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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-1114

STATE OF WEST VIRGINIA EX REL.  
BETSY JIVIDEN, COMMISSIONER OF THE  
WEST VIRGINIA DIVISION OF  
CORRECTIONS AND REHABILITATION,

**FILE COPY**

*Petitioner,*

v.

THE HONORABLE JOANNA TABIT,  
JUDGE OF THE CIRCUIT COURT OF  
KANAWHA COUNTY, WEST VIRGINIA,  
and MIGUEL ANGEL DELGADO,

*Respondents.*

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**BRIEF OF RESPONDENT MIGUEL ANGEL DELGADO IN OPPOSITION TO  
PETITION FOR WRIT OF PROHIBITION**

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Lydia C. Milnes (W. Va. State Bar No. 10598)  
Jennifer S. Wagner (W. Va. State Bar No. 10639)  
Mountain State Justice, Inc.  
325 Willey Street  
Morgantown, West Virginia 26505  
Telephone: 304-326-0188  
Email: [lydia@msjlaw.org](mailto:lydia@msjlaw.org)  
*Counsel for Respondent Delgado*

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## INTRODUCTION

In its petition for a writ of prohibition against the Honorable Judge Joanna Tabit, the Commissioner of the West Virginia Division of Corrections and Rehabilitation (hereinafter, “the Agency”), asks this Court to hold that the trial court exceeded its legitimate authority by issuing a writ of habeas corpus ad testificandum compelling the transport of an inmate to trial. Because trial courts possess the inherent authority to issue such writs, this petition involves a blatant attempt by the Agency to usurp a fundamental power of the judiciary, thereby violating the Separation of Powers Clause of the West Virginia Constitution. When presented with this issue below, Judge Tabit declined to adopt the agency’s proffered unconstitutional reading of the statute, and instead interpreted the subject statute in a manner that maintained its constitutionality, as directed by the canons of statutory interpretation. Because Judge Tabit did not exceed her legitimate authority by granting the writ of habeas corpus ad testificandum, this Court should decline to issue a writ of prohibition. Alternatively, the statute at question, which purports to divest the judiciary of an inherent authority, is unconstitutional on its face and thus void, such that the ruling below was proper.

Under section 25-1A-5(c) of the West Virginia Code, Donnie Ames, who is the Superintendent of Mount Olive Correctional Complex and Jail (“MOCCJ”) and also a defendant in the underlying lawsuit, submitted an affidavit stating he would not transport the plaintiff in the case, Mr. Delgado, to the court for trial. Reciting, nearly verbatim, the language of the statute, Superintendent Ames stated that such transport would pose a substantial risk of escape; he did not, however, provide any facts or evidence to support this proposition. In response, Mr. Delgado proffered a sworn affidavit that he has been transported by the Agency countless times over the course of years for medical appointments without any issue. In hopes of better understanding the

issues raised, Mr. Delgado further issued a subpoena requesting the evidence upon which Superintendent Ames based his affidavit. Rather than providing any evidence or explanation for his assertions, the Superintendent moved to quash the subpoena and provided no response to counter Mr. Delgado's sworn affidavit.

The Agency argued to the trial court, as it does now to this Court, that Superintendent Ames was not required to provide any explanation or evidence, because section 25-1A-5(c) of the West Virginia Code delegates to the Executive Branch the discretion of when to permit a trial court to issue a writ of habeas corpus ad testificandum. Such discretion has historically been the sound province of the trial court, as part of its inherent authority to conduct proceedings in a fair and orderly fashion. Nevertheless, the Agency contends that the trial court has no discretion in this matter, and is bound by the determination of the Agency with regard to Mr. Delgado's transport.

In considering the issues, albeit with a limited record due to Superintendent Ames's "barebones" affidavit, Judge Tabit found that while Mr. Delgado has no constitutional right to appear in court for his civil trial, transport to trial was appropriate in this matter, and she was confident that her court security could ensure the safety of the court and the public. Thus, she granted Mr. Delgado's motion for a writ of habeas corpus ad testificandum and ordered the Agency to transport him to court for trial. She further ordered that Mr. Delgado would remain in prison attire with shackles during the trial, further limiting any risk of escape. The Agency now seeks a writ prohibiting Judge Tabit from issuing the writ of habeas corpus ad testificandum. Because the Agency fails to meet the standard for issuance of a writ of prohibition, the petition should be denied.

## ISSUE PRESENTED

Whether the trial court exceeded its authority by issuing a writ of habeas corpus ad testificandum to compel the West Virginia Division of Corrections and Rehabilitation to transport an inmate plaintiff to court for a civil trial.

## STATEMENT OF THE CASE

### **A. Factual Background**

Respondent herein and plaintiff below, Miguel Delgado, is an inmate at the Mount Olive Correctional Complex and Jail (“MOCCJ”), in Fayette County, West Virginia. (DCR App. at 7.) In 2004, Mr. Delgado was convicted of first degree murder and sentenced to life in prison. (*Id.*) He has been incarcerated at MOCCJ since approximately 2006. (*Id.* at 102-03.) Mr. Delgado is currently housed in general population at MOCCJ, meaning he poses no greater security risk than any other inmate in that facility.<sup>1</sup>

Prior to being transferred to MOCCJ, Mr. Delgado was housed for approximately four years at Eastern Regional Jail in Martinsburg, West Virginia. (DCR App. at 103.) While an inmate at Eastern Regional, Mr. Delgado had subscriptions to several men’s entertainment magazines, including “Maxim” and “Stuff.” (*Id.*) After Mr. Delgado received several editions, the administration at Eastern Regional determined that the magazines were inappropriate, and terminated Mr. Delgado’s subscriptions. (*Id.*) Among other things, the jail administrators objected to several articles that were contained in issues of the magazines, including an article entitled “The World’s Wildest Prison Escapes,” published in Maxim, and an article entitled “How to Escape

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<sup>1</sup> While most inmates at MOCCJ are housed in general population, inmates that the prison administration are punishing or who they believe pose a security risk are housed in single-cell isolation. At the time of the underlying incident, Mr. Delgado was housed in segregation, but he has since been moved back to the general population.

from Restraints,” referring to the use of handcuffs in bedroom play, published in Stuff. (DCR App. at 102-103.)

In response to the jail administration’s decision to cancel his subscriptions to the men’s magazines, Mr. Delgado filed a federal lawsuit in the Northern District of West Virginia, entitled Delgado v. Rudloff, et al., Civ. Act. No. 3:04cv29 (N.D.W. Va. March 31, 2004). (DCR App. at 103, 147.) The Maxim and Stuff magazine articles were discussed in the complaint, and copies of the articles were attached to the complaint as exhibits. (DCR App. at 123.) Mr. Delgado maintained copies of the complaint and exhibits in his legal paperwork. (DCR App. 103.)

After being transferred to MOCCJ, Mr. Delgado was issued a disciplinary write-up for “Violation 1.01 – Escape” in July 2006. (DCR App. at 105.) The basis for the write-up was his possession of legal documents containing the two above-referenced articles. (DCR App. at 102, 105.) Mr. Delgado pled not guilty and explained that he had the articles in his possession because they were part of his legal paperwork; nevertheless, he was found guilty by the prison magistrate and sentenced to sixty days of punitive segregation and loss of privileges. (Id.)

Since July 2006, Mr. Delgado has never had another write-up or disciplinary charge relating to escape. (DCR App. at 103.) Mr. Delgado has, however, been transported out of the prison facility approximately fifteen to twenty times for various medical appointments, including to Montgomery General Hospital in Montgomery, West Virginia, and West Virginia University’s Ruby Memorial Hospital in Morgantown, West Virginia. (DCR App. at 103.) During several of these appointments, Mr. Delgado’s handcuffs and leg shackles have been removed to permit medical evaluation and treatment. (DCR App. at 103.) Mr. Delgado has had no disciplinary incidents during any of the excursions. In short, Mr. Delgado has never attempted to escape from prison. (DCR App. at 102.)

## B. Procedural History

Mr. Delgado filed this lawsuit in October 2015, alleging correctional officers at MOCCJ used excessive force when they sprayed him with Oleoresin Capsicum while he was locked alone in a solitary confinement cell.<sup>2</sup> The defendants in the lawsuit include the Superintendent of MOCCJ, Donnie Ames, against whom Mr. Delgado seeks injunctive relief to ensure similar excessive force is not used against him in the future. Following the circuit court's denial of summary judgment in March 2017, the defendants initiated an interlocutory appeal challenging the denial of qualified immunity. In March 2019, this Court issued a lengthy opinion affirming Judge Tabit's rulings and remanding the case for trial. Ballard v. Delgado, 241 W. Va. 495, 826 S.E.2d 620 (2019).

Following remand, trial was set for November 18, 2019. On September 6, 2019, Superintendent Ames submitted an affidavit to the trial court pursuant to West Virginia Code section 25-1A-5(c), which provides:

No court may compel the commissioner of the division of corrections or warden of any correctional facility operated by the division of corrections or the executive director of the West Virginia regional jail and correctional facility authority or any administrator of any facility operated by the West Virginia regional jail and correctional facility authority to transport to court any inmate having a maximum security classification if the warden or administrator of the facility tenders to the court an affidavit attesting to the custody level of the inmate and *stating that, in the warden's or administrator's opinion, the inmate possesses a substantial risk of escape if transported*. If a warden or administrator files an affidavit, then the warden or administrator shall, upon demand of the court, provide suitable room to conduct any trial or hearings at which an inmate's presence is required. The warden or administrator shall allow the court, counsel and all court personnel access to the correctional facility to conduct the proceedings the court considers necessary.

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<sup>2</sup> Details regarding the underlying claims in this case have been set forth comprehensively in this Court's opinion in Ballard v. Delgado, 241 W. Va. 495, 826 S.E.2d 620 (2019). Because this Court is already familiar with these facts, and because these facts are not relevant to this writ of prohibition, Respondent Delgado will not restate them here.

W. Va. Code § 25-1A-5(c) (emphasis added). The affidavit simply regurgitated the language of the statute. Specifically, Superintendent Ames stated that, in his opinion, Mr. Delgado “possesses a substantial risk of escape if transported.” (DCR App. at 7.) The affidavit contains no evidentiary basis for this assertion; it simply references Mr. Delgado’s underlying criminal conviction (which is now over fifteen years old), his status as having a maximum security classification (like all inmates housed at MOCCJ), and makes a vague reference to Mr. Delgado having been previously charged with “escape related administrative charges.” (Id.) Superintendent Ames provided no documentation or explanation of the alleged escape-related administrative charges. (Id.) A cover letter submitted with the affidavit indicated that Defendant Ames and the WVDCR were “prepared to provide a suitable room for the conducting of the trial of this matter at Mount Olive Correctional Complex and Jail, Mount Olive, West Virginia.” (Id. at 6.)

Seeking to understand the basis for Superintendent Ames’s assertions, on September 13, 2019, Mr. Delgado, by counsel, filed a notice of intent to serve a subpoena to Defendant Ames, requesting “all documents relied upon or relating to” the affidavit asserting the Mr. Delgado posed a risk of escape, as well as documentation of every instance in which Mr. Delgado had been transported out of MOCCJ since his incarceration at that facility. (DCR App. at 159-60.) Defendant Ames refused to respond to the subpoena with any supporting documentation, and instead sought a protective order on September 30, 2019. (Id. at 148.)

On September 16, 2019, Mr. Delgado filed objections to the Ames affidavit, and on September 25, 2019, he filed a supplement to that objection, and attached a sworn affidavit. (DCR App. at 93-147.) In his affidavit, Mr. Delgado explained that the only “escape-related” administrative charge he has ever received is the charge from 2006, related to his possession of legal paperwork containing the men’s magazine articles. (Id. at 102-04.) He attached copies of the

disciplinary write-up as well as the 2004 lawsuit referencing the articles to his affidavit. (Id. at 105-147.) Mr. Delgado additionally stated, under oath, that he has been transported out of MOCCJ for medical appointments on numerous occasions without incident throughout the years, and further stated that he has never attempted to escape from any prison. (Id. at 102-03.)

On October 28, 2019, Mr. Delgado filed a petition for a writ of habeas corpus ad testificandum, asking the circuit court to compel Superintendent Ames to transport him to trial. (DCR App. at 204-215.) In his petition, Mr. Delgado argued to the circuit court that Superintendent Ames's interpretation of section 25-1A-5(c) of the West Virginia Code violated the separation of powers doctrine as well as Mr. Delgado's due process rights. (Id.) On the same day, Mr. Delgado issued an additional subpoena to Defendant Ames, seeking to compel Ames's attendance at the pretrial hearing to enable the circuit court to hear from him directly about the factual basis for his affidavit. (DCR App. at 203). Mr. Delgado further filed a motion in limine seeking a ruling permitting him to appear at trial in non-prison attire, and without shackles or handcuffs. (DCR App. at 3.)

On November 6, 2019, one day before the pretrial hearing, Defendant Ames filed a motion to quash both of Mr. Delgado's subpoenas. (DCR App. at 169-195.) Despite that no ruling had issued quashing the subpoena, Defendant Ames refused to comply with the subpoena and did not appear at the pretrial hearing the following day.

At a pretrial hearing conducted on November 7, 2019, the circuit court considered the issues regarding transporting Mr. Delgado to trial, as well as Mr. Delgado's request to appear at trial in non-prison attire and without cuffs or shackles. (DCR App. at 218.) The circuit court noted that Superintendent Ames's affidavit was "bare bones," and that he merely quoted the statute instead of providing a factual basis for the underlying circumstances as to why he believed that

Mr. Delgado would create such a risk. (Id. at 218, 223.) The circuit court further found that it is within the court's constitutional authority to conduct the trial as it sees fit, and that it believed Mr. Delgado's attendance at trial was appropriate in this instance. (Id. at 219.) As a safety precaution, the circuit court denied Mr. Delgado's motions to appear in non-prison attire and ruled that he must remain shackled during trial. (Id. at 218-19.) The circuit court noted that its court security staff were regularly asked to provide security in trials for individuals accused of crimes similar to that of Mr. Delgado's underlying offense, and that she was confident that her court security staff could handle any risk. (Id. at 223.) Thus, the circuit court granted Mr. Delgado's petition for a writ of habeas corpus ad testificandum compelling his attendance at trial. (Id. at 221.) A written order to that effect was entered on November 21, 2019. (DCR App. at 1.) The Agency filed the subject petition for a writ of prohibition challenging that order on December 6, 2019.

#### **SUMMARY OF ARGUMENT**

Trial courts possess the inherent authority to issue writs of habeas corpus ad testificandum and Judge Tabit did not exceed her authority by issuing such a writ for the plaintiff in this case. Interpreting section 25-1A-5(c) of the West Virginia Code in the manner sought by the Agency would unconstitutionally usurp an inherent power of the judiciary by permitting the executive branch to unilaterally prevent the transport of an inmate to court, a power historically held by the judiciary. Such interpretation would additionally violate the due process rights of the inmate, who would have no opportunity to contest the assertion that he posed a substantial risk of escape or demonstrate that such assertion was inaccurate or pretextual. Accordingly, this Court should deny the petition for writ of prohibition because Judge Tabit's ruling preserved the constitutionality of the statute and was within her sound discretion, not clearly erroneous. Should the Court determine

that Judge Tabit's ruling was an erroneous application of the statute, as the Agency suggests, the Court must find the statute unconstitutional and deny the petition on that basis.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Respondent respectfully submits that this case is appropriate for disposition by memorandum decision pursuant to Rule 21(d) of the Rules of Appellate Procedure, as the inherent authority of a trial court to issue a writ of habeas corpus ad testificandum is well-settled. Should the Court determine that the case presents a new issue of law concerning the interpretation of, and constitutionality of, a statute that has not previously been interpreted by this Court, argument would be appropriate under Rule 20 of the Rules of Appellate Procedure.

### **ARGUMENT**

#### **A. Standard of Review**

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code 53-1-1." Syl. pt. 2, State ex rel. Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977). Here, the Agency does not explicitly challenge the trial court's jurisdiction, but rather contends that the trial court has exceeded its legitimate powers in issuing a writ of habeas corpus ad testificandum.<sup>3</sup>

This Court has set forth five factors for consideration in determining whether a writ of prohibition should issue when a petitioner contends a court has exceeded its legitimate powers:

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<sup>3</sup> While framing the issue as whether the trial court exceeded its legitimate powers (Pet. Br. at 5), the Agency's argument is essentially that West Virginia Code § 25-1A-5(c) divests trial courts of jurisdiction to issue writs of habeas corpus ad testificandum when, as here, the Agency submits an affidavit pursuant to that section of the code. For the reasons stated in Section C, supra, whether analyzed as a jurisdictional issue or under a clearly erroneous standard, Judge Tabit's order should stand.

(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.

Syl. pt. 4, in part, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996). "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." Id. Moreover,

"[T]his Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, 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.*"

Syl. pt. 3, in part, State ex rel. Almond v. Rudolph, 238 W. Va. 289, 794 S.E.2d 10 (2016) (emphasis added) (citation omitted). Here, the trial court has jurisdiction to issue writs of habeas corpus ad testificandum, its order is not clearly erroneous, and there is no probability that the trial would be completely reversed if the error was not corrected in advance. Accordingly, the Agency has failed to meet the standard for a writ of prohibition.

**B. The Agency Has Failed to Meet its Burden for Issuance of a Writ of Prohibition**

"In prohibition proceedings, the party seeking the writ has the burden of proving the allegations of his petition." State ex rel. Godfrey v. Rowe, 221 W. Va. 218, 221, 654 S.E.2d 104, 107 (2007). Here, the Agency has failed to meet this burden because it cannot demonstrate that the trial court exceeded its legitimate powers. Indeed, as set forth below, it fails to demonstrate a reasonable basis to issue a writ under any of the five factors, but in particular, it cannot show that the trial court's issuance of a writ of habeas corpus ad testificandum was clear error. Not only have courts long-possessed the inherent authority to issue such writs, a power that may not be simply

wiped away by the stroke of a legislative pen, this Court has previously established that trial courts may employ their sound discretion in issuing such writs. See Craig v. Marshall, 175 W.Va. 72, 76, 331 S.E.2d 510, 515 (1985). Judge Tabit balanced the relevant factors, to the extent she was able given the complete lack of evidence presented by the Agency, and reasonably concluded a writ was appropriate in this case. Because such decision was within her sound discretion, and because to apply the statute as requested by the Agency would violate not only the separation of powers but also Mr. Delgado's due process rights, this Court should decline to issue a rule to show cause and permit the writ of habeas corpus ad testificandum to issue.

**1. The Agency will not be irrevocably damaged or prejudiced in the absence of a writ of prohibition, and appeal is an available remedy.**

The first two elements for consideration in determining whether a writ of prohibition should issue are whether an appeal is available as a remedy, and whether the petitioner will be irrevocably damaged or prejudiced in the absence of the issuance of a writ. Here, the Agency is free to challenge Judge Tabit's interpretation of section 25-1A-5(c) of the West Virginia Code on appeal; it preserved its objections for the record and, thus, appeal is an available remedy. See, e.g., Thomas v. Morris, 224 W.Va. 661, 665, 687 S.E.2d 760, 764 (2009) (question of statutory interpretation raised on appeal after final judgment entered); Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 140, 459 S.E.2d 415, 417 (1995) (same).

Moreover, no damage or prejudice will occur to the Agency if a writ is not issued. The Agency transports inmates, including those charged with and/or convicted of murder, to courts on a daily basis. The Agency is well-prepared and capable of providing security during such transports and would not be prejudiced or irrevocably damaged by being required to perform a function in this case that it is regularly required to perform. The Agency, therefore, can demonstrate no justification for the issuance of a writ of prohibition under the first two factors.

**2. The trial court's interpretation of section 25-1A-5 of the West Virginia Code is not clearly erroneous.**

Of the factors to consider in issuing a writ of prohibition, the third, whether the trial court's ruling is clearly erroneous, should be given the most weight. See State ex rel. Hoover, 199 W. Va. 12, 483 S.E.2d 12, at syl. pt. 4. As previously set forth, section 25-1A-5(c) of the West Virginia Code provides that the Commissioner of the Division of Corrections or any warden (now called "superintendent") of a correctional facility can refuse to transport a maximum security inmate to court where that inmate "possesses a substantial risk of escape if transported." While the statute does not explicitly require the affiant to provide a meaningful basis to support the assertion in the affidavit, the legislature surely intended as much. Here, where the superintendent invoking the statute *is also a defendant in the civil action*, the trial court reasonably expected more than a bare-bones affidavit before allowing *the defendant* to prevent *the plaintiff* from attending his own civil trial. Under these circumstances, interpreting section 25-1A-5(c) in the manner sought by the Agency would violate both the separation of powers doctrine, by transferring an inherent power of the judiciary to the sole discretion of the executive branch, as well as Mr. Delgado's due process rights, by permitting a defendant to unilaterally deprive a plaintiff of his right to a fair and impartial jury trial.

Because such interpretation would be unconstitutional, Judge Tabit correctly sought to interpret the statute in a manner that sustains constitutionality. As a principal of statutory construction, "[e]very reasonable construction must be resorted to by the courts in order to sustain constitutionality." Syl. pt. 1, in part, State ex rel. Appalachian Power Co. v. Gainer, 149 W. Va. 740, 143 S.E.2d 351 (1965). Moreover, "[w]here there is an adequate procedural remedy which prevents a statute from being unconstitutionally applied, the Court will, under the doctrine of least obtrusive remedy, adopt such procedure to avoid declaring a statute unconstitutional." Syl.

pt. 6, Waite v. Civil Service Commission, 161 W.Va. 154, 241 S.E.2d 164 (1977). Here, had Superintendent Ames produced any factual basis whatsoever to support his opinion that Mr. Delgado poses an escape risk, Judge Tabit could have made an informed decision on whether the statute had proper application in this instance. Because Superintendent Ames provided no such evidence, and because Judge Tabit properly weighed the evidence that was presented, Judge Tabit did not commit clear error in directing Mr. Delgado's transport to trial.

**a. Judge Tabit's Order preserves the constitutional separation of powers.**

The separation of powers clause 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." W. Va. Const. art. V § 1. "Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." Syl. Pt. 1, State ex rel. Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981).

"Where there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government, this violates the separation of powers doctrine contained in Section 1 of Article V of the West Virginia Constitution." Syl. Pt. 2, Appalachian Power Co. v. Pub. Serv. Com'n of W. Va., 170 W.Va. 757, 296 S.E.2d 887 (1982). Judicial oversight, therefore, is "vital to the preservation of the constitutional separation of powers of government where that separation, delicate under normal conditions, is jeopardized by the usurpatory actions of the executive or legislative branches of government." State ex rel. Steele v. Kopp, 172 W. Va. 329, 337, 305 S.E.2d 285, 293 (1983); see also Sims v. Fisher, 125 W. Va. 512, 524, 25 S.E.2d 216, 222 (1943) ("[T]his Court has settled on a policy of strong adherence to the

several constitutional provisions relating to the separation of powers, as conferred on the three departments of the State government, and particularly as to the jurisdiction of courts, and the powers they may assume or decline to exercise.”). Thus, “[i]t is the constitutional obligation of the judiciary to protect its own proper constitutional authority by upholding the independence of the judiciary.” Syl. pt. 4, State ex rel. Lambert v. Stephens, 200 W. Va. 802, 490 S.E.2d 891 (1997).

To ensure the autonomy of the judiciary, this Court has repeatedly confirmed that “[a] court ‘has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.’” Syl. pt. 3, Shields v. Romine, 122 W. Va. 639, 13 S.E.2d 16 (1940) (quoting 14 Am. Juris. Courts, Section 171); see also Syl. Pt. 2, State v. Fields, 225 W. Va. 753, 696 S.E.2d 269 (2010) (“To safeguard the integrity of its proceedings and to insure the proper administration of justice, a circuit court has inherent authority to conduct and control matters before it in a fair and orderly fashion.”). Moreover, under section 3 of Article VIII of the West Virginia Constitution, the judiciary “shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the state relating to *writs*, warrants, process, practice and procedure, which shall have the force and effect of law.” W. Va. Const. Art. VIII § 3 (emphasis added).

In appropriate exercise of this constitutional authority, this Court has promulgated rules vesting circuit courts with authority to compel the attendance of a witness at a hearing as necessary for the administration of justice. See W. Va. R. Civ. Pro. 45. Indeed, courts regularly compel such attendance through the issuance of subpoenas and summonses, and its authority to do so is plainly established. See W. Va. R. Civ. Pro. 45; W. Va. Code § 57-5-1. Where the witness is an inmate, courts are likewise vested with the specific authority to compel the inmate’s attendance through a

writ of habeas corpus ad testificandum issued to the person in whose custody the witness is detained. See W. Va. Code §§ 53-4-2, -13; State v. Herbert, 234 W. Va. 576, 583, 767 S.E.2d 471, 478 (2014) (a circuit court had the authority to issue a writ of habeas corpus ad testificandum to secure transport of an inmate).

While the West Virginia legislature has codified the authority of trial courts to compel the production of an inmate at a court proceeding, see W. Va. Code § 53-4-13, that right was originally established at common law. See, e.g., Sampley v. Duckworth, 72 F.3d 528, 529 (7th Cir. 1995) (“[T]he common law powers associated with the writ of habeas corpus ad testificandum [] were attached to it at the time it was codified.”); Clark v. Hendrix, 397 F. Supp. 966, 969 (N.D. Ga. 1975) (“Since a prisoner is beyond the reach of an ordinary subpoena, this writ is the common law writ which is used to bring such an incarcerated prisoner to court to testify.”) (citing Gilmore v. U.S., 129 F.2d 199 (10th Cir. 1942); Neufield v. U.S., 118 F.2d 375, 385 (D.C. Cir. 1941)). Indeed, the inherent authority of a court to compel the transport of an inmate via a writ of habeas corpus ad testificandum can be traced back to English common law:

Precedent for the district court’s use of the writ of habeas corpus ad testificandum to command the presence of these witnesses is steeped in history. Judge Blackstone describes habeas corpus as “the most celebrated writ in the English law. Of these there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another, for the easy administration of justice.” 3 Commentaries \* 129. The writ of habeas corpus ad testificandum, issued to secure the presence of a prisoner at trial for testimony, is among those listed.

Ballard v. Spradley, 557 F.2d 476, 479-80 (5th Cir. 1977) (quoting 3 Commentaries on the Laws of England at 129, J. Blackstone). Thus, it is undisputed that courts have the inherent authority to issue writs of habeas corpus ad testificandum, and such authority is not dependent upon, or controlled by, statutory authorization.

Nevertheless, the Agency here asserts that Judge Tabit's order issuing a writ of habeas corpus ad testificandum was clearly erroneous as a result of the Agency's attempt to invoke section 25-1A-5(c) of the West Virginia Code. As the Agency itself concedes, this particular statute is unique to West Virginia. (Pet. Br. at 2.) Section 25-1A-5(c) of the West Virginia Code is part of the West Virginia Prison Litigation Reform Act, which is largely modeled on the federal Prison Litigation Reform Act, 42 U.S.C. § 1997e (PLRA). While the federal PLRA and many other state PLRAs give discretion to trial courts to limit the transport of inmates to pretrial court proceedings, none purport to divest a court of the power to compel an inmate's attendance.<sup>4</sup>

Indeed, under the federal PLRA, the ultimate decision of whether to conduct a proceeding with the inmate in person is, in fact, in the sole discretion of the court. See, e.g., Thornton v. Snyder, 428 F.3d 690, 697 (7th Cir. 2005) (“[T]he district court has discretion to determine whether a prison inmate can attend court proceedings in connection with an action initiated by the inmate.”); Atkins v. City of New York, 856 F. Supp. 755, 757 (E.D.N.Y. 1994) (“The decision to issue a writ of habeas corpus ad testificandum is committed to the sound discretion of the district court.”). The lack of a comparable provision in the federal PLRA or other state PLRAs suggests

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<sup>4</sup> On this matter, the federal PLRA provides:

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

42 U.S.C. § 1997e(f).

that other jurisdictions recognize that such a provision would compromise the separation of powers and infringe upon the inherent authority possessed by the judicial branch.

Maintaining a trial court's discretion in determining when to compel a necessary witness to a court proceeding is fundamentally necessary for the administration of justice. Trial courts are required to conduct proceedings in a fair manner, and are uniquely positioned to determine what is required for the administration of justice in any given case. "In determining whether an inmate should attend court proceedings, the trial court must balance the interest of the State in preserving the integrity of the correctional system with the prisoner's interest in access to the courts and strike a balance that is fundamentally fair." Pedraza v. Crossroads Sec. Systems, 960 S.W.2d 339, 342 (Tex. App. Corpus Christi 1997). A statute divesting a trial court of its authority to balance those factors likewise divests it of the ability to ensure fairness at trial.

Because courts have "inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction," see Shields, 122 W. Va. 639, 13 S.E.2d 16 at syl. pt. 3, any encroachment upon that power by the legislative or executive branch requires close examination to ensure the preservation of the separation of powers. While considered a measure of last resort, this Court has struck down statutes when necessary to preserve the separation of powers. See, e.g., State ex rel. Workman v. Carmichael, 241 W.Va. 105, 819 S.E.2d 251 (2018); Louk v. Cormier, 218 W. Va. 81, 622 S.E.2d 788 (2005). For example, in Louk v. Cormier, this Court considered a statute passed by the Legislature that stripped the right of a plaintiff to request a unanimous verdict in a medical malpractice actions, in contravention of judicial rules. Id. at 93; 622 S.E.2d at 800. In striking down that portion of the statute, this Court explained:

The provisions contained in W. Va. Code § 55-7B-6d (2001) (Supp. 2004) were enacted in violation of the Separation of Powers Clause, Article V, § 1 of the West

Virginia Constitution, insofar as the statute addresses procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia Constitution.

Id. at syl. pt. 3, in part.

Here, the interpretation of West Virginia Code § 25-1A-5(c) urged by the Agency enables it to unilaterally deprive the judiciary from compelling the attendance of an inmate witness to trial, regardless of the circumstances. Indeed, as repeatedly stated by the Agency, it interprets the statute as delegating the discretion of whether or not to transport an inmate to a court solely to the executive branch. If this is in fact what the Legislature intended to do, it clearly infringes upon the inherent power of the court to do all things that are reasonably necessary for the administration of justice, including its longstanding authority based in common law to issue writs of habeas corpus ad testificandum. Such infringement would violate the separation of powers doctrine and the statute would be void. Because Judge Tabit avoided such outcome, her order was not clearly erroneous, and the Agency's petition should be denied.

**b. Judge Tabit's Order preserves the constitutional right to due process.**

The Fourteenth Amendment of the United States Constitution provides, in part, that the State may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. pt. 1, Waite v. Civil Service Commission, 161 W.Va. 154, 241 S.E.2d 164 (1977). This Court has repeatedly recognized that, in considering what constitutes "property" under the due process clause, "[a] 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." Id. at syl. pt. 3.

Here, the property interest at issue is Mr. Delgado’s interest in a fair jury trial, at which he can appear and testify in person. This Court has previously recognized that prison inmates have a “constitutional right of meaningful access to the courts.” See State ex rel. James v. Hun, 201 W.Va. 139, 140-41, 494 S.E.2d 503, 504-05 (1997). While the right of meaningful access to the courts is “not unfettered,” deprivation of the right requires due process of law. Id.

In invoking section 25-1A-5(c), the Agency—as a defendant in this case—seeks to prevent Mr. Delgado from appearing at, and testifying in person at, his own civil trial. The Agency offers to provide space to hold the trial at MOCCJ, or alternatively suggests that Mr. Delgado could attend trial by videoconference. Under either scenario, Mr. Delgado would be divested of meaningful access to the courts, either by prejudicing the jury to an extent that the trial would not be fair, or by preventing Mr. Delgado from presenting his key evidence through live testimony and conferring with his counsel during the course of trial. While a court may legitimately deprive him of this right, as Judge Tabit found, Mr. Delgado is entitled to due process before this deprivation may be permitted.

**i. Trial at MOCCJ would deprive Mr. Delgado of a fair trial by impartial jury.**

The West Virginia Constitution conveys a right to a trial by jury in civil actions. W. Va. Const. Art. III § 13. Indeed, in West Virginia, plaintiffs in civil actions are entitled to a trial by an impartial and unbiased jury, when so demanded. Syl., Moon v. Michael Koslow Const., Inc., 193 W. Va. 673, 458 S.E.2d 610 (1995); O’Dell v. Miller, 211 W. Va. 285, 288, 565 S.E.2d 407, 410 (2002); W. Va. R. Civ. Pro. 38, 39. Likewise, the United States Supreme Court has found that the right to a fair trial guaranteed by the Fourteenth Amendment to the United States Constitution inherently provides that the merits of the case should be determined on the basis of evidence

introduced at trial, rather than “on grounds of official suspicion, indictment, continued custody” or any other circumstances not proved at trial. Taylor v. Kentucky, 436 U.S. 478, 485 (1978).

Here, conducting the trial at MOCCJ, rather than in a courtroom in Kanawha County, will prejudice the jurors against Mr. Delgado. Not only would moving the trial to MOCCJ, a maximum security facility located on the top of a mountain in Fayette County, substantially inconvenience the court and the jury, the effect of having to enter the State’s maximum security prison facility (past rows of barbed wire and through layers of security) would necessarily influence the jurors, and likely prejudice them against Mr. Delgado. The implication to the jury would be that Mr. Delgado is too dangerous to be transported out of MOCCJ; such implication would likely influence the jury’s consideration of the underlying issue in the case, i.e. the correctional officer’s decision to use force against Mr. Delgado. Further, the jurors would like be substantially inconvenienced and frustrated, and may take out this frustration on Mr. Delgado for filing his suit. Likewise, the prison setting will indicate a lack of importance of the actual matter at hand—the defendants’ violations of Mr. Delgado’s constitutional rights—and indicate that the case should not be treated with the same gravity as a case that takes place in a courtroom, with the attendant formality, structure, and solemnity. In short, the surroundings would prove to be a distraction from the merits of the case, and would likely deprive Mr. Delgado of a fair trial with impartial jurors.

Mr. Delgado, therefore, is entitled to basic due process before suffering such deprivation.

- ii. **Trial by videoconference would deprive Mr. Delgado of the right to prosecute his case, present testimony by witness in open court, and confer with counsel.**

As an alternative, the Agency proposes that Mr. Delgado attend the trial by video conference from MOCCJ. This alternative raises similar concerns of prejudice, however. First, the message to the jury remains the same, i.e., that Mr. Delgado is too dangerous to transport. As

already stated, such implication is likely to prejudice the jury in its consideration of the merits of the claims. Moreover, attendance by video would substantially disadvantage Mr. Delgado in his presentation of testimony: many of the underlying facts in this case are disputed and the outcome will rest on which witness testimony the jury finds to be most credible. Allowing the defendants to appear in person while preventing Mr. Delgado from appearing would create substantial prejudice. Further, a jury may perceive Mr. Delgado's absence as a lack of interest in his case or commitment to the outcome.

West Virginia Rule of Civil Procedure 43 provides that, with some limitation, in all trials, "the testimony of witnesses shall be taken in open court. . . ." W. Va. R. Civ. Pro. 43. Mr. Delgado is a necessary witness and seeks to provide his testimony in open court. While requiring a plaintiff to attend a civil trial by video is not unconstitutional per se, courts are required to weigh the rights of the plaintiff against the countervailing factors before depriving the plaintiff of such right. Specifically, courts have found that preventing an inmate plaintiff from appearing in person should only be done in extreme circumstances, and after weighing the likely prejudice against the threat of escape or harm which would be posed by transporting the inmate to trial.

Because evaluating testimony of a live witness is so important to determining credibility, courts recognize that the ability to observe demeanor is central to the fact-finding process, and that this essential observational component may be lessened or lost altogether when using video conferencing. Thornton, 428 F.3d at 697. In considering this issue, the Seventh Circuit Court of Appeals explained:

Clearly, a jury trial conducted by videoconference is not the same as a trial where the witnesses testify in the same room as the jury. Videoconference proceedings have their shortcomings. *Virtual reality is rarely a substitute for actual presence* and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it. The immediacy of a living person is lost with video technology. . . .Video conferencing is not the

same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing. *This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion.*

Id. (internal quotations omitted) (emphasis added). Furthermore, denying an inmate the right to appear in person requires the inmate and their counsel to choose between being in the same room, and thus not in the same room as the judge and jury, or having counsel remain in the courtroom with the judge and jury and thus unable to confer in person with her client. Id. at 698-99. Thus, the court in Thornton concluded that “[t]he limitations videoconferencing presents demonstrate that the decision to deny a prisoner the opportunity to be physically present at a civil rights trial he initiates *is not one that should be taken lightly.*” Id. at 698. (emphasis added).

Mr. Delgado’s absence would also substantially interfere with Mr. Delgado’s ability to confer with and assist counsel in the prosecution of the case at counsel table during the presentation of the evidence and during short breaks. As the Fourth Circuit Court of Appeals explained in the context of asylum hearings, attendance via video conference imposes substantial limitations:

Because video conferencing permits the petitioner to be in one location and [the judge/jury] in another, its use results in a “Catch 22” situation for the petitioner’s lawyer. While he can be present with his client—thereby able to confer privately and personally assist in the presentation of the client’s testimony—he cannot, in such a circumstance, interact as effectively with the [judge/jury] or his opposing counsel. Alternately, if he decides to be with the [judge/jury], he forfeits the ability to privately advise with and counsel his client. Therefore, under either scenario, the effectiveness of the lawyer is diminished; he simply must choose the least damaging option.

Rusu v. U.S. I.N.S., 296 F.3d 316, 323 (4th Cir. 2002).

Because preventing Mr. Delgado from appearing in person and being able to present live testimony would create substantial prejudice, and thereby deprive him of the fair and impartial

jury to which he is constitutionally entitled, Mr. Delgado must receive due process before such deprivation occurs.

**iii. Due process is required before a court may deprive Mr. Delgado of these rights.**

Where a property interest exists, the state may not take it away without due process of law. “[I]t is a fundamental requirement of due process to be given ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’” Hutchison v. City of Huntington, 198 W. Va. 139, 154, 479 S.E.2d 649, 664 (1996) (quoting Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976)). Here, Mr. Delgado has a clear property interest in a fair trial with impartial jurors. Accordingly, he should not be deprived of such interest “without the opportunity to be heard at a meaningful time and in a meaningful manner.” Id.

Judge Tabit’s application of the law to the evidence presented ensured that Mr. Delgado’s due process rights were protected in this case. As she held, “the affidavit submitted by Superintendent Ames simply recites the statutory language contained in West Virginia Code § 25-1A-5(c), and contains no specific facts relating to the underlying circumstances as to why Superintendent Ames believes that the Plaintiff in this case would create a significant risk of escape.” (DCR App. 2-3.) Judge Tabit reviewed all the submissions by Mr. Delgado setting forth evidence that he does not present a risk of escape, and additionally understood that Mr. Delgado had attempted to discover the basis for Superintendent Ames’s affidavit, to no avail. (Id. at 1-2.) Because there was no evidence submitted demonstrating that Mr. Delgado posed a risk of escape, while the evidence tending to show that he does not pose a risk was substantial, Judge Tabit properly declined to deprive Mr. Delgado of his property interests, i.e., his interest in a fair trial with impartial jurors.

Under the interpretation urged by the Agency, section 25-1A-5(c) would provide no opportunity for an inmate, such as Mr. Delgado, to be heard at all, much less in a meaningful time or in a meaningful manner, prior to depriving him of a fair trial with an impartial jury. In urging its interpretation, the Agency relies entirely on the proposition that an inmate in a civil case has no constitutional right to appear at their own trial. The lack of a fundamental right to attend a trial in person does not, however, mean that a court, much less a defendant in the case, may prohibit an inmate from appearing without proffering any basis or providing the inmate any opportunity to be heard.

Federal courts regularly acknowledge that, while there is no absolute constitutional right to attend a civil trial, an inmate may not be summarily excluded from attending either. In discussing the right of an inmate to appear at a civil trial, the Fourth Circuit Court of Appeals has explained:

Ideally . . . such a plaintiff should be present at the trial of his action, particularly if, as will ordinarily be true, his own testimony is potentially critical. Not only the appearance but the reality of justice is obviously threatened by his absence. The law recognizes this of course, but it also recognizes that there are countervailing considerations of expense, security, logistics, and docket control that prevent according prisoners any absolute right to be present.

*That an incarcerated litigant's right is necessarily qualified, however, does not mean that it can be arbitrarily denied by dismissal or indefinite stays; the law requires a reasoned consideration of the alternatives.*

Muhammad v. Warden, Baltimore City Jail, 849 F.2d 107, 111-12 (4th Cir. 1988) (emphasis added) (internal citations omitted). Likewise, the Court of Appeals for the Seventh Circuit has stated:

The fact that there is no constitutional right to be present in a civil action does not sanction the summary exclusion of a plaintiff-prisoner from the trial of his prison-connected civil rights claim. Rather the trial court must weigh the interest of the plaintiff in presenting his testimony in person against the interest of the state in maintaining the confinement of the plaintiff-prisoner.

Stone v. Morris, 546 F.2d 730, 735 (7th Cir. 1976). Accordingly, the Agency's reliance on the lack of an absolute constitutional right to attend a civil trial in person is misplaced, and does not "sanction the summary exclusion of a plaintiff-prisoner from the trial of his prison-connected civil rights claim." Id.

Rather, federal courts have set forth a number of factors to consider before denying an inmate the opportunity to appear in person. See, e.g., id.; Thornton, 428 F.3d at 697. For example, in the Fifth Circuit, courts are directed to balance several factors including "whether the prisoner's presence will substantially further the resolution of the case, the security risks presented by the prisoner's presence, the expense of the prisoner's transportation and safekeeping, and whether the suit can be stayed until the prisoner is released without prejudice to the cause asserted." Ballard, 557 F.2d at 480; Poole v. Lambert, 819 F.2d 1025, 1028 (1987) (adopting Ballard factors for the Eleventh Circuit).

Notably, in 1985, this Court specifically acknowledged that an inmate's right to attend a civil trial in person is not absolute, but rather that, for inmates, "the right to appear in [civil] court proceedings is a restricted one." Craig, 175 W.Va. at 76, 331 S.E.2d at 515. Thus, this Court held that trial courts must consider several factors before depriving an inmate of that opportunity. Id. The Court laid out the factors to balance in syllabus point three of Craig:

*Whether a prisoner may appear at trial is a matter committed to the sound discretion of the trial court which must balance a number of relevant factors. In making this determination the court should take into account the costs and inconvenience of transporting a prisoner from his place of incarceration to the courtroom, any potential danger or security risk which the presence of a particular inmate would pose to the court, the substantiality of the matter at issue, the need for an early determination of the matter, the possibility of delaying trial until the prisoner is released, the probability of success on the merits, the integrity of the correctional system, and the interests of the inmate in presenting his testimony in person rather than by deposition.*

Craig, 175 W.Va. 72, 331 S.E.2d 510 at syl. pt. 3 (emphasis added). While not speaking directly in terms of due process, this Court plainly required trial courts to provide due process before depriving an inmate of the ability to attend their own civil trial.

Consequently, the Agency's reliance on the lack of an inmate's constitutional right to attend civil trial does not equate to the ability of the Agency to unilaterally dispossess an inmate of that ability. Indeed, the Agency's interpretation of section 125-1A-5(c) of the West Virginia Code, which would provide no discretion to the trial court and no due process to Mr. Delgado, would render the statute unconstitutional. Judge Tabit properly declined to apply the statute in such manner.

**c. Judge Tabit's Order provides an adequate procedural remedy to avoid declaring the statute unconstitutional.**

As previously noted, "[w]here there is an adequate procedural remedy which prevents a statute from being unconstitutionally applied, the Court will, under the doctrine of least obtrusive remedy, adopt such procedure to avoid declaring a statute unconstitutional." Waite, 161 W.Va. 154, 241 S.E.2d 164, at syl. pt. 6. Here, as set forth above, Judge Tabit did just that, by providing Mr. Delgado a meaningful opportunity to be heard and then balancing a number of factors before determining whether to issue a writ of habeas corpus ad testificandum over the objection of the Agency.

As set forth above, in Craig, this Court provided trial courts with a set of factors for consideration in this exact context, which include the costs and inconvenience of transport, any potential danger or security risk to the court, whether a trial may be delayed until an inmate is released, the interests of the inmate in presenting his testimony in person, and the integrity of the correctional system. Craig, 175 W.Va. 72, 331 S.E.2d 510 at syl. pt. 3, in part. While not explicitly citing Craig, the trial court balanced many of these factors, to the extent she was provided with

the factual basis to do so. Judge Tabit correctly acknowledged that the cost and inconvenience of conducting the trial at MOCCJ far outweighed any cost of transporting Mr. Delgado to court, determined that her court security is more than capable of providing a safe trial environment at the Circuit Court of Kanawha County, and determined that the interests of having Mr. Delgado present to present testimony in person outweighed any factors to the contrary. (DCR at 2-3; 223-24.) Moreover, the circuit court was well-aware that Mr. Delgado is serving life without possibility of parole, and thus delaying the trial until his release is not a possibility. Consequently, Judge Tabit applied an “adequate procedural approach” to preserve the statute’s constitutionality by balancing factors previously set forth by this Court, and thus her decision was not clearly erroneous and a writ of prohibition should not issue. See Waite, 161 W.Va. 154, 241 S.E.2d 164, at syl. pt. 6.

**3. The issue is not “oft repeated,” the order does not manifest a persistent disregard for law, and the issue is not a new or important problem.**

The final two factors for consideration in issuing a writ of prohibition include whether the issue is “oft repeated” or the order manifests a persistent disregard for the law, and whether the issue is a new or important problem. State ex rel. Hoover, 199 W. Va. 12, 483 S.E.2d 12, syl. pt. 4, in part. Here, while trial courts regularly issue writs of habeas corpus ad testificandum, they do not manifest persistent disregard for the law in so doing. Rather, despite this statute having been enacted twenty years ago, this is the first time the Agency has sought to interfere with a trial court’s inherent authority to compel attendance of an inmate to trial.

Likewise, Judge Tabit’s issuance of a writ of habeas corpus ad testificandum to compel the transport of an inmate to trial is not a new or important problem. For as long as they have existed, trial courts in West Virginia, the United States, and England have been compelling wardens and superintendents of jails and prisons to transport inmates to trial through the use of the common law doctrine of a writ of habeas corpus ad testificandum. Here, Judge Tabit’s use of that writ is

not new or important, rather the “new” problem is that the Agency is attempting to interfere with the trial court’s inherent authority to issue such writs. A petitioner cannot fabricate a new issue in order to meet the standard for a writ of prohibition, and this Court should decline to issue such writ in this case.

**C. A Writ of Prohibition Should Not Issue**

For the reasons discussed herein, Judge Tabit’s issuance of a writ of habeas corpus ad testificandum does not meet the standard for a writ of prohibition. In the alternative, however, should this Court determine that a plain reading of the statutory language is required in this circumstance, it is clear that the plain language is unconstitutional, and subsection (c) of section 25-1A-5 of the West Virginia Code must be declared void. See Syl. Pt. 4, State ex rel. State Bldg. Commission v. Bailey, 151 W. Va. 79, 150 S.E.2d 449 (1966) (“A statute may contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and others will fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained.”) In such case, the circuit court’s issuance of a writ of habeas corpus ad testificandum should also stand, and no rule to show cause should issue.

**CONCLUSION**

For the reasons set forth herein, the Agency has failed to meet the standard for a writ of prohibition, and this Court should decline to issue a rule to show cause.

**Respectfully submitted,  
Miguel Angel Delgado,  
By counsel,**

*LMKR #10845 for LM*

Lydia C. Milnes (State Bar ID No. 10598)  
Jennifer S. Wagner (State Bar ID No. 10639)  
Mountain State Justice, Inc.  
325 Willey Street  
Morgantown, West Virginia 26505  
Telephone: 304-326-0188  
Email: [lydia@msjlaw.org](mailto:lydia@msjlaw.org)  
*Counsel for Respondent Miguel Delgado*