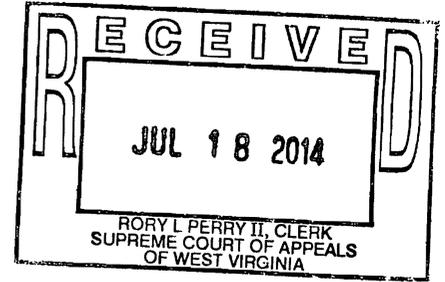


**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA**



**STATE OF WEST VIRGINIA, EX REL.  
PATRICK MORRISEY,  
ATTORNEY GENERAL OF WEST VIRGINIA,**

**Petitioner**

**v.**

**Supreme Court Docket No.: 14-0587**

**WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL,  
WEST VIRGINIA LAWYER DISCIPLINARY BOARD,**

**Respondents.**

**WEST VIRGINIA PROSECUTING ATTORNEYS ASSOCIATION  
AMICUS CURIAE BRIEF IN SUPPORT OF THE RESPONDENTS**

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## ARGUMENT

This *Amicus Curiae* brief is filed pursuant to Rule of Appellate Procedure 30<sup>1</sup> on behalf of the West Virginia Prosecuting Attorneys Association (“the Association”), in support of the Respondents, Office of Disciplinary Counsel (“ODC”) and Lawyer Disciplinary Board (“the Board”). As *amicus curiae*, the Association asserts that actions of the Attorney General threaten to dramatically alter the constitutional and statutory framework of the criminal business of the State in the counties wherein the prosecuting attorneys are elected by the people. As an important public policy matter, the Association respectfully asks the Court to deny the Petition for Writ of Prohibition.

### **I. THE ATTORNEY GENERAL IS WITHOUT AN INJURY-IN-FACT, AND SO LACKS STANDING TO SEEK THIS WRIT OF PROHIBITION.**

The Attorney General has no standing to seek this writ of prohibition as he has suffered no injury-in-fact. Despite a desire to resolve a legal question regarding his authority, if there is any aggrieved party herein, it is not the Attorney General. As this court has held:

Standing is comprised of three elements: First the party attempting to establish standing must have suffered an ‘injury-in-fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

*Syllabus Point 5, Findley v. State Farm Mutual Automobile Insurance Company*, 213 W.Va. 80, 576 S.E.2d 807 (2002); *Affiliated Const. Trades Foundation v. West Virginia Dept. of Transp.*, 227 W.Va. 653, 713 S.E.2d 809 (2011). This court has explained:

The question of standing to sue is whether the litigant has alleged such a personal stake in the outcome of the lawsuit so as to present the court with a justiciable controversy warranting judicial resolution of the dispute.

*Snyder v. Callaghan*, 168 W.Va. 265, 274, 284 S.E.2d 241, 248 (1981)(*citing Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). More succinctly, “When a person’s significant interests are

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<sup>1</sup> Consistent with the requirements of Rule of Appellate Procedure 30(e)(5) the Association asserts that counsel for the Respondents did not author this brief in whole or in part, and no remuneration was paid to its authors other than the normal salary paid to them as assistant prosecutors in their respective offices.

directly injured or adversely affected ... such person has standing.” Shobe v. Latimer, 162 W.Va. at 779, 790, 253 S.E.2d 54, 61 (1979).

The Attorney General asserts that two county prosecutors requested his assistance to prosecute crimes, however, the facts appear more nuanced. Both the Mingo County and Preston County assertions show that the Attorney General has no standing to raise this issue.

**A. The Mingo County Commissioner’s Request for Assistance Was Resolved Pursuant to Statute.**

In 2013 several of Mingo County’s public officials were the subject of a criminal probe conducted by the United States Attorney for the Southern District of West Virginia. On October 9, 2013 the Mingo County prosecutor announced that he intended to resign effective the following day.

Filling a vacancy for a county prosecuting attorney is provided in West Virginia Code § 3-10-8, which reads in part:

(a) Any vacancy occurring in the office of prosecuting attorney, sheriff, assessor or county surveyor shall be filled by the county commission within thirty days of the vacancy by appointment of a person of the same political party as the officeholder vacating the office. The appointed person shall hold the office for the period stated by section one of this article.

(b) Notwithstanding any code provision to the contrary, a county commission may appoint a temporary successor to the office of prosecuting attorney, sheriff, assessor or county surveyor until the requirements of this section have been met. The temporary successor may serve no more than thirty days from the date of the vacancy.

Consistent with West Virginia Code § 3-10-8, the Mingo County Commission called an emergency meeting on October 10, 2013 to appoint a successor to the prosecuting attorney. Pursuant to West Virginia Code § 3-10-8(b), Teresa Maynard, who was at that time an assistant prosecuting attorney, was appointed temporary successor to the prosecuting attorney on October 10, 2013. Less than thirty days later, on November 6, 2013, Maynard was appointed by the County Commission as prosecuting attorney for Mingo County, consistent with West Virginia Code § 3-10-8(a).

A *Charleston Daily Mail* newspaper article from November 6, 2013 reported that Mingo County Commissioner Greg “Hootie” Smith “said the commission first asked the office of state Attorney General

Patrick Morrissey to send an assistant attorney general to fill the prosecutor's role. The office told him that was not an option because an AG can't represent the state and county, Smith said."

<http://www.charlestondaily.com/News/201311060045>. That article is consistent with the assertions in the Attorney General's Petition which states that on October 9, 2013, Commissioner Smith "telephoned the Office of the Attorney General seeking counsel regarding the administration of justice in Mingo County" at a time when both the prosecutor and circuit judge<sup>2</sup> were facing federal criminal charges. According to the Attorney General's Petition, on October 10, 2013, the deputy attorney general telephoned ODC with a separate proposition to have assistant attorney generals accept appointments as assistant prosecuting attorneys in instances such as the one presented in Mingo County. However, on that same date, October 10, 2013, the Mingo County Commission appointed Ms. Maynard to her temporary successor position which was later confirmed as a permanent appointment. Accordingly, the issue of how to fill the vacant position of the Mingo County Prosecutor reached a final conclusion in the time and manner dictated by statute.

Nonetheless, in the interim between Maynard's appointment as temporary successor to the prosecuting attorney and her appointment as prosecuting attorney, on October 17, 2013, Attorney General Morrissey sent a seven-page letter to the Office of Disciplinary Counsel requesting an expedited formal advisory opinion regarding whether his office could, based upon "multiple requests" from county prosecutors, assist with county prosecutions. To date, Attorney General Morrissey has not demonstrated that any other requests were made prior to October 17, 2013. However, the Petition for a writ of prohibition does reference a second request that was made many months after the Attorney General requested an opinion from the ODC, which is addressed below. The Attorney General asserts in his petition that he "simply seeks to remove a deterrent to answering the request of resource-strapped county prosecutors", however that does not appear to be the case in relation to Mingo County. There was no mention from the County Commissioner who contacted the Attorney General on October 9, 2013, that

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<sup>2</sup> A County Commissioner was also the subject of the probe which further encompassed activities of the deceased Sheriff.

limited resources were causing a difficulty in prosecuting crimes in Mingo County. Rather, it appears that a rightfully concerned County Commissioner contacted the Attorney General in an attempt to quickly restore confidence to one of the County's public offices, that of the Prosecuting Attorney.

The mechanism for filling vacancies for elected Constitutional officers is clearly set forth in the West Virginia Code, and the Mingo County Commission complied with West Virginia Code § 3-10-8 in filling that vacancy. Upon compliance with that procedure, the Attorney General's interest was moot.

The Attorney General fails to meet the standards for application of the three prong test to determine standing. The Attorney General does not establish any injury-in-fact, or invasion of a legally protected interest, in relation to the appointment of a new Mingo County Prosecuting Attorney. Such an injury-in-fact must be both concrete and particularized and actual or imminent, not conjectural or hypothetical. No constitutional or statutory provision in West Virginia permits the Attorney General to serve two Constitutional functions simultaneously. Moreover, West Virginia Code § 3-10-8 clearly establishes the method for appointment of a new prosecuting attorney, which method was followed in Mingo County's appointment of Ms. Maynard. Any claim by the Attorney General that he has suffered an actual or imminent injury-in-fact is no longer applicable. Following the permanent appointment of Ms. Maynard there is no further need or request from Mingo County for assistance in prosecutions. Accordingly, any injury-in-fact claimed by the Attorney General in that instance would be purely conjectural or hypothetical. The injury claimed by the Attorney General would have to be likely to be redressed through a favorable decision of this court. However, absent a legislative revision of the clear and plain language of the Constitution and applicable statute, West Virginia Code § 3-10-8, it is difficult to see how this Court could interpret that clear and unambiguous language<sup>3</sup> granting the county

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<sup>3</sup> In two recent decisions of this Court where the Attorney General was a party this Court reiterated its long-standing standards of statutory interpretation:

“When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959). Accord Syl. pt. 2, *State v. Epperly*, 135 W.Va. 877, 65

commission to the right and responsibility of appointing a replacement for the county's Constitutional officers in any way that would redress the Attorney General's alleged injury.

**B. The Preston County Prosecutor's Request for Assistance Should be Resolved Through a Request to the Preston County Commission for Additional Funding to Hire More Assistant Prosecutors.**

The Attorney General cites to a written request from the Preston County prosecuting attorney for "assistance" as further grounds in his Petition for a Writ of Prohibition, however, again, standing, if it exists for any party, does not lie with the Attorney General.

Article 9, Section 11 of the West Virginia Constitution grants powers to County Commissions, including the "authority to lay and disburse the county levies." West Virginia Code § 7-7-7(a) provides in part that:

The county clerk, circuit clerk, sheriff, county assessor and prosecuting attorney, by and with the advice and consent of the county commission, may appoint and employ, to assist them in the discharge of their official duties for and during their respective terms of office, assistants, deputies, and employees.

It is clear that County Commissions bear both the authority and responsibility to collect taxes and to disburse those taxes, including for the payment of assistants for county prosecuting attorneys. The Attorney General asserts that because the Preston County Prosecutor is overburdened by an excessive

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S.E.2d 488 (1951) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."). In other words, "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).

Cavalry SPV I, LLC v. Morrisey, 232 W.Va. 325, 752 S.E.2d 356 at 36 (2013).

"A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951). In other words, "[w]here the language of a statutory provision is plain, its terms should be applied as written and not construed." *DeVane v. Kennedy*, 205 W.Va. 519, 529, 519 S.E.2d 622, 632 (1999).

State ex rel. Discover Financial Svcs., Inc. v. Nibert, 231 W.Va. 227, 234, 744 S.E.2d 625, 632 (2013).

caseload that the Attorney General's office should be permitted to assist in prosecuting Preston County crimes. However, this position is not supported by the Constitution or Code; instead both place that responsibility to prosecute such cases with the prosecuting attorney and the responsibility to pay for such prosecutions upon the County Commission of the respective counties.

The duties of West Virginia's prosecuting attorneys are many. Generally, those responsibilities are set forth in West Virginia Code § 7-4-1, which provides that:

It shall be the duty of the prosecuting attorney to attend to the criminal business of the state in the county in which he is elected and qualified, and when he has information of the violation of any penal law committed within such county, he shall institute and prosecute all necessary and proper proceedings against the offender, and may in such case issue or cause to be issued a summons for any witness he may deem material. Every public officer shall give him information of the violation of any penal law committed within his county. It shall also be the duty of the prosecuting attorney to attend to civil suits in such county in which the state, or any department, commission or board thereof, is interested, and to advise, attend to, bring, prosecute or defend, as the case may be, all matters, actions, suits and proceedings in which such county or any county board of education is interested.

It shall be the duty of the prosecuting attorney to keep his office open in the charge of a responsible person during the hours polls are open on general, primary and special county-wide election days, and the prosecuting attorney, or his assistant, if any, shall be available for the purpose of advising election officials. It shall be the further duty of the prosecuting attorney, when requested by the attorney general, to perform or to assist the attorney general in performing, in the county in which he is elected, any legal duties required to be performed by the attorney general, and which are not inconsistent with the duties of the prosecuting attorney as the legal representative of such county. It shall also be the duty of the prosecuting attorney, when requested by the attorney general, to perform or to assist the attorney general in performing, any legal duties required to be performed by the attorney general, in any county other than that in which such prosecuting attorney is elected, and for the performance of any such duties in any county other than that in which such prosecuting attorney is elected he shall be paid his actual expenses.

Upon the request of the attorney general the prosecuting attorney shall make a written report of the state and condition of the several causes in which the state is a party, pending in his county, and upon any matters referred to him by the attorney general as provided by law.

This statute makes clear that these are the broad responsibilities of prosecuting attorneys in West Virginia, and that, upon request of the Attorney General prosecutors shall assist him, however, the statute does not include any provision that the Attorney General shall in turn assist county prosecutors. By contrast, West Virginia Code § 5-3-2<sup>4</sup> broadly lists the duties of the attorney general, but specifies that the attorney general shall provide assistance to prosecuting attorneys to two instances: (1) where criminal activities at a state correctional facility merit the assistance of the attorney general, for example, should a prison riot occur; and (2) where prosecuting attorneys seek to consult the attorney general in matters relating to the official duties of their office.

Interestingly, West Virginia Code § 5-3-2 delineates responsibilities the Attorney General may require prosecuting attorneys to perform, including responsibilities of the attorney general which must be performed within the prosecutor's county of jurisdiction, or outside of that jurisdiction if another prosecutor has a conflict which prevents him or her from performing that function. However, the statute does not grant the attorney general the right to assume the powers of county prosecutors.

West Virginia Constitution Article 4, Section 8 provides that, "The legislature, in cases not provided for in this Constitution, shall prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed." The legislature has done so by dictating the powers and duties of prosecuting attorneys as separate and distinct from the powers and duties of the attorney general. The two offices are not interchangeable, but, rather, are clearly defined by statute.

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<sup>4</sup> The pertinent portion of West Virginia Code § 5-3-2 provides:

he shall, when requested by the prosecuting attorney of a county wherein a state institution of correction is located, provide attorneys for appointment as special prosecuting attorneys to assist the prosecuting attorney of said county in the prosecution of criminal proceedings when, in the opinion of the circuit judge of said county, or a justice of the West Virginia supreme court of appeals, extraordinary circumstances exist at said institution which render the financial resources of the office of the prosecuting attorney inadequate to prosecute said cases; he may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office, and may require a written report from them of the state and condition of the several causes, in which the state is a party, pending in the courts of their respective counties;

Moreover, the way in which this request to the Attorney General was made is unique in several respects. Preston County Prosecuting Attorney Mel Snyder first discussed the matter of the Attorney General's offer of assistance with the Attorney General at an open house meeting in the fall of 2013 where Mr. Morrissey offered the assistance of his office to prosecute cases. Thereafter, Mr. Snyder advises that he intended to send a formal request to the Attorney General for such assistance but did not do so until after he saw Mr. Morrissey at a Preston County Chamber of Commerce dinner held on May 29, 2014 in Kingwood. At that dinner Mr. Morrissey asked Mr. Snyder if he ever intended to write "that letter" requesting assistance. The letter was written and faxed to the Attorney General three days later.

Mr. Snyder's June 2, 2014 letter opens, "I apologize for not writing sooner." Mr. Snyder represents that his letter was a request for assistance, and it may well have been just that. However, it appears to have been prompted by the attorney general, first by his offer to assist county prosecutors in the fall of 2013 and later by his reminder in May of 2014. In any case, the letter clearly requests that the Attorney General provide information on how his office might "assist" local prosecutors. This letter was drafted more than seven months after the Attorney General sought an opinion from ODC and a full four months after the Office of Disciplinary Counsel's informal opinion letter on January 24, 2014, which advised the Attorney General that his office could not extend such assistance. Nonetheless, four months later, on May 29, 2014, the Attorney General did suggest to at least one county prosecutor that his office could assist in prosecutions, and reminded one of those prosecutors to send him a letter to regarding a request for help.

The Attorney General's assertion that he wishes to help prosecutors whose offices are underfunded appears more applicable here, but still does not grant the Attorney General standing in this matter. If the Prosecutor of any county requires additional resources to perform the functions of his office, the appropriate remedy is not to request assistance from a state agent, but rather to request those additional funds from the County Commission. The existence of a prosecuting attorney with too many cases and too little resources is well-known to members of the Association, many of whom would assert that is the status quo of any prosecutorial office. However, by permitting the Attorney General to perform

the duties of a Constitutionally established office that is not his own would do more than thwart the Constitution in this respect.<sup>5</sup> It could also serve as an excuse for County Commissions to deny funding to county prosecutors on any ground, claiming that the Attorney General's office could be relied upon instead to make up for any staffing or budget shortfall.

The Attorney General here has no significant interests in representing County prosecuting attorneys' offices. Even if he is viewed to have a significant interest in representing county prosecutors, those significant interests have not been directly injured or adversely affected by the actions of the ODC or Board.

Applying the three prong test to determine standing demonstrates that the Attorney General does not possess it here. The Attorney General is unable to establish any injury-in-fact, or invasion of a legally protected interest, in relation to assisting the Preston County Prosecuting Attorney. Such an injury-in-fact must be both concrete and particularized and actual or imminent, not conjectural or hypothetical. The Constitution clearly establishes separate offices of the attorney general and county prosecuting attorneys, which fulfill separate but related functions. Any claim by the Attorney General that he has suffered an actual or imminent injury-in-fact is difficult if not impossible to establish. The Attorney General claims he has been injured by not being able to assist another Constitutional officer fulfill the functions of his office. This specious claim is at best conjectural or hypothetical. Finally, the injury claimed by the Attorney General would have to be likely to be redressed through a favorable decision of this court. However, absent a revision of Constitution itself which establishes such separate offices, it is difficult to see how this Court could interpret that the Attorney General or his deputies may fulfill two separate Constitutional functions simultaneously.

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<sup>5</sup> W.Va. Const. Art. 7, § 1 provides in part that, "The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general." W.Va. Const. Art 9, § 1 provides that, "The voters of each county shall elect a surveyor of lands, a prosecuting attorney, a sheriff, and one and not more than two assessors, who shall hold their respective offices for the term of four years."

**II. THE WEST VIRGINIA ATTORNEY GENERAL LACKS AUTHORITY TO INITIATE OR PROSECUTE CRIMINAL CASES, WHICH CONSTITUTIONAL AND STATUTORY AUTHORITY IS VESTED SOLELY WITH THE ELECTED COUNTY PROSECUTING ATTORNEYS.**

**1. The Constitution and Statute make the County Prosecuting Attorney the Constitutional Officer Responsible for the Criminal Business of the State.**

This Court holds quite plainly that, in West Virginia, “The prosecuting attorney is the constitutional officer charged with the responsibility of instituting prosecutions and securing convictions on behalf of the State of those who violate the criminal law.” State ex rel. Skinner v. Dostert, 166 W.Va. 743, 750, 278 S.E.2d 624, 630 (1981). See also: Holcomb v. Ballard, 232 W.Va. 253, 752 S.E.2d 284, 293-294 (2013) (Loughry, J., concurring); State ex rel. Games-Neely v. Sanders, 220 W.Va. 230, 239, 641 S.E.2d 153, 162 (2006); Harman v. Frye, 188 W.Va. 611, 619, 425 S.E.2d 566, 574 (1992).

The Court’s holding is based on the West Virginia Constitution, which creates the office of the prosecuting attorney, to be elected in each county.<sup>6</sup> The Court’s holding is also based on W. Va. Code § 7-4-1, the statute prescribing the general powers and duties of the Prosecuting Attorney.<sup>7</sup>

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<sup>6</sup> *West Virginia Constitution*, Art. IX, sec. 1, reads: “The voters of each county shall elect a surveyor of lands, a prosecuting attorney, a sheriff, and one and not more than two assessors, who shall hold their respective offices for the term of four years.”

<sup>7</sup> W. Va. Code § 7-4-1 reads, in relevant part:

*It shall be the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is elected and qualified, and when he has information of the violation of any penal law committed within such county, he shall institute and prosecute all necessary and proper proceedings against the offender, and may in such case issue or cause to be issued a summons for any witness he may deem material. [...] It shall also be the duty of the prosecuting attorney to attend to civil suits in such county in which the State, or any department, commission or board thereof, is interested, and to advise, attend to, bring, prosecute or defend, as the case may be, all matters, actions, suits and proceedings in which such county or any county board of education is interested.*

*[...] It shall be the further duty of the prosecuting attorney, when requested by the attorney general, to perform or to assist the attorney general in performing, in the county in which he is elected, any legal duties required to be performed by the attorney general, and which are not inconsistent with the duties of the prosecuting attorney as the legal representative of such county. It shall also be the duty of the prosecuting attorney, when requested by the attorney general, to perform or to assist the attorney general in performing, any*

State ex rel. Skinner v. Dostert makes clear that the county Prosecuting Attorney is the official vested with the constitutional and statutory authority to attend to the criminal business of the state in the county where he or she is elected.

## **2. The Attorney General Lacks Legal Authority to Initiate or Prosecute Criminal Cases.**

*West Virginia Constitution*, Art. VII, sec. 1, creates the office of the Attorney General as an official of the executive department.<sup>8</sup> W. Va. Code §§ 5-3-1 and-2 set forth the general statutory powers and duties of the Attorney General.<sup>9</sup> <sup>10</sup> With the single exception in W. Va. Code § 5-3-2 relating to

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legal duties required to be performed by the attorney general, in any county other than that in which such prosecuting attorney is elected, and for the performance of any such duties in any county other than that in which such prosecuting attorney is elected he shall be paid his actual expenses.

Upon the request of the attorney general the prosecuting attorney shall make a written report of the state and condition of the several causes in which the State is a party, pending in his county, and upon any matters referred to him by the attorney general as provided by law.

W. Va. Code § 7-4-1 (emphasis added)

<sup>8</sup> *West Virginia Constitution*, Art. VII, sec. 1 reads:

The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general, who shall be ex officio reporter of the court of appeals. Their terms of office shall be four years and shall commence on the first Monday after the second Wednesday of January next after their election. They shall reside at the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices and shall perform such duties as may be prescribed by law.

*West Virginia Constitution*, Art. VII, sec. 1.

<sup>9</sup> W. Va. Code § 5-3-1 reads, in relevant part:

The attorney general shall give written opinions and advice upon questions of law, and shall prosecute and defend suits, actions, and other legal proceedings, and generally render and perform all other legal services, whenever required to do so, in writing, by the governor, the secretary of state, the auditor, the state superintendent of free schools, the treasurer, the commissioner of agriculture, the board of public works, the tax commissioner, the state archivist and historian, the commissioner of banking, the adjutant general, the director of the division of environmental protection, the superintendent of public safety, the state commissioner of public institutions, the commissioner of the division of highways, the commissioner of the bureau of employment programs, the public

“extraordinary circumstances” (like a riot) at a correctional institution, none of these provisions authorize the Attorney General to assist county Prosecuting Attorneys in criminal prosecutions or to initiate

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service commission, or any other state officer, board or commission, or the head of any state educational, correctional, penal or eleemosynary institution; [...]

It is also the duty of the attorney general to render to the president of the Senate and/or the speaker of the House of Delegates a written opinion or advice upon any questions submitted to the attorney general by them or either of them whenever he or she is requested in writing so to do.

W. Va. Code § 5-3-1.

<sup>10</sup> W. Va. Code § 5-3-2 reads, in relevant part:

The attorney general shall appear as counsel for the state in all causes pending in the supreme court of appeals, or in any federal court, in which the state is interested; he shall appear in any cause in which the state is interested that is pending in any other court in the state, on the written request of the governor, and when such appearance is entered he shall take charge of and have control of such cause; he shall defend all actions and proceedings against any state officer in his official capacity in any of the courts of this state or any of the federal courts when the state is not interested in such cause against such officer, but should the state be interested against such officer, he shall appear for the state; he shall institute and prosecute all civil actions and proceedings in favor of or for the use of the state which may be necessary in the execution of the official duties of any state officer, board or commission on the written request of such officer, board or commission; he shall, when requested by the prosecuting attorney of a county wherein a state institution of correction is located, provide attorneys for appointment as special prosecuting attorneys to assist the prosecuting attorney of said county in the prosecution of criminal proceedings when, in the opinion of the circuit judge of said county, or a justice of the West Virginia supreme court of appeals, extraordinary circumstances exist at said institution which render the financial resources of the office of the prosecuting attorney inadequate to prosecute said cases; he may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office, and may require a written report from them of the state and condition of the several causes, in which the state is a party, pending in the courts of their respective counties; he may require the several prosecuting attorneys to perform, within the respective counties in which they are elected, any of the legal duties required to be performed by the attorney general which are not inconsistent with the duties of the prosecuting attorneys as the legal representatives of their respective counties; when the performance of any such duties by the prosecuting attorney conflicts with his duties as the legal representative of his county, or for any reason any prosecuting attorney is disqualified from performing such duties, the attorney general may require the prosecuting attorney of any other county to perform such duties in any county other than that in which such prosecuting attorney is elected and for the performance of which duties outside of the county in which he is elected the prosecuting attorney shall be paid his actual traveling and other expenses out of the appropriation for contingent expenses for the department for which such services are rendered; [...]

W. Va. Code § 5-3-2.

criminal prosecutions without the Prosecuting Attorney. See State ex rel. Matko v. Ziegler, 154 W.Va. 872, 885, 179 S.E.2d 735, 743 (1971).

The Petitioner, however, asserts that the West Virginia Attorney General possesses a common law authority to “assist county prosecutors with criminal prosecutions.” (Petition, p. 12, emphasis added.) This Court recently reversed a long-standing tenet of law in West Virginia that the Attorney General possesses *no* common law powers, see Syl. Pt. 3, State ex rel. Discover Financial Services, Inc. v. Nibert, 231 W.Va. 227, 744 S.E.2d 625 (2013). After more than thirty years absence, common law powers of the Attorney General are recognized again as existing. The Petitioner avails himself of this change in the law to assert a common law power to assist county prosecutors despite the lack of a constitutional or statutory authorization to do so and the express limitation imposed by W. Va. Code § 7-4-1.

In Matko, *supra*, during a time when the Attorney General’s common law powers were not in question, this Court addressed that clause of W. Va. Code § 5-3-2, which reads:

[The Attorney General] may require the several prosecuting attorneys to perform, within the respective counties in which they are elected, any of the legal duties required to be performed by the attorney general which are not inconsistent with the duties of the prosecuting attorneys as the legal representatives of their respective counties; when the performance of any such duties by the prosecuting attorney conflicts with his duties as the legal representative of his county, or for any reason any prosecuting attorney is disqualified from performing such duties, the attorney general may require the prosecuting attorney of any other county to perform such duties in any county[.]

This Court held that an order of the Attorney General that the prosecuting attorney of Kanawha County be appointed as a special prosecuting attorney for a criminal case in Harrison County was not binding on the circuit court. The Attorney General’s order was not binding because that clause of W. Va. Code § 5-3-2 was inapplicable to a criminal prosecution, over which the Attorney General had no responsibility. This Court observed the distinction in duties between the Attorney General and the county Prosecuting Attorney. The Attorney General did not possess authority over criminal prosecutions; the Prosecuting Attorney did. Therefore, the Attorney General could not require a Prosecuting Attorney to perform duties that were not the Attorney General’s responsibility to perform in the first place:

This statute applies to the performance by the prosecuting attorneys of the counties of the duties required to be performed by the attorney general and not to the performance of the ordinary duties of the prosecuting attorney as such. As the duties of the prosecuting attorney of Harrison County in connection with the indictment and prosecution of the petitioner were not duties which the attorney general was required to perform the statute did not apply[.]

State ex rel. Matko v. Ziegler, *supra*, 154 W.Va. 872, 885, 179 S.E.2d 735, 743.

Well before Matko was decided, and over one hundred years ago, this Court recognized the distinction between the Attorney General and the Prosecuting Attorney when it comes to criminal prosecutions:

The prosecuting attorney of a county has authority, independent of the Attorney General, to institute and prosecute all criminal actions and proceedings, cognizable in the courts of his county, but has no such power or authority, respecting the prosecution of civil proceedings on the part of the state, beyond that expressly conferred by statute.

Syl. Pt. 1, State v. Ehrlick, 65 W.Va. 700, 64 S.E. 935 (1909). The issue decided in Ehrlick was whether the Prosecuting Attorney had the legal authority to initiate a civil suit to enjoin alleged criminal conduct. This Court held that the Prosecuting Attorney did not have such authority in civil proceedings, which authority was possessed by the Attorney General.

The Ehrlick Court recognized that the Attorney General historically possessed certain common law powers, but that that such powers may be limited by statute: “As the chief law officer of the state, the Attorney General is clothed and charged with all the common-law powers and duties pertaining to his office, *except in so far as they have been limited by statute.*” Syl. Pt. 2, *id.* (emphasis added). In West Virginia, a specific statutory limitation to any common law powers that the Attorney General may possess is that the powers and duties of criminal prosecution are invested in the county Prosecuting Attorneys. W. Va. Code § 7-4-1.

Ehrlick recognized that certain powers once belonging to the Attorney General were removed by statute and given to the county Prosecuting Attorney:

The business, once pertaining actually as well as theoretically to the office of Attorney General, has been divided between the two offices

for purposes of convenience. We may say the office of prosecuting attorney has been carved out of that of Attorney General and made an independent office, having exclusive control, to some extent, of business of the state, arising within the county.

Id., at 64 S.E. 936.

Exclusive control to attend to the criminal business of the State to initiate prosecutions and secure convictions was provided by the legislature to the Prosecuting Attorney. W. Va. Code § 7-4-1; State ex rel. Skinner v. Dostert, *supra*.

Additional legislative enactments demonstrate the intention to maintain that authority with county prosecutors even when the elected Prosecuting Attorney is unable to act or disqualified. The appointment of special prosecuting attorneys is legislatively mandated to be made from the pool of the fifty-five elected Prosecuting Attorneys and their assistants. W. Va. Code § 7-4-6(d), (e) and (f);<sup>11</sup> W. Va. Code § 7-7-8. The Attorney General is not included in the pool.

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<sup>11</sup> W. Va. Code § 7-4-6 reads, in relevant part:

(d) The duties and responsibilities of the institute, as implemented by and through its executive council and its executive director, shall include the following:

(1) The provision for special prosecuting attorneys to pursue a criminal matter, a juvenile delinquency matter or a matter involving child abuse neglect pursuant to chapter forty-nine of this code, or in any matter wherein a special prosecutor previously appointed has failed to take any action thereon within such time as the Executive Director deems unreasonable, not to exceed three terms of court from the date on which the special prosecutor was appointed: *Provided*, That such replacement or original appointment may be any attorney with a license in good standing in this state in any county upon the request of a circuit court judge of that county and upon the approval of the executive council; [...]

(e) *Each prosecuting attorney is subject to appointment by the institute to serve as a special prosecuting attorney in any county where the prosecutor for that county or his or her office has been disqualified from participating in a particular criminal case, a juvenile delinquency matter or a matter involving child abuse neglect pursuant to chapter forty-nine of this code, or in any matter wherein a special prosecutor previously appointed has failed to take any action thereon within such time as the Executive Director deems unreasonable, not to exceed three terms of court from the date on which the special prosecutor was appointed: Provided*, That such replacement or original appointment may be any attorney with a license in good standing in this state. *The circuit judge of any county of this state, who disqualifies the prosecutor or his or her office from participating in a particular criminal case, a juvenile delinquency matter or a*

In Ehrlick, this Court clearly delineated the difficulty that would follow if the powers of the Attorney General and the county Prosecuting Attorney were “coextensive and concurrent:”

Concurrence would produce interference, conflict, and friction in many instances, delaying the disposition of business to the detriment of the state. We think it plain therefore that, in a practical sense, the two offices are distinct and independent; but all the business does not seem to have been divided. Part of the civil business of the state in the county seems to have been reserved to the Attorney General.

Id., at 64 S.E. 937.

The criminal business of the State belongs to the county Prosecuting Attorney. W. Va. Code § 7-4-1. Part of the civil business of the State is reserved to the Attorney General. W. Va. Code §§ 5-3-1 and -2. Another part of the civil business is granted to the county Prosecuting Attorneys. W. Va. Code § 7-4-1.

Despite the difficulties identified by this Court, the Petitioner seeks to expand his powers into the counties’ criminal business, where historically he has never been, and where by constitution and statute the local county prosecutor is the sole authority. A single line from Ehrlick appears to be the basis for the

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*matter involving child abuse or neglect pursuant to chapter forty-nine of this code in that county, shall seek the appointment by the institute of a special prosecuting attorney to substitute for the disqualified prosecutor. The executive director of the institute shall, upon written request to the institute by any circuit judge as a result of disqualification of the prosecutor or for other good cause shown, and upon approval of the executive council, appoint a prosecuting attorney to serve as a special prosecuting attorney. The special prosecuting attorney appointed shall serve without any further compensation other than that paid to him or her by his or her county, except that he or she is entitled to be reimbursed for his or her legitimate expenses associated with travel, mileage and room and board from the county to which he or she is appointed as a prosecutor. The county commission in which county he or she is special prosecutor is responsible for all expenses associated with the prosecution of the criminal action. No person who is serving as a prosecuting attorney or an assistant prosecuting attorney of any county is required to take an additional oath when appointed to serve as a special prosecuting attorney.*

*(f) The executive director of the institute shall maintain an appointment list that shall include the names of all fifty-five prosecuting attorneys and that shall also include the names of any assistant prosecuting attorney who wishes to serve as a special prosecuting attorney upon the same terms and conditions as set forth in this section. The executive director of the institute, with the approval of the executive council, shall appoint special prosecuting attorneys from the appointment list for any particular matter giving due consideration to the proximity of the proposed special prosecuting attorney's home county to the county requesting a special prosecutor and giving due consideration to the expertise of the special prosecuting attorney.*

W. Va. Code § 7-4-6 (emphasis added).

Petitioner's assertion of common law power: "No doubt the Attorney General may assist the prosecuting attorney in the prosecution of such business, or perform it himself, in case of the nonaction of the prosecuting attorney, but he cannot displace that officer." *Id.*, at 936. This Court did not specify what "business" was meant.

Looking at the body of law as a whole, if this line from Ehrlick has any meaning today, it should not be read as suggesting a residual common law power of the Attorney General as to criminal prosecutions. This Court's holding in Matko recognizes the statutory limitation of the Attorney General's power as to criminal prosecution pursuant to W. Va. Code § 5-3-2. *West Virginia Constitution*, Art. IX, sec. 1, creates the county Prosecuting Attorney as a constitutional officer. The statutory authority of the Prosecuting Attorney to attend to the criminal business of the State is found in W. Va. Code § 7-4-1. The procedure for obtaining a special prosecuting attorney is governed by W. Va. Code § 7-4-6. It is a stretch for the Petitioner to presume that Ehrlick in 1909 reserved for the Attorney General under today's laws a residual common law power to involve himself in criminal prosecutions in the counties.

The Petitioner cites to nothing in the state constitution or any statute that reserved to the Attorney General such a power. The only time the *amicus curiae* finds this Ehrlick line quoted by this Court was shortly after it was decided, in Denham v. Robinson, 72 W. Va. 243, 77 S.E. 970, 972-973 (1913). In Denham, this Court rejected the proposition that the Attorney General's consent to the Prosecuting Attorney's nolle prosequi of certain criminal embezzlement charges negated the circuit judge's authority to deny the nolle. This Court held that the Attorney General's consent added no additional force to the motion. Denham admittedly involved an appeal from a criminal case where the Attorney General had some peripheral involvement. This Court, however, rejected the Attorney General's involvement as adding nothing to the proceeding. More than one hundred years have passed since Ehrlick was decided, yet the Petitioner cites no proclamation by this Court, or practice in this State, of the Attorney General assuming any power of criminal prosecution not specifically authorized by statute.<sup>12</sup> Matko, *supra*, holds

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<sup>12</sup> The case of Coal & Cokery Co., v. Conley, 67 W. Va. 129, 67 S.E. 613 (1910), also relied upon by the Petitioner, sheds no light on this issue. That case simply allowed to stand a civil injunction suit to

that the Attorney General has no duty as to criminal prosecution under W. Va. Code § 5-3-2. That duty plainly is the Prosecuting Attorney's exclusive province. W. Va. Code § 7-4-1.

Since the Prosecuting Attorney has "exclusive control, to some extent, of business of the state, arising within the county," but "part" of the civil business of the state is reserved to the Attorney General, to the extent that the "assistance" line from Ehrlick has any continuing viability, it follows that any areas of assistance most logically relate to the civil business of the state, as designated by statute, and not the criminal business.

Seventy-three years after Ehrlick, this Court revisited the Attorney General's common law powers in a dispute between the Attorney General and the Secretary of State over the duty of representation in a civil suit. Manchin v. Browning, 170 W.Va. 779, 296 S.E.2d 909 (1982), holds that "The powers and duties of the Attorney General are specified by the constitution and by rules of law prescribed pursuant thereto." Syl. Pt. 1, *id.* Manchin ruled that the powers of the Attorney General are specified by the constitution and statute, not the common law, and overruled Ehrlick as to this point. Manchin, 170 W.Va. 785, 296 S.E.2d 909 (1982).

Manchin did not overrule Ehrlick's holding that the Attorney General's power may be limited by statute. Manchin explained how, under the constitutional and statutory scheme, the Attorney General's power has been limited by the legislature. Manchin holds that the Attorney General is not the *law enforcement officer* for the State because the statutory scheme vested that power with the Governor and the county Prosecuting Attorneys:

Article 7, section 5 of our constitution provides: "The chief executive power shall be vested in the governor, who shall take care that the laws be faithfully executed." This provision plainly mandates that the chief law officer of the state, in the sense of "law enforcement" officer, is the Governor. Legislative enactment bears this out, for the Governor is ultimately the commander of all law enforcement agencies of the state, including the Department of Public Safety, W.Va.Code § 15-2-1 *et seq.*;

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prevent enforcement of a statute limiting the sums railroads could charge passengers. The suit named the Attorney General and the Prosecuting Attorney of Kanawha County as respondents. This Court found them to be suitable respondents, as representatives of the State generally charged with enforcement of its laws. There is no reference in the body of the opinion that there was any actual criminal prosecution brought by either respondent. *Id.*, 67 S.E. 613, 620.

the military forces of the state, W.Va. § 15–1–2; inspectors of the Department of Labor, W.Va.Code § 21–1–1 *et seq.*; security officers of the Department of Finance and Administration, W.Va.Code § 6A–1–1 *et seq.*; conservation officers, W.Va.Code § 20–7–1 *et seq.*; the Public Service Commission, W.Va.Code § 24–3–1 *et seq.*; and the Department of Highways, W.Va.Code § 17–2A–1 *et seq.*

The Attorney General is not a law enforcement officer in the same sense as the Governor. Nor has the Attorney General of West Virginia the same place in the law enforcement chain of command as does the Attorney General of the United States who, after the President, is the chief law enforcement officer of the federal system. *A series of West Virginia cases clearly indicates that the traditional law enforcement function associated with the office of Attorney General in Great Britain, colonial British North America and the federal government of the United States, is exercised in West Virginia by the respective county prosecuting attorneys.* State ex rel. Matko v. Ziegler, 154 W.Va. 872, 179 S.E.2d 735 (1971), *overruled on other grounds*, Smoot v. Dingess, 160 W.Va. 558, 236 S.E.2d 468 (1977); Denham v. Robinson, 72 W.Va. 243, 77 S.E. 970 (1913); State v. Ehrlick, *supra*.

Manchin, at 170 W.Va. 779, 786-787, 296 S.E.2d 909, 916-917 (emphasis added, code book dates removed).

This language from Manchin is significant. Last year, this Court changed tack and once again recognized that the Attorney General possesses certain common law powers, unless those powers are expressly restricted or limited by statute, holding:

The Office of Attorney General retains inherent common law powers, when not expressly restricted or limited by statute. The extent of those powers is to be determined on a case-by-case basis. Insofar as the decision in Manchin v. Browning, 170 W.Va. 779, 296 S.E.2d 909 (1982), is inconsistent with this holding, it is expressly overruled.

Syl. Pt. 3, State ex rel. Discover Financial Services, Inc. v. Nibert, *supra*, 231 W.Va. 227, 744 S.E.2d 625 (2013).<sup>13</sup>

Discover's overruling of Manchin's denial of the existence of any common law powers of the Attorney General did not dismantle Manchin's analysis of why the Attorney General is not the law

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<sup>13</sup> Just as in Manchin, the Discover case did not involve the respective duties of the Attorney General and the county Prosecuting Attorneys. Discover was directed to whether the Attorney General had common law power to appoint outside counsel as "special assistant attorneys general" for specific litigation when the legislature made no provision for such appointments. This Court found that it did, but did not speak to what other common law powers the Attorney General now possesses.

enforcement officer for the State, those powers having been statutorily granted to the Governor and the county Prosecuting Attorneys. Discover did specifically recognize that the Attorney General's powers may be expressly restricted or limited by statute, and will consider them on a case-by-case basis. <sup>14</sup> W. Va. Code § 7-4-1 is the express restriction or limitation of any common law powers that the Attorney General may have possessed, in that Prosecuting Attorneys are given the legislative authority to attend to the criminal business of the State.

The Petitioner's citation to cases from other jurisdictions, while they reference the historical common law powers of the Attorney General and how those powers apply in those states, are of limited value. These cases demonstrate that the majority of such states are like West Virginia in that they recognize that the Attorney General's common law powers may be limited by statute. Each state has its own peculiar statutory scheme prescribing the authority of the Attorney General and/or Prosecuting Attorney in criminal prosecutions, which limits their value for this Court's analysis. (State ex rel. Stephan v. Reynolds, 234 Kan. 574, 673 P.2d 1188 (1984)(unlike West Virginia, the Kansas Attorney General is the chief law enforcement officer of the State, State v. Finch, 128 Kan. 665, 280 P. 910 (1929), and is statutorily designated as one of the state's prosecuting attorneys); Com. v. Kozlowsky, 238 Mass. 379, 131 N.E. 207 (1921)(approving the statutory authority of Attorney General to attend deliberations of the grand jury as consonant with the Attorney General's common law powers); Dupree v. State, 14 Okla.Crim. 369, 171 P. 489 (Okla.Crim.App. 1918)(Attorney General's statutory authority to prosecute criminal cases when requested by the Governor was recognized, but held not to abrogate the district attorney's authority); Fieger v. Cox, 274 Mich.App. 449, 734 N.W.2d 602 (Mich.App., 2007)(recognized the Attorney General's statutory authority to intervene in any civil or criminal matter, either as requested by the governor or legislature, or in the Attorney General's own discretion, and held that the Attorney General possesses all the authority of a prosecuting attorney unless that authority has been removed by

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<sup>14</sup> The only case of this Court found to date citing to Discover's holding about the common law powers is Cavalry SPV I, LLC v. Morrisey, 232 W.Va. 325, 752 S.E.2d 356 (2013), where this Court declined to consider the extent of Attorney General's common law powers since the Attorney General's issuance of investigative subpoenas in that matter was expressly authorized by statute.

the legislature); People v. Buffalo Confectionery Co., 78 Ill.2d 447, 401 N.E.2d 546 (1980)(recognized the Attorney General’s common law powers could be added to by the legislature but could not be subtracted, and recognized the statutory authority to assist prosecuting attorneys in criminal proceedings).

The only determination that this Court can make on the common law powers retained by the Attorney General in West Virginia must be based on West Virginia’s constitutional and legislative framework.

**3. The Prosecuting Attorneys Association asks this Court to Deny the Writ of Prohibition.**

This Court recognizes the county Prosecuting Attorney as the constitutional officer with the authority to initiate prosecutions and secure convictions. State ex rel. Skinner v. Dostert, *supra*. W. Va. Code § 7-4-1 is the statutory grant of that authority from the legislature. The legislature has also provided a statutory mechanism for the appointment of special prosecuting attorneys, which pulls from the pool of county Prosecuting Attorneys. W. Va. Code § 7-4-6. The legislature makes clear its intention that the criminal business of the State is to be attended to by the county Prosecuting Attorneys, not the Attorney General. If the Attorney General is found to have any common law power to be involved in criminal prosecutions in the State, the Association respectfully asks this Court to hold that the legislature has granted that exclusive authority to the county Prosecuting Attorneys.

**III. A WRIT OF PROHIBITION IS INAPPROPRIATE BECAUSE THE ATTORNEY GENERAL CANNOT MEET THE FACTORS FOR ISSUANCE OF THE WRIT AND BECAUSE OTHER ADEQUATE REMEDIES ARE AVAILABLE.**

Pursuant to Article 8, Section 3 of the West Virginia Constitution, “The supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari.” Rule 16(a) of the Rules of Appellate Procedure governs “all cases seeking a writ of . . . prohibition . . . under the original jurisdiction of the Supreme Court.” Writs of prohibition are further governed by West Virginia Code § 53-1-1 which provides that, “The writ of prohibition shall lie as a matter or right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers.” It appears that the Petitioner is seeking this writ of prohibition under Article 8, Section 3 of the Constitution, Rule 16 of the Rules of

Appellate Procedure, or West Virginia Code § 53-1-1, however, that authority is not specified within the Petition. The petition<sup>15</sup> seeks to prohibit ODC and the Board, as a quasi-judicial entity, from enforcing ethical opinions written in response to queries posed by the Petitioner.

In State ex rel. Tucker County Solid Waste Authority v. West Virginia Div. of Labor, 222 W.Va. 588, 668 S.E.2d 217 (2008), a writ of prohibition was sought against the Division of Labor’s hearing examiner but denied by this Court. Syllabus Point 2 of Tucker holds that:

“In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitution, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” *Syllabus Point 1, Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

*Syllabus Point 1, State ex rel. United States Fidelity and Guaranty Company v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995). Tucker also set forth five factors to be considered in granting a writ of prohibition in Syllabus Point 1 and quoted an earlier holding of the court:

“In determining whether to entertain and issue the writ of prohibition for cases not involving the 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).

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<sup>15</sup> West Virginia Code § 53-1-3 also requires that “application for a writ of mandamus or a writ of prohibition shall be on verified petition.” The Petition herein is verified by counsel, but not by the Petitioner himself.

While it is true that the Attorney General cannot obtain relief from any other means, as should be considered in in the first factor, however, that lack of relief is based upon his complete lack of standing to bring this controversy before the court. The first factor also appears to be inextricably intertwined with whether there are other adequate available remedies.

This court has recognized that, “As a general rule any person who will be *affected or injured* by the proceeding which he seeks to prohibit is entitled to apply for a writ of prohibition; but a person who has no interest in such proceeding and whose rights will not be affected or injured by it can not do so.” *Syllabus Point 6, State ex rel. Linger v. County Court of Upshur County*, 150 W.Va. 207, 144 S.E.2d 689 (1965)(emphasis added); *Syllabus Point 15, Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 7872 (1984). Here the attorney general seeks to prohibit ODC and the Board from enforcing previously-issued ethics opinions. The attorney general seeks this relief so that he can perform the constitutional and statutory functions which are instead designated to county officials. The attorney general is already mandated to perform a number of separate functions as part of the executive branch of West Virginia’s government.

He will not be *injured* by being ethically prohibited from performing the duties of another Constitutional official. The only way in which he will be *affected* is by his inability to perform other officials’ work on their behalf. Considering the numerous other statutory duties imposed upon the attorney general it appears curious that he is so intent on seeking the authority to perform even more functions. It is difficult to reach any conclusion other than that articulated by ODC in its “Response to Motion for Expedited Relief” that the “Petitioner seeks to expand the powers of his office and is frustrated by the Board’s opinion.” However, adequate remedies are available to prosecutors who more clearly would be injured or affected by having another constitutional officer perform their statutory functions.

Second, it is difficult to imagine how the attorney general will be damaged or prejudiced in a way that is not correctable on appeal. The ethics opinions issued by ODC and the Board caution the attorney general of the potential to violate ethical rules should he or his deputies perform the functions of a county prosecuting attorney. Nothing mandates that he or his deputies perform those functions. Based upon the

singular written request for “assistance” cited by the Petitioner it does not appear as though prosecutors across the state are clamoring for the attorney general to relieve them of their responsibilities of office. The authorization of this Amicus Curiae brief by the Association rather supports the contrary position, that prosecutors do not wish to have their constitutional or statutory authority usurped by other state officials.

Third, the lower tribunal, the Board, was not clearly erroneous as a matter of law. In State ex rel. York v. West Virginia Office of Disciplinary Counsel, 213 W.Va. 183, 744 S.E.2d 293 (2013), this Court declined to issue a writ of prohibition against the ODC and the Board. There the Court stated that pursuant to its holding in State ex rel. Askin v. Dostert, 170 W.Va. 562, 295 S.E.2d 271 (1982), that it holds “the exclusive authority to define, regulate and control the practice of law in West Virginia.” Nonetheless, the York court noted that ODC and the Board, as the “state’s disciplinary authorities”, have “the obligation . . . to investigate issues of alleged attorney misconduct.” 213 W.Va. at 188, 744 S.E.2d at 298. While no attorney misconduct has been alleged here, ODC and the Board, in conformity with their obligation to offer guidance to attorneys as well as to investigate complaints, provided an informal advisory opinion on the matter, which informal opinion has served as the basis for this petition. More simply, the state’s disciplinary authorities issued an opinion which was requested by the attorney general, who then found the opinion unsatisfactory. However, the Attorney General’s dissatisfaction with the Board’s opinion, which is grounded in the Rules of Professional Conduct, does not make that opinion clearly erroneous as to a matter of law.

Fourth, as to whether the Board’s informal opinion constitutes an “oft repeated error or manifests persistent disregard for either procedural or substantive law” is best addressed by the Board itself.

Fifth, as to whether the lower tribunal’s informal opinion raises new and important problems or issues of law of first impression, it appears that the only thing that is “new” is the presentment of the issue by this attorney general. In the 151 years of West Virginia’s existence prosecuting attorneys and the attorney general have coexisted in their present form for 142 years, since the adoption of the Constitution in 1872, without this issue being raised.

In short, in the view of the Association the Petitioner is unable to meet any of the four factors for granting a writ of prohibition which are addressed herein, and a writ of prohibition should not issue.

**REQUEST FOR RELIEF**

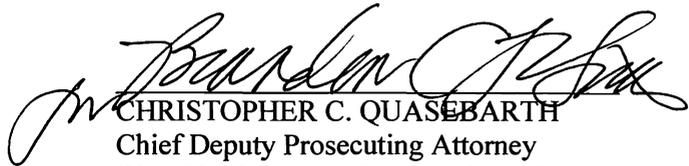
WHEREFORE, for the foregoing reasons, the Association requests that this Court deny the writ of prohibition sought herein.

Respectfully submitted,  
WEST VIRGINIA PROSECUTING ATTORNEYS ASSOCIATION,  
*Amicus Curiae,*

By counsel:



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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA**

**STATE OF WEST VIRGINIA, EX REL.  
PATRICK MORRISEY,  
ATTORNEY GENERAL OF WEST VIRGINIA,  
Petitioner**

v.

**Supreme Court Docket No.: 14-0587**

**WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL,  
WEST VIRGINIA LAWYER DISCIPLINARY BOARD,  
Respondents.**

**CERTIFICATE OF SERVICE**

I, Brandon C. H. Sims, Assistant Prosecuting Attorney for Jefferson County, West Virginia and counsel for the West Virginia Prosecuting Attorneys Association do hereby certify that on this 18<sup>th</sup> day of July, 2014, I have served a true copy of the foregoing *West Virginia Prosecuting Attorneys Association Amicus Curiae Brief in Support of the Respondents* by hand delivery upon:

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