

STATE OF WEST VIRGINIA  
IN THE SUPREME COURT OF APPEALS

DWIGHT L. MATHENA, ROGER SULLIVAN,  
PATRICK W. FEW, JACK GRIMES, KENNETH  
BENNETT, JEFFREY L. WOLFE, KENNETH  
POWELL STEVEN COGAR, JASON LAWSON,  
and EUGENE BLAKE,

Petitioners Below,

JASON LAWSON and EUGENE BLAKE, Appellants,

v.

NO. 32769

WILLIAM S. HAINES, Warden, HUTTONSVILLE  
CORRECTIONAL CENTER, Respondent Below,

Appellee.

BRIEF OF APPELLANTS

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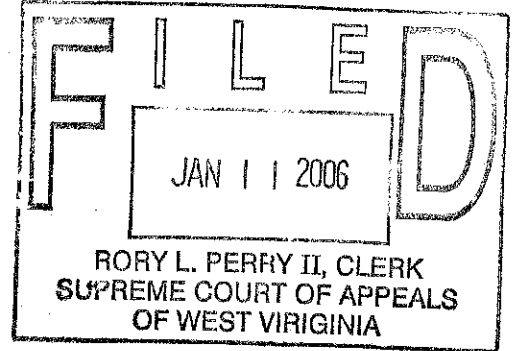


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v.

NO. 32769

WILLIAM S. HAINES, Warden, HUTTONSVILLE  
CORRECTIONAL CENTER, Respondent Below,

Appellee.

BRIEF OF APPELLANTS

I. INTRODUCTION

This appeal challenges the lower court's patently unconstitutional orders which prohibit Appellant Blake from filing pro se pleadings in respect to his petition challenging the conditions of confinement at HCC and challenges the unlawful retroactive application of West Virginia Code § 25-1-8 which requires inmates, even those who were incarcerated prior to the effective date of the statute, to pay for medical services. Finally, the Appellants request that this Court address the cruel and unusual conditions of confinement which exist.

II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

On January 11, 2001, the Appellants filed a petition for Writ of Habeas Corpus with the Circuit Court of Logan County. On January 18, 2001, an order was entered transferring the case from Logan County to the Randolph County pursuant to *McLaughlin v. Vickers*, 533 S.E. 2d 38,

(W.Va. 2000). The case was assigned Civil Action No. 01-C-12. On January 30, 2001, Appellant Blake and Few both sent a letter to the Judge in Randolph County requesting the appointment of counsel and again summarizing the issues.

On February 13, 2001, the Appellants filed an identical petition for writ of habeas corpus with the Circuit Court of Mercer County. On February 15, 2001, an Order was entered transferring the case from Mercer County to Randolph County pursuant to the Rules governing post-conviction habeas corpus in West Virginia. The case was assigned Civil Action No. 01-C-39. On March 1, 2001, Appellant Few sent a letter to the Randolph County Circuit Court which summarized the issues and requested appointment of counsel.

On June 6, 2001, the Appellees transferred Appellant Blake to Mount Olive Correctional Center. ("MCC")

On August, 23, 2001, and after a review of the two cases, the court consolidated them into Randolph County Civil Action No. 01-C-39 and dismissed Civil Action No. 01-C-12. The Circuit Court of Randolph County reviewed the case file and noted that the "Petition" was correctly filed pursuant to West Virginia Code § 53-4A-2. The court further noted that the petition was based upon the "totality of conditions" of confinement at the Huttonsville Correctional Center ("HCC"). The Court assessed filing fees and ordered the HCC business office to seize the necessary funds from the various inmate spending accounts to make payments directly to the Randolph County Circuit Clerk's Office.

Three years later, after the Appellees transferred Appellant Blake back to HCC, on August 10, 2004, he wrote a letter to the Office of the Circuit Clerk in Randolph County making an inquiry concerning the recently seized funds from his institutional account in Civil Action No.

01-C-39.

In addition to the money inquiry, Appellant Blake made the following statement in his letter: ". . . hopefully, it will not be necessary for me to flood your office with additional motions and litigations concerning this case."

In response to this letter Judge Henning issued an order dated August 25, 2004, which enjoined Blake from filing "any motions or sending any letters to the Office of the Clerk unless such documents were signed by an attorney licensed to practice law in the State of West Virginia."

In an attempt to not violate the Court's order and to by-pass the Clerk's office, Blake mailed his subsequent filings directly to the Court. In response, the Court issued yet another order dated November 19, 2004, which expanded its earlier order to include ". . . any further communication with the Circuit Court of Randolph County . . ." The Court took no action on the request for appointment of counsel or motion to certify the case as a class action.

On February 3, 2005, Appellants Blake and Lawson filed the instant Petition For Appeal which this Court granted on June 29, 2005.

### **III. STATEMENT OF FACTS**

Appellants Eugene Blake and Jason Lawson are two of the original inmates in the underlying litigation who now reside within dormitories of the Huttonsville Correctional Center. This case concerns the "totality of the conditions" that exist at HCC, the lawfulness of the Circuit Court's order prohibiting Appellant Blake from filing pro se pleadings and the retroactive application of West Virginia Code § 25-1-8. The unlawful nature of the Circuit Court orders and the retroactive application of § 25-1-8 are self evident. Due to the Circuit Court's failure to provide

the Appellants with an opportunity to litigate this matter no record below exists concerning the conditions of confinement. However, pursuant to *West Virginia Constitution* Article VIII § 3 this Court has original jurisdiction of proceedings in habeas corpus.

In a related matter the undersigned is counsel for over one hundred clients in an action currently pending before the Honorable John Henning, Judge of the Circuit Court of Randolph County, West Virginia. Gregory Mitchell and Michael Williams initially filed that case pro se on May 16, 2001, alleging that the Huttonsville Correctional Center facility does not comply with the state fire code.

Petitioners' counsel obtained an order permitting him to accompany the West Virginia State Fire Marshall on an inspection of HCC. The inspection established that the HCC facility violated numerous provisions of the state fire code. Thereafter the Circuit Court ordered the state to submit a compliance plan. Eventually the state did so and obtained approximately 12 million dollars in construction funds to correct the fire code deficiencies. However, in order to accommodate construction the Respondent closed many older portions of HCC and transferred all inmates who were previously housed on those units to the units which were not impacted by the renovation.

As a result and as described below, the facility became overcrowded, unsafe and unsanitary to the extent that the living conditions constituted cruel and unusual punishment.

Shortly after the construction began counsel filed a motion for a preliminary injunction on or about February 18, 2005, asserting that the conditions constituted an imminent threat to the health, safety and welfare of the inmates. The Court scheduled a hearing on the motion for a preliminary on January 24, 2006.

The Appellants do not contend that prisons should be desirable places. However, those

officials charged with overseeing the operation of HCC must ensure that certain minimal standards of decency are maintained. The state is only able to fulfill the twin goals of punishment and constitutionally required rehabilitation when the facilities in which it confines individuals meet these very basic standards.

The Petitioners in *Nobles v. Gregory*, Randolph County Circuit Court Civil Action No. 83-C-244 (1983), over twenty years ago, sought relief against confinement under such conditions as exist in the current case. Appellants herein have attempted to raise these issues in the Circuit Court of Randolph County. The Appellants now seek their release and/or relief from the living conditions that constitute cruel and unusual punishment in violation of the 8th Amendment to the *United States Constitution*, Article III, Section 5, 7, 10, and 17 of the *West Virginia Constitution*.

#### **IV. ASSIGNMENTS OF ERROR**

- A. The Circuit Court's Order Prohibiting Appellant Blake from Filing Any Further Pro Se Pleadings Violates His Constitutionally Guaranteed Access to Courts.**
- B. The Circuit Court's Order Prohibiting Appellant Blake from Filing Any Further Pro Se Pleadings Violates His Procedural and Substantive Due Process Rights.**
- C. The Retroactive Application of West Virginia Code Section 25-1-8 to Inmates Who Were Incarcerated Prior to the Statute's Effective Date Violates the Appellant's Constitutionally Guaranteed Due Process Rights.**
- D. The Conditions of Confinement at HCC Constitute Cruel and Unusual Punishment.**

#### **V. STANDARD OF REVIEW**

"In reviewing a challenge to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition

under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995); *State v. Green*, 207 W.Va. 530, 534 S.E.2d 395 (2000).

## VI. DISCUSSION

### A. Introduction

This Court is very familiar with litigation regarding the conditions of confinement which the inmates at HCC experience. See *Hurrah v. Leverette*, 165 W.Va. 665, 271 S.E.2d 322 (1980) (where inmate sought unconditional release from confinement because they were denied their due process rights and their rights to be free from cruel and unusual punishment following a 1978 Labor Day weekend riot.); *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 788 (1981) (inmates in state prisons have a right to rehabilitation enforceable through the substantive due process mandate of the West Virginia Constitution and all actions of the State with respect to deprivations of liberty are subject to strict scrutiny.); *Reed v. Harshbarger*, 173 W.Va. 258, 314 S.E.2d 616 (1984) (mandamus relief to inmates forcing the respondents to comply with the West Virginia Board of Health Food Service Sanitation Rules following a November 24, 1983 Thanksgiving Day food poisoning of a substantial numbers of inmates.); *Nobles v. Duncil*, 202 W.Va. 523, 505 S.E.2d 442 (1998) (addressing a number of issues involving internal disciplinary matters and inmate health care services.); *State ex rel. Valentine v. Watkins*, 208 W.Va. 26, 537 S.E.2d 647 (2000) (awarding good time credit to inmate during Parole Board hearing delay). Lawson was granted parole sometime after the filing of the original petition and returned to prison on parole violation in September, 2004.

Likewise, this Court had been repeatedly called upon to resolve disputes regarding inmates' substantive and procedural due process interests. See *Echard v. Holland*, 111 W.Va. 138, 351 S.E.2d 51 (1986)(prisoner not entitled to have warden's good time and overtime good time earned by him deducted from each of two consecutive sentences.); *State ex rel. Coombs v. Barnette*, 179 W.Va. 347, 368 S.E.2d 717 (1988)(allowing good time credit for cumulative terms exceeding six months.); *State ex rel. Williams v. Department of Military Affairs and Public Safety*, 573 S.E.2d 1 (W.Va. 2002)(warden practice of prohibiting inmates from applying for the restoration of good time credit until two years immediately preceding their discharge date was arbitrary and capricious.); *State ex rel. Bailey v. Department of Military Affairs and Public Safety*, 212 W.Va. 407, 573 S.E.2d 1 (2002)(more good time that an inmate has earned can not be taken in disciplinary proceedings.); *State ex rel. Fields v. McBride*, 216 W.Va. 623, 609 S.E.2d 884 (2004)(improper denial of good time credit and physical abuse by prison guards). This matter requests that this Court continue its tradition of assuring the Appellee's operation of correctional institutions meets constitutional and statutory requirements.

**B. The Circuit Court's Order Prohibiting Appellant Blake from Filing Any Further Pro Se Pleadings Violates His Constitutionally Guaranteed Access to Courts.**

*West Virginia Constitution Article III § 17* provides, "The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and just shall be administered without sale, denial or delay."

*West Virginia Constitution Article III § 16* provides, "The right of the people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate."

This Court has a proud tradition of zealously defending these important and fundamental constitutional provisions. See *Hurley v. Allied Chem. Corp.*, 164 W.Va. 268 (1980) (holding Article III Section 17 may establish an implied cause of action); *Herald v. Mail Co. V. Hamilton*, 165 W.Va. 103 (1989) (finding this provision provides for the public's independent right of public and press to attend criminal proceedings); *State ex rel. West Virginia State Police v. Taylor*, 499 S.E.2d 283 (W.Va. 1997) (noting an absolute bar to obtaining criminal history information through a subpoena duces tecum could impermissible burden the important right which this section provides).

This right of access to court provides with equal force to convicted and/or incarcerated individuals. See *Rhodes v. Leverette*, 160 W.Va. 781 (1977) (holding an indigent criminal defendant is constitutionally entitled to a copy of the trial record); *James v. Hun*, 201 W.Va. 139 (1997) (noting the fundamental right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful papers by providing prisoners with adequate law libraries); *Linger v. Jennings*, 143 W.Va. 57 (1957).

Here, it is undisputed that the Circuit Court's order unconditionally denied Appellant Blake access to courts. Thus, this Court must then determine if the restriction passes constitutional muster. Clearly under any standard or review it does not.

Counsel was unable to find any binding West Virginia precedent where a court has in such a blatant manner denied any inmate the right to file pro se pleadings (i.e. self representation). However, in other civil contexts this court has held that the right of self representation in a civil proceeding is a fundamental right which cannot be arbitrarily or unreasonably denied. *Blair v. Maynard*, 174 W.Va. 247 (1984); *Hawkinberry v. Maxwell*, 176 W.Va. 526 (1986). Further, a court may not deny this right without a clear showing that the pro se litigant is engaging in a course of

conduct which demonstrates a clear intention to obstruct the administration of justice. *Blair*, supra.

The United States Supreme Court in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 5143 stated court access "is part of the right of petition protected by the First Amendment." Further, in *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985) the Court held that restrictions on the right of court access are "generally subject to the same constitutional analysis" as the right to free speech.

Here, it is undisputable that the Circuit Court's orders enjoining all pro se communication whatsoever with the Circuit Clerk and the Court itself violate numerous well recognized First Amendment principles. In *NAACP v. Button*, 371 U.S. 415, 438 the Court stated that only a compelling state interest could justify such an infringement upon First Amendment rights. Here, the court made no factual findings or conclusions of law purportedly justifying his whole-sale censorship of Appellant Blake's well-recognized constitutional rights. In addition, because the court's orders prospectively enjoin any communication, provide for no alternative relief and did so without regard for the content of the speech, they constitute an unlawful prior restraint. See generally *Wheeling Park Comm 'n v. Hotel & Restaurant Employees*, 198 W.Va. 215 (1996).

Further, whenever restricting such a fundamental right the court should consider all less restrictive alternatives. See *Button*, 371 U.S. at 438 ("precision of regulation must be the touchstone in an area so closely touching our most precious freedoms").

The letter Blake mailed to the Randolph County Clerk's office on August 10, 2004, simply made an inquiry regarding the filing fees and stated: ". . . hopefully, it will not be necessary for me to flood your office with additional motions and litigations concerning this case."

While perhaps Appellant Blake poorly worded his letter it was simply not so egregious as

to warrant the subsequent orders from Judge Henning which enjoined any further litigation in the case. It must be remembered that Blake was the only jail house lawyer working on the case. While the Circuit Court was obviously upset with Appellant Blake it had available many less restrictive options short of completely abrogating his right of access to the courts. First and foremost, the Circuit Court could have granted Appellant Blake's request and appointed counsel. Or as more fully discussed below the court could have conducted a hearing to determine what sanction if any was appropriate.

The Circuit Court's order, even if one for argument's sake accepts that the language of Appellant Blake's letter is sanctionable, exceeds the statutory scheme designed to deter inmates from filing frivolous pleadings. See *W.Va. Code* §25-1 A-1 et seq. ("Prison Litigation Reform Act") Totally absent from the PLRA is a provision which allows the court to completely prohibit an inmate from filing any and all pro se pleadings.

In *James v. Hun*, 201 W.Va. 139 (1997) this court did address regulations adopted by the Jail and Correctional Facility Standards Commission restricting the amount of legal documents inmates were entitled to possess and an inmate's ability, when serving as a legal clerk, to possess another inmate's legal materials. There this Court did not use the First Amendment analysis described above which requires stricter scrutiny of the orders in question. However, in *Hun* the Court addressed regulations internal to the West Virginia Division of Corrections. In addressing these types of internal regulations the Court stated, "[T]his right of meaningful access to the courts is not completely unfettered." *Hun*, 201 W.Va. 141. Citing *Johnson v. Avery*, *supra*, this Court held that any such restriction upon this right must be reasonable and balanced against legitimate correctional interests.

Here because the Circuit Court imposed the restriction and not the Appellee, there is simply no legitimate correctional interest which the restriction serves. This Court should apply a much higher level of scrutiny as described above. However, even applying the *Hun* analysis the orders in question are completely unreasonable and arbitrary. The Circuit Court simply has no legitimate interest in prohibiting Appellant Blake's pro se access to courts. The lower court made absolutely no factual findings concerning any of Appellant Blake's actions, failed to provide any rational for its order, did not provide him with a hearing and failed to specify in its order why such an extreme sanction is justified. See *Blair*, supra.

Finally, not only do Article III Sections 16 and 17 provide for access to courts these provisions also protect individuals from unlawful retaliation where individuals have used courts to redress grievances. See *McClung v. Marion County Commission*, 178 W.Va. 444 (1957); *ACLU of Maryland, Inc. v. Wicomico County, Md.*, 999 F.2d 780 (4th Cir. 1983); *Johnson v. Rodriguez*, 110 F.3d 299 (5th Cir. 1997), cert denied, 522 U.S. 995, 118 S.Ct. 559, 139 L.Ed.2d 400 (1997); *State ex rel. Anstey v. Davis*, 202 W.Va. 538, 509 S.E.2d 579 (W.Va. 1989).

Here, undoubtedly the lower court unlawfully retaliated against Appellant Blake for simply having written a letter that the Circuit Court apparently found distasteful.<sup>1</sup> However, disagreeing with the content of an inmate's filing is not a lawful basis for the orders. In addition, here the letter in question actually complied with the Circuit Court's initial order that he have no contact with the clerk.

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<sup>1</sup>In more than twenty years Appellant Blake has never received a single disciplinary infraction.

Finally, the Appellees apparently retaliated against Petitioner Blake by transferring him from HCC to Mount Olive Correctional Center. Appellant Blake has always been known as a "jail house lawyer" and began serving his sentence at the West Virginia Penitentiary at Moundsville in 1985. He remained there until the closure of that prison in 1995. The Appellees then transferred him to the new prison at Mt. Olive until his transfer to HCC in March, 2000. Appellant Blake's transfer to HCC was based upon the modification of this sentence in October, 1996, and his excellent institutional record. On June 6, 2001, a few months after the filing of the underlying litigation in this case, the Appellees transferred Blake to the Mt. Olive Correctional Center.

After his transfer to the more secure prison at Mt. Olive, this matter sat inactive in the Randolph County Circuit Court. It appears sometime after Blake's transfer, the Court issued the writ. See (Order dated October 25, 2001, consolidating case number OI-C-12 into OI-C-39). The Appellees filed no response. In addition, the Court did not take any action on the then Petitioners' request for the appointment of counsel. In fact, no action was taken on the case whatsoever for three years until Blake was transferred back to HCC in March 2, 2004, when he learned that money was taken from his spending account for filing fees and wrote a letter to the Clerk of Court. In light of these facts Appellant Blake has established at least a prima facie case of unlawful retaliation. And therefore this Court should force the Appellee to establish a legitimate non-retaliatory basis for its actions.

**C. The Circuit Court's Orders Prohibiting Appellant Blake from Filing Any Further Pro Se Pleadings Violates His Substantive and Procedural Due Process Rights.**

Article III, § 10 of the *West Virginia Constitution* provides that "No person shall be

deprived of life, liberty, or property without due process of law and judgment of his peers.<sup>2</sup>

Inherent in the due process clause of the West Virginia Constitution are both the concepts of substantive due process and equal protection. *Thome v. Roush*, 164 W.Va. 165 (1979).

Pursuant to the Article III, § 10 classifications of citizens are subject to differing levels of constitutional scrutiny. *Tony P. Sellitti Constr. Co. v. Caryl*, 185 W.Va. 584 (1991), cert. denied, 502 U.S. 1073 (1992). Most classifications, excluding those invidious classifications such as race and gender, are subject to a minimal level of constitutional scrutiny such that any classification should be upheld if it is reasonably related to the achievement of a legitimate state purpose. *Id.*

This Court has consistently held that the basic due process guarantees of Article III Section 10 apply to incarcerated individuals. *Watson v. Whyte*, 162 W.Va. 26 (1978) (Due process is required regarding decision to reclassify inmates to a more restricted status.); *Tasker v. Mohn*, 165 W.Va. (1980) (Due process required as part of parole hearings.); *State ex rel. Gillespie v. Kendrick* 164 W.Va. 599 (1980) (Due process protections afforded to inmates when good time credit is sought to be revoked); *Cooper v. Gwinn*, 171 W.Va. 245 (1981) ("Consequently, the people incarcerated in the penitentiary, like all other citizens, have a constitutional right, guaranteed by due process as it operates through the republican form of government, to enjoy the benefit of this legislatively enacted rule of law."); *State ex rel. Williams v. Depart. of Military Affairs et al*, 212 W.Va. 407 (2002); *State Ex Rel. Bailey v. Division of Corrections et al*, 213 W.Va. 563 (2003); See

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<sup>2</sup>While it is sometimes helpful to look to the federal constitution for equal protection guidance, it is beyond dispute that the provision of the West Virginia Constitution may require higher standards of protection than afforded by the federal constitution. *State v. Bonham*, 173 W.Va. 416 (1984); *Queen v. West Virginia Univ. Hosps.*, 179 W.Va. 95 (1987).

also *Crain v. Bordenkircher*, 176 W.Va. 338 (1986); *Wolf v. McDonnell*, 418 U.S. 539 (1974); *Nobles, supra.*; *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977).

Thus, any classification must not be arbitrary or discriminatory and must have a rational relationship to some legitimate purpose. *State ex rel. Harris v. Calendine*, 160 W.Va. 172, 233 S.E.2d 318, 324 (1977); *Bailey v. West Virginia Divisions of Corrections*, 213 W.Va. 564, 567 (2003) (holding an incarceration does not strip an inmate of all rights, or deprive him or her the expectation that the state will act in a reasonable and logical manner).

The principle that individuals are free from wholly arbitrary and unreasonable classification is firmly established in the United State Constitution as well. "Our cases have recognized successful equal protection claims brought by a class of one where the plaintiff alleges differential treatment from others similarly situated and there is no rational basis for such treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923); *Allegheny Pittsburgh Coal Co. v. Comm'r. Of Webster Cy.*, 488 U.S. 336(1989).

Here, the Circuit Court orders created the distinct and invidious classifications; those inmates which have pro se access to the courts and Appellant Blake who does not enjoy the same. Further, as stated above the orders in question provided no rational basis for the same and are therefor unconstitutional.

In addition the procedural aspect of Article III Section 10, at a minimum, guarantees both notice and the opportunity to be heard prior to a court's deprivation of a fundamental right. *State ex rel. Staley v. Hereford*, 131 W.Va. 84 (1947). Here the lower court provided neither. At the very least the court could have made specific factual findings concerning any alleged rational basis for its order and then provided Appellant Blake with an opportunity, either in person, or through court

filings to contest the same. Rather, absent all of this the court eviscerated Appellant Bake's procedural due process interests.

**D. The Retroactive Application of West Virginia Code Section 25-1-8, Requiring Inmates to Pay for Certain Medical Services, to Inmates Who Were Incarcerated Prior to the Statute's Effective Date Violates the Appellants' Due Process Rights.**

Effective June 1, 1998 *West Virginia Code* § 25-1-8 requires inmates in the custody of the West Virginia Division of Corrections to pay for certain medical services. Prior to the effective date of this statute inmates were entitled to cost free medical care. It is undisputed that both Appellant's Lawson and Blake were incarcerated prior to the effective date of this statute. Thus, this Court must determine if requiring the Appellants and all similarly situated inmates to pay for medical services amounts to an unconstitutional retroactive requirement.

This Court has generally held that a statute which retroactively impinges a substantive or vested right is unconstitutional. *Conely v. Workers' Compensation Division and Hercules, Inc.*, 199 W.Va. 196 (1997). See also *Mildred LM v. John O.F.*, 192 W.Va. 345, 351 n.10 (1994); *Maxwell v. State Compensation Director*, 150 W.Va. 123 (1965), overruled on another point, *Sizemore v. State Workmen's Compensation Comm'r*, 159 W.Va. 100 (1975).

Here, without question, all inmates within the custody of the D.O.C. had a substantive (and constitutional) right to cost free medical care. And that statute has eliminated this right for all incarcerated individuals including those incarcerated prior to the effective date of the statute. Thus, it must be determined if the Appellee's are unlawfully retroactively applying the statute in question.

The United States Supreme Court in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 128 L.Ed. 2d 229, 114 S.Ct. 1438 (1994) held that a statute constitutes a retrospective application when

"new legal consequences are attached to events completed before the effective date of the statute." Here the issue turns on identifying the "completed event". In *Gerald Souch vs. Percy Howard, Jr.*, 27 Fed. Appx. 793; 2001 U.S. App. LEXIS 24401, No. 00-15814 (9th Cir 2001) the court addressed this identical issue. There the Arizona legislature passed a similar fee for medical services with an effective date after Mr. Souch had committed his offense and was incarcerated. Citing *Landgraf* the court found that the completed event entitling him to cost free medical services was his commission of the offense and his incarceration. The case at bar presents the identical situation. The Appellants and other similarly situation inmates' completed event was the commission of an offense and incarceration. The new statute requiring a fee for medical services therefor provides for "new legal consequences" to this one event and thus is an unconstitutional retroactive application.<sup>3</sup>

Comparing this result to another Arizona case helps define "completed event". In *Zuther v. State of Arizona*, 199 Ariz. 104, 14 P.3d 295, 300 (Ariz. 2000) the court dealt with statutory changes which addressed the award of fifty dollars (i.e. "gate money") to inmates upon release from incarceration. In short, prior to the legislative amendments, the state provided the gate money. After the amendments a scheme was enacted where if available inmate funds were withheld to provide the gate money. Mr. Zuther was incarcerated prior to the changes and thus argued that requiring him to contribute was an unlawful retroactive application of the statute because he was incarcerated at the time the state was to provide all the gate money. The Court, citing *Landgraf*,

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<sup>3</sup>*W.Va. Code* § 25-1-8 (2000 Repl. Vol.) provides: "every inmate shall be charged a reasonable medical and health service fee for each medical visit the inmate makes. . ." *Arizona Revised Statute* § 31-201-01, provides: "every inmate shall be charged a reasonable medical and health service fee for each medical visit the inmate makes. . ."

found that the completed event entitling him to the money was not his incarceration but rather his completion of all necessary requirements to secure his release. Whereas here, prior to the legislative changes, the Appellants and all inmates had completed all events necessary to entitle them to cost free medical care (i.e. incarceration). Therefore, by direct implication *Zuther* supports the Appellants' position.

Counsel was unable to find any direct binding precedent from this Court concerning what constitutes a complete event in respect issues impacting rights similar to those in question. However, in *Woodring v. Whyte*, 161 W.Va. 262 (1978) the Court addressed legislative changes concerning the calculation of good time credits. There, in relevant part, the inmates argued that the changes should apply retroactively. The Court rejected this argument and found that the inmates' good time will be computed consistent with the statute which existed when the good time, therefore, was actually earned. In *Woodring* the completed event entitling an inmate to good time was fulfilling all the necessary statutory requirements. Likewise here the completed event in respect to cost free medical care was fulfilling the only statutory requirement--incarceration. Thus, the *Woodring* analysis clearly supports the Appellant's position.

Wherefore, based on the above, the Appellee's request that this Court find that all inmates incarcerated prior to the effective date of West Virginia Code Section 25-1-8 are entitled to cost-free health care.

**E. The Conditions of Confinement at Hcc Constitute Cruel and Unusual Punishment in Violation of Article III Section 5 of the West Virginia Constitution**

**1. HCC is unconstitutionally overcrowded.**

HCC currently houses 49% more inmates than its original design capacity. At the time of

the *Nobles v. Gregory* decision, HCC contained 12 principle dormitories. Recently, the Appellees closed six 6 of those 12 dormitories and doubled-up hundreds of displaced inmates into the already overcrowded remaining dormitories. This action was taken, in part, due to the significant fire code violations found in *State ex rel. Williams v. Dept. of Military Affairs*, supra.<sup>4</sup>

Currently, dormitory 1 thru 6 house 55 inmates on each dorm. Each of the dormitories contains 33 individual beds plus 11 sets of double beds.<sup>5</sup> The dormitory day rooms have enough space for approximately 25 to 30 inmates. Each of the above dormitories, 1 through 6, are currently 25% overcrowded based upon the original design capacity of the facility.

In March 2000, the Therapeutic Community was established. These two units are called Dormitory G-1 and G-2. Units G-1 and G-2 are considered treatment dorms for drug addiction, alcoholism and negative behavior patterns associated with the same. It is a voluntary, self-contained program where inmates are selected on a variety of factors, including length of sentence, prison disciplinary record and ability to control violent behavior. Selected inmates sign a one (1) year contract, live, eat and sleep exclusively on these two units. Dormitories G-1 and G-2 house 74 inmates each, yet were only designed for fifty.<sup>6</sup> In the Appellee's haste to accommodate displaced inmates due to the construction, some of the inmates placed on Unit G are not qualified, do not

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<sup>4</sup>Unit D-dorms 7, 8, 9, Unit F-dorms 10, 11 and 12 are closed and currently under construction. The displaced inmates from these dorms were placed onto Unit A-Dorms 1, 2, 3, Unit C-Dorms 4, 5, 6, Unit B-1 and B-2, Unit G-1, G-2 and Unit E-2 all of which already over capacity.

<sup>5</sup>The double beds have no ladders so the inmates sleeping on the top bunk have to jump down to the floor. Each bed on the dormitory measures 30 by 80 inches.

<sup>6</sup>Units G-1 and G-2 even have their own recreational yard so as to minimize contact with inmates who are not part of the program.

meet the criteria and/or do not want to participate in the program. The addition of these inmates disrupts the program and therefore irreparably damages the already existing inmates' ability to avail themselves of the opportunity to achieve full rehabilitation.

Also, in the year 2000 two 120 bed additions (Unit B and Unit E) were opened which made provisions for single cell housing. These additions increased the capabilities for segregation, intake, Diagnostic Unit as well as housing long-term general population inmates. However, in order to accommodate the displaced inmates the Diagnostic Unit has been discontinued and all single cells have been equipped with army cots.

Dormitories B-1 and B-2 each now have 120 inmates but were only designed for 60. The American Public Health Association standards require single cells of 60 square feet and 500 cubic feet per person. Dormitories, although they are disfavored, should provide 75 square feet and 600 cubic feet per person.

The current conditions at HCC are in serious violation of regulatory standards for adequate space for the number of inmates. The American Correctional Association standards require 60 square feet per cell and 80 square feet per inmate per cell for those confined more than ten hours a day. Fifty square feet per person is required in dormitories. Other nationally recognized standards prescribe 70 or 80 square feet per person. The various standards require additional dayroom space - 35 square feet per inmate according to the ACA standards and an additional 50% living space according to the APHA standards.

Likewise, in *Nobles v. Gregory*, supra, the current conditions violate the order entered, with reference to the 12 principal dormitories. Accordingly:

- A. A dormitory may house up to a maximum of 45 inmates, provided that 90% of the inmates

residing in such dormitory are out of the dormitory at least ten (10) hours in rehabilitative activities five (5) days a weeks and at least six (6) hours the remaining days.

- B. A dormitory may house up to a maximum of 40 inmates, provided that 80% of the inmates residing in such dormitory are out of the dormitory at least ten (10) hours in rehabilitative activities five (5) days a week and at least six (6) hours the remaining days.
- C. Rehabilitative activities, according to the order, include work, vocational, education, recreational, social, and mealtime activities.
- D. A dormitory not meeting the requirement of subparagraphs (a) or (b) may house no more than thirty five (35) inmates.
- E. The order "shall apply to the Respondents, their employees, agents and successors in office and the term 'respondents' shall apply to all such persons."

This Court affirmed the order in *Nobles v. Duncil*, 202 W.Va. 523, 505 S.E. 2d 442, 454 (1998), modifying two minor requirements of the court order but declared that "the remaining provisions of the final order are affirmed."

In dormitories and in a double cell, each inmate at HCC now has only 30-35 square feet of floor space. The amount of day-room space is so far below the standards that it is useless to calculate. The amount of hours inmates are off the dorms is seriously affected by the lack of jobs, education, vocational and other classes. For example, the Appellants conducted a person to person survey in April, 2005, and arrived at the following results:

Unit A - Dorms 1, 2 and 3

Dorm 1 is considered the "old man's colony" where older inmates are housed. Dorm 1 has fifty-five inmates and eleven double bunks, thirteen of these inmates do not have jobs. Only sixteen

inmates are off the dorm 5 or more hours per day including recreation.

Dorms 2 and 3 are considered "honor dorms." Dorms 2 and 3 have 55 inmates each with 11 double bunk beds. Nearly every inmate housed on these two dorms is employed and off the unit during the day. Unit B - B-1 and B-2

Unit B-1 consists of 60 double cells and 120 inmates. There are 44 army cots and 16 double bunk beds. 51 of these inmates do not have jobs. Only 5 inmates are off the dorm for 10 hours per day. 42 inmates are off the dorm 6 hours or less per day.

Unit B-2 consists of double cells and 120 inmates. There are 44 army cots and 16 double bunk beds. 53 of the inmates do not have jobs. Only 1 inmate is off the dorm for 10 hours per day. 98 inmates are off the dorm 5 hours or less per day.

Unit C - Dorms 4,5 and 6

Dorm 4 has 55 inmates and 11 double bunks. 30 of these inmates do not have jobs. Only 13 inmates are off the dorm 5 or more hours per day including recreation.

Dorm 5 has 55 inmates and 11 double bunks. 35 of these inmates do not have jobs. Only 7 inmates are off the dorm 5 or more hours per day including recreation.

Dorm 6 has 55 inmates and 11 double bunks. 33 of these inmates do not have jobs. Only 4 inmates are off the dorm 5 or more hours per day including recreation. Unit D - Dorms 7,8 and 9

CLOSED FOR CONSTRUCTION Unit E - E-1 and E-2

Unit E-1 is the segregation "lock up" unit and has 60 cells with 60 inmates.

Unit E-2 consists of 60 double cells and 120 inmates. There are 44 army cots and 16 double bunk beds. 65 of the inmates do not have jobs. 18 inmates are off the dorm for 5 or more hours per day.

Unit F - Dorms 10,11 and 12

CLOSED FOR CONSTRUCTION Unit G- G-1 and G-2 (Therapeutic Community)

Unit G-1 consists of 74 beds with 22 bunk beds. There are 21 inmates on G-1 who do not have jobs. There are no inmates off the dorm 9 or 10 hours per day. 35 inmates are off the unit at least 5 hours per day.

Unit G-2 consists of 74 beds with 22 bunk beds. There are 19 inmates on G-2 who do not have jobs. There are no inmates off the unit 10 hours per day and 2 inmates are gone 9 hours per day. 15 inmates are off the unit at least 5 hours per day.

The officials at HCC not only doubled the population to accommodate the original 252 displaced inmates, they also increased the population by 54. Below represents the manner in which the DOC accomplished this:

- Unit A - Dorms 1, 2, and 3 (each dorm had 42 inmates originally).
- 13 inmates were added to each of these dorms for a total of 39 displaced inmates.
- Unit B - Unit B-1 and B-2 (each unit had 60 inmates originally)
- 60 inmates were added to Unit B-1 and 60 inmates were added to Unit B-2 for a total of 120 displaced inmates.
- Unit C - Dorms 4, 5 and 6 (each dorm had 42 inmates originally) .
- 13 inmates were added to each of these dorms for a total of 39 displaced inmates.
- Unit E - Unit E-2 (this unit had 60 inmates originally).
- 60 inmates were added to Unit E-2 for a total of 60 displaced inmates.
- Unit G - G-1 and G-2 (each unit had 50 inmates originally)
- 24 inmates were added to Unit G-1 and 24 inmates were added to Unit G-2 for a total of 48

displaced inmates.<sup>7</sup>

The number of idle inmates on unsupervised dormitories at HCC is dangerous.<sup>8</sup> HCC does not provide enough jobs or vocational classes to keep the number of inmates busy. See e.g. *Cooper v. Gwinn*, 298 S.E.2d 781 (1981). HCC currently offers seven (7) vocational classes. However, one has been discontinued and another is due to be discontinued this year. There are approximately ten (10) inmates in each of the following vocation classes:

Agriculture

Horticulture

Welding

Electric

Mill and Cabinet

Auto Mechanics (this vocation is due to be discontinued this year)

Auto Body (this vocation has been discontinued)

Facility Maintenance

In a nutshell, HCC is horrendously unconstitutionally overcrowded. The dilapidation of the physical facilities contributes to extremely unsanitary living conditions; windows are broken and unscreened, floors and ceilings are crumbling, pervasive plumbing problems cause waste to be spread throughout the facility, the State Fire Marshall has identified serious fire code violations,

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<sup>7</sup>The number of inmates on and off the dorm and not employed is obviously subject to change as inmates are moved from dorm to dorm.

<sup>8</sup>H.C.C. is perhaps the only prison in the country that has hundreds of inmates packed tightly into dormitories for hours at a time without any staff or guard supervision whatsoever.

vermin and insect infestation has reached an uncontrollable magnitude<sup>9</sup>. The large number of inmates packed into such small living areas has seriously increased the risks to inmate safety.

Overcrowding has increased the risks to the Appellants safety in three ways: (1) Appellants cannot retreat from conflicts; (2) Appellants are required to fight for limited resources; and (3) fights and tension are the norm.<sup>10</sup> Inmates within the overcrowded dormitories have no personal space and no time away from other inmates. Moreover, if involved in a dispute with another inmate, Appellants have no place to retreat. This lack of personal space at HCC in combination with other factors such as lack of staff has a direct role in inmate attacks on other inmates.<sup>11</sup>

Appellants' lack of access to limited resources has also caused conflicts at HCC. For example, during the summer, all inmates want relief from the unrelenting heat, putting fans and ice at a premium. Although fans are to be rotated every four hours, aggressive inmates sometimes

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<sup>9</sup>The plumbing system at HCC is antiquated, unsanitary and deficient. The 4 toilets on each dorm are constantly coated with urine day and night. The toilets and sinks constantly leak. Within each of the dormitories the only one shower which contains seven shower heads. Only one inmate is permitted to shower at any one time. The water temperature fluctuates between scalding hot and extremely cold. The walls, ceilings, and floors have small cracks and holes which are infested with insects posing a health hazard.

<sup>10</sup>Of significant concern is the security risk with the tightly packing of hundreds of inmates into already cramped and overcrowded conditions. The presence of large numbers of inmates with inadequate facilities has heightened tensions and dramatically increased the vulnerability of the inmates to violent attack. The overcrowded conditions at HCC have caused a serious deprivation of basic human needs such as safety and sanitation. See *French v. Owners*, 777 F. 2d 1250 (7th Cir. 1985); and *Toussaint v. Yockey*, 722 F. 2d 1490 (9th Cir. 1984).

<sup>11</sup>There is a significant problem with a lack of staff at HCC. Dormitories are not staffed at all during the hours of 5:30 A.M. and 10:00 P.M. A correctional officer is present on the dormitories between the hours of 10:00 p.m. and 5:30 A.M. Throughout the morning, daylight and evening hours the only staff present is scheduled security checks and an occasional walk-thru by a counselor. Other than that, inmates are left unsupervised for hours at a time.

refuse to turn the fan, leading to fights and violence. Similarly, the desire for ice also leads to fights. "Ice call" is twice a day, but most of the time the two ice machines are broken and what ice is obtained is taken by the aggressive inmates. Most inmates choose to leave these aggressive inmates alone or face retaliation and violence. HCC is not equipped with any instruments to monitor the heat. As a result there is no way for officials to determine when the temperature is above 90°. It is "terribly hot" because floor and wall fans do a poor job of circulating air within the dormitories.

**2. The unsanitary kitchen and lack of a properly trained kitchen staff constitute cruel and unusual punishment.**

In Syllabus Point 2 of *Hickson v. Kellison*, 170 W.Va. 732, 296 S.E. 2d 855 (1982) this

Court stated:

"Certain conditions of jail confinement may be so lacking in the area of adequate food, clothing, shelter, sanitation, medical care and personal safety as to constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution."

A section of the kitchen ceiling is falling, due apparently to moisture, and there is approximately two inches of sewer water on the area of the kitchen floor. Rodent feces is commonly found in dried food products within storage areas. Food is prepared and served without the direct guidance and direction of either a dietitian or nutritionist. Special diets are not properly served for persons with medical problems such as diabetes, high blood pressure, heart disease or ulcers. The failure to maintain an adequate and sanitary food service facility which provides nutritional and caloric necessities and Appellees' failure to provide adequate and palatable medical diets to the Appellants with medical problems constitutes cruel and unusual punishment.

See e.g., *Campbell v. Cauthron*. 623 F.2d 503, 508, (8th Cir. 1980); *Bolding v.*

*Holshouser*. 575 F. 2d 461, 468 (4th Cir. 1978), cert, denied, 439 U.S. 837, 99 S. Ct. 121, 58 L. Ed 2d 133 (1978); and *Dimarzo v. Cahill*. 575 F. 2d 15,19 (1st Cir. 1978), cert, denied, 439 U.S. 927, 99 S. Ct. 312, 58 L. Ed. 2d 320 (1978)." See also *Pugh v. Locke*. 406 F. Supp. at 334; *Lightfoot v. Walker*. 486 F. Supp. 504, 512, 528 (S.D. 111. 1980).

The contracted food service provider for HCC is a company named Ara-Mark Food Corporation. Their employees are not properly trained to supervise inmates in the preparation of food. When Ara-Mark first entered the West Virginia prison system it served a well proportioned meal. Very quickly, however, the weaning began. As time went on, Ara-Mark began to cut corners in the amount of ingredients it used, and the amount it served inmates. Ara-Mark regularly fails to cook enough food (often they run out with 50 to 75 inmates waiting to be fed). The delays and scrambling to cook more food regularly results in different food items being served to the last inmates in line, causing petty jealousies that may explode into fights. Ara-Mark employees routinely instruct inmate cooks to dilute the entree's to stretch it to feed the 898-plus prisoners. It is routine practice for Ara-Mark to short recipes by 90 or more pounds of beef or other ingredients.

Ara-Mark's unsanitary practices in kitchen maintenance and food handling is likewise designed to cut costs. Inmates working within the kitchen have been required by Ara-Mark supervisors to soak spoiled chicken in vinegar and water to rid it of the smell before cooking. Appellants can best describe Ara-Mark's kitchen at HCC as "filthy" or "horrendous." Ara-Mark is so determined to cut costs that it teaches the inmates at HCC how to scoop food from pans in a way it won't jam too much into the ladle. Food preparation at HCC is not regularly supervised by a dietitian. Diet menus are not published and are not approved by a dietitian. Special and Medical diets are not prepared as prescribed by a physician. The overall preparing, serving, and eating food

within the dining halls at HCC is not sanitary. The kitchen is generally dirty and has a complete lack of ventilation due to the vent hoods over the cooking grills being blocked with grease and grime.

Frequently, an open sewer backs up and overflows onto the kitchen floor. Inmate workers in the kitchen at HCC are not given even the rudiments of sanitary food handling or proper clean uniforms. It is the norm to find insects and foreign particles in the food. The roach infestation in the kitchen has been described by officials at HCC as "uncontrollable." The deplorable conditions as described above within the kitchen and dining room facilities at HCC together with the manner in which food is stored and prepared constitutes cruel and unusual punishment.

**3. Appellants are denied any meaningful opportunity to participate in vocational, education or work activities due to the overcrowded conditions at HCC.**

As pointed out in the issues above, most inmates must spend substantially all their time crowded in dormitories in absolute idleness. 42% of the prison population as of April, 2005, is unemployed. Such unbroken inactivity increases boredom, tension and frustration, which in turn promotes incidents of violence. Idleness of this magnitude destroys any job skills and work habits inmates may have and contributes to their mental and physical degeneration. The inmates sitting idle in the population with no opportunity to obtain jobs or become involved with programs is alarming. The West Virginia Prison Industries offer several work programs which are not available to any significant number of inmates. Other inmates who have assigned tasks perform mere housekeeping functions for the institution. The present vocational program at HCC is practically non-existent.

The work assignments available at HCC offer little to motivate inmates. There are too

few jobs and most take only a few hours to perform. Frequently many more inmates are assigned to a particular job than are required to accomplish it. Inmates work for very little pay and the jobs do not teach useable skills involving modern technology. There is a waiting list for many of the vocational classes and due to the overcrowded prison population inmates must have less than three (3) years to serve on their prison sentence before being eligible to enroll. The most obvious need for a facility such at HCC is a strong vocational educational program, sadly at the facility it is the most glaring deficiency.

The average reading level of inmates entering the Division of Corrections in the first quarter of the year 2004 was below the sixth grade level. Yet, basic education classes are available to only a small number of inmates. The Educational Department at HCC is under-staffed and under-funded. This department is attempting to serve the prison population with an extremely limited budget. The Legislature will not allocate the substantial amount of money that is required to operate the educational department in a constitutionally permissible manner. The instructors and teachers at HCC are attempting to provide the best educational system possible while facing financial constraints which have literally made it impossible to fulfill their own statutory and constitutional mandates. Inmate services are not utilized regularly in public works and community projects (for example forest preservation or cleanup). There is no working system for furloughs (i.e., job search, arrange papers, driver's license, or social security) or pre-release HCC inmates. Nor does any working system exist which allows inmates to work in the community prior to their release by contract with appropriate community facilities. Male inmates have more rigid standards with which they must comply in order to be eligible for work release than female inmates who have been convicted of the same crimes.

There is a substantial waiting list of inmates eligible for work release for which there is no space in the present work release centers. The absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militates against reform and rehabilitation. While Courts should recognize the primacy of the legislative and executive authorities in the administration of inmates, if the prison authorities do not conform to minimum standards, courts are under an obligation to take steps to remedy the violations. See *Procunier v. Martinez*, 416 U.S. at 405, 40 L. Ed 2d 224, 94 S. Ct. 1800. Not only is it cruel and unusual punishment to confine a person in an institution under circumstances which increase the likelihood of future confinement, but these same conditions defeat the goal of rehabilitation which prison officials have set for their institutions.

**4. The lack of any working classification system at HCC violates the inmates' constitutional rights to be housed with inmates of the same or similar classification.**

The failure to classify inmate in an appropriate fashion results in robbery, rape, extortion and other violent acts. That is, violent inmates are not isolated from those who are young, passive, or weak. Consequently, the latter inmates are repeatedly victimized by those who are stronger and more aggressive. There is no proper working classification system at HCC. Classification personnel at HCC have attempted to implement the established classification system, the under staffing and overcrowding has produced a total breakdown of that process. For no valid or apparent reason too many inmates receive maximum security classification. Most inmates are requested to their classification hearings by their individual counselors. As a result, there are inmates at HCC who have been incarcerated for more than 15 years having waived each and every

classification hearing.

Inmates who demand classification hearings are routinely denied lower classification status based upon criminal records of more than ten or fifteen years old. Even if the charges were dismissed they are still used as a basis to deny lower classification. In addition, the percentages of inmates suffering from some mental disorder are unidentified, and the mentally disturbed are haphazardly dispersed throughout the HCC prison population without receiving proper treatment. Currently, there is approximately 10% percent or more of the inmate prison population that are psychotic, and that another 60% percent that are to require psychiatric treatment. Consequently, the mental health care at HCC is woefully inadequate.

**5. The appellee deprives HCC segregation inmates their constitutional right to have adequate, effective, and meaningful access to courts.**

At a minimum, inmates either must be given direct access to adequate libraries or must receive help from trained and competent legal personnel other than mere "writ writers" or inmate paralegals. See e.g., *Harrington v. Holshouser*, 741 F. 2d 66, 69-70 (4th Cir. 1984) (limited library access with help from untrained inmate paralegals insufficient.); *Ramos v. Lamm*, 639 F. 2d 559, 584-85 (10th Cir. 1980) (access to untrained inmate paralegals insufficient.) cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L. Ed 2d 239 (1981); *Kendrick v. Bland*, 586 F.Supp. 1536, 1552 (N.D. Ky. 1984) (telephonic communication with untrained inmate paralegals insufficient for prisoners without library access.); *Canterino v. Wilson*, 562 F. Supp. 106, 110-12 (W. D. Ky. 1983) (inmates without library access must be given access to legally trained personnel.); *Lovell v. Brennan*, 566 F. Supp. 672, 696 (D. Me. 1983) (direct counseling by inmate advocate and hiring of full-time advocate for segregated prisoners sufficient.) aff'd 728 F. 2d 560 (1st Cir. 1984). A prison

inmate's right of access to the courts is the most fundamental right he or she holds. "All other rights of an inmate are illusory without it, being entirely dependent for their existence on the whim or caprice of the prison warden." See *Adams v. Carlson*, 448 F. 2d 619, 630 (7th Cir. 1973). In *Bounds v. Smiths*, 430 U.S. 817, 97 S.Ct. 1491, 52 L. Ed 2d 72 (1977), the United States Supreme Court held that access to the courts "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries and adequate assistance from persons trained in the law."

The Appellee's do not provide inmates confined to the E-1 Segregation Unit at HCC with any direct access to the law library.<sup>12</sup> Each of the sixty (60) inmates housed therein must rely on one inmate legal clerk to fulfill their every legal need. Inmates within the segregation unit lack the primary resources to adequately begin even an initial review of their cases in an effort to formulate tentative issues or theories.

The inmates confined to E-1 are forced under the current policy and system to first complete a form requesting legal material or talk with the one single untrained inmate legal clerk. The form is first reviewed by a correctional officer within the segregation unit. It is then given to the inmate legal clerk who then gives it to a HCC staff librarian. The librarian reviews the legal material and assigns it to one of the legal clerks. This procedure, not only unconstitutional, denies the Appellants adequate library access and violates the attorney/client confidentiality of information. See Rule 1.6 of the West Virginia Rules of Professional Conduct. If an inmate desires to work on his legal case it is necessary that he allow numerous third parties, including staff and other inmates,

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<sup>12</sup>The E-1 segregation unit does not have "satellite" or "starter" libraries like other institutions.

to review his papers prior to obtaining any assistance or copies.

In order to provide for a constitutionally efficient means to provide access to the court for inmates housed in segregation units, those inmates should be permitted to either personally visit the prison's law library during prescribed hours or permitted to have a smaller "satellite library" within the segregation unit where the inmates can conduct research and perform their own legal writings without the necessity of disclosing their material to agents of the state and other inmates. See e.g., *Marange v. Fontenot* 879 F. Supp. 679 (E.D. Tex. (1995)) ("bookmobile" system of periodically providing specifically requested law books is insufficient).

## VII. RELIEF REQUESTED

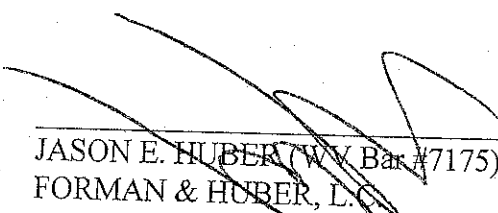
The Appellants respectfully request this Court to take immediate affirmative steps to redress the unconstitutional and unsafe conditions at H.C.C. In addition, the Appellants specifically request the Court to ORDER:

1. An immediate "cap" on the number of inmates based upon the *Nobles v. Gregory*, *supra*, and the original design of the facility;
2. An immediate program which provides adequate opportunities for prisoners to work and have adequate education and vocations, including work release and other outside jobs consistent with the proper classification of the inmates;
3. The termination of the Ara-Mark contract with a complete overhaul of the kitchen and dining room facilities at HCC;
4. HCC officials to provide incentives for inmates to earn extra good time through work and participation in programs;
5. HCC. officials to submit a plan for adequate access to a law library for those inmate

in segregation;

6. A reversal of the Court's order prohibiting Appellant Blake from filing pro se pleadings;
7. Immediate release from the cruel and unusual conditions of confinement;
8. HCC officials to cease and desist applying W.Va. Code § 25-1-8 in a retroactive manner to inmates whose offenses occurred prior to June 1, 1998; and
9. Any and all other or further relief the Court deems just and proper.

**Jason Lawson and Eugene Blake  
By Counsel**



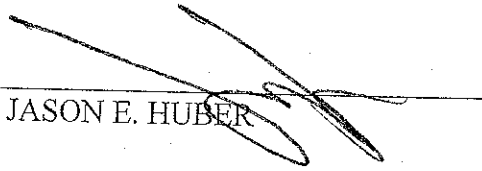
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CERTIFICATE OF SERVICE

I, Jason E. Huber, as counsel for the Petitioners/Appellants do hereby certify that true and correct copies of the foregoing BRIEF OF APPELLANTS were served upon counsel of record herein by placing true and correct copies thereof in properly addressed envelopes and by placing said envelopes in the regular course of the United States Mail on January 10, 2006, addressed as follows:

Charles Houdyschell, Assistant Attorney General  
Division of Corrections  
112 California Avenue  
Building 4, Room 300  
Charleston, WV 25305

  
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JASON E. HUBER