

APPEARANCES (Cont'd)

On Behalf of Respondent Corporation of Harpers Ferry:

EUPHEMIA KALLAS, ESQUIRE
Shepherdstown, West Virginia

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P R O C E E D I N G S

(Telephonic hearing.)

THE COURT: Mr. Ritchie, I've got my court reporter with me. I should have Ms. Kallas on the phone.

MS. KALLAS: Yes.

THE COURT: Mr. Bailey on the phone?

MR. BAILEY: Yes, and Daniel Kirkland is with me, Your Honor.

THE COURT: Mr. Ritchie is on the phone. Is Mr. Donovan with you?

MR. RITCHIE: Mr. Donovan is not with me, not today, Your Honor.

THE COURT: All right. So we have all three of you represented. My law clerk mentioned that she had not gotten ahold of the AG's office although I didn't think that they were probably basically had any necessary involvement in that their role was of the amicus brief as opposed to the motion to stay so I don't know that they had notice of this proceeding. Does anybody object on that ground?

I will tell you at this point my thought process in asking for this hearing was simply to figure out what issues needed to be addressed between whether or not we needed to take up any issues with the preliminary

1 injunction or not based upon what is happening with an
2 appeal and then the motion to stay as far as any briefing
3 schedule for the motion to stay, and then if we needed to
4 set oral arguments to set those oral arguments on either
5 or both of those issues.

6 So, Ms. Kallas, do you want to respond first?

7 MS. KALLAS: Oh, well, actually, I can, but I don't
8 know if that makes a lot of sense because I'm neither --
9 the Corporation has neither filed or responded.

10 THE COURT: Okay. That's fine.

11 MS. KALLAS: I defer to --

12 THE COURT: Mr. Bailey.

13 MR. BAILEY: First -- yeah, first, Your Honor, I do
14 not object to moving forward with today's hearing without
15 the AG present, and, yeah, I think we -- the Court
16 probably knows we filed this morning a response to object
17 to the request for a stay of this matter and we kind of
18 outlined the reasons therein, and our biggest concern
19 is -- was the same justification for when we came to the
20 Court and asked for a preliminary injunction is that while
21 this -- if the Court were to issue a stay it just, again,
22 permits the current governing body which may possibly not
23 be the legitimate governing body according to the will of
24 the voters that we may or may not be able to overturn when

1 your decision is ultimately upheld.

2 THE COURT: Okay. If the parties feel like the matter
3 has been fully briefed I will set it for oral argument if
4 that's what the parties are telling me. It was not my
5 intention to do oral argument by phone so --

6 MS. KALLAS: Well, is it a stay?

7 MR. BAILEY: Your Honor --

8 MS. KALLAS: Go ahead.

9 THE COURT: Well, and correct, that's what I needed to
10 find out and, honestly, my thought process was is we may
11 have to be addressing both the preliminary injunction as
12 well as the stay depending upon -- because if I were to
13 grant the stay it basically would trigger the issues that
14 were raised in the preliminary injunction it would seem to
15 me, but Mr. Ritchie?

16 MR. RITCHIE: Yes, Your Honor, I appreciate it. I
17 also have no objection to the lack of the Attorney
18 General's presence for the secretary.

19 From our vantage point, we think that the stay motion
20 is ripe for a decision by the Court. I understand it was
21 just -- the response was just filed this morning and the
22 Court understandably may not have had time to review it.
23 We would be open to having oral argument on that as soon
24 as possible to resolve that issue since it's fully briefed

1 and we would be, of course, fine with a telephonic oral
2 argument, but we would do whatever the Court asks in that
3 regard so we're prepared to argue that at this juncture,
4 and if Mr. Bailey does intend to seek some kind of what I
5 will call a coercive relief, coercive order, whether it's
6 in the form of an injunction or order to show cause
7 concerning contempt then we would definitely need to
8 respond to that in writing, but my primary concern is the
9 stay and the ability for this Court to ensure that no
10 irreparable harm comes in this case particularly as to the
11 unopened ballots and to preserve our ability to have it
12 fully heard on appeal before the supreme court of appeals.

13 THE COURT: So, Mr. Bailey, do you believe that if
14 this Court were to grant the stay that that would
15 necessitate a hearing on the preliminary injunction?

16 MR. BAILEY: Yes, but my -- honestly, Judge, and we
17 may need to do a little research and brief this, is
18 whether or not if you issue the stay whether the circuit
19 court still has jurisdiction to rule on the preliminary
20 injunction at that point.

21 THE COURT: I was questioning that myself.

22 MR. BAILEY: Which is why -- and I know the Court does
23 not intend to hear oral argument, and I'm just kind of
24 outlining my ideas and thoughts, but one, yes, I think we

1 should set this matter down for oral argument so we can
2 fully address all of your questions, Your Honor, but, you
3 know, one of the things I'm wondering is because under
4 Rule 28 that deals with stays, of course, it allows a
5 petitioning party, the party filing for appeal to ask the
6 circuit court for a stay and if the stay is not granted,
7 still allows that party the ability to move forward and
8 ask for a stay from the supreme court.

9 One thing I'm concerned about is that if there is a
10 stay issued without -- by the circuit court, we have no
11 idea how the appellate court is going to set up this
12 briefing schedule whether it will be expedited or not.
13 The term of the supreme court is getting ready to go out.

14 THE COURT: Well, and I will share with you one of my
15 thoughts was to simply grant a temporary stay and then set
16 out the oral arguments, and at this point it sounds like
17 the parties don't need any additional time to brief it
18 although if I were to hear the preliminary injunction
19 motion at the same time as the oral arguments on the stay
20 issue then it seems to me we could do it simultaneously
21 before I lost jurisdiction.

22 MR. BAILEY: Well, Judge, my request is -- Greg
23 Bailey. My request is we set it for oral argument. I can
24 represent to the Court that I will not take any action to

1 enforce the Court order pending our oral argument. Yes, I
2 had asserted that I was going to seek mandamus relief if
3 there was no stay granted. I'm not going to do that
4 before this Court has oral argument and rules on the stay.
5 I can represent that. But, yeah, I think we need to flesh
6 out some of the jurisdictional issues and we can do that
7 all at the same time as oral argument.

8 MR. RITCHIE: Your Honor, this is Mr. Ritchie. I
9 would -- my clients would support entry of a temporary
10 stay pending a decision on the question of whether to
11 enter a final stay, a permanent stay or an injunction
12 on -- in the alternative.

13 THE COURT: Okay.

14 MR. BAILEY: Well, I think that's unnecessary, Judge,
15 for this reason. If I was to try to seek enforcement of
16 the Court order it would have to come through you so if he
17 doesn't trust my representation that I'm not going to seek
18 it, you are going to be the gatekeeper of any such
19 enforcement, and I think they want a temporary stay for --
20 to use it as a some sort of public political victory. I
21 would ask the Court to not enter a temporary stay because
22 I don't think it's ripe until we get before you and argue
23 it.

24 THE COURT: All right.

1 MR. RITCHIE: Your Honor, I think that's an unfair
2 characterization. We certainly have not sought out
3 political victories in this case and, frankly -- well, I
4 won't get into that, but Your Honor, we are concerned --
5 and I will get to the nub of this. We are very concerned
6 about what may happen to those four ballots that are
7 currently sealed but may be opened. I will proffer to the
8 Court that there was an attempt last night, not by
9 Mr. Bailey's clients but by their supporters on council,
10 to open those ballots and what was said was indicated to
11 us that they were going to be commingled and it's after
12 that point they would lose -- we would lose our ability in
13 the event that the supreme court reversed in part, for
14 example, to determine which of the four voters voted for
15 which candidates, and that is our chief concern of
16 irreparable harm and that is why we would prefer that the
17 Court enter a temporary stay pending a decision on whether
18 to enter a permanent stay or some sort of coercive relief.

19 THE COURT: Well, first off, I mean, there's a
20 procedure set out for recounts and, you know, certain
21 people must be present at that recount and I think if
22 those people are present there are things that can be
23 done, but I think that probably has to do ultimately with
24 what I'm going to hear at oral argument, I guess, on both

1 sides.

2 Ms. Kallas, do you have any thoughts on where the town
3 is in terms of the recount process?

4 MS. KALLAS: The town council is fractured, and last
5 night was a horrible situation and so it was very likely
6 that last night those ballots were going to be opened. At
7 this point, I'm not sure anyone knows where they are right
8 now. There were people who are plaintiffs in this case
9 who were in that audience advocating on.

10 MR. BAILEY: Judge, can I just briefly --

11 THE COURT: First, I want to know from Ms. Kallas, I
12 mean, those votes should be in the hands of whom right
13 now?

14 MS. KALLAS: They should be in the ballot box at the
15 night of the recount back in July. Those ballots were
16 sealed, double sealed, put in the ballot box, ballot box
17 sealed, ballot box put into the private office of the
18 recorder. If I understand right now that ballot box is
19 not there and the recorder made representations that the
20 four ballots have been taken out and they're put in some
21 sort of strong box somewhere, and I don't know who
22 authorized such a thing or who allowed such a thing. So
23 last night when they were saying we're going to count
24 them, I had every indication to believe that they were

1 going to open them and count them and there was no reason
2 not to believe them.

3 THE COURT: Other than the fact that all the proper
4 people wouldn't have been present.

5 MR. BAILEY: They were not counted.

6 MS. KALLAS: No, the ballots were not counted. The
7 only reason they were not counted is because -- well, the
8 threats were made and it was very clear should one more
9 town council person walk through that door they were going
10 to get unsealed and counted. It was a show.

11 THE COURT: All right.

12 MR. BAILEY: Judge, I can just tell you this,
13 Mr. Carden has at all times -- Mr. Carden who is one of
14 Ms. Kallas' clients but has at all times completely been
15 obedient to the statute on this, that Mr. Kersey who was
16 before the Court and did oral argument on behalf of the
17 Secretary of State's Office contacted Mr. Carden and made
18 sure he understood that those votes could not be opened or
19 counted unless there was a quorum of the governing body
20 present. Mr. Carden understands that that is the rule.
21 When the majority of the council didn't appear at their
22 regularly scheduled hearing meeting last night to ensure
23 that there couldn't be a quorum, the votes were not opened
24 and they were not counted because Mr. Carden is abiding by

1 the law on that issue.

2 THE COURT: Doesn't there need to be more than just a
3 quorum present?

4 MS. KALLAS: Yes, ma'am. Thank you, Judge. Thank
5 you.

6 THE COURT: And I don't know it off the top of my
7 head, but I know I've read it before and it talked about
8 either the poll workers or something like that, isn't it,
9 Ms. Kallas?

10 MS. KALLAS: No, we don't need poll workers, but there
11 is more. You're exactly right, and I will be happy to
12 have that briefed for you.

13 THE COURT: All right. I mean, I just know under the
14 recount it's all spelled out as to who all needs to be
15 there.

16 Well, I think out of an abundance of caution I think
17 this Court will be issuing a temporary stay pending the
18 oral arguments. I don't know that that -- and I will make
19 it clear in my order that the sole purpose is to make sure
20 that there is no confusion by any of the parties or
21 members of council regarding what is to happen pending the
22 Court's final decision on this matter and it is the
23 purpose of the temporary order of stay is simply to allow
24 for due process to occur.

1 So, that being said, let's look at our calendars. I
2 can't do it tomorrow. I have the afternoon of November
3 14th.

4 MR. RITCHIE: Your Honor, this is Mr. Ritchie. To be
5 clear, this would be a hearing on the permanent stay as
6 well as a motion that we can anticipate that Mr. Bailey
7 will file for an injunction or some sort of coercive
8 relief?

9 THE COURT: Mr. Bailey, did you intend to proceed on
10 your request for permanent injunction?

11 MR. BAILEY: I'm going to if I determine that Your
12 Honor has jurisdiction to grant it.

13 THE COURT: So you want me to set it -- look at a
14 later week then to allow you a chance to brief that and
15 respond if it comes up?

16 MR. BAILEY: No. I will have an answer for the Court.
17 I will make sure I file whatever needs to be filed for the
18 Court or at least our position.

19 THE COURT: I will let you know this, if you intend to
20 proceed on the preliminary injunction, and if,
21 Mr. Ritchie, that triggers you needing additional time
22 then all you need to do is file a request for continuance,
23 Mr. Ritchie, and I will be moving the hearing date.
24 Understood?

1 MR. RITCHIE: Understood. Thank you, Your Honor.

2 MR. BAILEY: Understood, Your Honor. Judge, I'm
3 sitting here -- sorry. Having a discussion with
4 Mr. Kirkland about coverage because I'm actually at a
5 hearing in Morgan County at two o'clock on Thursday
6 afternoon.

7 THE COURT: So I also have Friday at three.

8 MR. BAILEY: I think we're okay Thursday afternoon.
9 Mr. Kirkland may appear on behalf of the clients.

10 THE COURT: Mr. Ritchie.

11 MR. RITCHIE: Yes, ma'am, we can do that.

12 THE COURT: Ms. Kallas.

13 MS. KALLAS: Yes, ma'am.

14 THE COURT: So you want to pick -- will 1:30 on
15 Thursday work?

16 MS. KALLAS: I thought we were at Friday at three.
17 I'm sorry.

18 THE COURT: We were still on Thursday afternoon is
19 what we were looking at. I have the afternoon wide open
20 that I can pick a time.

21 MR. BAILEY: 1:30 works for us.

22 MR. RITCHIE: 1:30.

23 THE COURT: It sounds like Mr. Ritchie and Mr. Bailey
24 are both okay with 1:30. What about you, Ms. Kallas?

1 MS. KALLAS: So we're doing the stay and the
2 injunction Thursday, November the 14th at 1:30, do I have
3 that right?

4 THE COURT: We're not sure exactly what we're doing on
5 the injunction part of it.

6 MS. KALLAS: So just a stay?

7 THE COURT: The stay, and if he files something on the
8 injunction and that triggers the need to continue it,
9 we'll continue it to allow time for the parties to address
10 that.

11 MS. KALLAS: Thank you.

12 MR. RITCHIE: Thank you.

13 MR. BAILEY: I should probably clarify. We would be
14 making an alternative argument if the Court is going to
15 issue a stay that we would like injunctive relief so we're
16 renewing that motion. The only issue that I obviously
17 need to update the Court on is whether or not there's a
18 jurisdictional issue with doing that. To be fair, I
19 absolutely intend to request injunctive relief in the
20 event that this Court grants a stay.

21 THE COURT: Okay.

22 MR. BAILEY: But I do need to update the jurisdiction
23 issue because the Court is now considering this issue
24 after they have filed a notice of appeal.

1 THE COURT: So that's the question is is whether or
2 not the Court can hear it.

3 MR. BAILEY: Correct.

4 THE COURT: So --

5 MR. RITCHIE: Your Honor -- sorry.

6 THE COURT: Go ahead, Mr. Ritchie.

7 MR. RITCHIE: Yes, Your Honor. We would have serious
8 concern -- jurisdictional concerns and would want to have
9 the ability to respond to whatever Mr. Bailey files. We
10 can, of course, do so swiftly, but we will probably need
11 at least a day or two to do that.

12 THE COURT: Okay. So the sole question -- or the sole
13 legal issue that you need additional time to respond to is
14 the jurisdictional one, is that a fair statement?

15 MR. RITCHIE: I think that's the major concern with us
16 in terms of the coercive relief because we, of course,
17 already have laid our positions out on the merits. It's
18 simply a question of whether this Court could or should
19 take the action to enforce its order at this time.

20 THE COURT: So then in order for us to basically be
21 able to address the jurisdictional issue, and I
22 understand, Mr. Bailey, you may walk in and say you don't
23 have jurisdiction, Your Honor, and you can't hear it; I
24 want to make sure we give everybody enough time to look at

1 that. So if we go out -- what if we go out to November
2 22nd, would that give everybody time to research the
3 jurisdictional issue as it relates to the preliminary
4 injunction as well as the issue of stay?

5 MR. BAILEY: Yes, Judge.

6 MR. RITCHIE: Yes, Your Honor.

7 THE COURT: So would the parties be available then at
8 three o'clock on Friday, November 22nd?

9 MR. BAILEY: Yes, Your Honor.

10 MR. RITCHIE: Yes, Your Honor.

11 THE COURT: And that will be jurisdictional arguments
12 on the preliminary injunction and motions for stay. Let
13 me double check one other thing. Can we move that time to
14 2:30 on Friday?

15 MR. BAILEY: That's fine.

16 MR. RITCHIE: Yes, Judge.

17 MS. KALLAS: Yes.

18 THE COURT: November 22nd at 2:30. I realized I'm
19 heading to New Jersey on that weekend so I want to be able
20 to hit the road at a reasonable hour but that should work.
21 See you guys on November 22nd at 2:30, and I will do an
22 order.

23 MS. KALLAS: Thank you, Your Honor.

24 MR. BAILEY: Thank you, Your Honor.

1 MR. RITCHIE: Thank you, Your Honor.

2 THE COURT: Thank you. Bye-bye.

3 (Proceeding concluded.)

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1 STATE OF WEST VIRGINIA,
2 COUNTY OF JEFFERSON, TO WIT:

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4 I, Tracy P. Rice, Official Court Reporter for the
5 Circuit Court of Jefferson County, West Virginia, and
6 Registered Professional Reporter, do hereby certify that
7 the foregoing is a true and correct transcript of the
8 proceedings had and testimony taken in the action of Nancy
9 Singleton Case and Deborah A. McGee, Petitioners, v.
10 Hardwick Smith Johnson, Charlotte Ward Thompson, Christian
11 Pechuekonis, Marjorie Flinn Yost, Barbara Humes, Jay
12 Premack and Corporation of Harpers Ferry, Respondents,
13 19-P-136, held on the 12th day of October 2019.

14 I hereby certify that the transcript within meets the
15 requirements of the Code of the State of West Virginia,
16 51-7-4, and all rules pertaining thereto as promulgated by
17 the Supreme Court of Appeals.

18 Given under my hand this 13th day of November 2019.

19
20 

21 _____
22 Official Reporter, Circuit Court of
23 Jefferson County, West Virginia
24