IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 13-1200

ROGER E. CLINE,

*Petitioner,*

v.

WILLIAM FOX, Warden,
St. Mary's Correctional Center,

*Respondent.*

# RESPONDENT'S BRIEF

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**St. Mary's Correctional Center.**

***Respondent.***

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# RESPONDENT'S BRIEF

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## I.

## ASSIGNMENTS OF ERROR

1. The Circuit Court of Greenbrier County erred in dismissing, as moot, Petitioner's habeas corpus action following Petitioner's release from incarceration.

## II.

## STATEMENT OF THE CASE

Roger E. Cline ("Petitioner") was convicted of First Degree Murder on January 31, 1992 in the Circuit Court of Greenbrier County, West Virginia. (App. at 67.) Petitioner received a life sentence with a recommendation of mercy. (*Id.*) Petitioner's direct appeal to the West Virginia Supreme Court was refused on October 16, 1992. (*Id.* at 68.) On January 12, 1995, Petitioner filed his first Petition for Writ of Habeas Corpus which was subsequently denied and dismissed. (*Id.* at 67-

68.) Petitioner also filed an appeal to the West Virginia Supreme Court in regard to that decision which was also refused. (*Id.* at 68.)

Petitioner then filed another Petition for Writ of Habeas Corpus (current petition) on June 23, 2006. (*Id.*) Petitioner was appointed counsel by order entered December 3, 2007, and directed to file an amended petition if required. (*Id.*) Petitioner had a number of different appointed attorneys to represent him, and his current counsel filed an Amended Petition for Writ of Habeas Corpus on August 30, 2012. (*Id.*) An Omnibus Habeas Corpus Hearing was thereafter scheduled for October 3, 2013. (*Id.* at 1-2, 69.)

On June 6, 2013, a few months before his scheduled hearing, Petitioner was paroled to the State of Ohio. (*Id.* at 69.) The State then filed a Motion to Dismiss as Petitioner was no longer incarcerated. (*Id.*) The circuit court granted the State's motion concluding that Petitioner's Amended Petitioner must be dismissed as moot as he no longer satisfied the statutory requirement of being incarcerated under W. Va. Code § 53-4A-1. (*Id.* at 70-71.) Petitioner now appeals this order.

## III.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not request oral argument in this matter. In accordance with Rev. R.A.P. 18(a), the State notes that the facts and legal arguments have been adequately presented in the briefs and record. The decisional process would not be significantly aided by oral argument.

## IV.

## SUMMARY OF ARGUMENT

The circuit court did not err in dismissing Petitioner's Amended Petition for Writ of Habeas Corpus because Petitioner no longer met the statutory requirement of being incarcerated under W. Va. Code § 53-4A-1. Pursuant to the plain language of West Virginia Code § 53-4A-1, the Legislature elected to limit habeas corpus relief to persons incarcerated, and therefore, West Virginia courts lack the necessary subject matter jurisdiction to grant habeas relief to persons who are not incarcerated.

Since Petitioner was paroled before his omnibus hearing, his amended petition is rendered moot as parolees do not come within "incarcerated" requirement under W. Va. Code § 53-4A-1. The West Virginia legislature declined to draft W. Va. Code § 53-4A-1 as broadly as the federal habeas statute's "custody" requirement. Petitioner invites this Court to extend the meaning of incarceration to encompass parole and to be for all purposes co-extensive with the term custody. Such a reading is in contravention of the expressed intent of the Legislature to limit habeas corpus in West Virginia to those individuals who are incarcerated. Therefore, Petitioner's claim must be rejected.

## V.

## ARGUMENT

**The circuit court did not err in dismissing Petitioner's Amended Petition for Writ of Habeas Corpus because Petitioner no longer met the statutory requirement of being incarcerated under W. Va. Code § 53-4A-1.**

### A. Standard of Review

This case deals with jurisdiction, "the power of a court . . . to hear and determine a controversy presented to it[.]" Syl. Pt. 1, in part, *Fraga v. State Comp. Comm'r*, 125 W. Va. 107, 23 S.E.2d 641 (1942) (emphasis added). This case specifically deals with subject-matter jurisdiction, which is concerned with "whether a court has the power to entertain a particular claim -- a condition precedent to reaching the merits of a legal dispute." *Haywood v. Drown,* 129 S. Ct. 2108, 2126 (2009) (Thomas, J., dissenting in part). "'Whether a court has subject matter jurisdiction over an issue is a question of law.'" *State ex rel. Orlofske v. City of Wheeling,* 212 W. Va. 538, 542, 575 S.E.2d 148, 152 (2002) (quoting *Snider v. Snider,* 209 W. Va. 771, 777, 551 S.E.2d 693, 699 (2001)). And, as a question of law, it is reviewed *de novo*. Syl. Pt. 2, in part, *Walker v. West Virginia Ethics Comm'n,* 201 W. Va. 108, 492 S.E.2d 167 (1997).

### B. Pursuant to the plain language of West Virginia Code § 53-4A-1, the Legislature elected to limit habeas corpus relief to persons incarcerated.

Subject-matter jurisdiction consists of two elements, (1) constitutional subject-matter jurisdiction; and, (2) statutory subject-matter jurisdiction. *See, e.g., Bartles v. Hinkle,* 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996) ("a trial court cannot write its own jurisdictional ticket, but it must act within the confines of constitutional as well as statutory limits on its jurisdiction."). Constitutional subject-matter jurisdiction exists only when there is a case or controversy between the

parties. *See DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 341 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."); *Harshbarger v. Gainer,* 184 W. Va. 656, 659, 403 S.E.2d 399, 402 (1991) ("the actual dispute or controversy rule applies to all West Virginia judicial proceedings").

Statutory subject matter jurisdiction "consists of the authority the legislature has given a particular court to hear the type of controversy involved in the action." *Valone v. Valone,* 80 Va. Cir. 45 (City of Norfolk 2010). "Whether there exists . . . Constitutional subject-matter jurisdiction, is analytically distinct from whether the pertinent habeas statutes confer statutory subject-matter jurisdiction." *Umanzor v. Lambert,* 782 F.2d 1299, 1301 n.5 (5th Cir. 1986).

In addressing the meaning of a statute,"[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder,* 152 W. Va. 571, 165 S.E.2d 108 (1968). *See also* Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548,* 144 W. Va. 137, 107 S.E.2d 353 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."); Syl. Pt. 2, *Crockett v. Andrews,* 153 W. Va. 714, 172 S.E.2d 384 (1970) ("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.").

West Virginia Code § 53-4A-1(a) (emphasis added) provides, in pertinent part, "*Any person* convicted of a crime and *incarcerated under sentence of imprisonment* . . . may, . . . file a petition for a writ of habeas corpus ad subjiciendum, *and prosecute the same*, . . ." Thus, "[w]hat is

critical to the assertion of a post-conviction challenge to a criminal sentence is whether [an] individual is 'incarcerated' within the meaning of West Virginia Code § 53–4A–1." *Elder v. Scolapia*, 230 W. Va. 422, 427, 738 S.E.2d 924, 929 (2013).

And, as this Court has held, "[w]henever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket." Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.* 158 W. Va. 492, 211 S.E.2d 705 (1975).

Therefore, the law is clear on this issue; relief in habeas corpus is unavailable to persons who are no longer incarcerated.

**C. A petition for post-conviction habeas corpus relief is rendered moot if the defendant is paroled because parolees should not be deemed as "incarcerated" under W. Va. Code § 53-4A-1.**

Petitioner argues that the restrictions placed on his liberty by a parole order are sufficient to bring him within the requirement of incarceration under W. Va. Code §53-4A-1. Petitioner relies on federal decisions determining what constitutes "in custody" within the meaning of the federal habeas corpus statute. (Pet'r's Br. at 4-6.)(citing *Jones v. Cunningham*, 371 U.S. 236 (1963); *Maleng v. Cook*, 490 U.S. 488 (1989); *United States v. Pregent*, 190 F.3d 279 (4th Cir. 1999)). However, incarceration is not synonymous with custody. While all incarceration is a form of custody, the converse is not true. *Hoover v. Blankenship*, 199 W. Va. 670, 673, 487 S.E.2d 328, 331 n.3. "[A]nyone who has been incarcerated is necessarily also in custody. However, someone who is in custody has not necessarily been incarcerated." *People v. Kuhns,* 866 N.E.2d 1181, 1189 (Ill. Ct. App. 2007) (Johnson, J., concurring in part and dissenting in part). *See also Taylor v. State,* 187

P.3d 1241, 1244 (Idaho Ct. App. 2008) ("It is clear that under Idaho law, 'incarceration' and 'custody' are not synonymous-a defendant can remain under the custody of the Board, but not be incarcerated.").

"Incarceration is defined as '*confinement in a jail* or [in a] penitentiary.'" *State ex rel. Goff v. Merrifield*, 191 W. Va. 473, 477, 446 S.E.2d 695, 699 (1994) (citing *Black's Law Dictionary* 760 (6th ed. 1990). "'Incarceration' is defined in the *Oxford English Dictionary* as 'to shut up in prison, to put in confinement; to imprison.'" *Hoover v. Blankenship*, 199 W. Va. 670, 673, 487 S.E.2d 328, 331 n.2 (1997). "What constitutes 'custody' for various purposes, and when custody begins and ends, has been litigated extensively in the criminal law area. The term custody is defined as being 'very elastic and may mean actual imprisonment or physical detention or mere power, *legal* or physical, of imprisoning or of taking manual possession.'" *Id.* (citations omitted)(emphasis added).

Importantly, at the time the Legislature enacted West Virginia Code § 53-4A-1 with its "incarcerated" language in 1967, the United States Supreme Court had already interpreted the "in custody" language in the federal habeas statute, 28 U.S.C. § 2254(d), broadly to extend beyond immediate, physical confinement. *See Jones,* 371 U.S. at 243 (parole was enough to keep prisoner "in custody" for purpose of federal habeas corpus statute). The Legislature must be presumed to have known of the *Jones* decision. *See Kessel v. Monongalia County Gen. Hosp.,* 220 W. Va. 602, 611, 648 S.E.2d 366, 375 (2007) (Legislature is presumed aware of the century of federal interpretation of the federal Sherman Anti-Trust Act when enacting West Virginia Anti-Trust Act). Consequently, the Legislature's use of the term "incarcerated" cannot be read as co-extensive with "custody" without doing significant violence to the meaning of the terms incarcerated and custody.

Petitioner attempts to equate his case with this Court's opinion in *Elder v. Scopalia* which determined that "an offender who has been sentenced pursuant to the Home Incarceration Act and is accordingly subject to substantial restrictions on his or her liberty by virtue of the terms and conditions imposed by a home incarceration order . . . is 'incarcerated under sentence of imprisonment' for purposes of seeking post-conviction habeas corpus relief under W. Va. Code § 53-4a-1." *Elder*, 230 W. Va. 422, 428, 738 S.E.2d 924, 930 (2013). Petitioner argues that akin to *Elder*, he should be considered incarcerated for purposes of the state habeas corpus statute as he remains in the "custody" of the State by the terms and conditions imposed by the parole order. (Pet'r's Br. at 8.)

*Elder* cited the United States Supreme Court's decision in *Jones*, *supra*, for the proposition that it could consider "the existence of significant restraints on Petitioner's freedoms to be indicative of whether he is 'incarcerated' for purposes of post-conviction habeas review." *Elder* 230 W. Va. at 427, 738 S.E.2d at 929. However, the *Elder* decision did not equate "custody" with "incarceration." In fact, the holding in *Elder* was motivated, in part, by the Legislature's decision to retitle the Home Confinement Act to the Home Incarceration Act. *Id.,* 230 W. Va. at 428, 738 S.E.2d at 930 ("[T]he decision to retitle the Home Confinement Act as the Home Incarceration Act, suggests a legislative recognition that individuals who are serving their criminal sentences within the confines of their respective homes are to be viewed as incarcerated rather than merely confined."). Additionally, the Court in *Elder* specifically held that it was the specific conditions imposed upon the defendant as a result of his home confinement that supported the conclusion that he should be considered incarcerated. *Id.*, 230 W. Va. at 428, 738 S.E.2d at 930 ("In view of the clear and undisputed restrictions of a substantial nature that are currently imposed on Petitioner pursuant to the

governing home incarceration order . . . we have no difficulty in viewing him as "incarcerated under sentence of imprisonment.") While the Court in *Elder* determined that it could consider significant restraints on individuals freedoms in its determination of what constitutes incarceration, it did not relax the requirement that individuals still must be incarcerated in order to come within the purview of W. Va. Code §53-4a-1. It simply determined that the terms and conditions of the petitioner's home incarceration in that case were sufficient to come within the definition of incarceration.

> "When the legislature initially adopted the home confinement statute, it stated that it was '... another form of incarceration....' W. Va. Code, 62-11B-4(a) (1990). The entire statutory scheme indicates that home confinement is designed to place substantial restrictions on the offender. A violation of these restrictions results in the offender being subject to incarceration under the penalties prescribed for the crime. W. Va. Code, 62-11B-9(b) (1990). The penal nature of home detention is recognized under W. Va. Code, 62-11B-9(b), as it provides credit for time spent in home confinement towards the imposition of any sentence following a violation of home confinement."

*State v. Long*, 192 W. Va. 109, 111, 450 S.E.2d 806, 808 (1994).

W. Va. Code § 62-11B-5 requires that an order for "home incarceration" include a requirement that the offender be confined to the offender's home at all times as well as a requirement that the offender abide by a schedule which specifically sets forth the times when the offender may be absent from the home and the locations the offender is allowed to be during those absences. An order for home incarceration necessarily means that the defendant does not have "the freedom to come and go as he pleases; his daily activities are subject to both the supervision and control of the Home Incarceration Office." *Elder*, 230 W. Va. at 427, 738 S.E.2d at 929.

As opposed to the restrictions placed on defendants under the Home Incarceration Act, the terms and conditions of Petitioner's parole do not contain the kind of significant restraints to support

the conclusion that he should be considered incarcerated. In addition to the standard conditions of parole, Petitioner was barred from Greenbrier County, West Virginia and ordered to have no contact with the victim's family or co-defendants. (App. at 65.) As opposed to being physically confined in his home under an order of home incarceration, "no one has actual custody or physical control of the [Petitioner]." *People ex rel. Williams v. Morris,* 44 Ill. App. 3d 39, 40, 357 N.E.2d 851, 852 (1976). Simply put, a parolee is not restrained to such a degree to warrant relief under the extraordinary writ of habeas corpus under West Virginia law.

Additionally a review of West Virginia case law also compels one to infer that a petition for post-conviction habeas relief in West Virginia is rendered moot upon a person's release on parole.

This Court found in *Leeper-El v. Hoke*, 230 W. Va. 641, 646, 741 S.E.2d 866, 871 (2013), that an appeal of a petition for writ of habeas corpus was moot because the defendant was paroled and had received "the relief he sought in his habeas petition: . . . release from state custody." Moreover, in *Kemp v. State*, 203 W. Va. 1, 2, 506 S.E.2d 38, 39 (1997) (per curiam) this Court held that "because the appellant has already been released, his request for a writ of habeas corpus is moot." The Court did note that *coram nobis* may be an available remedy, in limited circumstances, when a defendant is no longer incarcerated. *Id.* at 2 n.4, 506 S.E.2d at 39 n.4, citing 2 Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure II-508 to 509 (2d 1993).[1]

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[1] This Court has not definitively settled whether such writs still exist in the criminal law in West Virginia. *State ex rel. Richey v. Hill,* 216 W. Va. 155, 162 n.10, 603 S.E.2d 177, 184 n.10 (2004) ("We have noted that even though *coram nobis* is abolished in purely civil cases, it may still be available in a post-conviction context when the petitioner is not incarcerated."). However, the writ *coram nobis* has been controlled by statute in this State under West Virginia Code § 58-2-3, *see, e.g., State Road Comm'n v. Hereford,* 151 W. Va. 526, 533, 153 S.E.2d 501, 506 (1967); *Watt v. Brookover,* 13 S.E. 1007, 1008 (W. Va. 1891), but that statute was repealed in 1998. 198 W. Va.

In *State ex rel. McCabe v. Seifert*, 220 W. Va. 79, 85, 640 S.E.2d 142, 148 (2006) (per curiam), where the petitioner was released on parole during the pendency of his appeal, this Court held that:

> "in view of McCabe's release from incarceration in combination with: (1) his withdrawal of a substantial portion of the appeal from this Court's consideration and (2) the fact that he raises no issues concerning the terms of his parole agreement . . . this Court concludes that this appeal is moot and should be dismissed from the docket of this court."

Finally, in *Jones v. Hoke,* No. 11-0396, 2012 WL 4069364 (W. Va. Sept. 4, 2012) (memorandum opinion) *cert. denied,* 133 S. Ct. 1824, 185 L. Ed. 2d 834 (U.S. 2013), this Court affirmed the circuit court's order dismissing the habeas petition as moot because the petitioner was released on parole after the petition had been filed.

It is also worth noting that West Virginia is not the only State to draft and interpret its habeas statute to read less broadly than the federal statute. Consequently, "[w]e need not consider the broader language of other . . . habeas remedies in light of the narrower language used in our habeas statutory scheme." *Bostick v. Weber,* 692 N.W.2d 517, 521 (S.D. 2005).[2] Indeed, numerous

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Acts ch. 110. Since no court in West Virginia enjoys specific constitutional authority over the *coram nobis/vobis* writs, with the repeal of the *coram nobis* statute, the legislature has repealed the writ. *See Thoresen v. State,* 239 A.2d 654, 655 (Me. 1968).

[2] In *Bostick*, the South Dakota Court recognized the legislature's freedom in crafting the State's habeas remedy noting the following:

> Our state habeas remedy is not as broad as the federal habeas corpus remedy . . . Our remedy extends only as far as the language used by our legislature allows, as federal decisions on the application of the federal habeas statute do not control the interpretation of our state habeas remedy. . . We need not consider the broader language of other state habeas remedies in light of the narrower language used in our habeas statutory scheme. (citations omitted.)

jurisdictions have found that "the restraints imposed on a parolee are not such as to enable him to maintain a State habeas corpus action." *See Id.; also see People ex rel. Williams v. Morris*, 357 N.E.2d 851 (Ill. App. Ct. 1976); *Sorrow v. Vickery*, 184 S.E.2d 462 (Ga. 1971); *People ex rel. Wilder v. Markley*, 255 N.E.2d 784 (N.Y. 1970); *Williams v. State*, 155 So.2d 322 (Al. Ct. App. 1963), *cert denied*, 155 So.2d 323 (Al. 1963); *McGloin v. Warden of Maryland House of Correction*, 137 A.2d 659 (Md. 1958); *White v. Gladden*, 303 P.2d 226 (Or. 1956); *State v. Ballard*, 83 A.2d 539 (NJ Super. Ct. App. Div. 1951), *aff'd* 88 A.2d 537 (NJ Super. Ct. App. Div. 1952); and *Ex parte Davis*, 146 P. 1085 (Okla. Crim. App. 1915).

In summary, a petition for post-conviction habeas relief is rendered moot upon a person's release on parole. The federal habeas corpus doctrine developed under 28 U.S.C. §§ 2254 and 2255 interpreting the "custody" requirement differs significantly from the "incarceration" requirement under West Virginia Code § 53-4A-1. This Court has "stressed on numerous occasions, '[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]'" *State v. Richards,* 206 W. Va. 573, 577, 526 S.E.2d 539, 543 (1999) (quoting *State v. General Daniel Morgan Post No. 548,* 144 W. Va. 137, 145, 107 S.E.2d 353, 358 (1959) (citation omitted)). Petitioner invites this Court to extend the meaning of incarceration to encompass parole and to be for all purposes co-extensive with the term custody. Such a reading is in contravention of the expressed intent of the Legislature to limit habeas corpus in West Virginia to those individuals who are incarcerated. Therefore, Petitioner's claim must be rejected.

## VI.

## CONCLUSION

For the reasons herein stated, the State respectfully requests that this Court affirm the circuit court's order dismissing Petitioner's Petition for Writ of Habeas Corpus.

Respectfully submitted,

STATE OF WEST VIRGINIA,
*Respondent,*

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## CERTIFICATE OF SERVICE

I, Derek Austin Knopp, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *Respondent's Brief* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 28th day of April, 2014, addressed as follows:

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