IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 20-0981

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

Petitioner,

v.

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

Respondents.

RESPONDENT'S SUMMARY RESPONSE TO PETITIONER'S PETITION FOR WRIT OF MANDAMUS

PATRICK MORRISEY
ATTORNEY GENERAL

Briana J. Marino (WVSB #11060)
Assistant Attorney General
1900 Kanawha Blvd, East
Building 1, Suite 400-West
Charleston, WV 25305
Telephone: (304) 558-6593
Facsimile: (304) 558-4509
Email: Briana.J.Marino@wvago.gov
Counsel for Respondent

COMES NOW, the Respondent, Betsy Jividen, Commissioner of the West Virginia Division of Corrections and Rehabilitation, (referred to herein as "DCR"), by counsel, Briana J. Marino, Assistant Attorney General, to respectfully respond to the above-styled Petition for Writ of Mandamus filed on or about December 10, 2020 (hereinafter referred to as "Petition"). For the reasons fully discussed below, DCR asserts that the Petition should be refused in its entirety and dismissed from the Court's active docket.

I. STATEMENT OF FACTS

DCR agrees with the recitation of the facts and procedural history contained in the Petition on pages 3-5 with one exception. The underlying facts of this matter support DCR's conclusion that both a plain reading of West Virginia Code § 15A-4-17 (2018) and long-standing principles of statutory interpretation demonstrate Petitioner's ineligibility to receive "good time." Likewise, the underlying facts of this matter demonstrate, for the same reasons, that Petitioner will not meet the objective criterion necessary to be considered for parole pursuant to West Virginia Code § 62-12-13 (2020).[1]

II. LEGAL STANDARD

As an extraordinary remedy, a writ of mandamus will not issue unless a party can demonstrate (1) a clear legal 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. *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969). "Mandamus lies to require the discharge by a public officer of a nondiscretionary duty. *State ex rel. Greenbrier County Airport Authority v. Hanna*, 151 W.Va. 479 [, 153 S.E.2d 284 (1967)].' Syllabus point 1, *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W.Va. 636, 171 S.E.2d 545

[1] The prior version of W.Va. Code § 62-12-13 (2017) was effective July 6, 2017, through May 19, 2020, and contained the same objective criterion for parole eligibility contained in section (b).

(1969)." *State ex rel. Burdette v. Zakaib*, 224 W. Va. 325, 331, 685 S.E.2d 903, 909 (2009). "[T]he burden of proof as to all the elements necessary to obtain mandamus is upon the party seeking the relief[,]" 52 *Am. Jur. 2d Mandamus* § 3 at 271 (2000) (footnote omitted), a failure to meet any one of them is fatal." *Id.* Where a petitioner fails to show a clear right to the remedy sought mandamus relief is not warranted or appropriate.

III. ARGUMENT

A. *Consistent Among the "Good Time" and Parole Statutes is the Objective Requirement that one be 'Serving a Sentence' for the Statute to Apply*

Petitioner cannot demonstrate a clear legal right to the relief sought as he is not eligible for any type of "good time" pursuant to West Virginia Code § 15A-4-17 (2018) nor parole pursuant to West Virginia Code § 62-12-13 (2020). Both statutes have a common and consistent thread running through the objective criterion that governs their application to an offender's incarceration: that the offender be serving a "sentence." See, W.Va. §§ 15A-4-17(b); 62-12-13(b)(1)(A). It is the prerogative of the West Virginia Legislature to determine the classification of crimes and punishments, eligibility for "good time" accrual, and eligibility criterion for parole subject to certain constitutional limitations.

"Good time" is a statutory creation "designed to advance the goal of improved prison discipline." *Woods v. Whyte*, 162 W. Va. 157, 160, 247 S.E.2d 830, 832 (1978) (internal citations and footnotes admitted). Because "good time" is legislatively created, it is the Legislature's prerogative to determine which incarcerated individuals should be rewarded with commutation of his/her sentence in exchange for good behavior. *Id.* West Virginia Code § 15A-4-17 (eff. July 1, 2018), previously codified as W. Va. Code § 28-5-27 (repl. 2018), allows for the reduction of the amount of time certain incarcerated offender(s) must serve if he/she does not violate prison disciplinary rules so long as eligibility criterion are met. The grant of "good time," often termed "earned good time," effectively results in a day-for-day commutation of a sentence of incarceration

absent forfeiture. *See,* W.Va. Code § 15A-4-17(c). If an eligible offender violates prison disciplinary rules, as a penalty for those violations an offender's earned "good time" days may be forfeited, subject to certain due process rights, in addition to other privileges being curtailed. *See,* W.Va. Code § 15A-4-17(f). The eligibility criterion to receive "good time" is listed by the Legislature in section (b) of the statute and explicitly states that "[t]he commutation of *sentence*, known as "good time"...[.]" W.Va. Code § 15A-4-17(b) (emphasis added). There cannot be any disagreement among reasonable and objective minds that the "sentenced" language contained in the proviso is a mandatory, objective eligibility criterion that must be satisfied in order to receive the substantive benefit of the "good time" statute.

Likewise, the parole eligibility statute contains a substantively similar requirement in order to be considered for parole. In *State ex rel. Smith v. Skaff*, 187 W.Va. 651, 656, 420 S.E.2d 922, 927 (1992), this Court explained that the parole statute only "creates a reasonable expectation interest in parole to those prisoners meeting its objective criteria." *Citing* Syl. Pt. 1, *Tasker v. Mohen,* 165 W.Va. 55, 267 S.E.2d 183 (1980); *accord* Syl. Pt. 1, *Vance v. Holland,* 177 W.Va. 607, 355 S.E.2d 396 (1978). Therefore, only after all mandatory, objective eligibility criterion are satisfied is the non-discretionary duty of the Parole Board to evaluate the offender convicted of a crime for parole triggered. *See also, Skaff, supra; State v. Lindsey*, 160 W.Va. 284, 233 S.E.2d 734 (1977) ("A person convicted of a crime shall be considered for parole only after he becomes eligible therefor under the appropriate statute."). [2] The objective criteria for consideration for parole is codified in West Virginia Code § 62-12-13 (2020), which states in relevant part: (b) 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 determinate *sentence* or has served one fourth of his or her definite term *sentence,* as the care may

[2] An additional avenue to be parole eligibility is contained in W.Va. Code § 62-12-13(b)(1)(B) which also requires the offender to be serving a sentence. However, this section applies to an accelerated parole program which is more narrowly defined. The same legal bars that apply to those seeking parole under section (b)(1)(A) would also apply to the accelerated parole program.

be...[.] Again, there can be no divergence among reasonable minds that conviction of a crime thereby resulting in the imposition of a sentence is a necessary, objective prerequisite for the statute to apply.

B. *Defining "Sanctions" versus "Sentence" Within the Context of West Virginia Jurisprudence.*

1. West Virginia Jurisprudence and DCR Interpret and Identify an Offender's "Sentence" Consistently

The lynchpin of this case, and similar pending legal challenges, is how a "sentence" is defined within West Virginia jurisprudence. This Court previously recognized the term "sentence" to mean "[t]he judgment formally pronounced by the court or judge upon the defendant after his conviction . . . usually in the form of . . . incarceration, or probation." *State ex rel. Goff v. Merrifield,* 191 W. Va. 473, 477, 446 S.E.2d 695, 699 (1994). This is entirely consistent with the methodology DCR utilizes in these cases to identify the "sentence" of an offender. In the instant case, DCR identifies Petitioner's sentence for first degree sexual abuse as being comprised of two parts: (1) an indeterminate period of incarceration of not less than one nor more than five years, and (2) a period of twenty years on extended supervised release. Pet.App. 1-8. The sum of the two parts- the period of incarceration plus period of sex offender extended supervised release- constitutes Petitioner's "sentence." Petitioner served the first part of his sentence (i.e. the period of incarceration prescribed by West Virginia Code § 61-8B-7 (2006)) and received good time applied towards the discharge of the same pursuant to W.Va. Code § 15A-4-17 and its predecessor statute. Likewise, Petitioner was eligible for parole pursuant to W.Va. Code § 62-12-13 (2017) and was seen by the Parole Board in accordance with the statute's objective eligibility criterion.[3] Petitioner discharged the incarceration portion of his sentence on June 14, 2017, and was placed on extended sex offender supervision pursuant to W.Va. Code § 62-12-16 to serve the second portion of his sentence.

[3] Petitioner was seen by the Parole Board in 2015 and denied parole by a decision dated December 9, 2015. Petitioner provided documentation to the Parole Board waiving consideration for parole in 2016 and subsequently discharged the incarceration portion of his sentence June 14, 2017.

What happens in the second portion of Petitioner's sentence- the extended supervised release portion- is completely unknown at the time of imposition of the sentence, in this instance in 2015. As a matter of course there is not an incarceration element to supervised release, rather only a particularized listing of prohibited conduct the offender must abide by. There is likewise no presumption than Petitioner, or any other offender, will violate the terms and conditions of his/her extended supervised release. Even if an offender violates the terms and conditions of extended supervised release, there is certainly no presumption that any such violation will result in a period of incarceration as a penalty. Rather, incarceration is a tool utilized by the judiciary sparingly to gain compliance from offenders who meaningfully abuse the opportunity to reintegrate safely into society by violating the conditions of extended supervised release. While an offender can have his/her extended supervised release revoked as a byproduct of commission of a new crime, which typically is not the case. Instead, most offenders violate the terms and conditions of extended supervised release through the performance of a lawful act which is only prohibited by virtue of his/her original crime and sentence. Therefore, to gain compliance and obedience to the list of proscribed prohibited actions, incarceration as a *penalty* or "sanction" is necessary but does not represent a separate "sentence" for the defiant act. This Court's opinion in *State v. Hargus*, 232 W. Va. 232, 753 S.E.2d 735 (2013), acknowledged as much when it held that incarceration as a sanction upon revocation of extended supervised release does not create a separate "sentence" for the underlying crime but is part and parcel of society's redress for that crime.

Therefore, what Petitioner is currently serving is a *sanction* and is therefore excluded or exempted from receiving good time towards the discharge of his period of incarceration pursuant to W.Va. Code § 15A-4-17. Petitioner did not commit a new crime for which due process requirements such as a grand jury/indictment, trial by his peers, and the reasonable doubt evidentiary standard applies. Petitioner has already received the benefit of those due process protections, as well as good

time application and parole eligibility, on his sentence. Instead, what Petitioner is currently confronted with is a sanction that is a byproduct of his willful failure to abide by the terms and conditions of his extended supervised release. This one year period of incarceration is permissible and possible only because it is grounded in the twenty years of extended supervised release originally imposed in the "sentence." It is not a second punishment for the crime of first degree sexual abuse but a penalty to enforce the terms and conditions of extended supervised release. The distinction between a "sentence" and a "sanction" both is clear and unambiguous. The application of commutation and early release to yet another set of restrictive code of conduct when serving a sanction is inapplicable.

2. *West Virginia Code § 62-12-16 Contemplates "Sanctions" When Ordering an Offender to Serve a Period of Incarceration for a Violation of the Terms and Conditions of Extended Supervised Release.*

There is ample support for this paradigm within the "good time", parole, and extended supervised release statutes as well as caselaw from this Court. As discussed above, the clear and unambiguous language of both the "good time" and parole statutes state that applicability is conditioned upon the service of the sentence. Layered upon those statutes in the case of offenders serving an extended period of supervised release is the requirements and revocation standards contained in West Virginia Code § 62-12-26. The general premise of the statute evidences the Legislature's intent that a "*sentence imposed* for certain felony offenses must *include the additional penalty* of a period of supervised release of up to fifty years." *James*, at 414, 710 S.E.2d at 105 (emphasis in original). What occurs during the period of extended supervised release is entirely contingent upon the offender.

The extended offender supervision statute codified in West Virginia Code § 62-12-26 prescribes both behavioral standards and monitoring mechanisms for offenders who have been convicted of certain sexual and child abuse offenses who have been released from his/her period of

incarceration. Simply stated, this statute deals with an offender after he/she has discharged the incarceration portion of his/her sentence and moves into the extended supervised release portion. The statutory scheme requires an individual who commits a felony offense described in certain enumerated sections of the West Virginia Code, "*shall, **as a part of the sentence** imposed at final disposition be required to serve, in addition to any other penalty or condition imposed by a court*, a period of supervised release up to 50 years...[.]" with a minimum term of supervised release of ten years. W.Va. Code § 62-12-26(a) (2020).

The implementation of the extended supervised release component of the sentence is straightforward and structured in three provisos: the first establishes a mandatory minimum term of extended supervised release initiated after the conclusion of parole, probation or incarceration (whichever discharges last) of a minimum of ten years for adult offenders convicted of first-degree sexual assault and first-degree sexual abuse of victims 12 years old or younger; the second requires offenders who are found to be sexually violent predators to be subject to lifetime extended supervised release; and the third gives a sentencing court a wide degree of discretion to modify, terminate, or revoke any term of extended supervised release subject to the limitations contained in the statute. [4] *See,* W. Va. Code § 62-12-26(a)*; see also State v. James*, 227 W. Va. 407, 414-15, 710 S.E.2d 98, 105-06 (2011). The sex offender extended supervision statute provides for sanctions. West Virginia Code § 62-12-26(g)(3) states:

> (g) Modification of conditions or revocation. -- The court may:
>
> (3) Revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release without credit for time previously served on supervised release if the court, pursuant to the West Virginia Rules of Criminal Procedure applicable to revocation of probation, finds by clear and convincing evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this subdivision may not be required to serve more than the period of supervised release[.]

[4] The Legislature further vested the judiciary with the authority to terminate the term of extended supervised release after the expiration of two years in some cases if the court is satisfied that an early termination of extended supervised release is warranted by the conduct of the offender and in the interest of society. *See,* West Virginia Code § 62-12-26(h)(1).

Specific to revocation of extended supervised release, the Legislature structured the revocation portion of the statute to give the judiciary broad discretion regarding how to obtain compliance from offenders who may violate the terms and conditions of extended supervised release. This is evidenced by a plain reading of the statutory text. For example, revocation proceedings intentionally mirror those of probation revocations and are proven utilizing a clear and convincing evidence standard rather than one of reasonable doubt required to receive a new "sentence." *See,* W.Va. Code § 62-12-26(h)(3) ("...if the court, pursuant to the West Virginia Rules of Criminal Procedure applicable to revocation of probation, finds by clear and convincing evidence that the defendant violated a condition of supervised release..."). Second, the Legislature afforded the judiciary broad discretion when couching all modification, termination, and revocation requests in terms of permissive "may" language rather than mandatory "shall" language. *See,* Syl. Pt. 1, *State v. Bostic*, 229 W.Va. 513, 729 S.E.2d 835 (2012) ("'It is well established that the word 'shall', in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." (internal citations omitted)); *Gebr. Eickhoff Maschinenfabrik Und Eisengieberi mbH v. Starcher*, 174 W.Va. 618, 626. 12, 328 S.E.2d 492 500 n. 12 (1985) (stating that "[a] elementary principle of statutory construction is that the word 'may' is inherently permissive in nature and connotes discretion." (citations omitted)). Next, the judiciary has broad discretion to tailor the penalty or "sanction" to the individual offender's violation of terms of extended supervision based upon the severity, numerosity, and timeframe of the proven violation(s). *Id.* While incarceration is one option a judge has to enforce the terms and conditions of extended supervised release, it is by no means the exclusive or automatic sanction utilized to by the judiciary. There are no mandatory requirements to incarcerate or statutorily required periods of incarceration for initial or repetitive violations of the terms and conditions of extended supervised release in the statute. *See,* W.Va. Code § 62-12-26(h). Third, a "cap" is placed on the period of incarceration that an offender

whose extended supervised release is revoked may serve as a sanction should he/she be incarcerated to ensure no constitutional limitations are exceeded. *See,* W.Va. Code § 62-12-26(h)(3).

Layering these three statutes together, the sentencing scheme is clear and unambiguous. The first layer, the "good time" statute, constitutes an incentive for a sentenced offender to exhibit good behavior and compliance with prison rules and is rewarded by day-for-day commutation, subject to limitations, from his prescribed period of incarceration. By violating the rules and regulations of DCR, the offender incurs the loss of "good time" potentially extending his/her time being incarcerated. The second layer, the parole statute, further rewards rehabilitative efforts and good behavior by changing the custodial arrangement from one of segregation from society to reintegration into society under supervision. If the offender cannot sustain his/her reintegration into society (i.e. the position of trust afforded to him/her by being granted parole) and violates the terms and conditions of parole, then the offender is returned to incarceration to continue serving the remainder of his/her sentence. The third layer, extended supervised release which does not begin until all periods of probation, incarceration, and parole are discharged, acts as a long-term monitoring mechanism to ensure the offender's reintegration into society continues to be within prescribed boundaries. To the extent that the offender's behavior crosses the clearly-established boundaries, the offender incurs a penalty determined by the judiciary. There is no period of incarceration to return to- such as the indeterminate sentence of not less than one nor more than five years- so the individual offender's sanction is imposed based upon the best judgment of the court. This operates much the same as a parent penalizing a child for breaking a house rule: the penalty or sanction is tailored to fit the severity of the violation.

3. West Virginia Caselaw Supports the Distinction Between "Sanctions" and "Sentences" as Applied by DCR

This Court has had numerous opportunities to examine all of the statutory provisions challenged by Petitioner in this case. In many of those instances, this Court's opinions have implicitly recognized the paradigm discussed herein as well as acknowledged the distinctions between a

"sanction" and a "sentence." For example, in *State v. Hargus*, 232 W. Va. 232, 741, 753 S.E.2d 735, 899 (2013), this Court demonstrated the difference between a "sanction" and "sentence" when addressing "the constitutionality of revocation of supervised release and post-revocation sanctions." 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. Part and parcel of that analysis was whether 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". Mr. Hargus argued that, because an offender could be subject to additional incarceration as a result of a violation of extended sex offender supervision statute, any period of incarceration was a "sentence" entitling him to additional due process protections, such as a jury finding guilt beyond a reasonable doubt. *Hargus,* 232 W. Va. at 741. This Court rejected that premise relying upon both a comparison West Virginia Code § 62-12-26 with its federal counterpart, 18 U.S.C. § 3583, and examination cases which evaluated the constitutional issues associated with revocation.

Of particular note to this Court was *Johnson v. United States*, 529 U.S. 694 (2000). In *Johnson*, the United States Supreme Court examined similar issues to those raised in *Hargus.* The Supreme Court ruled the imposition of an additional period of incarceration for a violation of federal supervised release was a sanction attributable to the original crime's consequences and not a new "crime" for which a new sentence, new conviction, and prosecutorial due process requirements may apply. *See Hargus,* 232 W. Va. at 742, 753 S.E.2d at 900. The *Johnson* Court acknowledged that violations of supervised release often lead to re-incarceration as a sanction but that such violations are not *per se* criminal conduct in its own right making a jury or other prosecutorial steps inappropriate for such proceedings. *Hargus,* 232 W.Va. at 741, 753 S.E.d2d at 899 quoting *Johnson,* 529 U.S. at 700 (other citations omitted.) Finding the *Johnson* Court's rationale persuasive and constitutionally sound, this Court construed any "revocation proceeding under West Virginia Code § 62-12-26(g)(3) to be a

continuation of the prosecution of the original offense and not a new prosecution of additional offenses." *Id.* 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 pursuant to West Virginia Code § 15A-4-17. The same analysis and reasoning also applies to parole eligibility pursuant to West Virginia Code § 62-12-13.

It is the differentiation of the terms "sentence" and "sanction" that fuels both the constitutional application of West Virginia Code § 62-12-26 and practical application of West Virginia Code § 15A-4-17. Each has a distinct meaning with a defined set of protections under the state and federal constitutions. Both the federal and West Virginia systems of post-supervised release revocations utilize sanctions (including incarceration) to penalize those who do not abide by the terms and conditions of their extended supervision. For a period of incarceration to be a "sentence," a new case, with a new crime, new indictment, new plea or trial by jury, and new final disposition would have to occur. Whereas a "sanction" is an enforcement penalty for the violation of the terms and conditions of the sentence already imposed for a previously adjudicated crime. It is this distinction with a significant difference that is essential to the operation and application of the extended supervision, parole, and "good time" statutes. In the instant case, whether Petitioner's current term of incarceration is defined as a "sentence" or a "sanction" conclusively determines the outcome of this case. As DCR's interpretation of the applicable statutes and case law is neither arbitrary nor capricious and is consistent with a plain reading of the text, it should be upheld in its entirety. Petitioner cannot demonstrate a clear entitlement to relief in the instant action mandating his request for extraordinary relief be denied.

C. A Plain Reading of the "Good Time" and Parole Statutes Demonstrate Those Statutes to be Inapplicable to Petitioner

West Virginia Code § 15A-4-17(b), and its predecessor § 28-5-27(b), clearly and unambiguously demonstrate the Legislature's determination of who may receive an effective

commutation of his/her sentence. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). As this Court restated in *State ex rel. Bailey v. State Div. of Corrs.*, 213 W. Va. 563, 568, 584 S.E.2d 197, 202 (2003), "[i]n any search for the meaning or proper applications of a statute, we first resort to the language itself. *Maikotter v. Univ. of W. Va. Bd. of Trustees/W. Va. Univ.*, 206 W. Va. 691, 696, 527 S.E.2d 802, 807 (1999)." As the title of the statutory code section and the plain text of section (b) states, only *sentenced* inmates (i.e. those inmates serving periods of incarceration such as those prescribed by Chapter 61 of the West Virginia Code) are eligible for any type of "good time." When West Virginia Code §§ 15A-4-17, 62-12-13(b)(1), and 62-12-26 are read in concert with one another, again, the Legislature's intent is instantly recognizable: subsequent periods of incarceration following revocation of extended supervised release (i.e. sanctions) are not intended to have a commutation or abbreviation element.

The Legislature's exercise of its plenary powers through the inclusion or exclusion of a privilege for incarcerated offenders must be afforded broad deference. "In the interpretation of statutory provisions the familiar maximum *expression unius est exclusion alterius*, the express mention of one thing implies the exclusion of another, applies." Syl. Pt. 3, *Manchin v. Dunfee,* 174 W.Va. 532, 327 S.E.2d 710 (1984). The Legislative enactments of the parole, "good time," and extended supervision markedly demonstrate this principle. In 2018, the Legislature recodified the "good time" statute during the consolidation process that formed DCR. In doing so, the Legislature made some revisions to the "good time" statute but chose not to make any changes that would incorporate those offenders serving a sanction into the commutation provisions of § 15A-4-17. It is a long-settled principle that, when it enacts legislation, the Legislature is presumed to know its prior enactments. Syl. Pt. 12, *Vest v. Cobb,* 138 W. Va. 660, 76 S.E.2d 885 (1953). The Legislature, knowing that the statute was silent on the issue of sanctioned offenders, chose to include a provision

which excluded any class of offender not specifically mentioned in the statute from receiving "good time." *See* W. Va. Code §§ 15A-4-17(j); 28-5-27(j)(repl. 2018). *See also, Phillips v. Drive-In Pharmacy, Inc.* 220 W.Va. 484, 492, 647 S.E.2d 920, 928 (2007) ("The *expression unius* maxim is premised upon an assumption that certain omissions from a statute by the Legislature are intentional.") The Legislature chose not to include a specified class of incarcerated offender and, instead, chose to prohibit the award of "good time" to any incarcerated offender not specifically enumerated within the statute. *See,* W.Va. Code § 15A-4-17(j). This same analysis applies to the parole eligibility statute has maintained the same objective criterion of 'serving a sentence' throughout it many codifications over the past decade.[5]

Similarly, the Legislature passed the first codification of extended supervised release statute for certain sex offenders in 2006. Since that original enactment, known as The Child Protection Act of 2006, the West Virginia Legislature has amended § 62-12-26 a total of four additional times to arrive at the version applicable today. In each amended version of the statute the Legislature had the opportunity to include the earning or award of "good time" or eligibility for parole to offenders serving periods of incarceration as a sanction following revocation. In each instance the Legislature chose not to do so. *See, Vest v. Cobb, supra; Manchin v. Dunfee, supra.* Instead, the Legislature only chose to make credit for time served on supervised release prior to revocation optional and at the sole discretion of the circuit court. *See*, W. Va. Code § 62-12-26(g)(3) ("Revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release without credit for time previously served on supervised release..."). This demonstrates the Legislature's intent to foreclose those serving a sanction from accessing the commutation and privilege of parole. Through its actions the Legislature has spoken volumes: commutation and abbreviation of sanction

[5] West Virginia Code § 62-12-13 has had seven prior versions between 2010 and 2020 to arrive at the eighth and current version of the statute which became effective May 19, 2020.

periods under the extended supervised release provision is not permissible. Without being eligible for "good time" or parole based upon a plain reading of the statutes, Petitioner cannot demonstrate a clear legal right to the relief he is seeking. As a result, his Petition seeking a writ of mandamus must be denied in its entirety.

D. No Rescission of "Good Time" has Occurred as Petitioner Was Not Eligible for Commutation of his Sanction.

Petitioner asserts in his Petition that DCR has arbitrarily and unlawfully rescinded his earned "good time" as reflected on the Time Sheet DCR provided him dated July 31, 2020. Pet. Brief, pg. 4; Pet.App. 18. However, this assertion fails to consider Petitioner's ineligibility to receive "good time" commutation of sanction as described above. Just as a taxpayer who receives a tax refund check from the Internal Revenue Service in excess of his/her entitlement is not permitted to retain those funds, an inmate who is ineligible to receive a statutorily-created benefit is not permitted to keep the reward unlawfully. By operation of the statutory provisions, Petitioner was never eligible for "good time" when he returned to incarceration as a result of Judge Salango's Order dated July 20, 2020. Pet.App. pg. 15.-16. Petitioner's assertion that he should retain the "good time" days prior to DCR's recalculation of his sanction's minimum discharge date is the equivalent of asking DCR to engage in improper conduct simply because that was the way it was done in the past. This Court specifically rejected that line of justification in *City of Fairmont v. Hawkins,* 172 W.Va. 240, 244-45, 304 S.E.2d 824, 828-9 (1983) ("The law is clear that where a specific statute or ordinance exists prescribing how official acts should be done, the statutory mandate may not be circumvented by permitting the public official to show that in the past the required statutory procedure had been ignored."). Prior inadvertent mistakes that run contrary to the statutory requirements of a government official or agency cannot act as justification for the continued proliferation of that mistake. *Hawkins, supra; See also generally, State v. Chilton*, 49 W.Va. 453, 457, 39 S.E.2d 614 (1901). DCR cannot continue to maintain a

practice that it believes in good faith runs contrary to its constitutional obligation to faithfully apply the laws of the State of West Virginia as codified by the Legislature.

As set forth herein, DCR spent countless hours weighing legal jurisprudence, reviewing current and historical statutory enactments, and analyzing this issue prior to changing the agency's position on this issue. It was not decided haphazardly or done with any malicious or ill intent. DCR acknowledges that it erred by providing an erroneous timesheet to Petitioner when he began his sanction period in 2018. *See* Pet.App. 18. However, that error has been corrected with regard to Petitioner's anticipated discharge date, which is June 13, 2021. Pet.App. 19. DCR's erroneous time sheet does not create any set of circumstances which would allow the agency to ignore statutory enactments nor does it change the application of those code sections or the facts of this case.[6] In this case where an offender is seeking an extraordinary writ of mandamus to compel the Commissioner of DCR to award "good time" pursuant to W.Va. Code § 15A-4-17(i), affirm his eligibility of parole pursuant to W.Va. Code § 62-12-13(b), such an actions are contrary to a plain reading of all applicable code sections. By failing to satisfy the criterion set forth by the Court in *Kucera*, Petitioner has failed to carry his heavy evidentiary burden necessary for the issuance of an extraordinary writ; therefore, Petitioner's request must be denied in its entirety.

IV. CONCLUSION

Based upon the foregoing, Petitioner has not demonstrated, and cannot demonstrate, that he is entitled to mandamus, or any other relief, as requested in Petitioner's Petition for Mandamus. Accordingly, Respondent, Betsy Jividen, Commissioner of the West Virginia Division of Corrections and Rehabilitation respectfully requests that this Court refuse this petition in its entirety, together with such other and further relief as the Court deems necessary and appropriate.

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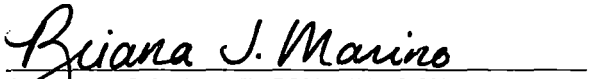
[6] *Cf. Davis v. Moore*, 772 A.2d 204, 291 (D.C. Cir. 2001) ("An expectation of early release from prison (or from service of a sentence) that is induced...by the mistaken representation of officials does not without more give rise to a liberty interest entitled to protection under the Due Process Clause.").

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

By Counsel.

PATRICK MORRISEY
ATTORNEY GENERAL



Briana J. Marino (WVSB #11060)
Assistant Attorney General
1900 Kanawha Blvd., East
Building 1, Suite W-400
Charleston, WV 25305
Telephone: (304) 558-6593
Facsimile: (304) 558-4509
Email: Briana.J.Marino@wvago.gov
Counsel for Respondent

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE EX REL. DOMINIC L. DAVIS,

Petitioner,

v. **No. 20-0981**

BETSY JIVIDEN, COMMISSIONER,
WEST VIRGINIA DIVISION OF CORRECTIONS
AND REHABILITATION,

Respondent.

CERTIFICATE OF SERVICE

I, Briana J. Marino, do hereby certify that on January 8, 2021, I caused the foregoing **RESPONDENT'S SUMMARY RESPONSE TO PETITIONER'S PETITION FOR WRIT OF MANDAMUS** to be served upon counsel for Petitioner by delivering to him/her a true copy thereof, via United States Mail, postage prepaid, and addressed as follows:

George Castelle
Ronnie Sheets
Kanawha County Public Defender Office
PO Box 2827
Charleston, WV 25330

Briana J. Marino

Briana J. Marino (WVSB #11060)
Assistant Attorney General
Counsel for Respondent