

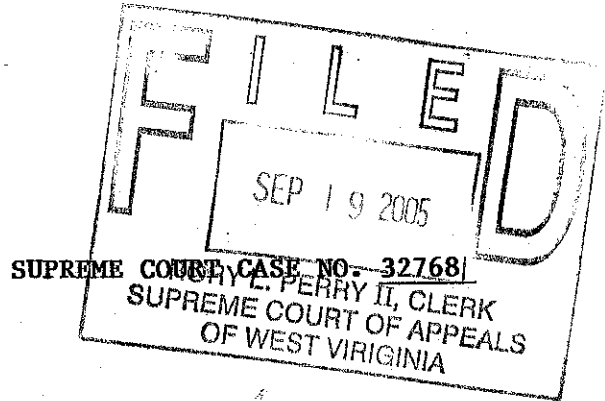
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

STATE OF WEST VIRGINIA ex rel.,
JAMES WILLIAM GORDON,
APPELLANT,

VS.

THOMAS McBRIDE, WARDEN,
MOUNT OLIVE CORRECTIONAL COMPLEX,
APPELLEE.



APPELLANT'S REBUTTAL TO APPELLEE'S BRIEF

REBUTTAL PRESENTED BY:

JAMES WILLIAM GORDON
D.O.C. 27226
MOUNT OLIVE CORRECTIONAL COMPLEX
1 MOUNTAINSIDE WAY
MT. OLIVE, WV. 25185

James William Gordon

JAMES WILLIAM GORDON, APPELLANT PRO SE

On appeal, the appellant contends that the circuit court erred in denying his Habeas petition without addressing the merits of his constitutional claim. In the alternative to remand, the appellant also invited this Court to declare the statute, West Virginia Code, § 61-8B-3 (1984), under which appellant was sentenced, to be found unconstitutional to the extent of its sentencing structure.

The appellee agrees the lower court's rationale for summarily dismissing the appellant's habeas corpus petition was flawed. This stipulation "alone" requires reversal by this Court, so the appellant would have the advantage of his habeas corpus rights including competent, knowledged habeas counsel to discover any additional constitutional errors that appellant himself could not raise for the absence of a complete record, which apparently he is not entitled to due to this Court's ruling in State ex rel. Wyant v. Brotherton, 589 S.E.2d 812 (W.Va. 2003), where this Court made records a discovery process within habeas proceedings. Noteworthy is the fact that without the expansion of record at the circuit court level, any other assignable errors go without review, making a mockery for the indigent criminal defendant of meaningful habeas corpus in the onslaught.

The appellee however, retains the position that the circuit court's decision to deny appellant habeas corpus relief in this matter should nevertheless be affirmed by this Court, which flies in the face of any constitutional protections of the individual citizen or known common law procedural requirement. In short, the State's stance on this issue is oxymoronic and without foundation.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant agrees with the appellee's Statement of Fact and Procedural History contained in "Brief of Appellee".

III. ASSIGNMENT OF ERROR

1) On appeal the appellant contends the circuit court erred in denying his habeas petition without addressing the merits of his constitutional claim and other habeas rights.

The appellee concedes that pursuant to West Virginia Code, § 53-4A-7, a circuit court must make "specific finds of fact and conclusions of law relating to each contention or contentions and grounds (in fact or law) advanced" by a habeas petitioner and the circuit court erred in dismissing the appellant's petition without addressing his claim (Brief of Appellee, p. 4-5).

Further, the appellee states under "Standard of Review",

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." Syllabus Point 3, Barnett v. Wolfolk, 149 W.Va. 246 (1965).

While this may be precedent, this citation is unfounded and inapplicable to the instant case because the judgment of the lower court was "incorrect" and was not a ground presented (though most assuredly raiseable from the review of this record) and was based on no applicable theory contained in its judgment, and therefore inapplicable to this case.

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.

2) On appeal, Appellant contends that a prisoner has a right to a parole hearing which is protected by the Due Process and Equal Protection Clause of West Virginia Constitution, Article III, § 10 and the Fourteenth Amendment, United States Constitution. The appellant's sentence of thirty (30) to fifty (50) years in the penitentiary denies him the opportunity to be considered for parole before the discharge of his sentence, as mandated by West Virginia Code, § 62-12-13 et seq.

The appellee erroneously contends that this claim is without merit and that no prisoner is entitled to parole or parole consideration. The appellant's claim is that he does receive the maximum "good time" credit pursuant to West Virginia Code, § 28-5-27 and will discharge his sentence in twenty-five (25) years, some five years before he is eligible for parole consideration. This denies the appellant due process and equal protection of the law, as mandated by the West Virginia Constitution, Article III, § 10.

The appellee states correctly that it is well established that "one convicted of a crime and sentenced to the penitentiary is never entitled to parole." State v. Lindsey, 160 W.Va. 284 (1977). It is also stated in Greenholtz v. Nebraska, 442 U.S. 1, 99 S.Ct. 2100 (1979) (" There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz, 442 U.S. 1 at 7). But, one convicted of a crime and sentenced to the penitentiary is eligible to be considered for parole. State v. Lindsey, 160 W.Va. 284 (1977). This Honorable Court held in Syllabus Point 2 of Lindsey that " A person convicted of a crime shall be considered for parole only after he becomes eligible therefore under the appropriate statute."

The appellant in this case was indicted in the year of 1998 for crimes alleged to have occurred, by open-ended indictment, between 1985 and 1990, thus making West Virginia Code, § 61-8B-3(1984) applicable to this case though West Virginia Code, § 61-8B-3 had been amended in 1991 to include a new sentence of fifteen to thirty-five (15-35) years. Because of West Virginia Code, § 28-5-27 (1987), appellant is entitled to day-for-day "good time."

Further, because of the overcrowding in West Virginia Prisons the legislature, and various court actions, mandated this good time to all sentences. Indeterminate sentences, as in this case, mandates the good time be taken from the back, or long end, of the sentence. In the appellant's case that means thirty to twenty-five (30-25) years, thirty years being parole eligible and twenty-five years being discharge.

The specific purpose of parole eligibility and the "good time" are to give incentive for good behavior and participation in rehabilitative programs designed to reintegrate prisoners as productive members of society. Without this incentive, West Virginia's goal of incarceration as rehabilitation flounders and becomes solely deterrence.

The issue of parole eligibility is the matter before the Court today. While agreeing with the appellee that the absolute right to a grant of parole is not incumbered by the due process clause, the appellant asserts eligibility and matters surrounding eligibility for parole are protected by the Due Process Clause. State v. Lindsey, 160 W.Va. 284, 291 (1977).

Further, when looking at legislative intent, the sentencing range of West Virginia Code, § 61-8B-3(1984) of fifteen to twenty-five years (15-25) is indicative in this case. The legislature clearly and plainly intended the appellant to see the parole board "prior to discharge of sentence." As additional thought on the matter, even inmates serving a life with mercy sentence see the parole board in fifteen (15) years(at the time of this offense, it was ten (10) years).

Our parole statute creates a reasonable expectation interest in parole to those prisoners meeting its objective criteria. (See Syllabus Point 1, Tasker v. Mohn, 165 W.Va. 55(1980). Even in Greenholtz v. Nebraska, 442 U.S.1, 99S.Ct. 2100(1979), the United States Supreme Court's decision that expectancy of parole provided by the Nebraska parole statute was held to entitle inmates to due process protection. The Court stated that "The Due Process Clause applies when government action deprives a person of liberty or

property..." Greenholtz, 442 U.S. at 7. Even Justice Powell of the United States Supreme Court concluded that "... the Respondents have a right under the Fourteenth Amendment to due process in the consideration of their release on parole." Greenholtz, 442 at 18.

A substantial liberty from legal restraint is at stake when the state makes decisions regarding parole or probation. Although still subject to limitations not imposed on citizens never convicted of a crime, the parolee enjoys a liberty incomparably greater than whatever minimal freedom of action he may have retained within prison walls, a fact that the United States Supreme Court recognized in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593(1972).

Liberty from bodily restraint always has been recognized as the core liberty protected by the due process clause from arbitrary government action. Ingram v. Wright, 430 U.S. 651, 97 S.Ct. 1401(1977). The presence of a parole system is sufficient to create a liberty interest, protected by the Constitution in the parole-release decision. Release on parole marks the first time when the severe restrictions imposed on a prisoner's liberty by the prison regimen may be lifted, and his behavior in prison often is molded by his hope and expectation of securing parole at the earliest time permitted by law. From the day that he is sentenced in a state with a parole system, a prisoner justifiably expects release on parole when he meets the standards of eligibility applicable within that system. All prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without due process, regardless of the particular statutory language that implements the parole system.

It is self-evident that all individuals possess a liberty interest in being free from physical restraint. A criminal conviction cannot, however, terminate all liberty interest. Wolfe v. McDonnell, 418 U.S. 539, 555-56, 94 S.Ct. 2963(1974). Because parole release proceedings clearly implicate a liberty interest, the Fourteenth Amendment of the United States Constitution requires that due process be observed, irrespective of the specific provisions in the applicable statute.

The use of mandatory language creates a liberty interest in parole release. Board of Pardens v. Allen, 482 U.S. 369, 373-81, 107 S.Ct. 2415 (1987). A state parole statute creates a liberty interest which is protected by the Due Process Clause. Board of Pardens v. Allen, 482 U.S. 369, 107 S.Ct. 2415(1987); Dautremont v. Broadlawns Hospital, 827 F.2d 291 (1987); Greenholtz v. Nebraska, 442 U.S. 1, 99 S.Ct. 2100 (1979). "A state creates a liberty interest when a state statute or regulation confers a particular status on an individual and expressly predicates the deprivation or revocation of that right or privilege on the occurrence of a specified event or condition. Baugh v. Woodward, 604 F.Supp. 1529, 1535-36 (4th Cir. 1985).

"It is axiomatic that due process is flexible and calls for such procedural protections as the particular situation demands." Guerrero-Guerrero v. Clark, 687 F.Supp. 1022, 1026 (4th Cir. 1988).

Those eligible for the benefits of a state's parole system are entitled to due process when a determination is made as to whether they will enjoy those benefits. Franklin v. Shields, 569 F.2d 784, 800 (4th Cir. 1977). The appellee argues that a prisoner does not have any "right" to parole consideration. This statement is oxymoronic and plainly wrong.

The State of West Virginia has instituted a system of parole eligibility conferred by statutory scheme (West Virginia Code, § 62-12-13 et seq.). In 1984 West Virginia Code, § 61-8B-3, set the statutory penalty for appellant's crime as an indeterminate sentence of fifteen to twenty-five years (15-25). That means the legislature conferred the right of parole consideration upon the appellant after serving the minimum sentence (fifteen years), to then max the sentence if parole was not granted ten (10) years later. This too is contemplated by West Virginia Code, § 62-12-13(a).

However in 1987, due to over-crowding in the prison system, the Legislature enacted West Virginia Code, § 28-5-27, which by application, grants day-for-day "good time", with the good time accruing from the back of the sentence, which created the denial of parole consideration or eligibility in the instant case.

Recognizing the infirmity, the Legislature, moving as legislatures do (slow), changed the applicable sentence in 1991 to fifteen to thirty-five (15-35) years, to circumvent or cure the problems created as here before the Court today. However, the Legislature failed to create a remedy for those whose convictions are sentenced under the 1984 version of § 61-8B-3.

Appellant was not charged for this crime until 1998. Whether it happened before the 1987 enactment of good time legislation appears to be debatable or 50/50 due to the open-ended indictment in this case. However, because the indictment didn't happen until 1998, confers application of the good time statute irregardless.

The appellee seems to implicate, for the sake of argument, that the loss of good time credit, due to misconduct, is never a safe assumption. In the state prison system a write up which may constitute a loss of good time are for infractions equal to crimes in society. The appellant is not an inmate that is likely to lose good time and ipso facto, has not lost any good time or had a write up in the last seven (7) years. Therefore, the assumption that he will not lose good time weighs heavily in his favor.

The appellee further designates that "the appellant has no constitutional right to parole eligibility" (Id., Brief of Appellee, pge. 8). However, the relevent authorities cited by the appellee do not say this. The authorities cited by the appellee say that there is no right to parole, not parole eligibility.

Rudimentary foundational due process protections become substantive due process violations where one's liberty is involved. The claim made by the appellant is constitutional in nature, statutorily protected, procedurally required, and legislatively intended by " plain reading of the statute involved". The Legislature's acknowledgment of the oversight or error is fortified by the 1991 amendment to West Virginia Code, § 61-8B-3, and the change of sentencing that resulted in that amendment as a cure to this defect. However, that cure, as with criminal statutes, operates only as a prospective. No retroactive cure was embodied by that amendment. Moreover, the appellant is still entitled to redress or a cure to this defect which breeches his constitutional rights.

IV. CONCLUSION

WHEREFORE, having set forth viable constitutional claims warranting relief, Appellant prays this Honorable Court for relief as remand with direction to appoint counsel to perfect a full habeas upon review of the record, an omnibus habeas corpus hearing with opinion of the court stating contentions of law relied upon, sufficient enough to appeal if needed, or in the alternative;

The Court elect to rule upon question two (2) involving this unconstitutional statute insofar as the sentencing structure and redress appropriate to that claim. Appellant believes that a sentence replacement of one to five years (1-5) would be appropriate and so suggests, because this is the only other lesser included statutory sentence within this set of statutes applicable and legally constitutional at the time of the alleged crime; or such other relief this Court deem in this matter. **SO BE IT PRAYED.**

Respectfully submitted this 16th day of September, 2005.



James William Gordon,
Appellant, pro se

Rebuttal Prepared By:

Lloyd Dale Buckhannon
D.O.C. # 32453
Mount Olive Correctional Complex
1 Mountainside Way
Mt. Olive, WV. 25185
(As Jail House Lawyer, not an Attorney)


Lloyd Dale Buckhannon

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STATE OF WEST VIRGINIA ex rel.,
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SUPREME COURT CASE NO. 32768

THOMAS McBRIDE, WARDEN,
MOUNT OLIVE CORRECTIONAL COMPLEX,
APPELLEE.


CERTIFICATE OF SERVICE

I, James William Gordon, Appellant pro se, in the foregoing Appellant's Rebuttal To Appellee's Brief, under penalty of perjury, hereby certify that a true and exact copy of the forgoing Appellant's Rebuttal To Appellee's Brief was served upon Appellee's Counsel of Record, the Deputy Attorney General of the State of West Virginia by depositing same in the United States Mail, First Class and Postage pre-paid and addressed as follows:

The Honorable Dawn E. Warfield
Deputy Attorney General
Appellate Division
State Capitol, Room 26-E
1900 Kanawha Blvd., East
Charleston, WV, 25305

this 16th day of September, 2005.

Sworn by signature affixed,


James William Gordon, Appellant pro se