

Nos. 24459, 24460, 24461,
24462, 24463, 24464,
24465, 24466, 24467,
24468, 24469, 24470,
and 24472:

*STATE OF WEST VIRGINIA EX REL. ALEN
STULL, ET AL.; DENNIS L. HALE; WILLIAM
E. EREN, ET AL.; DANIEL R. MAYNARD;
MICHAEL W. GRUBBS; MATTHEW
WITHROW; JERRY WILSON; MICHAEL D.
SALMONS; JAMES BROTSKY; ROY T.
WITHROW; ELIJAH D. MARTIN; ROBERT L.
WILLIAMS, JR.; WILLIAM E. EREN, ET AL.,
Petitioners, v. WILLIAM K. DAVIS,
COMMISSIONER, DEPARTMENT OF
CORRECTIONS, AND STEVEN D.
CANTERBURY, DIRECTOR OF THE
REGIONAL JAIL AUTHORITY, Respondents.*

McCUSKEY, Justice, concurring, in part, and dissenting, in part:

I agree with the majority position insofar as it directs compliance with the West Virginia law requiring Department of Corrections prisoners currently housed in county jails to be incarcerated in facilities of the Department of Corrections. However, I dissent from the part of the majority holding which interferes with the lawful discretion of the Department of Corrections to make incarceration decisions for specific inmates.

I am particularly concerned with the majority's statement that the duty of the Department of Corrections to incarcerate inmates in a state penal facility is simply being shifted to the regional and county jails. Clearly, prison overcrowding is a very real problem and one which is not easily solved. However, the Legislature has provided, under § 31-20-5(8) of the West Virginia Code, that the Regional Jail Authority may lease space and facilities in the regional jails to the West Virginia Department of Corrections

“for the keeping and detaining of prisoners sentenced to serve terms of incarceration under the custody of the West Virginia department of corrections for nonviolent crimes.”

Since the Legislature has clearly provided the Department of Corrections with this option, and as the only restraint placed upon this alternative is that “such leasing not restrict space or facilities needed for the detention of county prisoners,” I do not think that we should state, as we did in the order of December 8, 1997 pursuant to State ex. Rel. Dodrill v. Scott and State ex. Rel Smith v. Skaff, that the duty of the Department of Corrections to incarcerate inmates who are sentenced to the penitentiary, “in a state penal facility operated by the Division of Corrections,” is wholly nondiscretionary. Rather, it is nondiscretionary *except* as modified by the Legislature, which determines the extent of the authority of state agencies. For us to remove a grant of authority, which the Legislature has clearly provided to the Department of Corrections, is, in my opinion, micromanagement of that department and is unwarranted.

For the foregoing reasons, I concur in part and dissent in part.