IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

Supreme Court No.: 23-277
Case No. 22-F-164
Circuit Court of Raleigh County

CORBETT MAURICE CARTER,

Defendant below, Petitioner.

PETITIONER'S REPLY

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REPLY ARGUMENT

The State charged Petitioner in connection with a robbery.[1] He posted bond, and the court released him from custody[2] pending trial with a home confinement condition.[3] He absconded,[4] and police later arrested and returned him to State custody. Rather than revoke his bond, the State charged him with felony escape.[5]

Petitioner appeals his escape conviction.[6] When one is on home confinement pretrial, it is purely a bond condition.[7] Just as with any other bond condition, violation can lead to revocation.[8] But bond is, by definition, "Release From Custody."[9] Therefore Petitioner could not have escaped from custody as a matter of law.

The Response argues Petitioner was confined under the Home Incarceration Act, and therefore was still in custody and subject to the escape statute.[10] It is mistaken. Moreover, its mistake highlights a fundamental confusion that only this Court can fix. There is no such thing as pretrial confinement under the Home Incarceration Act.[11]

1. The Home Incarceration Act only concerns postconviction bail. Petitioner's confinement was a bond condition for his release from custody pretrial.

The Home Incarceration Act only concerns *post*conviction bail for individuals awaiting appellate decisions.[12] A person standing convicted of a crime certainly is within State custody.[13] But Petitioner had not been convicted of anything. He posted bond pretrial and the court released him from State custody.[14]

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[1] *See* Supplemental A.R. 230.
[2] W. Va. R. Crim. P. 46 ("Release From Custody").
[3] A.R. 221–24.
[4] A.R. 136–38.
[5] Supplemental A.R. 230
[6] This appeal does not concern the underlying charge from which the State alleges he escaped. That conviction stands.
[7] *See* Syl. Pt. 2, *State v. Jedediah C.*, 240 W. Va. 534, 814 S.E.2d 197 (2018) (quoting Syl. Pt. 4, *State v. Hughes*, 197 W. Va. 518, 476 S.E.2d 189 (1996).
[8] *See* A.R. 223.
[9] W. Va. R. Crim. P. 46.
[10] Resp.'s Br. 1 *et seq.*
[11] *Jedediah C.*, 240 W. Va. at 537 ("[T]he Act applies only to post-conviction situations[.]").
[12] *See id.* (discussing *Hughes*, 197 W. Va. 518 at Syl. Pt. 4).
[13] *See* W. Va. Code § 61-5-10.
[14] A.R. 124.

In *State v. Hughes*, the defendant argued he should receive credit for pretrial home confinement under the Home Incarceration Act.[15] This Court found that the Act's references to bond and bail only applied to postconviction bond.[16] This is wholly separate from pretrial home confinement, which operates as an explicit *release* from custody.[17] The Court ruled, on the strength of this distinction, that time spent on pretrial home confinement need not be credited to defendants.[18]

The Court made the point even plainer in *State v. Jedediah C.* There, the defendant sought credit for time served arguing that his bond conditions were just as stringent as confinement under the Act.[19] The Court disagreed.[20] the Act only concerns offenders who have been convicted, so even postconviction bail is, ultimately, penal.[21] This distinction—the Act being punitive versus pretrial release from custody[22]—leads to the different treatment between the two fundamentally different situations.[23]

Petitioner, therefore, was on home confinement per W. Va. Code § 62-1C-2—not the Home Incarceration Act—and was not in custody.[24] Yet despite this Court's efforts in *Hughes* and *Jedediah C.*, confusion persists. The circuit court ostensibly relied upon the Act.[25] The Home Confinement Office made Petitioner sign the same paperwork and gave him the same warnings as a convicted offender under the Act.[26] And the Response argument presumes the Act applies pretrial. Petitioner asks the Court to remedy this confusion and ensure that only offenders are treated like criminals.

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[15] *See Hughes*, 197 W. Va. at 525.
[16] *See id.* at 526.
[17] *See id.* at 527–28; W. Va. R. Crim. P. 46.
[18] *See Hughes*, 197 W. Va. 518 at Syl. Pt. 4.
[19] *See Jedediah C.*, 240 W. Va. at 539.
[20] *Id.* ("Critically, Petitioner's home confinement was solely a condition of his pretrial bail[.]").
[21] *Id.* at 538.
[22] *Compare id.* at Syl. Pt. 2 *with id.* at Syl. Pt. 3.
[23] *See id.*; *see also State v. Newill*, No. 20-0471, 2021 WL 2581687, at *3 (W. Va. June 23, 2021) ("[P]re-and post-trial defendants are not similarly situated, and … are not afforded the same protections.").
[24] *See Jedediah C.*, 240 W. Va. 534 at Syl. Pt. 2; *see also* W. Va. R. Crim. P. 46.
[25] *See* A.R. 221–223 (citing W. Va. Code § 62-11B-4).
[26] *See* A.R. 224–26; A.R. 126–27.

2. Unlike postconviction bail under the Act, pretrial bond is a release from custody.

When the court granted Petitioner bond, the State relinquished its custody over him.[27] He therefore could not have escaped from custody. It truly is that straightforward.

The Response begins by suggesting definitions for "custody" or "care" that it argues would ensnare Petitioner.[28] But the statute is plain on its face. The Court does not need to manufacture a definition that the legislature saw no need to provide. Whatever the legislature intended "custody" to mean, bond is unambiguously a release from it.[29] That is the point of pretrial bond, and what distinguishes it from the Act.[30]

The Response argues that *Craigo v. Legursky*[31] disposes of this case in its favor, but it is mistaken.[32] There, the convict was serving an actual prison sentence.[33] He had permission to attend a work release center and failed to report back.[34] The Court ruled this constituted an escape within the meaning of W. Va. Code § 62-8-1—not 61-5-10, the escape statute at issue here—because he never left DOC custody.[35] The DOC had custody of him, created the work release center, and assigned him there; it did not suspend his sentence or otherwise evince a break in its court-ordered custody.[36]

Because Petitioner's home confinement was a pretrial bond condition and not pursuant to the Act, his situation is the opposite. Inherent to pretrial bond is a break in the custodial relationship.[37] Rather than the continuous, uninterrupted custody in *Craigo*, the court's order ended the State's lawful dominion over Petitioner.[38] This is why detainees under the Act receive time credit, but not those released on pretrial bond.[39]

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[27] W. Va. R. Crim. P. 46.
[28] Resp.'s Br. 5.
[29] *See* W. Va. R. Crim. P. 46; *e.g. State v. Wears*, 222 W. Va. 439, 442, 665 S.E.2d 273, 276 (2008) ("Appellant posted bond … and was released from custody.").
[30] *See Jedediah C.*, 240 W. Va. 534 at Syl. Pt. 2.
[31] *Craigo v. Legursky*, 183 W. Va. 678, 398 S.E.2d 160 (1990).
[32] Resp.'s Br. 6.
[33] *See Craigo*, 183 W. Va. at 679.
[34] *See id.*
[35] *See id.* at 680.
[36] *See id.*
[37] W. Va. R. Crim. P. 46; W. Va. Code § 62-1C-1, 1a & 2.
[38] *See*, *e.g.*, *supra* at n. 29.
[39] *See Jedediah C.*, 240 W. Va. 534 at Syl. Pts. 2 and 3.

Nothing in the record suggests anyone other than Petitioner posted his bond so, implicitly, he was in no one's custody.[40] But the code makes the break in custody explicit when counties rely on bondspeople. The sheriff *surrenders* custody to the bondsperson.[41] If the defendant violates the bond terms, the bondsperson agrees to take the defendant *back* into their custody, then *return* custody to the sheriff.[42] Unless and until that happens, the defendant is not in the custody of any State actor governed by the escape statute. Again: pretrial bond, no matter the restrictions, is "Release From Custody."[43] It is not a continuation of it, as for someone who already stands convicted.

If any doubt remains, there is an elegant test for where custody lies pretrial. If a defendant misses a court date, with whom is the court upset: the defendant for failing to appear, or the sheriff for failing to transport? When a defendant is on pretrial bond, it is their responsibility to appear. Without a capias, the sheriff has no more authority to compel a home confinement defendant to attend court than a bonded defendant without that condition. Neither is in State custody for purposes of the escape statute.

3. By expressly including home confinement under the Act in the escape statute, the legislature implicitly excluded pretrial home confinement.

This Court has made clear that pretrial bond is a release from custody.[44] So has the legislature. It modernized the escape statute in 1995 to account for alternatives to traditional incarceration.[45] It chose only to extend the escape statute to home confinement ordered as a *sentence*.[46] Its exclusion of pretrial home confinement from the Act, and its inclusion of the Act in the escape statute, shows that it never intended escape to reach pretrial defendants confined to their homes as bond conditions.

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[40] W. Va. R. Crim. P. 46.
[41] *See* W. Va. Code § 62-1C-1a(2)(B).
[42] *See* W. Va. Code § 62-1C-14.
[43] W. Va. R. Crim. P. 46.
[44] *See id.*; *Jedediah C.*, 240 W. Va. 534 at Syl. Pt. 2.
[45] *See* LAW–ENFORCEMENT OFFICERS, INSTITUTIONS—ESCAPE FROM CUSTODY—PENALTIES, 1995 West Virginia Laws Ch. 79 (H.B. 2034).
[46] *See id.*; *see also* W. Va. Code § 61-5-10.

The Response misinterprets Petitioner's position due to its confusion over the Act.[47] In fact, the Response concedes Petitioner's actual point, which is that the legislature understands the distinction between pre and postconviction home confinement.[48] Therefore its omission of pretrial home confinement from the escape statute was deliberate.

Rather than amend the escape statute to govern *all* home confinement, the legislature limited its amendment to "alternative *sentence[s]*"[49] under the Act. It deliberately excluded pretrial home confinement, which, as a bond condition, is a release from custody.[50] Due to its confusion, the Response does not engage this argument.

4. Petitioner's case gives the Court an opportunity to correct an anomaly.

Consistent with *Jedediah C.'s* distinction between the penal Home Incarceration Act and non-punitive pretrial bond, this Court characterizes bond as "Release From Custody."[51] One who is not in custody cannot escape from custody, and Petitioner's case gives this Court the opportunity to correct an errant ruling in a memorandum decision reached without complete analysis.[52]

In *State v. McGann*,[53] the Court found that the lower court properly applied the escape statute to a defendant on pretrial home confinement[54] without analyzing the issue in depth.[55] It did so in reliance upon the respondent's representation that *State v. Allman*[56] controlled the outcome.[57] However, this was incorrect.[58]

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[47] *See* Resp's Br. 8.
[48] *Id.* ("Thus, the HCA makes a distinction between pretrial and post-conviction home confinement."). It does. Just not the one the Response draws. *Compare id. with Jedediah C.*, 240 W. Va. at 538.
[49] W. Va. Code § 61-5-10 (*emphasis added*).
[50] W. Va. R. Crim. P. 46.
[51] *Id.*
[52] Petitioner acknowledges he missed the memorandum decision because the case it purports to rely upon was off point.
[53] *State v. McGann*, No. 20-0329, 2021 WL 4936282 (W. Va. Sept. 27, 2021) (memorandum decision).
[54] *See McGann*, 2012 WL 4936282 *2.
[55] *See Hammons v. W. Virginia Off. of Ins. Com'r*, 235 W. Va. 577, 594, 775 S.E.2d 458, 475 (2015) (discussing the truncated analysis in memorandum decisions and its impact on their weight).
[56] *State v. Allman*, 240 W. Va. 383, 813 S.E.2d 36 (2018).
[57] *See McGann*, 2012 WL 4936282 *2; *see also id.* at Resp.'s Br. 5 (W. Va. 20-0329, Nov. 9, 2020).
[58] *See Allman*, 240 W. Va. at 388–89.

Allman held that under the modern escape statute, it is a felony to escape from custody imposed for a pending felony charge.[59] Earlier versions of the offense only punished postconviction escape and the penalty depended upon the underlying conviction.[60] Allman argued his conviction for felony escape was disproportionate because he was later convicted of a misdemeanor.[61] The Court affirmed because the present statute punishes pretrial escape based upon the nature of the pending charge.[62]

The Court reached the correct decision in *Allman*. But its holding had no bearing on *McGann*, nor does it control Petitioner's case. Allman never argued the escape statute did not apply to pretrial home confinement; he argued he could not be guilty of a felony based upon abrogated case law.[63] Thus, the Court did not analyze Petitioner's issue.[64]

Because the respondent in *McGann* mistook out-of-context dicta for *Allman's* holding, this Court has never analyzed whether pretrial home confinement, as opposed to confinement under the Act, can subject a defendant to the escape charge. Petitioner's case is an opportunity to rectify this and correct the confusion between offenders held under the Act and defendants released pretrial.

CONCLUSION

The legislature is free to amend the escape statute to include pretrial home confinement. But it hasn't yet. And when it did amend the offense to account for home confinement, it limited the escape statute's reach to those serving alternative *sentences* under the Act. Petitioner asks the Court to reverse his conviction out of respect for the legislature's co-equal role in declaring the law.

Respectfully submitted,
Corbett Maurice Carter,
By Counsel

[59] *See Allman*, 240 W. Va. 383 at Syl. Pt. 5.
[60] *See id.* at 388–89.
[61] *Id.* at 388; *see also id*. at Petr.'s Br. 5–8 (W. Va. 16-1128, Mar. 9, 2017).
[62] *Id.* at 389–90.
[63] *See id*. at Petr.'s Br. 5–8 (W. Va. 16-1128, Mar. 9, 2017).
[64] *See id.* at 388–90.

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