

DEC - 6 2019

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,

*Petitioner,*

v.

THE HONORABLE JUDGE JOANNA TABIT,  
Judge, Circuit Court of Kanawha County, and  
MIGUEL ANGEL DELGADO, Plaintiff below,

*Respondents.*

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PETITION FOR WRIT OF PROHIBITION

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From the Circuit Court of Kanawha County,  
Case No. 15-C-1885

PATRICK MORRISEY  
ATTORNEY GENERAL

BRIANA J. MARINO  
ASSISTANT ATTORNEY GENERAL  
1900 Kanawha Boulevard E.  
Building 1, Suite 400-West  
Charleston, WV 25305  
Telephone: (304) 558-6593  
Email: Briana.J.Marino@wvago.gov  
State Bar No. 11060  
*Counsel for Petitioner*

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## QUESTION PRESENTED

Whether the trial court exceeded its legitimate judicial authority by ordering the transport to court of an inmate having a maximum security classification after the Superintendent of his facility tendered to the court an affidavit attesting to the custody level of the inmate and stating that, in the Superintendent's opinion, the inmate possesses a substantial risk of escape if transported?

## STATEMENT OF THE CASE

1. *The prohibition on inmate transfers under the West Virginia Prison Litigation Reform Act (W.Va. Code §25-1A-1, et seq.) is non-discretionary.*

In the underlying action, inmate Miguel Angel Delgado ("Delgado") brought his 42 U.S.C. § 1983 action against various correctional officers and the former warden of the Mt. Olive Correctional Complex<sup>1</sup> ("MOCCJ") to recover for excessive force and deliberate indifference to serious medical needs arising from the use of oleoresin capsicum pepper spray while Delgado was in solitary confinement.<sup>2</sup> As Delgado is currently confined in a penitentiary, this litigation is controlled by the West Virginia Prison Litigation Reform Act, W.Va. Code §25-1A-1, *et seq.* ("PLRA"). Delgado was convicted of the offense of first degree murder and was sentenced to life imprisonment without the possibility of parole.

Originally enacted in 1996, the federal Prison Litigation Reform Act, 42 U.S.C. 1997e, was promulgated as a response to the proliferation of prisoner litigation in federal courts and the costs associated with such litigation. In 2000, the State of West Virginia enacted its state version of the PLRA.<sup>3</sup>

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<sup>1</sup> Now the Mt. Olive Correctional Complex and Jail.

<sup>2</sup> This matter was previously heard by this Court regarding issues of qualified immunity and supervisory liability. *David Ballard v. Miguel Delgado*, 241 W.Va. 495, 826 S.E.2d 620 (2019). Accordingly, the Petitioner will not give a detailed recitation of the facts of the underlying litigation action or Respondent Delgado's legal history as it is well-known to this Court.

<sup>3</sup> The stated purpose of the West Virginia PLRA was "to control the growing cost of inmate litigation related to prison conditions against the state and counties by requiring inmates to pay filing fees and costs and allowing for dismissal of complaints when frivolous or malicious. *The bill imposes specific requirements for the filing and prosecution of claims by inmates regarding prison conditions.*" S.B. 109, Acts 2000, c. 66, eff. March 11, 2000. [Emphasis added.]



Both the federal and state Acts contain provisions regarding the authority of the courts to conduct certain proceedings by alternative methods to the physical presence of an inmate in court, including telephone, video conferencing, or other telecommunications technology. The federal PLRA, and W.Va. Code §25-1A-5(a) and (b), address inmate presence at pretrial proceedings and hearings.<sup>4</sup> These provisions, which appear in multiple state's equivalents to the federal PLRA, were designed both for the safety of the public through the risk of transportation and the costs associated with transportation.

Apparently unique to the State of West Virginia, its PLRA contains a third subsection regarding the conduct of hearings or trials in a case of prisoner litigation. In W.Va. Code §25-1A-5(c), the West Virginia Legislature enacted this unique provision regarding an inmate's presence at a civil trial as it relates to the authority of the Commissioner of the Division of Corrections and Rehabilitation ["DCR"]<sup>5</sup>.

Specifically, the subsection states, in pertinent part, that "[n]o court may compel the commissioner of the division of corrections or warden<sup>6</sup> of any correctional facility operated by the division of corrections ... to transport to court any inmate" if two conditions are met, to-wit: the classification of the inmate as maximum security and an affidavit is submitted from the Superintendent of the facility stating that, in his or her opinion, the inmate possesses a substantial risk of escape if transported.<sup>7</sup> This subsection assigns the sole discretion regarding transport to the

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<sup>4</sup> However, at least one United States District Court applied the federal PLRA restrictions on inmate transport to a trial. See *Edwards v. Keen Mountain Correctional Officer Logan, et al.*, 43 Fed. R. Serv. 3d 1114 (1999).

<sup>5</sup> Previously "Division of Corrections." H.B. 4338, passed in the 2018 Regular Session of the Legislature re-designated the Division of Corrections as the Division of Corrections and Rehabilitation.

<sup>6</sup> Previously "warden" of the facility. H.B. 4338, passed in the 2018 Regular Session of the Legislature re-designated prison wardens as superintendents.

<sup>7</sup> The full text of the subsection states "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

Commissioner of the DCR, provided she can demonstrate compliance with the provisions of the subsection.

Prior to the commencement of the underlying civil trial, current MOCCJ Superintendent Donald Ames (“Ames”) provided the requisite affidavit to the trial court indicating that Delgado was classified as a maximum security inmate and, in Ames’s opinion, possesses a substantial risk of escape if transported. Pet.Appendix 6-9.

2. *The Order Requiring the Transport of Inmate to Court Despite the DCR Meeting the Requirements of the Code.*

In a plain reading of W.Va. Code §25-1A-5, the legislature specifically delegated the discretion as to whether or not to allow the transportation of an inmate for trial if the predicate conditions were met. Containing no balancing test, the subsection simply delegates the discretion of transport to the Commissioner. In the instant case, it is not in serious dispute that the Commissioner met its burden of satisfying the predicate requirements to prohibit the transportation of Delgado to the Circuit Court of Kanawha County for his pending civil action. Pet.Appendix 1-5.

Over the objection of the Commissioner and despite the fact that the predicate requirements of the subsection had been facially satisfied, the trial court ordered the Commissioner to transport the inmate for purposes of trial in the underlying civil action in a pretrial hearing held on November 7, 2019.<sup>8</sup> Pet. Appendix 1-5, 217-229. The trial court nevertheless *explicitly recognized that*

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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.”

<sup>8</sup> The invocation of West Virginia Code § 25-1A-5(c) and DCR’s position regarding transporting Delgado to Kanawha County Circuit Court for this matter was raised and discussed at the Pretrial Conference held on September 15, 2016. The Court deferred ruling on the issue at that time given other pending issues in the case. Pet.Appendix 85-90.

*inmates committed to incarceration by the State of West Virginia possess no due process or other constitutional right (state or federal) to attend a civil trial in person. Pet.Appendix 219.*

In entering its Order, the trial court cited neither law nor rule as justification for its rejection of the invocation of W.Va. Code §25-1A-5(c). Pet. Appendix 1-5, 217-229. The trial court ruled [“the Order”] simply that it is “within its discretion to conduct the trial in the manner it believes to be appropriate.” Pet.Appendix 2. In addition, the trial court noted that Ames’s affidavit did not provide a specific fact as to why he believed Delgado created a significant risk of escape, irrespective of the lack of this requirement in the subsection. Pet.Appendix 1-5, 221-222.

The trial court applied a de facto balancing test in ruling that the costs to the court in holding the trial at the MOCCJ outweighed the authority of the Commissioner in her invocation of W.Va. Code §25-1A-5(c), and further rejected the DCR’s proposed alternative means of participation at trial of Delgado through video or audio conferencing or other technology-based mechanisms in favor of in person attendance. Pet.Appendix 1-5, 217-229. Finally, the trial court ruled that Delgado’s presence at trial is appropriate and that appropriate security measure can be taken to ensure safety. *Id.* While the Commissioner fully appreciates the ability of the trial court to provide courtroom security, this portion of the ruling fails to consider the risks to the officers and the public regarding the actual transport to the court of a dangerous convicted inmate serving life imprisonment without the possibility of parole who will have full knowledge of the time and place of his transports.

On motion of Superintendent Ames, the trial court granted a 14 day stay of its order to allow the DCR to seek review of its denial of the invocation of W.Va. Code §25-1A-5(c). Pet.Appendix 3.



## **SUMMARY OF THE ARGUMENT**

The DCR submits that the order of the trial court was clearly erroneous in that it rejected the invocation of the provisions of W.Va. Code §25-1A-5(c) in the instant case where the predicate requirements to prohibit transportation of an inmate committed to the custody of the DCR were satisfied and by imposing additional requirements upon Superintendent Ames in the content of his affidavit which are not present in the strict construction of W.Va. Code §25-1A-5(c).

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

Petitioner asserts that oral argument is necessary and appropriate pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure and recognizes that memorandum decisions are deemed appropriate in limited circumstances in accordance with Rule 21(d).

## **ARGUMENT**

### **1. Statement of Jurisdiction and Writ of Prohibition Standard.**

This Court has original jurisdiction to issue a writ of prohibition to restrain a circuit court from exceeding its legitimate powers. Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). It is well established that “[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. 51-1-1.*” *W.Va. Dept. of Military Affairs and Public Safety, Div. of Juvenile Services v. Honorable Irene Berger*, 203 W.Va. 468, 508 S.E.2d 628 (1998) quoting Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977). Where, as here, the lower court has exceeded its legitimate powers by rejecting the exercise of the non-delegable statutory authority of the Commissioner of the Division of Corrections and Rehabilitation, five factors will be examined by this Court to determine if an extraordinary writ should issue:

- (1) whether the party seeking the writ has no other adequate means, such as a direct appeal, to obtain the desired relief;
- (2) whether the petitioner will be damaged or prejudiced in any 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). These five factors “are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue.” *Id.* Not all five factors need be satisfied in order for a writ to be issued; however, “it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” *Id.*

## **2. The Commissioner Has No Other Adequate Means, Such as A Direct Appeal, to Obtain the Desired Relief.**

The first factor is easily satisfied given that the Commissioner cannot obtain the relief desired in a direct appeal as the harm caused by the Order will have already occurred. In examining the issue of interlocutory appeals, this Court has held “[o]bjections to allowing an appeal from an interlocutory order are typically rooted in the need for finality. The provisions of West Virginia Code § 58–5–1 (2005) establish that appeals may be taken in civil actions from ‘a final judgment of any circuit court or from an order of any circuit court constituting a final judgment.’ [ ]. Justice Cleckley elucidated ... that [t]his rule, commonly referred to as the rule of finality, is designed to prohibit piecemeal appellate review of trial court decisions which do not terminate the litigation[.] Exceptions to the rule of finality include interlocutory orders which are made appealable by statute or by the West Virginia Rules of Civil Procedure, or ... [which] fall within a jurisprudential

exception such as the collateral order doctrine. *Robinson v. Pack*, 223 W. Va. 828, 832, 679 S.E.2d 660, 664 (2009)(internal citations and quotations omitted).

Inasmuch as it appears the Commissioner cannot seek an interlocutory appeal of this procedural Order of the trial court, the Commissioner has no other means to seek adequate relief than this extraordinary writ.

**3. The Commissioner Will Be Damaged or Prejudiced in a Way that is not Correctable on Appeal.**

Per the second element to be examined, there can be no question that DCR is and will continue to be damaged and prejudiced in a manner that is not correctable in any way other than issuance of an extraordinary writ by this Court. The lower court's November 21, 2019, Order represents an interference with the actions of a public officer discharging her non-delegable authority in an appropriate manner which is inconsistent with a strict construction of an applicable statute. Syl. Pt. 2, *Bane v. Board of Educ. of Monongalia County*, 178 W.Va. 749, 364 S.E.2d 540 (1987) ("A Court will not ordinarily interfere with the action of a public officer or tribunal clothed with discretion, in the absence of a clear showing of fraud, collusion or palpable abuse of discretion." Syl. Pt. 6, *Pioneer Co. v. Hutchison*, 159 W.Va. 276, 220 S.E.2d 894 *overruled on another point*, syl. Pt. 1, *State ex rel. E.D.S. Federal Corp. v. Ginsberg*, 163 W.Va. 647, 259 S.E.2d 618 (1979).).

The second element is also easily satisfied in this instance as relief from the trial court's order. The transport of an inmate with a maximum security classification facing life imprisonment poses an immediate and substantial risk to public safety and officer safety, and the rejection of the invocation of W.Va. Code §25-1A-5(c) cannot be remedied on appeal until after the violation has occurred.

Despite the trial court's ruling that adequate security can be maintained in the courtroom, the trial court wholly failed to address the security concerns involved in transporting such a dangerous inmate to and from the courthouse daily. Transportation of a dangerous inmate poses a substantial and unnecessary risk to public safety as well as the safety of the officers charged and risk to the agency associated with such transportation.<sup>9</sup> As noted by the court, Delgado has no state or federal constitutional right to attend his civil trial in person.<sup>10</sup> Pet.Appendix 219.

Given the potential for harm, the Commissioner has no other method or means to address these issues other than by award of an extraordinary writ of this Court.

**4. The Lower Court's November 21, 2019 Order is Clearly Erroneous as a Matter of Law in Rejecting the Plain Language of an Unambiguous Statute.**

The third, and most persuasive element, of the five factor test to determine whether a discretionary writ of prohibition should issue is "whether the lower tribunal's order is clearly erroneous as a matter of law." Syl. Pt. 4, in part, *Hoover, supra*. In the instant case, the lower

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<sup>9</sup> While not a part of the record below, the DCR states that due to their unpredictable nature, inmate transports present unique hazards to correctional officers and the public safety. Standard protocols can include, but not be limited to, an evaluation of the risks posed by the specific inmate based upon history and offense level, searches of the inmate prior to any transport, transportation at irregular times, and ensuring the proper restraints of the inmate. As stated above, Inmate Delgado has been sentenced to life imprisonment without the possibility of parole, thus elevating the risk of attempted escape at any point between the facility and the court.

<sup>10</sup> The DCR recognizes that several courts have authorized a trial court's review of certain factors in determining whether the risk of transportation of an inmate outweighs the necessity for an in-court appearance in a motion for writ of habeas corpus ad testificandum. Specifically, the DCR recognizes that the 4<sup>th</sup> Circuit has held:

"In deciding which alternative to follow, the court should consider at a minimum the following factors:

- (1) Whether the prisoner's presence will substantially further the resolution of the case, and whether alternative ways of proceeding, such as trial on depositions, offer an acceptable alternative.
- (2) The expense and potential security risk entailed in transporting and holding the prisoner in custody for the duration of the trial.
- (3) The likelihood that a stay pending the prisoner's release will prejudice his opportunity to present his claim, or the defendant's right to a speedy resolution of the claim."

*Muhammad v. Warden, Baltimore City Jail*, 849 F.2d 107, 113 (4th Cir. 1988).

Despite this ruling of the 4<sup>th</sup> Circuit, the DCR contends it is inapplicable in light of the specific statutory prohibition contained in W.Va. Code §25-1A-5(c), an interpretation of which remains a matter of first impression. The DCR maintains that imposition of a balancing test, such as that stated in *Muhammad*, is in contravention of the clear language in the West Virginia Code.

court's interference with the non-delegable statutory authority of the Commissioner of the DCR violates the plain language of the statute.

The West Virginia Legislature's intent to place the decision whether to transport an inmate to a civil trial solely within the sphere of authority of the executive branch is incontrovertible in its use of the language "no court may compel[.]" Moreover, the judgment and decision-making authority of the Commissioner of the Division of Corrections and Rehabilitation, subject to constitutional and statutory limitations, is primary and is entitled to substantial deference from a judicial body.

As stated above, W.Va. Code §25-1A-5(c) prohibits the courts from compelling the Commissioner of the DCR to transport an inmate to court if two conditions are met, to-wit: the classification of the inmate as maximum security and an affidavit from the Superintendent of the facility stating that, in his or her opinion, the inmate possesses a substantial risk of escape if transported. Pet.Appendix 6-9.

There can be no question of the mandatory, non-delegable nature of the Commissioner's obligation to perform this non-discretionary function; the Legislature's use of the phrase "[n]o court may compel" in this instance was not qualified in any way by context or syntax. In an analysis of the similar phrase "may not" by the Legislature, this Court has rejected the argument that the use of the term "may not" is merely directory, while "shall not" is mandatory. While "flatly rejecting this semantical argument", the Court accepted the ruling of the lower court which held "[t]o rely upon the absence of 'shall not' as a basis for interpreting the statute as merely directory, would rob the statute of all meaning and effect and nullify its clear intent. This Court must conclude the legislature did not establish [the] prohibitions and at the same time intend the prohibitions to be violated at the pleasure of election officials." *Barr v. Gainer*, 203 W. Va. 379,



383, 508 S.E.2d 96, 100 (1998). See also, Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1965) (“A statutory provision which is clear and unambiguous and plainly expresses the legislative intent [it] will not be interpreted by the courts but will be given full force and effect.”); Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959) (“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.”)

The statute vests the authority to act upon the Commissioner and her appointed representatives alone. Here, where the Commissioner has exercised her non-discretionary authority in a manner consistent with the statute’s language and intent, the judiciary has no need to either interpret or evaluate the executive branch’s classification or risk assessment of Inmate Delgado.

**5. The Order is Manifests Persistent Disregard for Either Procedural or Substantive Law.**

The fourth element to examine is whether the trial court’s Order manifests persistent disregard for procedural or substantive law. Given the plain language of W.Va. Code §25-1A-5(c) and its prohibition on the trial court to order transport of certain inmates for physical presence at a trial, the trial court’s order plainly manifests a disregard for substantive law. Given the ruling that an inmate enjoys no state or federal constitutional right to attend a civil trial in person, no other grounds exist to reject the invocation of the subsection.

**6. The Lower Court’s Actions are Capable of Repetition in the Future Across the State of West Virginia and the Order Raises New and Important Problems or Issues of Law of First Impression.**

The fifth element to examine when determining whether a writ of prohibition should issue is “whether the lower tribunal’s order raises new and important problems or issues of law of first

impression[.]” Syl. Pt. 4, in part, *Hoover, supra*. While DCR admits that a lower court’s interference with the executive function of the Commissioner is rare, similar cases have occurred in the past. Importantly, when the judiciary exceeds its legitimate authority in the manner which the lower court did in this case, the court’s actions can have far-reaching repercussions for the corrections facility as a whole. The best method to prevent this type judicial interpretation of an unambiguous statute from occurring in the future is through the issuance of the writ of prohibition and reversal of the lower court’s order.

W.Va. Code §25-1A-5(c), as a component of a PLRA equivalent law, is apparently unique to West Virginia and, at present, has never been tested before this Court. As such, the trial court’s order satisfies both the required showing of raising a new and important problem and an issue of a law of first impression.

There is no question that the Courts act as stewards of the fundamental constitutional rights of incarceration persons. *State ex rel. Antsey v. Davis et al.*, 203 W.Va. 538, 544, 509 S.E.2d 585 (1998). However, no due process or other constitutional right has been implicated in this action to warrant the Court’s interdiction in the Commissioner’s decision not to permit the transport of Inmate Delgado to trial.

### **CONCLUSION**

This petition should be granted; a writ should be issued to vacate the circuit court’s erroneous November 21, 2019, Order directing Inmate Delgado to be transported to the Circuit Court of Kanawha County for trial; and the matter remanded to the circuit court for entry of an Order consistent with the Commissioner’s authority under W.Va. Code §25-1A-5(c).

**Respectfully Submitted,**

**STATE OF WEST VIRGINIA  
EX REL. BETSY JIVIDEN,**

**By Counsel.**

**PATRICK MORRISEY  
ATTORNEY GENERAL**

*Briana J. Marino*

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Briana J. Marino (WVSB #11060)

Assistant Attorney General

1900 Kanawha Blvd, East

Building 1, Suite 400-West

Charleston, WV 25305

Telephone: (304) 558-6593

Email: [Briana.J.Marino@wvago.gov](mailto:Briana.J.Marino@wvago.gov)

*Counsel for Petitioner*