

No. 30696 - State of West Virginia ex rel. James William Berry, Sr. v. Thomas L. McBride, Warden, Mt. Olive Correctional Center

**FILED**

**December 13, 2002**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

**December 16, 2002**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Starcher, Justice, concurring:

I concur in the Court's judgment.

I would hold that Mr. Berry raised a colorable state and federal disability discrimination claim, because he may have been suffering a much reduced quality of life in a double cell, as a result of his need for a wheelchair – *when compared to other inmates* who do not have his disability.

I also would have appointed counsel for this inmate, before addressing the merits of an important legal issue like double-celling.

Finally, I have a suggested answer to the very fair question that is posed by Justice Maynard in his dissent – what to do about jail and prison overcrowding?

The answer is “work ’em!” Community-based sentencing with offenders repaying society for their wrongs in the form of public service is a preferable sentence for a very high percentage of offenders. Currently taxpayers are being required to pay nearly \$20,000.00 each year for each inmate while the offender sits in a cell and does nothing beneficial to either the community or himself.

We are unquestionably wasting a sizable percentage of our full-time, high-tech,

high-security prison and jail cells on nonviolent offenders who nearly everyone agrees do not pose a dangerous security risk. We could, today, put at least 500 check forgers, drug users, and other nonviolent offenders who are in state prisons and jails on strict probation, or home confinement, or weekends in jail. Then we should make them work – at fixing up our public roads, streets, and buildings – to pay for their offenses.

When I was a trial judge, the State Supreme Court appointed me as a special master to relieve overcrowding at Huttonsville State Penitentiary. In approximately 20 months, by transfer to prisons in other states, minor sentence modifications, and other legal tools, I reduced the Huttonsville prison population from 829 to approximately 550 inmates. No crime wave was ever tied to that reduction (not to be immodest, but I could do it again in a heartbeat).

Making offenders work in their own communities to pay for their crimes is not “soft on crime” – it is tough!

Unfortunately, I know that in the real world, with all of the competing voices and interests, it would not be feasible to implement the simple answer I propose. But it really would be that simple – and I thank Justice Maynard for posing the question.