No. 22359 -- State of West Virginia ex rel. William A. Allen v. Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County

Cleckley, Justice, concurring:

I believe the majority made two errors regarding appellate review. This petition should have been dismissed as improvidently granted simply because it was not ripe for our consideration. The "'[l]iberal allowance'" of extraordinary writs "'degrades the prominence of the trial'" and it undermines our statutory provisions limiting appellate review to final judgments. Brecht v. Abrahamson, ___ U.S. ___, ___, 113 S. Ct. 1710, 1720-21, 123 L.Ed.2d 353, 371 (1993), quoting Engle v. Isaac, 456 U.S. 107, 127, 102 S. Ct. 1558, 1571, 71 L.Ed.2d 783, 800 (1982). More importantly, the majority opinion adds to the mass of legal confusion in this State when it engages in a lengthy and unnecessary discussion of the physician-patient privilege. Because neither of these errors was outcome determinative, I concur.

I.

Writs of Prohibition

This petition for a writ of prohibition should not have been reviewed by this Court. The writ of prohibition is a creature

of common law. "The writ of prohibition is purely jurisdictional; it does not lie to correct mere errors." State ex rel. City of Huntington v. Lombardo, 149 W. Va. 671, 679, 143 S.E.2d 535, 541 (1965). The rationale behind a writ of prohibition is that by issuing certain orders the trial court has exceeded its jurisdiction, thus making prohibition appropriate.

Our earlier cases stated "neither the constitution nor the applicable statute enlarges or narrows the scope of the writ of prohibition as it was known at common law." State ex rel. Miller v. Smith, 168 W. Va. 745, 755, 285 S.E.2d 500, 505 (1981). (Citation omitted). Unfortunately, in West Virginia the writ of prohibition has been used with increasing frequency as a device to escape from the "final judgment" rule. When appropriate, writs of prohibition and mandamus provide a drastic remedy to be invoked only in extraordinary situations. "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." Will v. United States, 389 U.S. 90, 95, 88 S. Ct. 269, 273, 19 L.Ed.2d 305, 309 (1967). (Citation omitted). See also Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 108 S. Ct. 1133, 99 L.Ed.2d 296 (1988).

Mere doubt as to the correctness of a trial court's ruling on a motion in limine regarding an evidentiary issue is an insufficient basis to invoke this Court's writ power. To justify this extraordinary remedy, the petitioner has the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy. Thus, writs of prohibition, as well as writs of mandamus and habeas corpus, should not be permitted when the error is correctable by appeal.

I believe that there are appropriate circumstances where a writ of prohibition or mandamus should be granted by this Court. Perhaps our problem stems from the fact that we have not developed specific standards and guidelines to determine whether prohibition or mandamus is appropriate in a particular case. I believe as a starting point at least five questions must be asked:

1. Whether the party seeking the writ has other adequate means such as appeal to obtain the desired relief;

[1]Therefore, we should not allow a writ of prohibition as a substitute for an appeal. See County Court v. Boreman, 34 W. Va. 362, 366, 12 S.E. 490, 492 (1890) ("But it does not lie for errors or grievances which may be redressed in the ordinary course of

2. Whether the damage (other than expense and time) or prejudice suffered by the petitioner is correctable on appeal;

3. Whether the circuit court's order is clearly erroneous as a matter of law;

4. Whether the circuit court's order is an oft repeated error or manifests persistent disregard for the West Virginia Rules of Evidence, Rules of Criminal Procedure, or Rules of Civil Procedure; and

5. Whether the circuit court's order raises new and important problems or issues of law of first impression.

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judicial proceedings, by appeal or writ of error"). Some of our clearest language came in Woodall v. Laurita, 156 W. Va. 707, 713, 195 S.E.2d 717, 720-21 (1973), where this Court stated "[t]hese motions necessarily involve the exercise of discretion, and the correctness of discretionary rulings should ordinarily be challenged at a time when the entire record is available to an appellate court. The piecemeal challenge of discretionary rulings through writs of prohibition does not facilitate the orderly administration of justice." Thus, in the absence of jurisdictional defect, the administration of justice is not well served by challenges to discretionary rulings of an interlocutory nature. These matters are best saved for appeal.

[2]"[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." Syllabus Point 1, in part, State ex rel. DeFrances v. Bedell, ___ W. Va. ___, 446 S.E.2d 906 (1994), quoting Syllabus Point 1, Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979).

See Fleming James, Jr., Geoffrey C. Hazard, Jr., & John Leubsdorf, Civil Procedure § 12.13 at 677 (3rd ed. 1992); In re Cement Antitrust Litigation, 688 F.2d 1297, 1301 (9th Cir. 1982), aff'd sub nom. Arizona v. United States District Court, 459 U.S. 1191, 103 S. Ct. 1173, 75 L.Ed.2d 425 (1983). See also Mallard v. United States District Court, 490 U.S. 296, 109 S. Ct. 1814, 104 L.Ed.2d 318 (1989).

The majority chooses to review a pretrial ruling on an evidentiary issue, raised in limine, concerning a privilege that never has existed in this State's history, at least in courts of record. While the majority is writing an opinion that adds nothing substantial to West Virginia's jurisprudence, the trial is postponed and justice is delayed. Ultimately, we are told in the majority's opinion that evidentiary rulings are within the discretion of the

[3]As recently as 1980, this Court indicated it would not hear writs from interlocutory rulings on evidentiary rulings. In State ex rel. Foster v. Luff, 164 W. Va. 413, 419, 264 S.E.2d 477, 481 (1980), the Court observed that "it should be stressed that while we have accepted this issue under our original jurisdiction powers, this was done in order to resolve a substantial issue of considerable importance in the trial of criminal cases. In the future this type of issue like motion in limine rulings of a trial court are not reachable by an original writ of mandamus or prohibition." How quickly we forget.

trial court which is hardly an earthshaking revelation. What makes this case egregious is that the granting of the rule to show cause even is inconsistent with the liberal language of Syllabus Point 1 of State ex rel. Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979) (writ of prohibition is to be used "to correct only substantial, clear-cut legal errors" and when there "is a high probability that the trial will be completely reversed if the error is not corrected in advance").

The writ of prohibition in this case, as well as others, involves a perversion and exploitation of the concept of jurisdictional usurpation. The loose language in cases such as

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[4]The better position is stated in State ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 316, 233 S.E.2d 425, 426 (1977), that "[w]e cannot issue prohibition when the action of the trial court could be attacked as an abuse of discretion[.]"

[5]See State ex rel. Chafin v. Halbritter, ___ W. Va. ___, 448 S.E.2d 428 (1994) (granted prohibition because Court disagreed with trial court's ruling concerning "marital property"); McDowell County Bd. of Educ. v. Stephens, ___ W. Va. ___, 447 S.E.2d 912 (1994) (granted a rule to show cause to determine whether a lower court should have dismissed amended pleading); State ex rel. Scales v. Committee on Legal Ethics, ___ W. Va. ___, 446 S.E.2d 729 (1994) (granted prohibition to stop investigation of an attorney); State ex rel. Erickson v. Hill, ___ W. Va. ___, 445 S.E.2d 503 (1994) (granted prohibition to discovery order because it was abusive and oppressive); State ex rel. Spaulding v. Watt, 188 W. Va. 124, 423 S.E.2d 217 (1992) (prohibition granted to prevent defendant's release on bail); State ex rel. Strickland v. Daniels, 173 W. Va.

Hinkle, supra; McFoy v. Amerigas, Inc., 170 W. Va. 526, 532, 295 S.E.2d 16, 22 (1982), and Naum v. Halbritter, 172 W.CVa. 610, 309 S.E.2d 109 (1983), has contributed to the erosion of the proper use of the writs. I would overrule these cases as a necessary step in bringing the writ of prohibition back into proper focus.

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576, 318 S.E.2d 627 (1984) (granted writ to prohibit magistrate from removing only part of case to circuit court); Criss v. Salvation Army Residences, 173 W. Va. 634, 319 S.E.2d 403 (1984) (granted prohibition because tenant may be evicted before full appeal).

[6]The modern abuse of the writ of prohibition began in Woodall v. Laurita, 156 W. Va. 707, 712, 195 S.E.2d 717, 720 (1977), where a unanimous Court stated:

> "In this case the defendant seeks to invoke prohibition on the grounds that the court has exceeded its legitimate powers, and not on the grounds of lack of jurisdiction. In this type of case the issuance of the writ is discretionary with the appellate court. Prohibition will issue only in clear cases of abuse." (Emphasis added; citation omitted).

The only authority cited in Woodall for the proposition that this Court has "discretionary" authority to grant writs of prohibition is Brown v. Arnold, 125 W. Va. 824, 26 S.E.2d 238 (1943). Brown not only does not support the Woodall contention, it expressly rejects it. The Court in Brown stated that it had been cited no cases and could not find any cases that permitted the granting of a writ of prohibition beyond what was provided for in W. Va. Code, 53-1-1 (1923), which states "'[t]he right of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power[.]'" 125 W. Va. at 834-35, 26 S.E.2d at 243. (Emphasis added). In fact, the most poignant statement made in Brown was: "Judicial precedent in this jurisdiction precludes the use of the writ of prohibition as a means of correcting mere errors and irregularities in matters

I concede that some appellate review from lower courts' interlocutory rulings is necessary and helpful. Undoubtedly, the writ procedure has introduced into West Virginia appellate practice a flexible device of practical utility:

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over which the inferior court has cognizance." 125 W. Va. at 839, 26 S.E.2d at 245.

Of course, this Court did not stop with Woodall. We added other reasons not supported by precedent or statute to justify our intervention into lower court's rulings on interlocutory matters. In Naum, supra, we stated that the granting of a writ of prohibition was based on political harm to a prosecutor that was certain to occur during the period when his appeal was maturing for consideration. Further, this Court relied on the concept of judicial economy by stating that "allowing the trial to go through to its conclusion would be an exercise in futility, wasting both the trial court's time and the state's resources." 172 W. Va. at 613, 309 S.E.2d at 112. In McFoy v. Amerigas, Inc., 170 W. Va. at 532, 295 S.E.2d at 22, we stated that "[o]ur modern practice is to allow the use of prohibition, based on the particular facts of the case, where a remedy by appeal is unavailable or inadequate, or where irremediable prejudice may result from lack of an adequate interlocutory review." (Citation omitted). Under the language of these cases, any serious procedural, evidentiary, or substantive law misadventure can be characterized as appropriate for prohibition and lawyers have resorted to this characterization with great affinity.

[7]See State ex rel. Register-Herald v. Canterbury, ___ W. Va. ___, 449 S.E.2d 272 (1994) (prohibition granted to reverse order constituting prior restraint against newspaper); State ex rel. Tyler v. MacQueen, ___ W.Va. ___, 447 S.E.2d 289 (1994) (prohibition used to review disqualification of prosecutor's office); State ex rel. Leach v. Schlaegel, ___ W. Va. ___, 447 S.E.2d 1 (1994) (prohibition granted to prevent relitigation of case which was foreclosed because of collateral estoppel); State ex rel. DeFrances v. Bedell, __ W. Va. ___, 446 S.E.2d 906 (1994) (prohibition used to review decision on lawyer's disqualification).

> "The procedure is bounded by much stricter time limits than an appeal, involves a relatively simple record, concerns almost purely legal issues, and permits the appellate court to consider giving relief only in cases in which the application shows a strong justification for doing so. Nevertheless, the writ procedure would be unnecessary if 'ordinary' interlocutory review were less restricted in its availability."

Fleming James, Jr., Geoffrey C. Hazard, Jr., & John Leubsdorf, Civil Procedure § 12.13 at 678.

The solution, however, is for the legislature to expand the statutory opportunity for appeal in West Virginia, including appeals of some interlocutory rulings. Unquestionably, W. Va. Code, 58-5-1 (1925), is antiquated and in need of comprehensive and substantial revision. Although this Court has authority to accomplish some of the necessary reform through its rulemaking authority, I believe that revision is better undertaken by the legislature because the "right" and "scope" of appeal are matters of substantive law. Hopefully, the various bar associations in this State will give serious attention to recommendations concerning legislative and rule reform that would give this Court the same degree and flexibility that it has enjoyed under the writ practice. My general suggestion is that appellate review of some interlocutory

rulings be allowed whenever the question presented is either of great practical importance in a particular case or of general importance as a matter of procedural law.

II.

Physician-Patient Privilege

After declaring that a physician-patient privilege has not been adopted in West Virginia, the majority in two pages goes on to imply what our ruling would be if we had one. This type of gratuitous dicta sends a mixed message to lawyers and to our lower tribunals. I do not believe we should continue to discuss the physician-patient privilege as if we partially recognize it. To

[8]Alternative holdings, as we have provided in this case, are nothing more than advisory opinions that solve questions that do not require answering in order to resolve the issues raised by the parties. As a practical matter, if the first answer is independently sufficient, then all that follows is surplusage.
Thus, the strength of the first makes all the rest dicta. It is perfectly understandable for the majority opinion to want to explain to the losing petitioner in this case that he was wrong as to whether a physician-patient privilege existed; and, even if one did exist, he was wrong as to its application. Nevertheless, while that explanation may comfort the party, it has the potential of creating new law in a strictly advisory fashion. See Karsten v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., 36 F.3d 8 (4th Cir. 1994). Thus, any treatment of the physician-patient privilege on the merits is nothing more than dicta, is unnecessary for the determination of this case, and is a path we should decline to tread.

be clear and specific, there is no physician-patient privilege in West Virginia; and, unless the legislature in its wisdom sees fit to adopt the privilege, we should not create one indirectly by implication.

As we do in this case, we have skirted dangerously on the edge of creating a physician-patient privilege by suggestion. In King v. Kayak Manufacturing Corp., 182 W. Va. 276, 287, 387 S.E.2d 511, 522 (1989), we stated "[e]ven if we assume that such a privilege exists, the plaintiff waived it[.]" In State v. Cheshire, 173 W. Va. 123, 127, 313 S.E.2d 61, 67 (1984), we stated "[a]side from the issues of whether such privilege exists in a criminal case in this state, . . . we question whether the consultation was performed on a private basis." (Emphasis added; citations omitted). In addition to these unfortunate and unnecessary excursions, recently, we added a physician-patient fiduciary relationship to our jurisprudence. See Morris v. Consolidation Coal Co., ___ W. Va. ___, 446 S.E.2d 648 (1994); State ex rel. Kitzmiller v. Henning, 190 W. Va. 142, 437 S.E.2d 452 (1993). Although we have said there

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See State v. Simmons, 172 W. Va. 590, 309 S.E.2d 89 (1983) (no physician-patient privilege in West Virginia); Mohr v. Mohr, 119 W. Va. 253, 193 S.E. 121 (1937) (accord).

is not a physician-patient privilege, we have not come close to defining the limitations or parameters of this new physician-patient fiduciary duty. In Kitzmiller, 190 W. Va. at 144, 437 S.E.2d at 454, we stated:

> "As the hospital asserts, West Virginia has not codified a physician-patient privilege. However, the absence of such a privilege contemplates the release of medical information only as it relates to the condition a plaintiff has placed at issue in a lawsuit; it does not efface the highly confidential nature of the physician-patient relationship that arises by express or implied contract." (Emphasis in original).

In Morris, ___ W. Va. at ___, 446 S.E.2d at 656-57, we came even closer to adopting a physician-patient privilege:

> "Before Kitzmiller, supra, the physician-patient privilege was not recognized under common law in West Virginia. . . . We have acknowledged that '[t]he history of the common law is one of gradual judicial development and adjustment of the case law to fit the changing conditions of society.'. . . Therefore, in Kitzmiller this Court, in order to meet the current social demands, recognized that there is a fiduciary relationship between a patient and a physician which prohibits the physician from divulging confidential information he has acquired while attending to a patient." (Citations omitted).

Although I would not have voted with the majority in Kitzmiller, I am not particularly troubled with a legal principle

that merely states that nonjudicial expressions by a physician concerning the treatment of his or her patient constitute a violation of this new duty of confidentiality. The point must be made, however, that the adoption of this duty of confidentiality does not in any way regulate what may be testified to in judicial proceedings. Conversations between patients and physicians are not barred by either Rule 601 (general competency) or Rule 501 (privileges) of the West Virginia Rules of Evidence. When a disclosure of

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A rule that is designed to protect the confidence of a patient does not necessarily impede upon this State's Rules of Evidence regarding privileges. See State v. Simmons, supra, where Justice Miller discussed the difference between our statutory duty of confidentiality under W. Va. Code, 27-3-1, et seq., and an evidentiary privilege. See also State ex rel. Register-Herald v. Canterbury, ___ W. Va. at ___, 449 S.E.2d at 275-77 (seems to limit statute's application to only situations where information is released by medical personnel). The duty of confidentiality is enforced independently of the law of evidence.

> "In some respects the duty of confidentiality provides greater protection for privacy than an evidentiary privilege. A privilege applies only when testimony is sought in a legal proceeding, whereas the duty of confidentiality applies to prevent disclosure of secrets in extrajudicial settings as well." Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 5.2 at 335 (1994).

For example, all communications to an attorney by a client are not privileged, and an attorney may be called upon to testify regarding conversations that were not intended as confidential; but the confidentiality rule under our code of professional ethics may very

information is sought and it is required by law or compelled by court order, usually only a privilege will protect against disclosure.

Under Rule 501 of the West Virginia Rules of Evidence, courts may recognize privileges only to the extent they exist under common law, statute, or the Constitution. There is clear authority that this privilege is of a statutory origin and did not exist at common law. Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869, 51 L.Ed.2d

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well limit the attorney from disclosing the communications publicly. There are, however, some unique features of a privilege that are significant:

> "Nonetheless, complete confidentiality can generally be guaranteed only if an evidentiary privilege also applies. In the absence of a privilege, a person called as a witness can normally be compelled to disclose confidential communications, regardless of any professional standard of confidentiality and regardless of what personal assurances or contractual commitments were given to the communicants." Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 5.2 at 336.

It is important for practicing physicians and attorneys to be instructed on this difference, so they know not to make a confidential commitment beyond that which the law of privileges permits.

As part of our obligation to protect important constitutional rights, this Court created a new limited journalistic privilege under our constitutional role as opposed to our rulemaking authority. See State ex rel. Hudok v. Henry, 182 W. Va. 500, 389 S.E.2d 188 (1989).

64 (1977). "Despite the language to the effect that privileges 'shall be governed by the principle of common law,' it is contemplated that the courts will not adopt or permit a liberal expansion of the existing acknowledged privileges." 1 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers § 5-1(C)(2) at 472 (1994), quoting, in part, W.Va.R.Evid. 501. (Emphasis added). I believe it would be unwise both theoretically and practically to adopt a physician-patient privilege.

I concede that a majority of states have adopted the physician-patient privilege by statute. The irony is that all the jurisdictions that have adopted the physician-patient privilege also have adopted so many exceptions to its application that its scope is either significantly limited or the privilege has been completely abolished. In these jurisdictions, the privilege was adopted to facilitate the effective rendering of the professional service offered by a physician. See Franklin D. Cleckley, A Modest Proposal: A Psychotherapist-Patient Privilege for West Virginia, 93 W. Va. L. Rev. 1, 22-23 (1990). Thus, as the Supreme Court suggests in Trammel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 913, 63 L.Ed.2d 186, 195 (1980), the physician-patient privilege is based on the policy that "the physician must know all that a patient can

articulate in order to identify and to treat disease[.]" I have serious reservation whether an evidentiary privilege is necessary to facilitate proper medical treatment. Indeed, a wise patient who wants to survive his or her current medical problems would have a natural incentive to disclose all relevant information when seeking medical treatment. Lastly, it must be remembered that the physician-patient privilege works both ways in the judicial system. See Ronan E. Degnan, The Law of Federal Evidence Reform, 76 Harv. L. Rev. 275, 300 (1962) (danger of privilege being used to block disclosures that could "defeat dishonest claims or defenses"). In Baldridge v. Shapiro, 455 U.S. 345, 362, 102 S. Ct. 1103, 1112-13, 71 L.Ed.2d 199, 212-13 (1982), the Supreme Court stated:

> "It is well recognized that a privilege may be created by statute. A statute granting a privilege is to be strictly construed so as 'to avoid a construction that would suppress otherwise competent evidence.' St. Regis Paper Co. v. United States, 368 U.S. 208, 218[, 82 S. Ct. 289, 295, 7 L.Ed.2d 240, 248 (1961)]. . . .

[9]Dean Wigmore argued that the physician-patient privilege was unnecessary for several reasons. First, rarely will information given to a physician necessitate confidentiality. Second, even though a few instances may arise when patient information would require confidentiality, it would be given to a physician in spite of the absence of a privilege. Third, less harm occurs to the physician-patient relationship than does to the judicial process in providing a privilege for the relationship. 8 John H. Wigmore, Evidence §§ 2380-2391 (McNaughton rev. 1961).

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> ". . . A finding of 'privilege,' however, shields the requested information from disclosure despite the need demonstrated by the litigant." (Footnote omitted).

Because privileges contravene the fundamental principle that "the public has a right to every [person's] evidence," courts should recognize them only when the parties make a convincing showing both that the interest is one which society values strongly and that a rule of privilege is necessary to foster that value. John H. Wigmore, Evidence in Trials at Common Law § 2258 (McNaughton rev. 1961).

The Scriptures state "if the trumpet does not sound a clear call, who will get ready for battle." Appellate courts must speak with a clear voice. In this area, the message must be simple: There is no physician-patient privilege in West Virginia notwithstanding any of our past decisions or our adoption of a duty of confidentiality regarding physicians.

[10] 1 Corinthians 14:8 (New International Version 1985).