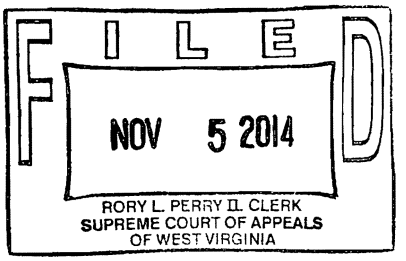
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 14-1043



JIM RUBENSTEIN, COMMISSIONER OF THE WEST VIRGINIA DIVISION OF CORRECTIONS,

Petitioner,

v.

LOUIS H. BLOOM, CIRCUIT JUDGE OF KANAWHA COUNTY, WEST VIRGINIA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Louis H. Bloom, Judge
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ARGUMENT

I. WRIT OF PROHIBITION IS IMPROPER BECAUSE THE PETITIONER HAS OTHER ADEQUATE MEANS TO OBTAIN THE REQUESTED RELIEF

Where it is claimed that a lower tribunal exceeded its legitimate powers, the Supreme Court of Appeals examines five factors, including, in pertinent part, whether the party seeking the writ has no other adequate means to obtain the desired relief.[1] The Division claims that the Circuit Court's *Work Release Order* (*Order*) usurped the Division's discretion to place Tracie Dennis in a facility of its choosing because the Division does not know whether the *Order* loses effect once Ms. Dennis is placed or transferred.[2] However, it is apparent on the face of the *Order* that the Division retains discretion to move Ms. Dennis to another facility of its choosing, thus eliminating work release. The *Order* states:

> [T]he Court does hereby ORDER that the Defendant be granted work release from the South Central Regional Jail . . . . The Court notes that the Defendant is in the custody of the Division of Corrections, and it is not intended that this grant of work release should serve as any impediment to the Division in its decisions regarding the timing of placement of the Defendant in a facility of its choosing.[3]

The Division's hands are not tied with respect to where it places Ms. Dennis, and the *Order* only applies so long as Ms. Dennis is placed at South Central Regional Jail. As such, the Division has other adequate means of relief. It can move Ms. Dennis to another facility.

II. WRIT OF PROHIBITION IS IMPROPER BECAUSE THE CIRCUIT COURT ORDER IS NOT CLEARLY ERRONEOUS AS A MATTER OF LAW.

Where it is claimed that a lower tribunal exceeded its legitimate powers, the Supreme Court of Appeals examines five factors, including, in pertinent part, whether the lower tribunal's

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[1] Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).
[2] Pet. at 13.
[3] App. at 4, *Order*, Aug. 15, 2014 (emphasis added).

order is clearly erroneous as a matter of law.[4] The Division asserts that the Circuit Court's *Order* is clearly erroneous because "it both exceeds the Circuit Court's statutory sentencing authority *and* violates Corrections' explicit statutory responsibility for Corrections' inmates housed at regional jails."[5]

By W. Va. Code § 31-20-31, the Division's executive director is authorized to establish a "work program" or "job program" and determine an inmate's eligibility for participation in such a program. Here, the Circuit Court did not order Ms. Dennis to participate in a job or work program under W. Va. Code § 31-20-31. The Circuit Court ordered Ms. Dennis be released to her employer, Enerfab Electric Company in Dunbar, West Virginia, each weekday from 7:00 a.m. to 4:00 p.m. in order for Ms. Dennis to pay restitution for monies she embezzled.[6] Because the Circuit Court did not order Ms. Dennis to participate in a "work program" established by the Division, and because the Circuit Court could not therefore usurp the Division's authority and discretion in determining Ms. Dennis's eligibility for such a program, the Circuit Court's *Order* is not contrary to law.

By W. Va. Code § 62-11A-1(a), a Circuit Court is authorized to order work release "[w]hen a defendant is sentenced or committed for a term of one year or less." Here, Ms. Dennis was sentenced on July 29, 2014, to an indeterminate term of "not less than one year nor more than ten years."[7] In the same *Sentencing Order*, the Circuit Court ordered that said sentence be suspended on December 1, 2014, for a five-year period of probation with a separate probation order to follow.

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[4] Syl. pt. 4, *Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).
[5] Pet. at 11 (emphasis original).
[6] App. at 3, *Order*, Aug. 15, 2014.
[7] App. at 1, *Sentencing Order*, July 29, 2014.

Under West Virginia law, a probation sentence is separate and distinct from an underlying criminal sentence such that a probation sentence suspends the underlying sentence. The West Virginia Supreme Court has stated:

> In West Virginia[,] there are fundamental statutory differences between probation and parole in the relationship they bear to the underlying criminal sentence. The term of probation has no correlation to the underlying criminal sentence, while parole is directly tied to it. In effect, there is a probation sentence which operates independently of the criminal sentence.[8]

Hypothetically, had parole—and not probation—been imposed in the case *sub judice*, the underlying criminal sentence would continue to control the length of the parole term. However, the Circuit Court ordered that the sentence be suspended on December 1, 2014, whereupon Ms. Dennis's probation sentence would commence. Consequently, Ms. Dennis's sentence was effectively shortened to four months, satisfying the "for a term of one year or less" language in W. Va. Code § 62-11A-1. As such, the Circuit Court *Order* is not clearly contrary to law. If Ms. Dennis violates the probation agreement, then Ms. Dennis's original sentence may be reinstated and imposed in its entirety, at which point the Division may have authority and discretion to implement its procedures.

Furthermore, even if a Circuit Court sentences a defendant to a term exceeding one year, a Circuit Court is authorized by W. Va. Code § 62-11A-1(c) to entertain a petition or motion filed by an inmate "at any time after sentence for the [purpose] of leaving jail under this section . . . ." In the instant matter, the Circuit Court placed Ms. Dennis on probation upon the motion she filed after sentencing; therefore, this subsection applies.

[8] Syl. pt. 1, *Jett v. Leverette*, 162 W. Va. 140, 247 S.E.2d 469 (1978).

Moreover, W. Va. Code § 62-11A-1(c) does not contain a time limit as subsection (a) does, and W. Va. Code § 62-11A-1(g) does not solely apply to misdemeanors as (a) does.[9] This Court has stated consistently that:

> A cardinal rule of statutory interpretation is that code sections are not to be read in isolation but construed in context. . . . Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded *in pari materia* to assure recognize and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather the act or statute in its entirety to ascertain legislative intent properly. [10]

When the subsections of W. Va. Code § 62-11A-1 are read together, it becomes clear that the Legislature did not intend to limit a Circuit Court's authority to order work release only when a defendant is convicted of a misdemeanor. Further, this Court has clarified that the legislative intent of W. Va. Code § 62-11A-1 is to enable a "guilty person . . . [to] have his or her sentence reviewed and made less restrictive by a court of record, without appealing the conviction itself."[11] Applying canonical tools of statutory construction and considering the legislative intent, W. Va. Code § 62-11A-1 does not restrict a Circuit Court from ordering work release as it did in the underlying matter. For these reasons, the sentence imposed by the Circuit Court is lawful.

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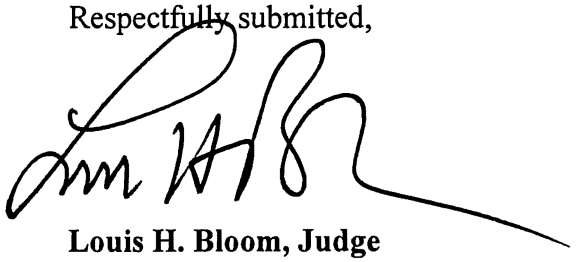
[9] W. Va. Code § 62-11A-1(g) addresses inmates convicted of felonious crimes involving incest and minors.
[10] Syl. pts. 5–6, *State v. Stone*, 229 W. Va. 271, 728 S.E.2d 155 (2012) (internal citations omitted).
[11] *State v. Kerns*, 183 W. Va. 130, 134, 394 S.E.2d 532, 536 (1990).

CONCLUSION

Because the Division has other adequate means to obtain relief and because the Circuit Court's *Order* is not clearly erroneous or contrary to law, the Respondent requests that this Court deny the *Petition*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Louis H. Bloom, do hereby certify a copy of the foregoing *Response to Petition for Writ of Prohibition* was served on counsel of record on November 5, 2014, through the United States Postal Service, postage prepaid, to the following addresses:

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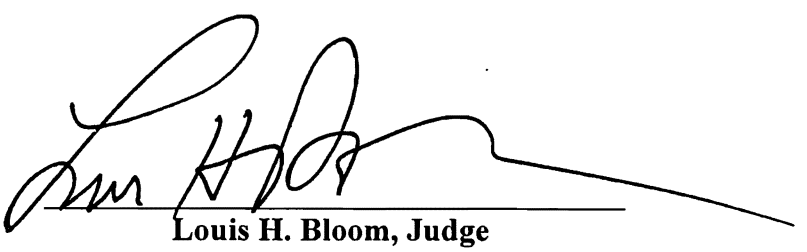

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