IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Fall 2026 Term

No. 24-341

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent,

v.

CARLI R. REED
Defendant Below, Petitioner.

Appeal from the Circuit Court of Taylor County
Honorable Shawn D. Nines, Judge
Criminal Action No. 23-F-74

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS

Submitted: September 9, 2026
Filed: November 13, 2026

Hunter B. Mullens, Esq.
C. Brian Matko, Esq.
Matthew L. Ervin, Esq.
MULLENS & MULLENS, PLLC
Philippi, West Virginia
Counsel for Petitioner

John "JB" McCuskey, Esq.,
Attorney General
Mary Beth Niday, Esq.,
Assistant Attorney General
Charleston, West Virginia
Counsel for Respondent

JUSTICE WOOTON delivered the Opinion of the Court.

CHIEF JUSTICE BUNN dissents and reserves the right to file a separate opinion.

JUSTICE KIRKPATRICK dissents and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "'The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.' Syl. Pt. 1, in part, *State v. Lucas,* 201 W. Va. 271, 496 S.E.2d 221 (1997)." Syl. Pt. 1, *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011).

2. "Pursuant to the provisions of the Home Incarceration Act, West Virginia Code §§ 62–11B–1 to –12 (1997 & Supp. 1999), when an offender is placed on home incarceration as a condition of post-conviction bail, if the terms and conditions imposed upon the offender are set forth fully in the home incarceration order and encompass, at a minimum, the mandatory, statutory requirements enunciated in West Virginia Code § 62–11B–5, then the offender is entitled to receive credit toward any sentence imposed for time spent on home incarceration, whether or not the offender violates the terms and conditions of home incarceration and whether or not the order specifically references the Home Incarceration Act." Syl. Pt. 3, *State v. McGuire*, 207 W. Va. 459, 533 S.E.2d 685 (2000).

3. """In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question...." Syllabus Point 1, *Appalachian*

Power Co. v. Gainer, 149 W. Va. 740, 143 S.E.2d 351 (1965).' Syl. Pt. 2, in part, *Hartley Hill Hunt Club v. County Commission of Ritchie County,* 220 W. Va. 382, 647 S.E.2d 818 (2007)." Syl. Pt. 7, *Kanawha Cnty. Pub. Libr. Bd. v. Bd. of Educ. of Cnty. of Kanawha*, 231 W. Va. 386, 745 S.E.2d 424 (2013).

4. "The failure to credit on the underlying sentence the time served on parole prior to the revocation of parole constitutes a multiple punishment for the same offense, and is a violation of the Double Jeopardy Clause of the West Virginia Constitution, Article III, Section 5." Syl. Pt. 2, *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529 (1977).

5. When a defendant is placed on post-conviction home confinement under terms and conditions which are set forth fully in the home incarceration order and encompass, at a minimum, the mandatory, statutory requirements enunciated in West Virginia Code section 62–11B–5 (2001), and the defendant complies with all such terms and conditions, a circuit court must credit the time served on home confinement to the sentence. To the extent that West Virginia Code section 62-11B-11(b) (2005) may be read to authorize circuit courts in their discretion to refuse credit for a defendant's time served on post-conviction home confinement even where the statutory terms and conditions have been imposed and have been fully met, the statute is unconstitutional as applied.

6. "Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982).

WOOTON, Justice:

Petitioner Carli R. Reed ("the petitioner") appeals from the May 30, 2024, order of the Circuit Court of Taylor County, West Virginia, sentencing her to a determinate fifteen-year term of imprisonment following her *Alford/Kennedy*[1] plea of guilty to a charge of voluntary manslaughter. The petitioner contends that her sentence was illegal for three reasons: the circuit court refused to credit her with 183 days served on post-conviction home confinement; the court refused to credit her with 278 days served on pre-trial home confinement; and the court relied on an impermissible factor in its determination that the maximum statutory sentence was appropriate.[2]

After careful consideration of the parties' briefs and oral arguments, the appendix, and the applicable law, we affirm in part, reverse in part, and remand with directions that the circuit court issue a corrected sentencing order crediting the petitioner with 183 days served on post-conviction home confinement.

I. Facts and Procedural Background

The factual and legal events relevant to this appeal unfolded in two distinct time periods following the death of the petitioner's husband, Marcus Fagons ("Mr.

[1] *See North Carolina v. Alford*, 400 U.S. 25 (1970) and *Kennedy v. Frazier*, 178 W. Va. 10, 357 S.E.2d 43 (1987).

[2] West Virginia Code section 61-2-4 (1994) provides in relevant part that "[v]voluntary manslaughter shall be punished by a definite term of imprisonment in the penitentiary which is not less than three nor more than fifteen years."

Fagons") on August 15, 2019, and her subsequent indictment by a Barbour County, West Virginia, grand jury on June 20, 2020, on a charge of first-degree murder.

1.

There was no dispute that the petitioner shot and killed Mr. Fagons. At the petitioner's trial, which began on September 16, 2020, the State claimed that the shooting was intentional, occasioned by Mr. Fagons' infidelity and his desire to obtain a divorce. In contrast, the petitioner claimed that the shooting was an accident. She testified that she had suicidal thoughts after she and Mr. Fagons discussed the possibility of a divorce and moved to retrieve his gun from the nightstand intending to shoot herself; however, the gun discharged when she grabbed it from the nightstand. Because the petitioner was disoriented and confused after the gunshot, she was unsure whether Mr. Fagons had been struck or whether the bullet had missed him, and therefore called her mother rather than 911 because "I knew that mom would know what to do."

Notwithstanding the petitioner's testimony as to how events had unfolded, the circuit court refused to instruct the jury as to the law of accident, finding that the instruction was not necessary:

> [I]f they [the jury] believe it was an accident then there will not be a crime. So accident being something less than involuntary manslaughter they would assume. So a complete accident I don't think there's any real caselaw on what should happen in an accident except for coming in and saying it was an accident and seeing how the jury takes that. So[,] I think that's a common usage much more than a legal usage. And I think that accident would necessarily be included in a not guilty.

State v. Reed [Reed I], No. 21-0227, 2022 WL 9931717, at *2 (W. Va. Oct. 17, 2022) (memorandum decision).[3] Thereafter, the jury convicted the petitioner of second-degree murder and the circuit court sentenced her to a forty-year determinate term of imprisonment.[4]

On October 17, 2022, this Court reversed and remanded for a new trial, finding that the circuit court's refusal to give the requested instruction on accident was reversible error.

2.

On December 22, 2022, the petitioner was released on a $900,000.00 bond, cash or surety, with the condition of home incarceration with electronic monitoring. A Special Prosecutor was appointed to handle the case on remand and, by agreement of the

[3] The petitioner's alternative theory of defense was that she was a battered woman, a defense which, if established, would have allowed the jury to consider it as a factor in determining whether the State had established premeditation, malice, or intent. *See Reed I*, 2022 WL 9931717, at *6 (Hutchison, J., concurring) (citing Syl. Pt. 1, in part, *State v. Stewart*, 228 W. Va. 406, 719 S.E.2d 876 (2011)). The circuit court refused to allow certain testimony relevant to this issue, finding that it was inadmissible character evidence offered to show that Mr. Fagons acted in accordance with a character trait – the trait being that he was a domestic batterer. We did not reach this issue in *Reed I*, deeming the court's failure to give an accident instruction to be dispositive.

[4] West Virginia Code section 61-2-3 (1994) provides in relevant part that "[m]urder of the second degree shall be punished by a definite term of imprisonment in the penitentiary which is not less than ten nor more than forty years." We note that the Legislature amended this Code section in 2026, but no changes were made that affect the instant case.

parties, venue was transferred to Taylor County due to the volume of publicity in Barbour County.

The terms and conditions of the petitioner's home confinement were stringent. She was required to live with her parents in Barbour County and was not allowed to go outside further than six feet from the front door of the home; she was required to work, if at all, from home; she was permitted to leave the residence only for medical appointments or to meet with her attorneys; she was permitted to attend only one religious service per week, despite the fact that her church held four such services; and although the usual terms and conditions of home confinement in Barbour County establish a five-hour period every Wednesday in which a defendant may run errands and purchase groceries or other necessities, the petitioner was denied this "grace period."

Of significance to this appeal, the State concedes in its brief that the terms and conditions of the petitioner's home confinement "encompass[ed], at a minimum, the mandatory, statutory requirements enunciated in West Virginia Code § 62-11B-5[.]" *See* discussion *infra*. Further, it is undisputed that the petitioner did not violate any of those terms and conditions while she was on home confinement.

On September 26, 2023, the petitioner agreed to enter an *Alford/Kennedy* plea to voluntary manslaughter; agreed that the sentencing enhancement set forth in West

Virginia Code section 62-12-13(b)(1)(C) (2017)[5] was applicable because a firearm was used in the commission of the crime; and agreed that she would neither seek nor accept parole until she had served one-third of any sentence that the circuit court would impose. On that same date, the circuit court accepted the plea and allowed the petitioner to remain on home confinement pending sentencing, although, as the State emphasizes, the court warned the petitioner that she might not receive credit for any time served on home confinement as a condition of her bond and she indicated that she understood.

On March 28, 2024, the circuit court held a sentencing hearing, during which the court considered the petitioner's motion for credit for time served on home confinement, both pre-trial and post-conviction, and her motion for an alternative sentence. As to the former, the court found it dispositive that home confinement was a condition of bond, not a sentence; that the petitioner had requested home confinement, i.e., that it was not "forced upon her[,]"; that the court had cautioned her on two occasions that she might not receive credit for the time spent on home confinement; and, in summary, "that it [home confinement] was permissible, requested and done knowingly." As to the petitioner's motion for an alternative sentence, the court found that the factors supporting imposition of a prison sentence outweighed the petitioner's evidence of her good conduct while in prison, her efforts to correct negative patterns of thinking and behavior through counseling, her positive psychological prognosis, and her need for follow-up care – care not available

[5] After Mr. Fagons' death in August 2019, the Legislature amended West Virginia Code section 62-12-13 in 2020, 2021, and 2026; however, none of these amendments alter our analysis in the instant case.

in prison – which was necessary for her to successfully reintegrate into society.[6] As support for its decision to impose a maximum prison sentence, the court cited the fact that the plea agreement was fair and reasonable, reducing the petitioner's exposure from forty years to fifteen years; that the petitioner's plea to voluntary manslaughter was an acknowledgement of her intent to kill, which is an essential element of the crime; that the crime had been committed with the use of a firearm; that Mr. Fagons had lost his life and his family and friends had been left to grieve, as detailed in victim statements which the court found very affecting; "[a]nd [that] there is a price to pay, Ms. Reed, for what has happened here."

In its May 30, 2024, sentencing order, the circuit court made the following statement which gives rise to the petitioner's claim that the court relied on an impermissible factor in determining her sentence:

> Defendant pled to Voluntary Manslaughter, which carries with it the necessary element of the 'intent to kill.' Defendant's intent to kill lead [sic] to conduct that the Court cannot take lightly and given the specific circumstances of this case cannot allow to be minimized simply by the passage of time. Defendant's crim [sic] not only took the life of the victim, but has and will continue to have ripple effects on countless family members for years to come. *Given the posture of this case, having been remanded for a new trial after a jury verdict to Second Degree Murder, the Court believes that the Defendant already received substantial consideration in the current plea agreement which significantly reduced her possible sentence.* Lastly, the underlying crime was one of violence involving Defendant's use of a firearm.

(Emphasis added). This appeal followed.

[6] Dr. David Clayman gave extensive testimony concerning all of these matters, and the court indicated that it had carefully considered both his factual and opinion evidence.

II. Standard of Review

"'The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.' Syl. Pt. 1, in part, *State v. Lucas,* 201 W. Va. 271, 496 S.E.2d 221 (1997)." Syl. Pt. 1, *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011).

III. Discussion

We will discuss the petitioner's assignments of error in the order presented: post-conviction home confinement, pre-trial home confinement, and whether the circuit court relied on an impermissible factor in sentencing.

POST-CONVICTION HOME CONFINEMENT

The petitioner contends that the circuit court's failure to give her credit against her sentence for time served on post-conviction home confinement violates her rights under the double jeopardy and equal protection clauses of the West Virginia Constitution. *See* W. Va. Const. art. III, §§ 5 & 10.[7] An analysis of this issue requires the Court to first examine the Home Incarceration Act, W. Va. Code § 62-11B-1 to -13 ("the Act"),[8] which provides in relevant part that "[a]s a condition of probation or bail or as an

[7] West Virginia Constitution article III, section 5 provides in relevant part that "[n]o person shall . . . be twice put in jeopardy of life or liberty for the same offence. West Virginia Constitution article III, section 10 provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

[8] Although the title of the Act refers to "Home Incarceration," its effect as a practical matter is to permit convicted defendants to be confined in their homes rather than in jail as

alternative sentence to another form of incarceration for any criminal violation of this code over which a circuit court has jurisdiction, a circuit court may order an offender confined to the offender's home for a period of home incarceration." *See id.* § 62-11B-4(a). We have held that the Act "applies only to post-conviction [bail] and is penal in nature[,]" as it applies only to "offenders," who are defined as "adult[s] convicted of a crime." *State v. Jedidiah C.*, 240 W. Va. 534, 537, 814 S.E.2d 197, 200 (2018) (citation omitted), *cert. denied*, 586 U.S. 1085 (2019).

In syllabus point three of *State v. McGuire*, 207 W. Va. 459, 533 S.E.2d 685 (2000), we held that

> [p]ursuant to the provisions of the Home Incarceration Act, West Virginia Code §§ 62-11B-1 to -12 (1997 & Supp. 1999), when an offender is placed on home incarceration as a condition of post-conviction bail, if the terms and conditions imposed upon the offender are set forth fully in the home incarceration order and encompass, at a minimum, the mandatory, statutory requirements enunciated in West Virginia Code § 62-11B-5,[9] then the offender is entitled to receive credit

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they await sentencing. For that reason, we will generally refer to home confinement when discussing the constitutional issues raised herein.

[9] West Virginia Code section 62-11B-5 (2001) provides that

> An order for home incarceration of an offender under section four of this article is to include, but not be limited to, the following:
>
> (1) A requirement that the offender be confined to the offender's home at all times except when the offender is:
>
> (A) Working at employment approved by the circuit court or magistrate, or traveling to or from approved employment;

toward any sentence imposed for time spent on home incarceration, whether or not the offender violates the terms and conditions of home incarceration and whether or not the

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(B) Unemployed and seeking employment approved for the offender by the circuit court or magistrate;

(C) Undergoing medical, psychiatric, mental health treatment, counseling or other treatment programs approved for the offender by the circuit court or magistrate;

(D) Attending an educational institution or a program approved for the offender by the circuit court or magistrate;

(E) Attending a regularly scheduled religious service at a place of worship;

(F) Participating in a community work release or community service program approved for the offender by the circuit court, in circuit court cases; or

(G) Engaging in other activities specifically approved for the offender by the circuit court or magistrate.

(2) Notice to the offender of the penalties which may be imposed if the circuit court or magistrate subsequently finds the offender to have violated the terms and conditions in the order of home incarceration.

(3) A requirement that the offender abide by a schedule, prepared by the probation officer in circuit court cases, or by the supervisor or sheriff in magistrate court cases, specifically setting forth the times when the offender may be absent from the offender's home and the locations the offender is allowed to be during the scheduled absences.

(4) A requirement that the offender is not to commit another crime during the period of home incarceration ordered by the circuit court or magistrate.

(5) A requirement that the offender obtain approval from the probation officer or supervisor or sheriff before the offender changes residence or the schedule described in subdivision (3) of this section.

order specifically references the Home Incarceration Act.

As previously noted, the State concedes that the terms and conditions of the petitioner's post-conviction home confinement "encompass[ed], at a minimum, the mandatory, statutory requirements enunciated in [the statute]"; and the petitioner contends that *McGuire* is therefore dispositive of the petitioner's first assignment of error. However, what the petitioner overlooks is that in the first legislative session held after *McGuire* was decided, the Legislature amended the Act, which now explicitly states in relevant part that "[u]pon conviction of a person, the circuit court . . . *may, in its discretion*, grant credit for time spent on home incarceration as a condition of bail toward any sentence imposed[.]" *See id*. § 62-11B-11(b) (2001) (emphasis added). In reliance on this amendment to the Act, the State contends that whether to grant credit for time spent on post-conviction home confinement is a matter within the circuit court's discretion, and that the court did not abuse its discretion under the facts and circumstances of this case. In this regard, the State points out that in *Jedediah C*. we specifically acknowledged that "the Legislature [has] amended the Act, making it discretionary as to whether a circuit court grants credit to an offender for time spent on home incarceration[.]" *Jedediah C*., 240 W. Va. at 539, 814 S.E.2d at 202. The State thus regards *Jedediah C.* as dispositive of the issue raised in the instant case, arguing that the Legislature gave circuit courts discretion to determine whether credit for time spent on post-conviction home confinement should be granted, and this Court has acknowledged – and thus tacitly approved – that fact.

While the State is correct that the amendment to the statute is strong evidence of legislative intent to overrule *McGuire* in part by making credit for time served on home confinement a discretionary issue for the circuit courts, our analysis and holding in *Jedidiah C*. do not control the outcome here. First, our acknowledgement that the Act has been amended did not in any way affect the outcome in *Jedediah C*. because that case involved pre-indictment home confinement and thus the Act did not apply. 240 W. Va. at 537, 814 S.E.2d at 200. Second, not only did we not formulate any new syllabus points in *Jedediah C*. reflecting the statutory amendment, but also we reaffirmed, in syllabus point three, the holding of *McGuire.* Finally, because *Jedidiah C*. did not involve post-conviction home confinement, we did not resolve the core issue in the instant case: whether the circuit court's refusal to grant credit for post-conviction home confinement, which we have acknowledged to be penal in nature pursuant to the Act,[10] violated the equal protection and double jeopardy guarantees of the West Virginia Constitution.

As a threshold matter, the lynchpin of the petitioner's constitutional argument is the fact that this Court has expressly found post-conviction home confinement, whether

[10] *See State v. Hughes*, 197 W. Va. 518, 527, 476 S.E.2d 189, 198 (1996) ("Accordingly, due to the penal nature of the Act, when a circuit court, in its discretion, orders an offender confined to his home as a condition of bail, the offender must be an adult convicted of a crime punishable by imprisonment or detention in a county jail or state penitentiary or a juvenile adjudicated guilty of a delinquent act that would be a crime punishable by imprisonment or incarceration in the state penitentiary or county jail, if committed by an adult"); *see also McGuire*, 207 W. Va. at 460, 533 S.E.2d at 686, Syl. Pt. 1.

imposed as a condition of bond or as an alternative sentence, to be penal in nature. *See* discussion *supra*. However, the State argues that our prior holdings fall short of the analytical mark because we have failed to consider that whether or not post-conviction home confinement is penal in nature requires a fact-driven inquiry into the purpose for which it was imposed. Specifically, the State contends that home confinement is penal in nature only if it was imposed for the purpose of punishment, whereas in this case the purpose of the petitioner's home confinement was to secure her appearance at sentencing. In broad strokes, the State's position is that post-conviction home confinement is penal in nature only if it is imposed as an alternative sentence, in which case it can fairly be deemed to be a punishment.

In support of its argument the State relies on this Court's opinion in *State v. Walker*, 244 W. Va. 61, 851 S.E.2d 507 (2020), where we held in syllabus point three that "West Virginia Code § 62-11B-9(b) (2017) permits a participant in a home incarceration program to receive credit for time served while incarcerated in his home only where the term of home incarceration was imposed as an alternative sentence to another form of incarceration." 244 W. Va. at 61, 851 S.E.2d at 507. The State infers from this language that "the penal nature of post-conviction home incarceration seems contingent upon the type of sentence imposed." We disagree. First, *Walker* does not make the leap of logic suggested by the State; indeed, nowhere in the opinion is there any analysis of whether the home confinement imposed in Mr. Walker's case – he received a sentence of one-to-ten years in the penitentiary, which was suspended in favor of three years of probation with the

first year to be served on home confinement – was penal in nature. Second, and more fundamentally, *Walker* involved a subsection of the Act, West Virginia Code section 62-11B-9(b), which is applicable only in cases where "there is reasonable cause to believe that a participant sentenced to home incarceration by the circuit court has violated the terms and conditions of the court's order of home incarceration[.]" *Walker*, 244 W. Va. at 64, 851 S.E.2d at 510.

Additionally, the State's punishment theory, that post-conviction home confinement is not penal because its purpose is not to punish, is directly undercut by our reiteration in *State v. Gerald R*., No. 18-0814, 2019 WL 5092946 (W. Va. Oct. 11, 2019) (memorandum decision), that

> [p]ost-conviction home incarceration is penal while "the purpose of *pre-trial bail* is not to punish, but rather it acts as 'security for the appearance of a defendant to answer to a specific criminal charge . . . at a specific time or at any time to which the case may be continued.'"

Gerald R., 2019 WL 5092946, at *3 (quoting *Jedediah C*., 240 W. Va. at 538, 814 S.E.2d at 201); *see also Hughes*, 197 W. Va. at 527-28, 476 S.E.2d at 198-99.

We decline to overrule or modify our prior rulings that post-conviction home confinement, whether imposed as a condition of bond or as an alternative sentence, is penal in nature. *See id*. §§ 62-11B-4 & 5. Thus, the only question before us is whether the Legislature's amendment to the Act, which gives circuit courts discretion to deny credit for

time served on post-conviction home confinement, is constitutional. In resolving this issue, our standard of review is well established:

> """In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question...." Syllabus Point 1, *Appalachian Power Co. v. Gainer,* 149 W. Va. 740, 143 S.E.2d 351 (1965).' Syl. Pt. 2, in part, *Hartley Hill Hunt Club v. County Commission of Ritchie County,* 220 W. Va. 382, 647 S.E.2d 818 (2007)."

Syl. Pt. 7, *Kanawha Cnty. Pub. Libr. Bd. v. Bd. of Educ. of Cnty. of Kanawha*, 231 W. Va. 386, 745 S.E.2d 424 (2013).

The petitioner contends that denial of credit for post-conviction home confinement violates the double jeopardy clause of the Constitution, W. Va. Const. art. III, § 5, in that it permits the court to impose a sentence which exceeds the maximum sentence allowed by law. *See, e.g.*, Syl. Pt. 1, in part, *Conner v. Griffith,* 160 W.Va. 680, 238 S.E.2d 529 (1977) ("The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution . . . prohibits multiple punishments for the same offense."). In support of her argument the petitioner relies on *Conner*, which although not directly on point is certainly instructive. In syllabus point two of *Conner*, this Court held that "[t]he failure to credit on the underlying sentence the time served on parole prior to the revocation of parole constitutes a multiple punishment for the same offense, and is a violation of the Double

Jeopardy Clause of the West Virginia Constitution, Article III, Section 5." 160 W. Va. at 680-81, 238 S.E.2d at 529. Inasmuch as we have consistently held that post-conviction home confinement is penal in nature, *see* text and note 10 *supra*, and further that the terms and conditions of post-conviction home confinement imposed on a defendant are far more restrictive than the terms and conditions imposed on a parolee, the rationale of *Conner* mandates our conclusion that a circuit court's failure to credit time served on post-conviction home confinement toward completion of a defendant's sentence violates article III, section 5 of the West Virginia Constitution.

It is readily apparent that it is not, and can never be, within a circuit court's discretion to impose a sentence that violates the constitutional command of West Virginia Constitution article III, section 5. We therefore hold that when a defendant is placed on post-conviction home confinement under terms and conditions which are set forth fully in the home incarceration order and encompass, at a minimum, the mandatory, statutory requirements enunciated in West Virginia Code section 62–11B–5 (2001), and the defendant complies with all such terms and conditions, a circuit court must credit the time served on home confinement toward the completion of the defendant's the sentence.[11] To the extent that West Virginia Code section 61-11B-11(b) (2005) may be read to authorize circuit courts, in their discretion, to refuse credit for a defendant's time served on post-

[11] We express no opinion as to whether credit for time served on post-conviction home confinement is mandatory in a situation where the defendant has not fully complied with the required terms and conditions.

conviction home confinement even where the statutory terms and conditions have been imposed and have been fully met, the statutory grant of discretion is unconstitutional as applied.[12]

PRE-TRIAL HOME CONFINEMENT

[12] As noted *supra*, the petitioner also contends that allowing a court to deny credit for post-conviction home confinement violates the equal protection clause of the West Virginia Constitution, W. Va. Const. art. III, § 10, in that it treats two groups of individuals differently: those who are denied bond and thus confined in jail pending sentencing, who are given credit against their sentences for time served, and those who are granted bond with the condition of home incarceration, who are not given credit. See Syl. Pt. 2, *Israel v. W. Va. Secondary Sch. Activities Comm'n,* 182 W. Va. 454, 388 S.E.2d 480 (1989) ("Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner. The claimed discrimination must be a product of state action as distinguished from a purely private activity."). We disagree. First, we note that this Court has never held that denial of credit for post-conviction home confinement violates a defendant's equal protection rights; we have considered the issue solely in the context of pretrial or post-conviction denial of credit for confinement in a correctional facility. *See* Syl. Pt. 1, *Martin v. Leverette*, 161 W. Va. 547, 244 S.E.2d 39 (1978) ("The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that time spent in jail, either pre-trial or post-trial, shall be credited on an indeterminate sentence where the underlying offense is bailable."); *see also State v. Slaughter*, 252 W. Va. 284, 287-88, 922 S.E.2d 284, 287-88 (2024) ("a defendant with means to post bond could end up serving less time on his or her sentence than an indigent defendant who could not post bond—an equal protection violation under our constitution."). Second, it cannot be said that defendants who are granted post-conviction home confinement are treated in a constitutionally disadvantageous manner, because even if their time is not credited against their sentences, they have nonetheless received a significant benefit not enjoyed by defendants remaining in jail: the freedom to spend time with family and friends and to put their affairs in order.

Accordingly, we decline to hold that the circuit court's denial of credit for the petitioner's time spent on post-conviction home confinement violated her equal protection rights under the facts and circumstances of this case.

The petitioner contends that because the terms and conditions of her pre-trial home confinement "encompass[ed], at a minimum, the mandatory, statutory requirements enunciated in [the statute]," her pre-trial confinement was therefore also penal under the rationale of *McGuire* and *Hughes*. We disagree, as neither of those cases contain any such holding. To the contrary, in both *McGuire* and *Hughes* this Court specifically found that the provisions of the Act were penal because they applied to "offenders," i.e., individuals who had been convicted either by way of a plea or a trial. *See McGuire*, 207 W. Va. at 460, 533 S.E.2d at 686, Syl. Pt. 1, in part; *Hughes*, 197 W. Va. at 520, 476 S.E.2d at 191, Syl. Pt. 3, in part.

Indeed, we have held in an unbroken line of decisions beginning with *Hughes* that pre-trial home confinement is not penal, and that credit for time served on pre-trial confinement is not credited toward a defendant's sentence:

> "'When a person who has been arrested, but not yet convicted of a crime, is admitted to pre-trial bail with the condition that he be restricted to home confinement pursuant to West Virginia Code § 62–1C–2(c) (1992), the home confinement restriction is not considered the same as actual confinement in a jail, nor is it considered the same as home confinement under the Home Confinement Act, West Virginia Code §§ 62–11B–1 to –12 (1993). Therefore, the time spent in home confinement when it is a condition of bail under West Virginia Code § 62–1C–2(c)[13] does not count as credit toward a sentence subsequently imposed.

[13] West Virginia Code section 62-1C-2(c) (1992) provides in relevant part that bail "may take any of the fallowing forms: . . . (c) Such other form as the judge of the court that will have jurisdiction to try the offense may determine."

Jedediah C., 240 W. Va. at 534, 814 S.E.2d at 197, Syl. Pt. 2 (citing *Hughes*, 197 W. Va. at 528, 476 S.E.2d at 199); *see also State v. Shepherd,* No. 22-791, 2024 WL 2032726, at *2-3 (W. Va. May 7, 2024) (memorandum decision); *State v. Newill*, No. 20-0471, 2021 WL 2581687, at *2 (W. Va. June 23, 2021) (memorandum decision); *State v. Gerald R.*, No. 18-0814, 2019 WL 5092946, at *3 (W. Va. Oct. 11, 2019) (memorandum decision); *State v. Barnett*, No. 12-0116, 2013 WL 949522 at *2 (W. Va. Mar. 12, 2013) (memorandum decision).[14]

Inasmuch as pre-trial home confinement is not penal in nature, and because we have specifically held that pre-trial home confinement imposed as a condition of bond is not the same as home confinement under the Act, *see Jedediah C.*, 240 W. Va. at 534,

[14] We do not believe that this Court's opinion in *State v. Carter*, 252 W. Va. 195, 919 S.E.2d 443 (2025) compels a different conclusion. In *Carter,* we found that the defendant, who escaped while awaiting trial on pre-trial home confinement, was in "custody" for purposes of the escape statute. The defendant in *Carter* argued that because home confinement is not penal, as this Court has held on numerous occasions, an individual on home confinement cannot be deemed to be "in custody." We disagreed:

> We are likewise unpersuaded by Mr. Carter's arguments regarding credit for time served on home incarceration. First, any distinction this Court has drawn between pretrial home incarceration and postconviction home incarceration based on the penal or punitive nature of the latter form of home incarceration does not support excluding the former form from the reach of the escape statute. This is so because one can escape from custody or confinement imposed "by virtue of a charge." Plainly, application of the escape statute does not turn on whether the custody or confinement is punitive, as no punishment has been imposed at the charge stage.

Carter, 252 W. Va. at 201, 919 S.E.2d at 449 (footnote omitted).

814 S.E.2d at 198, Syl. Pt. 2, in part, we conclude that there is no constitutional impediment to a circuit court's denial of credit for the time spent by the petitioner on pre-trial home confinement. Therefore, the circuit court neither erred nor abused its discretion in refusing to credit the petitioner's time spent on pre-trial home confinement.

IMPERMISSIBLE FACTOR CONSIDERED IN DETERMINING SENTENCE

The petitioner's final assignment of error is a challenge to the legality of her sentence based on her contention that the circuit court impermissibly considered her prior conviction of second-degree murder in determining the sentence to be imposed on her *Alford/Kennedy* plea to voluntary manslaughter.[15] As set forth *supra*, this argument hinges on a single statement contained in the court's written sentencing order: "Given the posture of this case, having been remanded for a new trial after a jury verdict to Second Degree

[15] Subsumed in the petitioner's argument on this issue is her contention that the circuit court failed to take her "right to rehabilitation" into account in determining the sentence to be imposed. The factual underpinning for this contention is the lengthy testimony given by Dr. David Clayman at sentencing to the effect that the petitioner had a spotless record while imprisoned on the initial second-degree murder conviction; that she had a spotless record during the entirety of her pre-trial and post-conviction home confinement following her *Alford/Kennedy* plea to voluntary manslaughter; and that she needs continuing therapy, which will not be available to her in prison, in order to complete a successful transition back into society. The record shows that the court gave consideration to Dr. Clayman's testimony but deemed that other factors – primarily that one element of the crime of voluntary manslaughter is an intent to kill, that the victim's family members testified as to their devastation over his death, and that the crime was a crime of violence involving the use of a firearm – outweighed the petitioner's ongoing efforts to change her life and become a productive member of her community.

Tellingly, the petitioner cites no authority for a "right to rehabilitation," and our research has found nothing to support a claim that a sentence of imprisonment is illegal if there is evidence that the petitioner could be rehabilitated in a less restrictive environment.

Murder, the Court believes that the Defendant already received substantial consideration in the current plea agreement which significantly reduced her possible sentence."

We begin by noting our well-established rule that "[s]entences imposed by the trial court, if within statutory limits and if not based on some impermissible[16] factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). Thus, in order to prevail on appeal, the petitioner must demonstrate that the circuit court committed clear error and relied on an impermissible factor in alluding to the history of this case as support for its conclusion that the maximum statutory sentence of fifteen years for voluntary manslaughter was as good a deal as the petitioner could reasonably expect under the circumstances.

The petitioner has cited no case law in support of her contention that the prior conviction was an impermissible factor, i.e., a factor whose consideration in the court's sentencing decision rendered the sentence illegal. To the contrary, we have found that "the impermissible factors a court should not consider in sentencing include such matters as 'race, sex, national origin, creed, religion, and socioeconomic status[.]'" *See State v. Moles*, No. 18-0903, 2019 WL 5092415, at *2 (W. Va. Oct. 11, 2019) (memorandum decision) (citing *United States v. Onwuemene*, 933 F.2d 650, 651 (8th Cir. 1991)); *see also State v.*

[16] We note that syllabus point four in *Goodnight* actually contains the word "unpermissible," which is clearly a typographical error. In the text of the opinion, 169 W. Va. at 371, 287 S.E.2d at 507-08, the Court cites *State v. Rogers*, 167 W. Va. 358, 360, 280 S.E.2d 82, 84 (1981) as the source of the language contained in the syllabus point; however, *Rogers* uses the correct term, "impermissible." Rather than carry a typographical error forward, we have amended syllabus point four of *Goodnight*.

Norman, No. 21-0374, 2022 WL 3931414, at *3 (W. Va. Aug. 31, 2022) (memorandum decision) (to similar effect). We agree with the petitioner that the circuit court's inclusion of the prior proceedings in its sentencing order was unfortunate, in that the petitioner's earlier conviction of second-degree murder was handed down by a jury which had not been instructed as to either of the petitioner's defenses to the charge. However, in the absence of any case law or scholarly analysis to support the petitioner's claim that the prior conviction was a factor whose consideration in the court's sentencing decision rendered the sentence illegal, we cannot conclude that the court erred or abused its discretion in this regard.

Additionally, both in the circuit court's oral remarks at sentencing and in its written order, the court explained the multiple factors it had taken into consideration: the fact that in admitting to a charge of voluntary manslaughter, the petitioner was admitting to having had an intent to kill; the fact that she used a firearm to kill Mr. Fagons; the anguish suffered by Mr. Fagons' family; the need for society to feel that a just punishment has been imposed for a serious crime; and the fact that the petitioner had intentionally taken a life, an act that merited a serious punishment. It is readily apparent that the court's inclusion of the case history was not a dispositive factor – if indeed, it was a factor at all – in its determination that the circumstances of the case warranted a maximum sentence on the petitioner's *Alford/Kennedy* plea to voluntary manslaughter.

IV. Conclusion

For the foregoing reasons, we affirm the circuit court's May 30, 2024, order in part; reverse in part; and remand with instructions that the court issue a corrected sentencing order crediting the petitioner's time spent on post-conviction home confinement.

Affirmed in part, reversed in part, and remanded