

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**STATE OF WEST VIRGINIA, ex. rel.  
WEST VIRGINIA REGIONAL JAIL AND  
CORRECTIONAL FACILITY AUTHORITY,**

**Petitioner,**

**vs.**

**Case No.: 15-1021**

**COUNTY COMMISSION OF WEBSTER COUNTY,  
DANIEL B. DOTSON, President,  
JERRY F. HAMRICK, Vice-President, and  
ANNA CARPENTER, Commissioner,**

**Respondents.**

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**RESPONDENTS' RESPONSE  
TO PETITION FOR WRIT OF MANDAMUS**

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**RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF MANDAMUS**

The Respondents, County Commission of Webster County, Daniel B. Dotson, III, Jerry F. Hamrick and Anna Carpenter (collectively, "Respondents"), by counsel, Dwayne C. Vandevender, Prosecuting Attorney of Webster County, hereby responds to the Verified Petition for Writ of Mandamus and Incorporated Memorandum of Law ("Petition") filed by the West Virginia Regional Jail and Correctional Facility Authority ("Petitioner"). Respondents respond pursuant to W. Va. R. App. P. 16(g). In support of their response the Respondents state as follows:

**QUESTION PRESENTED**

Whether the statutory requirements imposed upon county commissions to incarcerate and pay for inmates through the West Virginia Regional Jail and Correctional Facility Authority, hereinafter "WVRJCFA" takes precedence over the constitutional and statutory requirements imposed upon county commissions to fund the constitutional offices of the county?

**STATEMENT OF THE CASE**

The Respondents deny the truth of certain facts as characterized in the Petition as will be discussed hereinafter.

The Respondents admit that Webster County has an outstanding jail bill of approximately \$1.31 million dollars and that the monthly bill for Webster County continues to accrue at the current rate of approximately \$40,000 per month or \$480,000 per year. However, the bulk of the arrearage alleged by the Petitioner accrued during 2013 and 2014 when Webster County was experiencing a devastating increase in methamphetamine production and at a time when the jail bill was averaging approximately \$65,000 per month. (Respondents' Appendix, Page 1 - Spreadsheet of monthly bills from the WVRJCFA to Webster County from July 2012 to October 2015 and Respondents' Appendix Page 7, Affidavit of Traci Dean)

Based upon records being kept by Cpl. J. S. Crane of the West Virginia State Police, Bureau of Criminal Investigations, on July 3, 2014 Webster County was number four overall for 2014 and number one per capita (based upon population) for methamphetamine lab reports/seizures in West Virginia. The top five counties in the State as of July 2014 were Kanawha County with 24 labs, Wood County with 16 labs, Upshur County with 15 labs, Webster County with 13 labs and Cabell County, also with 13 labs. (Respondents' Appendix, Page 2 - Email from Cpl. J. S. Crane dated July 3, 2014)

The 2013 United States Census Bureau population estimates Kanawha County has 191,275 people, Wood County has 86,569 people, Upshur County has 24,665 people, Webster County has 8,893 people and Cabell County has 97,133 people. Dividing each county's population by the number of labs seized through July, 2014 placed Webster County in the number one spot with one lab for every 684 people living in the county. By comparison Upshur County had one lab for every 1,644 people; Wood County one lab for every 5,410 people; Cabell County one lab for every 7,471 people and Kanawha County one lab for every 7,970 people.

Compounding the problem is the fact that from 2010 until 2015 the county's incoming

coal severance monies have been reduced by over half from \$442,907.05 during fiscal year 2009-2010 to \$216,045.85 during fiscal year 2014-2015. (Respondents' Appendix, Page 5 - Spreadsheet of coal severance revenues from June 2010 to June, 2015 and Respondents' Appendix, Page 7 - Affidavit of Traci Dean) Respondents have historically used large portions of this money to help pay the jail bill with remaining amounts being used to fund elections, jury funds and other required activities.

In its brief the Petitioner alleges that Webster County has refused to make any accommodations to pay the past due bill and that "Respondents have not paid the amounts their county has owed since at least mid-2012." These assertions are incorrect. Since July 2012 Webster County has paid the Petitioner a total of \$890,242.11 towards the Regional Jail bill, with \$208,701.29 being paid from July, 2014 through June, of 2015 and an additional \$62,577.15 being paid since July of 2015. (Respondents' Appendix, Page 6 - Spreadsheet of Payments to the Regional Jail and Respondents' Appendix, Page 7 - Affidavit of Traci Dean)

Further, as a result of the dramatic increase in crime and the corresponding increase in regional jail costs to the county the Respondents have taken drastic action over the last four years to adjust the budget for Webster County and make provisions to pay the regional jail bill. Real property is currently being taxed at the maximum allowable levy rates. In fiscal year 2012-2013 the county commission expended the entirety of its "rainy day" reserve fund. In fiscal year 2011-2012 the Respondents began requiring newly hired county employees and elected officials to pay 10% of their insurance premiums.<sup>1</sup> In fiscal year 2013-2014 the Respondents expanded that requirement and began requiring all county employees and officials to pay 20% of their health

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<sup>1</sup> The Webster County Commission had previously paid 100% of the employees' health insurance premiums.

insurance premiums. County employees' last received an across the board raise of \$1,000 in 2010. (Respondent's Appendix, Page 7 - Affidavit of Traci Dean; Page 10 - Affidavit of Daniel B. Dotson, III; Page 13 - Affidavit of Anna Carpenter; Page 15 - Affidavit of Jerry Hamrick) Thus, the insurance premium payment requirements effectively resulted in a defacto reduction in the salaries of every county employee and elected official.

For fiscal year 2013-2014 the county commission cut any and all spending from the budget which was not directly related to funding necessary for the minimal operation of the constitutional offices, reduced its own office budget by approximately \$216,340.00 and made an overall budget reduction of \$266,972.00. For fiscal year 2014-2015 the county commission imposed a further budget reduction of 1 ½ percent on all other constitutional offices resulting in an additional spending cut of approximately \$23,878. (Respondent's Appendix, Page 7 - Affidavit of Traci Dean; Page 10 - Affidavit of Daniel B. Dotson, III; Page 15 - Affidavit of Jerry Hamrick)

In April of 2015 the Respondents enacted a hiring freeze on county offices. (Respondent's Appendix, Page 21, Page 7 - Affidavit of Traci Dean; Page 10 - Affidavit of Daniel B. Dotson, III; Page 13 - Affidavit of Anna Carpenter; Page 15 - Affidavit of Jerry Hamrick) Over the following months the hiring freeze has resulted in the loss of one position in the County Clerk's Office and one position in the Circuit Clerk's Office due to employees leaving those positions and the vacant positions not being filled. In fact, as a direct result of lack of adequate custodial personnel county officials and their employees have frequently resorted to cleaning their own offices and county commissioner Jerry F. Hamrick has volunteered his time to mow lawns and collect trash from the various offices. (Respondent's Appendix, Page 7 - Affidavit of Traci Dean; Page 10 - Affidavit of Daniel B. Dotson, III; Page 13 - Affidavit of

Anna Carpenter; Page 15 - Affidavit of Jerry Hamrick)

The fiscal year 2015-2016 county budget for Webster County employees' salaries in the constitutional offices is currently approximately \$585,825.00.<sup>2</sup> Several of the county offices' operating expense budgets for supplies, equipment, training postage and other necessary expenses (exclusive of salaries) have been reduced to less than \$20,000 per year. (Respondent's Appendix, Page 7 - Affidavit of Traci Dean; Page 10 - Affidavit of Daniel B. Dotson, III; Page 13 - Affidavit of Anna Carpenter; Page 15 - Affidavit of Jerry Hamrick)

The Petitioner contrasts Webster County's efforts to neighboring Nicholas County. In its brief the Petitioner states that Nicholas County has "worked with Petitioner to shoulder its mandatory duty." Petitioner fails to elaborate on the actions Nicholas County has been forced to take to meet the requirements imposed upon it by the Petitioner. Since Petitioner desires to contrast Webster County with Nicholas County the Respondents will elaborate.

First, Nicholas County is a Class III county with an estimated population, according to the 2013 United States Census Bureau, of 25,827 people compared to Webster County which is a Class VIII county with an estimated population of 8,893 people.

In 2014 Nicholas County's constitutional offices had approximately 56 employees, including 26 deputy sheriffs. (Respondents Appendix, Page 20 - Affidavit of Patricia Deel) The *lowest* paid deputy in Nicholas County receives a salary of \$31,800 per year. (Respondents Affidavit, Page 19 - Affidavit of Jeannette Hall) In 2015 Nicholas County was forced to enact budget cuts and lay off employees in order to "shoulder its mandatory duty" and pay the Petitioners. Nicholas County laid off approximately 13 workers from the constitutional offices

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<sup>2</sup>The employees' salary amounts do not include the salaries of the elected officials, which salaries are set by statute.

and now has a total of approximately 43 employees in those offices, including 20 deputies.

(Respondent's Appendix, Page 20 - Affidavit of Patricia Deel)

In 2015 Webster County had 26 full-time and 3 part-time employees, including four deputies. Webster County's *highest* paid deputy, who is a veteran of the department with over ten years experience, only receives \$29,000 per year. As a result of the hiring freeze enacted in April, 2015 and the loss of two positions, Webster County now has 24 full-time and 3 part-time employees. (Respondent's Appendix, Page 7 - Affidavit of Traci Dean; Page 18 - Affidavit of Eva Green)

In 2014 the Nicholas County Circuit Clerk numbers show 91 felony indictments or informations compared to 97 felony indictments or informations according to the Webster County Circuit Clerk's numbers. (Respondents Appendix, Page 20 - affidavit of Patricia Deel)

On or about July 16, 2015 the Respondents received a notice from David Farmer, Director of the Regional Jail Authority advising the Respondents that the Petitioner "will direct the Tax Commissioner to set off all distributions of revenues to the County until the arrearage has been satisfied." The notice also advised the Respondents that "if you disagree with the proposed adjustment please notify David A. Farmer....within ten (10) business days of the date of this letter. (Petitioner's Appendix 14) On or about July 17, 2015, the Respondents received a notice from Mark Matkovich advising the Respondents that the tax department would begin withhold "distribution of revenues to the County" upon expiration of the 10 day "notice period." (Petitioner's Appendix 19)

By letters dated July 21, 2015, counsel for the Respondents sent notice to the Petitioner and to the State Tax Commissioner objecting to the proposed "set off." (Respondents Appendix, Pages 22 and 25 respectively.) Despite the county's timely objections the set off was enacted

without further notice, hearing or debate and the Tax Commissioner began withholding the monies due to the county. Interestingly, the withholding included reallocated severance tax money that is designated by West Virginia Code § 11-13-6A(f)(1) and (2) to be used only for economic development and infrastructure projects.<sup>3</sup> Even though Webster County cannot use that portion of the severance tax money to pay the regional jail bill, the Petitioner utilized the Tax Commissioner to seize that money as well.

On September 25, 2015 the Respondents along with other elected officials met with David Farmer, Director of the Regional Jail Authority, Leah Macia, General Counsel for the Regional Jail Authority and other officials from the WVRJCFA to discuss the jail bill and county budget. The Respondents provided the WVRJCFA with copies of the county's annual budgets showing the budget cuts enacted and the lack of any spending for projects or items outside the operation of the constitutional offices. (Respondent's Appendix, Page 7 - Affidavit of Traci Dean; Page 10 - Affidavit of Daniel B. Dotson, III; Page 13 - Affidavit of Anna Carpenter; Page 15 - Affidavit of Jerry Hamrick)

During the meeting the Petitioner's representative were asked how much money was being withheld by the Tax Commissioner. The representatives did not know and promised to obtain and provide that amount. The Respondents agreed to work with Petitioner in providing a plan for payment which would include the amounts being withheld once those amount were

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<sup>3</sup> West Virginia Code § 11-13-6A state in relevant part "(f)(1) No distribution made to a county under this section may be deposited into the county's general revenue fund. The county commission of each county receiving a distribution under this section shall establish a special account to be known as the "(Name of County) Coal County Reallocated Severance Tax Fund" into which all distributions made to that county under this section shall be deposited. (2) Moneys in the county's coal county reallocated severance tax fund *shall be expended by the county commission solely for economic development projects and infrastructure projects.* (Emphasis added.)

received. As of the filing of this answer neither the Tax Commissioner nor the Petitioner have provided Respondents with any information about the exact amounts of taxes being withheld.<sup>4</sup> (Respondent's Appendix, Page 7 - Affidavit of Traci Dean; Page 10 - Affidavit of Daniel B. Dotson, III; Page 13 - Affidavit of Anna Carpenter; Page 15 - Affidavit of Jerry Hamrick)

Further, at the September 25, 2015 meeting the Petitioner's representatives agreed to provide a copy of the "Interagency Agreement" between the Petitioner and the Tax Commissioner which Petitioner alleged granted them the authority to withhold the tax money. On October 8, 2015 Counsel for the Respondents sent correspondence to Mark Matkovich again requesting a copy of the Interagency Agreement and advising the Tax Commissioner that the Respondents still did not have the exact amount of money being withheld. (Respondents' Appendix, Page 26) The Interagency Agreement, which is contained in Petitioner's Appendix at Page 23, was not provided to the Respondents until on or about October 23, 2015. (Respondents' Appendix, Page 147.)

In contrast to the stark financial landscape facing the Respondents and other small counties in West Virginia, the WVRJCFA seems to be flourishing. Despite the statutory requirements that the Regional Jail Authority charge daily rates necessary for the operational costs of housing inmates and adjust the same accordingly, the Regional Jail Authority surplus fund continues to grow.

The WVRJCFA annual report for 2013 shows a surplus of \$49,991,000 in fiscal year 2012 and \$56,194,000 in fiscal year 2013. (Respondents' Appendix Page 46) Interestingly the annual report for 2014 does not reflect the total surplus for the WVRJCFA but does reflect a net

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<sup>4</sup> On October 8, 2015 Matt Irby of the State Tax Commissioner's office did verbally tell counsel for the Respondents that the Tax Commissioner was holding "around \$150,000." No exact amount has ever been given.

increase in revenue of \$2,228,000. (Respondents' Appendix, Page 88) Simple math concludes that, as of the end of fiscal year 2014, the WVRJCFA has a surplus of \$58,482,000.

In addition on page 8 of the 2014 annual report the WVRJCFA proudly notes that it "began the process of installing an inmate kiosk system to provide video visitation capabilities as well as a wide variety of internal services to the inmate population." (Respondents' Appendix, Page 88) Page 17 of the same reports shows that the computer kiosks have been installed in five WVRJCFA facilities with plans to install kiosks in an additional five facilities in 2015. (Respondents' Appendix, Page 85)

In its brief the Petitioner notes "the West Virginia Legislature conceived of the Regional Jail system as a means to provide new modern jail facilities, which meet or exceed all state and federal minimum jail standards..." Nowhere in the West Virginia Minimum Standards for Construction, Operation, and Maintenance of Jails is there a requirement that inmates be provided with video conferencing, email and other such capabilities. (Respondents' Appendix, Page 109) So, while poorer counties languish in debt and struggle just to keep the lights on, it appears that the WVRJCFA prospers, the surplus continues to grow and the WVRJCFA continues to spend money that is not required.

### **ARGUMENT**

The West Virginia Legislature has imposed a statutory duty upon counties to house inmates in regional jail facilities. The Legislature has also imposed a statutory duty upon the counties to pay for the costs of housing each prisoner.

West Virginia Code § 31-20-10(g)(1) requires counties to house inmates at a regional jail facility stating, "After a regional jail facility becomes available pursuant to this article for the incarceration of inmates, each county within the region shall incarcerate all persons whom the

county would have incarcerated in any jail prior to the availability of the regional jail facility in the regional jail facility except those whose incarceration in a local jail facility used as a local holding facility is specified as appropriate under the standards and procedures developed pursuant to section nine of this article and who the sheriff or the circuit court elects to incarcerate therein.”

W. Va. Code § 31-20-10(h) states, “When inmates are placed in a regional jail facility pursuant to subsection (g) of this section, the county shall pay into the Regional Jail and Correctional Facility Authority Fund a cost per day for each incarcerated inmate to be determined by the Regional Jail and Correctional Facility Authority according to criteria and by procedures established by legislative rules proposed for promulgation pursuant to article three, chapter twenty-nine-a of this code and as established in section ten-a of this article to cover the costs of operating the regional jail facilities of this state to maintain each inmate. The per diem costs for incarcerating inmates may not include the cost of construction, acquisition or renovation of the regional jail facilities.” Based upon W. Va. Code § 31-20-10(h) Webster County was also required to pay the Petitioner the per diem costs of housing those inmates, which costs the Petitioner just recently lowered from \$48.50 per day to \$48.25 per day.

W. Va. Code § 31-20-10a(b)(1) requires the regional jail authority to “develop and approve a schedule of anticipated operational expenditures for each regional jail. The schedules shall include funds for personal services and fringe benefits for personnel necessary to the operation of the facilities, as well as allocations of funds for food, clothing, utilities, supplies, transportation and all other costs necessary to operate and maintain the facilities. The operational expenditure schedule shall include all costs, both direct and indirect, for operating and maintaining the regional jail.”

This Court has previously ruled that “Under the statutory scheme adopted in creating the regional jail system, the Legislature was acting within its powers in establishing a system of remuneration whereby counties that incarcerate individuals within the regional jails are obligated to remit to the Authority a reasonable per diem rate for costs associated with the housing of such inmates.... Continuing in this same vein, we recognize that the Legislature was acting within its powers in delegating to the Authority the duty to set a reasonable per diem rate in connection with the costs associated with inmates housed at the regional jails.” *State ex rel. Reg'l Jail & Corr. Facility Auth. v. Cty. Comm'n of Cabell Cty.*, 222 W. Va. 1, 7, 657 S.E.2d 176, 182 (2007).

However, “[a] statute may be valid on its face but unconstitutionally applied. The unconstitutional application of the statute may be prohibited and the statute allowed to stand.” *Kolvek v. Napple*, 158 W. Va. 568, 568, 212 S.E.2d 614, 616 (1975). In fact, “[t]his Court has repeatedly held that a statute may be constitutional on its face but may be applied in an unconstitutional manner. This is cogently reflected in Norfolk and Western Railway Company v. Field, 143 W.Va. 219, 100 S.E.2d 796, wherein the Court said in point 3 of the syllabus, ‘A taxing statute, though valid on its face, may be invalid when applied to particular circumstances or conditions of a particular taxpayer.’ Demonstrating that the burden of proof in establishing unconstitutionality of a statute rests on the assailant of the tax is point 4 of the syllabus which reads as follows: ‘To establish that a taxing statute, valid on its face, is so unreasonable or arbitrary as to amount to a denial of due process of law when applied in a particular case, the taxpayer must prove by clear and cogent evidence facts establishing unreasonableness or arbitrariness.’ *State ex rel. Haden v. Calco Awning & Window Corp.*, 153 W. Va. 524, 530, 170 S.E.2d 362, 366 (1969) “Each case, where the constitutionality of a statute is questioned, must be determined on its own particular facts.” *State ex rel. Haden v. Calco Awning & Window*

*Corp.*, 153 W. Va. 524, 531, 170 S.E.2d 362, 366 (1969).

“The *Constitution of West Virginia* requires the operation of certain county offices, including those of the county officers involved herein, that is, the clerk of the circuit court, the prosecuting attorney and the clerk of the county commission. *See*, respectively, *W.Va. Const. art. VIII, § 9; art. IX, § 1; art. IX, § 12.*” *State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 146, 386 S.E.2d 640, 644 (1989). County Commissions are expressly granted the power to administer the fiscal affairs of the county by the *Constitution of West Virginia* Art. IX §11 which states in pertinent part, “They shall also, under such regulations as may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties.” Although the budgetary and fiscal powers of the County Commission are not absolute W. Va. Code § 7-7-7 requires that, in fixing the total amount of money to be expended by the county, the County Commission “shall give due consideration to the duties, responsibilities and work required of the assistants, deputies and employees and their compensation shall be reasonable and proper.”

The *Constitution of West Virginia* Art. V §1 states that “The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature.” This Court considered the separation of powers and the county commission’s duty to manage the fiscal affairs of the county pursuant to the Constitution and W. Va. Code § 7-7-7 in *State ex rel. Canterbury v. Cty. Court of Wayne Cty.*, 151 W. Va. 1013, 158 S.E.2d 151 (1967). The *Canterbury* Court stated:

It is obvious that the action of the County Court of Wayne County which is complained of in this proceeding was of an administrative, not a judicial, nature

and the trial court was confronted primarily with the provisions of Article V, Section 1 of the constitution, which provides as follows: 'The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.' In commenting upon this section of the constitution, this Court in the early case of *State ex rel. Miller v. Buchanan*, 24 W.Va. 362, stated that the legislative, executive and judicial departments of the government must be kept separate and distinct and each in its legitimate sphere must be protected. In the very recent case of *State ex rel. County Court of Marion County v. Demus*, 148 W.Va. 398, 135 S.E.2d 352, this Court reiterated what has been said many times before-that the courts of this state are by this constitutional provision 'forbidden to perform administrative duties.' That the duty imposed on county courts by Code, 7-7-7, as amended, in making allowances to those county officials named therein for expenses incidental to the employment of deputies and assistants, is not of a judicial nature has been specifically held in *Raleigh County Court v. Painter*, 123 W.Va. 415, 15 S.E.2d 396. Thus when we apply these principles of law to the facts in this case the power of the Respondents, the County Court of Wayne County and its commissioners, Pearl E. Booth and Barney Asbury, in passing upon the administrative fiscal question which was presented to them, would appear unlimited except as such power may have been circumscribed by the legislature by the provisions of Code, 7-7-7, as amended, or perhaps by such action of the county court as would constitute arbitrariness or capriciousness. This is the third syllabus point of the case of *Board of Trustees, etc. v. City of Huntington*, 142 W.Va. 217, 96 S.E.2d 225: 'Though under Section 3, Article VIII of the West Virginia Constitution, this Court has original jurisdiction in Habeas corpus, mandamus and prohibition, the Court will not, in the first instance and in the absence of arbitrary action on the part of the council or other governing body of a municipal corporation, engage in determining or controlling the fiscal affairs of any municipal corporation in the State of West Virginia.'

"Expenditures by a county court, from the general county fund, necessary to administer constitutionally required functions of county government, are mandatory, and take precedence over those required for general relief." *Kenny v. Webster Cnty. Court*, 124 W. Va. 519, 21 S.E.2d 385, 385 (1942).

There has been no allegation, nor any showing by the Petitioner that the Respondents have acted arbitrarily and capriciously or have failed to follow the relevant statutory requirements and the requirements of the *Constitution of West Virginia* in administering to the fiscal affairs of

the constitutional offices of the county. In fact, the Respondents have, at all times relevant to these proceedings, followed the constitutional and statutory requirements during the budgetary process in determining the requirements, needs and duties of, and budgets for the constitutional offices. (Respondent's Appendix, Page 10 - Affidavit of Daniel B. Dotson, III; Page 13 - Affidavit of Anna Carpenter; Page 15 - Affidavit of Jerry Hamrick)

This Court stated in *State ex rel. Bd. of Ed., Kanawha Cnty. v. Rockefeller*, 167 W. Va. 72, 281 S.E.2d 131, 135, 136 that "once a given activity or right is found to be protected by a constitutional or fundamental principle, the State may not impinge on the right without showing a compelling State interest."

The Petitioner alleges a compelling interest, to-wit "the public safety of the citizens of West Virginia." Respondents concede that such interest is certainly a compelling interest. The compelling public interest also extends to the citizens of Webster County, their public safety and the necessary services provided to them by the constitutional offices of the county. If the relief requested by the Petitioner is granted, the compelling public interests for the citizens of Webster County will not be served.

It is the Petitioner that has failed in its duty to the citizens of this State, especially those in the small counties such as Webster County. The Petitioner fails to properly adjust the per diem rates for housing inmates and continues to accumulate surplus funds. The Petitioner spends money on unnecessary programs such as computer kiosks for inmate video conferencing. The Petitioner directs State officials to seize money without any due process and claims the same is authorized by an Interagency Agreement provided for by a statute that appears to be inapplicable. (Petitioner's Appendix 23)

W. Va. Code § 14-1-37(h) as cited in the Interagency Agreement between the Petitioner

and the State Tax Commissioner for authority to seize funds due the county states, “The auditor and the chief administrators of the various state agencies are authorized by this section to enter into interagency agreements for the purpose of protecting a person's return information as defined in section ten, article five-d, chapter eleven of this code and collecting debts, fees and penalties due the state, its departments, agencies or institutions.”

The entirety of W. Va. Code § 14-1-37 states:

**§ 14-1-37. United States Treasury offset program authorized; setoff of federal debts**

(a) The auditor is authorized to enter into an agreement with the Secretary of the Treasury to participate in the Treasury Offset Program pursuant to 31 U.S.C. § 3716 for the collection of any debts owed to the state or to state agencies from federal payments to vendors, contractors and taxpayers. The agreement may provide for the United States to submit nontax debts owed to federal agencies for offset against state payments otherwise due and owing to taxpayers, vendors and contractors providing goods or services to the state, its departments, agencies or institutions.

(b) For purposes of this section the following words have the meanings indicated.

(1) “Federal official” means a unit or official of the federal government charged with the collection of nontax liabilities payable to the federal government and with the authority to enter into the offset agreement.

(2) “Offset agreement” is the agreement authorized by this section.

(3) “Person” means an individual, vendor, contractor, partnership, society, association, joint stock company, limited liability company, corporation, estate, receiver, trustee, assignee, and any other person acting in a fiduciary or representative capacity whether appointed by a court or otherwise, or any combination of the foregoing.

(4) “State payments” shall include tax refunds pursuant to the Tax Procedure and Administration Act, article ten, chapter eleven of this code, and vendor or contractor payments made by the state to any person including expense reimbursements to an employee of the state: Provided, That “state payments” do not include salary, wages, pension and any other type, class or amount of payment as the auditor determines to impact the health or welfare of the citizens of the state.

(c) Pursuant to the agreement authorized herein, a federal official may:

(1) Certify to the auditor the existence of a person's delinquent, nontax debt owed by the person to the federal government by providing:

(A) The name of the person;

(B) The social security number or federal tax identification number;

(C) The amount of the nontax debt; and

- (D) Any other information pursuant to the agreement authorized herein;
- (2) Request the auditor to withhold any state payment to which the person is entitled; and
- (3) Retain a portion of the proceeds of any federal administrative setoff pursuant to 31 CSR 285.6.
- (d) As required or permitted by state law, federal law or the offset agreement, the State Auditor:
  - (1) Shall determine if a person for whom a certification is received is due a state payment;
  - (2) Shall withhold a state payment that is due a person whose name has been certified by a federal official;
  - (3) Shall notify the person of the amount withheld in accordance with the offset agreement;
  - (4) Shall pay to the federal official the lesser of:
    - (A) The entire state payment; or
    - (B) The amount certified; and
    - (C) Pay any refund or state payment in excess of the certified amount to the person less any fee pursuant to subsection (e);
  - (5) May certify to a federal official a person's delinquent debt owed to the state by providing the federal official:
    - (A) The name of the person;
    - (B) The social security number or tax identification number;
    - (C) The amount of the debt due the state; and
    - (D) Any other information required by the offset agreement; and
  - (6) May request that the federal official withhold any federal vendor or other federal payment pursuant to the offset agreement to which the person is entitled.
  - (e) The auditor may, by rule, establish a reasonable administrative fee to be charged to the person for the provision of state offset of federal debt. The fee is a separate debt and may be withheld from any refund, reimbursement or other monies held for the person. The auditor may charge the person who is the subject of federal offset of a state debt, a fee equal to the fee authorized in subsection (c).
  - (f) Each state agency and institution shall take all appropriate and cost-effective actions to aggressively collect its accounts receivable. Each agency and institution may participate in the Treasury Offset program of the United States under 31 U.S.C. § 3716.
  - (g) The auditor may propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to administer and implement this section and the offset agreement.
  - (h) The auditor and the chief administrators of the various state agencies are authorized by this section to enter into interagency agreements for the purpose of protecting a person's return information as defined in section ten, article five-d, chapter eleven of this code and collecting debts, fees and penalties due the state, its departments, agencies or institutions.

It appears upon a thorough reading of the statute that the same was intended to attach tax

returns of persons that owe a debt to the State, not to seize tax monies due to counties from the State Tax Commissioner without due process.

The Petitioner acknowledges that counties find themselves “between a rock and a hard place.” However, this case it is much more complicated. This is not a case where the county commission has money it wants to spend supporting projects in the community or other non-essential programs rather than pay the statutory obligations to the Petitioner. Simply put, there is no more money.

Webster County has taken all possible steps to accommodate the requirements placed upon the county by the legislature. All spending outside the constitutionally required offices has been stopped. Employee benefits and positions have been cut. Webster County employees’ salaries are outrageously low compared to other counties such as neighboring Nicholas County. Grants have been declined because there is no money to match them. Libraries, volunteer fire departments, child advocacy centers, community programs and community projects that previously received support from the Webster County Commission now go unfunded. The elected officials operating budgets and staffing are at a bare minimum. County officials are volunteering their time to perform essential services for the county offices and the citizens of the county.

If this Court grants the relief requested by the Petitioner the only option remaining is to layoff employees. Staff that is already operating under nearly impossible circumstances to keep up with the demands of operating the county. If that staff is lost providing services to the citizens of Webster County will become impossible. Tax assessment, tax collection, county police services, prosecution, all will become practically non-existent. Such is not a “doomsday” cry, such is the reality of the situation.

The Respondents are resigned to the fact that, until the Legislature addresses the serious issues now facing the counties, the statutory debt will remain an obligation for the Respondents to resolve. The Respondents also acknowledge that if counties that have the ability to pay the regional jail bill fail or refuse to pay the result could be the inability of the WVRJCFA to meet its obligations. However, the WVRJCFA appears to be more than sound financially. The WVRJCFA continues to accumulate a surplus of millions of dollars per year, spend money on projects that are not required and even lower the daily incarceration fee, despite the inability of some counties to pay their bills in full. For the Petitioner to argue that the “Respondents’ actions place an impermissible burden on Petitioner to meet statutory mandates without Respondents’ share of the necessary and mandatory funding” is simply overreaching and completely ignoring the *constitutional* mandates placed upon the Respondents.

The Respondents do not argue that the statute creating the Regional Jail Authority and requiring the counties to pay for housing of inmates is unconstitutional. The Respondents do argue that, when a county truly has no more to give and when the constitutional services required for the operation of that county would be seriously impacted, then the application of the statute which interferes with the constitutional requirements must be considered unconstitutional and the constitutional requirements maintained. It cannot have been the intent of the Legislature to impose a statutory payment so burdensome upon the counties as to effectively bankrupt the counties and eliminate the constitutional services to their citizens.

Denying the requested writ based upon an unconstitutional application of the statute in this case would not affect the amount of money owed to the WVRJCFA by a struggling county, nor would it relieve the county from the debt. However, such a ruling would give the struggling county relief until such time as financial situations improve or the legislature addresses the

issues, or both.

Respondents acknowledge that there may be some concern that such a ruling would encourage other counties to stop paying the WVRJCFA bills. However, if the ruling is sufficiently narrow, other counties would have to show that they have cut all spending that is not constitutionally required; that they are paying all additional available money to the WVRJCFA; that they are operating at the minimum required level to perform constitutional duties; that they are not acting arbitrarily or capriciously by setting high salaries for their employees, overstaffing offices or paying other unnecessary money to avoid paying the jail bill; and that they have a current inability to pay any additional money without cutting the minimum necessary constitutionally required services to the citizens of the county.

#### **REQUEST FOR ORAL ARGUMENT**

The Respondents request oral argument in this matter. The Respondents agree with the Petitioner that, if oral argument is granted, the same should be held pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure because the issue is one of fundamental public importance.

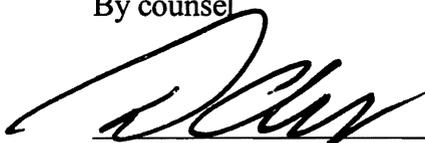
#### **CONCLUSION**

**WHEREFORE**, the Respondents respectfully prays the following relief:

1. That the Court find that the statutes requiring payment to the WVRJCFA for per diem costs of housing inmates be deemed to be unconstitutional as applied to counties that do not have funds currently available over and above those funds currently being paid to the WVRJCFA and those funds necessary to operate constitutionally required offices.
2. That the writ prayed for by the Petitioner be denied.
3. That the Respondents be granted any other general relief as may be deemed just and

proper.

**COUNTY COMMISSION OF WEBSTER COUNTY,  
DANIEL B. DOTSON, President,  
JERRY F. HAMRICK, Vice-President, and  
ANNA CARPENTER, Commissioner,  
By counsel**



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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**STATE OF WEST VIRGINIA, ex. rel.  
WEST VIRGINIA REGIONAL JAIL AND  
CORRECTIONAL FACILITY AUTHORITY,**

**Petitioner,**

vs.

**Case No.: 15-1021**

**COUNTY COMMISSION OF WEBSTER COUNTY,  
DANIEL B. DOTSON, President,  
JERRY F. HAMRICK, Vice-President, and  
ANNA CARPENTER, Commissioner,**

**Respondents.**

**CERTIFICATE OF SERVICE**

I, Dwayne C. Vandevender, the undersigned attorney, do hereby certify that a true copy of the foregoing **RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF MANDAMUS** and **RESPONDENTS' APPENDIX** was served upon Leah Macia, General Counsel and Stephen R. Connolly, Deputy Attorney General, counsel for the Petitioner, by mailing a true copy thereof to them by United States Mail, first class postage prepaid, addressed to them at Office of the Attorney General of West Virginia, State Capitol, Building 1, Rm. E-26, Charleston, WV 25305 on this 20<sup>th</sup> day of November, 2015.



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