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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Docket No. 20-1023

STATE OF WEST VIRGINIA ex rel SCOTT PHALEN
Petitioner

v. (Habeas Corpus – Original Jurisdiction)

CRAIG ROBERTS,
Superintendent South Central Regional Jail

PETITION FOR WRIT OF HABEAS CORPUS

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Questions Presented

Are inmates sentenced for violations of extended supervision under W.Va. Code § 62-12-26 eligible for parole?

Can an inmate who has been granted parole on a sentence under W.Va. Code § 62-12-26 be arrested and required to serve out his sentence without a hearing or other due process?

Statement of the Case

The petitioner, Scott Phalen, was released on parole by the West Virginia Parole Board. He was arrested by an administrative warrant issued by the Commissioner of the Division of Corrections. He was not afforded a hearing or other process upon his arrest and is incarcerated at the South Central Regional Jail. The Petitioner moves this Court to issue a writ of habeas corpus, pursuant to W.Va. Code § 53-4-1, requiring the State to show cause for his incarceration. This petition sets forth the probable cause for the issuance of a writ and rule to show cause.

Procedural History

Mr. Phalen was charged in 2010 with First Degree Sexual Assault and related charges. He was indicted on April 1, 2011 for First Degree Sexual Assault, First Degree Sexual Abuse, Sexual Abuse by a Parent, and Incest in Kanawha County Case No. 11-F-321. (Exhibit 1) Mr. Phalen pleaded guilty to one count of First Degree Sexual Abuse on December 9, 2011. On February 14, 2012, the Circuit Court sentenced Mr. Phalen to a term of one to five years in prison followed by fifteen years of extended supervision. Mr. Phalen discharged his prison sentence of December 2, 2013, commencing his extended supervision. Mr. Phalen violated his extended supervision in April 2014 and was sentenced to five years on the violation. Mr. Phalen discharged the five year sentence on March 23, 2017 and released to complete his extended supervision. He was charged with violating extended supervision on May 22, 2017. On June 9,

2017, he was sentenced to ten years on the violation. (Exhibit 2). Mr. Phalen was granted parole on this sentence on June 29, 2020.

A warrant for Mr. Phalen's arrest was issued by the commissioner of corrections on December 7, 2020. (Exhibit 3). The warrant states that Mr. Phalen's release was due to a "clerical error or mistake." This warrant was related to a new policy of the Division of Corrections and Rehabilitation, [hereinafter the Division] denying parole and good time to inmates sentenced under W.Va. Code § 62-12-26.

Mr. Phalen was arrested on the warrant and incarcerated at the South Central Regional Jail. There are no allegations that Mr. Phalen violated the conditions of his parole and no proceedings have been scheduled regarding Mr. Phalen's arrest or the revocation of his parole.

The petitioner has provided in the appendix a copy of the original indictment, (Exhibit 1) sentencing order and certified commitment order in Kanawha County Circuit Court Case 11-F-321, (Exhibit 2) and the Division of Corrections Warrant of Arrest dated December 7, 2020 (Exhibit 3). The defendant's petition is based on the assertion that the warrant was unlawfully issued and an improper basis for his incarceration. The petitioner asserts that these exhibits provide a sufficient basis to determine whether a writ should be issued. The petitioner has no objection to the record in this case being expanded by any request of the State.

Summary of Argument

Mr. Phalen was arrested and incarcerated under an improper warrant issued by the commissioner of corrections. "A writ of habeas corpus ad subjiciendum will lie to effect the release of one imprisoned in the State Penitentiary without authority of law." Syllabus Point 1, *State ex rel. Vandal v. Adams*, 145 W.Va. 566, 115 S.E.2d 489 (1960); Syllabus Point 2, *State ex rel. Harding v. Boles*, 150 W. Va. 534, 534, 148 S.E.2d 169 (1966).

"Release on parole is a substantial liberty interest and the procedures by which it is granted or denied must satisfy due process standards." Syllabus Point 3, *Tasker v. Mohn*, 165 W.Va. 55, 267 S.E.2d 183 (1980); Syllabus Point 2, *Rowe v. Whyte*, 167 W. Va. 668, 280 S.E.2d 301 (1981). Mr. Phalen's arrest under an administrative warrant without further hearing constitutes a denial of due process.

West Virginia Code § 62-12-13 provides that "any inmate of a state correctional institution is eligible for parole if he . . . has served one fourth of his or her definite sentence . . ." This includes any inmates sentenced under W.Va. Code § 62-12-26. Mr. Phalen's parole was properly granted under this statute.

The Division's new policy is to deny parole and parole eligibility, as well as good time, for inmates incarcerated for violations of extended supervision pursuant to W.Va. Code § 62-12-26. Up until the policy change, these inmates had been eligible for parole in the same manner as other inmates serving determinate sentences. This denial of parole is not supported by any statute excluding these inmates from parole. Counsel is unaware of any judicial determination that inmates serving these sentences are not eligible for parole.

The revocation of Mr. Phalen's parole without a hearing and the new policy of the Division to deny parole to certain inmates denied Mr. Phalen's right to due process under the Fourteenth Amendment of the United States Constitution. The Division's policy and actions also violate his right to be free from cruel and unusual punishment as guaranteed by West Virginia Constitution Article 3 § 5 and the Eighth Amendment to the U.S. Constitution.

Statement Regarding Oral Argument and Decision

The Petitioner asserts that the contents of this petition and appendix set forth sufficient grounds for the issuance of a rule to show cause. However, this is a matter of first impression and there are other cases pending before the Court on this issue. These are State ex rel Joshua Miller, Case No. 20-0628 and State ex rel. Dominic L. Davis, Case No. 20-0981. Due to the procedural posture of this case and the novel issues involved, the Court may determine that oral argument is necessary for a full and proper ruling and determination of the legal issues.

Argument

New Policy

The Division has recently determined that inmates incarcerated for revocation of extended supervision/conditional release for sex offenders/child abusers are not eligible for parole. This determination was not made pursuant to any ruling by a West Virginia Court or the Parole Board. The Division is applying this directive retroactively to individuals already granted parole, such as Mr. Phalen.

Before this policy change, inmates sentenced under § 62-12-26 were eligible for both parole and good time.

Necessity for Writ of Habeas Corpus

West Virginia Code § 53-4-1 provides the authority for the Court to grant a writ of habeas corpus. The issuance of a writ is warranted in this case.

> [T]he principal function of the writ of habeas corpus is the determination of the legality of the confinement of a person or of the restraint imposed upon his liberty; and this Court has said in *Mathews v. Wade*, 2 W.Va. 464 (1868), that 'The purpose of the writ is to release any one from restraint who is detained without lawful authority.'

State ex rel. Titus v. Hayes, 150 W. Va. 151, 159–60 (1965). The administrative warrant in this case was improperly issued and was based on an erroneous interpretation of West Virginia Law. It does not provide lawful authority for the incarceration of Mr. Phalen.

Due Process

Mr. Phalen was granted parole on June 29, 2020. He was in compliance with his conditions of parole. He was arrested pursuant to an order, or warrant, issued by the commissioner of corrections citing W.Va. Code § 62-8-8. Under this statute, the commissioner "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."

"Release on parole is a substantial liberty interest and the procedures by which it is granted or denied must satisfy due process standards." Syllabus Point 3, *Tasker v. Mohn*, 165 W.Va. 55, 267 S.E.2d 183 (1980); Syllabus Point 2, *Rowe v. Whyte*, 167 W. Va. 668 (1981)(following *Morrisey v. Brewer,* 408 U.S. 471, 482, 92 S.Ct. 2593 (1972)).This rule is necessary to comply with the due process protections contained in the Fourteenth Amendment of the U.S. Constitution "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Mr. Phalen's case presents a different procedural posture than other cases pending before this court. (State ex rel Joshua Miller, 20-0628, State ex rel. Dominic L. Davis, Case No. 20-0981). The petitioners in those cases were serving sentences and were denied parole eligibility

and good time credit under the Division's new policy. Mr. Phalen had already been released on parole and was arrested and incarcerated without due process.

The warrant issued by the commissioner was improper under the standards of W.Va. Code § 62-8-8. Mr. Phalen was not paroled due to a "clerical error." The Division received a sentencing order and commitment dated June 13, 2017 and calculated Mr. Phalen's parole eligibility under W.Va. Code § 62-12-13. The Parole Board considered his case and paroled him. These actions were consistent with the Division's actions from the passage of § 62-12-26, until the recent policy change

In the same vein, Mr. Phalen was not paroled due to a "mistake." His time calculation and release on parole were performed in the same manner as any other inmate serving a sentence in a state correctional institution.

Due Process requires a judicial determination of whether there was a "mistake" or "clerical error" justifying his incarceration under § 62-8-8. The record will demonstrate that Mr. Phalen's incarceration is due to a new and retroactively applied policy of the Division, not a mistake or clerical error.

Eligibility for Parole

The West Virginia statute involving eligibility for parole applies to all inmates of state correctional institutions, not sentenced to life without parole. W.Va. Code § 62-12-13. "Any inmate of a state correctional institution is eligible for parole if he or she: (1)(A) Has served the minimum term of his or her indeterminate sentence or has served one fourth of his or her definite term sentence, . . . "

"When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the court not to construe

but to apply the statute." *State ex rel. Goff v. Merrifield*, 191 W.Va. 473, 479, 466 S.E.2d 695 (1994), *quoting* Syl. pt. 1, *Cummins v. State Workmen's Compensation Comm'r*, 152 W.Va. 781, 166 S.E.2d 562 (1969). Mr. Phalen was an inmate of a state correctional institution who had served one fourth of his definite term sentence and was granted parole by the West Virginia Parole Board. The statute explicitly includes him and no West Virginia statute or judicial opinion excludes him.

Absence of Exclusionary Language.

The parole eligibility statute does not contain an exclusion for prisoners based on their status as inmates whose extended supervision has been revoked, and no such exclusion can properly be read into them. The Court in *Goff* specifically addressed the absence of statutory language excluding a class of prisoners (trustees) from receiving good time. Upon restating that it is not the Court's duty to construe a statute that is already plain on its face, the Court added

> Nor is there language within these statutes precluding a person confined as a condition of probation to serve as a trustee and thus excluding him from receiving a reduction in his sentence for work performed accordingly. Due to the absence of such exclusionary language and in light of the principle that penal statutes must be strictly construed in favor of the defendant, we conclude that these provisions were meant to be all inclusive."

191 W.Va. at 479-80.

Goff emphasized that "The legislature is the governmental body empowered to amend the statutory framework regarding confinement as a condition of probation and good time credit thereon." The Court explains that "a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten, or given a construction of which its words are not susceptible . . ." The Court concluded, "if the legislature desires to amend W.Va.Code § 62–12–9, § 7–8–11, or § 17–15–4 [the then-existing good time and

probation statutes] in order to prohibit authorization for good time credit, trustee credit or cumulation of sentences, it may specifically do so." *Id.*

In *Steager v. Consol Energy, Inc.*, 242 W.Va. 209, 832 S.E.2d 135, 832 S.E.2d 135 (2019), this Court reaffirmed the longstanding principle that, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

<u>Incarceration imposed upon violation of extended supervision is a sentence</u>

Extended supervision under W.Va. Code § 62-12-26 was found to be Constitutional "as an inherent part of the sentencing scheme for certain offenses." Syllabus Point 4, *State v. Hargus*, 232 W. Va. 735, 753 S.E.2d 893 (2013) Syllabus Point 11, *State v. James,* 227 W.Va. 407, 710 S.E.2d 98 (2011). The United States Supreme Court has outlined the same principles, although in a different context.

> Today, we merely acknowledge that an accused's final sentence includes any supervised release sentence he may receive. Nor in saying that do we say anything new: This Court has already recognized that supervised release punishments arise from and are "treat[ed] ... as part of the penalty for the initial offense." *Johnson v. United States*, 529 U.S. 694, 700, 120 S.Ct. 1795 (2000). The defendant receives a term of supervised release thanks to his initial offense, and whether that release is later revoked or sustained, it constitutes a part of the final sentence for his crime.

United States v. Haymond, 139 S. Ct. 2369, 2379–80 (2019)(increased mandatory sentence upon judicial finding denied right to trial under Fifth and Sixth Amendments).

Denial of parole eligibility violates the protections against cruel and unusual punishments provided in the West Virginia and United States Constitutions. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence." W.Va. Const. Art. 3 § 5; U.S. Const. Am. VIII. The imposition of a sentence in West Virginia includes the right to be considered for

parole as set forth in § 62-12-13. The denial of this parole eligibility results in a harsher sentence than intended by the legislature.

Counsel has reviewed a response filed by the State of West Virginia in State ex rel. Joshua Miller v. Jividen. Case No. 20-0628. Miller involves the denial of good time, but the petitioner understands the justification to be the same for the issue of parole. The response states:

> It is the differentiation of the terms "sentence" and "sanction" that fuels both the constitutional application of West Vriginia Code § 62-12-26 and practical application of West Virginia Code § 15A-4-17. Each has a distinct meaning with a defined set of protections under the state and federal constitutions. In the instant case, whether Petitioner's current term of incarceration is defined as a "sentence" or a "sanction" conclusively determines both his eligibility to receive "good time" and the outcome of this case.

The remainder of the State's response does not provide any judicial or statutory definition of the term "sanction," much less a distinct meaning with a defined set of protections under the state and federal constitutions.

Constitutional guarantees do not make a distinction between criminal sentences and "sanctions." They apply to punishments. W.Va. Const. Art. 3 § 5; U.S. Const. Am. VIII.

The word "sentence" is used, properly, throughout the *Hargus* opinion. Syllabus Points 4, 8 and 10 use the term "sentence". The opinion refers to the appellant's "post-revocation sentences." *Id.* at 743. The case does not involve parole eligibility or good time. The case does not hold, or even suggest. that there is some legal distinction between the words sanction and sentence.

Hargus does not provide authority for the distinction between a sentence and a "sanction." The opinion states that a term of incarceration upon revocation "is part of a single sentencing scheme arising from the defendant's original conviction." 232 W.Va. at 743. The "sanction" for revocation of extended supervision is not a separate matter from the "sentence" for

the underlying offense. (Otherwise, it *would* be a violation of Double Jeopardy.) Therefore, *Hargus* cannot be used as the basis for denying parole eligibility.

Consequently, the Division's revocation or denial of Mr. Phalen's parole is in violation of both constitutional and statutory mandates. The Court should grant the writ, issue a rule to show cause, and ultimately, order that Mr. Phalen be reinstated to his parole.

PRAYER FOR RELIEF

WHERFORE, for all of the reasons stated herein, the defendant respectfully prays this Honorable Court for the issuance of a writ of habeas corpus requiring the State to show cause for his incarceration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Sullivan, hereby certify that on December 22, 2020, service of this Petition for Writ of Habeas Corpus was made upon the State of West Virginia by mailing a copy to:

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