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The Honorable Melvin Snyder
Office of the Preston County Prosecuting Attorney
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Dear Prosecutor Snyder:

You have asked for an Opinion of the Attorney General concerning the legal process that must be afforded to federal inmates incarcerated in West Virginia who are subject to detainers issued by other States for "unserved sentences, probation, and parole violations." This Opinion is issued pursuant to W. Va. Code § 5-3-2, which provides that the Attorney General "may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." To the extent this Opinion relies on facts, it is based solely on the factual assertions in your correspondence with the Office of the Attorney General.

In your letter, you explain that the Hazelton Federal Prison Complex is located in Preston County. Every year, 50 to 60 of the inmates housed at Hazelton finish serving their federal sentences, yet remain subject to detainers from other States based on unserved sentences for state-law convictions, or probation or parole violations. These inmates thus "need to be transported back [to] the requesting State." Your letter further explains that there is no formal agreement between West Virginia and the Federal Bureau of Prisons regarding the process to transfer inmates from federal custody at Hazelton to the custody of another State, and no otherwise "clear legal process" governing these situations.

As a result, and out of an abundance of caution, these prisoners currently receive the equivalent of an extradition hearing before transfer: A circuit judge "goes through the process for an extradition," including appointing a public defender to represent the inmate's interests and requiring attorneys from your office to appear at the hearing on behalf of the State. You note that these proceedings are not actually extradition hearings because the inmates are not fugitives from the requesting State, and that it takes significant time and resources for your attorneys to participate in dozens of these hearings each year. Further, the proceedings are often uncontested because

many of the federal inmates signed waivers before they were transferred to federal custody consenting to their return to state custody at the end of their federal sentence. Finally, you explain that the federal Bureau of Prisons is open to revising the current extradition-like procedures if they receive assurance that West Virginia law does not require legal process under these circumstances.

Your letter raises the following legal question:

> *What process, if any, must be afforded to a federal inmate incarcerated in West Virginia who is subject to a detainer arising from a conviction in another State before the federal government may transfer that inmate to the custody of the requesting State?*

We conclude that the State of West Virginia has no obligation to provide process to a federal inmate before the federal government transfers the inmate to the custody of a State where the inmate will serve an uncompleted sentence for a state-law conviction.

Discussion

A detainer is a "request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent." *Carchman v. Nash*, 473 U.S. 716, 719 (1985) (citing *Cuyler v. Adams*, 449 U.S. 433, 436 n.3 (1981)). This "administrative mechanism" is designed to avoid a break in custody when one jurisdiction releases an inmate, and another jurisdiction seeks custody of the same inmate to pursue charges or to require that inmate to serve a sentence under that jurisdiction's laws. *See State v. Inscore*, 219 W. Va. 443, 446 n.4 (2006); *see also Moody v. Daggett*, 429 U.S. 78, 81 n.2 (1976). Detainers can be filed for a variety of reasons, including "outstanding criminal charges, outstanding parole or probation-violation charges, or additional sentences already imposed against the prisoner" by the requesting jurisdiction. *Carchman*, 473 U.S. at 719 (citations omitted).

In many cases, the procedural framework governing detainers is established by the Interstate Agreement on Detainers ("Agreement"), a compact signed by most States, including West Virginia, and the federal government. *See*, *e.g.*, W. Va. Code § 62-14-1 (West Virginia's codification of the Agreement). This Agreement dictates the process required when one jurisdiction seeks custody of an inmate related to "outstanding criminal charge[s]" and "untried indictments, informations or complaints." *State ex rel. Modie v. Hill*, 191 W. Va. 100, 102, 443 S.E.2d 257, 259 (1994) (citations omitted). It does not, however, resolve the question you raised: As the United States Supreme Court explained, the Agreement "clearly does not apply to a detainer based on *an additional sentence already imposed* against the prisoner." *Carchman*, 473 U.S. at 727 n.5 (1985) (emphasis added); *see also id.* at 727 ("By its terms [the Agreement] does not apply to all detainers, but only those based on 'any untried indictment, information or complaint.'"). Our Supreme Court of Appeals has never addressed this question directly, but authority from other signatory States further confirms that the Agreement applies only to detainers involving pending, unresolved criminal charges in another jurisdiction. *See*, *e.g.*, *Reed v. People*, 745 P.2d 235, 240 (Colo. 1987) ("The [Agreement] . . . does not apply where there is no untried indictment, information or complaint outstanding in the receiving state."); *State v. Barnes*, 471 N.E.2d 514, 514 (Ohio Ct. App. 1984) (holding that "the [Agreement] does not apply to detainers placed on a

prisoner who has already been convicted"); *State v. Jimenez*, 808 N.W.2d 352, 357 (Neb. 2012) ("[A] detainer for a prisoner who has been convicted but not sentenced does not relate to an "untried indictment, information or complaint and thus does not trigger the procedural requirements of the Agreement."); *Robison v. State*, 278 N.W.2d 463, 464 (S.D. 1979) (concluding that the Agreement is not implicated where "there are no untried charges outstanding" in the other jurisdiction).

Because the Agreement does not govern detainers for inmates who have already been convicted by the requesting State, the process currently used at Hazelton apparently imports principles from extradition law instead. We conclude that these transfers do not trigger the concerns associated with extradition, and thus that the legal process for extradition—including the hearings you describe—is also inapplicable.

The Extradition Clause of the U.S. Constitution provides that "[a] person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." U.S. CONST. art. IV, § 2. Many States have enacted the Uniform Criminal Extradition Act ("UCEA") in light of this constitutional requirement, which establishes a uniform process when one State seeks extradition of a fugitive found in another. *See generally Dunn v. Hindman*, 855 P.2d 994, 996 (Kan. Ct. App. 1993) (discussing Kansas's adoption of the UCEA and noting that the UCEA was designed to "implement[] the requirements of the Extradition Clause"). The Extradition Clause does not, however, apply to the federal government, and the federal government accordingly has not enacted any version of the UCEA. *See Kornegay v. Ebbert*, 502 F. App'x 131, 133 (3d Cir. 2012) (unpublished); *McCallum v. State*, 407 So. 2d 865, 870 (Ala. Crim. App. 1981) (explaining that "the United States has not adopted the [UCEA] and does not statutorily provide a federal prisoner with any procedural protections when being transferred to state custody").

Extradition also does not make sense as a conceptual matter when applied to federal-state transfers. The "historical objective of extradition," which is to "prevent the territorial boundaries of a state's sovereignty from frustrating its efforts to bring to justice those who violate its laws," "obviously has no application to the dual or 'vertical' territorial sovereignty which characterizes the federal-state relationship." *Thomas v. Levi*, 422 F. Supp. 1027, 1032 (E.D. Pa. 1976) (citing *Abbate v. United States*, 359 U.S. 187 (1959), *Bartkus v. Illinois*, 359 U.S. 121 (1959)). In other words, because the territorial boundaries of the United States fully encompass those of the individual States, "an inmate incarcerated in a [state] prison remains within the territorial jurisdiction of the United States and thus 'extradition' is unnecessary." *Commonwealth v. Hale*, 96 S.W.3d 24, 32 (Ky. 2003).

Instead, the weight of authority demonstrates that recognition of a state detainer by the federal government (except in circumstances encompassed by the Agreement, as discussed above) is a matter of *comity*, not statutory or constitutional law. The Supreme Court's seminal decision on the question explained that "[w]e live in the jurisdiction of two sovereignties, each having its own system of courts," and an inmate "may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it." *Ponzi v. Fressenden*, 258 U.S. 254, 259-60 (1922) (citations

omitted). Thus, although "[t]here is no express authority authorizing the transfer of a federal prisoner to a state court," there is "no doubt that it exists" and that it is a matter addressed "*solely to the discretion of the sovereignty making it and of its representatives with power to grant it*." *Id.* at 260-62 (emphasis added); *see also United States v. Warren*, 610 F.2d 680, 684-85 (9th Cir. 1980) (explaining that "the sovereign which first arrests an individual acquires priority of jurisdiction for purposes of trial, sentencing, and incarceration," but that sovereign may always "elect under the doctrine of comity to relinquish it to another sovereign"); *Derengowski v. U.S. Marshal, Minn. Office, Minn. Div.*, 377 F.2d 223, 224 (8th Cir. 1967) ("[t]he exercise of jurisdiction over a prisoner who has violated the law of more than one sovereignty . . . is solely a question of comity between the sovereignties").

In the specific context raised here—transferring a federal prisoner to state custody to serve out a state sentence—these principles make clear that the only issue is whether the federal government consents to transfer. *See*, *e.g.*, *Ballard v. State*, 983 A.2d 264, 268 (R.I. 2009) ("When confronted with a question concerning the transfer of a federal prisoner to state custody *with the consent of federal authorities*, the United States Supreme Court has held that the state may properly exercise its power to vindicate its own laws." (emphasis added; citations omitted)); *Wing v. Stewart*, 77 F. Supp. 257, 258 (W.D. Mo. 1948) ("Comity between the United States Government and the several States permits a Federal prisoner, *with the consent of the United States*, to be delivered to a State for service of a sentence in vindication of State laws." (emphasis added)). In the situations you have described, there is no question that the federal government consents to transfer to state custody after the Hazelton inmates complete their federal sentences.

It is also clear that transfers under the circumstances you describe do not implicate any personal right of an inmate. There is "no federal law" that "creates a right or expectation for a federal prisoner to avoid transfer to state authorities," and the Fifth Amendment accordingly "does not guarantee [a federal prisoner] the right to a hearing concerning his transfer." *Atkinson v. Hanberry*, 589 F.2d 917, 920 (5th Cir. 1979). The reason for this is straightforward: Here, the inmates have *already received* due process and other constitutional and statutory protections when they were charged and convicted under federal and state law. The remaining question is simply who "shall first inflict punishment"—the federal government or the State—and "it is for the sovereigns and not the criminal to settle" that question. *Banks v. O'Grady*, 113 F.2d 926, 927 (8th Cir. 1940). This arrangement "does not concern the defendant who has violated the laws of each sovereignty," *Stamphill v. Johnston*, 136 F.2d 291, 292 (9th Cir. 1943), and voluntary surrender into the custody of another sovereign is "not a personal right of the prisoner," *Dean v. State of Ohio*, 107 F. Supp. 937, 940 (N.D. W. Va. 1952) (citations omitted). In short, transfer decisions are "an executive, and not a judicial, function," and no specific legal process is required. *Warren*, 610 F.2d at 685 (citing *Ponzi*, 258 U.S. at 261-62).

Finally, we are aware of nothing in West Virginia law, as opposed to the federal constitutional and statutory principles discussed above, suggesting a different result. West Virginia's interest in these matters is attenuated: The inmates are housed in the State, but they are serving federal sentences at a federal prison for crimes that did not necessarily occur in West Virginia, and the detainers in question are from other States. There is also no indication that West Virginia has any involvement in these transfers apart from the pre-transfer hearings that currently take place in West Virginia's courts. The federal government's decision to honor a detainer from

another State is purely a matter of comity; just as this decision does not implicate a personal right of the inmate, it also does not create a legal duty on the part of the State where the federal prison sits.

We thus conclude that the transfer of a federal prisoner to a State in which the prisoner is subject to an uncompleted sentence does not raise a cognizable question of West Virginia or federal law. Accordingly, there is no requirement under these circumstances for a hearing or other judicial process before the federal government may facilitate the transfer of an inmate from a federal correctional facility in West Virginia pursuant to a valid detainer from another State.

Sincerely,

Patrick Morrisey
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Solicitor General

Zachary A. Viglianco
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