

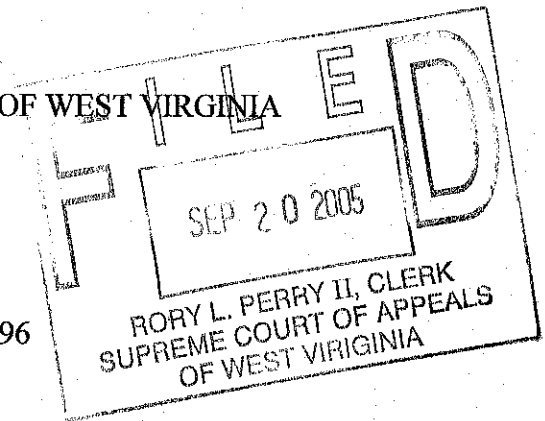
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.  
JAMES WILLIAM BERRY, SR.,  
Petitioner,

v.

THOMAS MCBRIDE,  
Respondent.

No. 30696



**BRIEF OF RESPONDENT REGARDING REPORT OF SPECIAL MASTER**

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**WEST VIRGINIA ATTORNEY GENERAL**

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## POINTS AND AUTHORITIES RELIED UPON

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## STATEMENT OF THE CASE

Like the petitioner, the respondent does not have extensive objections to the Special Master's findings in this case. Also, the respondent does not take exception to the Special Master's conclusions and recommendations in this case.<sup>1</sup> Accordingly, the respondent will largely address the petitioner's exceptions in this case.

## DISCUSSION

### I.

**THE 1998 AMENDMENTS TO WEST VIRGINIA CODE § 31-20-9  
THAT ELIMINATED THE JAIL STANDARDS COMMISSION  
JURISDICTION OVER CORRECTIONS DOES NOT ARBITRARILY CREATE  
TWO CLASSES OF INMATES BECAUSE THIS COURT  
HAS RULED THAT JAILS AND PRISONS ARE NOT INTERCHANGEABLE**

Equal Protection Clause challenges to social and economic programs which do not involve invidious discrimination are analyzed using a rational relationship test. Miller v. Illinois Department of Public Aid, 94 Ill. App. 3d 11, 19, 418 N.E.2d 178, 186 (1981). Government actions need not be distributed with "mathematical nicety." Id. "The problems of government are practical ones and may justify, if not require rough accommodations." Id. citing Dandridge v. Williams, 397 U.S. 471, 485 (1970). Prisoners seeking to establish a violation of the Equal Protection Clause must prove that a discriminatory purpose is the motivating factor in the decision made by the prison official. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 256-66 (1977). In other words, a prisoner must prove, as an element of his action, that prison officials had some discriminatory intent or purpose behind the actions of which the prisoner complains. Id. Moreover,

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<sup>1</sup> The respondent does continue to assert that this proceeding, filed by a prisoner housed in a single cell, to preclude some potential future double-bunking, that may or may not occur is in the nature of seeking an advisory opinion and is therefore not ripe.

official action will not be held unconstitutional only because it results in a disproportionate impact. Such impact may be relevant, but it is not the sole touchstone. The focus is on whether the particular defendant was motivated by a discriminatory purpose. See St. Francis College v. Al-Khazraji, 481 U.S. 604, 609-10 (1987). In the case at hand, the petitioner has not brought a proceeding adequate to advance such an issue. This is not a proceeding seeking a writ of mandamus against Jail Standards Commission compelling the issuance of some set of standards. Likewise, the West Virginia Division of Corrections does not have the power to enact legislation. The primary concern at hand in this case is whether the petitioner may utilize the courts to prevent the Division of Corrections from even thinking of placing him in a double cell. Clearly there is no discriminatory purpose that can be assigned to the Division of Corrections. Consequently, the petitioner's arguments in this regard fail.

Likewise, the removal of the standards committee's jurisdiction over the Division of Corrections furthers legitimate purposes. As this Court has noted, Jails are not substitutes for prisons. State ex rel., Sams v. Kirby et al., 208 W.Va. 726, 730, 542 S.E.2d 889, 893 (2000). Jails undertake different missions from prisons. Their mission is to house prisoners for shorter periods of time and they house different types of prisoners. Consequently, a legitimate governmental purpose exists in having different specializing bodies formulating standards for jails versus prisons. Likewise, it is equally logical, and a better stewardship of tax payer dollars, to utilize the vast resources of a national accrediting association, such as the American Correctional Association which publishes standards for prisons, to guide the operations and practices of the prison system. The respondent respectfully submits that it would be folly for the state to expend its limited resources developing, writing, designing and otherwise establishing something that is readily available "off the shelf." Such an act would be akin to expending thousands of dollars on laboratory equipment

and chemicals to produce a bottle of aspirin when the same could have been purchased for a couple dollars. As such, the legislative changes in question clearly further legitimate governmental interest, namely allowing Corrections the ability to be guided by available, and nationally recognized standards. However, the petitioner's view of such standards is in error. Standards should be flexible and for guidance of prison officials. The failure of prisons to meet model standards does not in and of itself arise to constitutional violations. Miltier v. Beorn, 896 F.2d 848 (1990). Likewise, the petitioner has not established a due process violation.

There is a clear, mandatory method to examine procedural due process claims:

. . . We examine due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.

Kentucky Board of Corrections v. Thompson, 490 U.S. 454, 460 (1989). "Although the constitution protects property interests, it does not create them. . . . [t]o have a property interest the plaintiff must have more than an abstract need or desire for it. . ." Hutchison v. City of Huntington, 198 W.Va. 139, 479 S.E.2d 649 (1996), citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972). "[L]iberty' and 'property' for Fourteenth Amended purposes are not unlimited; the interest must rise to more than an abstract need or desire and must be based upon more than a unilateral hope." Thompson, 490 U.S. at 460. Turning to the first component of the test is the question of whether placement in a double cell (whether real or speculative) invokes the due process clause. It does not.

"The Due Process Clause creates no liberty interest in inmates' being free from double-celling. In Bell v. Wolfish, 441 U.S. 520, 542, 99 S.Ct. 1861, 1875, 60 L.Ed.2d 447 (1979), in the context of pretrial detainees, the Supreme Court explicitly rejected the notion 'that there is some sort of 'one man, one cell' principle lurking in the Due Process Clause of the Fifth Amendment.' Bolton v. Goord, 992 F. Supp. 604, 630 (S.D. N.Y. 1998); see also Nottingham v. Peoria, 709 F. Supp. 542

(M.D. P.a. 1988) (no due process right to single cell).

**II.**  
**THE STATUTORY CHANGES ARE OF NO CONSEQUENCE  
TO THIS ACTION BECAUSE THIS COURT HAD ALREADY RULED  
THAT TITLE 95 WAS UNENFORCEABLE PRIOR TO THE  
LEGISLATIVE CHANGES W.VA. CODE § 31-20-9**

The basis for the initial ruling in this case that there was a regulatory right to a single cell was C.S.R. Title 95 Series 2. However, the respondent respectfully submits that reliance upon Title 95 Series 2 was improvident because these rules had been a “dead letter” for some time. Only a few months after the rules took effect, the Court ruled that Title 95 Series 2 was unenforceable. State ex rel. White v. Parsons, 199 W.Va. 1, 11, 483 S.E.2d 1,11 (1996). In striking down these rules, the Court noted that “appropriate replacement rules may be proposed and adopted” but it, quite properly, did not mandate replacement rules. Id (emphasis added). Consequently, the respondent asserts that disputing the legislative changes is of no meaningful consequence to the regulation in question because the rules had been rendered unenforceable well before the legislative changes were undertaken.

**III**  
**THE DIVISION OF CORRECTIONS’ POLICIES DO NOT VEST  
THE PETITIONER WITH SUBSTANTIVE LIBERTY INTERESTS**

The petitioner takes exception with rudimentary language contained within one of the respondent’s policy directives. More specifically, the petitioner takes exception with the provisions of Policy Directive 101.00 which provide that the respondent’s policy directives are not to be construed in a manner creating substantive or procedural rights. However, written policies should be considered broad guidelines for prison officials and are not to serve as a basis for creating liberty interests. In rejecting mandatory language of a written policy to serve as a basis for creating a liberty

interest, the Supreme Court held that “we believe that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause.” Sandin v. Conner, 515 U.S. 472, 483 (1995). This Court also rejected the argument that property interest are created in prisoners through policies enacted solely at the discretion of state officials. State ex rel. Anstey v. Davis, 203 W.Va. 538, 546, 509 S.E.2d 579, 586 (1998). Corrections does not write policies with the express intent of ignoring them. However, one of the first rules correctional management is not to give prisoners weapons to use against prison officials. If policy directives are to be construed as vesting prisoners with liberty interests as opposed tools to guide prison officials, then prudent prison management would dictate that such policies, which allow prisoners rigid rights to alter prison management, be rescinded or modified. Clearly there is a need for Courts to provide prison officials deference in the day-to-day operations of prisons. Sandin, 515 U.S. at 482.

While the petitioner asserts that Corrections’ Policy Directives require that he be kept in a single cell, this was not mandated by the Special Master. Instead, the Special Master utilized a balanced approach to addressing the concerns of both parties. By requiring the respondent to formulate objective criteria for certifying prisoners with physical disabilities for double celling, the Special Master refrained from imposing unnecessary impediments upon the operations of Corrections while providing for the concerns prisoners. As a result, the respondent does not object to the Special Master’s balanced approach.

### CONCLUSION

The initial ruling in this case provided that the petitioner had a regulatory right to a single cell, based upon the proposition that Title 95 Series 2 prohibited double celling in a facility designed

for single occupancy. This initial ruling, which relied upon this rule, was broad and had the potential to force a reduction in the number of prisoners that Corrections could housed within its own facilities.

However, C.S.R. 95 Series 2 does not apply to the Division of Corrections. W.Va. Code § 30-20-9 (1998). Even prior to the legislation, it was ruled unenforceable by the Court. As such, there is no regulatory right to a double cell.

Both Corrections and the jails are faced with the pressure of how to deal with increasing populations. The Special Master's recommendation clearly alleviates this concern while also providing the petitioner with the knowledge that the respondent will have to develop objective criteria for medically approving a prisoner to be double celled. In light of this, the respondent can accept the ruling of the Special Master and would ask the Court to do the same.

**RESPECTFULLY SUBMITTED,**  
**THOMAS MCBRIDE,**  
By Counsel,

**DARRELL V. MCGRAW JR.**  
**WEST VIRGINIA ATTORNEY GENERAL**



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Respondent

Certificate of Service

I Charles Houdyschell Jr. Assistant Attorney General do hereby certify that on this 19<sup>th</sup> day of September, 2005 I served the foregoing and hereto attached **BRIEF OF RESPONDENT REGARDING REPORT OF SPECIAL MASTER** upon the Petitioner by mailing a true copy thereof U.S. first class postage prepaid to the following addresses:

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Hon. Derek C. Sowpe, Judge  
Circuit Court of Mercer County  
1501 W. Main St.  
Princeton, WV 24740-2626  
*special master*



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