IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 20-1023

STATE OF WEST VIRGINIA ex rel.
SCOTT PHALEN,

Petitioner,

v.

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

Respondents.

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

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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 Habeas filed on or about December 22, 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 1-2 with the following exceptions. First, when the Kanawha County Circuit Court revoked Petitioner's extended supervised release and re-incarcerated him as a penalty, the Circuit Court "sanctioned" Petitioner. It did not "sentence" Petitioner. Second, a warrant was issued for Petitioner's arrest pursuant to W.Va. Code § 62-8-8(a) (2007) regarding clerical error, mistake, or other error. This was to effectuate the uniform application of applicable statutes as written. Petitioner did not meet the objective requirements to be eligible for release on parole pursuant to W.Va. Code § 62-12-13; therefore, DCR could not violate the law by leaving Petitioner in the community-at-large. The underlying facts of this matter support DCR's conclusion that both a plain reading of West Virginia Code § 62-12-13 (2020) and long-standing principles of statutory interpretation demonstrate Petitioner does not meet the objective criterion necessary to be released on parole.[1]

II. ARGUMENT

A. *Parole Statute Contains an Objective Requirement that one be 'Serving a Sentence' for the Statute to Apply*

Petitioner is not unlawfully detained nor has any substantive or due process right been violated during the course of his sanction period. It is the prerogative of the West Virginia Legislature to

[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).

determine the classification of crimes and punishments, eligibility for "good time" accrual, and eligibility criterion for parole subject to certain constitutional limitations. The parole eligibility statute, W.Va. § 62-12-13(b)(1)(A), contains an objective requirement that individuals seeking parole must be serving a "sentence" to be considered under its provisions. 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 be...[.] There can be no divergence among reasonable minds that serving a "sentence" is an objective prerequisite for application of the statute. This is in contrast to an individual serving a penalty or "sanction" as an enforcement mechanism to promote acceptable behavior while the individual reintegrates into society on extended supervised release.

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

[2] 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.

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 fifteen years on extended supervised release. The sum of the two parts- the period of incarceration plus the 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/or its predecessor statute. Petitioner discharged the incarceration portion of his sentence on December 2, 2013, and was placed on extended sex offender supervision pursuant to W.Va. Code § 62-12-16 to serve the second portion of his sentence. Pet.Brief 1. The act of being out-of-custody but monitored on extended supervised release constitutes the second portion of his 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 2012. As a matter of course there is <u>not</u> an incarceration element to supervised release, rather only a particularized listing of prohibited conduct the offender must abide by. 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 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, that is 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. The incarceration penalty or sanction is a derivative in nature made possible only by Petitioner's knowing conduct. 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 or parole benefits towards the discharge of his period of incarceration pursuant to W.Va. Code §§ 15A-4-17 and 62-12-13. 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 second failure to abide by the terms and conditions of his extended supervised release. This period of incarceration is permissible and possible only because it is grounded in the fifteen 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 fifty years...[.]" with a minimum term of supervised release of ten

years. W.Va. Code § 62-12-26(a) (2009). The statute 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.[3] *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(i) states:

> (i) Supervised release following revocation. -- When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of supervised release authorized under subsection (a) of this section, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such term of supervised release shall not exceed the term of supervised release authorized by this section less any term of imprisonment that was imposed upon revocation of supervised release.

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

[3] 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).

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 statutes together, the sentencing scheme is clear and unambiguous. The parole statute rewards rehabilitative efforts and good behavior by changing the custodial arrangement from one of segregation from society to reintegration into society under supervision earlier prior to the full service of the mandatory incarceration period. 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 next 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 the constitutional application of West Virginia Code § 62-12-26. 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.[4]

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

[4] 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.

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. 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. DCR's Warrant for Petitioner Does Not Violate Any Due Process Requirements as Petitioner Does Not Meet the Requirements for Parole.

Petitioner asserts in his Petition that DCR has violated his due process rights by issuing a warrant for his arrest and re-incarcerating him pending discharge of his sanction. Pet. Brief, generally. Petitioner further argues that parole violations resulting in re-incarceration must be proven at a hearing and so Petitioner must be adjudicated in violation of his parole prior to being re-incarcerated following DCR's policy amendment. *Id.* However, this assertion fails to consider Petitioner's ineligibility for parole in the first instance as described above as well as nature of the warrant issued.

Essential to Petitioner's argument is his attempt to color a parole violation and Petitioner's situation with the same brushstroke. These are two entirely different scenarios with different legal requirements. DCR is not asserting Petitioner violated his parole, in which case Petitioner would be afforded a hearing on the merits of the alleged violation. Syl. pt. 1, *Dobbs v. Wallace*, 157 W.Va. 405, 201 S.E.2d 914 (1974) ("A parole revocation hearing, being a critical proceeding at which the accused

parolee's liberty is in jeopardy, must be conducted within the protections afforded by the state and federal constitutions.") DCR issued a warrant pursuant to W.Va. Code § 62-8-8(a)[5] for Petitioner, and other similarly situated sanction offenders, because he was ineligible to be released on parole in the first place. Without meeting the objective requirements of the parole statute, no due process or liberty interest attaches and Petitioner may be returned to custody pending service of his sanction according to the law.[6] Petitioner is not serving a sentence but rather a sanction as a direct result of his second failure to abide by the terms and conditions of the terms of his extended supervised release.

In the simplest of terms, Petitioner was afforded a substantial benefit by virtue of a mistaken interpretation of law by DCR which was later corrected by the October 2020 policy amendment. By issuing a warrant for Petitioner's arrest pursuant to W.Va. Code § 62-8-8, DCR brought back into its care, custody, and control an individual whose parole was in violation of objective criterion for parole eligibility. Petitioner cries foul because the October 2020 policy amendment made by DCR to bring its operations in line with the current state of the law does not comport with 'how it has always been done.' If that were the case, no adjustments to operations of any state agency could be undertaken if it resulted in any sort of shift from prior practice. 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

[5] 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.

[6] This Court has analyzed and adjudicated the constitutional objections raised for and against the use of incarceration as a sanction as codified in West Virginia Code § 62-12-26 at various points over the last fifteen years and have consistently held such periods of incarceration do not violate the prohibition against cruel and unusual punishment. *See generally, State v. James,* 227 W.Va. 407, 710 S.E.2d 98 (2011).

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 could not continue to maintain a practice that it believed 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. Petitioner should not have been granted parole based upon his status as a sanctioned offender. Once the error was identified consistent with its analysis of applicable jurisprudence, DCR took immediate steps to bring Petitioner back into its care, custody, and control through an administrative warrant so he could finish serving his sanction. The means and methodology employed by DCR to do this neither violated Petitioner's due process nor substantive rights as Petitioner is neither eligible for "good time" nor "parole" pursuant to applicable statutes.

III. 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.

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

By Counsel.

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CERTIFICATE OF SERVICE

I, Briana J. Marino, do hereby certify that on January 26, 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:

John Sullivan, Esq.
Ronni Sheet
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330

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