitution and Article III, § 5 of the Constitution of West Virginia." 232 W.Va. at 743, 753 S.E.2d at 901.

The holding in *State v. Hargus* could not have been stated more clearly. The "sanction" for revocation of extended supervision is not a separate matter from the "sentence" for the underlying offense. (Otherwise, it *would* be a violation of Double Jeopardy.) The sanction is part of a single sentencing scheme. Consequently, *Hargus* does not support the proposition set forth by the Respondent. It, in fact, states the opposite.

The Respondent also quotes a portion of the Court's opinion in *Hargus* for the proposition that revocation proceedings in extended supervision cases are "a continuation of *the prosecution* of the original offense and not a new prosecution of additional offenses." 232 W.Va. at 742, 753 S.E.2d at 900 (emphasis added) (A.R. 27). This much is correct. The Respondent then asserts that "Without a new and separate criminal prosecution there is no new jury, no new conviction, and no new *sentence* to which 'good time' may apply . . . " Summary Response, *State ex rel. Jason Miller v. Jividen*, No. 20-0628, at 8. (emphasis by Respondent) (A.R. 27). The Respondent's error is that there is no requirement that there be a new sentence for good time to apply. In fact, if there were a new sentence, it would be a violation of double jeopardy and due process in the absence of a trial by jury. Instead, good time applies to the time served upon revocation because good time applies to the original sentence, and the sanction of revocation, as

explicitly stated in *Hargus*, is a continuation of this sentence. Because there is only a single sentence in cases involving revocation of extended supervision – the whole point of *Hargus* – the statutory award of good time applies to this sentence.

Similarly, the Court's holding in *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011), also cited by the Respondent, refutes rather than supports the Respondent's position. (A.R. 26-27). *State v. James* involved a challenge to the constitutionality of the extended supervision statute itself. The Court held that the statute "requires courts sentencing persons convicted of certain crimes enumerated in the statute to impose a term of supervised release *as part of the sentence* . . . at final disposition.' " (emphasis and ellipsis in original). The Court described the "the imposition of the legislatively mandated additional punishment of a period of supervised release as an inherent part of the sentencing scheme . . . " 227 W.Va. at 420, 710 S.E.2d at 111.

In its constitutional analysis, the Court in *Hargus* applied the principles that the United States Supreme Court set forth in considering the constitutionality of supervised release in the federal courts. In rejecting the claims of double jeopardy, the Court in *Johnson v. United States*, 529 U.S. 694 (2000), stated, "Treating postconviction sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties. *See e.g., United States v. Wyatt,* 102 F.3rd 241, 244-45 (C.A. 7 1996) (rejecting double jeopardy challenge on grounds that sanction for violating the conditions of supervised release are part of the original sentence.)." The United States Supreme Court recently reaffirmed these points in *United States v. Haymond*, 139 S.Ct. 2369, 2679-79 (2019).

Consequently, the Respondent DOCR's denial to the Petitioner of good time and eligibility for parole, based solely on his status as an inmate returned to DOCR custody upon revocation of his supervised release, is in violation of both constitutional and statutory mandates.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Mandamus should be granted and the Petitioner's good time credits, eligibility for parole, and minimum discharge date restored.

Respectfully submitted,

DOMINIC L. DAVIS,
By counsel

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VERIFICATION

I, GEORGE CASTELLO do hereby verify that I represent the Petitioner in the above Petition for a Writ of Mandamus, that I have reviewed the Petition, and that the assertions in the Petition are accurate, to the best of my knowledge and belief.

Counsel for the Petitioner

CERTIFICATE OF SERVICE

I, George Castelle, do hereby certify that on the 10th day of December, 2020, I delivered a copy of the foregoing PETITION FOR A WRIT OF MANDAMUS, by U.S. mail, upon:

Brianna J. Marino
Assistant Attorney General
1900 Kanawha Blvd., East
Building 1, Suite W-400
Charleston, WV 25305