

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

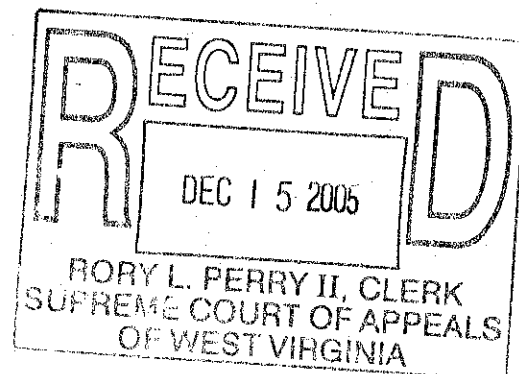
**STATE OF WEST VIRGINIA ex el.
STATE OF WEST VIRGINIA
Petitioner**

V.

DOCKET NO. 32875

**HONORABLE DAVID H. SANDERS,
Circuit Judge, 23rd Judicial Circuit and
JASON ERIC VAN METRE,
Respondents**

**RESPONDENT VAN METRE'S SUPPLEMENTAL MEMORANDUM IN
OPPOSITION TO STATE'S PETITION FOR PROHIBITION AND STAY**



**John P. Adams
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I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW.

In this case, the State seeks the continued incarceration in West Virginia of the Respondent, Eric Van Metre, until such time as the criminal proceedings pending against him in West Virginia are concluded, notwithstanding the fact that the Respondent has already made bond on all West Virginia charges. Mr. Van Metre is only incarcerated at this time because of a detainer and/or fugitive warrant filed on him by the Commonwealth of Virginia alleging unrelated felony offenses.

Upon inquiry in Circuit Court, and after consultation with counsel, the Respondent advised the Court that he wished to waive formal extradition proceedings and wanted to return to Virginia to resolve the charges against him. Of particular concern to the Respondent was the fact that his current incarceration constitutes "dead time" for which he will not receive credit against any possible sentence in either West Virginia or Virginia.¹

The State opposes permitting Mr. Van Metre to return to Virginia under two different rationales. The first is that the State has a right under West Virginia Code 5-1-9(j) to refuse to return him to Virginia until trial, and presumably sentencing and punishment, are complete in West Virginia. The second is that the State would be somehow prejudiced in fulfilling its obligation to the Respondent for a speedy trial pursuant to West Virginia Code 62-3-21, commonly known as the "Three Term Rule."

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He cannot receive credit in West Virginia because he has been admitted to bond; he cannot receive credit in Virginia because he is in West Virginia.

On October 31, 2005, the Circuit Court of Berkeley County (Sanders, Judge) ruled that the Respondent should be permitted to waive formal extradition proceedings and return to Virginia. The Circuit Court's Order was stayed until 5:00pm November 3, 2005 to permit the State to seek intervention by this Court. The State sought Prohibition against the Circuit Court and this Court issued A Rule to Show Cause on November 3, 2005 returnable on January 10, 2006. Both the Petitioner and the Respondent were granted leave by the Court to file supplemental memoranda by December 16, 2005. The Respondent remains incarcerated in the Eastern Regional Jail.

II STATEMENT OF FACTS

The Respondent does not dispute the Statement of Facts set forth by the Petitioner.

III AUTHORITIES RELIED UPON

United States Constitution, 5th Amend.

United States Constitution, 6th Amend.

United States Constitution, 14th Amend.

West Virginia Constitution, Article III, Section 4.

West Virginia Constitution, Article III Section 10 .

West Virginia Constitution, Article III, Section 20

West Virginia Code 5-1-7

West Virginia Code 5-1-9(h)

West Virginia Code 5-1-9(j)

West Virginia Code 62-3-21

West Virginia Code 62-14-1

State ex rel. White v. Todt, 475 S.E. 2d 426 (WV 1996)

State ex rel. Stines v. Locke, 220 S.E. 2d 443 (WV 1975)

State v. McClain, 211 W.Va. 61, 561 S.E.2d 783(WV 2002)

IV Argument.

1. The Court should not permit the State to use West Virginia Code 5-1-9(j) to keep the Respondent incarcerated in West Virginia on out-of-state charges when he has made bond on his West Virginia Charges and voluntarily seeks to return to the demanding jurisdiction.² The purpose of the Uniform Extradition Act is to facilitate the return of fugitives from one state to another, and to ensure that no state becomes a haven for alleged wrongdoers. The Act itself is the result of a Constitutional mandate found at Article IV Section 2 of the United States Constitution.

In this case the Respondent has been made aware of charges against him in the Commonwealth of Virginia and has elected to waive his right to invoke the formal procedures set forth under the Extradition Act. Such waivers of extradition are an everyday occurrence in the Circuit Courts of West Virginia, especially in the border counties. Because the Extradition Act has not been invoked and the underlying mandatory procedures have not taken place, it is not

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Counsel for the Respondent has been unable to find any reported decisions construing this Section in this State.

applicable, and the State has no authority to invoke Section 5-1-9(j) of the Act.

2. If the Extradition Act is in fact applicable, Section 5-1-9(j) states that the "Governor" may decline to return an individual until the completion of trial and punishment in the asylum state. The term "Governor" is defined by West Virginia Code 5-1-7 as including "any person performing the functions of governor by authority of the law of this state." A Prosecuting Attorney can obviously not issue a Governor's Rendition Warrant for the return of an individual from another state; and the state cites no authority for the Proposition that the Prosecuting Attorney may act in place of the Governor in refusing to return an individual to the demanding state. Therefore, the Prosecuting Attorney lacks the statutory authority to refuse to return an individual to the demanding state.

3. Finally, if the Extradition Act is applicable and the Prosecuting Attorney has standing to in his or her discretion to refuse to return a fugitive pending resolution of the West Virginia charges, then Section 5-1-9(j) is unconstitutional as applied to the respondent and other individuals in the same factual position as the defendant. \ It is undisputed that the Respondent in this case is entitled to fundamental due process of law under the United States and West

Virginia Constitutions.^{3 4 5 6}

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United States Constitution, 5th Amend. The Fifth Amendment guarantees that no person shall be deprived of life, liberty, or property without due process of law.,

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United States Constitution, 14th Amend. The Fourteenth Amendment guarantees that no state shall deprive any person of life, liberty, or property without due process of law.

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West Virginia Constitution, Article III, Section 10. Article III, Section 10 guarantees

The Fifth Amendment to the United States Constitution specifically states that "No person...shall be deprived of life, liberty, or property without due process of law..."

4. In syllabus point 1 of State ex rel. Stines v. Locke , 220 S.E. 2d 443 (WV 1975) this Court held

When due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by government action.

What then are the respective interests of the State and the Respondent in this case? The State has an interest in insuring that the Respondent appears for trial. With regards to this interest the State has placed the Respondent upon a trial bond, and was apparently satisfied that he would appear for trial and did not pose an unreasonable threat to society if released. The State also has an interest in ensuring that requests for extradition from and to West Virginia are promptly completed. Finally, the State has an interest in complying with the various requirements for speedy trial so as to not lose the ability to try the Respondent due to delay.

5. The primary interest of the Respondent is obviously his liberty which is the most fundamental recognized by both the United States and West Virginia Constitutions. The Fifth and Fourteenth Amendments to the United States Constitution leave no doubt as to the

that no person shall be deprived of life, liberty or property, without due process of law and the judgment of his peers.

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West Virginia Constitution, Article III Section 20. Article III, Section 20 states that free government and the blessing of liberty can be preserved to any people only by a firm adherence to justice, moderation, temperance, frugality and virtue, and by a frequent recurrence to fundamental principles.

importance of liberty. Although the State has offered various pretexts to explain his continued incarceration the situation is clear - he is currently being held in jail awaiting trial on charges for which he has already made bond. Further, not only is he being held despite making bond, but it is unclear whether he is entitled to credit for time served since he is technically being held on the Virginia charges.⁷

6. The Respondent also has a significant interest in being permitted to return to Virginia and resolving the charges there. If he was able to make bond in Virginia as he did in West Virginia, then all the issues in this case would be moot. If he was unable to make bond in Virginia, then the State would have to make arrangements for his return for trial.

When the competing interests here are balanced, the balance obviously favors the Respondent who is being deprived of his liberty. Administrative convenience for the State should never be a legitimate grounds for incarceration.

6. Moreover, permitting the State to incarcerate individuals in a pretrial status for charges in other jurisdictions for periods of time at its discretion for periods of up to one year (under the State's Three Term Rule argument), and without any credit for time served, is clearly a violation of the Fifth Amendment's prohibition on deprivation of liberty without due process of law.⁸

This incarceration would be solely on the basis of pending charges in another jurisdiction, which

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West Virginia Code 61-11-14 provides for credit for time served prior to conviction. State v. McClain, 211 W.Va. 61, 561 S.E.2d 783(WV 2002). However, McLain contains language about "bailable offenses" and it is unclear how it would be applied in a situation such as this, where you have a defendant who has made bail but is still being incarcerated.

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The Court's approval of such a practice would also raise the unsettling specter of the State coercing pleas to local charges in return for permitting a defendant to return to the demanding state rather than accrue substantial "dead time."

the State, in its discretion, could prevent detainees such as the Respondent, from resolving. This is especially troubling because the language of the West Virginia Code 5-1-9(j) which provides that "the Governor, in his or her discretion, may either surrender him or her on the demand of the executive authority of another state or hold him or her until he or she has been tried and discharged or convicted and punished in this state." As previously noted, this gives the State a discretionary and essentially unreviewable ability to incarcerate individuals without trial in factual situations similar to those presented here.⁹

7. The State's argument that it may be somehow prejudiced if the Defendant is permitted to return to Virginia is without merit. In State ex rel. Stines v. Locke, 220 S.E. 2d 443 (1975), cited by the State, the terms of Court the defendant was incarcerated in another state were counted against the State under the three-term rule solely because the State failed to apply under West Virginia Code 62-14-1 to seek custody of the defendant for trial. The right to a speedy trial is obviously the Defendant's right and not the State's. While it is true that the State may be inconvenienced by being required to file routine forms with the Commonwealth of Virginia to secure the Defendant's presence for trial if he returns to Virginia, such inconvenience to the State is surely minimal when compared to the continued incarceration of the Defendant in this case.

Moreover, since the State bases its claim on the Three Term Rule, the State by inference must believe that no substantial injustice would occur if the defendant were held for trial until the

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Such a grant of discretionary authority to hold an individual is totally inconsistent with the provisions of West Virginia Code 5-1-9(h), which provides for bond if there is no Governor's Warrant forthcoming within 60 days.

end of the third term.¹⁰ The State also ignores the obvious conclusion that if the Respondent is returned to Virginia and the State makes a request for the Respondent for trial pursuant to West Virginia Code 62-14-1, the Three Term Rule would undoubtedly be tolled for those terms of Court the Respondent was out of the jurisdiction.

8. Other Considerations. Finally, there are several other considerations that the Court should consider. Accepting the State's arguments in this case would add to the overcrowding in the regional jails. As the Court is aware, prison overcrowding is an ongoing problem, State ex rel. Sams v. Kirby, 542 S.E.2d 889 W.Va.,2000, and a substantial portion of that overcrowding has been shifted to the regional jails. What compelling State interest is fulfilled by further overcrowding? In a case such as this the question of which jurisdiction should pay for the incarceration of the Respondent must also be considered. Assuming that the Respondent were to go to trial as scheduled on the West Virginia charges on February 13, he would have spent approximately four months incarcerated, for a total cost of approximately \$6,000.¹¹ Should this cost be paid by Berkeley County, when the respondent has made bond on the Berkeley County charges? Should it be paid by Virginia, since the basis of his incarceration is the outstanding Virginia charges, notwithstanding the fact the State will not permit his voluntary return? Or perhaps the Governor's Office or the Berkeley County Prosecutor's Office?

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Although Respondent's West Virginia trial is currently scheduled Feb. 15, 2006, with over 100 indictments returned in the October 2005 term, it does not appear that date can be relied upon. Paradoxically, although the Respondent is incarcerated, it is unclear whether he is entitled to trial in this term of Court because he is admitted to bond in West Virginia.

¹¹ Assuming \$50/day x 120 days.

CONCLUSION

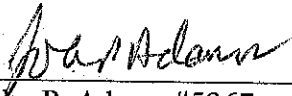
The Respondent enjoys a presumption of innocence in Virginia as well as West Virginia. Under the State's novel theory, the Respondent could be imprisoned in West Virginia for essentially a year on the Virginia charges. The Respondent in this action has substantial Constitutionally protected interests. These include a right to trial on the Virginia charges under the Sixth Amendment, an interest in his personal freedom under the Fourth and Fifth Amendments, and a right to Due Process of Law under the Fifth and 14th Amendments to the United States Constitution and the corresponding sections of the West Virginia Constitution. The only state interest which is being asserted is inconvenience - the State may have to fill out some forms - obviously not the type of compelling state interest which would require an abridgement of substantial Constitutional rights. Petitioner offers only the speculative assertion that it might be prejudiced under the Three Term Rule if it failed to file the proper forms to seek the return of the Respondent for trial as a grounds for keeping the Respondent incarcerated.

The Respondent respectfully requests that the Court balance the respective interests presented in this case. The Respondent has already waived his right to invoke the formal procedures of the Uniform Extradition Act, and its lengthy requisition and habeas processes, and has requested that he be returned to the State of Virginia so that he may resolve the outstanding charges. The State is seeking to avoid the inconvenience of having to obtain temporary custody of the Respondent and transport him back to the jurisdiction for trial. The possible cost to the Respondent for avoiding this "inconvenience" is up to a year of "dead time" in a West Virginia facility. Up to a year of a man's life to free the State from a little paperwork is an unconscionable and unconstitutional balancing of interests.

The Circuit Court of Berkeley clearly recognized the proper balancing of interest and made the correct ruling. Accordingly, the Defendant should be permitted to waive extradition and return to the Commonwealth of Virginia and no Writ of Prohibition should issue from this Court.

Respectfully submitted this 13th day of December 2005.

JASON ERIC VAN METRE
BY COUNSEL



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CERTIFICATE OF SERVICE

I, John P. Adams do hereby certify that I have served a true copy of Respondent Van Metre's Supplemental Memorandum upon

Pamela Games-Neely
Berkeley County Prosecuting Attorney
101 S. Spring St.
Martinsburg WV 25401

Hon. David H. Sanders
100 W. King St.
Martinsburg, WV 25401

on this 13th day of December 2005.



John P. Adams #5967