STEPTOE & JOHNSON PLLC
ATTORNEYS AT LAW

The Extraordinary Remedies in West Virginia: Purposes, Practices & Procedures

Scott E. Johnson, Esquire
Steptoe & Johnson PLLC
Bank One Center - Eight Floor
Post Office Box 1588
Charleston, West Virginia 25326-1588

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I. INTRODUCTION

The role of the extraordinary remedies is explained by a leading treatise on the subject, "t]hroughout the common-law world, freedom of the individual person has been principally protected . . . by what were once called 'the prerogative writs' and are now generally known as the 'extraordinary writs . . .,' " [1] or, in West Virginia, the extraordinary remedies.[2] The statutes governing extraordinary remedies in West Virginia are codified in Chapter 53 of the West Virginia Code. Chapter 53 contains eight articles dealing with extraordinary remedies: (1) prohibition and mandamus; [3] (2) quo warranto; [4] (3) certiorari;[5] (4) habeas corpus;[6] (5) post conviction habeas corpus;[7] (6) injunctions;[8] (7) special receivers;[9] and, (8) arrest in civil cases.[10] Additionally, the West Virginia Supreme Court of Appeals, acting under its constitutional "power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs,

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[1]CHARLES J. ANTIEAU, THE PRACTICE OF EXTRAORDINARY REMEDIES: HABEAS CORPUS AND THE OTHER COMMON LAW WRITS, Preface (1987).

[2]"Among other distinctive qualities, 'supreme' courts in both England and America have historically enjoyed discretionary powers to supervise inferior tribunals through what have been variously described as the prerogative writs (in England), the extraordinary writs (in America), or, more generically, the common law writs." James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1441-42 (2000) (footnote omitted).

[3]W. Va. Code § 53-1-1 to -12 (2000 Repl. Vol.).

[4]*Id.* § 53-2-1 to - 8 (2000 Repl. Vol.).

[5]*Id.* § 53-3-1 to 6 (2000 Repl. Vol.).

[6]*Id.* § 53-4-1 to -13 (2000 Repl. Vol.).

[7]*Id.* § 53-4A-1 to -11 (2000 Repl. Vol.).

[8]*Id.* § 53-5-1 to -13 (2000 Repl. Vol.).

[9]*Id.* § 53-6-1 to -3 (2000 Repl. Vol.).

[10]*Id.* § 53-7-1 to -8 (2000 Repl. Vol.).

warrants, process practice and procedure, which shall have the force and effect of law,"[11] has promulgated specific rules of procedure dealing with post-conviction habeas corpus,[12] and included within the Rules of Civil Procedures rules addressing injunctions,[13] receivers,[14] and seizure of person or property.[15]

Knowledge of extraordinary remedies in West Virginia is crucial as they play a large part in practicing law in the State. Indeed, the extraordinary remedies have expanded from their original roots. Originally directed against public authorities, courts have broadened them to protect the individual from possible jeopardy been by those who are not necessarily cloaked with public office.[16]

Moreover, while extraordinary remedies in the Supreme Court of Appeals play an important role in the discharge of the Court's responsibility, it has expressed a growing dismay that counsel are unaware (or ignore) the "extraordinary" nature of these remedies. Routine resort to these proceedings in circumstances not warranting their invocation diminishes their usefulness and importance. "Lawyers are encouraged to be circumspect in the use of extraordinary petitions. Such

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[11]W. VA. CONST. art. VIII, § 3. *See also Bennett v. Warner*, 372 S.E.2d 920, 923 (W. Va. 1988)) ("As we have previously noted, '[u]nder Article VIII, [and Section 3] of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them."). The Supreme Court of Appeals specifically noted the supremacy of the West Virginia Rule of Civil Procedure 71B over statutory extraordinary remedy procedures. *Cable v. Hatfield*, 505 S.E.2d 701, 706 (W. Va. 1998) ("We therefore hold that, W. Va. Code § 56-4-36 (1923) (Repl. Vol. 1997) is superseded by Rule 7(c) and Rule 71 B(a) of the West Virginia Rules of Civil Procedure insofar as that statute relates to extraordinary remedies.").

[12]W. Va. Rules Governing Post-Conviction Proceedings (adopted Dec. 13, 1999).

[13]W. Va. R. Civ. P. 65.

[14]*Id.* 66.

[15]*Id.* 64.

[16]ANTIEAU, *supra*, note 1 at Preface. *See also Hickman v. Epstein*, 450 S.E.2d 406, 408 (W. Va. 1994) (finding that a mandamus will lie against a private actor if some public interest is involved).

petitions should not be used as a routine practice."[17] "Prohibition, much like its companion original jurisdiction writs of mandamus and habeas corpus, is an extraordinary remedy, the issuance of which is usually 'reserved for really extraordinary causes.'"[18] Thus, counsel is well-advised to be thoroughly familiar with extraordinary remedies practice, including the procedures for seeking extraordinary remedy relief as well as the substantive nature and scope of the remedy sought.

This section of the *Practice Handbook* will discuss some of the general procedural considerations applicable to all the extraordinary remedies in West Virginia.[19] It will then discuss in turn each of the eight extraordinary remedies collected in Chapter 53 of the West Virginia Code and any corresponding rules of procedure – explaining the remedy's purpose and role, the applicable standards for the issuance of the remedy and any peculiarities associated with that particular remedy.

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[17]*Emergency Proceedings*, SUPREME COURT JOURNAL: THE MONTHLY NEWSLETTER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, Jan. 14, 2000, at 1.

[18]*State ex rel. Davidson v. Hoke*, 532 S.E.2d 50, 53 (2000) (per curiam) (quoting *State ex rel. Suriano v. Gaughan*, 480 S.E.2d 548, 554 (W. Va. 1996) (internal quotations and citations omitted)). *See also State ex rel. United States Fidelity & Guar. Co. v. Canady*, 460 S.E.2d 677, 682 (W. Va. 1995) (citations omitted) ("[M]andamus, prohibition and injunction against judges are drastic and extraordinary remedies . . . .As extraordinary remedies, they are reserved for really extraordinary causes.").

[19]The federal extraordinary writs are beyond the scope of this section. A good overview of federal extraordinary writ practice can be found in CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4005 (2d ed. 1996).

II. PROCEDURAL CONSIDERATIONS

A. Extraordinary Remedies in Circuit Court

The West Virginia Constitution vests circuit courts with original jurisdiction in habeas corpus, mandamus, quo warranto, prohibition and certiorari.[20] By statute, circuit courts also enjoy jurisdiction over injunctions,[21] receivers,[22] and civil arrest and seizure.[23]

Before 1998, West Virginia Rule of Civil Procedure 81(a)(5) provided, "[e]xtraordinary Remedies.-Rules 5(b), 5(e) and 80 apply, but the other rules do not apply, to proceedings under the writs of mandamus, prohibition, certiorari, habeas corpus and quo warranto, and upon an information in the nature of a quo warranto." In 1998, however, the Supreme Court of Appeals amended the West Virginia Rules of Civil Procedure by rescinding Rule 81(a)(5)[24] and adopting West Virginia Rule of Civil Procedure 71B.[25] The purpose behind the amendments was to "'dramatically simplify the procedural aspects of writ practice and align them more closely with 'ordinary' civil

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[20]W. VA. CONST. art. VIII, § 6. Thus, circuit courts share their original jurisdiction in habeas corpus, mandamus, prohibition and certiorari with the Supreme Court of Appeals.

[21]W. Va. Code § 53-5-3.

[22]*Id.* § 53-6-1.

[23]*Id.* § 53-7-1.

[24]201 W. Va. CXI (1998).

[25]*Id.* at CIV-CV.

procedure.'"[26] Notwithstanding the amendments to the West Virginia Rules of Civil Procedure, some litigants erroneously continue to apply pre-Rule 71B practice.[27]

West Virginia Rule of Civil Procedure 71B provides in its entirety:

RULE 71B. EXTRAORDINARY WRITS

(a) Applicability of Rules. The West Virginia Rules of Civil Procedure govern the procedure for the application for, and issuance of, extraordinary writs.

(b) Joinder of Claims in Different Writs. A plaintiff may join a demand for relief which encompasses different types of writs and other types of relief.

(c) Complaint.

(1) Caption. The complaint shall contain a caption as provided in Rule 10(a) expect that the plaintiff shall name as defendants the agencies, entities, or individuals of the State of West Virginia to which the relief shall be directed.

(2) Contents. The complaint shall contain a short and plain statement of the authority for the writ demanded.

(d) Appearance of Answer.

(1) Right to Relief Conceded. If a defendant agency, entity, or individual concedes the appropriateness of the writ requested, the defendant may serve notice of the concession and the court shall enter a writ granting appropriate relief and may

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[26]*State ex rel. Parsons v. Zakaib*, 532 S.E.2d 654, 658 (2000) (quoting the Advisory Committee to the 1998 amendments to the West Virginia Rules of Civil Procedure). The drafters of the original West Virginia Rules of Civil Procedure recognized that, at some point, the Rules should encompass extraordinary remedies practice. *See* W. Va. R. Civ. P. 81 advisory committee's note, 144 W. Va. cxvi (1960) ("It is believed desirable not to have the rules apply to the extraordinary writs for the time being. There has been little criticism of procedural delay and technicality in the use of these writs.")

[27]*See, e.g., State ex rel. Orlofske v. City of Wheeling*, 575 S.E.2d 148, 152 n.2 (W. Va. 2002) ("The City did not object below nor in this appeal regarding the filing of a petition for a writ of mandamus rather than a complaint as required by Rule 71B of the West Virginia Rules of Civil Procedure."); *Shaffer v. West Virginia Dep't of Transp.*, 542 S.E.2d 836, 838 (W. Va. 2000) (per curiam) (footnote omitted) ("In response to Ms. Shaffer's petition [for mandamus], the [Department] filed a motion to dismiss asserting that, under the version of Rule 71B of the West Virginia Rules of Civil Procedure that become effective on April 6, 1998, Ms. Shaffer's action should have been filed as a complaint. By order entered March 30, 1999, the circuit court granted the DOH's motion to dismiss, but preserved Ms. Shaffer's right to properly apply to that court for a writ of mandamus.")

substitute the concession for findings of fact on the need for and the appropriateness of the relief demanded if justice requires.

(2) Answer. If a defendant agency, entity, or individual contests the plaintiff's right to the writ demanded, the defendant shall answer within the time and in the form specified by the applicable provisions of this rule.

(3) Default. If a defendant agency, entity, or individual fails to answer or otherwise appear, the court shall declare the defendant in default pursuant to Rule 55(a). The court may not enter default judgment pursuant to Rule 55(b) but shall hold a hearing or hearings on the relief demanded and award a writ or writs as justice requires.

(4) Jurisdiction and Venue Unaffected. Jurisdiction and venue requirements for writ proceedings are unaffected by this rule.

As discussed below, however, the grounds for issuing a particular remedy may extend beyond the parameters Rule 71B (a) establishes. For example, quo warranto lies against, *inter alia*, "a corporation for misuse or nonuse of its corporate privileges and franchises . . .,"[28] notwithstanding that Rule 71B(c)(1) identifies as defendants in an extraordinary remedy proceeding "the agencies, entities, or individuals of the State of West Virginia to which the relief shall be directed." Moreover, while Rule 71B(c) provides that extraordinary remedies are to be instituted by complaint, Rule 2(a) of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia provides for the initiation of a post-conviction habeas corpus proceeding by the filing of a "petition" in substantially the same form as the example petition contained in Appendix A to the West Virginia Habeas Rules. Thus, Rule 71B must be read in light of the other statutory and rules-based provisions specifically applicable to particular extraordinary remedies.

The timeliness of rendering a ruling in an extraordinary remedies case is dealt with in West Virginia Trial Court Rule 16.12. Trial Court Rule 16.12 provides, "[a] final judgment or decree shall

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[28]W. Va. Code § 53-2-1(a).

be entered in extraordinary, declaratory judgment, and equitable proceedings within one month of submission." Trial Court Rule 16.03(c) defines "submission" as "the later date of argument or the filing: of the final reply brief, unless otherwise ordered by the court." Trial Court Rule 16.03(e) defines "final judgment" as "the date of the entry by the circuit clerk of a final order, decree or other document that terminates or otherwise disposes of the case." Thus, if an extraordinary remedy ruling is not rendered within the applicable time frame, the extraordinary remedy of mandamus might itself lie to compel a court to issue an order.

B. Extraordinary Remedies in the Supreme Court of Appeals

The West Virginia Constitution confers original jurisdiction on the Supreme Court of Appeals in habeas corpus, mandamus, prohibition and certiorari.[29] The Constitution confers appellate jurisdiction upon the Supreme Court of Appeals in proceedings in quo warranto, habeas corpus, mandamus, prohibition and certiorari.[30] The Supreme Court of Appeals has no original jurisdiction to issue an injunction. However, under West Virginia Code § 53-5-5, the Supreme Court of Appeals, or a justice in vacation, may issue an injunction if a circuit court refuses to issue one.[31]

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[29]W. Va. Const. art. VIII, § 3. The Supreme Court of Appeals has recognized the concurrent nature of its original extraordinary remedy jurisdiction with circuit courts. *See State ex rel. Blankenship v. McHugh*, 217 S.E.2d 49, 52 (W. Va. 1975) ("Sections 3 and 6 of Article VIII of the Constitution of West Virginia grant original and concurrent jurisdiction in habeas corpus, mandamus, prohibition and certiorari to this Court and all circuit courts."), *superseded by rule on other grounds as stated in State v. Coleman*, 281 S.E.2d 489, 489-490 (W. Va. 1981). *See also Coleman*, 281 S.E.2d at 490 (recognizing original/concurrent jurisdiction in mandamus); *State v. Summerfield v. Maxwell*, 135 S.E.2d 741, 744 (W. Va. 1964) (same); *Sheftic v. Boles*, 377 F.2d 423 (4th Cir. 1967) (recognizing original/concurrent jurisdiction in habeas corpus).

[30]W. VA. CONST. art. VIII, § 3.

[31]*Wheeling Parl Comm'n v. Hotel & Restaurant Employees*, 479 S.E.2d 876, 881 n.4 (W. Va. 1996) ("[West Virginia] Code, 53-5-5 [1923] gives this Court original jurisdiction over proceedings when a circuit court refuses to award an injunction.").

West Virginia Code § 53-5-8 provides, "[q]uestions may be certified and appeals may be taken in injunction proceedings as in any other cases in equity."

When invoking the Supreme Court's original jurisdiction, counsel should be aware of the Court's admonishment that, "[g]enerally, [it] decline[s] to exercise original jurisdiction in cases involving merely factual disputes."[32] Thus, if the issue to be addressed is one requiring factual development, counsel is advised to proceed in circuit courts which are best equipped to create a record and proceed by route of appeal.[33] If, however, the issue is one of significant importance that addresses legal questions, counsel should consider seeking relief in the Supreme Court by invoking its original jurisdiction.[34] Again, though, counsel should take heed of the Court's reluctance to exceed the bounds of appropriateness in original jurisdiction proceedings.[35]

The West Virginia Rules of Civil Procedure governing extraordinary remedy proceedings in circuit court are inapplicable to Supreme Court of Appeals practice.[36] Before turning to the Rules, however, it should be noted that the Supreme Court of Appeals has created by case law a

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[32]*State ex rel. Suriano v. Gaughan*, 480 S.E.2d 548, 554 (W. Va. 1996).

[33]*State ex rel. McGraw v. Telecheck Serv.*, 582 S.E.2d 85, 893 n.11 (W. Va. 2003) ("[W]here a substantial factual record is present, or where the issues for review are more nuanced and fact-driven–such as a lower court's exercise of its discretion in balancing the equities–then the route of appeal may be more appropriate.")

[34]*Cf. id.* ("Where the issues are largely one of law and clearly erroneous actions of the court below are asserted, prohibition may be a more appropriate method to seek review of an interlocutory determination regarding injunctive relief.")

[35]*See Emergency Proceedings*, SUPREME COURT JOURNAL: THE MONTHLY NEWSLETTER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, Jan. 14, 2000, at 1.

[36]*See State ex rel. Ritchie v. Tripplet*, 236 S.E.2d 474, 478 (W. Va. 1977) (recognizing original jurisdiction proceedings in the Supreme Court of Appeals are governed by Supreme Court of Appeals Rule of Procedure.)

requirement precedent to seeking the Court's original jurisdiction. In syllabus point 6 of *State ex rel. Allstate Insurance Co. v. Gaughn*,[37] the Court held:

> A party seeking to petition this Court for an extraordinary writ based upon a non-appealable interlocutory decision of a trial court, must request the trial court set out in an order findings of fact and conclusions of law that support and form the basis of its decision. In making the request to the trial court, counsel must inform the trial court specifically that the request is being made because counsel intends to seek an extraordinary writ to challenge the court's ruling. When such a request is made, trial courts are obligated to enter an order containing findings of fact and conclusions of law. Absent a request by the complaining party, a trial court is under no duty to set out findings of fact and conclusions of law in non-appealable interlocutory orders.

After satisfying *Gaughn*, the proper procedure for invoking the original jurisdiction of the Supreme Court of Appeals is found in Rule 14 of the West Virginia Rules of Appellate Procedure. Rule 14(a) provides, in pertinent part:

> *Petition.* A petition for writ of mandamus, prohibition, habeas corpus, or certiorari under the original jurisdiction of the Supreme Court shall be filed in the office of the Clerk thereof, together with (1) an attached addendum or separate appendix of any exhibits or affidavits, (2) a memorandum of law citing the relevant authorities, and (3) a memorandum listing the names and addresses of those persons upon whom the rule to show cause is to be served, if granted.

The original and nine copies of all documents discussed in Rule 14(a)(1)(2)&(3) shall be filed with the Clerk of the Supreme Court of Appeals. A copy of all documents filed with the Clerk shall be served upon each of the respondents in accordance with West Virginia Rule of Appellate Procedure 15. If any of the respondents is either a state or county official, a copy of all documents filed with the Clerk's Office shall be served upon either the Attorney General or the appropriate county prosecuting attorney. If the original jurisdiction proceeding involves a matter that is then pending in a circuit court where the circuit court has entered a written order relating to the matters

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[37]508 S.E.2d 75 (W. Va. 1998).

sought to be adjudicated by the Supreme Court of Appeals, a copy of such order shall be filed with the petition. A petition shall not exceed 50 pages in length, including any addendum (but excluding any appendix) except by permission of the Supreme Court of Appeals. An appendix shall not exceed 75 pages, except by permission of the Supreme Court of Appeals. Thus, if a *single* document is filed with the Court including the petition and appendix, the number of pages cannot exceed fifty *in toto*. However, if a petition if filed accompanied by a *separate* appendix, the maximum available pages is one hundred twenty five.

Before deciding whether to issue a rule to show cause, the Court may direct a respondent to file an informal response directing the Court's attention to the reasons why the Court should not issue the rule to show cause. The rule does not detail what an informal response should look like. In the past, informal responses have ranged from simple letters to the Court to full blown brief-like answers. Also, although not detailed by Rule 14, because many informal responses will be required to be filed in a short period of time, the Court's past practice is that issuance of a rule to show cause does not limit a respondent to what is contained in the informal response, but may be expanded upon and added to in the formal response under Rule 14(d).

If the Court agrees to take the case, it will issue a rule to show cause directed to the respondents as set out in the petitioner's memorandum of parties. The Court will also mail a copy of the rule to the petitioner or the petitioner's counsel. If the rule to show cause is issued in prohibition, the underlying proceedings are stayed unless the rule to show cause provides otherwise. If the Court refused to issue a rule to show cause, the petitioner is not precluded from seeking an extraordinary remedy in a circuit court having jurisdiction. The single exception to this is that a

petitioner is precluded from proceeding in circuit court if the Supreme Court of Appeals' order refusing to issue the rule is designated as being "with prejudice."

Within 20 days of service of the rule to show cause, unless lengthened or shortened by the Court, the respondents shall file an original and nine copies of a formal response with the Clerk of the Supreme Court of Appeals. As is the case with the petitioner, the response shall not exceed 50 pages, inclusive of addendum (but exclusive of any appendix) without the Court's permission. If a separate appendix of exhibits is filed, the memorandum of law may not exceed fifty pages and the appendix of exhibits may not exceed seventy-five pages without the Court's permission. The response may raise any relevant defenses, including matters addressable by demurrer or motion to dismiss. The response shall answer each allegation in the petition.

In the event that the parties' filing raise a genuine issue of material fact, the parties shall advise the Clerk of the Supreme Court of Appeals in writing of any proposed schedule for taking and filing depositions. The proposed schedule shall be subject to approval by the Court. No other or further discovery shall be permitted, without the Court's approval.

The Supreme Court of Appeals, *sua sponte* or upon written motion of the parties, may determine that the complexity of the factual issues involved requires reference of the case to a special master or commissioner. The special master or commissioner has the duty of supervising the taking of depositions and making such findings of fact as the Court may direct. The special master's or commissioner's findings of fact must be written and the parties have the right to file written objections to them before the Supreme Court of Appeals considers them.

The record in an original jurisdiction proceeding consists of the pleadings and addenda, the appendices, any depositions filed and findings of fact made by the special master. Oral argument

is permitted in accordance with West Virginia Rule of Appellate Procedure 12. The Supreme Court's exercise of its original jurisdiction, "is discretionary and is governed by the practical circumstances of the case.'"[38] When the Supreme Court declines to exercise its original jurisdiction and refer the case to a more appropriate court, the Supreme Court is "'exercising the discretion granted to us by the [state] Constitution.'"[39] The Supreme Court of Appeals exercises its appellate jurisdiction over circuit court extraordinary remedies rulings in the same manner as any other appellate review of circuit court action.

III. THE EXTRAORDINARY REMEDIES

A. Mandamus

1. Purpose

The Supreme Court of Appeals has explained the purpose of a Mandamus is "well-settled:"[40]

> "[m]andamus lies to require the discharge by a public officer of a nondiscretionary [sic] duty." A non-discretionary or ministerial duty in the context of a mandamus action is one that "is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance[.]" Also, "[m]andamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made."[41]

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[38] *State ex rel. McGraw v. Telecheck* 213 W. Va. 438, 443 n.3, 582 S.E.2d 885, 890 n.3 (2003) (quoting *State ex rel. Doe v. Troisi*, 194 W. Va. 28, 32, 459 S.E.2d 139, 143 (1995)).

[39] *State ex rel. Richey v. Hill*, No. 31676, concurring slip opinion at 11 (W. Va. July 6, 2003) (Maynard, C.J., concurring).

[40] *Nobles v. Duncil*, 505 S.E.2d 442, 453 (W. Va. 1998).

[41] *Id.* at 453-454 (citations omitted).

The writ of mandamus runs only against a governmental officer, agent, agency or other public entity; it does not run against private parties unless some public interest is involved.[42] If the mandamus (or any other court proceeding) would directly affect or determine an interest in real property, any persons claiming an interest in the property are indispensable parties and must by joined in the proceeding.[43]

In syllabus points 2 and 3 of *State ex rel. Waller Chemicals, Inc. v. McNutt*,[44] the Supreme Court of Appeals established the prevailing rule that the doctrine of laches applies to a mandamus action and that an unreasonable delay in bringing the action may bar relief.

2. Test governing award of relief

"The now classic test for the availability of mandamus"[45] was articulated in Syllabus Point 2 of *State ex rel. Kucera v. City of Wheeling*, [46] "A writ of mandamus will not issue unless three elements coexist – (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." The plaintiff or petitioner carries the burden of proof on all three of these issues.[47]

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[42]*Hickman v. Epstein*, 450 S.E.2d 406, 408 (W. Va. 1994).

[43]*O'Daniels v. Charleston*, 490 S.E.2d 800, 805 (W. Va. 1997).

[44]160 S.E.2d 170 (W. Va. 1968).

[45]*State ex rel. Orlofske v. City of Wheeling*, 575 S.E.2d 148, 157 n.15 (W. Va. 2002).

[46]170 S.E.2d 367 (W. Va. 1969).

[47]Syl. pt.2, *Myers v. Bartle*,, 167 W. Va. 194, 279 S.E.2d 406 (1981) ("To invoke mandamus the relator must show (1) a clear right to the relief sought; (2) a legal duty on the part of the respondent to do the thing relator seeks; and (3) the absence of another adequate remedy."); Syl. pt. 1, *State ex rel. Prince v. West Virginia Department of Highways*,, 156 W. Va. 178, 195 S.E.2d 160 (1972) (""To entitle one to a writ of mandamus, the party seeking the writ must show a clear legal right thereto and a corresponding duty on the respondent to perform the act demanded."). *See also State*

Whether a plaintiff (in circuit court) or petitioner (in the Supreme Court of Appeals) has a clear legal right, "is generally a question of standing. Thus, where the individual has a special interest in the sense that he is part of the class that is being affected by the action then he ordinarily is found to have a clear legal right."[48] A party cannot use mandamus to establish the right sought to be enforced.[49] The right must be clear, and if the right is doubtful, the writ should not issue.[50] Thus, a mandamus proceeding is only the *vehicle* to enforce an existing right; the right cannot be *established* by the proceeding itself.[51]

Before a mandamus may issue, the party seeking the right must establish that the duty sought to be enforced is purely ministerial and imposed upon the government actor by law.[52] A "'non-discretionary or ministerial duty" is one which "is so plain in point of law and so clear in matter of

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ex rel. Bess v. Black, 139 S.E.2d 166, 174 (W. Va. 1964) (Calhoun, J., dissenting) ("The burden of proof is on the plaintiff, upon the petitioner in mandamus."). *See generally* 52 Am. Jur. 2d *Mandamus* § 3 at 271 (2000) (footnote omitted) ("[T]he burden of proof as to all the elements necessary to obtain mandamus is upon the party seeking the relief.") *Accord* Syl. pt. 2, in part, *State ex rel. Booth v. Board of Ballot Commr's*, 156 W. Va. 657, 196 S.E.2d 299 (1973) (showing a "*clear legal right* . . . is an affirmative burden placed on any relator in *mandamus*[.]"); Syl. pt. 3, *State ex rel. Nelson v. Ritchie,* 154 W. Va. 644, 177 S.E.2d 791 (1970) ("He who seeks relief by mandamus must show a clear legal right to the remedy."); Syl. pt. 1, *Brumfield v. Board of Educ.*, 121 W. Va. 725, 6 S.E.2d 238 (1940) ("One seeking relief by mandamus must show a clear right to the remedy and a corresponding duty on the respondent.")

[48]*State ex rel. Billy Ray C. v. Skaff*, 438 S.E.2d 837, 850 (W. Va. 1993) (citations omitted). *See also* Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1008 (1997) (noting that "a 'personal stake' or standing was indeed necessary to invoke the power of English courts in prerogative proceedings during the eighteenth century). *But see State ex rel. Booth v. Board of Ballot Commr's*, 156 W. Va. 657, 674, 196 S.E.2d 299, 311 (1973) ("Standing, however, is not equivalent to Clear legal right which is an affirmative burden placed on any relator in Mandamus."); *State ex rel. Alsop v. McCartney*, 228 S.E.2d 278, 283 (W. Va. 1976) (footnote omitted) ("In West Virginia the slippery doctrine of standing is not usually employed to avoid a frontal confrontation with an issue of legitimate public concern.")

[49]*Kucera*, 170 S.E.2d at 369. *See also* Syl. pt. 3, *Traverse Corp. v. Latimer*, 205 S.E.2d 133 (W. Va. 1974); *Williams v. Robinson*, 376 S.E.2d 304, 308 (W. Va. 1988); *Black v. Fortney*, 151 S.E. 319, 321 (W. Va. 1929).

[50]*See e.g.*, Syl. pt. 3, *State ex rel. Churchman v. Hall*,, 102 S.E. 694 (W. Va. 1920); *Plymale v. Garner*, 128 S.E.2d 185, 191 (W. Va. 1962); *Black*, 151 S.E. at 321; *Bunch v. Short*, 90 S.E. 810, 813 (W. Va. 1916).

[51]*State ex rel. Graney v. Sims*, 105 S.E.2d 886, 893 (W. Va. 1958).

[52]*Nobles*, 505 S.E.2d at 453.

fact that no element of discretion is left as to the precise mode of its performance[.]'"[53] The corollary to this rule is that while mandamus lies to compel a mandatory duty, it does not lie to control the manner in which the duty is performed.[54] However, mandamus lies if the exercise of the discretionary act is refused arbitrarily and capriciously,[55] without substantial reason,[56] or under a misapprehension of the law.[57] The majority rule is that a public officer cannot question the constitutionality of statute compelling some official duty where performing that duty will not violate the officer's personal rights or interests, will not impose a personal liability, or will not violate the oath of office.[58]

While it is true that mandamus does not lie if there exists another "adequate" remedy, the Supreme Court of Appeals has been reticent in finding other remedies adequate. "'The tendency in [West Virginia] is to enlarge and advance the scope of the remedy of mandamus, rather than to restrict and limit it, in order to afford the relief a party is entitled to when there is no other adequate and complete legal remedy.'"[59] Thus, "'if such other remedy is not equally as beneficial, convenient,

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[53]*Id.* (citations omitted).

[54]Syl. pt. 4, *Paxton v. State Dep't of Tax and Revenue*, 415 S.E.2d 779 (W. Va. 1994).

[55]*State ex rel. Bronaugh v. Parkersburg*, 136 S.E.2d 783, 787 (W. Va. 1964).

[56]*Id.*

[57]Syl. pt. 7, *State ex rel. Orlofske v. City of Wheeling*, 575 S.E.2d 148 (W. Va. 2002).

[58]*E.g., State ex rel. Ross v. Guion*, 161 N.E.2d 800, 802 (Ohio Ct. App. 1959) (applying majority rule to municipal officer who sought to challenge constitutionality of municipal ordinance).

[59]*State ex rel. Billy Ray C. v. Skaff*, 438 S.E.2d 837, 850 (W. Va. 1993) (citations omitted).

and effective, mandamus will lie.'"[60] Thus, mandamus generally cannot substitute for an appeal,[61] although there is a limited exception where the error complained of is "plainly discernible [as] palpably wrong" and resort to appeal would not be as expeditious as a mandamus.[62] Similarly, the Supreme Court has implied that a failure to file a cross-assignment of error arguing that a mandamus or prohibition is barred by the existence of another adequate remedy may result in waiver of a defense under this test.[63]

3. Jurisdiction and Venue

Jurisdiction in mandamus and prohibition is controlled by W. Va. Code § 53-1-2 which provides:

> Jurisdiction of writs of mandamus and prohibition (except cases whereof cognizance has been taken by the supreme court of appeals or a judge thereof in vacation), shall be in the circuit court of the county in which the record or proceeding is to which the writ relates. A rule to show cause as hereinafter provided for may be issued by a judge of a circuit court or of the supreme court of appeals in vacation. A writ peremptory may be awarded by a circuit court or a judge thereof in vacation, or by the supreme court of appeals in term.

However, if a party defendant to the mandamus is a State entity, W. Va. Code § 14-2-2 applies:

> (a) The following proceedings shall be brought and prosecuted only in the circuit court of Kanawha county:

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[60]*State ex rel. ACF Indust., Inc. v. Vieweg*, 514 S.E.2d 176, 186 (W. Va. 1999) (citations omitted).

[61]Syl. pt. 4, *State ex rel. Boggs v. County Court*, 11 S.E. 72 (W. Va. 1980). *See also* Syl. pt. 3, *Miller v. Tucker County Court*, 12 S.E. 702 (W. Va. 1980).

[62]Syl. pt. 2, *Barnes v. Warth*, 2, 22 S.E.2d 547 (W. Va. 1942).

[63]*Trozzi v. Board of Review*, 591 S.E.2d 162, 166 n.4 (W. Va. 2003) (per curiam) ("We wish to emphasize that we do not approve of Mr. Trozzi's utilization of an extraordinary writ when an appeal procedure was made available. If the Board of Review had properly presented this issue as a cross-assignment of error, a different outcome may have been reached by this Court.")

(1) Any suit in which the governor, any other state officer, or a state agency is made a party defendant, except as garnishee or suggestee.

(2) Any suit attempting to enjoin or otherwise suspend or affect a judgment or decree on behalf of the State obtained in any circuit court.

(b) Any proceeding for injunctive or mandamus relief involving the taking, title or collection for or prevention of damage to real property may be brought and presented in the circuit court of the county in which the real property affected is situate.

This section shall apply only to such proceedings as are not prohibited by the constitutional immunity of the State from suit under section 35, article VI of the Constitution of the State.

The provisions of W. Va. Code § 14-2-2 are "exclusive and controlling as to other general venue provisions."[64] Thus, no matter how many other defendants, if the "governor, any other state officer, or a state agency is made a party defendant" in a mandamus proceeding (not involving real property), venue is only proper in Kanawha County.[65]

4. Costs

West Virginia Code § 53-1-8 provides, "[t]he writ peremptory shall be awarded or denied according to the law and facts of the case, and with or without costs, as the court or judge may determine." In *Martin v. West Virginia Division of Labor Contracting Licensing Board*,[66] the Supreme Court of Appeals again recognized the difference between attorneys' fees and costs:

> In *Nelson v. West Virginia Public Employees Ins. Bd.*, this Court, while considering the applicability of attorney fees under W. Va. Code § 53-1-8 in an action for a writ of mandamus, observed our previous holding that "attorney fees are not 'costs' . . . and thus attorney fees would not ordinarily be recoverable as such." 171 W. Va. at

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[64] *Vance v. Ritchie*, 358 S.E.2d 239, 241 (W. Va. 1987).

[65] *Shobe v. Latimer*, 253 S.E.2d 54, 62 (W. Va. 1979).

[66] 486 S.E.2d 782 (W. Va. 1997).

451, 300 S.E.2d at 92 (citing *State ex rel. Citizens Nat'l Bank v. Graham*, 68 W. Va. 1, 59 S.E. 301 (1910)).[67]

The Court went on:

> In the absence of statutory authority upon which to base an award of attorney fees, the *Nelson* Court applied the following exception to the general rule which was subsequently adopted by this Court in the Syllabus of *Daily Gazette Co., Inc. v. Canady*:
>
> > A court may order payment by an attorney to a prevailing party reasonable attorney fees and costs incurred as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, ex tension, modification, or reversal of existing law.[68]

In syllabus point 2 of *State ex rel. West Virginia Citizens Action Group v. West Virginia Econ. Dev. Grant Comm.*,[69] the Supreme Court held, "[a]ttorney's fees may be awarded to a prevailing petitioner in a mandamus proceeding when the petitioner makes a constitutional challenge to a statute and that statute is found and declared to be unconstitutional."

Counsel pursuing or defending a mandamus against political subdivisions of the State should take note of W. Va. Code § 53-1-12:

> Wherever a writ of mandamus, issued to enforce the laying of a levy to satisfy a judgment against a political subdivision of the State, would produce a disturbance in the administration of the financial affairs of the political subdivision not necessary to the protection and enforcement of the right of the creditor, the court may order that the levy be distributed equally over a period of years not to exceed ten, and shall allow the creditor interest, not in excess of the legal rate, upon the installments.

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[67] *Id.* at 788.

[68] *Id.*

[69] No. 31125 (W. Va. Dec. 4, 2003).

B. Prohibition

1. Purpose

West Virginia Code § 53-1-1 provides, "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." Prohibition "lies to restrain both judicial and quasi-judicial administrative bodies."[70] Purely administrative or ministerial acts do not fall within prohibition's ambit.[71] Consistent with its extraordinary nature, prohibition is unavailable if relief is available through ordinary practice channels.[72] Thus, the writ does not lie if the error claimed is remediable by appeal.[73]

2. Tests governing award of relief

West Virginia Code § 53-1-1 creates two distinct circumstances warranting prohibition: (1) when an inferior tribunal acts without subject-matter jurisdiction; or, (2) when having jurisdiction it exceeds its legitimate powers.[74] Before a prohibition may issue, the petitioner must show a clear right to relief.[75]

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[70]*Cowie v. Roberts*, 312 S.E.2d 35, 38 (W. Va. 1984).

[71]Syl. pt. 5, *Petition of Beckley*, 460 S.E.2d 669 (W. Va. 1995).

[72]*State ex rel. Gordon Mem. Hosp. v. West Virginia Bd. of Medical Examiners*, 66 S.E.2d 1, 10 (W. Va. 1951).

[73]Syl. pt. 1, *State ex rel. Garden State Newspapers v. Hoke*, 520 S.E.2d 186 (W. Va. 1999). *See also State ex rel. Shelton v. Burnside*, 575 S.E.2d 124, 128 (W. Va. 2002) ("Our law plainly says that prohibition may not be used as a substitute for appeal."); *State ex rel. Charlottan v. O'Brien*, 63 S.E.2d 512, 517 (W. Va. 1951) ("This Court has consistently held that prohibition will not lie to correct errors, or be allowed to usurp the functions of the writ of error or the remedy of appeal."); *McConiha v. Guthrie*, 21 W. Va. 134, 140 (1882) ("It is a fundamental principle and one which will be strictly enforced, that this writ is never allowed to usurp the functions of a writ of error or certiorari, and can never be employed as a process for the correction of errors of inferior tribunals.")

[74]*State ex rel. Parsons v. Zaikaib*, 532 S.E.2d 654, 657 (W. Va. 2000).

[75]*Norfolk Southern Ry. Co. v. Maynard*, 437 S.E.2d 277, 284 (W. Va. 1993). *See also Fisher v. Bouchelle*, 61 S.E.2d 305, 306 (W. Va. 1950); *Board of Educ. v. Hudson*, 164 S.E.2d 269, 298 (W. Va. 1932).

In *Beard v. Worrell*,[76] the Supreme Court traced the history of the writ of prohibition as it originated in England and demonstrated that the writ served as a protection of the sovereign and not of the parties.[77] While the writ in Great Britain protected the king and the royal courts, in this country the writ "protects and preserves the rule of law."[78] Thus, a writ of prohibition is always properly brought in the name of the State at relation to a party, although a failure in this regard will not usually defeat a petitioner's right.[79] Similarly, a defendant or respondent in a prohibition is the person or tribunal sought to be prohibited, they are not real parties in interest.[80] The real party in interest (and who defends the validity of the action sought to be prohibited) is the party in the underlying proceeding who has benefitted from the contested action.[81] The real party in interest should be joined in a prohibition, but a failure to do so will not constitute error if the rights of the real party in interest are fully protected.[82]

The Supreme Court has articulated the test applied to determine if a prohibition should issue in a lack of jurisdiction case in the single syllabus of *Health Management, Inc v. Lindell*:[83]

> For a writ of prohibition to issue preventing a quasi-judicial administrative tribunal from taking up a particular matter on the asserted basis of lack of jurisdiction, the

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[76]212 S.E.2d 598 (W. Va. 1974).

[77]*Id.* at 602.

[78]*Id.*

[79]*Id.*

[80]*See Board of Educ v. MacQueen*, 325 S.E.2d 355, 356 (W. Va. 1984) (recognizing that the respondent judge "was not a party of interest.")

[81]*See State ex rel. Handley v. Hey*, 255 S.E.2d 354, 356 (W. Va. 1979).

[82]*Id.*

[83]528 S.E.2d 762 (W. Va. 1999).

> petitioner must demonstrate that there is a clear limitation on the tribunal's jurisdiction, and that there are no disputed issues of fact such that the jurisdictional question may be decided purely as a matter of law. In other words, the prohibition remedy is available only where an administrative tribunal patently and unquestionably lacks jurisdiction over the matter pending before it.

The test applicable in a prohibition conceding jurisdiction, but claiming an exceeding of lawful authority is found in syllabus point 4 of *State ex rel. Hoover v. Berger*:[84]

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

In light of *Hoover's* modernization of prohibition law, the Supreme Court brought West Virginia into line with the majority of other jurisdictions by holding in syllabus point 5 of *State ex rel. Frazier & Oxley v. Cummings*[85] that "[w]hen a circuit court fails or refuses to obey or give effect

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[84]483 S.E.2d 12 (W. Va. 1996).

[85]591 S.E.2d 728 (W. Va. 2003). In *King v. Dooley*, 41 S.E. 145 (W. Va. 1902), the Court held that prohibition would not be available in such a proceeding since an appeal was available. However, as the Court in *Frazier & Oxley* implicitly recognized that a rule barring prohibition was inconsistent with the modern view of this issue. Indeed, the Supreme Court of Appeals subsequently held that mandamus is available to require a lower tribunal to adhere to the mandate of the Supreme Court of Appeals. Syl. pt. 1, *State ex rel. Smoleski v. County Court of Hancock County*, 168 S.E.2d 521 (W. Va. 1969) ("Mandamus is the proper remedy to compel a county court, acting as an election contest court, to comply with the mandate of this Court in relation to such election contest."); Syl. pt. 1, *State ex rel. Emery v. Rodgers*, 76 S.E.2d 690 (W. Va. 1953) ("Mandamus is an appropriate remedy to compel compliance with a mandate of this Court."). The American Bar Association has also found that appellate courts should enjoy the power to issue original jurisdiction writs, to include prohibition, to protect their appellate jurisdiction and supervise the lower court. ABA, *Standards Relating to Appellate Courts* stnd. 3.00(a) (1994 ed.). Consequently, *Frazier & Oxley* should be understood as overruling *King*.

to the mandate of this Court, misconstrues it, or acts beyond its province in carrying it out, the writ of prohibition is an appropriate means of enforcing compliance with the mandate."

Prohibition plays an important role in criminal law on behalf of the State. The State enjoys only a limited right of statutory appeal.[86] The State may invoke prohibition to stop a court from interfering with a legitimate prosecution.[87] The burden is on the State to demonstrate "the [lower] court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented."[88] A writ of mandamus is not interchangeable with a writ of prohibition.[89]

3. Jurisdiction and Venue

West Virginia Code § 53-1-9 grants the court or jurist to who an application for prohibition is made to suspend the proceeding sought to be prohibited until a final decision. In the Supreme Court of Appeals, Rule of Appellate Procedure 14(c) provides that the issuance of a rule to show cause (but not the filing of a petition) automatically stays all the lower proceedings, unless the Court directs otherwise.

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[86]W. Va. Code § 58-5-30 (2004 Supp.)

[87]Syl. pt. 5, *State v. Lewis*, 422 S.E.2d 807 (W. Va. 1992).

[88]*Id.*

[89]*State ex rel. State v. Gutske*, 205 S.E.2d 272, 287 n.2 (W. Va. 1999).

C. Quo Warranto

1. Purpose

Quo warranto may be awarded: 1) against a corporation for non-use of misuse of its corporate privilege or franchise, or to stop the exercise of a privilege or franchise not granted by law, or where a corporation has received a certificate of incorporation for a fraudulent or illegal purpose; 2) against a person for the misuse or non-use of a privilege or franchise conferred upon the person by or in pursuance of law; 3) against any person(s) acting as a corporation without legal authority; or, 4) against any person who shall intrude into or usurp any public office.[90] In short, "[a] writ of quo warranto commands a defendant to show the authority under which he is acting, and is intended to prevent the exercise of powers that are not conferred by law."[91] Quo warranto has generally been eclipsed by other remedies, such as mandamus,[92] so that one jurist has asserted the "virtual death of Quo warranto as a means of testing entitlement to office . . . ."[93]

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[90]W. Va. Code § 53-2-1(a)-(d).

[91]*West Virginia Trust Fund, Inc. v. Bailey*, 485 S.E.2d 407, 417 n.6 (W. Va. 1997). *Bailey* is consistent with the majority view that the burden of proof in a Quo warranto rests with the defendant. *See, e.g., State ex rel. Garcia v. Martinez*, 459 P.2d 458, 59 (N.M. 1969) (citations omitted) (noting that "that the burden rested upon the respondents 'at all times to justify their alleged acts of usurpation.' The rule as thus stated is generally recognized as applicable as well in quo warranto cases involving public or municipal corporations.")

[92]*State ex rel. Maloney v. McCarty*, 223 S.E.2d 607, 616-17 (W. Va. 1976).

[93]*Id.* at 622 (Flowers, J., dissenting).

2. Procedure

Quo warranto may be pursued only by the Attorney General or prosecuting attorney,[94] at their own insistence or upon relationship to a person interested in the cause.[95] The Attorney General or prosecuting attorney are the only proper parties to pursue a Quo warranto.[96]

However, in any case where a Quo warranto would lie, a proper party may file a petition for leave to pursue an information in the nature of a Quo warranto.[97] A proper party to pursue an information in the nature of a Quo warranto is the Attorney General, prosecuting attorney or "any person interested."[98] Such "person interested" must have an interest in the case beyond that shared by the public in general.[99]

3. Jurisdiction and Venue

Venue for a Quo warranto or information lies in the county where the seat of government is, or in the county where the cause, or any part of the cause, for issuing the Quo warranto arose.[100]

4. Procedure

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[94]W. Va. Code § 53-2-1.

[95]*Id.* 53-2-2.

[96]*Slater v. Varney*, 68 S.E.2d 757, 766 (W. Va. 1951).

[97]W. Va. Code § 53-2-4.

[98]*Id.*

[99]*State ex rel. Bumgardner v. Mills*, 53 S.E.2d 416, 423 (W. Va. 1949).

[100]W. Va. Code § 53-2-2 (Quo warranto); *id.* § 53-2-4 (information).

If the Quo warranto or information is sought by a relator or person interested, the relator or person interested must give bond sufficient in the opinion of the court to cover the costs of the proceeding incurred by the State to prosecute the action if the defendant prevails.[101]

ii. Verdict. Unlike most civil actions, a Quo warranto or information verdict is either "guilty" or "not guilty." If found guilty as to only some of the charges, the verdict must specify to what charges the defendant is guilty.

5. Costs

A court shall give judgment as appropriate and authorized by law, and shall award fees and costs incurred by the prosecution. An award of attorney's fees shall be no less than $10.00 nor more than $50.00 as set by the court.[102]

6. Relief Awardable

Upon a guilty verdict against a corporation or a "pretend corporation," the court may appoint a receiver and may make all other orders necessary for the preservation and safekeeping of affected property.[103]

D. Certiorari

1. Purpose

The purpose of a certiorari in West Virginia is detailed in West Virginia Code § 53-3-2 which provides a certiorari is available in all cases where it had been available before enactment of section 52-3-2. Section 53-3-2 also includes within the purview of certiorari every case, matter or

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[101] W. Va. Code § 53-2-3, -4.

[102] *Id.* § 53-2-7.

[103] *Id.* § 53-2-8.

proceeding before a county commission, city, town or village council, justice of the peace or other inferior tribunal. The Supreme Court has held that certiorari is available to test decisions of State agencies not covered by the Administrative Procedures Act.[104] However, the Court retreated from this long standing and venerable rule in syllabus point 2 of *Scott v. Stewart*[105] holding that, notwithstanding the availability of appeal of judicial review of an agency decision under the contested case provisions of the West Virginia Administrative Procedures Act,[106] certiorari was an available remedy. Only judicial or quasi-judicial actions are within the ambit of certiorari.[107]

2. Tests for Awarding

Certiorari today is generally in the nature of appellate review.[108] Under West Virginia Code § 53-3-3, a party seeking a certiorari in circuit court must request the inferior tribunal to certify the evidence it heard, along with the bills of exception or certificates as spelled out in West Virginia Code § 56-6-36. The inferior court must certify these documents which become the record on certiorari. Upon receiving these documents, the circuit clerk shall docket the certiorari in the same manner as any other case. Upon hearing, the circuit court has authority under West Virginia Code

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[104]*State ex rel. Ginsberg v. Watt*, 285 S.E.2d 367, 369 (W. Va. 1981).

[105]560 S.E.2d 260 (W. Va. 2001).

[106]W. Va. Code § 29A-5-4 (2002).

[107]Syl. pt. 1, *Garrison v. Fairmont*, 147 S.E.2d 397 (W. Va. 1966). *Garrison* was modified by the Court in syllabus point 3 of *Lower Donnally Association v. Charleston Municipal Planning Commission*, 575 S.E.2d 223 (W. Va. 2002):

> The final actions of a planning commission adopting a comprehensive plan or amendments to it, approving or rejecting plats or plans of subdivisions, and adopting a final report with respect to a zoning ordinance, regardless of whether that report is an initial report or a revised and resubmitted report, are subject to review by writ of certiorari regardless of whether the final action of the planning commission is dispositive of the matter or is followed by legislative action of the governing body.

[108]3B Michie's Juris. *Certiorari* § 4 (1996)

§ 53-3-3 to "determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require." Thus, this section contemplates that the circuit court shall issue an order finally disposing of the case.[109]

The circuit court's ruling on the record is *de novo*.[110] Some litigants have claimed that in certiorari they can generally adduce additionally evidence not presented in the proceeding under review because certiorari review is de novo.[111] This is incorrect.

In *Harrison v. Ginsberg*,[112] the Court specifically said, "the circuit court [hearing the certiorari], to all intents and purposes, a fact finding tribunal *upon the record as it was before the inferior court*."[113] The Court then contrasted Administrative Procedures Act review with certiorari and concluded that

> While we agree that an arbitrary and capricious decision of an inferior tribunal should not be affirmed by the circuit court on certiorari, in light of the language of W. Va. § 53-3-3 these cases cannot be read as limiting the circuit court on certiorari to an arbitrary and capricious standard of review. Such a result would be inconsistent with our holding in *North* [v. *West Virginia Board of Regents*, 233 S.E.2d 411, 419 (W. Va. 1977)] that in *proper circumstances*, the circuit court on certiorari is authorized to take evidence independent of that contained in the record of the lower tribunal.[114]

The only time additional evidence is permitted would be in those circumstances detailed in *North*. *North* said that evidence *de hors* of the record below could be taken in a certiorari proceeding

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[109] *See also* W. Va. Code § 53-3-6 (using the language "final determination of the matter by the circuit court . . . .")

[110] *Board of Educ. v. MacQueen*, 325 S.E.2d 355, 357 (W. Va. 1984); *accord* Syl. pt. 3, *Bee v. Seaman*, 15 S.E. 173 (W. Va. 1892).

[111] *See, e.g.*, Reply Brief of Appellant at 11, *Scott v. Stewart*, 560 S.E.d 260 (W. Va. 2001).

[112] 286 S.E.2d 276 (W. Va. 1982).

[113] *Id.* at 283 (emphasis added).

[114] *Id.* (emphasis added).

to show a deprivation of substantial rights in the proceeding under review in the certiorari.[115] However, the issue in *North* was a deprivation of *procedural* rights in the lower proceeding itself undocumented by the record created in the Board of Regents proceeding. In the absence of additional evidence, the rights deprivation would have to go unaddressed. This reading is further confirmed by footnote 11 of *North* which equated its holding with the additional evidence provisions of West Virginia's Administrative Procedures Act judicial review section, W. Va. Code § 29A-5-4(f) (emphasis added), which provides:

> The review shall be conducted by the court without a jury and shall be upon the record made before the agency, *except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court.*

The Supreme Court crystalized this view in *Wheeling-Pittsburgh Steel Corp. v. Rowing*,[116] when it said, "[r]eview is limited to the record made before the administrative agency, and a circuit court is authorized to accept additional evidence only where there is an allegation of procedural irregularity. W. Va. Code § 29A-5-4(f)."[117]

Finally in the per curiam case of *Adkins v. West Virginia Department of Education*,[118] the Court said that review under the judicial review section of the Administrative Procedures Act is "essentially the same" as certiorari.[119] This appears to be incorrect. In the signed *Ginsberg* opinion, the Supreme Court has explained that review under the Administrative Procedures Act and the

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[115]233 S.E.2d at 260-61.

[116]517 S.E.2d 763 (W. Va. 1999).

[117]*Id.* at 770.

[118]556 S.E.2d 72 (W. Va. 2001) (per curiam).

[119]*Id.* at 75 n.3.

certiorari statute are "inconsistent."[120] Given that the Court has reaffirmed that per curiam opinions are not proper vehicles to change existing law,[121] it appears that the Administrative Procedure Review and certiorari review are not essentially the same.

If certiorari is sought from a justice of the peace court [now magistrate courts] where the amount in controversy is more than fifteen dollars, the case must be disposed of in that Court.[122]

A certiorari's timeliness is technically governed by the equitable doctrine of laches.[123] The Supreme Court has analogized the statutory appeal period with the appeal period to create an benchmark for timely filing a certiorari.[124] Upon a showing of hardship or other good cause, a court may grant an extension of time.[125]

3. Jurisdiction and Venue

Jurisdiction of a certiorari shall be in the circuit court of the county where the record or proceeding is under West Virginia Code § 53-3-1. However, where a defendant is a state entity, the venue provisions of West Virginia Code § 14-2-2 control.[126]

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[120]*Ginsberg*, 286 S.E.2d at 283.

[121]*Walker v. Doe*, 558 S.E.2d 290, 296 n.16 (W. Va. 2001).

[122]W. Va. Code § 53-3-3.

[123]Syl. pt. 3, *Lipscomb v. Tucker County Comm'n*, 475 S.E.2d 84 (W. Va. 1996).

[124]*Lipscomb*, Syl. pt. 3.

[125]*Id.*

[126]*MacQueen*, 325 S.E.2d at 359-60.

E. Habeas Corpus

Article 4, Chapter 53 of the West Virginia Code governs simply "habeas corpus." Article 4A, Chapter 53 governs "Post-Conviction Habeas Corpus." Counsel representing a client convicted of a crime should refer to article 4A[127] which is discussed in section III. F of this paper.

1. Purpose

The purpose of a habeas corpus (or technically a habeas corpus as subjiciendum) is to determine the legality of a person's confinement or any restraint upon their liberty.[128] "The writ lies in all cases of imprisonment by commitment, detention, confinement or restraint for whatever cause or under whatever pretense. In this respect the statute and common law are the same."[129] Thus, habeas has been used to test the validity of involuntary mental commitment,[130] and custody of a minor child.[131] Habeas corpus is available to test the Parole Board's decision to deny parole.[132] A party facing criminal extradition has the right to file for a writ of habeas corpus.[133]

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[127]*See* W. Va. Code § 53-4A-1(e); *Leftwich v. Coiner*, 424 F.2d 157, 159 (W. Va. 1970).

[128]*State ex rel. Titus v. Hayes*, 144 S.E.2d 502, 508 (W. Va. 1965).

[129]1 W.F. BAILEY, A TREATISE ON THE LAW OF HABEAS CORPUS AND SPECIAL REMEDIES § 2 (1913). *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("It is clear, not only from the language of [the federal habeas corpus statute] but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody.")

[130]*Sloan v. Wachtel*, 233 S.E.2d 137 (W. Va. 1977).

[131]*Pukas v. Pukas*, 42 S.E.2d 11 (W. Va. 1947). *See also In re Michael Ray T.*, 525 S.E.2d 315, 324 (W. Va. 1999) (citation omitted) (recognizing that, with certain exceptions, "[t]he writ of habeas corpus is a proper remedy to determine the custody of a child . . . .")

[132]*Tasker v. Mohn*, 267 S.E.2d 183, 191 (W. Va. 1980).

[133]W. Va. Code § 5-1-9(a) (2002). Extradition habeas is governed under the interstate extradition clause of the United States Constitution and questions arising there under are federal questions and the mandatory, non-ministerial duty to abide by the extradition clause can be enforced against an asylum state governor in federal court. *See generally Puerto Rico v. Branstad*, 483 U.S. 219 (1987) (asylum state governor has no discretion to refuse extradition if constitutional requisites for extradition are met). Thus, in keeping with pronouncement of the United States Supreme Court, the Supreme Court of Appeals has consistently "enunciated the limited role of the asylum state in extradition

Habeas is not a substitute for appeal.[134] Furthermore, habeas is not an appropriate mechanism to challenge conditions of confinement; the proper remedy would be a mandamus.[135]

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matters." *State ex rel. Coryell v. Gooden*, 457 S.E.2d 138, 143 (W. Va. 1995). *See also New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151 (1998) (per curiam) (alleged unconstitutional conditions of demanding state's prisons not cognizable in an extradition habeas); *State ex rel. Nelson v. Grimmett*, 486 S.E.2d 588 (W. Va. 1997) (per curiam) (claim that demanding state's conviction was invalid because demanding state's guilty plea failed to show knowing, intelligent and voluntary waiver of counsel in demanding state's trial not cognizable); W. Va. Code § 5-1-9(k) ("The guilt or innocence of the accused as to the crime for which he or she is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as provided in this article has been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.")

> "In habeas corpus proceedings instituted to determine the validity of custody where petitioners are being held in connection with extradition proceedings, the asylum state is limited to considering whether the extradition papers are in proper form; whether there is a criminal charge pending in the demanding state; whether the petitioner was present in the demanding state at the time the criminal offense was committed; and whether the petitioner is the person named in the extradition papers."

Syl. pt.1, *State ex rel. Gonzales v. Wilt*, 256 S.E.2d 15 (W. Va. 1979) (quoting *State ex rel. Mitchell v. Allen*, Syl. pt. 2, 185 S.E.2d 355 (W. Va. 1971)).

[134]Syl. pt. 2, *State ex rel. Clarke v. Adams*, 111 S.E.2d 336 (W. Va. 1959).

[135]*State ex rel. Williams v. Dep't of Military Affairs*, 573 S.E.2d 1, 4 n.2 (W. Va. 2002). Because the only issue on habeas is whether the judgment resulting in the deprivation of freedom is valid, habeas is an inapprorpiate remedy to test any other issue. While the Supreme Court of the United States has never directly addressed the issue, *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979), most federal and state courts have concluded that habeas corpus is not a proper vehicle to address condition of confinement cases since the amelioration of the unconstitutional conditions through injunction–and not release–should be the proper remedy. *See, e.g., Kruger v. Erickson*, 77 F.3d 1071, 1073 (8th Cir. 1996); *Gomez v. United States*, 899 F.3d 1124, 1126 (11th Cir. 1990); *Spina v. Aaron*, 821 F.3d 1126, 1127-28 (5th Cir. 1987); *Crawford v. Bell*, 599 F.2d 890, 891-92 & n.1 (9th Cir. 1979); *Cook v. Hanberry*, 596 F.2d 658, 660 (5th Cir. 1979) (per curiam); *Kamara v. Farquharson*, 2 F. Supp.2d 81, 88-89 (D. Mass. 1998); *Caldwell v. United States*, 992 363, 366 (S.D.N.Y. 1998); *Griffin v. DeRobertis*, 557 F. Supp. 302, 304 (N.D. Ill. 1983); *Maddux v. Rose*, 483 F. Supp. 661, 672 (E.D. Tenn. 1980); *Powell v. State*, 726 So. 2d. 725, 737 (Ala. Ct. Crim. App. 1997); *People v. Jackson*, 234 Cal. Rptr. 293, 297 (Ct. App. 1987) (dicta); *Amek bin-Rilla v. Israel*, 335 N.W.2d 384, 389 (Wis. 1983); *People v. Sandstrom*, 638 P.2d 831, 831 (Colo. Ct. App. 1981). In *State ex rel. K.W. v. Werner*, 242 S.E.2d 907 (W. Va. 1978) a majority of the justices agreed that release could be an available option in a condition of confinement case (two justices would have released the petitioners, but the concurring justices did not agree that in the particular case release should be exercised, even though it was available as a remedy). The concurring opinion on *K.W.* asserted that release is only an option when "the practices [at issue] have been judicially condemned as cruel and unusual. Additionally, it must be established that the State, after being given a reasonable time to correct the practices, has utterly failed to do so. Finally, the State should have the right to develop fully all ameliorating circumstances surrounding its conduct and to present viable alternatives to unconditional release." 242 S.E.2d at 923 (Miller, J., concurring). The Court implicitly followed the *K.W.* concurrence in *Harrah v. Leverette*, 271 S.E.2d 322, 331 (W. Va. 1980) (footnote omitted) noting that habeas could be used to test conditions of confinement, but that "An exhaustive search of habeas corpus cases involving cruel and unusual punishment of prisoners failed to discover any case wherein an abused prisoner was unconditionally released. Courts have affirmatively remedied petitioners' complaints by ordering substantial changes in prison conditions and prospectively enjoining use of unconstitutional facilities or means of discipline." Thus, a party seeking to challenge the conditions of confinement must first proceed by way of injunction, mandamus and/or prohibition (as appropriate) to remedy the conditions. Only after the government fails to remedy conditions judicially determined to be cruel and

A proper plaintiff in a habeas is either the person detained or someone acting on the detained person's behalf.[136] The proper defendant is "the person in whose custody the petitioner [plaintiff] is detained . . . ."[137]

2. Jurisdiction and Venue

Under West Virginia Code § 53-4-2, venue is in the circuit court for the county where the plaintiff is detained. If the plaintiff files in the Supreme Court of Appeals, the Court may remand the case to the circuit court of the county where the plaintiff is detained.[138]

3. Bond

A circuit court may require the plaintiff to post a bond payable to the defendant to secure the plaintiff and prevent escape.[139]

4. Costs

A circuit court may adjudge costs as "shall seem to be right."[140]

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unusual and fails to convince a court of other viable alternates in light of any ameliorating circumstances should a party be allowed to seek a habeas to be released from incarceration due to cruel and unusual conditions.

[136]W. Va. Code § 53-4-1; *Pukas*, 42 S.E.2d at 13.

[137]W. Va. Code § 53-4-2.

[138]*Id.*

[139]*Id.* § 53-4-3.

[140]*Id.* § 53-4-7.

F. Post-Conviction Habeas Corpus

1. Purpose

The Post-Conviction Habeas Corpus Act governs habeas proceedings where the petitioner is "convicted of a crime and incarcerated under sentence of imprisonment . . . ."[141] There remains an open question of something less than full confinement would satisfy the statute.[142] For example, in *State v. Eddie Tosh K*,[143] the Supreme Court recognized, " . . . the appellant in the case before us will be unable to petition for a writ of habeas corpus since he is not currently incarcerated."[144] However, in *Kemp v. State*,[145] the Court raised, but did not resolve, the issue of whether release on probation and parole would satisfy the basis of habeas jurisdiction. On at least two occasions, however, (albeit not under the Post-Conviction Habeas Act) the Court defined "incarcerated" as confined. In *State ex rel. Goff v. Merrifield*,[146] the Court said, "'[i]ncarceration is defined as confinement in a jail or [in a] penitentiary.'"[147] Likewise, in *Hoover v. Blankenship*,[148] the Supreme Court said, "'[i]ncarceration' is defined in the *Oxford English Dictionary* as 'to shut up in prison,

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[141] *Id.* § 53-4A-1.

[142] The federal habeas corpus statute creates habeas jurisdiction in federal courts over state inmate claims. Under the federal act, a federal court only has jurisdiction over a petition if the petitioner is "in custody." 28 U.S.C. § 2254(a). The differences in terminology make federal cases inappropriate for reviewing the issue under the "incarcerated" language of West Virginia Code § 53-4A-1(a).

[143] 460 S.E.2d 489 (W. Va. 1995) (per curiam).

[144] *Id.* at 498 n.10.

[145] 506 S.E.2d 38 (W. Va. 1997) (per curiam).

[146] 446 S.E.2d 695 (W. Va. 1994).

[147] *Id.* at 699 (citation omitted) (emphasis deleted).

[148] 487 S.E.2d 328 (W. Va. 1997).

to put in confinement; to imprison.'"[149] It does not appear that anything less than full confinement would satisfy the statutory jurisdictional requirement of West Virginia Code § 53-4A-1.

2. Procedure

The West Virginia Rules Governing Post-Conviction Habeas Corpus govern post-conviction petitions in West Virginia's circuit courts.[150] These rules were modeled on the corresponding Rules Governing Section 2254 Proceedings in the United States District Courts.[151] Thus, federal cases interpreting the federal habeas rules should provide strongly persuasive guidance when the West Virginia habeas rules are at issue.[152]

Under the habeas rules, a proceeding is commenced with the filing of a petition in substantially identical form to the one contained in the habeas rules appendix.[153] The proper respondent in a post-conviction habeas is the petitioner's custodian.[154] Normally, the inmate's

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[149]*Id.* at 331 n.2.

[150]Only Rule 2 of the Habeas Rules apply to habeas petitions filed in the Supreme Court of Appeals. W. Va. Hab. R. 1.

[151]*State ex rel. Parsons v. Zaikaib*, 532 S.E.2d 654,658 & n.6 (W. Va. 2001)

[152]*State v. Sutphin*, 456 S.E.2d 402, 414 (W. Va. 1995) ("[W]e have repeatedly recognized that when codified procedural rules or rules of evidence of West Virginia are patterned after the corresponding federal rules, federal decisions interpreting those rules are persuasive guides in the interpretation of our rules."). *See also State v. Hedrick*, 514 S.E.2d 397, 404 (W. Va. 1997) (similar-State and Federal Rules of Criminal Procedure); *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 335 n.6 (W. Va. 1995) (similar-Federal and State Rules of Civil Procedure); *Gable v. Kroger Co.*, 410 S.E.2d 701, 702 (W. Va. 1991) (similar-Civil Procedure and Evidence). *But cf.* Syl. pt. 3, *Brooks v. Isinghood*, 584 S.E.2d 531 (W. Va. 2003) ("A federal case interpreting a federal counterpart to a West Virginia rule of procedure may be persuasive, but it is not binding or controlling.").

[153]W. Va. Hab. R. 2(a).

[154]*State ex rel. Valentine v. Watkins*, 537 S.E.2d 647, 649 n.1 (W. Va. 2000). *See also* W. Va. Code § 53-4A-3(b) ("Any writ granted in accordance with the provisions of this article shall be directed to the person under whose supervision the petitioner is incarcerated.") Conceptually, the custodian is named as a respondent because it is the custodian to whom an order of release will be directed if the petitioner prevails. *See Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 494-95 (1972); Note, *Habeas Corpus Procedure*, 83 HARV. L. REV. 1154, 1167 (1970); JOSEPHINE R. POTUTO, PRISONER COLLATERAL ATTACKS: FEDERAL HABEAS AND FEDERAL PRISONER MOTION PRACTICE § 2:6 (1991) ("Because technically the only question on habeas corpus is the legality of custody and the only remedy is release from

custodian is his or her warden or the Commissioner of the Department of Corrections as "the chief officer in charge of state penal institutions."[155] However, a court should allow amendments of the petition to join the proper respondent (so long as the petition for habeas corpus shows the court entertaining the petition enjoys personal jurisdiction over the respondent) if a petitioner erroneously names someone other than a custodian.[156] If the petition is insufficient, Rule 2(b) authorizes the clerk to return it to the petitioner detailing the petition's deficiencies. A circuit court has the duty to review the petition and determine if it contains grounds that may be the basis for awarding relief, but is not sufficient as filed to allow the court to conduct a fair adjudication, the court shall appoint

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custody, the person sued is the prisoner's custodian (in other words, the prison warden or director of corrections."); *id.* § 5:6 (same). Likewise the State is not a proper party because, during the developmental period of prerogative writs in England the King could not be sued–either on the grounds that the Crown was immune from suit or that as the writ was brought in relation to the Crown an action against the Crown would be an impossible suit against oneself. *Cf.* Louis J. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1-2 (1963) (discussing suits against the Crown under the prerogative writs).

[155]*See* Rule 2 of the Rules Governing Section 2254 Proceedings in the Federal District Courts, advisory committee's notes (citation omitted) ("The proper person to be served in the usual case is either the warden of the institution in which the petitioner is incarcerated or the chief officer in charge of state penal institutions.") The advisory committee's note to the federal habeas rule should prove persuasive in interpreting the analogous state rule. *See, e.g., State ex rel. Appleby v. Recht*, 583 S.E.2d 800, 807-08 (2002) (collecting cases) (per curiam) (noting that the Supreme Court of Appeals has looked to the advisory committee notes of the Federal Rules of Criminal Procedure when interpreting the West Virginia Rules of Criminal Procedure), *cert. denied*, 123 S. Ct. 2618 (2003). Thus, in West Virginia, a proper respondent would also be the Sheriff or the Administrator of the State Regional Jail if the petitioning inmate is in a regional jail or county jail when petitioning for habeas relief.

[156]*See West v. Louisiana*, 478 F.2d 1026, 1029 (5th Cir. 1973) (finding that the failure to name the warden as respondent did not require dismissal of the petition because the petition may be amended to name the correct party–the court also found that even though the petitioner "apparently made no effort to correct his petition, and the district court did not amend it on its own initiative" dismissal was unwarranted as the "unamended petition supplied in substance all the information which a habeas petition must contain . . . ."), *vacated in part on other grounds*, 510 F.2d 363 (5th Cir. 1975) (per curiam). The obligation to name the custodian as the respondent flows from the requirement that a court must have personal jurisdiction over the respondent-custodian, because it is to the custodian that an order of release will be directed if the court orders the inmate-petitioner released. It is axiomatic that if a court lacks jurisdiction over the respondent-custodian, any order of release would be unenforceable. *See Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973) (noting that the writ of habeas corpus acts upon the person holding the prisoner and that, consequently, a court issuing a writ must have jurisdiction over the person holding the prisoner).

counsel.[157] Appointment of counsel is also dependent, however, on the petitioner's indigency.[158] A court need not appoint counsel if it appears from the documents filed that the petitioner is not entitled to relief.[159] Under West Virginia Habeas Rule 4, the circuit court must initially review the petition to determine if it makes out a facial claim for relief. If so, the circuit court must direct the respondent to answer.[160] The respondent as the petitioner's custodian is a straw- party. The real party in interest is the State of West Virginia. Consequently, the respondent in a circuit court habeas is represented by the prosecuting attorney.[161] In an original jurisdiction habeas in the Supreme Court of Appeals, the respondent is represented by the Attorney General.[162]

The contents of an answer are fairly detailed and are spelled out in Habeas Rule 5. The answer "must respond to the allegations in the petition." Therefore, unlike a normal answer, simple denials would be insufficient under the Rule.[163] The answer must also detail what transcripts are

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[157]*Id.* Rule 4(b).

[158]*See id. See also* W. Va. Hab. R. 3(a) and Hab. Form B on how to request indigency status.

[159]*See, e.g., Mugano v. Painter*, 575 S.E.2d 590, 592 (W. Va. 2002) (per curiam) (following Syl. pt. 1, *Perdue v. Coiner*, 194 S.E.2d 657 (W. Va. 1973)).

[160]W. Va. Hab. R. 4(d).

[161]W. Va. Hab. R. 4(d). *See also* W. Va. Code § 53-4A-3(c) (directing the circuit clerk of a court requiring a return to serve all papers on the prosecuting attorney).

[162]W. Va. Code § 53-4A-3(c).

[163]The advisory committee's note to Federal Habeas Rule 5 explains that occasionally under pre-rules practice answers contained merely procedural delay devices and that the purpose of the requirement to "respond to the allegations" is to "ensure that a responsive pleading will be filed and thus the functions of an answer fully served." The federal advisory committee's note presents persuasive guidance in implementing the state rule. Because the West Virginia Habeas Rules are modeled on the Federal Habeas Rules, *State ex rel. Parsons v. Zaikaib*, 532 S.E.2d 654, 658 (W. Va. 2000) (noting that the West Virginia Habeas Rules "are modeled closely upon analogous federal rules governing post-conviction habeas corpus."), federal court decisions interpreting the Federal Habeas Rules should provide persuasive guidance in interpreting the West Virginia Habeas Rules. *But cf.* Syl. pt. 3, *Brooks v. Isinghood*, 584 S.E.2d 531 (W. Va. 2003) ("A federal case interpreting a federal counterpart to a West Virginia rule of procedure may be persuasive, but it is not binding or controlling.")

available, when they can be produced and what proceedings have been recorded but not transcribed. The answer should include those portions of the transcripts the respondent deems relevant.

Discovery is available under the Habeas Rule 7. A circuit court may grant discovery, but only in the court's discretion and upon a showing of good cause. The discovery processes available are those available under the West Virginia Rules of Civil Procedure. Proposed interrogatories, requests for admissions and a list of documents sought must accompany the discovery request. Under Habeas Rule 8, a court may also expand the record to include letters documents, exhibits, etc. The documents submitted by a party under Rule 8 must be provided to the opposing party and the opposing party has the right to admit of deny their correctness. A court may require authentication of any submitted documents.

A petitioner is not automatically entitled to an evidentiary hearing on a habeas petition. Under Habeas Rule 9, if the circuit court can determine the proceeding upon the submissions of the parties, it may render judgment including findings of fact and conclusions of law justifying why no hearing was necessary was well as findings of fact and conclusions of law related to the substantive claims. There are some instances where an evidentiary hearing is almost always required, for example, in cases of alleged ineffective assistance of counsel.[164]

In an effort to give a petitioner one full round of habeas proceedings and to avoid repetitive habeas litigation, the circuit court must conduct an on the record colloquy with the petitioner informing him that the habeas proceeding is his only opportunity to bring his claims and that any

[164]*State ex rel. Watson v. Hill*, 488 S.E.2d 476, 479 (W. Va. 1997).

claims he does not raise will be res judicata and generally cannot be raised in the future.[165] In the absence of these steps, a petitioner may bring additional claims in a subsequent habeas proceeding.

Chief Justice Maynard has written a separate opinion to review some of the purposes and limitations of post-conviction review in an opinion where the Supreme Court (albeit in a mandamus case), crafted judicial rules governing post-conviction DNA testing for inmates requesting DNA testing before the effective date of West Virginia's post-conviction DNA testing statute.[166]

3. Test for Awarding

West Virginia Code § 53-4A-1(a) spells out the general areas under which a petitioner can claim relief (a "cognizable" claim in habeas parlance):

> a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common-law or any statutory provision of this State.

A cognizable claim in West Virginia is one that asserts a claim of constitutional magnitude; mere trial error does not rise to the level of a cognizable claim.[167] Consequently, "[i]t is well established that '[a] habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.'"[168] Before filing a petition,

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[165]*Gibson v. Dale*, 319 S.E.2d 806, 811 (W. Va. 1984); W. Va. Hab. R. 9(b).

[166]*State ex rel. Richey v. Hill*, No. 31676 (W. Va. May 27, 2004) (Maynard, C. J., concurring).

[167]Syl. pt. 9, *State ex rel. Vernatter v. Warden*, 528 S.E.2d 207 (W. Va. 1999).

[168]*State ex rel. Hall v. Liller*, 536 S.E.2d 120, 124 (W. Va. 2000) (per curiam) (quoting Syl. pt. 4, *State ex rel. McMannis v. Mohn*,, 254 S.E.2d 805 (W. Va. 1979)).

or an amendment to an originally filed pro se petition,[169] counsel should meet with the petitioner and go over with him what claims will be raised in the petition. A guideline (but by no means exhaustive) list of claims is found in *Losh v. McKenzie*.[170]

4. Relief Awardable

A circuit court has the power to "release [the petitioner] from . . . illegal imprisonment, correct[] . . . the sentence, . . . set[] . . . aside . . . the plea, conviction and sentence, or [award] other relief[.]"[171] However, a circuit court sitting in habeas lacks the power to award a recommendation of mercy when the trial court jury that heard the case refused to make such a recommendation.[172] Normally, unconditional release is discouraged and the normal course of events is to grant a conditional writ allowing the State a given period of time to retry the petitioner.[173]

5. Jurisdiction and Venue

Under West Virginia Habeas Rule 3(a), a petition may be filed in the circuit court where the petitioner is incarcerated or where he was convicted or sentenced. West Virginia Habeas Rule 4(a) allows for transfer of the case. Venue in a post-conviction habeas action lies in one of three locations:

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[169]In many instances a petitioner will file an original petition pro se. Counsel may be appointed to represent the petitioner, but this is not automatic. *See supra* note 154-56 and accompanying text.

[170]277 S.E.2d 606, 611 (W. Va. 1981).

[171]W. Va. Code § 53-4A-1(a).

[172]*Schofield v. Department of Corr.*, 460 S.E.2d 425 (W. Va. 1991).

[173]*See Herrera v. Collins*, 506 U.S. 390, 403 (1993) ("The typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner, or in a capital case a similar conditional order vacating the death sentence."). *Cf.* Syl. pt. 2, *State ex rel. Kisner v. Fox*, 267 S.E.2d 451 (W. Va. 1980) ("The failure of the State to provide a transcript of a criminal proceeding for the purpose of appeal, absent extraordinary dereliction on the part of the State, will not result in the release of the defendant; however, the defendant will have the option of appealing on the basis of a reconstructed record or of receiving a new trial.").

"Under W. Va. Code, 53-4A-3(b), the court receiving a writ of habeas corpus has three choices as to where to return the writ: before (i) the court granting it, (ii) the circuit court, or a statutory court, of the county wherein the petitioner is incarcerated, or (iii) the circuit court, or the statutory court, in which, as the case may be, the petitioner was convicted and sentenced."[174]

Syllabus point 5 of *State ex rel. McLaughlin v. Vickers* provides:

In determining whether a habeas corpus petition is suitable for transfer to another court, the circuit court should consider whether the allegations set forth in the habeas petition relate to the petitioner's conviction and/or sentencing. If the petition does contain such allegations, then practical considerations and judicial economy ordinarily dictate that it be transferred to the county wherein the petitioner was convicted and sentenced. However, if the petition challenges the conditions of confinement or raises other purely legal questions or issues unrelated to the petitioner's conviction and/or sentencing, the writ should be returnable to the court in the county in which the petitioner is confined. In any event, the circuit court should act with dispatch and render a prompt decision.[175]

G. Injunctions

1. Purpose

Procedural concerns governing injunctions are contained in West Virginia Code §§ 53-5-1 to -13 and West Virginia Rule of Civil Procedure 55. The West Virginia Code contains numerous provisions relating to when injunctions may and may not be awarded.[176] Injunctions may be classified as either mandatory (commanding performance of an act) or prohibitory (forbidding the doing of an act). Injunctions may also be either preventive (blocking future violations of a right) or

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[174]Syl. pt. 3, *State ex rel. McLaughlin v. Vickers*, 533 S.E.2d 38 (W. Va. 2000) (quoting Syl. pt. 2, *Adams v. Circuit Court*,, 317 S.E.2d 808 (W. Va. 1984)).

[175]*Id.*, Syl. pt. 5. Given that the Court in *State ex rel. Williams v. Department of Military Affairs*, 573 S.E.2d 1, 4 n.2 (W. Va. 2002) took conditions of confinement cases out of the ambit of habeas corpus, it appears that syllabus point five of *McLaughlin* may be nugatory.

[176]*See, e.g.*, W. Va. Code §§ 53-5-1 (property); 17-16-1 (road obstructions); 61-9-11 to -11 (lewd places); 37-6-22 (unlawful detainer or ejectment); 60-6-17 (liquor nuisance); 33-2-11 (enforcement of insurance commissioner's orders); 24-2-2 (enforcement of Public Service Commission orders) 57-2-5, 47-3-3 (trademarks).

reparative (which safeguards a right.)[177] An injunction "does not create a right but protects an existing right."[178] In this sense, it is like a mandamus.[179] Thus, "[t]he first matter to consider when assessing whether injunctive relief is warranted in a particular case is the nature of the underlying controversy."[180] If the courts have never recognized the right to be enforced, a preliminary injunction is properly denied.[181]

2. Test for Awarding

West Virginia Code § 53-5-5 empowers the Supreme Court of Appeals or a Justice thereof to issue an injunction only if a circuit court has first refused.[182] "Because its emergency nature does not afford the court the usual degree of careful consideration afforded by the deliberative processes of a trial, the issuance of such an injunction is one which is at best used sparingly, if at all."[183]

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[177] *See generally* 1 DAN B. DOBBS, LAW OF REMEDIES § 2.9 (2d ed. 1993); 10A MICHIES JURIS. *Injunctions* § 2 (1990).

[178] *Edlis, Inc. v. Miller*, 51 S.E.2d 132, 142 (W. Va. 1948). *See also NTN Bearing Corp. v. United States*, 892 F.2d 1004, 1006 (Fed. Cir. 1989) (noting that even broad injunctive powers "may not be used to create a right but only to enforce an existing right.")

[179] *Brunswick v. Elliot*, 103 F.2d 746, 750 (D.C. Cir. 1939) (footnote omitted) ("A writ of injunction, like a writ of mandamus, cannot be used to establish a legal right.")

[180] *Hart v. National Collegiate Athletic Ass'n*, 550 S.E.2d 79, 85 (W. Va. 2001) (per curiam).

[181] *Id.* at 86.

[182] *Wheeling Park Comm'n v. Hotel & Restaurant Employees*, 479 S.E.2d 876, 881 n.4 (W. Va. 1996).

[183] *Mantle Ranches, Inc. v. National Park Service*, 945 F. Supp. 1449, 1452 (D. Colo. 1996). *See also MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 1999) (quoting *Direx Israel, Ltd v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1991) ("[P]reliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances.'")); *Bancoult v. McNamara*, 277 F. Supp.2d 144, 151 (D.D.C. 2002) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)) ("Because preliminary injunctions are extraordinary forms of judicial relief, courts should grant them sparingly.")

The Supreme Court of Appeals has made clear, "'[i]njunctive relief, like other equitable or extraordinary relief, is inappropriate when there is adequate relief at law.'"[184] In *Camden-Clarke Memorial Hospital v. Turner*,[185] the Court reiterated:

> To determine if the lower court has exceeded the bounds of its discretion in issuing the injunction, we must . . . examine the overall circumstances of the case and whether the court has made an attempt to balance the requisite factors:
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> > The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.[186]

The Court continued:

> In making this "balancing" inquiry, we have followed the lead of the Fourth Circuit Court of Appeals:
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> > Under the balance of hardship test the [lower] court must consider, in "flexible interplay," the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.[187]

Under Rule of Civil Procedure 65(a), no injunction may issue without notice to the adverse party. Further, a circuit court may order the merits portion of the trial consolidated with the application for a preliminary injunction. If no consolidation is ordered, any evidence presented at

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[184]*Perdue v. Ferguson*, 350 S.E.2d 555, 561 (W. Va. 1986) (quoting *Hechler v. Casey*, 333 S.E.2d 799, 805 (W. Va. 1985)).

[185]575 S.E.2d 362 (W. Va. 2002)

[186]*Id.* at 366.

[187]*Id.*

the preliminary injunction hearing which would be admissible at the merits trial becomes part of the record and need not be repeated at the merits trial.[188] This procedure must be applied and construed in a manner to preserve the parties right to trial by jury.[189]

Unlike prior practice,[190] Rule 65(b) now provides for a Temporary Restraining Order (TRO). Under Rule 65(b), a court may grant a TRO without written or oral notice to the adverse party only if: 1) it appears clearly from specific facts shown by affidavit or verified complaint that immediate, irreparable damage, loss or injury will result to the applicant before the opposing party can be heard in opposition; and, 2) counsel for the applicant certifies in writing to the court the efforts undertaken, if any, made to give notice and detailing the reasons that notice should not be required. In discussing ex parte preliminary injunctions, the immediate and almost indistinguishable forerunners of TROs, the Court has held, "[a]n ex parte preliminary injunction is an extraordinary remedy which is justified only under extraordinary circumstances."[191]

The TRO expires by the terms fixed by the court, not to exceed ten days. The issuing court may, within the time fixed by the original order and for good cause shown, extend it for a like period unless the adverse party consents to a longer extension.

If the TRO is issued without notice, the preliminary injunction hearing should be held at the earliest time possible and takes precedence over all other matters except older matters of the same character. Upon hearing the party with the TRO must proceed, or the TRO dissolves. On two days

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[188]W. Va. R. Civ. P. 65(a)(2).

[189]*Id.*

[190]*See UMW v. Waters*, 489 S.E.2d 266, 271 n.2 (W. Va. 1997).

[191]Syl. pt. 1, *Ashland Oil Inc., v. Kaufman*, 181 W. Va. 728, 384 S.E.2d 173 (1989).

notice to the TRO party, or less if the court proscribes, the adverse party may appear to dissolve or modify the TRO. The court must then hear the adverse party's motion as "expeditiously as the ends of justice require.[192]

Under Rule 65(c), no preliminary injunction or restraining order shall issue unless the requesting party posts security in an amount sufficient to cover any losses or damages the adverse party may suffer as a result of a wrongful restraint. There may be times no bond is required, such as when the party against whom the injunction is directed will not be harmed by a wrongful issuance.[193] The decision to require an injunction bond "is dependent upon the prerogative of the enjoining court."[194] Rule 65(c) excuses the United States, the State of West Virginia and the State's political subdivisions, or officers or agencies from the bond requirement. "[D]amages under an injunction bond are limited to those damages arising from the effect of the injunction and any attorneys' fees accruing from efforts to dissolve the injunction."[195] Case law from the Supreme Court of Appeals "on injunction bonds indicates that the language contained in the bond itself limits the damages the bond will pay."[196]

In issuing an injunction or TRO, a court must specifically detail the reason it was issued and shall describe in reasonable detail without reference to any extrinsic document such as a complaint,

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[192]*See generally* W. Va. R. Civ. P. 65(b).

[193]*Kessel*, 511 S.E.2d at 785-86.

[194]*Id.*

[195]*R.E.X., Inc v. Trio Food Enterprises, Inc.*, 395 S.E.2d 217, 219 (W. Va. 1990) (per curiam) (citing Syl. pt. 1, *State ex rel. Shatzer v. Freeport Coal Company*, 115 S.E.2d 164 (W. Va. 1960); Syl. pt. 4, *Wolverton v. Holcomb*,, 329 S.E.2d 885 (W. Va. 1985)).

[196]*Id.* (citing *State ex rel. Bush v. Carden*, 163 S.E. 54 (W. Va. 1932); *State ex rel. Meadow River Lumber Co. v. Marguerite Coal Co.*, 140 S.E. 49 (W. Va. 1927)).

the acts sought to be restrained.[197] The injunction or TRO is binding upon the parties to the action and their "officers, against, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."[198]

The court addressed a number of procedural issues related to injunctions in *Camden-Clark Memorial Hospital Association v. Turner*[199] where the Court held in syllabus points 5 and 6 that:

> A party in a civil action who desires immediate injunctive relief without prior notice to the adverse party must make application for a temporary restraining order under Rule 65 of the West Virginia Rules of Civil Procedure. Both the applicant and the court must comply with the dictates of the rule, including applicable time limits.
>
> If a civil action contains both a request for injunctive relief and a legal claim that would ordinarily be tried before a jury, a court must allow a jury to hear the legal claim before ruling on the question of permanent injunctive relief.

The Supreme Court of Appeals has said that a party subjected to an injunction may seek relief from the injunction by way of prohibition in the Supreme Court of Appeals.[200] Likewise, the Court has also held that "West Virginia Constitution, article VIII, section 3, which grants this Court appellate jurisdiction in civil cases in equity, includes a grant of jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief."[201]

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[197]W. Va. R. Civ. P. 65(d).

[198]*Id.*

[199]575 S.E.2d 362 (W. Va. 2002).

[200]*Id.* at 775 n.57.

[201]Syl. pt. 2, *State ex rel. McGraw v. Telecheck Servs., Inc.*, 582 S.E.2d 885 (2003).

3. Jurisdiction and Venue

Under West Virginia Code § 55-3-5, venue for injunctions is laid, unless otherwise specifically provided for in another Code provision, in the circuit court of the county in which the judgment is rendered, or the act or proceeding is to be done, or is doing, or is apprehended. While generally a circuit court cannot issue an injunction enjoining acts occurring outside the court's territorial jurisdiction, a "well-recognized exception" permits courts to issue extraterritorial injunctions where the injunctive relief is ancillary to an underlying proceeding where the issuing court unquestionably has jurisdiction.[202]

H. Special Receivers

1. Purpose

A court has the authority to appoint a special receiver in cases pending before it in which funds or property of a corporation, firm, or person is involved and there is risk of misappropriation or loss of them, in whole or in part.[203]

2. Practice

In appointing receivers, Rule 66 provides that prior practice governs, except when prior practice does not address an issue, in which case the Rules of Civil Procedure govern. The receiver must post bond.[204] In the event a lower court refuses to appoint a receiver, the Supreme Court, or

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[202] *Kessel v. Leavitt*, 511 S.E.2d 720, 775 (W. Va. 1998).

[203] W. Va. Code § 53-6-1.

[204] *Id.*

a justice thereof when the Court is in vacation, may upon proper application determine a receiver should be appointed and direct the lower court to appoint one.[205]

I. Arrest in Civil Cases

Civil arrests in West Virginia are governed by West Virginia Code § 53-7-1 to -8 so that "except in cases provided by Article 7 of Chapter 53 of the Code, arrests in civil cases are not permitted in this State."[206] The substantive authority to issue an order directing an arrest in a civil case, is found in West Virginia Code [207] A court, or a judge or clerk thereof in vacation, may direct the arrest of a defendant in any pending action if the person requesting the arrest can show the court, or judge or clerk in vacation, by affidavit the nature and justice of the plaintiff's claims, the amount which the plaintiff believes he or she is entitled to recover in the action, and at least one of the following: 1) the defendant is about to remove or has removed the subject property from the state with an intent the defraud the creditors; 2) the defendant is about to convert or has converted the property to money or securities with intent to defraud; 3) the defendant has assigned, disposed of, or removed or is about to do any of these things with fraudulent intent; 4) the defendant has property or rights in action which the defendant is fraudulently concealing; 5) the defendant has fraudulently contracted the debt or incurred the liability which is the subject of the suit, or 6) the defendant is about to flee the state and reside permanently in another state or country without paying the debt or liability which is the subject of the action.[208] If the court finds sufficient evidence to justify an arrest,

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[205] *Id.* §53-6-2.

[206] *Fisher v. Bouchelle*, 61 S.E.2d 305, 307 (W. Va. 1950).

[207] W. Va. Code § 53-7-1.

[208] *Id.*

the plaintiff must deliver a bond in an amount twice the amount being sought to pay the defendant damages if the civil arrest is later found to have been wrongfully obtained.[209] A defendant may post a bond at any time during the action in an amount equal to the sum the plaintiff seeks in order to avoid commitment to jail under the order or release therefrom.[210] After giving reasonable notice to the plaintiff or the plaintiff's attorney, the court may discharge the defendant from custody or discharge the defendant's bond upon a finding that the order of arrest was wrongfully obtained.[211]

Rule 64 of the West Virginia Rules of Civil Procedure incorporates this substantive authority, but limits some of the procedural aspects of West Virginia Code § 53-7-1 to -8 to certain time-frames:[212]

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the State existing at the time the remedy is sought, subject to the following qualifications: (1) An order for the seizure of specific personal property in an action to recover possession of such property shall be executed forthwith and a return made thereon within 20 days after issuance of the order; (2) an order of civil arrest or attachment shall be executed forthwith and a return made thereon within 30 days after issuance of the order; and (3) a garnishee shall serve an answer within 90 days after service of the order of attachment, unless the answer is waived. The remedies thus available include arrest, attachment, garnishment, order of seizure of specific personal property, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether the remedy is ancillary to an action or must be obtained by an independent action.[213]

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[209] *Id.* § 53-7-2.

[210] *Id.* § 53-7-4.

[211] *Id.* § 53-7-6.

[212] FRANKLIN D. CLECKLEY, ET AL., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 1012 (2002) ("It should be understood that Rule 64 does not provide substantive law for seizing property or person. The rule is intended merely to provide certain time periods for substantive remedies that are provided by statute.").

[213] W. Va. R. Civ. P. 64.

IV. CONCLUSION

The practice of extraordinary remedies is vitally important in West Virginia. However, notwithstanding the changes to the Rules of Civil Procedure, counsel continue to rely on outdated practices such as filing petitions rather than complaints and drafting "rules to show cause" in circuit court which are not contemplated by the new rules. All counsel in West Virginia should familiarize themselves with the rules of practice as well as the reach and limitations of the extraordinary remedies.