IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

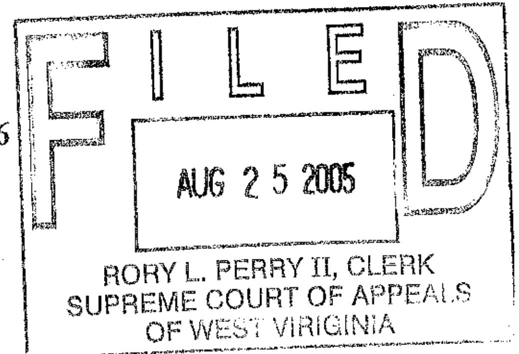
JAMES WILLIAM BERRY, SR.,

Petitioner,

vs. CASE NO: 30696

THOMAS McBRIDE,

Respondent.



PETITIONER'S MEMORANDUM OF LAW IN RESPONSE TO SPECIAL MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

JASON E. HUBER, ESQUIRE
FORMAN & HUBER, L.C.
100 CAPTIOL STREET, SUITE 400
CHARLESTON, WV 25301
(304) 346-6300
STATE BAR NO: 7175

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

I.	STATEMENT OF CASE	1
II.	INTRODUCTION	2
III.	ARGUMENT	3
	A. THE ORIGINAL WRIT WAS NOT IMPROVIDENTLY GRANTED BECAUSE THE AMENDMENT TO WEST VIRGINIA CODE §31-20-9 WHICH ELIMINATED THE COMMISSION'S JURISDICTION OVER THE RESPONDENT UNCONSTITUTIONALLY CREATES TWO ARBITRARY CLASSES OF INMATES	3
	B. THE ORIGINAL WRIT WAS NOT IMPROVIDENTLY GRANTED BECAUSE EVEN IF C.S.R. 95-2-8.6 NO LONGER APPLIES THE RESPONDENT IS REQUIRED TO FOLLOW ITS OWN POLICIES AND PROCEDURES WHICH IN TURN MANDATE THAT THE RESPONDENT HOUSE THE PETITIONER IN A SINGLE CELL	8
	C. THE WRIT WAS NOT IMPROVIDENTLY GRANTED BECAUSE AS THE SPECIAL MASTER RECOGNIZED THIS COURT SHOULD FORCE THE RESPONDENT TO DEVELOP OBJECTIVE CRITERIA FOR EVALUATING THE SUITABILITY OF INMATES FOR DOUBLE BUNKING	11
	D. THE ISSUES PRESENTED IN THIS PETITION ARE NOT MOOT	12
IV.	CONCLUSION	13
	CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

CASES Page

Allegheny Pittsburgh Coal Co. v. Comm'r. Of Webster Cy., 488 U.S. 336 (1989) 5

Cooper v. Gwinn, 171 W.Va. 245 (1981) 4

Crain v. Bordenkircher, 176 W.Va. 338 (1986) 4

Dent. v. West Virginia, 129 U.S. 114 (1889) 6

Dodrill v. Scott, 177 W.Va. 452 (1986) 7

Israel by Isreal v. West Virginia Secondary Schs. Activities Comm'n, 182 W.Va. 454 (1989) . 12

Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) .4

Queen v. West Virginia Univ. Hosps., 179 W.Va. 95 (1987) 3

Sams v. Kirby, 208 W.Va. 726 (2000) 7, 8

Service v. Dulles, 354 U.S. 363, 388, (1957) 8

Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923) 5

State Ex Rel. Bailey v. Division of Corrections et al., 213 W.Va. 563 (2003) 4,6,9, 10

State ex rel. Gillespie v. Kendrick 164 W.Va. 599 (1980) 4

State ex rel. Harris v. Calendine, 160 W.Va. 172, 233 S.E.2d 318, 324 (1977) 4

State ex rel. Williams v. Depart. of Military Affairs et al., 212 W.Va. 407 (2002) 4

State ex rel. Wilson v. Truby, 167 W. Va. 179 (1981) 8

State v. Bonham, 173 W.Va. 416 (1984) *3*

Tasker v. Mohn, 165 W.Va. (1980) 4

Thorne v. Roush, 164 W.Va. 165 (1979) 3

Tony P. Sellitti Constr. Co. v. Caryl, 185 W.Va. 584 (1991), cert. denied, 502 U.S. 1073 (1992) 4

Trimboli v. Board of Educ., 163 W. Va. 1 (1979) 8

United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) 8

United States v. Nixon, 418 U.S. 683, 695-97, (1974) 8

Village of Willowbrook v. Olech, 528 U.S. 562 (2000) 5

Watson v. Whyte, 162 W.Va. 26 (1978) 4

Williams v. Dept. of Military Affairs, 212 W.Va. 407 (2002) 13

Williams v. Precision Coil, 194 W.Va. 52 (1995) 3,8,9

Wolf v. McDonnell, 418 U.S. 539 (1974) 4

STATE REGULATIONS

West Virginia Code § 31-20-9 1,2,3,5,6,13

West Virginia Code §29A-1-1 6

West Virginia Code §31-20-1 5

STATE RULES

West Virginia C.S.R. §95-2-8.6 1,6,7,8,14

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

JAMES WILLIAM BERRY, SR.,

Petitioner,

vs. **CASE NO: 30696**

THOMAS McBRIDE,

Respondent.

PETITIONER'S MEMORANDUM OF LAW IN RESPONSE TO SPECIAL MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. STATEMENT OF CASE

This matter arises from the Petitioner's challenge to the Respondent's practice of double-bunking inmates at Mount Olive Correctional Center ("MOCC"). This Court previously found that the Petitioner did not have a statutory or constitutional right to an individual cell. However, the Court noted that West Virginia C.S.R. §95-2-8.6 prohibited the Respondent from placing more than one inmate in a cell designed for single occupancy and therefore granted his writ.

Thereafter, Respondent requested that this Court reconsider its decision arguing that the legislative amendment to West Virginia Code § 31-20-9 removed the Jail and Correctional Facilities Standards Commission's ("Commission") authority over the West Virginia Division of Corrections ("Division"). Thus, the Respondent asserts that C.S.R. §95-2-8.6 does not apply and the original writ was improvidently granted.

This Court granted the Respondent's request and appointed counsel to represent the Petitioner. Upon the parties request, this Court referred this matter to The Honorable Derek

Swope for the purposes of supervising the taking of depositions and facilitating discovery. The parties exchanged written discovery materials, conducted numerous depositions and submitted briefs to the Special Master. He then, upon reviewing the material, issued a preliminary report requesting additional information and upon receiving the same issued his final report (hereinafter referred to as "report"). Thereafter this Court directed the parties to submit briefs in response to the same.

II. INTRODUCTION

The report included detailed findings of fact and conclusions of law. The petitioner has no objection to the Special Master's findings in respect to the material facts and therefore for brevity's sake incorporates the same by reference.

In respect to the legal issues presented, this Court requested that the Special Master determine if this Court improvidently granted the Petitioner's writ in light of the legislature's amendment to West Virginia Code §31-20-9 which removed the Jail and Correctional Facilities Standards Commission's (hereinafter referred to as "Commission") authority over correctional facilities. The resolution of this issue in turn required the Special Master to determine if the amendment itself was a constitutional exercise of legislative authority and if so, whether the Respondent's Internal Operational Procedures (hereinafter referred to as "IOP"), and the West Virginia Division of Corrections Policy Directives (hereinafter referred to as "PD") were arbitrary and capricious. (Report p. 18-20)

The Special Master concluded that the amendment was not unconstitutional and then addressed the Respondent's policies and procedures which in turn involved two sub-issues. The first was whether the Respondent's position that it was not bound by its own policies and

procedures was lawful. And second, were the Respondent's procedures adequate in respect to determining which inmates with physical and or psychiatric impairments received single cells.

The Special Master concluded that the Respondent's position that it is not bound by its own procedures is in conflict with this Court's decision in *Williams v. Precision Coil,* 194 W.Va. 52 (1995). (Report p. 23). He further concluded that the procedures for determining which inmates should be in a single cell to be inadequate and recommended that the Respondent develop objective criteria for the same. (Report p. 24-25).

As more fully stated below, the Petitioner agrees with the Special Master's conclusions concerning the Respondent's policies and procedures but disagrees with his conclusion concerning the constitutionality of the amendment to West Virginia Code §31-20-9 .

III. ARGUMENT

A. THE ORIGINAL WRIT WAS NOT IMPROVIDENTLY GRANTED BECAUSE THE AMENDMENT TO WEST VIRGINIA CODE §31-20-9 WHICH ELIMINATED THE COMMISSION'S JURISDICTION OVER THE RESPONDENT UNCONSTITUTIONALLY CREATES TWO ARBITRARY CLASSES OF INMATES.

Article III, Section 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.[1] Inherent in the due process clause of the West Virginia Constitution are both the concepts of substantive due process and equal protection. *Thorne v. Roush*, 164 W.Va. 165 (1979).

Pursuant to the Article III, Section 10, legislative authority to create classifications of

[1]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)

citizens is 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 legislative 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 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 legislative created 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 it is beyond dispute that the amendment to *West Virginia Code* §31-20-9 creates two discrete and identifiable classifications of West Virginia's prisoners. The first class comprises inmates in the Respondent's custody who are physically housed in its facilities. These inmates due to the amendment have no independent state agency which regulates the Respondent's conduct. The second class includes inmates sentenced to the Respondent's custody but are still housed in the regional jails and inmates housed in regional jails either as pretrial detainees or individuals convicted of misdemeanor offenses who are subject to the Commission's regulatory protections.

Thus, this Court must determine whether granting regulatory protection to one class of individuals while totally abrogating regulatory protection for another is rationally related to a legitimate state interest or is wholly arbitrary and capricious and therefore unconstitutional.

West Virginia Code §31-20-1 created the West Virginia Regional Jail and Correctional Authority in order to, among other things, provide a comprehensive scheme for reforming West Virginia's correctional system. Pursuant to Article 20, the legislature authorized the creation of

new agencies to advance the statute's goal.

One such agency was the Jail and Correctional Facilities Standards Commission ("Commission"). The Commission's purpose was to assure that proper minimum standards and procedures were developed for the operation of correctional facilities, regional jails and local jails. *W.Va. Code* §31-20-9. In addition, the statute required the Commission to, in accord with *West Virginia Code* §29A-1-1, issue regulations to fulfill its purpose. Thereafter the Commission promulgated Title 95 Series 2 titled "Minimum Standards for Construction, Operation and Maintenance of Correctional Facilities." The regulation in issue, C.S.R. 95-2-8.6, prohibited the Respondent from double bunking inmates in cells designed for single occupancy. Thus, prior to the amendment, all inmates in correctional facilities, regional jails or local jail were assured through regulatory protection at least some basic minimum standard.

These regulations were obviously designed, at least in part, to protect inmates' basic rights. Thus, the Petitioner and all inmates have a statutorily created liberty interest in these basic minimal protections. As this Court stated in *Bailey*, "We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of the government." *Dent. v. West Virginia*, 129 U.S. 114 (1889).

Since the amendment which removed the Commission's authority, inmates in the Respondent's custody have absolutely no guaranteed regulatory protection and no regulatory state agency. The Respondent, beyond conclusory assertions and alarmist statements has totally failed to articulate any legitimate or rational basis for this classification. In fact, the classification itself is antithetical to the Commission's original purpose. How could one reasonably argue that

eliminating regulatory protections is rationally related to guaranteeing minimum regulatory protections? This is especially troubling in light of the Respondent's position, as more fully discussed below, that it is not even bound by its own internally created policies and procedures.

Despite the above, the Special Master held that the classification which the amendment created is not arbitrary and capricious because the regional jail system and correctional facilities serve different purposes. (Report pp. 19-20) This Court has recognized the distinction between the regional jails and correctional facilities. *Sams v. Kirby*, 208 W.Va. 726 (2000); *Dodrill v. Scott*, 177 W.Va. 452 (1986). However, this distinction rings hollow in respect to the amendment eliminating the Commission's jurisdiction over correctional facilities. It is wholly irrational to guarantee short-term inmates and sentenced inmates awaiting transfer to the Respondent's custody regulatory protection and those long-term, and in some cases inmates with life sentences, absolutely no regulatory protection.

Thus, based on the above, the legislative amendment abrogating regulatory and statutory protections for inmates is wholly arbitrary, capricious and not rationally related to any legitimate state interest. This Court should therefore declare that the legislative amendment is unconstitutional. This in turn would restore the Commission's jurisdiction over the Respondent and thus would require him to comply with all regulations previously issued, including C.S.R. 95-2-8.6 which prohibits double bunking.

The Respondent questions the Court's initial interpretation of this regulation arguing that the regulation only applies to cells designed for single occupancy. However, here it is clear that all cells in MOCC were designed for single occupancy. First, according to Mr. Coleman, any design features which would have permitted modification of the cell to accommodate inmates were

deleted before construction. In addition, MOCC inmates were exclusively housed in single-occupancy cells until the *Sams v. Kirby* decision. Thus the regulation is unambiguous as applied to the MOCC cells.

The Respondent asserts that prohibiting double-bunking will have disastrous effects upon the Division in light of this court's decision in *Sams v. Kirby.* While it is true that enforcing the regulation, absent the construction of additional facilities, would limit the number of individuals over which the DOC could exercise physical custody, this is hardly a bad result. Rather, the DOC and other agencies involved in the criminal justice system would (and should) be forced to develop alternative sentencing programs which would lessen the human supply side of the prison-industrial complex as opposed to reactionary solutions like double-bunking which do not address systemic flaws.

B. THE ORIGINAL WRIT WAS NOT IMPROVIDENTLY GRANTED BECAUSE EVEN IF C.S.R. 95-2-8.6 NO LONGER APPLIES THE RESPONDENT IS REQUIRED TO FOLLOW ITS OWN POLICIES AND PROCEDURES WHICH IN TURN MANDATE THAT THE RESPONDENT HOUSE THE PETITIONER IN A SINGLE CELL.

"It is for example a basic notion of due process of law that a governmental agency must abide by its own stated procedures even though it is under no constitutional obligation to provide the procedures in the first place and even though it can change the procedures at any time; so long as the procedures are in place, the agency must follow them. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 65 (1995). E.g., *United States v. Nixon*, 418 U.S. 683, 695-97, (1974); *Service v. Dulles*, 354 U.S. 363, 388, (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) *State ex rel. Wilson v. Truby*, 167 W. Va. 179 (1981); *Trimboli v. Board of Educ.*, 163 W. Va. 1 (1979).

Here, MOCC Deputy Warden Coleman and Unit Manager and Director of Classification Reynolds have both testified that the Policy Directives and Internal Operational Procedures do not create any substantive or procedural rights for inmates.

In fact PD 101.00 addressing Division policies and procedures and the interpretation thereof explicitly states:

> In addition, all policies and procedures set forth by the Policy Directives, Operational Procedures, Post Orders, and other written documents of the Division of Corrections are solely for the guidance of officers, employees, and agents of the Division of Corrections. These Policy Directives, Operational Procedures, Post Orders, and other written documentation are not intended to and cannot be relied upon to create rights, substantive or procedural, enforceable by any party and any litigation, grievance, or other matter with the Division of Corrections, or any officer, employee, agent, or servant.

As the Special Master recognized, the Respondent's position demonstrated through the testimony of its employees and PD 101.00 are in clear conflict with the Court's decision in *Williams,* supra. If this Court does not agree that the amendment to §31-20-9 is unconstitutional and does not consistent with *Williams* force the Respondent to follow its own procedures then the Respondent is totally free to choose which policies it will apply and follow and which ones it will not, even on a case by case basis. The public policy implications for inmates and West Virginia's correctional system are astounding. Considering this, the absence of an agency which oversees the Respondent inmates are rendered helpless to the arbitrary exercise of institutional authority and even the most minimal of prisoners' due process rights are clearly jeopardized . The Respondent's policy grants the Division unbridled discretion to selectively choose when, where and if he will follow it's own policies and procedures. As this Court stated in *Bailey*, "Perhaps no

place else are fairness and predictability more valued than within the walls of prison. Those incarcerated have little to look forward to, and little to motivate them, beyond a return to their normal, free lives on the outside." 213 W.Va. 566. A system where inmates have no mandatory substantive or even procedural due process protections is hardly fair or predictable and provides little or no incentive for inmates to conform their conduct to prison rules.

Thus, when the Respondent's own regulations are applied the Petitioner clearly meets three of the circumstances requiring single-occupancy cells under Policy Directive 202.02. (Attached as Exhibit C to Report). First, he obviously has a severe physical disability. The Respondents have recognized this throughout his incarceration by providing an allegedly accessible cell and wheel-chair.

Second, based on his physical disability, it is clear that Mr. Berry is particularly likely to be exploited and/or victimized. As the Special Master notes, he has been verbally and physically assaulted by a cell-mate in the past and would likely become a victim in the future if the Respondent placed another inmate in his cell.

And third, he has other special needs due to his wheel-chair confinement which require a single occupancy cell. When in a double occupancy cell he has difficulty moving around. He has to remove the leg pieces from his wheel-chair which in turn exacerbates his physical symptoms and cause him to suffer serious pain. The temperature, ventilation and mold problems likewise have detrimental effects on his condition with which he of course would have more trouble coping if he were in a double occupancy cell.

Despite the fact, as discussed below, that PD 202.02 lacks appropriate objective criteria, at least in respect to the Petitioner, this Court should find that the Petitioner satisfies the criteria

under PD 202.02 and direct the Respondent to maintain Mr. Berry in a single occupancy cell for the duration of his sentence.

C. THE WRIT WAS NOT IMPROVIDENTLY GRANTED BECAUSE AS THE SPECIAL MASTER RECOGNIZED THIS COURT SHOULD FORCE THE RESPONDENT TO DEVELOP OBJECTIVE CRITERIA FOR EVALUATING THE SUITABILITY OF INMATES FOR DOUBLE BUNKING.

Throughout the discovery process the Petitioner established that the Respondent has no objective criteria which it uses, short of the above mentioned regulation, to guide its determination under PD 202.02(D) concerning what constitutes "severe medical disabilities" and "serious mental illness".

Rather, as the Special Master found, the Respondent makes this decision merely based on a directive from a medical or mental health professional. (Report pp. 12-14). It also was clear that, in response to the Special Master's request for additional information, that the Respondent was unable to establish that the Petitioner had ever in fact been medically evaluated despite the fact that the Respondent's employees testified that an evaluation would occur in light of an inmate's request for a single cell. (Report pp. 7-8, 12).

In response to this evidence the Special Master concluded that, "[T]he medical assessment of inmates must be based on an acceptable standard of care, the determination of the inmate's housing needs should be based on some objective criteria in consideration of the medical assessment, including, but not limited to mobility/ability to ambulate, flexibility, strength, bowel function, etc." (Report p. 24). Considering the unique issues which housing inmates with physical and mental impairments raise, the Special Master also recommended that Respondent develop and implement internal review process for housing grievances. Finally, he directed that

the Respondent evaluate the Petitioner in respect to the developed objective criteria.

The Special Master's recommendations are entirely consistent with the due process protections which Article III, Section 10 of the West Virginia Constitution and the cases cited above interpreting the same provide. Therefore this Court should accept the Special Master's recommendation.

D. THE ISSUES PRESENTED IN THIS PETITION ARE NOT MOOT.

The Respondent has alleged that this matter is moot. When evaluating a mooteness allegation, this Court should consider three factors: first, the court should determine whether sufficient collateral consequences will result from determination of the question presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of the fleeting and determinate nature, may appropriately be decided. *Israel by Isreal v. West Virginia Secondary Schs. Activities Comm'n,* 182 W.Va. 454 (1989).

Here, all three factors are easily met. First, the collateral consequences of this matter are immense. All wardens and the Division must be put on notice that they cannot arbitrarily pick and choose what regulations it will or will not follow. Further, informing inmates that the regulations in question do provide procedural and substantive protections and forcing the Respondent to develop objective criteria concerning double-bunking issues will result in a more orderly and predictable resolution to inmate grievances which in turn would positively impact inmate behavior.

Second, this matter is of profound public importance. The Respondent and the Division of

Corrections are responsible for the care, custody, control of the entire correctional population. Allowing the Respondent to refuse to provide procedural and substantive protections, as stated above, would undermine some of the most basic purposes of confinement and thus destroy inmates' motivation to conform their behavior to appropriate standards.

Third, the issues presented are obviously capable of repetition, yet continually evade review. Regarding the regulatory protections for inmates, or more appropriately the lack thereof, this case presents the most efficient way to resolve this issue. If the Court did not address this claim, inmates will be forced to perpetually litigate this issue. In turn, the Respondent could moot the issue by simply applying the regulation just like it did in the present case when the Petitioner's cell-mate was removed only after he filed this case.

In addition, this Court has consistently refused to shy away from important matters involving the Respondent and the DOC where the issue in respect to a particular inmate may be technically moot. For example, this Court initially addressed the Petitioner's substantive claims despite the fact that the Respondent had previously removed the Petitioner's cell-mate. Likewise in *Williams v. Dept. of Military Affairs*, 212 W.Va. 407 (2002) this Court, in pertinent part, addressed the Respondent's unconstitutional policy of prohibiting inmates from requesting restoration of good-time credits until they are within two years of discharge, despite the fact that Respondent conceded on that issue and revoked the policy during litigation.

IV. CONCLUSION

Wherefore, based on the following, the Petitioner requests that this Honorable Court enter an Order:

1. Declaring that legislative amendment to *West Virginia Code* §31-20-9 constitutes

an unconstitutional violation of the Petitioner's due process interests thereby restoring the applicability of all Commission regulations including C.S.R. 95-2-8.6 which prohibits double-bunking;

2. Requiring the Respondent to follow its own Policy Directives and Internal Operational Procedures;

3. Requiring the Respondent to provide the Petitioner with a single cell for the duration of his confinement at MOCC;

4. Requiring the Respondent to develop objective criteria concerning the double bunking of inmates;

5. Requiring the Respondent to implement an internal house grievance procedure;

6. Any other relief that this Court deems just and equitable.

JAMES WILLIAM BERRY, SR.,
By Counsel

JASON E. HUBER (WV Bar #7175)
FORMAN & HUBER, L.C.
100 Capitol Street, Suite 400
Charleston, WV 25301
304-346-6300
Counsel for Petitioner

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES WILLIAM BERRY, SR.

Petitioner,

v. **Case No. 30696**

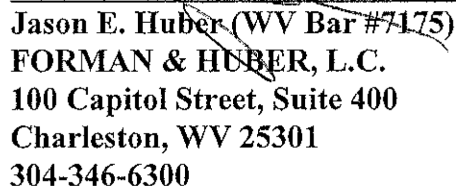
THOMAS McBRIDE,

Respondent.

CERTIFICATE OF SERVICE

I, Jason E. Huber, counsel for the petitioner, do hereby certify that the foregoing Petitioner's Memorandum of Law in Response to Special Master's Findings of Fact and Conclusions of Law has been served upon the following counsel of record, by first class mail, postage prepaid, on this 25th day of August, 2005:

Charles Houdyschell, Jr., Esquire
Office of the Attorney General
112 California Avenue
Building 4, Room 300
Charleston, WV 25305



Jason E. Huber (WV Bar #7175)
FORMAN & HUBER, L.C.
100 Capitol Street, Suite 400
Charleston, WV 25301
304-346-6300