IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NUMBER: 082566

JOHN JAY CARROLL,

Appellant,

v.

GENE M. JOHNSON, DIRECTOR,
DEPARTMENT OF CORRECTIONS,

Appellee.

OPENING BRIEF OF APPELLANT

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V I R G I N I A:

IN THE COURT OF APPEALS

JOHN JAY CARROLL,	)	
	)	
Appellant,	)	
	)	
v.	)	**Record No. 082566**
	)	
GENE M. JOHNSON, DIRECTOR,	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Appellee.	)	

OPENING BRIEF OF APPELLANT

TO THE HONORABLE CHIEF JUDGE AND ASSOCIATE JUDGES OF THE COURT OF APPEALS OF VIRGINIA:

Your appellant, **JOHN JAY CARROLL**, petitioner in the Court below and hereinafter referred to as "Petitioner," respectfully represents that he is aggrieved by the final decision of the Circuit Court of Henrico County, and prays that upon review the aforesaid Final Order be reversed and remanded.

STATEMENT OF THE NATURE OF THE CASE AND THE MATERIAL PROCEEDINGS IN THE COURT BELOW

In Stafford County, Virginia, the Petitioner filed a habeas petition challenging the refusal by the Virginia Department of Corrections to give him credit for time in Virginia custody awaiting trial in Stafford. The Respondent filed a motion to dismiss, with exhibits, and the Petitioner filed a response.

The trial court ruled that the court did not have jurisdiction "because even a result in his favor would not result in his immediate release." (App. 11). The court further ruled that "the Petitioner has been properly credited with time he spent in jail towards his sentence in another state." (App. 11).

ASSIGNMENTS OF ERROR

I. The trial court erred in ruling that it did not have habeas corpus jurisdiction to hear the petitioner's claim that he was not being credited for time spent in jail on the Stafford charges towards his sentence.

II. The trial court erred in ruling that assuming it did have jurisdiction, petitioner's claim lacks merit.

III. The trial court erred in not granting petitioner's request for an evidentiary [hearing] to settle factual disputes necessary for a determination of petitioner's claim.

QUESTIONS PRESENTED

I. (*Assignment of Error I*)

Did the trial court err in ruling that it did not have habeas corpus jurisdiction to hear the petitioner's claim that he was not being credited for time spent in jail on the Stafford charges towards his sentence?

II. (*Assignment of Error II*)

Did the trial court err in ruling that assuming it did have jurisdiction, petitioner's claim lacks merit?

III. (*Assignment of Error III*)

The trial court erred in not granting petitioner's request for an evidentiary [hearing] to settle factual disputes necessary for a determination of petitioner's claim?

STATEMENT OF FACTS

The majority of the material facts of the case are not in dispute, but, as identified herein, a few materials facts are in dispute.

On October 3, 1997, Petitioner was extradited from New Jersey to the custody of the Stafford Sheriff's Department to await trial in Stafford Circuit Court for carjacking, case number CR95-373-02. The Petitioner was convicted, and on July 7, 1998, the court sentenced Petitioner to a 13-year term that was to be served consecutively with his New Jersey sentence. (App. 3-4).

Additionally, the Petitioner was to be awarded credit for time spent in jail awaiting trial. (App. 8). The Petitioner was in Virginia custody from October 3, 1997 through July 17, 1998, a total of 288 days. (App. 14).

On July 17, 1998, Petitioner was returned to the custody of New Jersey. On February 13, 2008, Petitioner returned to Virginia to begin serving the Stafford 13-year sentence. On June 11, 2008, Petitioner was given an update sheet by the Virginia Department of Corrections

(DOC) indicating his status as a Virginia prisoner and release date. Petitioner immediately noticed that his update sheet did not reflect jail credit for the time he spent in the Stafford Sheriff's Department custody. Therefore, in July 2008, the Petitioner wrote Eva C. Brown, Inmate Records Supervisor, Rappahannock Regional Jail, where the Stafford Sheriff's Department houses its detainees, seeking for the dates he spent there (from October 3, 1997 through July 17, 1998 - 288 days) to be sent to the DOC for the credit towards his 13 year sentence. (App. 3-4, 9).

However, on July 30, 2008, Ms. Brown responded to Petitioner's request stating the Petitioner was housed at the jail for the Stafford charge "on an Interstate Compact;" that during his stay there, Petitioner was already sentenced and committed to the New Jersey DOC; and that all dates spent at the Stafford jail went towards his New Jersey sentence. (App. 10).

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

I. The Trial Court Erred in Ruling That it Did Not Have Habeas Corpus Jurisdiction to Hear the Petitioner's Claim That He Was Not Being Credited for Time Spent in Jail on the Stafford Charges Towards His Sentence.

The trial court ruled that it did "not have habeas corpus jurisdiction over Petitioner's claim because even a result in his favor would not result in his immediate release from confinement." (App. 11). This ruling was in error.

First, Virginia Code § 8.01-654(B)(3), states that a habeas petition "may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by [the] petitioner." The clear import is that "immediate release" is not required under Virginia law, and – as discussed further below – "immediate release" is not required under federal habeas corpus jurisprudence either.

The better rule for a case such as the present matter – one that challenges time computation or "execution" of the sentence rather than the validity of the conviction – would be to require habeas relief to impact the duration of the custody or incarceration. In the present

matter, if the Petitioner were granted the requested relief, the duration of his incarceration would be shortened by 288 days, significantly impacting his mandatory release date. (App. 13).

For example, under federal law, a habeas petition challenging the execution of the sentence rather than the validity of the conviction would be filed under 28 U.S.C. § 2241, rather than under § 2254 (state inmates) or § 2255 (federal inmates). Thus, under federal law, when challenging time-computation, the application of good time credits, credit for pre-trial detention, and similar issues, a petition may challenge the "execution" of the sentence through a petition under § 2241. See, e.g., Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) (challenge that affects fact or duration of confinement must be brought in habeas petition); Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 632 (2d Cir. 2001) (petition that challenges prison disciplinary sanction, including loss of good-time credits, is a challenge to execution of sentence properly brought under § 2241); McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 812 (10th Cir. 1997) (same).

While the federal statutes differentiate between challenges to the validity of the conviction resulting in confinement and challenges to the "execution" of the sentence, the only habeas statute in Virginia (for non-

death penalty cases) found in Code § 8.01-654 must apply to both.

Second, the case relied upon by the trial court is inapplicable because the relief sought in Virginia Parole Board v. Wilkins, 255 Va. 419, 498 S.E.2d 695 (1998), was challenging the decision of the Virginia Parole Board denying discretionary parole and deferring his next parole review for two years. The trial court ordered that Wilkins be reviewed by the Board and if deferred again, that Wilkins be provided a reason. Thus, in Wilkins, the petitioner's complaints would not definitively impact the duration of his incarceration but would merely allow him another opportunity to be reviewed by the parole board.

> The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process we have inquired into the nature of the individual's claimed interest.
>
> "[To] determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." Board of Regents v. Roth, 408 U.S. 564, 570-571 (1972).
>
> This has meant that to obtain a protectible right
>
> "A person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id., at 577.
>
> There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of

> a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: "[Given] a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." Meachum v. Fano, 427 U.S. 215, 224 (1976).

Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 7 (1979); see also Morrissey v. Brewer, 408 U.S. 471 (1972).

In the present matter, the nature of the interest at stake is a definitive number of days of incarceration, 288 days, as opposed to a mere possibility, desire, or expectation.

For the reasons stated herein, to the extent that Wilkins requires "immediate release," it should be overturned.

Third, the trial court's ruling in the present matter does not comport with statements by the United States Supreme Court. In Preiser v. Rodriguez, 411 U.S. 475 (1973), United States Supreme Court declared as follows:

> In the case before us, the respondents' suits in the District Court fell squarely within this traditional scope of habeas corpus. They alleged that the deprivation of their good-conduct-time credits was causing or would cause them to be in illegal physical confinement, i. e., that once their conditional-release date had passed, any further detention of them in prison was unlawful; and they sought restoration of those good-time credits, which, by the time the District Court ruled on their petitions, meant their immediate release from physical custody.

> **Even if the restoration of the respondents' credits would not have resulted in their immediate release, but only in shortening the length of their actual confinement in prison, habeas corpus would have been their appropriate remedy.** For recent cases have established that habeas corpus relief is not limited to immediate release from illegal custody, but that the writ is available as well to attack future confinement and obtain future releases. In Peyton v. Rowe, 391 U.S. 54 (1968), the Court held that a prisoner may attack on habeas the second of two consecutive sentences while still serving the first. The Court pointed out that the federal habeas corpus statute "does not deny the federal courts power to fashion appropriate relief other than immediate release. . . ." **So, even if restoration of respondents' good-time credits had merely shortened the length of their confinement, rather than required immediate discharge from that confinement, their suits would still have been within the core of habeas corpus in attacking the very duration of their physical confinement itself.** It is beyond doubt, then, that the respondents could have sought and obtained fully effective relief through federal habeas corpus proceedings.

Id. at 487 (emphasis added).

Likewise, in the present matter, the Petitioner is not seeking immediate discharge; instead, he attacks the duration of the confinement. Thus, the court has jurisdiction to consider his challenge to the computation of his time to serve or application of credit for time spent in jail.

II. The Trial Court Erred in Ruling That Assuming it Did Have Jurisdiction, Petitioner's Claim Lacks Merit.

The trial court ruled that the Petitioner would not be entitled to relief, even if the court had jurisdiction, because "the Petitioner has been properly credited with time he spent in jail towards his sentence in another state." (App. 11). This ruling was in error.

Under the facts of this case, the statute, Virginia Code § 53.1-187 and the sentencing order leave no room for interpretation. It is well-settled that "a court speaks only through its written orders." Moreau v. Fuller, 276 Va. 127, 137, 661 S.E.2d 841, 847 (2008). The written sentencing order specifically states that the Petitioner "shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187." (App. 8). Virginia Code § 53.1-187 states, "Any person who is sentenced to a term of confinement in a correctional facility shall have deducted from any such term all time actually spent by the person . . . in a state or local correctional facility awaiting trial or pending an appeal . . . ."

First, the right of credit for jail time awaiting trial and pending appeal is not a matter of legislative grace but is a right constitutionally mandated, available to state prisoners as well as federal prisoners.

Durkin v. Davis, 538 F.2d 1037 (4th Cir. 1976).

Second, the sentencing order and statue do not limit the credit if a person "might" receive credit toward some out-of-state sentence. In fact, the words of the order and statute could not be more clear.

In this case, the Petitioner was a "person" who "actually spent" time "in a state or local correctional facility awaiting trial or pending an appeal." Whether New Jersey would give Petitioner credit toward the New Jersey sentence while he was in a local Virginia jail is entirely up to New Jersey and completely irrelevant under the Virginia statute. The fact that the DOC has a "policy" where they do not give credit if the inmate received the same credit toward, for instance, a sentence from another state, cannot trump the sentencing order and the Virginia Code.

Again, Petitioner was "actually" held in a state or local correctional facility. While being held, the Petitioner was awaiting trial in Stafford County on a Stafford County charge.

None of the words in the statute are ambiguous or open for interpretation. Thus, the Petitioner is entitled to the actual time he spend in a Virginia facility awaiting trial in a Virginia court.

III. The Trial Court Erred in Not Granting Petitioner's Request for an Evidentiary [Hearing] to Settle Factual Disputes Necessary for a Determination of Petitioner's Claim.

The only real factual dispute is whether the Petitioner received credit in New Jersey for time spent in Virginia awaiting trial in Stafford. First, as stated above, the resolution of this factual dispute is not necessary because the sentencing order and Virginia Code cannot be interpreted any other way than to give Petitioner the requested credit of 288 days.

To the extent that this Court disagrees with Petitioner's position, the Petitioner challenges the claim by Wendy Brown that he received said credit toward his New Jersey sentence. (See App. 19, 24). Wendy Brown makes nothing more than a bare assertion. She does not provide any information as to how she knows this is true and whether she spoke to or received any official information from New Jersey.

The Court cannot accept such bare assertion, with no basis provided at all, and without the opportunity for the Petitioner to challenge the assertion. Thus, an evidentiary hearing is required. United States v. Witherspoon, 231 F.3d 923, 926 (4th Cir. 2000) (concluding that petitioner's facts if true would entitle him to relief,

holding that the record does not conclusively demonstrate that petitioner was entitled to no relief, and remanding the case).

CONCLUSION

For the foregoing reasons, the Defendant prays that this Honorable Court, upon review, REVERSE the judgment of the trial court and either GRANT habeas relief or REMAND the matter to the circuit court for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE

1. I hereby certify that on this **July 22, 2009**, pursuant to the Rules of Court, sufficient copies of the foregoing Opening Brief of Appellant, as well as the Appendix, were hand-delivered to the Clerk of the Supreme Court of Virginia, and sufficient copies were mailed or hand-delivered to counsel for the Commonwealth as follows:

Marc Davis
Senior Assistant Attorney General
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900 East Main Street
Richmond, Virginia 23219

2. Counsel for Appellant is ***court-appointed***.

3. Counsel for Appellant wishes to ***state orally and in person*** the reasons for reversal.

David B. Hargett, Esquire