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STATE OF WEST VIRGINIA ex rel. DARRELL
V. MCGRAW, JR., IN HIS CAPACITY AS ATTORNEY
GENERAL FOR THE STATE OF WEST VIRGINIA

Petitioner,

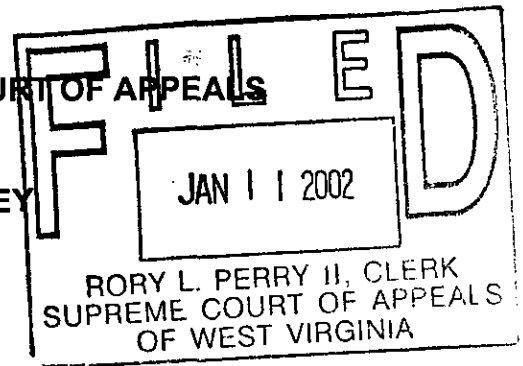
v.

GREGORY A. BURTON, CABINET SECRETARY OF
THE DEPARTMENT OF ADMINISTRATION; NICHELLE
PERKINS, DIRECTOR OF PERSONNEL OF THE DEPARTMENT
OF ADMINISTRATION; KAY HUFFMAN GOODWIN, CABINET
SECRETARY OF THE DEPARTMENT OF EDUCATION AND THE
ARTS; MIKE CALLAGHAN, CABINET SECRETARY
OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION; PAUL
NUSBAUM, CABINET SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN RESOURCES; JOE MARTIN, CABINET
SECRETARY OF THE DEPARTMENT OF MILITARY AFFAIRS &
PUBLIC SAFETY; BRIAN KASTICK, CABINET SECRETARY OF THE
DEPARTMENT OF TAX & REVENUE; and FRED VANKIRK,
CABINET SECRETARY OF THE DEPARTMENT OF TRANSPORTATION,

Respondents.

**RESPONSE OF INTERVENOR WEST VIRGINIA REGIONAL JAIL
AND CORRECTIONAL FACILITY AUTHORITY TO PETITION
FOR WRIT OF MANDAMUS**

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Case No.: 30094

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COMES NOW, the West Virginia Regional Jail and Correctional Facility
Authority, (hereinafter "RJA") by counsel, Chad M. Cardinal, Esq., to respond to
the Petition for Writ of Mandamus as follows:

I. STANDARD OF REVIEW

It is well-settled that a writ of mandamus will not issue unless three
elements co-exist: (1) a clear legal right of the petitioner to the relief sought; (2) a

legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy. Syllabus Point 2, State ex rel. Kucera v. City of Wheeling, 153 W. Va. 538, 170 S.E.2d 367 (1969).

In as much as Petitioner is seeking a declaration that numerous West Virginia statutes are unconstitutional, the unconstitutionality of a statute must be shown beyond a reasonable doubt. The standard for reviewing the constitutionality of statutes was set forth in Syllabus Point 1 of State ex rel. Appalachian Power Co. v. Gainer, 149 W. Va. 740, 143 S.E.2d 351 (1965). When considering the constitutionality of a legislative enactment, courts must exercise due restraint in recognition of the principle of the separation of powers in government among the judicial, legislative, and executive branches. The courts must resort to every reasonable construction in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are virtually plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

II. ARGUMENT

A. THE ATTORNEY GENERAL IS TO PERFORM ONLY THOSE DUTIES PRESCRIBED BY LAW.

The duties of the Attorney General are prescribed by West Virginia law. Article VII § 1 of the West Virginia Constitution establishes the Office of the

Attorney General. The Constitution specifically provides that the Attorney General "shall perform such duties as may be prescribed by law." Under the settled rules of construction, the word "may" generally should be read as conferring both permission and power. State ex rel. Trent v. Simms, 138 W. Va. 224, 77 S.E.2d 122 (1953). The phrase "prescribed by law" means that which is provided by statute. Lawson v. Kanawha Co. Court, 80 W. Va. 612, 92 S.E.2d 786 (1917). The plain meaning and intent of the Constitution is to limit the powers of the Attorney General to those powers conferred to him by statute. Manchin v. Browning, 170 W. Va. 779, 296 S.E.2d 909 (1982).

This Court in Manchin discussed the Attorney General's powers and duties. In a well-reasoned opinion, the Court determined that the Attorney General does not exercise common law powers. Manchin, 170 W. Va. 779, 785, 296 S.E.2d 909, 914 (1982). The inclusion of the constitutional clause which identifies that the Attorney General "shall perform such duties as may be prescribed by law" specifically prevents the Attorney General from assuming duties not statutorily granted. Manchin, 170 W. Va. 779, 787, 296 S.E.2d 909, 917 (1982). West Virginia statutes define and contain the Attorney General's duties, not the Attorney General himself. Manchin, 170 W. Va. 779, 787, 296 S.E.2d 909, 917 (1982), State ex rel. Fahlgren Martin v. McGraw et al., 190 W. Va. 306, 307, 438 S.E.2d 338, 339 (1993), see Better Gov't. Bureau Inc. v. McGraw et al., 106 F.3d. 582, 597 (1996). The Constitution vests the Legislature, Chief Executive, and the Judiciary with the authority to define the

perimeters of the Attorney General's duties. Id. As was noted by Justice D. McGraw in Cooper v. Gwinn, 170 W. Va. 245, 298 S.E.2d 781, 789 (1981):

Our Constitution does not permit executive officers to pick and choose the laws they will or will not execute, for if such were the case, the executive department could, either by commission or omission, model a system of law different than that specified by the people acting through the Legislature.

The Legislature, Chief Executive, and the Judiciary have prescribed many duties to the Attorney General. They did not, however, vest the office with unbridled power. Many of the duties of the Attorney General are found in W. Va. Code § 5-3-1. The duties listed are specified, and thus limited. The Code does not establish the Attorney General as chief law enforcement officer for the State. Manchin, 170 W. Va. 779, 787, 296 S.E.2d 909, 917 (1982). It does not permit the Attorney General to make public policy. Id. at 917. The West Virginia Code neither vests the Attorney General with the authority to assert his own vision of the State's interest Id., nor does the West Virginia Code establish the Attorney General as the sole attorney for every governmental instrumentality in the State of West Virginia. Id. Though many duties are generally assigned to the Attorney General, many duties are specifically exempted. The duty to hire legal staff for the RJA is one such exemption. W. Va. Code § 31-20-4.¹

This Court has consistently, logically, and rightfully held that under West Virginia law "the powers and duties of the Attorney General" are limited to those "specified by the Constitution and by rules of law prescribed pursuant thereto."

¹ Petitioner incorrectly asserts in his brief that the RJA lacks statutory authority to appoint counsel and staff. Petitioner's Petition for Writ of Mandamus, page 4.

Manchin, 170 W. Va. 779, 787, 296 S.E.2d 909, 917 (1982), Fahlgren Martin, 190 W. Va. 306, 307, 438 S.E.2d 338, 339 (1993), See Better Gov't. Bureau Inc., 106 F.3d. 582, 597 (1996).

At bar, Petitioner seeks the authority to perform duties not assigned by law to the Attorney General. He seeks to assume duties which are assigned by law to others. Such a proposition runs afoul of the separation of powers clause of the Constitution, and stands contrary to the plain meaning of Article VII § 1.

The RJA has a specific exemption from W. Va. Code § 5-3-1 *et seq.* and an unambiguous legislative grant of authority to employ staff and legal counsel. The Legislature intended to carve out narrow exceptions to the general list of duties it granted to the Attorney General in W. Va. Code § 5-3-1 *et seq.* The Attorney General has no legal right to assume duties assigned to others. See Fahlgren Martin, 190 W. Va. 306, 438 S.E.2d 338 (1993), See Better Gov't. Bureau Inc., 106 F.3d. 582 (1996). Petitioner has no legal right to the relief sought in the Petition for Writ of Mandamus.

B. THE RJA HAS STATUTORY AUTHORITY TO EMPLOY LEGAL COUNSEL AND STAFF.

The RJA is a unique government instrumentality created pursuant to W. Va. Code § 31-20-1 *et seq.*; indeed, the RJA is defined specifically by the Legislature as a body corporate and government instrumentality. Among the RJA's many tasks, foremost is the responsibility of providing a cost-effective system for the construction, maintenance, and operation of adult jails throughout

West Virginia. It is governed by the provisions of W. Va. Code § 31-20-1 through 28 as well as various constitutional provisions and decisions of this Court. The operation of jails had historically been a county function.

Jails by their nature are a tool of all three branches of government and the various jailing jurisdictions. The RJA must be particularly responsive not only to the needs of the State as a whole, but also to the needs of the communities and jurisdictions that it serves. The Legislature recognized that for a modern jail system to be effective, yet responsive, to all of those jurisdictions' concerns, it requires a central organization controlled primarily by those whom it serves.

Therefore, the Legislature recognized the need for this unique agency to have a Board as its controlling agent. Furthermore, the Legislature recognized that the Board must be composed of three different groups who have fundamental interests in the security of the jails, their secure and efficient operation, and the safety of the citizens of this State. That is why the seven voting board members are comprised of the following: two statutory appointees, the Secretary of Administration, who is primarily concerned with state financial interests, and the Secretary of Military Affairs and Public Safety, who primarily protects public safety interests; and two citizens who represent the public interests from professional points-of-view, since one is required to be a lawyer and the other to be a medical doctor; but the largest body of appointees are the three who must come from the ranks of county officials.

The counties have a fundamental interest in the successful operations of the RJA. These interests are not always parallel to the interests of state

government. In fact, when the counties were asked to close their jails, the Legislature ensured that these county jail replacements, *i.e.*, regional jails, would not be controlled by a typical state agency, such as the Division of Corrections which operates solely with general revenue. Since there is no expenditure of general revenue whatsoever for the operation of regional jails, it is the county governments' responsibility and their representatives' keen interest in maintaining as much control over the cost of jail operations as possible. Since these county governments are sometimes faced with state mandates (which county officials typically call "unfunded mandates"), the interest of the RJA, especially from the counties' point-of-view, would be in conflict with those of the State.

The RJA receives no general revenue funds. All operational costs are borne directly by the counties and other jailing jurisdictions. W. Va. Code § 31-20-1 *et seq.* All RJA construction has been financed through the collection of Court costs or through other special revenue sources. This places the RJA in an inevitable nexus where the often divergent interests of the counties and the interests of various state agencies can come into conflict.

In recognition of the inevitable conflicts which arise and of the special nature of the authority, the RJA was not designed as a typical executive agency which answers simply to the Governor. Rather, it is a body corporate and a government instrumentality controlled by a governing board which includes not only two state appointees and two citizens, but three county officials as well – the largest block of appointees. W. Va. Code § 31-20-3

To ensure that the day-to-day operations of the RJA reflect the will of its governing board, the Board (not the Governor) appoints an Executive Director to a five-year term subject only to legislative confirmation. This corporate structure ensures that the Board is responsive to the people who pay the bills - the counties and other jailing jurisdictions – as well as in compliance with the standards and needs of the State.

Consistent with these challenging concerns, the RJA enabling legislation specifically provides that “the Executive Director may employ any other person that he or she determines necessary and may appoint counsel and legal staff for the Authority. . .” W. Va. Code 31-20-4. The West Virginia Legislature has specifically exempted the Attorney General from acting as the sole provider of legal advice to the Authority.²

It is well-settled in West Virginia law that the Attorney General has only those powers specifically granted to him. Manchin, 170 W. Va. 779, 296 S.E.2d 909 (1982), Fahlgren Martin, 190 W. VA. 306, 438 S.E.2d 338 (1993), See Better Gov't. Bureau Inc., 106 F.3d. 582 (1996). Petitioner has no authority to act in a manner which is not authorized, or to assume duties which are not granted by the Legislature. Id. At hand, the laws of the State of West Virginia do not provide the Attorney General with the sole authority to provide legal advice to the RJA. W. Va. Code § 31-20-4. There is wisdom in the Legislature's acts.

² It should be noted that the Executive Director of the RJA has the same legislative grant of authority to hire legal staff as is granted to the Attorney General in W. Va. Code § 5-3-3 to hire Assistant Attorneys General and staff.

The RJA inevitably finds itself holding a different legal position than some state agencies and the Attorney General. These conflicts were recently illuminated in State ex rel. W. Va. Reg'l. Jail & Correctional Facility Auth. v. W. Va. Inv. Management Bd., 203 W. Va. 413, 508 S.E.2d 130 (1998), where the Attorney General intervened advocating a position adverse to the RJA. Currently the RJA (though named as a Respondent) supports a position adverse to the West Virginia Division of Corrections in Sams v. Kirby, 208 W. Va. 726, 542 S.E.2d 889 (2000). In this matter, the RJA contends that the counties should not subsidize the housing of state inmates in regional jails. As of this writing, a Senior Assistant Attorney General has filed a motion with the West Virginia Court of Claims in an attempt to avoid payment of the State's defaulted \$1.7 million-dollar invoice for housing state inmates in regional jails. Looking to the immediate future, inevitable conflicts surrounding the RJA internet web site and issues concerning the appropriate housing and treatment of the mentally ill will again probably place the West Virginia Attorney General and the agencies it represents in an adverse position to the RJA. While it is true that Chinese walls may be constructed to lessen the influence of the Attorney General advocating to contrary positions, the Legislature elected to avoid even the appearance of impropriety in the case of the RJA. The Legislature simply did not assign the duty of representing the RJA to the Attorney General. The Attorney General has no legal right to represent the RJA.

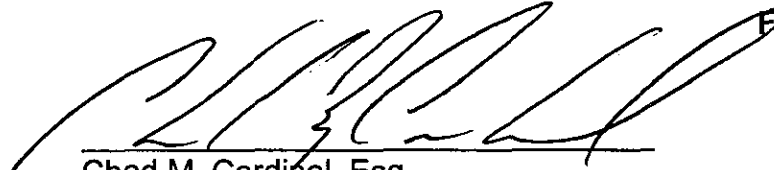
III. CONCLUSION

The Legislature did not create a typical state agency with the RJA, nor did it intend to. The Legislature created an agency to assume tasks historically assigned to the counties, made that agency viable primarily through county funds, and gave the counties a controlling voice in that agency. The RJA elected to hire legal staff not only because the Legislature said it could, but because the RJA determined that only by having its own counsel could it properly further this unique agency's mandated mission.

Therefore, RJA does humbly pray that this Honorable Court **DENY** this Writ of Mandamus, or in the alternative, **MOULD** the Writ to identify that the Attorney General may only assume those duties assigned to that office by the Legislature as mandated by West Virginia Constitution.

Respectfully Submitted,

**WEST VIRGINIA REGIONAL
JAIL AND CORRECTIONAL
FACILITY AUTHORITY**



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CERTIFICATE OF SERVICE

I, Chad M. Cardinal, do hereby certify that the foregoing "*Response of Intervenor West Virginia Regional Jail and Correctional Facility Authority to Petition for Writ of Mandamus*" was served upon the following by depositing a true and exact copy thereof in the United States mail, first class, postage prepaid, this 11th day of January 2002, as follows:

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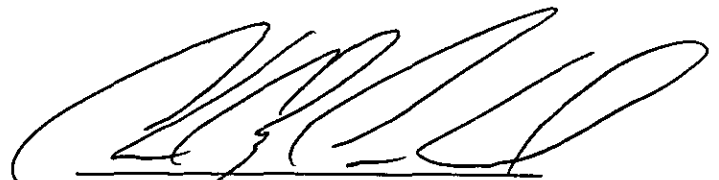
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