

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
at CHARLESTON

FILED
AUG 3 2005
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA
SUPREME COURT NO. 32768

STATE ex rel. JAMES WILLIAM GORDON,
APPELLANT/PETITIONER,

VS.

THOMAS McBRIDE, WARDEN
MOUNT OLIVE CORRECTIONAL COMPLEX
as THE STATE OF WEST VIRGINIA,
APPELLE/RESPONDENT.

APPELLANT'S BRIEF IN SUPPORT
FOR WRIT OF HABEAS CORPUS APPEAL

BRIEF PRESENTED BY:

JAMES WILLIAM GORDON
D.O.C. 27266
MT. OLIVE CORR. COMPLEX
ONE MOUNTAINSIDE WAY
MT. OLIVE, W.Va. 25185

James William Gordon
JAMES WILLIAM GORDON
APPELLANT/PETITIONER

TABLE OF AUTHORITIES

<u>WEST VIRGINIA CONSTITUTION</u>	<u>PAGE</u>
Article III, § 4	Numerous
Article III, § 5	10, 19
Article III, § 10	Numerous
Article III, § 14	Numerous
Article III, § 17	Numerous
<u>West Virginia Code</u>	
§ 28-5-27 et seq.	Numerous
§ 29-21-1 et seq.	2
§ 53-4A-1 et seq.	Numerous
§ 61-8B-3	Numerous
§ 61-11-24	14
§ 62-12-13 et seq.	Numerous
<u>W.Va. Case Law</u>	
State ex rel. Burgett v. Oakley, 155 W.Va. 276, 184 S.E.2d 318 (1971)	5
Gibson v. Dale, 173 W.Va. 681, 319 S.E.2d 806 (1984)	5
Billotti v. Dodrill, 183 W.Va. 48, 394 S.E.2d 39 (1990)	6
State v. Rogers, 189 W.Va. 402, 434 S.E.2d 402 (1993)	6
Losh v. McKenzie, 166 W.Va. 762, a77 S.E.2d 606 (1981)	7
Ford v. Coiner, 156 W.Va. 362, 196 S.E.2d 91 (1972)	7
Markley v. Coleman, 215 W.Va. 729, 401 S.E.2d 49 (2004)	8
State ex rel. Watson v. Hill, 200 W.Va. 201, 488 S.E.2d 476 (1997)	8
State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977)	13
Tasker v. Mohn, 165 W.Va. 55, 267 S.E.2d 183 ()	13, 18
Rowe v. Whyte, 167 W.Va. 668, 280 S.E.2d 301 (1981)	13, 18
State ex rel. Smith v. Skaff, 187 W.Va. 651, 420 S.E.2d 922 (1992)	13
Nibert v. Carroll Trucking Co., 139 W.Va. 583, 82 S.E.2d 445 (1954)	13
State v. England, 180 W.Va. 342, 376 S.E.2d 548 (1988)	13
Vance v. Holland, 177 W.Va. 607 (1987)	13, 18
Adkins v. Bordenkircher, 164 W.Va. 292 (1980)	17
State v. Woodward, 68 W.Va. 66 (1910)	19
State v. Wamsley, 68 W.Va. 104 (1910)	19

<u>W.Va. Rules of Appellant Procedure</u>	
Rule 10	1
<u>W.Va. Rules of Civil Procedure</u>	
Rule 17	7
<u>United States Constitution</u>	
Article 1, § 9	7
Amendment 5	10
Amendment 8	10,19
Amendment 14	10,19
<u>U.S. Federal Cases</u>	
Miller v. Boles, 248 F.Supp. 49 (N.D.W.Va. 1965)	5,7
Sheftic v. Boles, 377 F.2d 423 (4th Cir. 1967)	5,7
Strickland v. Washington, 466 U.S. 688, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674, 696 (1984)	6
Hamrick v. Boles, 229 F.Supp. 570 (N.D.W.Va. 1964)	14
Greenholtz v. Nebraska, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979)	19

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
at CHARLESTON

STATE ex rel. JAMES WILLIAM GORDON,
APPELLANT/PETITIONER,

vs.

SUPREME COURT NO. 32768

THOMAS McBRIDE, WARDEN
MOUNT OLIVE CORRECTIONAL COMPLEX
as THE STATE OF WEST VIRGINIA,
APPELLE/RESPONDENT.

APPELLANT'S BRIEF IN SUPPORT
FOR WRIT OF HABEAS CORPUS APPEAL

Comes now, James William Gordon, Appellant/Petitioner, pro se, and doth present Appellant's Brief In Support For Writ of Habeas Corpus, to the Honorable Supreme Court of Appeals of the Great State of West Virginia, pursuant to West Virginia Rules of Appellant Procedure, Rule 10, for consideration and thus ruling by opinion of the Court.

TIMELINESS

By ORDER of the West Virginia Supreme Court of Appeals, entered 29 June, 2005, granting petition for appeal, referenced above, and being received by the appellant 5 July, 2005, with orders of Appellant's Brief to be filed within (30) thirty days of receipt of ORDER, and being within that (30) thirty day parameter, appellant avers his Brief timely filed.

STATEMENT OF FACTS

Appellant, James William Gordon, was indicted by Wood County Circuit Court Grand Jury on an (8) eight-count indictment alleging various sexual offenses, filed 20 February, 1998. Appellant's case was assigned the Honorable Judge George W. Hill. Appellant entered into a plea agreement with the State to (2) two counts of the indictment (counts (1) one and (5) five). He was sentenced within statutory provisions of West Virginia Code, §61-8B-3(1984 version) and sentenced to (15) fifteen to (25) twenty-five years in prison, run consecutively, for a total of (30) thirty to (50) fifty years in prison. No direct appeal was taken by counsel, Mr. Joseph Santer, Esq., because appellant's understanding that, pleading guilty to the charges, appellant waived or gave up all his constitutional rights and could not later ask that they be restored to him or rely upon any of them. Appellant received this understanding during his plea hearing from the Honorable Judge George W. Hill (See Exhibit One, Plea Agreement Hearing, June 18, 1998, filed July 7, 1998, pgs. 6-7).

Appellant filed Petition for Writ of Habeas Corpus Ad Subjiciendum, pursuant to W.Va. Code, § 53-4A-1 et seq., as amended, with motion for appointment of counsel, motion for omnibus habeas corpus hearing, Habeas Corpus Filing Form "A" and "B" (Affidavit for Indigency), and Civil Information Statement with the Circuit Clerk of Wood County, W.Va. on October 28, 2004, with directions to the Clerk to advise of appointment of counsel (due to appellant's indigency, pursuant to W.Va. Code, § 29-21-1 et seq.) . The Honorable Circuit

Court Judge George W. Hill was assigned the case and denied appellant's petition and all motions without a comprehensive ORDER including the finding of facts and conclusion of law on the merits of the issue addressed by appellant, nor a notation that appellant was advised concerning his obligations to raise all grounds for postconviction relief in one proceeding by an ORDER of the Court entered on November 3, 2004. It is noteworthy that the circuit court denied the petition on a singular ground that was not raised in the petition. The issue of unconstitutional statutory sentencing, which was the only issue advanced by appellant, was not addressed by the court. Thus, appellant's petition was improvidentially denied. No hearings were held and no appointment of counsel was granted for appellant to establish his cause, making a mockery of the writ of habeas corpus and its esteemed value and constitutional protections. (See Exhibit Two, ORDER DENYING WRIT OF HABEAS CORPUS PETITION, entered on November 3, 2004).

Appellant filed Notice of Intent to Appeal with the Circuit Clerk on November 16, 2004, with the actual appeal being filed with this Honorable Court on January 11, 2005. This Court **GRANTED** appellant's appeal by **ORDER** entered on June 29, 2005. (See appellant's Exhibit Three, Order Granting Habeas Appeal, entered June 29, 2005).

MEMORANDUM BRIEF

Was Petitioner denied his constitutional right to meaningful habeas corpus review, procedural protections, statutory mandates and appointed counsel in direct violation of West Virginia Constitution, Article III, § 4, 10, 14, and 17, warranting remand or other relief?

Appellant James William Gordon filed:

- a) Formal Petition for Writ of Habeas Corpus Ad Subjiciendum with appendix;
- b) State Habeas Corpus Filing Form Part "A"
- c) State Habeas Corpus Filing Form Part "B" (Affidavit of Indigency);
- d) Motion for Omnibus Habeas Corpus Hearing;
- e) Motion for appointment of counsel;
- f) Civil Information Statement; and,
- g) Letter to Wood County Circuit Clerk with directions.

Appellant's Application for Writ of Habeas Corpus Ad Subjiciendum was filed and docketed by the Wood County Circuit Clerk on October 28, 2004, with the case being assigned to the Honorable Judge George W. Hill. Apparently the Honorable Judge George W. Hill made an ex parte ORDER denying the Petition for Writ of Habeas Corpus Ad Subjiciendum and all motions on a single ground that was not advanced by the appellant. The issue of unconstitutional statutory sentencing, which was the only issue advanced by appellant, was not addressed by the court. Thus, appellant's petition was improvidentially denied. No hearings were held and no appointment of counsel was granted for appellant to establish his cause, making a mockery of the writ of habeas corpus and its esteemed value and constitutional protections. (See Exhibit Two, ORDER DENYING WRIT OF HABEAS CORPUS PETITION, entered on November 3, 2004).

" The privilege of the writ of habeas corpus shall not be suspended..." West Virginia Constitution, Article III, § 4 in part.

"The privilege of the writ of habeas corpus is guaranteed by West Virginia Constitution, Article III, § 4." Miller v. Boles, 248 F.Supp. 49 (N.D.W.Va. 1965); Modified on other grounds, Sheftic v. Boles, 377 F2d 423 (4th. Cir. 1967).

" The writ of habeas corpus is guaranteed by both the Federal and State Constitutions." State ex rel. Burgett v. Oakley, 155 W.Va. 276, 184 S.E.2d 318 (1971).

" It is clear that our postconviction habeas corpus statute, West Virginia Code, §53-4A-1 et seq. contemplates that a person who has been convicted of a crime is ordinarily entitled to one postconviction habeas corpus proceeding." Syllabus Point One, Gibson v. Dale, 173 W.Va. 681, 319 S.E.2d 806 (1984).

" A habeas corpus petitioner is entitled to careful consideration of his grounds for relief, and the court before which the writ is made returnable has a duty to provide whatever facilities and procedures are necessary to afford the petitioner an adequate opportunity to demonstrate his entitlement to relief. Syllabus Point 5, Gibson v. Dale.

Appellant was given no habeas corpus proceeding as contemplated by West Virginia Code, § 53-4A-1 et seq.; Nor was he given careful consideration of his grounds for relief, inasmuch as the court failed to rule on his only asserted ground; Nor was he given the necessary facilities and procedures necessary to afford him an adequate

opportunity to demonstrate his entitlement to relief, because the court failed to appoint counsel for him, upon motion, as an indigent, pro se habeas corpus petitioner, and no hearings were held, making a mockery of the writ of habeas corpus and its esteemed value and constitutional protections.

"Through the interpretation of Article III, § 10 and Article III, § 17 of the Constitution of West Virginia, this Court has recognized a constitutional right to petition for appeal in criminal cases and has also "constitutionalized" the criminal defendant's right to receive a free transcript, appointment of counsel, and the effective assistance of counsel in appellant proceedings." Syllabus Point 3, Billotti v. Dodrill, 183 W.Va. 48, 394 S.E.2d 32(1990); Restated, State v. Rogers, 189 W.Va. 402, 434 S.E.2d 402 (1993).

Further, it has been held that "actual or constructive denial of the assistance of counsel... is legally presumed to result in prejudice. Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed. 2d 674, 696 (1984). Appellant was denied "actual and constructive" assistance of counsel by the circuit court. The denial of "effective" assistance of counsel can therefore be presumed in this case as there was no assistance of counsel, chilling and denying meaningful habeas corpus by an indigent, incarcerated, pro se petitioner, a lay person at law.

In the Great State of West Virginia, due process and equal protection set forth certain and specific process and procedural

requirements within the constitutional parameters of habeas corpus, with the appointment of counsel for the indigent. West Virginia Constitution, Article III, §§ 10, 14, and 17; West Virginia Code, § 29-21-1 et seq.; and West Virginia Rules of Civil Procedure, Rule 17.

In Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981), it was well established that certain and specific procedural safeguards were necessary and required to vivate West Virginia's habeas corpus statute, West Virginia Code, § 53-4A-1 et seq., to establish a procedural bar on future state proceedings and to meet exhaustion requirements as enunciated by the federal habeas corpus courts and federal habeas guarantee. United States Constitution, Article 1, § 9; Miller v. Boles, 248 F.Supp. 49 (N.D. W.Va. 1965); Modified on other grounds, Sheftic v. Boles, 377 F.2d 423 (4th. Cir. 1967).

"In general, the post-conviction habeas corpus statute, W.Va. Code, 53-4A-1 et seq. [1967] contemplates that every person convicted of a crime shall have a fair trial in the circuit court, an opportunity to apply for an appeal to this Court, and one omnibus post-conviction habeas corpus hearing at which he may raise all collateral issues which have not previously been fully and fairly litigated." Losh, 166 W.Va. at 764. It was also held that "when the petitioner makes a prima facie case that he was denied a fair trial or his constitutional rights, the circuit court is obligated at some point to afford him an opportunity to offer proof to meet the burden of Ford, supra." Losh, 166 W.Va. at 765, citing Ford v. Coiner, 156 W.Va. 362, 196 S.E.2d 91 (1972).

"[A] circuit court denying or granting relief in [a] habeas corpus proceeding is statutorily required to make specific findings of fact and conclusions of law relating to each contention advanced by petitioner, and to state [the] grounds upon which [the] matter was determined." Syllabus Point 4, Markley v. Coleman, 215 W.Va. 729, 601 S.E.2d 49 (2004); Syllabus Point 1, State ex rel. Watson v. Hill, 200 W.Va. 201, 488 S.E.2d 476 (1997).

The Circuit Court of Wood County, by the Honorable Judge George W. Hill, denied appellant's petition for writ of habeas corpus ad subjiciendum, and did not make the statutorily required specific findings of fact and conclusion of law relating to the one (1) contention advanced by the appellant, and did not state the grounds upon which the matter was determined. Instead the court denied the petition on a contention that was not raised. Therefore, the court did not carefully consider appellant's ground for relief and did not afford him an adequate opportunity to demonstrate his entitlement to relief. Appellant's due process, procedural protections, statutory mandates, and habeas corpus rights were quashed by the court without even the most fundamental and rudimentary bedrock principles being afforded him, such as, appointment of counsel, or even effective assistance of counsel as an indigent defendant in appellant proceedings.

Appellant has been denied even rudimentary due process, obliterating any premise of protection of his habeas corpus constitutional right. The merits of the factual dispute were not resolved in the circuit court; the fact finding procedure employed by

the court was not adequate to afford a full and fair hearing; the material facts were not adequately developed; and the court did not afford the appellant a full and fair fact hearing, as required by the concepts of due process, nor considered additional grounds upon appointment of counsel and that counsel's review of record, which makes a mockery of the judicial process and "chills" any real and meaningful habeas access.

WHEREFORE, Appellant asserts that when a petitioner makes a prima facie case that he was denied his constitutional rights, the circuit court is obligated at some point to afford him an opportunity to offer proof to meet the burden of Ford, and the court did not carefully consider appellant's ground for relief and did not afford him an adequate opportunity to demonstrate his entitlement to relief, the circuit court denied his constitutional right to meaningful habeas corpus review, procedural protections, statutory mandates and appointed counsel in direct violation of West Virginia Constitution, Article III, § 4, 10, 14, and 17, warranting remand or other relief.

Is West Virginia Statutory Code, § 61-8B-3 (1984 version) unconstitutional as it denies, by applicable sentence, any parole consideration mandated by West Virginia Code, § 62-12-13, as amended, thus denying due process and equal protection in derogation of Article III, § 10 and 14 of West Virginia Constitution and Amendments Five and Fourteen, United States Constitution warranting invalidation of Statute or other relief?

Appellant was convicted of (2) two counts of Sexual Assault in the First-Degree in violation of West Virginia Code, § 61-8B-3 (1984 version). Appellant was sentenced by the Wood County Circuit Court on 28 September, 1998, to (2) two (15-25) fifteen to twenty-five year sentences in prison, with the sentences to run consecutively to one another by the Honorable Judge George W. Hill.

Appellant contends that the circuit court, by applying the statutory provisions of West Virginia Code, § 61-8B-3 (1984 version), is violating his due process and equal protection rights. Appellant's contention is that the sentence of (15-25) fifteen to twenty-five years, in consideration of other applicable statutes, deprives him of ever seeing the parole board prior to discharge of his sentence.

Appellant contends that further, this total denial of parole eligibility or early release constitutes cruel and unusual punishment, West Virginia Constitution, Article III, § 5, and United States Constitution, amendment 8, in light of the fact that even those convicted of murder are eligible for parole.

MEMORANDUM OF BRIEF

Gordon asserts that West Virginia Statutory Code, § 61-8B-3 (1984), as amended, denies him the right to parole consideration or the possibility of early release from his sentence. This constitutes cruel and unusual punishment; and, with the legislature having recognized this error, changed this statute, it now carries a statutorily permissible sentence of ~~(15-35)~~ fifteen to thirty-five years, which means a chance to see the parole board before discharge.

West Virginia Code, § 62-12-13(b) "Any inmate of a state correctional center is eligible for parole if he or she: "§ 62-12-13(b)(1)(A) Has served the minimum term of his or her indeterminate sentence..." or as in this case the inmate becomes eligible for parole consideration after serving (30) thirty years.

However, West Virginia Code, § 28-5-27(a)(1984) provides: "All inmates now in the custody of the commissioner of corrections, or hereafter committed ... , except those committed pursuant to article four [§§ 25-4-1 et seq.], chapter twenty-five of this code, shall be granted commutation from their sentences for good conduct in accordance with this section."

W.Va. Code, § 28-5-27(c), (1984): "Each inmate committed to the commissioner of corrections and incarcerated in a penal facility pursuant to such commitment shall be granted one day of good time for

each day he or she is incarcerated ...” This GOOD TIME is computed upon arrival at the institution by the West Virginia Parole Board, or a time sheet called the minimum discharge sheet. The information given tells the inmate the following (as relevant to Gorden):

Sentencing Date: 09-24-1998

Effective Sentencing Date: A) 09-24-98 JC
B) Expiration of A

Minimum Discharge Date: A) 03-24-2011
B) 09-24-2023

Parole Eligibility Date: September 20, 2028(See Exhibit 4)

with the good time taken from the back end of the sentence. On the sentence of (15-25) fifteen to twenty-five years, with good time factored in, the sentence becomes (15-12½) fifteen to twelve and a half years, with no opportunity to be paroled. Further, the inmate who is serving a determinant sentence is considered for parole after serving one third of his total sentence.

Therefore, all inmates not serving natural life, are mandated to see the parole board for consideration of release on parole, all except those sentenced by the sentence of (15-25) fifteen to twenty-five years. These inmates are denied the opportunity to be considered on their rehabilitative efforts. This violates due process and equal protection of the law. W.Va. Constitution, Article III, § 10. And further, the legislative command that the goal of the West Virginia Penal System shall be rehabilitation, which was enacted upon the citizens (voters) empowering the legislature.

Legally, "One convicted of a crime and sentenced to penitentiary is never entitled to parole; he shall be considered for parole only after he becomes eligible therefore under appropriate statute." State v. Lindsey, 160 W.Va. 284 (1977); West Virginia Code, § 62-12-13(a).

Parole statute creates reasonable expectation interest in parole to these prisoners meeting its objective criteria. Tasker v. Mohn, 165 W.Va. 55 (1980); Rowe v. Whyte, 167 W.Va. 668 (1981); State ex rel. Smith v. Skaff, 187 W.Va. 651 (1992); West Virginia Code, § 62-12-13 et seq.; West Virginia Constitution, Article III, § 10.

The purpose of the parole system is to afford to a person convicted and sentenced to imprisonment an opportunity to reform and, by demonstrating his determination to do so, to become a law-abiding member of society. Nibert v. Carroll Trucking Co., 139 W.Va. 583 (1954).

Right to parole eligibility is available under general parole statute, where life sentence statute contains no specific statutory language prohibiting parole. State v. England, 180 W.Va. 342 (1988); West Virginia Code, § 62-12-13 et seq.

Release on parole is a substantial liberty interest and the procedures by which it is granted or denied must satisfy due process standards. Tasker v. Mohn, 165 W.Va. 55 (1980); Rowe v. Whyte, 167 W.Va. 668 (1981); Vance v. Holland, 177 W.Va. 607 (1987).

When the prisoner has received an indeterminate sentence, the minimum sentence shall be considered as an eligibility date for parole consideration but does not confer in the prisoner the right to be released as of that date. West Virginia Code, § 62-12-13a (1955, c. 42).

West Virginia Code, § 62-12-13a, fixes parole eligibility at expiration of minimum sentence with reference to an indeterminate sentence, rather than the usual one-third of a definite sentence. Hamrick v. Boles, 229 F.Supp. 570 (N.D. W.Va. 1964).

Petitioner contends that West Virginia Statutory Code, § 61-8B-3 (1984 version), as amended, denies him the right to statutory mandated parole consideration before discharge of sentence.

Petitioner states that under West Virginia Code, § 28-5-27 (Good Time Law), each inmate committed to the custody of the Commissioner of Corrections and incarcerated in a penal facility pursuant to such commitment shall be granted one day good time for each day he or she is incarcerated, including any and all days in jail awaiting sentence and which is credited by the sentencing court to his or her sentence pursuant to West Virginia Code, § 61-11-24, or for any other reason relating to such commitment. An inmate under two (2) or more consecutive sentences shall be allowed good time as if the several sentences, when the maximum terms thereof are added together, were all one sentence.

In effect, Petitioner has a (50) fifty year sentence. Under West Virginia Code, § 28-5-27, with a day for day credit of good time, he will discharge his sentence before becoming eligible for parole. To discharge the (2) two, (15) fifteen to twenty - five(25) year sentences, the Petitioner must serve ~~thirty~~ (30) years. Therefore, Petitioner is deprived of any chance of parole consideration prior to the discharge of his sentence, which is in direct violation of his statutory right to be considered for parole before the discharge of his sentence.

A sentence of fifteen to twenty-five years does not allow for the possibility of parole or the advantages of rehabilitative procedures of this state that other prisoners are afforded that are not doing a fifteen to twenty-five year sentence. The Petitioner is deprived of the statutory right given to other inmates for parole consideration as the West Virginia Code, due process, and equal protection clauses of the West Virginia Constitution so amply provide for.

A statute, when testing its constitutionality, should be read on its face. The language of West Virginia Code, § 61-8B-3 (1984) as amended, is quite clear. It provides a penalty of fifteen (15) to twenty-five (25) years for the violation of the statute. Under West Virginia Code, § 28-5-27, absent the Petitioner losing good time during his term of incarceration, he will discharge his sentence before being considered for parole.

In furtherance of the Petitioner's contention is the fact that, West Virginia Code, § 61-8B-3 (1984) permits parole eligibility in fifteen (15) years; however, when factoring in West Virginia Code, § 28-5-27(c), and tabulating his mandatory "good time" allowance, the maximum amount of his sentence is again twelve and one half (12½) years, effectively denying any consideration for parole prior to discharge of the sentence expiration. Thus a redundancy.

In the instant case, this Petitioner was sentenced to fifteen (15) to twenty-five (25) years in prison on each count, which means, by the terms of West Virginia Code, §28-5-27(e), thirty to fifty years. Then, factoring in good time, West Virginia Code, § 28-5-27(c), his sentence becomes a (30) thirty year minimum sentence and (25) twenty-five year maximum sentence, with no parole eligibility. The Petitioner receives no parole consideration on this sentence at all. This is a collateral consequence of the sentence structure which violates the provisions of West Virginia Code, § 62-12-13 et seq.

West Virginia Code § 61-8B-3 has been amended three times where the courts recognized that the (10-20) ten to twenty year sentence (1976 version) was an illegal application, after the good time statute came into effect. The legislature then applied the sentence of (15-25) fifteen to twenty five years amended in 1984. Again a redundancy occurs and in 1991 they again amended to the current (15-35) fifteen to thirty five year sentence making a legal application. See the Parole Board in fifteen years, discharge in seventeen and one-half years.

Thus, a legal application of the four statutes, West Virginia Codes, § 61-8B-3; § 62-12-13 et seq.; § 28-5-27(c); and § 28-5-27(e) in total harmonization.

Based upon the contradiction between the statutes affecting sentencing, parole eligibility, and axiomatic good time provisions, it is abundantly clear the 1984 version of W.Va. Code, § 61-8B-3 is unconstitutional on its face, and the sentencing structure must be corrected, as it is unenforceable and void as it is codified because it denies the petitioner the statutory right to parole consideration prior to discharge of his sentence or the goal of the penal system, being rehabilitation, thus constituting cruel and unusual punishment.

A superseding law or administrative rule cannot change the conditions of parole eligibility to the detriment of an imprisoned offender without running a foul of the ex post facto clause. Adkins v. Bordenkircher, 164 W.Va. 292 (1980). The critical issue is not whether a change in the actual date of release has been effected, but whether the standards by which the petitioner's date of release has been altered to his detriment. In the instant case, the petitioner's being denied any parole consideration prior to discharge is clearly a detriment to him and violative of the statutory provisions mandating that all inmates are eligible for parole consideration who are not sentenced to natural life. West Virginia Code, § 62-12-13 et seq.

Eligibility for parole is a matter provided for by statute. West Virginia Code, § 62-12-13 et seq. When effectuated, West Virginia Code, § 61-8B-3 (1984) denies exactly what § 62-12-13 commands, of course, this is after factoring in the statutory good time provisions commanded in West Virginia Code, § 28-5-27 which is day for day, computed upon arrival at West Virginia Department of Corrections, which is determinative of the inmates parole eligibility date or date the inmate is permitted to see the parole board for consideration of release. The petitioner herein, has been sentenced to (30-50) thirty (30) to fifty (50) years on his sentences by the provisions of § 61-8B-3(1984). He will not see the parole board on this sentence. His liberty interests, due process rights, and equal protection rights are all violated by this sentence application or portion of § 61-8B-3(1984).

In SUM, release on parole is a substantial liberty interest (protected by due process); and, the procedures by which it is granted or denied must satisfy due process standards (as well as equal protection). This is a well settled point. See, Tasker v. Mohn, 165 W.Va. 55 (1980); Rowe v. Whyte, 167 W.Va. 668 (1981) and, Vance v. Holland, 177 W.Va. 607 (1987).

By denying the Petitioner a statutory right to parole consideration prior to discharge of his sentence, the State (respondent) is denying his fundamental right to a vested liberty interest protected within the due process and equal protection clauses of West Virginia Constitution, Article III, § 10, which flies in the face of democracy and fundamental fairness entitled all State citizens.

Further, "the legislature has power to create and define crimes and fix their punishments, provided only that such punishment is not cruel or unusual or disproportionate to the offense." State v. Woodward, 68 W.Va. 66 (1910); State v. Wamsley, 68 W.Va. 104 (1910); Greenholtz v. Nebraska, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979) where it has been found that denying any parole consideration is in violation of United States Constitution, Amendment 8; which would make it imposed upon the State of West Virginia by virtue of the Supremacy Clause, and United States Constitution, Amendment 14; undoubtedly, in violation of West Virginia Constitution, Article III, § 5 as well.

"A state may establish a parole system, but it has no duty to do so, and to insure that the state-created parole system serves the public interest purposes of rehabilitation and deterrence, the state may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority." Syllabus Point 7, Greenholtz.

According to West Virginia Code, § 62-12-13 (1997 Version) (which Appellant does fall under), to be eligible for parole consideration,

"...Any inmate of a state correctional center, to be eligible for parole:

- (1) (A) Shall have served the minimum term of his or her indeterminate sentence, or shall have served one fourth of his or her definite term sentence, as the case may be, except that in no case shall any person who

committed, or attempted to commit a felony with the use, presentment or brandishing of a firearm, be eligible for parole prior to serving a minimum of five years of his or her sentence or one third of his or her definite term sentence, whichever shall be the greater....."

By denying the appellant parole consideration before the discharge of his sentence, he is being denied consideration by the parole board of (a) written reports of the warden or superintendent of the state correctional center to which such inmate was sentenced. This report contains the inmates (b) conduct record while in custody, including a detailed statement showing (c) any and all infractions of disciplinary rules by the inmate and (d) the nature and extent of discipline administered for those infractions; (e) on improvement or other changes noted in the inmate's mental and moral condition while in custody, (f) including a statement expressive of the inmate's current attitude toward society in general, toward the judge who sentenced him or her, toward the prosecuting attorney who prosecuted him or her, toward the policeman or other officer who arrested the inmate and toward the crime for which he or she is under sentence and (g) his or her previous criminal record; (h) on the inmate's industrial record while incarcerated; (i) nature and kinds of employment which he or she is best fitted to perform and in which the inmate is most likely to succeed when he or she leaves prison; (j) and, the current physical, mental and psychiatric examinations of the inmate. Other considerations include the (k) adequacy of parole plan; (l) family status and community ties, etc. In general, the object of the penal system is denied to this inmate by not having any parole

consideration prior to release, which runs afoul of rehabilitative mandates.

Therefore, Petitioner avers that West Virginia Code § 61-8B-3 (1984) commands a statutory sentence of (15-25) fifteen to twenty five years in prison does not permit him to see the parole board prior to discharge of that sentence. Further, it denies him the State's goal of incarceration which is rehabilitation by permitting no consideration of his rehabilitative efforts; nor, the mandated goal of confinement in the least restrictive manner, which would of course, include release on parole, even with its conditions, meeting the liberty interest concerns. Due process requires at a minimum the right to be heard.

Statutory commands permit the legislature wide berth when making a statute; however, the laws the legislature creates are subject to review by the judicial system when, as here, the legislature has created a statute, that is in part (sentencing) an illegally adaptable perversion of law.

The plain facts are clear, and the statutory sentencing has been corrected; however, this does not relieve the burden that has been cast upon Mr. Gorden. Mr. Gorden is currently under the burden of incarceration and remains in prison under a statutorily impermissible sentence. He seeks redress.

APPROPRIATE REMEDY

In consideration of West Virginia Code, § 61-8B-3 (1984), the only appropriate remedy would be to find the (15-25) fifteen to twenty - five year sentence in violation of the petitioner's rights as an unconstitutional sentence in direct violation of the United States Constitution, Amendment 8 and West Virginia Constitution, Article III, § 5 and void the sentencing portion of the statute. Thereafter to enact a (1-5) one to five year sentence, the only lesser legal sentence in this section.

Wherefore, the petitioner having presented viable constitutional questions of law and having shown a breach of those constitutional rights belonging to the individual citizen, and being a citizen of this State and the United States and entitled to those protections seeks relief by this Honorable Court of Appeals.

Respectfully Submitted,



James William Gorden,
Petitioner/Appellant
pro se

Brief Prepared By:

Lloyd Buckhannon

D.O.C. 32453

Mt. Olive Corr. Complex

One Mountainside Way

Mt. Olive, WV. 25185

(As Jailhouse Lawyer; Not an attorney)


Lloyd Buckhannon

VERIFICATION

Now comes the Appellant, James William James, by pro se, and states that the facts and information contained in his APPELLANT'S BRIEF IN SUPPORT FOR HABEAS CORPUS APPEAL are true and correct to the best of his knowledge and belief and have been offered by him in good faith to the best of his ability.

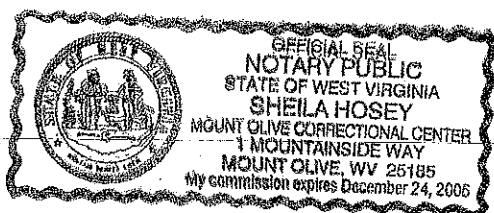
Respectfully submitted,

James William Gordon 27226 8/1/05
James William Gordon D.O.C. Number Date
Mt. Olive Correctional Complex
One Mountainside Way
Mt. Olive, WV. 25185

STATE OF WEST VIRGINIA

COUNTY OF FAYETTE, TO WIT:

Taken, subscribed, and sworn to before me the undersigned Notary Public in and for Fayette County, W.V., this 1st day of August, 2005.



Notary Seal

Sheila Hosey
Notary Public

CERTIFICATE OF SERVICE

Now comes the Appellant herein, James William Gordon, and doth certify that a true and exact copy of the foregoing Appellant's Brief IN Support For Writ of Habeas Corpus Appeal, has been mailed to the Appellee's Counsel of record by placing same in the United States Mail, First-Class Postage prepaid and addressed as follows:

The Honorable Dawn E. Warfield
Deputy Attorney General
Room E-26, Ground Floor
Main Unit, State Capitol
Charleston, WV. 25301

this 2 day of August, 2005.

Sworn to by Signature affixed;

James William Gordon
Mr. James William Gordon, Appellant/Petitioner

2 August 05
Date