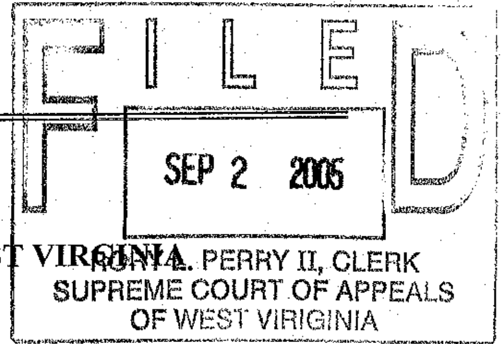

NO. 32768

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
JAMES WILLIAM GORDON,

Appellant,

v.

THOMAS McBRIDE, WARDEN,
MOUNT OLIVE CORRECTIONAL
COMPLEX,

Appellee.

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal by James William Gordon (hereinafter "Appellant") of an order of the Circuit Court of Wood County (George W. Hill, Judge), dated November 3, 2004. The order denied the Appellant's petition for a writ of habeas corpus.

On appeal, the Appellant contends that the circuit court erred in denying his habeas petition without addressing the merits of his constitutional claim. He also asks this Court to declare the statute under which he was sentenced, West Virginia Code § 61-8B-3 (1984), to be unconstitutional on its face.

The State agrees that the lower court's rationale for dismissing the Appellant's habeas petition was flawed. However, the circuit court's decision to deny Appellant habeas corpus relief in this matter should nevertheless be affirmed by this Court.

II.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In February of 1998 Appellant was indicted by the Grand Jury of Wood County on six counts of sexual assault in the first degree and two counts of sexual abuse in the first degree. (R. 1-4.) Both of the victims were under the age of 11, and the Appellant was over the age of 40 at the time of the offenses. On June 18, 1998, the Appellant entered a plea of guilty to Counts 1 and 5 of said indictment, each of which counts charged the Appellant with sexual assault in the first degree, in violation of West Virginia Code § 61-8B-3 (1984). (R. 34-35.) By order entered September 28, 1998, the circuit court sentenced the Appellant upon his plea to a term of 15 to 25 years on each count, said sentences to run consecutively, for an effective sentence of 30-50 years.[1] (R. 37-38.)

On October 28, 2004, the Appellant filed a petition for a writ of habeas corpus in the Circuit Court of Wood County attacking the legality of his sentence. In his petition, he listed one ground for relief: "Is West Virginia Code, § 61-8-B-3 (1985) [sic] unconstitutional in that it denies the Petitioner statutory right to parole consideration?" (R. 60.)[2]

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[1]Because the offenses to which Appellant pled guilty occurred in January 1985, he was sentenced under the 1984 version of West Virginia Code § 61-8B-3, which provided for a sentence of not less than 15 nor more than 25 years. The statute was subsequently amended to provide a penalty of 15 to 35 years.

[2]Given the statutory scheme for the awarding of "good time" to prisoners (West Virginia Code § 28-5-27), if the Appellant does not have any of his "good time" revoked, he will discharge his sentences before he becomes eligible for parole under West Virginia Code § 62-12-13(b).

On November 3, 2004, the circuit court entered an order summarily denying the petition, without addressing the constitutional issue.[3] The order stated in its entirety:

> On October 28, 2004, the defendant filed his Petition for Writ of Habeas Corpus. In his Petition, the defendant alleges that the undersigned informed him that he could not file an appeal on a guilty plea. Upon reviewing the transcripts of the guilty plea hearing held June 18, 1998 and the sentencing hearing held September 28, 1998, the Court FINDS that the defendant was not so informed.
>
> Therefore, the Petition for Writ of Habeas Corpus is hereby DENIED.
>
> The Clerk is directed to mail a copy of this order to the defendant.

(R. 101.)

On January 11, 2005, Appellant filed an appeal to this Court, seeking a remand to the circuit court for a determination of the constitutional question presented in his petition, or in the alternative that this Court take original jurisdiction to decide the issue. This Court granted the appeal, by order dated June 29, 2005.

III.

ASSIGNMENT OF ERROR

Appellant's Petition for Appeal presented one assignment of error – that Appellant was denied his constitutional right to meaningful habeas corpus review when the Circuit Court of Wood County failed to appoint counsel, conduct an evidentiary hearing, or make specific findings on the merits of the constitutional question presented. In his brief to this Court, the Appellant also argues the merits of his original claim that the sentence prescribed by West Virginia Code § 61-8B-3 (1984) is unconstitutional because it denies Appellant the parole consideration mandated by West Virginia Code § 62-12-13.

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[3]In so doing, the court apparently seized upon a statement by Appellant in his petition, explaining why he had not appealed his sentence. (*See* R. at 59.)

IV.

STANDARD OF REVIEW

Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, this Court applies a *de novo* standard of review. *E.g., Bass v. Rose,* 216 W. Va. 587, 609 S.E.2d 848 (2004).

> "This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 3, *Barnett v. Wolfolk,* 149 W.Va. 246, 140 S.E.2d 466 (1965).

Syl. Pt. 4, *White v. Haines*, 215 W. Va. 698, 601 S.E.2d 18 (2004) (*per curiam*); Syl. Pt. 3, *State v. Boggess*, 204 W. Va. 267, 512 S.E.2d 189 (1998) (*per curiam*).

V.

ARGUMENT

The factual and procedural aspects of this case present an odd conflict. The Appellant may be correct in his claim that the Circuit Court of Wood County did not give him a meaningful review of his habeas corpus petition. The habeas petition attacked the constitutionality of his sentence, wherein the Appellant claimed that he would not be eligible for parole until after he fully discharged his sentence. Whether meritorious or not, the circuit court did not address this claim. The circuit court, in its ruling, found that the Appellant was not told by the court that he could not appeal his sentence. While this finding may have been factually accurate, it was not responsive to the Appellant's writ.

The Appellee concedes that, pursuant to West Virginia Code § 53-4A-7, a circuit court must make "specific findings of fact and conclusions of law relating to each contention or contentions and

grounds (in fact or law) advanced" by a habeas petitioner. Therefore, the circuit court erred in dismissing the Appellant's petition without addressing his claim. However, this does not mean that the only alternative is to reverse the circuit court's decision and remand this matter for further proceedings.

Because the only habeas claim presented by the Appellant is purely a question of law, this Court should accept the Appellant's invitation to decide the issue. The Supreme Court of Appeals has original jurisdiction over post-conviction habeas corpus petitions pursuant to West Virginia Code § 53-4A-1(a). And, as this Court has held:

> A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief.

Syl. Pt. 1, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973); *accord* Syl. Pt. 2, *White v. Haines, supra*; Syl. Pt. 2, *State ex rel. Blake v. Chafin*, 183 W. Va. 269, 395 S.E.2d 513 (1990).

The underlying "constitutional" claim presented by the Appellant in his writ, and which was not addressed by the circuit court, is clearly without merit. Appellant cites to numerous cases that purportedly support his claim that a prisoner has a constitutional right to a parole hearing. However, the cases cited by Appellant all stand for the proposition that a prisoner has certain due process rights that attach when he becomes eligible for parole consideration. This assertion, while correct, is not applicable to Appellant's circumstances. The denial of parole to the Appellant is not the subject of this writ, nor is it the factual predicate for his complaint.

The gravamen of the Appellant's claim is that if he receives the maximum "good time" credit pursuant to West Virginia Code § 28-5-27, he will discharge his sentences in 25 years – five years

before he becomes eligible for parole after serving the minimum 30 years of his consecutive sentences under § 61-8B-3 (1984).[4] Appellant asserts that he has a constitutional "right" to appear before the Parole Board, and that the lack of parole eligibility before discharge is a denial of his right to parole consideration, as granted by West Virginia Code § 62-12-13(b). This claim is entirely without merit.

It is well established that a prisoner does not have any "right" to parole consideration. *See, e.g., Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S.1, 7, 99 S. Ct. 2100, 2104 (1979) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."). This Court has also stated that "[o]ne convicted of a crime and sentenced to the penitentiary is never entitled to parole. W. Va. Code, 1931, 62-12-13a, as amended. He is eligible to be considered for parole." *State v. Lindsey*, 160 W. Va. 284, 291, 233 S.E.2d 734, 738-39 (1977). The Court held, in Syllabus Point 2 of *Lindsey*: "A person convicted of a crime shall be considered for parole only after he becomes eligible therefor under the appropriate statute."

West Virginia Code § 62-12-13a provides:

> 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.

The Appellant received the statutory penalty for each of his crimes – an indeterminate sentence of 15-25 years. W. Va. Code § 61-8B-3(b) (1984). Consequently, he will not become eligible for parole consideration under West Virginia Code §§ 62-12-13(b) and 62-12-13a until he

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[4]Assuming, for the sake of argument, that Appellant loses no "good time" credit due to his conduct while incarcerated – never a safe assumption.

has served at least 15 years of each of his consecutive sentences. If the Appellant has no statutory or constitutional "right" to be released on parole as of that date, he cannot complain if he is *absolutely* released from incarceration by the discharge of his cumulative sentence at an *earlier* date. The Appellant does not have a meritorious claim because neither he, nor any prisoner, has any "right" to early release on parole.

Additionally, the Appellant's factual premise is flawed. The accrual of "good time," upon which he bases his claim that he will discharge his sentences in 25 years, is not a certainty. The statute which grants the "good time" also provides for the forfeiture and revocation of "good time" for disciplinary violations. *See* W. Va. Code § 28-5-27(f). Neither the Appellant, nor any prisoner, can be assured that their "good time" will continue to accrue, rendering his claim on this issue sheer speculation on his part. Should Appellant's "good time" be revoked, even the factual predicate of his claim fails.

The Appellant has failed to establish his entitlement to habeas corpus relief on the ground asserted. The record demonstrates that the lower court made the right ruling, but for the wrong reasons. In addressing such a circumstance, this Court has held:

> "This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

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The Appellant is clearly not entitled to the relief he seeks. If this Court were to reverse the circuit court's decision and remand this case for a determination on the merits of his claim, the

circuit court would simply dismiss the petition on other grounds – that the Appellant has no constitutional right to parole eligibility. No hearings, lawyers, or motions will change this fact, and returning this case to Wood County would accomplish nothing.

Although the circuit court erred in dismissing the Appellant's petition on the ground stated, its ultimate decision to deny the Appellant habeas corpus relief was correct. As this Court found in *White*, "alternative grounds exist to affirm the circuit court's order denying the appellant's [] habeas petition." *Id.* at 705, 601 S.E.2d at 25. This Court should therefore affirm the circuit court's order denying the Appellant habeas corpus relief.

VI.

CONCLUSION

WHEREFORE, for the foregoing reasons, the judgment of the Circuit Court of Wood County should be affirmed, and the writ sought by the Appellant should be denied by this Honorable Court.

Respectfully submitted,

THOMAS McBRIDE, Warden,
Mount Olive Correctional Complex,
Appellee,

By counsel,

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CERTIFICATE OF SERVICE

I, DAWN E. WARFIELD, Deputy Attorney General and counsel for the Appellee, do hereby certify that I have served a true copy of the foregoing *Brief of Appellee* upon the Appellant by depositing it in the regular United States mail, postage prepaid, this 2nd day of September, 2005, addressed to him as follows:

James William Gordon, DOC # 27226
Mt. Olive Correctional Complex
One Mountainside Way
Mt. Olive, WV 25185

DAWN E. WARFIELD