IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. _____

State ex rel. LOREN JOYCE GARCIA,
Petitioner,

20-1021

v.

CRAIG ROBERTS, Superintendent,
South Central Regional Jail and Correctional Facility,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

TABLE OF AUTHORITY

Cases

Statutes

Constitutional Provisions

Rules

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PETITION FOR WRIT OF HABEAS CORPUS

The Petitioner, Loren Joyce Garcia, by counsel, Jeremy B. Cooper, invoking the original jurisdiction of this Court pursuant to W. Va. Code §51-1-3; W. Va. Code §53-4-1, et seq.; and Rule 16 of the West Virginia Rules of Appellate Procedure, states the following as her Petition for Writ of Habeas Corpus ad Subjiciendum.

QUESTION PRESENTED

Is an administrative rule change that results in a retroactive modification in the manner in which a convict's "good time" is calculated, and which causes her rearrest after having been paroled under the old rule, a violation of the prohibition on *ex post facto* law under the constitutions of West Virginia and the United States?

STATEMENT OF THE CASE

The Petitioner was indicted by the Randolph County Grand Jury in 2013, on three felony charges: child abuse resulting in bodily injury, conspiracy, and child neglect resulting in bodily injury, in case number 13-F-71. She ultimately, via plea agreement, pleaded guilty to one count of child neglect resulting in bodily injury, and was sentenced to 1-3 years of incarceration, followed by 10 years of extended supervised release pursuant to W. Va. Code § 62-12-26. Subsequently, while on supervised release, she was accused of and indicted for

participating in a robbery in Harrison County. As a result, she pleaded guilty in Harrison County case number 16-F-200 to one count of First Degree Robbery, and was sentenced to a determinate sentence of ten years. Additionally, a motion to revoke her supervised release was granted in Randolph County, with the Petitioner being ordered to serve three years of her supervised release as a period of incarceration, with an additional thirty year period of supervised release being imposed thereafter.[1] The Harrison County sentence ran consecutively to the three year period of incarceration ordered by Randolph County. The Petitioner began serving these terms of incarceration on April 12, 2016. (Appendix, at 1).

On December 5, 2019, the Petitioner was released to parole.[2] (Appendix, at 1). Without any violation of the terms of her parole having been alleged, the Petitioner was arrested on December 7, 2020. (Appendix, at 1). Upon learning of her rearrest, the undersigned counsel made inquiries of the Petitioner's parole officer, and subsequently other personnel in the Division of Corrections and Rehabilitation ("DOCR"). It was represented to the undersigned counsel that the DOCR had modified its own administrative rules to reclassify the 3 year period of incarceration imposed for the violation of the Petitioner's period of supervised release as a "sanction," concerning which she would not be eligible to earn good time (i.e., a day-for-day commutation). Specifically, the new provision, numbered 151.06, which was adopted on or about November 23, 2020, stated:

> III. Inmates shall not receive day-for-day good time for incarceration pursuant to revocation of extended supervision for sex offenders/child abusers; parole/mandatory supervision/conditional release sanctions; probation/home confinement sanctions; drug court sanctions, civil contempt/family court; bond revocation/pre-trial diversion; criminal contempt; federal sentences; fugitives; and out-of-state

1 This Court denied relief in an appeal of that revocation order in Docket No. 16-0889.

2 Although it is not wholly clear from the Petitioner's DOC time sheet, it appears that this release to parole took place a few months after the Petitioner had served of one quarter (three years and three months) of the 13 years of incarceration ordered collectively by the Randolph County and Harrison County circuit courts.

parolees/probationers supervised by Parole Services.

(Appendix, at 10). The previous versions of the administrative rule, numbered 151.02, did not include this limitation relating to the revocation of supervised release.[3] (Appendix, at 2-8).

The Petitioner's new time sheet indicates that she was "erroneously released to parole on 12/5/2019[.]" (Appendix, at 1). She is now deemed to have discharged her three year "sanction" by serving time from April 12, 2016 until April 12, 2019, with calculations of her 10 year determinate sentence only beginning on the latter date, rather then being calculated as an aggregate determinate sentence, as appears to have been done under the preexisting rule. (Appendix, at 1). She now seeks relief from her confinement by this original jurisdiction habeas action.

SUMMARY OF ARGUMENT

It is a violation of the prohibition on *ex post facto* enactments in the United States and West Virginia constitutions for any legislation or administrative rule to operate to the detriment of a criminal defendant. Specifically, this Court has specifically held that the manner in which "good time" is calculated may not be modified in a way that would retroactively lengthen an inmate's period of incarceration. Allowing the Petitioner to be released, and to begin to build a life for an entire year, only to revoke her parole in the absence of any allegation of wrongdoing is an affront to justice, and a clear constitutional violation.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner asserts that this matter is appropriate for oral argument under Rule 20 of the Rules of Appellate Procedure, as there are serious implications on the Petitioner's

3 The undersigned counsel was provided the two rules referenced in this petition by an assistant attorney general representing the DOCR. These "policy directives" are not available by means of the Secretary of State's Code of State Rules online search., but are incorporated by means of 90 C.S.R. 1. (Appendix, at 12-13).

constitutional rights. Additionally, it is the Petitioner's information and belief that there are numerous other arrested parolees whose rights are implicated by the unlawful acts of the DOCR, rendering this a matter of great public import. Alternatively, the Petitioner asserts that oral argument under Rule 19 would be appropriate because of the unsustainable exercise of discretion by the Parole Board in this matter.

ARGUMENT

I. Standard of Review

In a habeas proceeding under this Court's original jurisdiction, the Petitioner has the burden of proof of establishing the illegality of her confinement. She must demonstrate her grounds for relief by probable cause for the writ to issue, and by a preponderance of the evidence to obtain release from incarceration. "In this original jurisdiction habeas corpus proceeding the burden is upon the petitioner to establish the illegality of his sentences." *State ex rel. Thompson v. Watkins*, 200 W.Va. 214, 217, 488 S.E.2d 894 (1997). "The sole issue presented in a habeas corpus proceeding by a prisoner is whether he is restrained of his liberty by due process of law." Syl. Pt. 1, *State ex rel. Tune v. Thompson*, 151 S.E.2d 732, 151 W.Va. 282 (1966).

> Under the statute of this state dealing with habeas corpus proceedings a prima facie case, in order for this Court to issue the writ, may be made by petition showing by an affidavit or other evidence probable cause to believe that a person is detained without lawful authority. However, this does not in any way warrant the release of a petitioner confined in the penitentiary. Such petitioner has the burden of proving by a preponderance of the evidence the allegations contained in his petition or affidavit which would warrant his release.

Syl. Pt. 1, *State ex rel. Scott v. Boles*, 147 S.E.2d 486, 150 W.Va. 453 (1966).

II. The application of Policy Directive 151.06 to the Petitioner's detriment, after she had already obtained parole under the previous administrative rule, violates the constitutional prohibition on *ex post facto* enactments.

Because the Petitioner was arrested and denied any procedural protections related to the effective termination of her parole, the Petitioner is forced to refer to informal, off-the-record discussions and the pleadings in other cases to try to understand the conduct of the DOCR in this matter. Originally, the undersigned counsel was told by DOCR personnel that the Petitioner and other similarly situated individuals were rearrested due to a "new case" from this Court. The undersigned counsel reviewed every opinion and memorandum decision in criminal and original jurisdiction cases from the Fall 2020 Term and could find no fact pattern implicating this issue. Subsequently, the undersigned counsel was informed by an assistant attorney general representing the DOCR that the basis for the new distinction in the treatment of prison sentences and "sanctions" arose from *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011); and *State v. Hargus*, 232 W.Va. 735, 753 S.E.2d 893 (2013), neither of which is particularly recent, and which both long predate the 2018 version of Policy Directive 151.02 that was in effect prior to Policy Directive 151.06 under which her arrest was apparently authorized.

Additionally, the undersigned counsel was told that this Court is currently considering a case on this subject matter: *State ex rel. Joshua Miller v. Betsy Jividen*, Docket No. 20-0628, an original jurisdiction mandamus matter. A review of the pleadings in this case shows that it implicates the question of eligibility for good time for those serving a "sanction" rather than a sentence. It also shows the genesis of the new policy embodied in Policy Directive 151.06, which went into effect less than a month after the Respondent's Brief was filed by the DOCR. The Commissioner of the DOCR decided to review a program under which volunteers who

assisted with Covid-19 mitigation were given good time toward their sentences to determine whether the recipients of the good time were actually eligible to receive it:

> Therefore, on or about August 7, 2020, Petitioner was notified that the program had been placed "under review" by Commissioner Jividen pending completion of a comprehensive review of the program. Pet. Brief, pg. 15. Since that time, Commissioner Jividen has engaged in discussions, analysis, and review of the meritorious "good time awards," "good time" eligibility; and the process through which awards will be processed for those found eligible to receive them. The program is currently under review, including determining the need for additional safeguards for strengthening it application.

State ex rel. Miller v. Jividen, No. 20-0628, Respondent's Summary Response (October 30, 2020) *4. Thus, in an unusually transitive manifestation of the axiom that "no good deed goes unpunished," the Petitioner can trace the revocation of her year-long, successful stint on parole to the efforts of another defendant in another prison to help his fellow inmates avoid the effects of the pandemic while living in close quarters.

The DOCR is correct that *Hargus* and *James* differentiate between a sanction and a sentence. That distinction turns on what type of procedural due process protections are necessary before imposing a period of incarceration for a violation of a post-sentence period of supervised release, and whether the imposition of additional prison time implicates double jeopardy or constitutes cruel and unusual punishment. Neither case even remotely touches on whether, once such additional incarceration is imposed, a defendant is ineligible for good time.

Irrespective of whether or not the DOCR's current interpretation of the good time statute, in light of the distinctions this Court drew in *James* and *Hargus*, is correct, it is abundantly clear that it is a *new* interpretation. No DOCR policy directive drew that distinction until long after the Petitioner's original 2013 Randolph County offense and conviction, or her 2016 Randolph County commitment for violating her supervised release. Under the prior

interpretation and rule, she was clearly considered eligible for good time, as evidenced by the text of the policy and the fact that she was, in fact, released on parole in conformity with a policy that awarded her good time for her three-year term of incarceration for violating supervised release. The DOCR's response in *Miller v. Jividen* mentions but does not rely on the fact that the good time statute was recodified in 2018, moving from § 28-5-27 to § 15A-4-17, with minor but potentially material changes to its wording. Whether or not the basis for the adoption of Policy Directive 151.06 was purely administrative, or partially legislative, what is clear is that it may not be applied to the Petitioner at this late date.

This habeas corpus action is not intended to seek declaratory relief that Policy Directive 151.06 must be declared invalid. The Petitioner is entitled to relief irrespective of the resolution of the issues in *Miller v. Jividen* on *ex post facto* grounds. However, it should be noted that the new rule seems to run afoul of the plain language of the statute it interprets. § 15A-4-17(a) begins: "(a) All current and future adult inmates sentenced to a felony and, placed in the custody of the division, except those committed pursuant to §25-4-1 et seq. of this code, shall be granted commutation from their sentences for good conduct in accordance with this section..." Clearly, the Petitioner is an "adult inmate," "sentenced to a felony," and "placed in the custody of the division." And while "sentence" is not defined anywhere in the statute, subsection (c) states that "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." The plain language of that section clearly applies to everyone in DOCR custody, irrespective of the sentence/sanction distinction advanced by the DOCR. Furthermore, the modified text of the current version of the statute, § 15A-4-17(a), specifically provides that "nothing in this section shall be considered to recalculate the 'good

time' of inmates currently serving a sentence..." That provision shows that the Legislature, unlike the DOCR, recognized the applicability of the prohibition on *ex post facto* laws to questions of good time.

There are decades of precedent that demonstrate that the State may not change parole eligibility, including calculations of good time, in a manner adverse to a convict, without violating the prohibition on *ex post facto* enactments. In addition to the *ex post facto* clause in Article 1, § 10 of the United States Constitution, Article III, § 4 of the West Virginia Constitution states that "No ... *ex post facto* law ... shall be passed." Additionally, this Court has held that "Good time credit is a valuable liberty interest protected by the due process clause, W.Va.Const. art. III § 10." Syl. Pt. 2, *State ex rel. Gillespie v. Kendrick*, 265 S.E.2d 537, 164 W.Va. 599 (1980). The law on this question, as it pertains to the instant subject matter, is glaring. Consider the following syllabus, which also dates to 1980:

> 1. Under *Ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him.
>
> 2. In order to avoid *Ex post facto* principles, W.Va.Code, 28-5-28 (1977), must be construed to apply to those persons who committed offenses after May 1, 1978, and those individuals presently incarcerated in State penal institutions for crimes committed prior to May 1, 1978, are entitled to good time credit as calculated under W.Va.Code, 28-5-27 (1931).

Syl. Pts. 1 & 2, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980) (page number omitted). This Court went on to recount the applicable law on this subject, and noted that the above principle is true not only for legislation, but for administrative rule-making as well, stating:

> Parole eligibility is another facet of penal law scrutinized under the *Ex Post Facto* Clause. In *Warden v. Marrero*, 417 U.S. 653, 662-63, 94

S.Ct. 2532 2538, 41 L.Ed.2d 383, 392 (1974), the Supreme Court strongly implied that a law which altered the conditions of parole eligibility to the detriment of an inmate would contravene the *Ex post facto* prohibition:

"(O)nly an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole. See *United States v. Ross*, 464 F.2d 376, 379 (CA 2 1972); *United States v. DeSimone*, 468 F.2d 1196, 1199 (CA 2 1972). For the confined prisoner, parole even with its legal constraints is a long step toward regaining lost freedom. An observation made in somewhat different context is apt:

" 'It may be "legislative grace" for Congress to provide for parole but when it expressly removes all hope of parole upon conviction and sentence for certain offences, . . . this is in the nature of an additional penalty.' *Durant v. United States*, 410 F.2d 689, 691 (CA 5 1969).

"(A) repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *Ex post facto* clause . . . of whether it imposed a 'greater or more severe Punishment than was prescribed by law at the time of the . . . offense,' *Rooney v. North Dakota*, 196 U.S. 319, 325, 25 S.Ct. 264, (265) 49 L.Ed. 494 (1905) (emphasis added). See *Love v. Fitzharris*, 460 F.2d 382 (CA 9 1972); cf. *Lindsey v. Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937); *Holden v. Minnesota*, 137 U.S. 483, 491-492, 11 S.Ct. 143, (146) 34 L.Ed. 734 (1890); *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798); *United States ex rel. Umbenhowar v. McDonnell*, 11 F.Supp. 1014 (N.D.Ill.1934)."

Following *Marrero*, the federal courts have rather uniformly held that a superseding law **or administrative rule** cannot change the conditions of parole eligibility to the detriment of an imprisoned offender without running afoul of the *Ex Post Facto* Clause. *Rodriguez v. United States Parole Commission*, 594 F.2d 170 (7th Cir. 1979); *Geraghty v. United States Parole Commission*, 579 F.2d 238, 263-67 (3d Cir. 1978), Cert. granted, 440 U.S. 945, 99 S.Ct. 1420, 59 L.Ed.2d 632 (1979); *Shepard v. Taylor*, 556 F.2d 648 (2d Cir. 1977). In *Rodriguez*, the court emphasized that it was immaterial that the imprisoned offender might not have received parole at the time of his eligibility. It was, rather, the right of the prisoner to satisfy eligibility conditions, and thus earn the right to demonstrate fitness for parole, which could not be retroactively affected to the inmate's disadvantage. See *Lindsey v. Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937).

Rodriguez invalidated the application to an inmate **of a new rule promulgated** by the United States Parole Commission which postponed the date by which an inmate would receive a parole hearing. Under the **former rule existing at the time he committed the**

> **underlying offense**, Rodriguez was eligible for a parole hearing after serving one-third of his two-year sentence, or eight months. **Under the new rule**, he was forced to wait 18 months before a meaningful parole hearing was held. Thus, rather than receive a hearing in the eighth month of confinement, Rodriguez was compelled to wait until the 18th month of his 24-month sentence, and was denied an earlier hearing as prescribed by the former rule, and the court concluded:
>
> "Eligibility in the abstract is useless; only an unusual prisoner could be expected to think that he is not suffering a penalty when even though he is eligible for parole and might be released if granted a hearing, he is denied that hearing. **Denial of any meaningful opportunity for parole by retroactive application of the Parole Commission's rule violates the *Ex post facto* clause of the federal Constitution.** (Citations omitted)." (594 F.2d at 176).

Adkins, 164 W.Va. at 296-97, 262 S.E.2d at 887-88. (Boldface emphasis added) (Page numbers omitted).

Shortly after *Adkins* was decided in this Court, the Supreme Court of the United States decided *Weaver v. Graham*, 450 U.S. 24 (1981), in which it similarly decided that a detrimental modification of parole eligibility violated *ex post facto* principles, irrespective of whether it could be guaranteed that the prisoner would, in fact, be granted parole. In *Lynce v. Mathis*, 519 U.S. 433 (1997) the Supreme Court granted relief to an inmate who had been released under an early-release program designed to alleviate prison overcrowding, but was then, similarly to the Petitioner, rearrested when the policy was modified. Like the Petitioner, he had been released and then subsequently rearrested after an executive branch entity (the attorney general) reinterpreted a statute. The State of Florida argued that the withdrawal of the early-release credits only had a "speculative" and "attenuated" likelihood of increasing punishment, however, the Court stated:

> Given the fact that this petitioner was actually awarded 1,860 days of provisional credits and the fact that those credits were retroactively cancelled as a result of the 1992 amendment, we find this argument singularly unpersuasive. In this case, unlike in Morales, the actual course of events makes it unnecessary to speculate about what might

> have happened. The 1992 statute has **unquestionably disadvantaged the petitioner because it resulted in his rearrest and prolonged his imprisonment**. Unlike the California amendment at issue in *Morales*, the 1992 Florida statute did more than simply remove a mechanism that created an opportunity for early release for a class of prisoners whose release was unlikely; rather it made ineligible for early release a class of prisoners who were previously eligible-including some, like petitioner, who had actually been released.

Lynce, 519 U.S. at 446-47 (boldface emphasis added).

This Court, at one point, endorsed a somewhat narrower interpretation of *ex post facto* protections, over a dissent, in *State ex rel. Carper v. W. Va. Parole Bd.*, 509 S.E.2d 864, 203 W.Va. 583 (1998), in which this Court permitted the Parole Board to reduce the frequency of parole hearings for certain convicts already sentenced to life with mercy based on new legislation to that effect.[4] However, in order to survive constitutional scrutiny, this Court required that the Parole Board had to show an individualized determination that no detriment would accrue to the individual prisoner. *Id.*, 509 S.E.2d at 871. It is clear that the DOCR's actions action against the Petitioner would never pass muster under this standard.

To the contrary, the Petitioner has suffered an extreme detriment, of the sort that overwhelms any objection by the government to the application of *ex post facto* principles, per *Lynce*. The rug has been pulled out from under the life she has built for herself over the past year,[5] with no procedural protections, and no allegation of wrongdoing. It is an appallingly callous, obviously illegal act by the DOCR, which has been multiplied in the form of the rearrest of numerous similarly situated parolees whose identities are unknown. "The

4 *See also, California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995), and subsequently *Garner v. Jones*, 529 U.S. 244 (2000) for the Supreme Court's analysis of similar speculative harm claims relating to the frequency of parole hearings.

5 Upon information and belief, the Petitioner has, up until the time of her arrest, obtained an apartment in Charleston following eight months at a sober living home, some of which time she served as a resident assistant. She bought a car, and has stable employment at the Southridge Burger King, in addition to working multiple other jobs to get herself on her feet economically. All of her efforts at reestablishing herself as a productive member of society are threatened by her illegal detention.

touchstone of due process is protection of the individual against arbitrary action of government." *Dent v. West Virginia*, 129 U.S. 114, 123 (1889). The passage of 131 years has not dulled the vitality of this admonishment to the State. The Petitioner prays that this Court grant her relief, and order her immediate reinstatement to parole.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant the writ of habeas corpus, and order the respondent to release the Petitioner to parole as previously situated, or grant any other relief the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 20th day of December, 2020, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing Petition for Writ of Habeas Corpus to the following, by U.S. Mail:

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