

Docket No. 11-1035

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

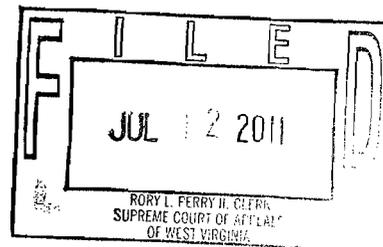
State of West Virginia ex rel.,
County Commission of
Greenbrier County, West Virginia

Petitioner,

v.

Honorable John L. Cummings and
James W. Childers, Sheriff of
Greenbrier County, West Virginia,

Respondents.



PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

A. WHETHER A COURT EXCEEDS ITS JURISDICTION BY ORDERING A COUNTY COMMISSION TO REVISE ITS BUDGET IN ACCORDANCE WITH THE SHERIFF'S BUDGETARY REQUESTS EVEN WHERE THE ORDER INCLUDES A MANDATE TO MEET AND CONFER AND DETERMINE A "FAIR AND REASONABLE" AMOUNT FOR THE SHERIFF'S BUDGET WHERE THE COURT DOES NOT CONTEMPERANEOUSLY ORDER THE SHERIFF TO MEET AND CONFER?

B. WHETHER A COURT EXCEEDS ITS JURISDICTION WHERE IT ORDERS A COUNTY COMMISSION TO AFFIRMATIVELY REVIEW ITS BUDGET AND MAKE ADDITIONAL ALLOCATIONS TO FIVE ITEMS OF THE SHERIFF'S BUDGET?

C. WHETHER A COURT MAY AWARD ATTORNEY FEES AGAINST A COUNTY COMMISSION WHERE THE COUNTY COMMISSION HAS PERFORMED ITS DUTIES IN ACCORDANCE WITH WEST VIRGINIA CODE § 7-7-7?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On April 15, 2011, James W. Childers, Sheriff of Greenbrier County, West Virginia, filed a petition for writ of mandamus in the Circuit Court of Greenbrier County, West Virginia seeking an order compelling the County Commission of Greenbrier County "to budget the amount of funds which is 'reasonable and proper' for the performance of the constitutional and statutory duties of the Sheriff." Appendix D., p. 19. The Sheriff also requested legal fees and expenses incurred in relation to the writ. Appendix D., p. 19. A Rule to Show cause was issued on April 15, 2011 and the matter was heard by the Honorable John L. Cummings on May 6, 2011.

On May 20, 2011, Judge Cummings entered an order granting the writ of mandamus. Appendix A., pp. 3-9. In that order, the court held as follows:

To correct the misapprehension of law, this Court holds and rules that the County Commission is required to allocate sufficient funds in the fiscal year 2011-2012 budget for the Sheriff to fill any necessary vacant positions, if such allocation may be made without cutting other constitutional duties or statutory

duties. The Court also grants a writ of mandamus compelling the Respondent County Commission to meet and confer with the Sheriff to determine an amount that is fair and reasonable to uniform and train personnel, to discuss and resolved [sic] any other unresolved issues in the budget for fiscal year 2011-2012. The Court further directs the Respondent County Commission to present a revised budget not later than June 7, 2011.

Appendix A., p. 7. The court also awarded legal fees and expenses incurred in the action. Appendix A., p. 8. The order was amended to extend its effective date until July 12, 2011. Appendix B. and C., pp. 10-13.

B. STATEMENT OF THE FACTS

In the month of March, the County Commission of Greenbrier County ("Commission") receives budget requests from the county officials. Appendix H., p. 140, ll. 10-11. The Commission discusses those requests with the officials and compares their needs with other information. Appendix H., p. 140, ll. 11-13. The starting comparison is the previous year's budget. Appendix H., p. 140, ll. 13-14. Primarily, the last year's budget is considered when the Commission confers with the officials. Appendix H., p. 142, ll. 8-13. The Commission also considers whether the last year's budget was sufficient, it considers the officials' requests for the next fiscal year, and considers any situations that have changed that warrant a change in the officials' budgets. Appendix H., p. 142, ll. 8-13.

As a part of this process, the Commission separately met with all public officials on March 8, 2011, to confer with the officials and discuss their budgets. Appendix E., p. 58. At this meeting, all of the county officials, including Sheriff James W. Childers ("Sheriff"), presented their budget requests to the Commission. Appendix E., p. 58;

Appendix H., pp. 140-141. The Petitioner, Sheriff Childers, attended this meeting accompanied by his chief deputy and clerk from law enforcement and his assistant from the tax office. Appendix E., p. 58; Appendix H., p. 141, ll. 6-9. All budgets were discussed, including the budget for the Sheriff's Office. Appendix E., p. 58. The officials were given as much time as they wanted to discuss their budgets. Appendix E., pp. 58-59. The Sheriff admitted that he and his employees were provided ample time to meet and confer with the Commission regarding his requests. Appendix H., p. 119, ll. 15-17.

During this meeting, the Commission specifically advised the Sheriff that he should review the budget requests and compare the requests with the County's revenue because there was not enough money to fill every request of every office. Appendix E., p. 59. The commissioners were concerned about the difficult financial times at large and, as a result, did not want to raise the levy rate and increase the tax burden on the public. Appendix H., pp. 142-143. With this in mind, they had to satisfy the desires and needs of the officials with limited resources. Appendix H., p. 143, ll. 2-4.

The Commission had no extra money to draw from as they had in the prior two years. Appendix E., p. 59. In the previous two years, the Commission budgeted extra money for the Sheriff for special projects and to allow the Sheriff to bring his office "up to speed." Appendix E., p. 59, 60. The Commission took this into account when fixing the 2011-2012 budget. Appendix E., pp. 59, 60. The Commission also compared the Sheriff's budget with the prior Greenbrier County Sheriffs' budgets and compared it to

other sheriffs' budgets in other counties. Appendix E., p. 59-61; Appendix H., p. 143-144.

Using the prior Sheriff's last full year's budget as a baseline, the Commission found that Sheriff Childer's budget had increased over 940 thousand dollars above that baseline since he had been in office. Appendix H., p. 143, ll. 6-19. A 2010 comparison of the sheriff's offices in other counties showed that the Greenbrier County Sheriff's budget was high compared to other counties with larger populations and approximately the same number of deputies. Appendix E., p. 59-61; Appendix H., pp. 143-144.

The Mercer County Sheriff's Office employed 25 deputies, compared to 27 in Greenbrier County, and Mercer County had a population of 61,921 in 2009, compared to 34,527 in Greenbrier County, yet the Mercer County Sheriff's budget was only \$1,926,615.00 compared to Greenbrier County Sheriff's budget of \$2,171,175.00. Appendix E., p. 60. Additionally, the Fayette County Sheriff's Office employed 30 deputies and had a population of 46,123, yet the Fayette County Sheriff's budget was only \$1,016,645.00 compared to Greenbrier County Sheriff's budget of \$2,171,175.00. Appendix E., p. 60. Counties with greater populations and more deputies operated on less money. Appendix H., p.144, ll. 2-3. Even if you took the population of the county and divided it into their budget and came up with a situation of how much money was spent on law enforcement, per person, there was only one county that spent more money per person than Greenbrier County, and that was Pocahontas, which has a small population in a very large county. Appendix H., p. 144, ll. 2-15. The Greenbrier County

Commission was spending far more than other county commissions for their law enforcement. Appendix H., p. 144, ll. 14-15.

The "Travel and Training" monies appropriated in the Greenbrier County Sheriff's budget far exceeded even the money appropriated by Kanawha County. Appendix E., p. 60. The "Travel and Training" budget for 2010 in Greenbrier County was \$102,000.00, and the money appropriated by Kanawha County (which employs 101 deputies and had a population of over 191,000) was only \$50,000.00. Appendix E., p. 60. Mercer County had only appropriated \$4,000.00 for this line item and Fayette County had only appropriated \$10,500.00. Appendix E., p. 60. The budget for the previous Greenbrier County Sheriff for this line item was \$25,000.00. Appendix E., p. 60.

Sheriff Childers was budgeted nearly \$99,000.00 last year for uniforms. Appendix E., p. 61. This year, he requestd \$80,000.00 for uniforms—totalling almost \$180,000.00 in two years. Appendix E., p. 61, Appendix H, p. 144, ll. 19-23. Fayette County (which has 30 deputies) appropriated \$18,000.00 in their budgets for 2010-2011 and 2011-2012 for uniforms. Appendix E., p. 60. Mercer County (which has 25 deputies) appropriated \$11,000.00 in their budgets for 2010-2011 and 2011-2012 for uniforms, and Nicholas County (which has 25 deputies) appropriated \$15,000.00 in their budgets for 2010-2011 and 2011-2012 for uniforms. Appendix E., p. 60.

The Commission also took into account the fact that the Sheriff was appropriated money in 2010 to hire two deputies to "backfill" positions. Appendix E., p. 62. The Sheriff hired only one deputy and did not do so until October 2010, despite having the money to do so and despite the fact that he had submitted paperwork to collect grant

money for the hiring of a deputy in September. Appendix E., p. 62. As a result, the County now has to reimburse \$19,133.75 grant money to the Division of Criminal Justice Services. Appendix E., pp. 62-63.

The Commission took into account the money that will not be available from the drug task force this year. Appendix E., p. 63. The drug task force, a cooperative effort with the West Virginia State Police, provided approximately \$20,000.00 in funding for overtime for two sheriff's deputies. Appendix E., p. 63. The Sheriff voluntarily withdrew from the task force and the \$20,000.00 is no longer available to be added to the budget. Appendix E., p. 63.

The Commission considered the "Contributions to Other Government Units" line item. Appendix E., p. 61. Last year, in September, the Sheriff was budgeted \$85,000.00 in this line item for new cars because there was a carryover of funds in that line item from the previous year. Appendix E., p. 61-62. Both, the fact that there was a carryover of unused funds from the previous year, and the fact that cars were purchased last year were taken into account when considering the Sheriff's budget request. Appendix E., p. 62.

Furthermore, in prior years, the grant money that the Commission reasonably expected to receive for the Sheriff's Office was included in the Sheriff's budget. The Sheriff requested that no monies expected to be received from grants be reflected in his budget this year. Appendix E., p. 63. Therefore, that money is not reflected in the Sheriff's 2011-2012 budget as it has been for previous budgets. Appendix E., p. 63.

Based upon these considerations, the Commission made the decision to reduce several line items in the Sheriff's budget request. The Sheriff requested \$80,000.00 for law enforcement uniforms. The Commission found that \$45,000.00 was ample money to cover the costs of law enforcement uniforms, especially since the Sheriff was budgeted nearly \$90,000.00 in the prior year for uniforms. Further, this amount of money divided among 30 people would provide \$1,500.00, per person, for uniforms. Appendix E., p. 61; Appendix H., p. 144, ll. 23-35. The Commission further considered how the money in the previous budget was being spent and determined that \$80,000.00 was an excessive amount for this line item. Appendix E., p. 61. Commissioner McClung testified that "if we spent that much money, last year, to spend that much money again seemed beyond reason." Appendix H., p. 145, ll. 3-4. The Commission decided that a reduction of this line item was reasonable and proper. Appendix E., p. 61.

The Commission decided to reduce the Sheriff's travel and training budget request due to the excessiveness of the request compared to other county budgets and the fact that \$102,000.00 was allotted to the Sheriff's office for this line item last year. Appendix E., p. 60. While the Sheriff complained that the training and education funding was increased for other county officials, the Commission determined that the increases for those offices were warranted inasmuch as the other offices had lower budgets for these items. Appendix E., p. 61. For example, in the 2010-2011 budget, the Prosecuting Attorney's budget was allotted \$6,500.00 for travel and training. Appendix E., p. 61. The line item was increased to only \$8,500.00 for the 2011-2012 budget. Appendix E., p. 61.

The Commission reduced the Sheriff's "Salary & Wage of Employees" line item from \$1,275,904.00 in 2010 to \$1,131,090.00 in 2011. Appendix E., p. 62. This is a difference of \$144,814.00. Appendix E., p. 62. When making this reduction, in addition to the considerations above, the Commission took into account the fact that the Sheriff had been allotted money in last year's budget to hire two deputies. Appendix E., p. 62-63. Part of this money was grant money. Appendix E., p. 62-63. The Sheriff made the decision not to fill all the vacancies in his office and the County Commission has to repay over \$19,000.00 in grant money. Appendix E., p. 62-63. Therefore, the Commission did not fund any additional positions. However, all of the Sheriff's current employees were funded and provided raises. Appendix E., p. 63. The Commission also informed the Sheriff that if the Sheriff were to find deputies, funds would be made available for the deputies' salaries, but the County Commission would not agree to place that money in his budget before a decision is made to hire deputies. Appendix H., p 147, ll. 21-24.

The Sheriff complained that many offices received more money than they requested, while the Sheriff's budget request was reduced. Appendix E., p. 62. The reason for this is simple. While not requested from each office, all offices, including the Sheriff's office, (with the exception of the County Commission and Inspectors) received \$100.00 raises for their employees. Appendix E., p. 62.

The Sheriff complained that the Commission decided to increase discretionary funding for the Visitor's Bureau this year while cutting funding for the Sheriff's Office. Appendix E., p. 62. However, the funding to the Visitor's Center is not discretionary.

Appendix E., p. 62. The Commission is required, by law, to appropriate half of the County monies collected for motel tax to the Visitor's Center. West Virginia Code § 7-18-14; Appendix E., p. 62. As stated by Commissioner McClung: "It's not discretionary. If their money went up, it's because the money that we received from the bed tax increased. There is no decision on the County Commission, in any way, on that matter." Appendix H., p. 146, ll. 22-25.

Similarly, there are additional monies reflected in the Agricultural Agent's budget that are not provided from County funds. Appendix H., p. 147, ll. 1-6. There is money that comes from a West Virginia University extension service that comes through the County Commission. Appendix H., p. 147, ll. 1-6. Commissioner McClung testified: "... that situation is not directly a discretionary thing, as other constitutional offices are." Appendix H., p. 147, ll. 5-6.

The Sheriff also complained that the line item in the county budget for "General County Contingencies" was increased this year to \$142,114.00 from \$12,750.00 last year. Appendix E., p. 62. This account is normally budgeted at \$200,000.00. Appendix E., p. 62. It is for emergency or "new needs" for all of the County. Appendix E., p. 62. Last year, there was \$12,750.00 balance in this line item because the money was appropriated to the Sheriff's Office. Appendix E., p. 62. This was taken into consideration when the County budget and the Sheriff's budget were fixed. Appendix E., p. 62. As stated by Commissioner McClung, "Last year, we got down to \$12,000.00, which, obviously, isn't very much on a 10 ½ million dollar budget. To say that this year, it's unreasonable to increase that to \$142,000, is not telling the whole story." Appendix H., pp. 145-146.

The Commission worked in "work session" on the budget on March 11, 2011, March 17, 2011 and March 25, 2011. Appendix E, p. 59. During the "work session", the Commission took into consideration the amount of money available to the officials collectively, as well as the workload and operating needs of each official's office. Appendix E, p. 59. The Commission considered many factors, in addition to those above, in appropriating the budgets for the county officers. Appendix E, pp. 59-64. The Commission based the budgets on the workloads and operating needs of each office and the funds available to the County. Appendix E, p. 59, 63-64. A special meeting to approve the budget was also held at 4:30 p.m. on Friday, March 25, 2011. Appendix E, p. 59. The Sheriff, while permitted to do so, did not attend these meetings. Appendix E, p. 59, Appendix H., pp. 121-122.

The Commission also specifically requested that the Sheriff meet with them to discuss the reductions in his budget request prior to the budget approval. Appendix E, p. 59. The Sheriff did not do so. Appendix H., pp. 121-122. The Commission believed that the Sheriff had adequate funds to fulfill the duties of his office and that the funds budgeted were reasonable and proper. Appendix E, p. 64. The Commission submitted its budget to the State Auditor's Office and it was approved. Appendix H., pp. 148-149.

Subsequently, on April 15, 2011, the Sheriff filed for a writ of mandamus (Appendix D.) and the Honorable John L. Cummings entered an order on May 20, 2011, finding and holding as follows:

While there has been testimony and representations by the Sheriff and the County Commission in the case concerning comparisons to other counties, crime rates, and different programs started or continued by the sheriff, the

court does not consider such testimony to be relevant to the decision to be reached. Comparisons between budgets of the various counties and sheriffs, or any office, would need to show similar populations, urban centers, rural areas, and geographic size, as well as similar revenue to the county, in order to be of help. In this instance, the information, while interesting, is not of much help.

The Commission has asserted that it met with the sheriff, and therefore has met its obligation under the law of this state. However, implicit in the need to meet with the sheriff, or other office holders, is the requirement that the meeting be meaningful. It appears that this was not so in this instance. It is also necessary to budget in a fashion so that the office holder may plan in a responsible manner. To hire deputies based on the anticipation that money would then be put in the salary budgets would not allow the responsible planning necessary. For the Commission to make the representation to the sheriff that this would be permissible demonstrates an incorrect understanding of the law. The Respondent County [sic] Commission set the Sheriff's budget line items based upon a misapprehension of law. That is, the Commission apparently believed that they could hold money aside in the budget and unofficially authorize the Sheriff to hire upon the promise that the funding will be made available in the future.

Therefore, the Court finds that the Respondent County Commission did act arbitrarily and capriciously by reducing the Sheriff's budget while increasing funding for other County Officers and projects. Such cuts interfere with the Sheriffs ability to fulfill his constitutional and statutory duties. The Court further finds that the Respondent County [sic] Commission set the Sheriff's budget line items based upon a misapprehension of law. That is, the Commission apparently believed that they could hold money aside in the budget and unofficially authorize the Sheriff to hire upon the promise that the funding will be made available in the future.

To correct the misapprehension of law, this Court holds and rules that the County Commission is required to allocate sufficient funds in the fiscal year 2011-12 budget for the Sheriff to fill any necessary [sic] vacant positions, if such allocation may be made without cutting other constitutional or statutory duties. The Court also grants a writ of mandamus compelling the Respondent County Commission to meet and confer with the Sheriff to determine an amount that is fair and reasonable to uniform and train personnel, and to discuss and resolved [sic] any other unresolved issues in the budget for fiscal year 2011-12. The Court further

directs the Respondent County Commission to present a revised budget not later than June 7, 2011.

The Court finds that the Petitioner is entitled to recover his legal fees and expenses incurred in this civil action. Counsel shall submit a fee petition not later than June 7, 2011. "Where a county commission arbitrarily fixes a county officer's budget without complying with the provisions of W.Va. Code, 7-7-7, as amended, the county commission is responsible for the county officer's reasonable attorney's fees incurred in a mandamus proceeding to compel compliance with that statute." Syllabus point 2, *State ex rel. Lambert v. Cortellessi*, 182 W.Va. 142, 386 S.E.2d 640 (1989).

Appendix A., pp. 3-9. This order required the County Commission to present a revised budget not later than June 7, 2011, twelve business days after entry of the order.¹

Appendix A., p. 7.

Rather than immediately seeking relief in this Court, the Commission attempted to comply with the order in a reasonable manner. The Commission has attempted to meet and confer with the Sheriff, but the Sheriff believes the Order requires the Commission to automatically grant him the items he requests. Judge Cummings order was entered on May 20, 2011. Appendix A., p. 8. The Commission promptly set a meeting on Friday, May 27, 2011, at a time when the Sheriff could attend the meeting and bring with him information relevant to their issues. Appendix G., pp. 89, 93-94. The Sheriff refused to meet with or provide any information to the Commission. Appendix G., pp. 89-91. Rather than provide information to the Commission, the Sheriff filed a Motion for Contempt against it. Appendix F., pp. 76-81, Appendix G, p. 89.

¹ The order was later amended to allow the County Commission additional time to revise its budget. Appendix B. and C., pp. 10-13.

The Court extended the deadline to meet and confer to July 1, 2011, and later to July 12, 2011. Appendix B. and C., pp. 10-13. The Commissioners all agreed that they did not believe that a revision of the budget was "necessary" and that it was important and necessary for the Commission to meet with the Sheriff and for the Sheriff to justify the need. Appendix G., p. 89. The Commissioners therefore scheduled another meeting with the Sheriff for June 21, 2011. Appendix G., pp. 89-90. The Sheriff advised the Commission prior to the meeting that he would not be attending the meeting and he did not attend. Appendix G, pp. 90, 96.

The Commissioners also requested that the Sheriff provide them additional dates and times to meet and confer in order to make a reasonable effort to accommodate the Sheriff's schedule. Appendix G., pp. 90, 96. The Sheriff never made contact to schedule another meeting. Appendix G., p. 90.

The Commission believes that the Sheriff's budget is substantially and sufficiently funded to allow the Sheriff to administer his constitutionally required functions. Appendix G., p. 91. The Commissioners further believe that a revision of the budget cannot be made in good conscience, especially since the Sheriff provided no justification for the revision either prior to the hearing before the Court or after the Court's order, and, several issues have come to light both before and after the hearing that demonstrate that additional funds are not necessary. Appendix G., pp. 90-91.

The Commission's decision is weighted by the state of the County's finances. The Commission's carryover of discretionary funds from last year's budget is only approximately \$40,000.00 for a 10 million dollar budget, and their financial stabilization

fund has steadily decreased from \$300,000 to \$400,000 per year to presently \$4,566.00. Appendix G., p.90. The Commission has therefore advised the circuit court that a revision of the budget cannot be made in good conscience. Appendix G., pp. 82-87, 91.

III. SUMMARY OF ARGUMENT

The County Commission, in performing its duties to review and set its budget for Greenbrier County, reviewed the Sheriff's proposed budget for 2011-2012. In the review, it met with the Sheriff and considered his requests. When the Commission requested further meetings, the Sheriff told the Commission he was not going to beg, that he had supplied to them his requests.

At the heart of the Sheriff's request were three additional deputies. But the Sheriff could not or would not tell the Commission when or if he was going to, for certain, hire them or whether he had identified candidates. The Commission had budgeted these three positions in 2010-2011, which money was never used. The Commission told the Sheriff that they would consider the request when and if the Sheriff determined he would hire any additional deputies. There were a few other items the Sheriff wanted as well.

When the Commission did not approve the deputies, even though the Sheriff had no definite plans, no start dates, etc., the Sheriff filed a Petition for Writ of Mandamus, and the Circuit Court ordered the Commission to present a "revised" budget within two and one-half weeks. In the Order, the Circuit Court apparently gave the Commission the discretion to determine whether the additional deputies were "necessary" before approving them and ordering the Commission to meet and confer

with the Sheriff and determine whether the other requests were "fair and reasonable" before approving those requests. The Circuit Court approved legal fees for the Sheriff as well.

The Circuit Court exceeded its jurisdiction by ordering the County Commission to revise its budget, and the Circuit Court was clearly wrong to find that the County Commission was arbitrary and capricious in any respect because the evidence was that the Commission worked to meet with the Sheriff before setting the budget and he refused, saying he was not going to beg. Further, the Commission determined that the Sheriff did not need the additional deputies because he had not hired them for over a year and still had no prospects for hiring them.

The County Commission did not refuse to act nor refuse to meet with the Sheriff and discuss the Sheriff's needs. It was the Sheriff who refused to meet with them and give it information. This conduct continued after the Order was entered. The Commission scheduled meetings pursuant to the Court's Order, but the Sheriff refused to meet and confer or give dates he could or would meet. On the other hand, the Sheriff filed a contempt motion and is still attempting to have the Circuit Court find the Commission in contempt.

"Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse to do so, 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." Syl. pt 1, *State ex rel. Buxton v. O'Brien and the County Court of*

Mason County, supra; Syllabus point 2, *Lambert v. Cortellessi*, 182 W.Va. 142, 386 S.E.2d 640 (1989)(emphasis added).

The Circuit Court erred by granting the Writ of Mandamus based upon the facts in this case and further by ordering the Commission to affirmatively present a revised budget impliedly ordering it to approve three deputies and other items requested in the budget. Further, by ordering the Commission to meet with the Sheriff and not ordering the Sheriff to meet with them, the Order requires an impossibility. This Petition for Writ of Prohibition should be granted.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the Rules of Appellate Procedure, oral argument is appropriate here because the parties have not waived oral argument; the appeal is not frivolous; the dispositive issues have not been authoritatively decided; and the decisional process would be significantly aided by oral argument. Rule 19 argument is requested in this matter inasmuch as the case involves assignments of error in the application of settled law and this case claims an unsustainable exercise of discretion where the law governing that discretion is settled.

V. ARGUMENT

A. STANDARD OF REVIEW

" 'Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.' Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953)."

Syllabus Point 1, *Kristopher v. Mazzone*, 227 W.Va. 184, 706 S.E.2d 381 (2011).

" '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. Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).' " Syllabus Point 2, *Kristopher v. Mazzone*, 227 W.Va. 184, 706 S.E.2d 381 (2011).

A circuit court abuses its discretion where it makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances, or if its ruling is based on an erroneous assessment of evidence or law. *Wysong v. Walker*, 224 W.Va. 437, 442, 686 S.E.2d 219, 224 (2009); *Gribben v. Kirk*, 195 W.Va. 488, 500, 466 S.E.2d 147, 159 (1995); *Bartles v. Hinkle*, 196 W.Va. 381, 389, 472 S.E.2d 827, 835 (1996).

B. A COURT EXCEEDS ITS JURISDICTION BY ORDERING A COUNTY COMMISSION TO REVISE ITS BUDGET IN ACCORDANCE WITH THE SHERIFF'S BUDGETARY REQUESTS EVEN WHERE THE ORDER INCLUDES A MANDATE TO MEET AND CONFER AND DETERMINE A "FAIR AND REASONABLE" AMOUNT FOR THE SHERIFF'S BUDGET WHERE THE COURT DOES NOT CONTEMPERANEOUSLY ORDER THE SHERIFF TO MEET AND CONFER.

The circuit court here attempted to order a county commission to revise its budget to give more money and yet comply with this Court's strong precedent that limits the circuit court to ordering the county commission to meaningfully meet with the officer in its county whose budget it is considering. The Circuit Court ordered the Commission to "allocate sufficient funds ... to fill any necessary vacant positions". The court ordered the Commission to "meet and confer with the Sheriff to determine an amount that is fair and reasonable to uniform and train" etc., and then ordered the Commission to "present a revised budget" within 2 ½ weeks. Obviously, this implicitly requires the Sheriff to meet and confer with the Commission. However, the Sheriff did not read the Order that way and refused to attend two meetings the Commission had scheduled for the purpose of complying with the court's order. Further, the Sheriff refused to produce documents the Commission requested in writing and refused to give the Commission times when he would meet with it and discuss justifications for his additional budget requests.

The Commission was willing to meet with the Sheriff and reconsider its decision. However, the order, in the eyes of the petitioner below, gives him the right to demand that positions be filled even though he had not filled them the past year and to demand additional money for training and uniforms, etc., without explaining why he needed substantially more funding per person than all but one of the counties the Commission

considered in its analysis. The Sheriff obviously believed that the Commission must comply with his requests and that it had no discretion in that regard.

The Commission, after several attempts to meet and confer to resolve the issue without requesting extraordinary relief, now must seek relief from this Court in order to protect its constitutional powers, duties and responsibilities. This case demonstrates why a circuit court should not attempt to administer the minutiae duties of setting county budgets. County budgets should be prepared by elected, constitutional officers who have the ultimate duty and responsibility to make the decisions while considering the specific needs of the county. The record in this case demonstrates that the circuit court was clearly wrong in finding that this Commission acted arbitrarily and capriciously. The circuit court's only finding of arbitrariness was that the County Commission misapprehended a law in agreeing to approve other deputy positions if and when the Sheriff actually was in a position to hire them. This was not arbitrary since it was based on several factors including unavailability of money, the fact that county commissions routinely add items to their budget during the year, and that the Sheriff had wasted a large amount of the county's budget the previous year with the same request and the Sheriff never decided that it was "necessary" to hire anyone. No other bases of arbitrariness can be gleaned from the court's order.

The trial court here found that the Commission was arbitrary and capricious. However, that finding is not made on any basis heretofore recognized as valid by this Court or by statute in West Virginia. The Court found that the Commission was arbitrary and capricious by:

1. "Reducing the Sheriff's budget while increasing funding for other County officers and projects". Such a basis for analyzing County Commission's acts would kill the reasonable analysis that County Commissions must utilize in determining budgets particularly where the County Commission just last year allocated extra funds for one time items which should not be necessary each year at the same rate; and

2. The Commission set its Sheriff's budget without "misapprehension" of the law" by "holding money aside in the budget and unofficially authorizing the Sheriff to hire upon the promise that money will be made available in the future". The Commission was aware that amending its budget throughout the year is a common practice and is not prohibited by law, and the reason the County Commission suggested they wait and see whether the Sheriff really needed three (3) new deputies was that the Sheriff had requested substantial funding the year before for the same deputies and the County Commission funded it and the positions were never filled by the Sheriff. The Court therefore found it arbitrary and capricious for the Commission not to fund positions that were not filled for over a year and were not scheduled to be filled next year. Perhaps the Court could disagree with the Commission's thinking but a finding that it was arbitrary and capricious was clearly not warranted.

Further the Circuit Court made conclusionary findings that "such cuts interfere with the Sheriff's ability to fulfill his constitutional and statutory duties". This likewise violates the Circuit Court's limited role in overseeing a County Commission's budgetary process. Obviously, if a Sheriff has plans as to how he or she intends to operate his department any disagreement with that will interfere in his view of what the Sheriff may want to do, but what "constitutional duties and responsibilities" is the Sheriff or Court claiming will be violated - none that the Commission is aware.

Before a court " 'may properly issue a writ of mandamus three elements must coexist: (1) the existence of a clear right in the petitioner to the relief sought; (2) the

existence of a legal duty on the part of the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law.' Syl. pt. 3, *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981)." Syl. pt. 1, *State ex rel. Dickerson v. City of Logan*, 221 W.Va. 1, 650 S.E.2d 100 (2006).

"Mandamus lies to compel a county commission to 'give due consideration to the duties, responsibilities and work required of the assistants, deputies and employees' of a county officer, as required by W. Va. Code, 7-7-7, as amended, where the county commission has arbitrarily fixed the overall budget of a county officer without having consulted with the county officer as to the amount of funds which is 'reasonable and proper' for the performance of the statutory duties of his or her office." Syl. pt. 1, *Lambert v. Cortellessi*, 182 W.Va. 142, 386 S.E.2d 640 (1989).

Black's Law Dictionary defines "arbitrary" as: "In an unreasonable manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on will alone; absolutely in power; capriciously; tyrannical; despotic; *Corneil v. Swisher County*, Tex.Civ.App., 78 S.W.2d 1072, 1074. Without fair, solid, and substantial cause; that is, without cause based upon the law, *U.S. v. Lotempio*, D.C. N.Y., 58 F.2d 358, 359; not governend by any fixed rules or standard. Willfull and unreasoning action, without consdieration and regard for facts and circumstances presented. *In re West Laramie*, Wyo., 457 P.2d 498, 502. Ordinarily, 'arbitrary' is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act would be one performed without adequate determination of principle and

one not founded in nature of things. Huey v. Davis, Tex.Civ.App., 556 S.W.2d 860, 865." BLACK'S LAW DICTIONARY, 6th Ed. 1995. While Petitioner has found no West Virginia case that specifically defines the word "arbitrary", there are several cases that, like the definition in Black's, equate arbitrariness with unreasonableness. See, *Melchiori v. Board of Education of the County of Marshall*, 188 W.Va. 575, 581, 425 S.E.2d 251, 257 (1992)(differentiating the exercise of reasonable discretion and arbitrariness and capriciousness); *McLendon v. Morton*, 162 W.Va. 431, 441, 249 S.E.2d 919, 924 (1978)(equating arbitrary and capricious conduct with conduct based upon no substantial reason); *Austin v. Knight*, 124 W.Va. 189, 20 S.E.2d 897, 900 (1942)(equating arbitrary conduct with conduct done for no satisfactory reason).

The Commission's actions cannot be deemed arbitrary or capricious. No facts were presented as to how the Sheriff is precluded from performing his statutory duties and responsibilities by the Commission refusing to allocate thousands of extra dollars to his budget. The Sheriff has never explained why he cannot use the number of deputies he has and the amount of money he has to cover his alleged "constitutional and statutory duties".

In *State ex rel. Buxton v. O'Brien and the County Court of Mason County*, 97 W.Va. 343, 125 S.E.2d 154 (1924), the Circuit Clerk of Mason County sought a writ of mandamus requiring the county commission to meet with the circuit court judge to determine and fix an aggregate sum to be expended for deputies and assistants alleging that the county commissioners had failed to so act. The Supreme Court refused to award the writ on the facts of the case. *Id.* at 157. The Court explained:

'In support of the writ, several affidavits were filed, but the fact that the county court in obedience to the alternative writ of mandamus herein did not meet with the judge of the circuit court, for the purpose of considering the detailed statement filed by the clerk of the circuit court, and for the purpose of fixing the amount to be expended for deputies and assistants for the office of the circuit clerk, did concurrently consider the matter, and that they failed to agree on the amount to be so expended, is not denied, and the only question as we now see it is: can this court by mandamus compel them to agree? We think not.

The county court and said judge in meeting to concurrently consider the amount of compensation, as set out by the detailed statement of the clerk, to be paid the deputy clerks and assistants were acting in their ministerial capacity, even though they were clothed with discretionary powers, and, while mandamus will lie to compel them to so meet, yet it will not lie to compel them to act in any particular manner or fix any particular sum. The duty to fix this amount is imposed by statute, but what that amount shall be seems to be entirely discretionary with them under the requirements of the law.'

....

'Mandamus is a proper remedy to compel tribunals and officers exercising discretionary ... powers to act, when they refuse to do so, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have committed.'

Buxton, at 156-157 (citations omitted).

Article V, Section 1 of the West Virginia Constitution provides that "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others...". In commenting upon this section of the Constitution, the West Virginia Supreme Court of Appeals has stated: "The legislative, executive and judicial departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected." Syl. pt. 1., *Miller v. Buchanan*, 24 W.Va. 362, 1884 WL 2784 (1884). It is well established law that courts of this state are by this constitutional provision

"forbidden to perform administrative duties." *State ex rel. County Court of Marion County v. Demus*, 148 W.Va. 398, 401, 135 S.E.2d 352, 355 (1964). *See also, State ex rel. Canterbury v. County Commission*, 151 W.Va. 1013, 1018, 158 S.E.2d 151, 156 (1967).

The West Virginia Constitution, Article IX, § 11, gives to the county commission superintendence and administration of the internal police and fiscal affairs of the county under such regulations as may be prescribed by law. West Virginia Code § 7-1-3 also provides: " They shall also, under the rules as now are or may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties...". Constitutional and statutory provisions vest in county courts, in exercise of sound discretion, power, right, and duty to administer fiscal affairs of their counties free from judicial control by courts of this state. *Meador v. County Court of McDowell County*, 141 W.Va. 96, 87 S.E.2d 725 (1955). County commissions are vested with wide discretion in the superintendence and administration of the internal police and fiscal affairs of their counties. *State ex rel. Farley v. Spaulding*, 203 W.Va. 275, 507 S.E.2d 376 (1998).

West Virginia Code § 7-7-7 requires the county commission to receive and consider the budgets prepared by the county officers and to fix the aggregate sum to be paid to all deputies, assistants and other employees of each of the officers. Pursuant to this section, the sum fixed must be reasonable and proper and due consideration must to be given to the duties, responsibilities and work involved. However, this section does not require that the commission accept the county officer's estimate but confers upon the county commission discretion in fixing that sum. W.Va. Code § 7-7-7; *State ex*

rel. *Canterbury v. County Commission*, 151 W.Va. 1013, 158 S.E.2d 151 (1967). The fixing of the budget is a legislative, or "administrative function", of the county commission. See *Canterbury*, at 1018, 155.

With regard to West Virginia Code § 7-7-7 and the fixing of the budget, while mandamus may lie, under the proper circumstances, to compel a county commission meet, " ' **it will not lie to compel them to act in any particular manner or fix any particular sum.** The duty to fix this amount is imposed by statute, but what that amount will be seems to be entirely discretionary with them under the requirements of the law.' " *State ex rel. Canterbury v. County Commission*, at 1024, 158, citing *State ex rel. Buxton v. O'Brien and the County Court of Mason County*, 97 W.Va. 343, 125 S.E. 154 (1924) (emphasis added). "Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse to do so, 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." Syl. pt 1, *State ex rel. Buxton v. O'Brien and the County Court of Mason County*, *supra*; Syllabus point 2, *Lambert v. Cortellessi*, 182 W.Va. 142, 386 S.E.2d 640 (1989)(emphasis added). In accord with this law: "If such inferior tribunal refuse to exercise its discretion, and render its judgment, it may be compelled to act by *mandamus*, but **the manner of its action or result of its decision cannot be thus controlled.**" Syl. Pt. 2, *Miller v. County Court of Tucker County*, 34 W.Va. 285, 12 S.E. 702 (1890) (emphasis added); Mandamus "... **can never be so employed, nor is it ever awarded to control or direct how discretionary or judicial power shall be exercised. Its sole office as regards tribunals or officers exercising such powers, is to**

compel them to act when they refuse to do so, not to prescribe in what manner they shall act, or remedy errors they have committed." *Taylor County Court v. Holt*, 61 W.Va. 154, 56 S.E. 205 (1906) (emphasis added). See also, Syllabus, *County Court of Mingo County v. Bailey*, 97 W.Va. 351, 125 S.E. 253 (1924) ("Generally courts have no power to control, by injunction, a county court exercising purely legislative or governmental functions."); *State v. Herrlad*, 36 W.Va. 721, 15 S.E. 974 (1892) ("If the inferior tribunal, corporation or public agent or officer has discretion, and acts and exercises it, his discretion cannot be controlled by *mandamus*.") (citation omitted).

Canterbury v. County Commission, supra, is instructive on the issues in this case. In *Canterbury*, the petitioner had filed a detailed statement setting forth the names of his deputies and assistants and the compensation to be paid to them totaling \$46,800.00, the amount allocated by the commission for the conduct of his office in the preceding fiscal year. The commission reduced the aggregate sum to \$29,400.00. The petitioner objected, the commission overruled his objections, and the petitioner instituted a mandamus proceeding to compel the county commission to reconvene and reconsider the estimate and levy for that fiscal year. The commission demurred to the petition on the ground that mandamus did not lie inasmuch as respondents had performed the duties imposed upon them by law and answered, asserting that sufficient funds had been allocated.

In that case, the petitioner testified that when he was elected county clerk, eight deputies were employed in the office; the work increased and two additional deputies were employed; the work continued to increase; while modern equipment was

purchased and utilized, it was still necessary for some of his employees to work overtime; he could not obtain competent help at smaller salaries; and could not operate his office in the manner required by law. The commission testified that it had incurred a fiscal deficit in the preceding year. In an effort to repay the deficit and being of the opinion that the budgets of certain offices were too high in comparison to counties of like size, they effected the reduction by comparing the populations, budgets, and the amounts appropriated for the clerk's offices of the other counties. The workload of the counties was not compared in any way.

After considering the evidence, the circuit court overruled the demurrer and granted the writ, holding that while the respondents had not acted in a arbitrary or capricious manner, insufficient funds had been allocated to permit the petitioner to conduct his office in an efficient manner as prescribed by law. The court ordered the commission to reconvene and reallocate a sufficient sum of money for the continued operation of the petitioner's office.

The West Virginia Supreme Court of Appeals found that the circuit court committed reversible error when the circuit court found that the commission had not acted in a willful or arbitrary manner but nevertheless granted the writ of mandamus directing the county commission to reconvene and reconsider the estimate and levy for the fiscal year and to redetermine and reallocate a sufficient sum of money for the continued operation of the clerk's office. *Canterbury*, at 1025, 159. The Court reversed and remanded the case with directions to dismiss the proceedings. *Id.* In making its decision, the Court explained the following:

The test by which it is determined whether a petitioner in the extraordinary proceeding of mandamus is entitled to relief is not the same as it is in the ordinary civil case. In the latter it is enough that he prove his right to relief by a preponderance of the evidence. In mandamus, he must show a clear legal right to the relief sought and before such relief may be granted by a court it must be shown that the respondent has a mandatory duty to perform the act required of him and **it is never enough merely to show that the action of the respondent was not in accord with the opinion of the court with regard to the matter under consideration.**

Canterbury, 1017, 155 (emphasis added).

The Court noted that county commissions "have the superintendence and administration of the internal police and fiscal affairs of their counties", and further explained that:

... this Court reiterated what has been said many times before--that the courts of this state are by this constitutional provision 'forbidden to perform administrative duties.' That the duty imposed on county courts by Code, 7-7-7, as amended, in making allowances to those county officials named therein for expenses incidental to the employment of deputies and assistants, is not of a judicial nature has been specifically held in *Raleigh County Court v. Painter*, 123 W.Va. 415, 15 S.E.2d 396.

....

This is the third syllabus point of the case of *Board of Trustees, etc. v. City of Huntington*, 142 W.Va. 217, 96 S.E.2d 225: 'Though under Section 3, Article VIII of the West Virginia Constitution, this Court has original jurisdiction in Habeas corpus, mandamus and prohibition, the Court will not, in the first instance and **in the absence of arbitrary action** on the part of the council or other governing body of a municipal corporation, **engage in determining or controlling the fiscal affairs of any municipal corporation in the State of West Virginia.**'

....

Code, 7-7-7, as amended, provides that the county clerk and other officials named therein shall prepare what is in effect a budget prior to the beginning of each fiscal year and present it to the county court for its consideration. The language of the section then provides that the county court shall 'take up and consider the same and shall determine and fix an aggregate sum to be expended

for the period covered... for the compensation of all such deputies, assistants, and other employees....' The section provides further that the sum fixed 'shall be reasonable and proper, regard being had to the amount of labor necessary to be performed by those to receive the compensation....' **This language does not require absolute acceptance of the officer's estimate but confers upon the county court a discretion in that regard,** although it may be, and has been argued, that such language requires the county court to provide such funds as will permit the official, here the county clerk, to properly carry out the statutory duties of this office.

Canterbury, at 1017-1020, 155-157 (emphasis added).

Lambert v. Cortellessi, 182 W.Va. 142, 386 S.E.2d 640 (1989), is likewise on point here. In *Lambert*, county officers of McDowell and Wayne Counties petitioned for mandamus relief after the county commissions had fixed their budgets. The circuit courts of McDowell and Wayne Counties granted relief and appeals were taken. The circuit courts' decisions to require the county commissions to reconvene were affirmed. However, the Supreme Court reversed and remanded a circuit court ruling requiring the chief judge of the circuit court to participate in determining the circuit clerk's budgets in the future, and a circuit court ruling setting the particular amounts of the revised budgets. The Court pointed out that, in each instance where injunctive relief was granted, the respective county commissions did not consult with the county officers to determine the workloads and operating needs of those officers prior to fixing their budgets.

The Court reasoned that in order

"[t]o comply with its duty under W.Va. Code, 7-7-7 [1982] of providing 'reasonable and proper' compensation to the staff of the county officers, a county commission is required by that statute to 'give due consideration to the duties, responsibilities and work required of the assistants, deputies and employees[.]' To give such consideration, a county commission obviously must be *informed* of

the workloads and operating needs of each county officer by consulting with each county officer as to those needs prior to fixing the budget for each county officer. It is 'arbitrary action' on the part of a county commission, within the meaning of Syllabus point 2 of *Canterbury v. County Court*, 151 W.Va. 1013, 158 S.E.2d 151 (1967), quoted above,² for a county commission to fix the overall budget of a county officer without having consulted with the county officer as to the workload and operating needs of that officer."

Lambert, 182 W.Va. at 148, 386 S.E.2d at 646. (emphasis in original).

Accordingly, the Court held that

...mandamus lies to compel a county commission to give "due consideration to the duties, responsibilities and work required of the assistants, deputies and employees" of a county officer, as required by W.Va. Code, 7-7-7, as amended, where the county commission has arbitrarily fixed that overall budget of a county officer without having consulted with the county officer as to the amount of funds which is "reasonable and proper" for the performance of the statutory duties of his or her office.

This holding is a specific application of the general principle "that while a court ordinarily will not interfere with the action of an officer or board clothed with discretion, it will do so where there is a clear showing of fraud, collusion or palpable abuse of such discretion[.]" *State ex rel. Printing-Litho, Inc. v. Wilson*, 147 W.Va. 415, 422, 128 S.E.2d 449, 453 (1962)(emphasis added). See also, syl. pt. 2, *Bane v. Board of Education*, 178 W.Va. 749, 364 S.E.2d 540 (1987). Another formulation of this rule is that mandamus lies to control the exercise of discretion when there is a showing of " 'caprice, passion, partiality, fraud, arbitrary conduct, some ulterior motive, or misapprehension of law[.]'" *Allen v. State Human Rights Commission*, 174 W.Va. 139, 147, 324 S.E.2d 99, 107 (1984)(emphasis added) (quoting *Bailey v. Truby*, 174 W.Va. 8, 13 321 S.E.2d 302, 307 (1984)). See also, syl. pt. 5, *Staton v. Hrko*, 180 W.Va. 654, 379 S.E.2d 159 (1989)(misapprehension of law).

Our holding applies to each of the three cases involved herein because the respective county commissions failed to consult with the circuit clerk, the prosecuting attorney and the county clerk as to their

² Syllabus point 2 of *Canterbury*, *supra*, provides: "In the absence of arbitrary action on the part of the county court [now county commission] in exercise of its discretion as to the sum to be allotted to the office of the county clerk for the compensation of deputies and assistants for the ensuing fiscal year, in accordance with the provisions of Code, 7-7-7, as amended, mandamus will not lie."

respective workloads and operating needs prior to fixing their respective budgets.

Lambert, 182 W.Va. at 148-149, 386 S.E.2d at 646-647.

In examining the relief awarded by the respective circuit courts, the Court found that the relief "mandated" in such cases "should be to compel the county commission to consult with the county officer as to such needs and to compel the county commission to reconvene and to consider revising the county officer's budget for the remainder of the fiscal year, taking those needs into account." *Id.*, at 149, 64. The Court reasoned that "[t]he county commission, not a court, has the authority to fix the amount of the revised budget for a county officer, for that is an administrative function *relating to a county office*, and *W.Va. Const. art. IX, § 11* confers upon the county commission the power to administer the fiscal affairs of the county", and for a court to substitute its judgment for that of the county commission in its administration of the fiscal affairs of the county "would be unconstitutional" and a violation of the separation of powers. *Id.* at 149, 151, 647-649. The Court, relying on *Buxton v. O'Brien*, 97 W.Va. 343, 125 S.E. 154 (1924), also held that while "mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse to do so, in violation of their duty, ... **it is never employed to prescribe in what manner they shall act, or to correct errors they have made.**" Syl. pt. 2, *Lambert, supra* (emphasis added).

Staton v. Hrko, 180 W.Va. 654, 379 S.E.2d 159 (1989), is also helpful in an analysis of this case. Syllabus point 5 of *Staton* provides: "Mandamus lies when a court or other tribunal, based upon a misapprehension of law, refused to exercise certain jurisdiction

or discretion because the court or other tribunal believed that it did not possess such jurisdiction or discretion. In that situation mandamus lies to compel the court or other tribunal to exercise the jurisdiction or discretion **but does not ordinarily lie to direct the manner in which to exercise discretion.**" (emphasis added). In *Stanton*, the petitioner sought a writ to compel a circuit judge to allow the petitioner to take certain depositions in a mandamus proceeding that had been brought to enforce the statutory provisions regarding the promotions of public school teachers. The Supreme Court awarded the writ "to compel the trial court to exercise its sound discretion." *Id.* at 659, 164. The Court did not direct the manner in which the trial court should exercise its discretion.

Here the court ordered the Commission to meet with the Sheriff but left the Sheriff free to make his own decision as to whether he would meet or not, then frustrating any efforts the County Commission might make to investigate and to further analyze the Sheriff's budget requests. The circuit court's order finding the County Commission's actions to be arbitrary and capricious was clearly wrong and ordering specific revisions to the Sheriff's budget exceeded the court's jurisdiction.

C. THE COURT EXCEEDS ITS JURISDICTION WHERE IT ORDERS A COUNTY COMMISSION TO AFFIRMATIVELY REVIEW ITS BUDGET AND MAKE ADDITIONAL ALLOCATIONS TO FIVE ITEMS OF THE SHERIFF'S BUDGET.

From the citations to the Court holdings above it is clear that the circuit court does not have jurisdiction to specifically order that the County Commission must add money to the Sheriff's budget under the facts and findings presented in the record and

in the court's order. The County Commission deemed the order to require it to meet and confer with the Sheriff and reconsider the Sheriff's requests. However, the Sheriff apparently believes that the Order requires the Commission to add additional items to his budget.

If the Circuit Court truly eliminated the Commission's discretion in these matters then it exceeded its jurisdiction and the Commission is entitled to a writ of prohibition on that basis.

D. THE COURT MAY NOT AWARD ATTORNEY FEES AGAINST A COUNTY COMMISSION WHERE THE COUNTY COMMISSION HAS PERFORMED ITS DUTIES IN ACCORDANCE WITH WEST VIRGINIA CODE § 7-7-7.

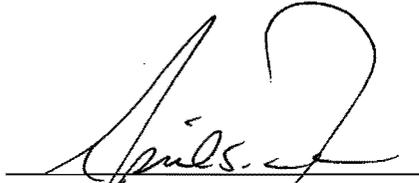
Pursuant to Syllabus Point 5 of *Lambert v. Cortellessi, supra*, a county commission is not responsible for a county officer's "reasonable attorney fees" unless the Commission acts arbitrarily in fixing a county officer's budget without complying with the provisions of West Virginia Code § 7-7-7. When the facts in this case are applied to the legal authority set forth above, it is evident that the County Commission did not act arbitrarily in fixing the Sheriff's budget. Accordingly, the County Commission is entitled to a writ of prohibition on this basis.

VI. CONCLUSION

The Petitioner therefore prays that this Honorable Court grant its Petition for Prohibition, preventing enforcement of the Writ of Mandamus entered by the circuit court of Greenbrier County and relieve them of the order entered on May 20, 2011, in its entirety.

COUNTY COMMISSION OF
GREENBRIER COUNTY,
WEST VIRGINIA

By Counsel

A handwritten signature in black ink, appearing to read "Masters", written over a horizontal line.

Marvin M. Masters

West Virginia State Bar No. 2359

April D. Ferrebee

West Virginia State Bar No. 8034

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Docket No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel.,
County Commission of
Greenbrier County, West Virginia

Petitioner,

v.

Honorable John L. Cummings and
James W. Childers, Sheriff of
Greenbrier County, West Virginia,

Respondents.

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF GREENBRIER, To-Wit:

The County Commission of Greenbrier County, West Virginia, who after being first duly cautioned and sworn according to law, says that it is the Petitioner named in the foregoing "Petition For Writ of Prohibition", that it has reviewed the same, and, that to the best of its knowledge, information and belief, the facts and allegations therein contained are true and correct in every respect.

Further, affiant sayeth naught.

County Commission of Greenbrier County,
West Virginia

Betty D. Crookshanks
Betty D. Crookshanks, President

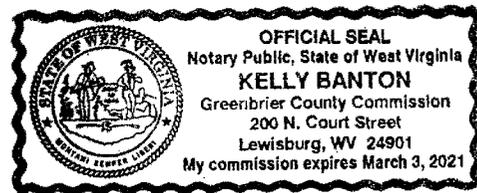
Karen Lobban
Karen Lobban, Commissioner

Michael F. McClung
Michael F. McClung, Commissioner

Taken, subscribed and sworn to before me this 8th day of July
2011.

My commission expires March 3, 2021.

Kelly Banton
NOTARY PUBLIC



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel.,
County Commission of
Greenbrier County, West Virginia

Petitioner,

v.

Honorable John L. Cummings and
James W. Childers, Sheriff of
Greenbrier County, West Virginia,

Respondents.

CERTIFICATE OF SERVICE

I, April D. Ferrebee, counsel for Petitioner, do hereby certify that all persons upon whom a rule to show cause should be served, if granted, have been timely provided a copy of the "Petition for Writ of Prohibition" and "Appendix" and that true and exact copies of the foregoing "Petition for Writ of Prohibition" and "Appendix" were served upon:

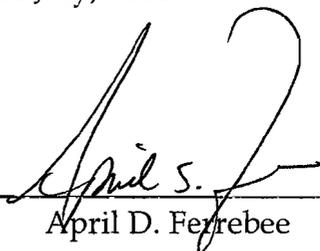
John R. Teare, Jr.
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Charleston, West Virginia 25321
304-340-3813
jteare@spilmanlaw.com
Counsel for James W. Childers, Sheriff of Greenbrier County, West Virginia

via hand delivery, this 12th day of July, 2011; and upon

Honorable John L. Cummings, Senior Status Judge
2255 Nelson Court
Milton, West Virginia 25541
john.cummings@courtsww.gov
john.cummings@suddenlink.net

Patrick Via
Greenbrier County Prosecuting Attorney's Office
200 Court Street North
Lewisburg, West Virginia 24901
304-647-6616
p.via@greenbriercounty.net
Prosecuting Attorney for Greenbrier County

via electronic mail, and in envelopes properly addressed, stamped and deposited in the regular course of the United States Mail, this 12th day of July, 2011.



April D. Fejrebee