

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

JOHN BAXLEY, JR., *et al.*,

Plaintiffs,

v.

**Civil Action No. 3:18-cv-01526
(Chambers, J.)**

BETSY JIVIDEN, *et al.*,

Defendant.

**DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT AS TO AMBER ARNETT AND ERIC L. JONES**

NOW COMES the Defendant Betsy Jividen, Commissioner of the West Virginia Division of Corrections and Rehabilitation, in her official capacity only, and the West Virginia Division of Corrections and Rehabilitation, by counsel, Webster J. Arceneaux, III, James C. Stebbins, and Valerie H. Raupp of Lewis Glasser PLLC and Briana J. Marino, Assistant Attorney General for the State of West Virginia, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and they move this Honorable Court for summary judgment with regard to two of the Plaintiffs' claims on the grounds of mootness as set forth herein as follows:

1. Plaintiffs Amber Arnett and Eric L. Jones are both named plaintiff in the above styled civil action. At the time the Second Amended Complaint was filed on December 19, 2019, Ms. Arnett was a pretrial detainee at North Central Regional Jail, Comp. ¶ 15 and Mr. Jones had been released from Western Regional Jail, Comp. ¶ 13.

2. Mr. Jones was released from custody on or about May 19, 2019 as a result of discharging his sentence for Failure to Register as a Sexual Offender and a Parole violation related thereto. (See Affidavit of Jonathan E. Huffman, Exhibit 1 at ¶ 2(a)). Counsel for Mr. Jones agreed to set his deposition on June 17, 2020 (Doc. 227), but on the date the deposition was noticed, Mr.

Jones did not appear. (See Exhibit 2, Transcript of Jones Deposition). Based on information and belief, since that date, counsel for Mr. Jones has been unable to speak with him to re-schedule his deposition.

3. Ms. Arnett, had been charged with Fraudulent Use of an Access Device and Conspiracy and, on or about June 4, 2020, she posted bond and she was released from custody by a Judge of the Circuit Court of Wood County, West Virginia. (See Affidavit of Jonathan E. Huffman, Exhibit 1 at ¶ 2(b)). By coincidence, Ms. Arnett's deposition had been set for June 8, 2020 (Doc. 211). Counsel for Ms. Arnett advised that they were unable to communicate with Ms. Arnett after her release and her deposition was postponed. Since that date, based upon information and belief, counsel for Ms. Arnett has been unable to communicate with her to re-schedule her deposition.

4. Plaintiffs Amber Arnett and Eric L. Jones clearly state in their Second Amended Complaint that "Plaintiffs bring this suit seeking solely declaratory and injunctive relief." Comp. ¶2. Plaintiffs' claims for declaratory and injunctive relief are moot, as Plaintiffs Amber Arnett and Eric L. Jones, are no longer housed in a West Virginia Regional Jail facility or Prison, as set forth in the affidavit of Jonathan E. Huffman, Exhibit 1.

5. This Court addressed an almost identical situation on a Motion to Dismiss filed by the West Virginia Regional Jail and Correctional Facilities Authority in *S.M.B. v. West Virginia Regional Jail and Correctional Facility Authority, et al.*, 2017 U.S. Dist. LEXIS 177668 (S.D. W.Va. 2017) at pp. 6-7, and it concluded that the Plaintiff's claim for injunctive relief was mooted by his release.

6. This Court should likewise examine the facts and circumstances in this case and conclude that it is undisputed that Plaintiffs Amber Arnett and Eric L. Jones have been released

from custody and that none of the exceptions to the mootness doctrine are present in this case that would preclude this Court from dismissing the claims of these two Plaintiffs at this time.

WHEREFORE, based upon the foregoing, as more fully discussed in the Memorandum of Law in Support, the Defendants respectfully request that this Court enter an order dismissing as moot the Plaintiffs Amber Arnett and Eric L. Jones claims for declaratory and injunctive in this case, and that it order any other further relief that the Court deems just and proper.

**Respectfully submitted on behalf of Defendants
by:**

LEWIS GLASSER PLLC

/s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III, State Bar #155
Richard L. Gottlieb, State Bar #1447
James C. Stebbins, State Bar #6674
Valerie H. Raupp, State Bar #10476
Post Office Box 1746
Charleston, WV 25326
(304) 345-2000
FAX: (304) 343-7999
wjarceneaux@lgcr.com

**PATRICK MORRISEY
ATTORNEY GENERAL**

/s/ Briana J. Marino
Briana J. Marino (WVSB #11060)
Assistant Attorney General
1900 Kanawha Blvd., East
Building 1, Suite W-400
Charleston, WV 25305
Telephone: (304) 558-6593
Facsimile: (304) 558-4509
Email: Briana.J.Marino@wvago.gov

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

JOHN BAXLEY, JR., et al.

Plaintiffs,

v.

**Civil Action No. 3:18-cv-01526
(Chambers, J.)**

BETSY JIVIDEN, et al.,

Defendants.

CERTIFICATE OF SERVICE

I, Webster J. Arceneaux, III, co-counsel for all Defendants, do hereby certify that on this 17th day of July 2020, I electronically served a copy of the foregoing “**DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT AS TO AMBER ARNETT AND ERIC L. JONES**” and the “**MEMORANDUM OF LAW IN SUPPORT**” via the CM/ECF system that will send notification to the following counsel of record:

Lydia C. Milnes, Esq.
Jennifer S. Wagner, Esq.
Mountain State Justice
Counsel for Plaintiffs

/s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III, State Bar #155

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

JOHN BAXLEY, JR., et al.,

Plaintiffs,

v.

**Civil Action No. 3:18-cv-01526
(Chambers, J.)**

BETSY JIVIDEN, et al.,

Defendants.

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT AS TO AMBER ARNETT AND ERIC L. JONES**

Defendants, pursuant to Rule 56 of the Federal Rules of Civil Procedure, have moved this Honorable Court for summary judgment with regard to two of Plaintiffs' claims on the grounds of mootness. Plaintiffs Amber Arnett and Eric L. Jones have both been released from custody and therefore, this Court should dismiss their claims against Defendants for declaratory and injunctive relief as moot as more fully discussed herein.¹

I. Plaintiffs' Claims for Declaratory and Injunctive Relief are Moot.

Plaintiffs Amber Arnett and Eric L. Jones clearly state in their Complaint that "Plaintiffs bring this suit seeking solely declaratory and injunctive relief." *Complaint*, ¶2. Plaintiffs' claims for declaratory and injunctive relief are moot, as Plaintiffs Amber Arnett and Eric L. Jones, are no longer housed in a West Virginia Regional Jail facility or Prison, as set forth in the affidavit of Jonathan E. Huffman, attached to the Motion as Exhibit 1.

¹ As set forth in the Motion, despite being class representatives, neither Ms. Arnett nor Mr. Jones have cooperated in this case by sitting for a deposition. Mr. Jones specifically failed to attend his deposition after it was noticed (Exhibit 2) and Ms. Arnett's deposition was never scheduled because she did not respond to her counsel. Pursuant to Rule 37(d), Federal Rules of Civil Procedure, Defendants would have the right to move for dismissal of the Second Amended Complaint for these two plaintiffs as a sanction for their non-appearance at their depositions and if the Court is not inclined to dismiss on mootness grounds, they will file an additional motion to dismiss under Rule 37(d).

This Court addressed an almost identical situation on a Motion to Dismiss filed by the West Virginia Regional Jail and Correctional Facilities Authority in *S.M.B. v. West Virginia Regional Jail and Correctional Facility Authority, et al.*, 2017 U.S. Dist. LEXIS 177668 (S.D. W.Va. 2017) at pp. 6-7, and it concluded that the Plaintiff's claim for injunctive relief was mooted by his dismissal:

In this case, Plaintiff was paroled on March 28, 2017. While he was purportedly housed in a West Virginia correctional facility at the time he filed his Complaint, this is no longer the case. As Plaintiff is no longer housed in a WVRJCFA facility, he is no longer subject to the prison policy he challenges and, accordingly, has no "present interest affected by that policy." As a result, the Court FINDS that Plaintiff's claim for equitable relief against WVRJCFA is moot.

In so holding, this Court relied upon the Court of Appeals decision in *Incumaa v. Ozmint*, 507 F.3d 281, 286-287 (4th Cir. S.C. 2007) and other similar decisions. This Court also concluded that none of the exceptions to the mootness doctrine were present in that case.

Likewise, in *Whitmore v. Western Reg'l Jail*, 2019 U.S. Dist. LEXIS 133646 (S. D. W. Va. July 19, 2019), Magistrate Eifert reviewed a *pro se* inmate complaint regarding conditions at Western Regional Jail and found that the inmate's transfer to a different correctional facility effectively mooted his claim for injunctive relief, that no exception applied and dismissed his claim for injunctive relief. *Id.* at pp. 11-13. This Court accepted and incorporated Magistrate Eifert's findings and recommendation and dismissed the complaint with prejudice. *Whitmore v. W. Reg'l Jail*, 2019 U.S. Dist. LEXIS 132230 (S. D. W. Va. August 7, 2019).

This case, like *S.M.B.* and *Whitmore*, should be dismissed as moot because Plaintiffs Amber Arnett and Eric L. Jones are no longer incarcerated in any Regional Jail or prison. It is undisputed that Plaintiff Jones was released from Western Regional Jail on May 19, 2020, and that

Plaintiff Arnett was released from North Central Regional Jail on June 4, 2020. *See* Huffman affidavit, Exhibit 1.

This Court should examine the facts and circumstances in this case and conclude that it is undisputed that Plaintiffs Amber Arnett and Eric L. Jones have been released from custody and that none of the exceptions to the mootness doctrine are present in this case that would preclude this Court from dismissing the claims of these two Plaintiffs at this time.

II. Conclusion.

WHEREFORE, based upon the foregoing, the Defendants respectfully request that this Court enter an order, as a matter of law, dismissing the claims of Plaintiffs Amber Arnett and Eric L. Jones for declaratory and injunctive relief as moot, based on their release from the Regional Jails were they were incarcerated, and that it order any other further relief that the Court deems just and proper.

**Respectfully submitted on behalf of Defendants
by:**

LEWIS GLASSER PLLC

/s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III, State Bar #155
Richard L. Gottlieb, State Bar #1447
James C. Stebbins, State Bar #6674
Valerie H. Raupp, State Bar #10476
Post Office Box 1746
Charleston, WV 25326
(304) 345-2000
FAX: (304) 343-7999
wjarceneaux@lgcr.com

**PATRICK MORRISEY
ATTORNEY GENERAL**

/s/ Briana J. Marino
Briana J. Marino (WVSB #11060)

Assistant Attorney General
1900 Kanawha Blvd., East
Building 1, Suite W-400
Charleston, WV 25305
Telephone: (304) 558-6593
Facsimile: (304) 558-4509
Email: Briana.J.Marino@wvago.gov

EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

JOHN BAXLEY, JR., *et al.*,

Plaintiffs,

v.

**Civil Action No. 3:18-cv-01526
(Chambers, J.)**

BETSY JIVIDEN, *et al.*,

Defendant.

AFFIDAVIT OF JONATHAN E. HUFFMAN

**STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, To-wit:**

I, Jonathan E. Huffman, being first duly sworn upon my oath, hereby come forth and state as follows:

1. I have worked at what is now known as the Division of Corrections and Rehabilitation, (“Corrections”) since September 2005. I am employed by Corrections as the Assistant Director for Records and Interstate Compact.

2. I am familiar with inmate records for the State of West Virginia. Pursuant to my review of records, I can state:

- a. Mr. Eric L. Jones was previously incarcerated at Western Regional Jail from November 28, 2018, as a result of a Parole violation related to his sentence for Failure to Register as a Sexual Offender. Mr. Jones was released from custody on or about May 19, 2019 as a result of completing his sentence.

- b. Ms. Amber Arnett was previously incarcerated at North Central Regional Jail as a pretrial detainee from September 19, 2019, with a charge of Fraudulent Use of an Access Device and Conspiracy out of Wood County. During this incarceration she also had charges from Doddridge and Harrison County brought against her. On December 30, 2019, she was released from custody and ordered to a rehabilitation facility. On May 1, 2020, Ms. Arnett left the treatment facility and self-reported to North Central Regional Jail. On June 4, 2020, she posted bond and she was released from custody by a Clerk of the Circuit Court of Wood County, West Virginia.
- c. Mr. John Baxley, Jr. was previously incarcerated at the Western Regional Jail in Barboursville, West Virginia beginning on August 16, 2018. Mr. Baxley was in jail facing charges of armed robbery, kidnapping, grand larceny, and burglary and he is now serving a 25-year determinate sentence for 2 counts of Robbery in the 1st Degree (counts are running concurrently). Since March 11, 2020, Plaintiff John Baxley has been incarcerated at Salem Correctional Center located on the border of Doddridge County and Harrison County, West Virginia. Salem Correctional Center is a medium security prison and not a jail.
- d. Ms. Heather Reed was previously incarcerated at the Northern Regional Jail in Marshall County, West Virginia from April 10, 2019 to July 29, 2019 and at Tygart Valley Regional Jail in Randolph County, West Virginia from July 29, 2019 to November 20, 2019. Plaintiff Heather Reed is currently serving a sentence of 1-10 years and she is incarcerated at Lakin Correctional Center which is a prison in Mason County, West Virginia and not a jail. According to

my records, Plaintiff has been arrested 21 times since 2002 and she is currently serving a sentence related to credit card fraud.

- e. Mr. Earl Edmondson was previously incarcerated at the Northern Regional Jail in Marshall County, West Virginia from July 15, 2019 to January 17, 2020. Thereafter, Mr. Edmondson was incarcerated for a short time at Martinsburg Correctional Center in Berkeley County, West Virginia (a prison) from January 17, 2020 to February 13, 2020. Plaintiff Earl Edmondson is currently serving a sentence of 1-5 years and he is incarcerated at the Pruntytown Correctional Center in Taylor County, West Virginia since February 13, 2020, for an unlawful assault.
- f. Mr. Joshua Hall was previously incarcerated at the North Central Regional Jail in Doddridge County, West Virginia from October 1, 2019 to February 26, 2020. Plaintiff Joshua Hall is currently serving a sentence of 1-5 years for Strangulation. Mr. Hall is currently incarcerated at Potomac Highlands Regional Jail in Hampshire County, West Virginia. But for the coronavirus, he would have already been transferred to a prison facility.

Further the affiant sayeth naught.


Jonathan E. Huffman

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA

Signed and sworn before me this 17th day of July, 2020, by Jonathan E. Huffman.

My commission expires August 28, 2021.


Notary Public



EXHIBIT 2

JOHN BAXLEY, JR., et al. v.
BETSY JIVIDEN, et al.

ERIC JONES (NON-APPEARANCE)
June 17, 2020

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

* * * * *

JOHN BAXLEY, JR., et. al.,
Plaintiffs,

vs.

CIVIL ACTION
NO. 3:18-CV-01526

BETSY JIVIDEN, et. al.,
Defendants.

* * * * *

Scheduled deposition of Eric Jones taken by
the Defendants under the West Virginia Rules of Civil
Procedure in the above-entitled action, pursuant to
notice, before Angela L. Curtis, a Certified Court
Reporter, at Realtime Reporters, 713 Lee Street,
Charleston, West Virginia, on the 17th day of June
2020.

REALTIME REPORTERS, LLC
ANGELA L. CURTIS, CCR
713 Lee Street
Charleston, WV 25301
(304) 344-8463
realtimereporters.net

JOHN BAXLEY, JR., et al. v.
BETSY JIVIDEN, et al.

ERIC JONES (NON-APPEARANCE)
June 17, 2020

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

APPEARANCES:

APPEARING FOR THE DEFENDANTS:

Valerie H. Raub, Esquire
LEWIS GLASSER PLLC
Post Office Box 1746
Charleston, WV 25325

APPEARING FOR THE PLAINTIFFS:

Lydia Milns, Esquire
MOUNTAIN STATE JUSTICE
Charleston, WV 25305

JOHN BAXLEY, JR., et al. v.
BETSY JIVIDEN, et al.

ERIC JONES (NON-APPEARANCE)
June 17, 2020

1 P R O C E E D I N G S

2 MS. RAUB: My name is Valerie Raub of
3 Lewis Glasser, PLLC. We represent the defendant in
4 this matter. The deposition of Eric Jones was noticed
5 for today, June 17th at 11:00 am. The notice was sent
6 on June 1st. Mr. Jones's counsel is here. Mr. Jones
7 has not appeared. So we're noting for the record that
8 the deposition was properly noticed and Mr. Jones has
9 not appeared. Ms. Milns, do you have anything to add
10 to the record?

11 MS. MILNS: I would add we did inform
12 Mr. Jones. It was my understanding he was planning to
13 appear. I can't speak to why that did not occur, so I
14 will continue to attempt to be in touch with him and
15 we'll let counsel know as soon as I know anything
16 further about rescheduling or what happened this
17 morning.

18 MS. RAUB: All right. Thank you. That
19 concludes this proceeding unless there's anything else.

20 MS. MILNS: Nothing further from me.

21 MS. RAUB: Thank you.
22
23
24

JOHN BAXLEY, JR., et al. v.
BETSY JIVIDEN, et al.

ERIC JONES (NON-APPEARANCE)
June 17, 2020

1 STATE OF WEST VIRGINIA,
2 COUNTY OF KANAWHA, to wit;

3 I, Angela L. Curtis, a Notary Public within
4 and for the County and State aforesaid, duly
5 commissioned and qualified, do hereby certify that the
6 foregoing proceeding was duly taken by me and before me
7 at the time and place and for the purpose specified in
8 the caption hereof.

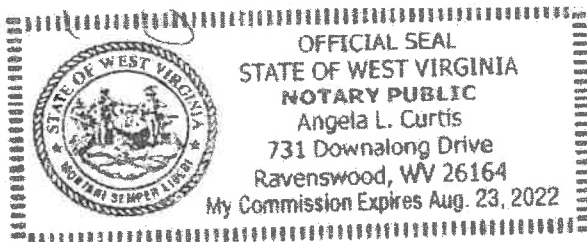
9 I further certify that the attached proceeding
10 transcript meets the requirements set forth within
11 article twenty-seven, chapter forty-seven of the West
12 Virginia Code to the best of my ability.

13 I do further certify that the said proceeding
14 was correctly taken by me in shorthand notes, and that
15 the same were accurately written out in full and
16 reduced to typewriting.

17 I further certify that I am neither attorney
18 or counsel for, nor related to or employed by, any of
19 the parties to the action in which this deposition is
20 taken, and further that I am not a relative or employee
21 of any attorney or counsel employed by the parties or
22 financially interested in the action.

23 My commission expires August 23, 2022. Given
24 under my hand this 23rd day of June 2020.

Angela L. Curtis



JOHN BAXLEY, JR., et al. v.
BETSY JIVIDEN, et al.

ERIC JONES (NON-APPEARANCE)
June 17, 2020

1 STATE OF WEST VIRGINIA
2 COUNTY OF KANAWHA, to wit:

3 I, Teresa Evans, owner of Realtime
4 Reporters, LLC, do hereby certify that the attached
5 transcript meets the requirements set forth within
6 article twenty-seven, chapter forty-seven of the West
7 Virginia Code to the best of my ability.

8
9 Given under my hand this 23rd day of June
10 2020.

11
12
13 /s/ Teresa Evans

14
15 -----
16 Registered Professional
17 Reporter/Certified Realtime Reporter
18
19
20
21
22
23
24

JOHN BAXLEY, JR., et al. v.
 BETSY JIVIDEN, et al.

ERIC JONES (NON-APPEARANCE)
 June 17, 2020

1	J	3:16	
11:00 3:5	Jones 3:4,6,8,12	S	
17th 3:5	Jones's 3:6	speak 3:13	
1st 3:6	June 3:5,6	T	
A	L	today 3:5	
add 3:9,11	Lewis 3:3	touch 3:14	
appeared 3:7,9	M	U	
attempt 3:14	matter 3:4	understanding 3:12	
C	Milns 3:9,11,20	V	
concludes 3:19	morning 3:17	Valerie 3:2	
continue 3:14	N		
counsel 3:6,15	notice 3:5		
D	noticed 3:4,8		
defendant 3:3	noting 3:7		
deposition 3:4,8	O		
E	occur 3:13		
Eric 3:4	P		
G	planning 3:12		
Glasser 3:3	PLLC 3:3		
H	proceeding 3:19		
happened 3:16	properly 3:8		
I	R		
inform 3:11	Raub 3:2,18,21		
	record 3:7,10		
	represent 3:3		
	rescheduling		