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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Case No. 20-1021**

**STATE OF WEST VIRGINIA ex rel.**
**LOREN GARCIA,**

**Petitioner,**

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FROM FILE

**v.**

**CRAIG ROBERTS, Superintendent,**
**South Central Regional Jail and**
**Correctional Facility,**

**Respondents.**

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# RESPONDENT'S SUMMARY RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

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**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, Craig Roberts, Superintendent of South Central Regional Jail and Correctional Facility, (referred to herein as "DCR"), by counsel, Briana J. Marino, Assistant Attorney General, to respectfully respond to the above-styled Petition for Writ of Habeas Corpus filed on or about December 20, 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 objective facts and procedural history of Ms. Garcia's incarceration contained in the Petition on pages 1-3 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 62-12-13 as well as long-standing principles of statutory interpretation demonstrate Petitioner's ineligibility to receive "good time" and parole while serving a sanction. Accordingly, DCR's policy amendment, as set forth in Policy 151.06 dated November 23, 2020, does not violate any *ex post facto* prohibition; rather, it is a required modification of policy and practice to bring DCR's analysis of offender incarcerations in line with long-standing legislative enactments.

## II. 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 entitlement to either "good time" or parole while serving her sanction period as she is ineligible for both pursuant to the objective criterion of West Virginia Code § 15A-4-17 (2018)[1] or § 62-12-13 (2020)[2] or their prior codifications. Both statutes have a common and consistent thread running through the objective criterion that governs their application to an

[1] The prior version of the "good time" statute, codified at W.Va. Code § 28-5-27, effective July 13, 2011, through June 30, 2018, all contain the same objective criterion for receipt of "good time" of serving a sentence as contained in section (b) of the current statute.

[2] Prior versions of W.Va. Code § 62-12-13 effective January 25, 2011, and after, all contain the same objective criterion for parole eligibility of serving a "sentence" contained in section (b) of the current statute.

offender's incarceration: that the offender be serving a "sentence." See, W.Va. §§ 15A-4-17(b); 62-12-13(b)(1)(A). This was true at the time Petitioner committed the crime (2013-F-71, Randolph County, WV) for which she received a period of extended supervised release and remains true through the current codifications of the same statutes. That DCR has revised the manner in which "good time" is applied and parole eligibility is determined to bring it into compliance with statutory requirements neither improperly imprisons Petitioner nor violates *ex post facto* principles.

"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 omitted). 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), 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). 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). The "sentence" 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."). [3] 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 case may be...[.] Again, there can be no divergence among reasonable minds that service 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*

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 child neglect resulting in bodily injury as being comprised of two parts: (1) an indeterminate period of incarceration of not less than one nor more than three years, and (2) a period of ten years on extended supervised release. Pet. Brief 1. The sum of the two parts- the period of incarceration plus period of offender extended supervised release- constitutes Petitioner's "sentence." Petitioner served the first part of her sentence (i.e. the period of incarceration prescribed by West Virginia Code § 61-8D-4

[3] An additional avenue to 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.

(repl. 2014)) 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 upon completing the necessary minimum of period of incarceration. Petitioner discharged the incarceration portion of her sentence on November 13, 2014, and was placed on extended offender supervision pursuant to W.Va. Code § 62-12-16 to serve the second portion of her sentence.

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 2013. As a matter of course there is not an incarceration element to supervised release, rather only a particularized listing of prohibited conduct with which the offender must comply. There is likewise no presumption that 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 to gain compliance from offenders who meaningfully abuse the opportunity to reintegrate safely into society by violating the conditions of extended supervised release. 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 the original crime.

In this instance, Petitioner's extended supervised release was revoked as result of her commission of a new crime. As a result, Petitioner received both a sentence for a her new crime, a determinate sentence of ten years for first degree robbery in Harrison County, as well as a sanction

for violating the terms and conditions of her supervised release, three years with an additional thirty year period of extended supervised release in Randolph County. Pet. Brief. 2. The new sentence and the sanction were ordered to be served consecutively with an effective date of April 12, 2016. *Id.* DCR's revision of its "good time" and parole eligibility reviews in late 2020 changes neither her sentence for first degree robbery nor her sanction's length. Rather, it brings each of the objective criterion in the "good time" and parole statutes enacted by the Legislative prior to Petitioner's commission of her crimes to the forefront of the analysis of Petitioner's discharge date(s) consistent with the law. Under the revised policy, Petitioner has completed her three years incarceration for her sanction (April 12, 2016, to April 12, 2019).

Petitioner was released on parole on the sanction and sentence prior to DCR's updated, objective policy being effectuated in November 2020. Parole was granted on the premise that Petitioner had served both the minimum period of incarceration on the first degree robbery and the sanction. However, this was in error as it violated a plain reading of both the parole and "good time" statutes. As an executive agency charged with faithfully implementing and administering the constitutional acts of the Legislature, DCR could not forego correcting its mistake and leave Petitioner in the community-at-large. After DCR examined Petitioner's case and concluded that she was not yet eligible for parole based upon time served on the first degree robbery conviction, an arrest warrant was issued pursuant to W.Va. Code § 62-8-8(a)[4] and she was detained. Petitioner is now serving her sentence on the first degree robbery conviction and receives both the benefit of "good time" as well

[4] West Virginia Code § 62-8-8(a) (2007) reads as follows: Notwithstanding any provision of this code to the contrary, the Commissioner of the Division of Corrections, or his or her designee, may issue an order of arrest for inmates who have been released from the custody of the division due to a clerical error, mistake or due to the failure of a sentencing court to timely transmit an order of commitment prior to the release of an inmate from the commissioner's custody or to the commissioner's custody. All law-enforcement officers shall honor and enforce orders of arrest in the same manner afforded warrants of arrest issued by magistrate or circuit courts notwithstanding any provision of this code to the contrary.

as parole. Petitioner will be eligible for parole on October 12, 2021, which represents the completion of one-fourth of Petitioner's sentence,[5] including earned "good time."

By operation of the statutory provisions, Petitioner was never eligible for "good time" when she was returned to incarceration to serve her sanction period of three years nor would she be eligible for parole on the sanction. 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. Petitioner's assertion that she should remain on parole despite not meeting the required objective eligibility criterion or that the policy revision should not apply to her 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). Understanding and applying statutory enactments is not static; a state agency must be permitted to evolve and amend its good faith application of the law when necessary. In this case, DCR cannot continue to maintain its former practices when it believes in good faith they run contrary to its constitutional obligation to apply the laws of the State of West Virginia as codified by the Legislature.

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

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[5] One-Fourth of Petitioner's 10 year determinate sentence equals 2 years and 6 months.

This Court has had numerous opportunities to examine all of the statutory provisions at issue 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 of West Virginia Code § 62-12-26 with its federal counterpart, 18 U.S.C. § 3583, and examination of 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.

### *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. This statute has maintained the same objective criterion of 'serving a sentence' throughout it many codifications over the past decade.[6]

[6] 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.

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 periods under the extended supervised release provision is not permissible.

### *D. DCR's Policy Revision Does Not Violate the Prohibition Against* Ex Post Facto *Laws.*

Petitioner alleges that DCR's revised practices regarding "good time" and parole eligibility violate the constitutional prohibition against *ex post facto* laws because it lengthens the amount of time the individual is incarcerated. However, Petitioner's analysis and underlying reasoning for her conclusions is in error. The Legislature's enactment of the objective criterion to be eligible for the commutation of a sentence through "good time" or parole were law long before any crime committed by Petitioner. Moreover, DCR's revised practice regarding the same does not result in longer periods of incarceration. Petitioner's periods of incarceration, whether as a sanction or sentence, remain capped at the number of years dictated by the judge adjudicating Petitioner's charges. An offender's behavior dictates the period of his/her incarceration from beginning to end: a sanction is not

predetermined to occur when an offender begins his/her period of extended supervised release and is only imposed as a result of impermissible behavior; an offender being released on parole when serving a sentence is not guaranteed but is wholly dependent upon an offender's behavior while incarcerated; and an offender retaining earned "good time" while serving a sentence is wholly determined by an offender's compliance with prison rules and regulations. Petitioner's sporadic compliance with these tenets dictate her period of incarceration, not DCR's policy revision. The policy revision simply brings into compliance practices that were previously inconsistent with the plain language of the statutes' requirements by treating every period of incarceration the same. Under the law every period of incarceration is not identical and this conclusion is firmly rooted within the statutory text. DCR's practices are deep-seated in long-standing principles of statutory construction and constitutional jurisprudence, as discussed above.

Petitioner's *ex post facto* argument can arguably be seen as a constitutional challenge to the objective criterion of both the "good time" and parole statutes "sentence" requirement. "When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.' Point 3, Syllabus *Willis v. O'Brien,* 151 W.Va. 628 [153 S.E.2d 178] [1967]]." Syl. Pt. 1, *State ex rel. Haden v. Calco Awning & Window Corp.*, 153 W.Va. 524 170 S.E.2d 362 (1969). In *State v. R.H.*, this Court acknowledged the definition of *ex post facto* laws as set forth by the U.S. Supreme court in *Calder v. Bull,* 3 U.S. 386, 390 (3 Dall.) 386, 1 L.Ed. 648, 650 (1798):

> (1) every law that makes an action done before the passing of the law, which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the punishment, and inflicts greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the commission of the offense, in order to convict the offender.

166 W.Va. 280, 288-90, 273 S.E.2d 578, 583-84 (1980). *See also, State ex rel. Carper v. W.Va. Parole Board,* 203 W.Va. 583, 587, 509, S.E.2d 864, 868 (1998). As illustrated above, there are simple, straightforward constructions of the statutes which support their constitutional application to Petitioner and those similarly situated. When DCR's revised policies, and the statutes they are rooted in, are evaluated against previously-articulated general principles applicable to *ex post facto* challenges, it is apparent no constitutional error exists.

This Court in Syllabus Point 1 of *Adkins v. Bordenkircher* stated, "[u]nder *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." 164 W.Va. 292, 296, 262 S.E.2d 885, 887 (1980) (emphasis added). This prohibition may likewise apply to administrative rules, even if labeled procedural in nature. 164 W.Va. at 296-7, 262 S.E.2d at 887. In this case, no "new" or "amended" law was passed by the Legislature after the commission of any offense Petitioner is convicted of that in any way alters her sentence or sanction. On the contrary, the objective requirement of service of a "sentence" was always present in the eligibility criterion of the statutes at issue. What has changed is that DCR has brought the existing, objective requirement to the forefront of the analysis in order to comply with the statutes as written. Under the law every period of incarceration is not the same. Petitioner's sentence and sanction remains the identical; only the manner in which the incarceration portion is counted has changed.

Petitioner asserts that DCR's revised policy regarding "good time" and parole eligibility operates to her detriment. However, it was Petitioner's actions and not DCR's revised policies which caused Petitioner's current predicament. Petitioner's punishment has not been increased nor has her sentence been lengthened by DCR's policy revision. No deviation from either the statutorily prescribed penalty for first degree robbery or the judicial discretion afforded in W.Va. Code § 62-12-

26 has occurred by virtue of DCR's policy amendment. Petitioner's sanction of three years imprisonment mandated by the Circuit Court of Randolph County was served by Petitioner as exactly that- three years of incarceration without the benefit of commutation. A sanction is a discrete penalty for violating the terms and conditions of her extended supervised release and was served as such until discharged on April 12, 2019. Petitioner's current, consecutive sentence of a determinate 10 years incarceration for first degree robbery imposed by the Circuit Court of Harrison County is now underway. Petitioner is now receiving the benefit of commutation afforded a "sentence" by applicable statutes via day-for-day "good time" and will receive impartial consideration for parole upon completion of the minimum required period of incarceration on October 12, 2021. Petitioner may violate facility rules and lose her earned "good time" or if she violates the terms and conditions of parole. In each of these scenarios, it is Petitioner's actions and not DCR or any policy revision that causes her to be incarcerated. From DCR's perspective, it will not incarcerate any individual longer than required to effectuate the clear and unambiguous intent of the applicable statutes and judicial decree. Just as courts speak through the words of their orders,[7] the Legislature does through the words appearing in the statutes it ratifies.

This Court further recognized in *State v. R.H.* that not all alterations or amendments of either law or policy, even those unfavorable to offenders, will rise to a sufficient level to constitute impermissible violations of *ex post facto* principles. 166 W.Va. at 290, 273 S.Ed.2d at 584. Rather it requires a case-by-case analysis because the difference between impermissible and permissible alterations is often one of degrees. *Id. See also, Carper, 203 W.Va. at 587, 509 S.E.2d at 868.* If every change, policy alteration, or rule revision affecting existing offenders were selectively applicable, the hodgepodge of rules and regulations affecting its populations would cripple an agency such as DCR

[7] *Legg v. Felinton,* 219 W.Va. 478, 483, 637 S.E.2d 576, 581 (2006) ("It is a paramount principle of jurisprudence that a court speaks only through its orders.")

and be impossible to enforce. Likewise, if no amendment, alteration, or revision of polices or statutory interpretation was allowed, DCR would be prohibited from evolving with the standards of acceptable behavior of society. Here, where the statutes' language is interpreted through sound legal analysis, is uniformly applied, and creates predictable, easily anticipated results that implement the plain intent of both courts and legislators, no *ex post facto* violation has occurred.

Petitioner is unable to demonstrate entitlement to any relief warranting her release from incarceration onto parole status. As discussed herein, DCR's revised November 2020 policies uniformly apply the Legislature's enactments by bringing to the forefront the objective analysis of the type of incarceration an individual is serving: sanction or sentence. Once determined, commutation, parole, or other substantive rights are afforded each individual consistent with the Legislature's intent as demonstrated through the unambiguous terms in each statute. That DCR's prior practice did not make a necessary differentiation between service of a sanction or sentence does not foreclose it from doing so now as its differentiation is soundly grounded in each statute's language the jurisprudence of this Court.

## IV. CONCLUSION

Based upon the foregoing, Petitioner has not demonstrated, and cannot demonstrate, that she is entitled to habeas corpus, or any other relief, as requested in Petitioner's Petition. Accordingly, Respondent Craig Roberts 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.

**CRAIG ROBERTS, Superintendent,**
**South Central Regional Jail and Correctional Facility,**

**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. LOREN GARCIA,**

**Petitioner,**

**v.** **No. 20-1021**

**CRAIG ROBERTS, Superintendent,**
**South Central Regional Jail and**
**Correctional Facility,**

**Respondent.**

## CERTIFICATE OF SERVICE

I, Briana J. Marino, do hereby certify that on February 5, 2021, I caused the foregoing **RESPONDENT'S SUMMARY RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS** 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:

Jeremy Cooper, Esq.
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215

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