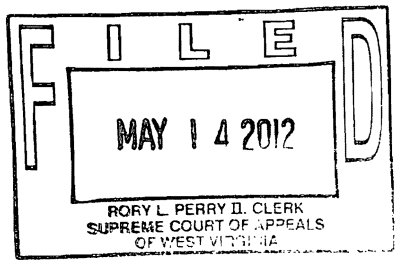
SUPREME COURT OF APPEALS
OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Plaintiff below/Respondent,

v. **APPEAL NO.: 11-1618**

JAMES ROBERTSON,

Defendant below/Petitioner.

ON APPEAL FROM THE CIRCUIT COURT OF
RALEIGH COUNTY, WEST VIRGINIA

REPLY BRIEF OF PETITIONER JAMES ROBERTSON

Submitted by:

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I.
STATEMENT OF THE CASE

1. Introduction.

The most telling statement in the respondent's brief is:

> The Department's goal is for Appellant to receive necessary treatment unavailable in this State, so that Appellant can return to West Virginia and be placed in an appropriate environment.[1]

The statement has two "tells." First, it is inaccurate. The appellant James Robertson is not being sent to the maximum security facility in South Carolina for treatment; instead, he is being sent ostensibly for "management" but, essentially, for "punishment." Second, it identifies the real problem in this matter; that is, the state cannot provide the services needed by Mr. Robertson and, instead of devoting resources to providing such services, the state is simply transporting Mr. Robertson out-of-state.

2. The transfer is not for purposes of treatment; rather it is for purposes of punishment.

The resident psychiatrist at the Mildred Mitchell Bateman facility, Robert Miller, M.D., stated:

> In the hospital, he's not been psychotic. So, what we deal with on a daily basis is his personality pathology, *which essentially is not amenable to treatment.*[2] [emphasis added].

Dr. Miller elaborated:

> Mr. Robertson is currently difficult to treat in an inpatient setting, and ... I really have very little to offer him, other than daily maintenance and management. And, actually, I've said two things; one is that he either needs to be in a more restricted environment or he needs to be simply sent home, *that where he is right now is likely to continue to be ineffective,* and I would think that anything that would be intermediate would also be ineffective. So, I've

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[1] *Brief of Appellant,* p. 4.
[2] Appendix, p. 107.

> taken polar positions. One is to do more or to do nothing.[3] [emphasis added].

Essentially, Mr. Robertson does not require medical treatment because he is not currently "mentally ill."[4] Due to his personality traits, however, he cannot be simply warehoused at the psychiatric hospital. Accordingly, he is being transported outside the State of West Virginia to a maximum security facility that, crudely stated, can "handle" him, although it is being done under the label of "behavioral management."

The state proffers that "behavioral management" is a part of treatment. The respondent states, "Appellant skirts over the fact that behavior modification is one aspect of treatment."[5] In Mr. Robertson's case, behavior modification is not treatment, because Mr. Robertson has personality disorders that "are not amenable to treatment."[6] Instead, Mr. Robertson is being punished for his behaviors, not treated. Again, the professionals recognize that his personality disorders are so intractable that they cannot be treated.

As David A. Clayman, Ph.D., stated in advocating the transfer to the South Carolina facility:

> He's got to learn behaviors.... [T]hat he can't make threats, he can't say the MF word to people, he can't tell them that he's the one that's setting the rules, he can't tell them that every time something happens, he's going to call his attorney and make threats that people don't have to go along with him.[7]

Dr. Clayman is stating in effect that Mr. Robertson must learn the consequences of his behaviors; that is, punishment or loss of liberty will result.

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[3] Appendix, pp. 106, 107.
[4] Appendix, p. 142.
[5] *Brief of Appelle,* p. 11.
[6] Appendix, p. 107.
[7] Appendix, p. 16.

Dr. Miller acknowledged that an advantage of the privately-owned facility in South Carolina was:

> I mean, we don't have a forensic hospital. We have two state psychiatric facilities where we manage forensic individuals, I think very successfully. But at the same time, by being a hospital, we have rules that are imposed upon us that involve civil liberties. And what I think would happen in South Carolina is those liberties are likely not going to apply.[8]

Again, Dr. Miller is stating in effect that Mr. Robertson will learn through punishment, not treatment.

Because the lower court will not discharge Mr. Robertson, the Department of Health and Human Resources is transporting Mr. Roberton to the out-of-state facility in the hope that the facility can break Mr. Robertson and change his behaviors. Once broken and returned to the State of West Virginia, Mr. Robertson can be confronted with the threat of returning to the facility if he misbehaves. Again, this is not treatment of a mental illness, but, instead, is punishment of the behaviors that make Mr. Robertson difficult to manage.

3. <u>The root of the problem is that the State of West Virginia has not dedicated resources to the population of forensic patients such as Mr. Robertson.</u>

The second "tell" in the respondent's statement is that the actual issue is that the State of West Virginia does not currently have the programs in place to provide services to forensic patients such as Mr. Robertson.

Again, the failure of the initial *Community Placement and Treatment Plan* was attributable by David A. Clayman, Ph. D., to a lack of "structure."[9] And Dr. Clayman's further assessment was that "they need more than we can give them in a facility that we have in West

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[8] Appendix, p. 117.
[9] Appendix, p. 136; and pp. 150, 151.

Virginia."[10] Dr. Clayman attested to the fact that the state's private behavioral health centers, by statute, do not have any mandatory obligation to take patients who are in the custody of the Department of Health and Human Resources.[11] Dr. Miller noted that the State of West Virginia does not have a "forensic hospital."[12] The Department of Health and Human Resources refuses to consider Mr. Robertson for placement at its Transitional Living Facility at the William R. Sharpe Hospital.[13] Essentially, the apparent solution to the State of West Virginia's problem is to make Mr. Roberton someone else's problem.

For the reasons that have been stated in the *Brief of Petitioner James Robertson* and for the reasons that are set forth below, the order of the Circuit Court of Raleigh County, West Virginia, from which this appeal is taken should be vacated and Mr. Robertson should be returned to his home state.

II.
ARGUMENT

RE: *ASSIGNMENT OF ERROR #1:* The Circuit Court erred when it ordered the placement of the appellant, who is within the Circuit Court's jurisdiction by reason of the provisions of W. Va. Code § 27-6A-4, in a privately owned facility situated in the State of South Carolina in which psychiatric services are provided to forensic patients and inmates in a maximum security setting because the transportation clause contained in the provisions of Section 5 of Article III of the West Virginia Constitution, W. Va. Cons., Art. III, § 5, bars such a placement if it is forced over the objection of the appellant.

REPLY:

The respondent seemingly disagrees with the supposition that the Transportation Clause applies to Mr. Robertson, even though the Circuit Court of Raleigh County, West Virginia, seemingly conceded that it does.

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[10] Appendix, p. 142.
[11] Appendix, pp. 147 and 148.
[12] Appendix, p. 117.
[13] Appendix, pp. 170 and 171.

The respondent emphasizes that the provisions of the governing statute, *i.e.*, W. Va. Code §27-6A-4, refer to an "acquitee," which, according to the respondent, makes it clear that the affected person is not one who stands convicted of a crime.

But, again, the Transportation Clause refers to a "person" who is facing out of state transportation for the reason of "any offense committed" within the state. W. Va. Const., Art. III, § 5. The Transportation Clause does not restrict its application to a person who is actually convicted of an offense.

Significantly, a person acquitted for reason of mental illness is committed, nonetheless, to the Court's jurisdiction and is not released from the state's custody. W. Va. Code §27-6A-4(e). Rather, the person's custodian merely changes from the Division of Corrections to the Department of Health and Human Resources although, admittedly, the court retains jurisdiction in the matter.

Moreover, the court is directed to "determine on the record the offense or offenses of which the acquitee could have otherwise been convicted, and the maximum sentence he or she could have received." *Id.* The jurisdiction of the Court continues "until the maximum sentence or until discharged by the court." *Id.* Every aspect of an "acquitee's" status, therefore, is dictated by the offense which, but for the person's mental illness, would have resulted in a conviction.

The Transportation Clause applies, therefore. And, again, the lower court agreed, but, as discussed in the opening brief, the lower court determined that Mr. Robertson was, essentially, legally incompetent to object to his transfer and the lower court could waive the Transportation Clause on his behalf. Mr. Robertson refers to his opening brief's discussion of the lower court's position.

The respondent further makes the assertion that the Court has the sole authority to decide the placement under the governing statute and "patients do not get to agree to their placement."[14] Specifically, the respondent states that, after some process is afforded to the forensic patient, "ultimately it is the judge who decides appropriate placement after considering all the evidence and weigh the arguments of both sides."[15] In actuality, the governing statute provides that "the court shall commit the acquitee to a mental health facility designated by the department." W. Va. Code §27-6A-4(e).[16] The court can only discern whether the recommended placement is the "least restrictive environment to manage the acquitee" and "will allow for the protection of the public." *Id.* The burden falls upon the State of West Virginia's administrators to designate the placement.

Accordingly, the statute does not provide any support for the circuit court's exercise of authority in placing Mr. Robertson outside the State of West Virginia in contravention of the Transportation Clause, but instead limits the circuit court's authority to commit a person to a mental health facility designated by the Department of Health and Human Resources which, obviously, contemplates a facility within the department's auspices. Significantly, the Department of Health and Human Resources has failed to provide any authority regarding its ability to place forensic patients in privately owned facilities situated out-of-state.

The respondent also asserts that "due process" was afforded to Mr. Robertson before his transportation out-of-the-state. However, the Court's determination was that Mr. Robertson was

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[14] *Brief of Appellant,* p. 8.

[15] *Brief of Appellant,* p. 8.

[16] This is to be distinguished from the Court's statutory "authority to make facility-specific decisions governing juvenile placements." *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35, 40 (1997). While counsel has not extensively analyzed this issue, the reason for the court's authority in the matter of the juvenile is seemingly that the placement constitutes an actual "sentence," which is the court's constitutional prerogative, and the discussion of different placements is effectively the consideration of "alternative sentencing arrangements." *See* W. Va Code §49-5-13. Mr. Robertson's disposition is not a "sentence" since he is not convicted and, thus, the Court's traditional disposition of such offenses is not invoked.

incompetent to make any determination regarding his placement, notwithstanding that all the medical evidence stated that he was competent. Instead, the Court constructed a multi-disciplinary team to make this decision for Mr. Robertson. Notably absent from this team, however, was Mr. Robertson. While Mr. Robertson's counsel was designated for inclusion, Mr. Robertson was not part of the meetings and was not given his own voice regarding these decisions. The absence of Mr. Robertson or any legal representative distinguishes this process from the formation of multi-disciplinary teams for juveniles, which teams must include the child's parent and guardian, the child's statutory advocates, and, most notably, the child. *See* W. Va. Code §49-5D-3. Mr. Robertson was woefully underrepresented on the constructed team, therefore.

Mr. Robertson has not been afforded due process; instead, he has been excluded from the process due to his perceived legal incompetency. And, as argued in the opening brief, no legal incompetency attaches to Mr. Robertson who, according to all the medical testimony, is, in fact, competent.

Moreover, the issue of equal protection was raised in Mr. Robertson's initial brief and was, admittedly, not thoroughly discussed. The respondent's brief gave similarly short shrift to the argument. In reply, however, the issue of equal protection is seemingly more deserving of discussion.

According to respondent, scrutiny of the Court's ruling on the issue of the Transportation Clause under equal protection analysis is misplaced.[17] However, the respondent recognizes that

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[17] As opinions of the Supreme Court of Appeals of West Virginia have "not[ed]":

> The concept of equal protection is inherent in article three, section ten of the West Virginia Constitution and the scope and application of this protection is coextensive or broader than the fourteenth amendment to the United States Constitution. [citations and quotations omitted].

the effect of the ruling is to treat persons under the Court's jurisdiction, differently, depending on the classification of these persons as either persons who have actually been adjudged to be guilty, *i.e.*, "prisoners," or persons who have been found not guilty by reason of mental illness, *i.e.*, "patients."[18] The respondent then states that the separate classification of these individual is rational. Prisoners can object to the transfer because they do not require treatment, but patients cannot object because the transfer may be the only way in which the state can provide appropriate treatment. Prisoners cannot be punished, therefore, by transfer to out-of-state maximum security facilities, but Mr. Robertson can be transferred to an out-of-state maximum security facility because he is classified as a "patient, who deserves appropriate treatment so he may come back to West Virginia and be in a lesser restrictive environment."[19]

The problem for respondent is that the Transportation Clause is not about punishment or treatment, but, rather, is about being "transported out of" or being "forced to leave" the state. *See Ray v. McCoy*, Syl. Pt. 1, 174 W. Va. 1, 321 S.E.2d 90 (1984). Mr. Robertson's forced transportation outside of the state may be to a maximum security hospital rather than a maximum security prison, but it is nonetheless the situation that he is being transported out of the state over his objection. The rationale for the distinction between patients and prisoners within the Court's jurisdiction does relieve the application of the Transportation Clause.

And, again, Mr. Robertson's transfer in this matter is more for punitive reasons than actual treatment. He is being transported for "behavioral management" and not "medical treatment." The undisputed testimony is that Mr. Robertson is not currently mentally ill, but he

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State v. Shelton, 204 W. Va. 311, 512 S.E.2d 568, fn. 1 (1998).

[18] *Brief of Appellant,* p. 10.
[19] *Ibid.*

does possess intractable personality disorders requiring a structured environment, not a punitive environment, in order to prevent his mental illness from recurring.

For this reason, no objective is met by treating Mr. Robertson differently than a prisoner with respect to his right, while under the Court's jurisdiction, to remain in the State of West Virginia. The lack of the appropriate facility in the state is not the fault of Mr. Robertson. If resources must be committed to meet the state's obligations of maintaining Mr. Robertson in the State of West Virginia, then so be it.

Again, no rational basis exists for permitting a person who is adjudged guilty of an offense from being able to object to an out-of-state placement, but denying this same basic right to a person who is not adjudged guilty, but is nonetheless subjected to the Court's jurisdiction for a period up to the maximum sentence for the offense against the state with which the person was charged. The denial of this basic liberty provided in the West Virginia constitution requires "strict scrutiny" and, in this matter, the denial of the right of choice to forensic patients does not survive such scrutiny. *See State v. County Commission of Boone County,* 192 W. Va. 448, 452 S.E.2d 906, 914 (1994)("[W]hen a ... constitutional right ... is involved, the legislation must survive 'strict scrutiny.'"). Accordingly, the order requiring the transfer of Mr. Robertson to the South Carolina facility over his objection violated his rights of equal protection under both the state and federal constitution.

RE: *ASSIGNMENT OF ERROR #2:* The Circuit Court erred when it ordered the placement of the appellant, who is within the Circuit Court's jurisdiction by reason of the provisions of W. Va. Code § 27-6A-4, in a privately owned facility situated in the State of South Carolina in which psychiatric services are provided to forensic patients and inmates in a maximum security setting because the provisions of W. Va. Code § 27-6A-5 required the placement of the appellant, when

his release into the community was revoked, in the "least restrictive setting appropriate to manage the acquitee and protect the public" rather than in the most restrictive setting imaginable.

REPLY:

The respondent defends the South Carolina facility as the least restrictive setting in the circumstances of this matter. This defies logic. The South Carolina facility is, in fact, the most restrictive setting imaginable. It is a "maximum security" facility. Mr. Robertson is denied basic liberties as he is once again housed in, essentially, a jail cell. No testimony exists that Mr. Robertson is at risk of escaping. Locked doors are not the issue for Mr. Robinson. Locked doors are simply the State of West Virginia's answer to managing Mr. Robinson.

The justification for this setting is that it provides for "behavioral management" of Mr. Robinson, which, according to the respondent, "is the most critical aspect of effective treatment."[20] Admittedly, the professionals' diagnosis is that, without structure, Mr. Robertson could become psychotic under stress due to his personality disorders. However, in all instances in the community setting during which Mr. Robertson became psychotic, the psychosis disappeared almost immediately upon the resulting medical treatment.[21] And, notably, no person was actually harmed during Mr. Robertson's four months in the community setting, although, in one episode of psychosis, Mr. Robertson purportedly made threats that he would set fire to his apartment.

It is the imposition of structure that is required by Mr. Robertson, not the management of behaviors arising out of his disorders. And this structure need not mean four walls and a locked door. Instead, it is the structure of a support system from medical providers or professionals so

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[20] *Brief of Respondent,* p. 11.
[21] Appendix, p. 145.

that any stress suffered by Mr. Robertson can be identified and the potential need for medication can be determined before the psychosis appears or deepens.

What the respondent is really stating is that the South Carolina is the "only" setting the state can find in which to manage Mr. Robertson because the state's only other settings are not suited to, or refuse to accommodate, Mr. Robertson. That does not satisfy the "least restrictive setting" requirement. The reality is that lesser restrictive settings would work with the appropriate structure, but it would require commitment of resources that the state has not, and will not, make. This reticence does not justify "locking up," once again, Mr. Robertson.

RE: *ASSIGNMENT OF ERROR #3:* The Circuit Court erred when it ordered the placement of the appellant, who is within the Circuit Court's jurisdiction by reason of the provisions of W. Va. Code § 27-6A-4, in a privately owned facility situated in the State of South Carolina in which psychiatric services are provided to forensic patients and inmates in a maximum security setting because the statutory authorization for transfer of "mentally disordered offenders," as set forth in the "Interstate Compact on the Mentally Disordered Offender," W. Va. Code § 27-15-1, to facilities in another state requires a contract with the sovereign authority of the receiving state who is then an agent of the State of West Virginia and not with a privately owned facility that is not subject to regulation or control by the State of West Virginia.

REPLY:

Finally, the respondent asserts that the contract with the private facility is in compliance with the "Interstate Compact." The respondent relies, however, on Article X of the Interstate Compact, W. Va. Code §27-15-1, which provides:

> Nothing contained in this compact shall be construed to abrogate or impair any agreement or arrangement which a party state may have with a *nonparty state*... [emphasis added].

Notably, this provision does not authorize the entry into a contract with a private entity in a member state. The provision does no more than state that entering into the compact does not affect existing contracts with other states who are not members of the compact.

Again, the provision refers to contracts with a "state." No authorization in this enactment exists for the execution of contracts with non-sovereign entities. No provision makes private entities the "agent" of the State of West Virginia in matters affecting the custody of its wards.

Essentially, the respondent has proffered no statute, regulation, or other authority to support its contract with a private facility in another state without any accompanying contract with the state in which the facility is located. Obviously, the Interstate Compact has not been followed in this matter.

Mr. Robertson repeats the concerns articulated in his opening brief. The State of West Virginia has transported him to an out-of-state private facility over which the State of West Virginia has no regulatory authority. The facility is not governed by the provisions of the law or regulations of West Virginia protecting the rights of mental health patients. And, the State of West Virginia has no agreement with the State of South Carolina, as its agent, to ensure the foreign state's enforcement of the State of West Virginia's interests. The State of West Virginia has effectively abandoned Mr. Robertson.

Indeed, the vetting of the South Carolina facility has been minimal. The facility was visited by the State's forensic coordinator, Georgette Bradstreet. In the course of a hearing, she recited the marketing material for the facility. No official inspection or certification has been proffered. No statistics or other demographics have been provided except for broad generalities. Notably, the contract between the facility and the State of West Virginia has not been proffered.

Moreover, the following information was provided:

> Q. ... In terms of being a psychiatric hospital though, what constitutes its population? First of all, do you know the number?
>
> A. Yes – I don't know the number, I know the divide. It's two-thirds forensic patients, one-third inmates.
>
> Q. ... In this psychiatric facility, there nonetheless are patients in that facility who are actually inmates?
>
> A. That is correct.
>
> Q. And do they segregate that population from the forensic population?
>
> A. Not to my knowledge.[22]

Mr. Robertson has been transported out-of-state to a facility that is not regulated by the State of West Virginia and is being housed with an inmate population. No information has been provided regarding the crimes of which these inmates have been convicted. Mr. Robertson's safety has not been adequately assessed.

In short, no contract has been produced that, in any part, provides the oversight of the facility by state authorities. No report of any formal investigation has been provided into the operation of the facility, except for the forensic coordinator's visceral reaction from her personal tour. Again, the State of West Virginia has entirely, and inappropriately, abrogated its role as a state authority to this private concern.

III.
CONCLUSION

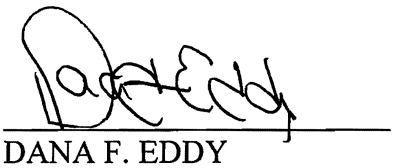
For the reasons that have been set forth, the Court is requested to vacate the final order of the Circuit Court ordering the transfer of the appellant to the facility in the State of South

[22] Appendix, p. 179.

Carolina and to direct the Circuit Court to enter its order for the proper placement of the appellant in the most appropriate setting within the State of West Virginia.

RESPECTFULLY SUBMITTED,

JAMES ROBERTSON
By Counsel



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CERTIFICATE OF SERVICE

I, Dana F. Eddy, counsel for the appellant James Robertson, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying *Reply Brief of Petitioner James Robertson* on this 10th day of May, 2012, by depositing the copy in the United States mail in a postage paid envelope with the following addresses:

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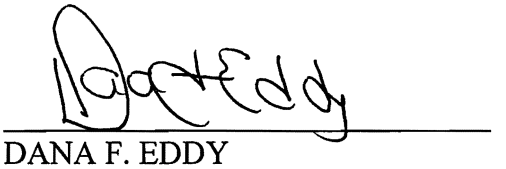

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