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Constitutional Law

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*West Virginia Supreme Court of Appeals*

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States."^{1414}

In *Bowman v. Leverette*,^{1415} Justice McHugh was called upon to examine the use of habeas corpus to challenge a conviction based upon prior federal and state supreme court decisions that prohibited shifting the burden of proof on an element of an offense to a defendant. The *Bowman* court held that

> *W.Va. Code, 53-4A-1(d) [1967]* allows a petition for post-conviction habeas corpus relief to advance contentions or grounds which have been previously adjudicated only if those contentions or grounds are based upon subsequent court decisions which impose new substantive or procedural standards in criminal proceedings that are intended to be applied retroactively.^{1416}

Bowman went on to address prior precedents on shifting the burden of proof to the defendant and held that "[t]he decisions in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and *State v. O'Connell*, [163] *W.Va. [366]*, 256 S.E.2d 429 (1979), do not require full retroactive application."^{1417}

Justice McHugh held in *State ex rel. Dye v. Bordenkircher*^{1418} that "[w]hen a stay of proceedings under *W.Va. Code, 62-7-2 [1931]*, is in effect the proper method of seeking bail pending appeal is by a petition for habeas corpus to this Court."^{1419}

**XXII. CONSTITUTIONAL LAW**

**A. Retroactive Application of Constitutional Pronouncements**

Justice McHugh indicated in *Kincaid v. Mangum*^{1420} that "[w]hen this Court issues an interpretation of the W.Va. Const. which was clearly not foreshadowed, and when retroactive application of the new interpretation would excessively burden the government’s ability to carry out its functions, then the new constitutional interpretation will apply prospectively."^{1421}

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^{1414} *Id.* at Syl. Pt. 2.

^{1415} 289 S.E.2d 435 (W. Va. 1982).

^{1416} *Id.* at Syl. Pt. 1.

^{1417} *Id.* at Syl. Pt. 2.


^{1419} *Id.* at Syl. Pt. 3.

^{1420} 432 S.E.2d 74 (W. Va. 1993).

^{1421} *Id.* at Syl. Pt. 5.
A TRIBUTE TO THOMAS E. McHugh

B. Article 8 West Virginia Supreme Court of Appeals

Justice McHugh held in State ex rel. Crabtree v. Hash\textsuperscript{1422} that

W.Va. Const. art. VIII, §§ 3 and 8, and all administrative rules made pursuant to the powers derived from article VIII, supersede W.Va. Code, 51-2-10 [1931] and vest the Chief Justice of the Supreme Court of Appeals of West Virginia with the sole power to appoint a judge for temporary service in any situation which requires such an appointment.\textsuperscript{1423}

Justice McHugh said in Committee on Legal Ethics of the West Virginia State Bar v. Karl\textsuperscript{1424} that

[p]ursuant to article VIII, section 8 of the West Virginia Constitution, this Court has the inherent and express authority to "prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof[]."\textsuperscript{1425}

C. Article 3, Section 14 Speedy Trial

In State ex rel. Shorter v. Hey,\textsuperscript{1426} the court clarified a defendant's right to a speedy trial pursuant to the constitution and by statute. Justice McHugh held that

[w]hereas W.Va. Code, 62-3-1, provides a defendant with a statutory right to a trial in the term of his indictment, it is W.Va. Code, 62-3-21, rather than W.Va. Code, 62-3-1, which is the legislative adoption or declaration of what ordinarily constitutes a speedy trial within the meaning of U.S. Const., amend. VI and W.Va. Const., art. III, § 14.\textsuperscript{1427}

\textsuperscript{1422} 376 S.E.2d 631 (W. Va. 1988).
\textsuperscript{1423} Id. at Syl. Pt. 2.
\textsuperscript{1424} 449 S.E.2d 277 (W. Va. 1994).
\textsuperscript{1425} Id. at Syl. Pt. 5 (alteration in original).
\textsuperscript{1426} 294 S.E.2d 51 (W. Va. 1981).
\textsuperscript{1427} Id. at Syl. Pt. 1.
D. Article 10, Section 4 Contracting Debt

In *Devon Corp. v. Miller*, Justice McHugh addressed the effect of the Contract Clause contained in Article 3, Section 4 of the West Virginia Constitution and Article I of the United States Constitution. The court in *Devon* ruled:

The clauses of the Constitution of the United States and the Constitution of West Virginia which forbid the passage of a law impairing the obligation of a contract are not applicable to a statute enacted prior to the making of a contract. Specifically, an oil and gas lease obtained subsequent to the enactment of *W.Va. Code*, 22-4A-7(b)(4), which statute requires an operator to obtain the written consent and easement of surface owners prior to the drilling or operation of a deep well, is not unconstitutionally impaired by such statute.  

Justice McHugh stated in *State ex rel. Dadisman v. Caperton* that

[the 1990 amendment to *W.Va. Code*, 5-10-28 eliminating, for most accounting purposes, the two divisions of the Public Employees Retirement System previously existing only for such purposes, specifically, the state division and the public employer division, does not constitute an unconstitutional impairment of the contractual rights of the former public employer division’s beneficiaries or retirants, for the System has always owned all of the assets.]

Justice McHugh held in *State ex rel. Marockie v. Wagoner* that

[the school building debt service fund, described in *W.Va. Code*, 29-22-18 [1994] as consisting of monies allocated from the net profits of the West Virginia Lottery, may be used to liquidate the School Building Authority’s revenue bonds. This method of funding the School Building Authority’s revenue bonds does not violate section 4 of article X of the West Virginia Constitution since the monies allocated to the school building debt service fund are a new revenue source and since the legislature specifically provided in *W.Va. Code*, 29-22-18 [1990 and 1994] that the net

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1429 *Id.* at Syl. Pt. 1.
1431 *Id.* at Syl. Pt. 2.
profits from the West Virginia Lottery are not to be treated as part of the general revenue of the State.\textsuperscript{1433}

E. \textit{Article 6, Section 30 One Object Rule}

Justice McHugh was called upon to explain the one object rule legislation provision in the state constitution in the case of \textit{Kincaid v. Mangum}.\textsuperscript{1434} The court held:

If there is a reasonable basis for the grouping of various matters in a legislative bill, and if the grouping will not lead to logrolling or other deceiving tactics, then the one-object rule in W.Va. Const. art. VI, § 30 is not violated; however, the use of an omnibus bill to authorize legislative rules violates the one-object rule found in W.Va. Const. art. VI, § 30 because the use of the omnibus bill to authorize legislative rules can lead to logrolling or other deceiving tactics.\textsuperscript{1435}

F. \textit{Article 10, Section 8 Bonded Debt}

In \textit{State ex rel. Council of City of Charleston v. Hall},\textsuperscript{1436} Justice McHugh indicated that "W.Va. Const. art. X, § 8 does not preclude a contract for a term of twenty-five years whereby a city is obligated to pay a fee for solid waste disposal when that fee comes from a special fund collected by the city for such solid waste disposal."\textsuperscript{1437} It was further held:

The provisions of an agreement which provide a city the option of buying back improvements made to its solid waste facility at certain years of the agreement or when the City chooses to prematurely terminate the agreement, do not violate W.Va. Const. art. X, § 8 or \textit{W.Va. Code}, 11-8-26 [1963] since the City decides when or if it will buy back the improvements to the solid waste facility. However, if the City chooses to buy back the improvements made to the solid waste facility it must do so without violating W.Va. Const. art. X, § 8 or \textit{W.Va. Code}, 11-8-26 [1963].\textsuperscript{1438}

\textsuperscript{1433} \textit{Id.} at Syl. Pt. 3.
\textsuperscript{1434} 432 S.E.2d 74 (W. Va. 1993).
\textsuperscript{1435} \textit{Id.} at Syl. Pt. 2.
\textsuperscript{1436} 441 S.E.2d 386 (W. Va. 1994).
\textsuperscript{1437} \textit{Id.} at Syl. Pt. 1.
\textsuperscript{1438} \textit{Id.} at Syl. Pt. 2.
Justice McHugh held in *State ex rel. County Commission of Boone County v. Cooke* ¹⁴³⁹ that

[w]hen tax increment obligations are issued pursuant to W.Va. Code, 7-11B-1, et seq. [1995], The Tax Increment Financing Act, to finance a county development project authorized therein, a debt is created within the meaning of article X, § 8 of the Constitution of West Virginia and such tax increment obligations may only be issued in accordance with article X, § 8. ¹⁴⁴⁰

The court went on to hold that

[t]he issuance of tax increment obligations pursuant to W.Va. Code, 7-11B-1, et seq. [1995], The Tax Increment Financing Act, is not in accordance with W.Va. Const. art. X, § 8 because W.Va. Code, 7-11B-1, et seq. [1995] does not provide “for the collection of a direct annual tax on all taxable property therein, in the ratio, as between the several classes or types of such taxable property, specified in section one of this article [W. Va. Const. art. X, § 1], separate and apart from and in addition to all other taxes for all other purposes” in order to pay the principal of and interest on such tax increment obligations and is, therefore, unconstitutional. ¹⁴⁴¹

G. Article 3, Section 6 Search and Seizure

Justice McHugh examined the constitutional issue of privacy, vis-a-vis an automobile, in *State v. Peacher.* ¹⁴⁴² The court noted initially that “[t]he Fourth Amendment of the United States Constitution, and Article III, Section 6, of the West Virginia Constitution protect an individual’s reasonable expectation of privacy.” ¹⁴⁴³ Justice McHugh then went on to find that

[a]n individual’s expectation of privacy in his automobile is less than that which he would have in his home or his place of business. The expectation of privacy associated with the exterior aspects of an automobile is even less than that associated with the interior portions. And, where an automobile is parked on a third person’s property, after control had been relinquished to yet

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¹⁴³⁹ 475 S.E.2d 483 (W. Va. 1996).
¹⁴⁴⁰ *Id.* at Syl. Pt. 1.
¹⁴⁴¹ *Id.* at Syl. Pt. 2.
¹⁴⁴³ *Id.* at Syl. Pt. 7.
another person, and the automobile is open to view from a public highway, any possible expectation of privacy regarding the exterior aspects of the automobile is even further diminished.\textsuperscript{1444}

Justice McHugh relied on the decision in \textit{State v. Plantz}\textsuperscript{1445} to hold in \textit{State v. Wimer}\textsuperscript{1446} that

[t]he general rule is that the voluntary consent of a person who owns or controls premises to a search of such premises is sufficient to authorize such search without a search warrant, and that a search of such premises, without a warrant, when consented to, does not violate the constitutional prohibition against unreasonable searches and seizures.\textsuperscript{1447}

Justice McHugh was concerned with the issue of a warrantless search and seizure by public school officials in \textit{State v. Joseph T.}\textsuperscript{1448} The court initially held that “[p]ublic school students in West Virginia are entitled under U.S. Const. amend. IV and W.Va. Const. art. III, § 6, to security against unreasonable searches and seizures conducted in the schools by school principals, teachers and other school authorities.”\textsuperscript{1446} The court then held that

[i]n determining whether a warrantless search concerning a public school student conducted by school authorities is reasonable under U.S. Const. amend. IV and W.Va. Const. art. III, § 6, in the context of delinquency or criminal proceedings instituted against the student, the search is to be assessed in view not only of the rights of the public school student but also in view of the need of this State’s educational system to prevent disruptive or illegal conduct by public school students; in particular, the search must be reasonable in terms of (1) the initial justification for the search and (2) the extent of the search conducted; the initial justification for the search is determined by the “reasonable suspicion standard” (a standard less exacting than “probable cause”) under which a search is justified where school authorities have reasonable grounds for suspecting that the search will reveal evidence that the student violated the rules of the school or the law; the extent of the search conducted is reasonable when

\textsuperscript{1444} \textit{Id.} at Syl. Pt. 8.
\textsuperscript{1445} 180 S.E.2d 614 (W. Va. 1971).
\textsuperscript{1446} 284 S.E.2d 890 (W. Va. 1981).
\textsuperscript{1447} \textit{Id.} at Syl. Pt. 2.
\textsuperscript{1448} 336 S.E.2d 728 (W. Va. 1985).
\textsuperscript{1449} \textit{Id.} at Syl. Pt. 2.
reasonably related to the objective of the search and not excessively intrusive to the student.\textsuperscript{1450}

Justice McHugh concluded \textit{Joseph T.} by holding:

Where an assistant principal of a public school had reasonable grounds for suspecting that the locker of a public school student contained an alcoholic beverage in violation of the rules of the school, and a warrantless search of the student’s locker revealed a number of marihuana cigarettes, the search, in the context of delinquency or criminal proceedings instituted against the student, did not constitute a violation of the student’s right under U.S. Const. amend. IV and W.Va. Const. art. III, § 6, to security against unreasonable searches and seizures.\textsuperscript{1451}

The case of \textit{State v. Choat}\textsuperscript{1452} challenged the constitutionality of the stop and frisk procedure. Justice McHugh stated initially that “[w]here a police officer observes several individuals in a high-crime vicinity during the early morning hours and has reason to believe at least one of those individuals is violating a city ordinance, an investigatory stop conducted by the police officers is constitutionally permissible.”\textsuperscript{1453} The court then set out guidelines for conducting a stop and frisk:

Where a police officer making a lawful investigatory stop has reason to believe that an individual is armed and dangerous, that officer, in order to protect himself and others, may conduct a search for concealed weapons, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be certain that the individual is armed; the inquiry is whether a reasonably prudent man would be warranted in the belief that his safety or that of others was endangered.\textsuperscript{1454}

\textbf{H. Article 3, Section 14 Right to Counsel}

Relying on \textit{State v. Thomas},\textsuperscript{1455} Justice McHugh addressed the constitutional right to counsel in criminal cases in \textit{State v. Baker}.\textsuperscript{1456} The court in \textit{Baker} held:

\begin{flushleft}
\textsuperscript{1450} \textit{Id.} at Syl. Pt. 3.
\textsuperscript{1451} \textit{Id.} at Syl. Pt. 4.
\textsuperscript{1452} 363 S.E.2d 493 (W. Va. 1987).
\textsuperscript{1453} \textit{Id.} at Syl. Pt. 2.
\textsuperscript{1454} \textit{Id.} at Syl. Pt. 3.
\textsuperscript{1455} 203 S.E.2d 445 (W. Va. 1974).
\textsuperscript{1456} 287 S.E.2d 497 (W. Va. 1982).
\end{flushleft}
In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error.\textsuperscript{1457}

Justice McHugh continued in \textit{Baker} by holding that "[w]here a counsel’s performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client’s interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused."\textsuperscript{1458}

In \textit{State ex rel. Levitt v. Bordenkircher},\textsuperscript{1459} the defendant alleged ineffective assistance of counsel during his criminal prosecution. Justice McHugh responded to the claim as follows:

A defendant in a criminal case, whose voluntary tape recorded confession to police authorities indicated that he was guilty of murder of the first degree under the West Virginia “felony-murder rule,” who entered a plea of guilty to murder of the first degree and received a sentence of life imprisonment, without a recommendation of mercy, failed to demonstrate that his conviction and sentence resulted from ineffective assistance of counsel, where his counsel (1) filed various pre-trial motions upon the defendant’s behalf, including motions to discover the nature of the State’s evidence, (2) evaluated the strength of the evidence against the defendant and met with the defendant upon several occasions prior to recommending the guilty plea and (3) attempted to mitigate the defendant’s sentence by eliciting testimony from witnesses who stated that the defendant “turned himself in,” helped the authorities locate a revolver used during the crime, and would, in time, be a good candidate for parole.\textsuperscript{1460}

Justice McHugh held in \textit{State v. Glover}\textsuperscript{1461} that “[i]nexperience alone does

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1457} \textit{Id.} at Syl. Pt. 4.
\item \textsuperscript{1458} \textit{Id.} at Syl. Pt. 3.
\item \textsuperscript{1459} 342 S.E.2d 127 (W. Va. 1986).
\item \textsuperscript{1460} \textit{Id.} at Syl. Pt. 5.
\item \textsuperscript{1461} 355 S.E.2d 631 (W. Va. 1987).
\end{enumerate}
\end{footnotesize}
not constitute ineffective assistance of counsel.”\textsuperscript{1462} The court also ruled:

Ineffective assistance of counsel is established when it is proved that counsel for a criminal defendant failed to investigate adequately a purported alibi defense and consequently failed to contact, subpoena and call alibi witnesses who were willing and able to testify for the defendant in a case in which the alibi was the defendant’s sole possible defense or a material defense.\textsuperscript{1463}

I. Article 3, Section 4 Ex Post Facto

In \textit{Shumate v. West Virginia Department of Motor Vehicles},\textsuperscript{1464} Justice McHugh said:

\begin{quote}
[i]t is not a violation of the ex post facto clauses, U.S. Const. art. I, § 10, and W. Va. Const. art. III, § 4, to apply the provisions of \textit{W.Va. Code}, chapter 17C, article 5\textsuperscript{A}, as amended, to persons whose license to operate a motor vehicle has previously been suspended or revoked pursuant to \textit{W.Va. Code}, chapter 17C, article 5, as amended.\textsuperscript{1465}
\end{quote}

The opinion concluded that “[t]he ex post facto clauses of the United States Constitution, article I, section 10, and the West Virginia Constitution, article III, section 4, do not apply to administrative proceedings for which the purpose is to suspend or revoke a license to operate a motor vehicle.”\textsuperscript{1466}

In \textit{State ex rel. Collins v. Bedell}\textsuperscript{1467} Justice McHugh ruled that

[a] procedural change in a criminal proceeding does not violate the ex post facto principle found in the W.Va. Const. art. III, § 4 and in the U.S. Const. art. I, § 10 unless the procedural change alters the definition of a crime so that what is currently punished as a crime was an innocent act when committed; deprives the accused of a defense which existed when the crime was committed; or increases the punishment for the crime after it was committed.\textsuperscript{1468}

\textsuperscript{1462} \textit{Id.} at Syl. Pt. 4.

\textsuperscript{1463} \textit{Id.} at Syl. Pt. 2.

\textsuperscript{1464} 392 S.E.2d 701 (W. Va. 1990).

\textsuperscript{1465} \textit{Id.} at Syl. Pt. 2.

\textsuperscript{1466} \textit{Id.} at Syl. Pt. 3.

\textsuperscript{1467} 460 S.E.2d 636 (W. Va. 1995).

\textsuperscript{1468} \textit{Id.} at Syl. Pt. 7.
A TRIBUTE TO THOMAS E. McHUGH

J. Article 3, Section 10 Equal Protection

Justice McHugh was concerned with the constitutional impact of a statute that limited funds for certain counties in State ex rel. Board of Education for Grant County v. Manchin.\(^\text{1469}\) Justice McHugh stated that

\[ W.Va. \text{Code}, \ 18A-4-5 \ [1985], \text{to the extent that it fixes a county's entitlement to state equity funding based upon whether an excess levy was in effect in that particular county on January 1, 1984, and continues to limit that county's funding to the specific amount awarded on January 1, 1984, despite the fact that the county's voters subsequently rejected continuation of the levy at the polls, violates equal protection principles because such a financing system operates to treat counties which never passed excess levies more favorably than those which had excess levies in effect on January 1, 1984, but failed to renew them.\(^\text{1470}\) \]

Justice McHugh determined the constitutionality of a criminal statute in the Public Employees Insurance Act, in the case of Courtney v. State Department of Health of West Virginia.\(^\text{1471}\) The court held that the statute, "W.Va. Code, 5-16-12 [1988] does not violate equal protection principles contained in article III, sections 10 & 17 or in article VI, section 39 of the West Virginia Constitution."\(^\text{1472}\) In Lewis v. Canaan Valley Resorts, Inc.,\(^\text{1473}\) Justice McHugh held:

The West Virginia Skiing Responsibility Act, W.Va. Code, 20-3A-1 to 20-3A-8 [1984], which immunizes ski area operators from tort liability for the inherent risks in the sport of skiing which are essentially impossible for the operators to eliminate, does not violate equal protection principles of article III, section 10 of the Constitution of West Virginia or of the fourteenth amendment to the Constitution of the United States. The Act similarly does not constitute special legislation in violation of article VI, section 39 of the Constitution of West Virginia.\(^\text{1474}\)

In the case of Pritchard v. Arvon,\(^\text{1475}\) Justice McHugh held that

\[ 1469 \quad \text{366 S.E.2d 743 (W. Va. 1988).} \]
\[ 1470 \quad \text{Id. at Syl. Pt. 3.} \]
\[ 1471 \quad \text{388 S.E.2d 491 (W. Va. 1989).} \]
\[ 1472 \quad \text{Id. at Syl. Pt. 5.} \]
\[ 1473 \quad \text{408 S.E.2d 634 (W. Va. 1991).} \]
\[ 1474 \quad \text{Id. at Syl. Pt. 3.} \]
\[ 1475 \quad \text{413 S.E.2d 100 (W. Va. 1991).} \]
W.Va. Code, 29-12A-16(d) [1986], which provides that the purchase of liability insurance or the establishment of an insurance program by a political subdivision does not constitute a waiver of any immunity or defense of the political subdivision or its employees, does not violate equal protection principles as set forth in W.Va. Const. art. III, § 10.\footnote{1476}

Justice McHugh held in \textit{Randall v. Fairmont City Police Department}\footnote{1477} that \textit{"[t]he qualified tort immunity provisions of the West Virginia Governmental Tort Claims and Insurance Reform Act of 1986, W.Va. Code, 29-12A-1 to 29-12A-18, do not violate the equal protection principles of article III, section 10 of the Constitution of West Virginia."}\footnote{1478}

In \textit{State ex rel. Lambert v. County Commission of Boone County}, Justice McHugh stated:

The provision of W.Va. Code, 5-16-22 [1992], which requires employers, whether or not they elect to participate in the Public Employees Insurance Agency, to contribute to the Public Employees Insurance Agency if they participate in the Public Employees Retirement System and their retired employees elect to participate in the Public Employees Insurance Agency, does not violate the equal protection principle found in West Virginia Constitution art. III, Sec. 10, which is West Virginia's due process clause. Such provision relates to a legitimate governmental purpose of providing medical coverage to retired employees who participate in the Public Employees Retirement System.\footnote{1480}

Justice McHugh ruled in \textit{Wetzel County Solid Waste Authority v. West Virginia Division of Natural Resources}\footnote{1481} that

\textit{[t]he equal protection and due process rights found in W.Va. Const. art. III, § 10 are not violated by the imposition of the solid waste assessment fee as set forth in W.Va. Code, 7-5-22 [1990] because the imposition of the solid waste assessment fee is rationally related to the legitimate governmental purpose of defraying the administrative costs of the regional or county solid waste authorities and their solid waste programs. Furthermore, the}

\begin{footnotesize}
\footnote{1476}{Id. at Syl. Pt. 7.}
\footnote{1477}{412 S.E.2d 737 (W. Va. 1991).}
\footnote{1478}{Id. at Syl. Pt. 5.}
\footnote{1479}{452 S.E.2d 906 (W. Va. 1994).}
\footnote{1480}{Id. at Syl. Pt. 5.}
\footnote{1481}{462 S.E.2d 349 (W. Va. 1995).}
\end{footnotesize}
imposition of the solid waste assessment fee is neither arbitrary nor discriminatory.\textsuperscript{1482}

Justice McHugh ruled in \textit{Payne v. Gundy}\textsuperscript{1483} that

[it] is a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and article III, section 10, of the Constitution of West Virginia for a party in a civil action to purposefully eliminate potential jurors from a jury through the use of peremptory strikes solely upon the basis of gender.\textsuperscript{1484}

The court then held:

To establish a prima facie case of unlawful gender discrimination in the jury selection process through the use of peremptory strikes, the party moving to disqualify the jury must show: (1) that the opposing party has exercised peremptory strikes to eliminate potential jurors of the movant’s gender, and (2) that the circumstances raise an inference that the opposing party used the peremptory strikes to exclude from the jury potential jurors solely upon the basis of their gender. The opposing party may defeat a prima facie case of such unlawful discrimination by providing non-discriminatory, credible reasons for using the peremptory strikes to eliminate members of the moving party’s gender from the jury. Although the reasons or explanations of the opposing party for striking members of the moving party’s gender from the jury need not rise to the level of a “for cause” challenge, the trial court has the discretion to conduct an evidentiary hearing upon the motion to disqualify the jury because of unlawful gender discrimination.\textsuperscript{1485}

Justice McHugh wrote in \textit{State ex rel. Blankenship v. Richardson}\textsuperscript{1486} that

\textit{W.Va. Code, 23-4-6(n)(1) [1995]}, which provides that in order to be eligible to apply for an award of permanent total disability benefits, a claimant must have been awarded the sum of fifty percent in prior permanent partial disability awards or have suffered an occupational injury or disease which results in a

\textsuperscript{1482} \textit{Id.} at Syl. Pt. 6.
\textsuperscript{1483} 468 S.E.2d 335 (W. Va. 1996).
\textsuperscript{1484} \textit{Id.} at Syl. Pt. 4.
\textsuperscript{1485} \textit{Id.} at Syl. Pt. 5.
\textsuperscript{1486} 474 S.E.2d 906 (W. Va. 1996).
finding that the claimant has suffered a medical impairment of fifty percent, does not violate W.Va. Const. Art. III, § 10, our equal protection clause.\textsuperscript{1487}

K. \textit{Article 3, Section 22 Right To Bear Arms}

Justice McHugh was concerned with legislative intrusion in to the state constitutional right to keep and bear arms in the case of \textit{State ex rel. City of Princeton v. Buckner}.\textsuperscript{1488} Justice McHugh held that

\textit{W.Va. Code}, 61-7-1 [1975], the statutory proscription against carrying a dangerous or deadly weapon, is overbroad and violative of article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment." It infringes upon the right of a person to bear arms for defensive purposes, specifically, defense of self, family, home and state, insofar as it prohibits the carrying of a dangerous or deadly weapon for any purpose without a license or other statutory authorization.\textsuperscript{1489}

Justice McHugh noted in \textit{Buckner} that

[t]he West Virginia legislature may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment."\textsuperscript{1490}

L. \textit{Article 3, Section 7 Free Speech}

The right of a citizen to speak while a police officer issues a traffic ticket to another person was addressed by Justice McHugh in \textit{State ex rel. Wilmoth v. Gustke}.\textsuperscript{1491} The court held that

[a] person, upon witnessing a police officer issuing a traffic citation to a third party on the person's property, who asks the

\begin{footnotesize}
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\item[1487] \textit{Id}. at Syl. Pt. 5.
\item[1488] 377 S.E.2d 139 (W. Va. 1988).
\item[1489] \textit{Id}. at Syl. Pt. 2.
\item[1490] \textit{Id}. at Syl. Pt. 4.
\item[1491] 373 S.E.2d 484 (W. Va. 1988).
\end{enumerate}
\end{footnotesize}
A TRIBUTE TO THOMAS E. McHUGH

officer, without the use of fighting or insulting words or other opprobrious language and without forcible or other illegal hindrance, to leave the premises, does not violate W.Va. Code, 61-5-17 [1931], because that person has not illegally hindered an officer of this State in the lawful exercise of his or her duty. To hold otherwise would create first amendment implications which may violate the person’s right to freedom of speech. 1492

Justice McHugh held in Wheeling Park Commission v. Hotel & Restaurant Employees, International Union, AFL-CIO1493 that

[w]hen evaluating whether an injunction’s content-neutral restrictions on a person’s or group’s speech in a public forum is constitutional pursuant to W.Va. Const. art. III, § 7, the freedom of speech provision, as opposed to evaluating a content-neutral statute, ordinance or regulation, the standard time, place, and manner analysis of the restrictions is not sufficiently rigorous. Instead, a court must ensure that the content-neutral restrictions in the injunction burden no more speech than necessary to serve a significant government interest.1494

Justice McHugh examined the impact of mandatory disclosure of certain matters on the right to free speech in the case of State ex rel. Hechler v. Christian Action Network.1495 The court held:

Pursuant to W.Va. Code, 29-19-8 [1992] of the Solicitation of Charitable Funds Act all charitable organizations must include the following statement on every printed solicitation: “‘West Virginia residents may obtain a summary of the registration and financial documents from the Secretary of State, State Capitol, Charleston, West Virginia 25305. Registration does not imply endorsement.’” The mandated statement does not violate the First Amendment to the Constitution of the United States or article III, section 7 of the Constitution of West Virginia because it burdens no more speech than is necessary to further the substantial state interest of “prevent[ing] deceptive and dishonest statements and conduct in the solicitation and reporting of funds for or in the name of charity.”1496

1492 Id. at Syl.
1494 Id. at Syl. Pt. 2.
1495 491 S.E.2d 618 (W. Va. 1997).
1496 Id. at Syl. Pt. 6 (alteration in original).
The court further said that "[a]n organization which 'holds itself out to be an... educational... organization' is a 'charitable organization' within the meaning of W.Va. Code, 29-19-2(1) [1992] of the Solicitation of Charitable Funds Act and, thus, is subject to the requirements of that Act."\(^{1497}\) The court concluded that "W.Va. Code, 29-19-8 [1992] does not authorize the Secretary of State to require charitable organizations to submit to his office copies of any solicitation materials mailed to the public."\(^{1498}\)

**M. Article 3, Section 15 Free Exercise**

Justice McHugh indicated in *Matter of Kilpatrick*\(^{1499}\) that

> [t]he free exercise clause of the first amendment to the United States Constitution and art. III, § 15 of the West Virginia Constitution are not violated by the provision of W.Va. Code, 48-1-6 [1986] requiring a standard serological test before a license for marriage will be issued, because this statutory provision furthers the compelling interests in the health and welfare of the citizens of this State.\(^{1500}\)

**N. Article 6, Section 36 Lottery**

The constitutional lottery provision was the subject of interpretation by Justice McHugh in *State ex rel. Mountaineer Park, Inc. v. Polan*.\(^{1501}\) It was said initially in the opinion:

Article VI, section 36 of the West Virginia Constitution provides an exception to the prohibition against lotteries to allow the operation of a lottery which is regulated, controlled, owned and operated by the State of West Virginia in the manner provided by general law. Only those lottery operations which are regulated, controlled, owned and operated in the manner provided by general laws enacted by the West Virginia Legislature may be properly conducted in accordance with the exception created under article VI, section 36 of our Constitution.\(^{1502}\)

The *Polan* court then held:

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\(^{1497}\) *Id.* at Syl. Pt. 5 (alterations in original).

\(^{1498}\) *Id.* at Syl. Pt. 10.

\(^{1499}\) 375 S.E.2d 794 (W. Va. 1988).

\(^{1500}\) *Id.* at Syl.

\(^{1501}\) 438 S.E.2d 308 (W. Va. 1993).

\(^{1502}\) *Id.* at Syl. Pt. 1.
A TRIBUTE TO THOMAS E. McHUGH

In order for a delegation of authority by the legislature to an administrative agency to be constitutional, the legislature must prescribe adequate statutory standards to guide the agency in the administration of the statute, and not grant the agency unbridled authority in the exercise of the power conferred upon it. A general delegation of authority by the legislature to the Lottery Commission under W.Va. Code, 29-22-9(b)(2) [1990], authorizing it to promulgate rules and regulations with regard to "electronic video lottery systems," is clearly not a sufficient statutory standard which would vest the Lottery Commission with power to include electronic gaming devices, such as electronic video lottery, as part of the operations of the state lottery. To hold otherwise would result in an unlawful delegation of legislative power to the Lottery Commission and would violate article VI, § 36 of the West Virginia Constitution. 1503

O. Article 12, Section 2 Free Schools

Justice McHugh interpreted the constitutional authority of the state board of education in West Virginia Board of Education v. Hechler. 1504 The court held:

Rule-making by the State Board of Education is within the meaning of "general supervision" of state schools pursuant to art. XII, § 2 of the West Virginia Constitution, and any statutory provision that interferes with such rule-making is unconstitutional. Consequently, W.Va. Code, 29A-3A-12 and -13 [1988] are hereby declared to be unconstitutional. 1505

The court also stated in Hechler that

[a] rule adopted by the State Board of Education, setting forth minimum requirements for the design and equipment of school buses, is within the meaning of "general supervision" of state schools pursuant to art. XII, § 2 of the West Virginia Constitution. W.Va. Code, 29A-3A-12 and -13 [1988] interfere with such "general supervision," and, therefore, are unconstitutional. 1506

1503 Id. at Syl. Pt. 2.
1504 376 S.E.2d 839 (W. Va. 1988).
1505 Id. at Syl. Pt. 2.
1506 Id. at Syl. Pt. 3.
P. Article 3, Section 17 Certain Remedy

In *Lewis v. Canaan Valley Resorts, Inc.*, Justice McHugh held that "'[t]he West Virginia Skiing Responsibility Act, W.Va. Code, 20-3A-1 to 20-3A-8 [1984], does not violate the certain remedy provision of article III, section 17 of the Constitution of West Virginia.'" The court also held that

[w]hen legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication, thereby implicating the certain remedy provision of article III, section 17 of the Constitution of West Virginia, the legislation will be upheld under that provision if, first, a reasonably effective alternative remedy is provided by the legislation or, second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose.

In *Pritchard v. Arvon*, Justice McHugh held that

W.Va. Code, 29-12A-5(b) [1986], which provides immunity for an employee of a political subdivision under some circumstances, does not violate the certain remedy provision of W.Va. Const. art. III, § 17, nor does it violate equal protection principles as contained in W.Va. Const. art. III, § 10.

Article 10, Section 1 Taxation

The issue of disproportionate tax assessment was addressed by Justice McHugh in the case of Petition of Maple Meadow Mining Co. for Relief from Real Property Assessment for Tax Year 1992. The court held that

[a] taxpayer’s right to equal and uniform taxation under article X, section 1 of the West Virginia Constitution and equal protection of the laws under amendment XIV, section 1 of the United States Constitution is not violated when a certain class of property of that taxpayer is assessed at a higher percentage than certain other classes of property of other taxpayers within the three-year period of achieving equality of assessed property valuation pursuant to W.Va. Code, 11-1C-1, et seq. Accordingly, article X, section 1 of the West Virginia Constitution and amendment XIV, section 1 of the United States Constitution is satisfied when general adjustments are utilized over a short period of time to equalize the differences existing among taxpayers regarding property valuation and assessments.

In Wetzel County Solid Waste Authority v. West Virginia Division of Natural Resources, Justice McHugh distinguished a regulatory fee from a tax. The court held that

[the solid waste assessment fee authorized by W.Va. Code, 7-5-22 [1990] is a regulatory fee rather than a tax since the revenue from the fee is used for the sole purpose of defraying the costs of the administration of duties imposed upon the county or regional solid waste authorities. Therefore, W.Va. Code, 7-5-22 [1990] does not violate W.Va. Const. art. V, § 1, by impermissibly delegating taxing authority to the county or regional solid waste authorities nor does it violate W.Va. Const. art. X, § 1, which requires taxation to be equal and uniform throughout the State.

Justice McHugh ruled in City of Huntington v. Bacon that

[a]n ordinance which imposes a municipal service fee pursuant to W.Va. Code, 8-13-13 [1971] upon the owners of buildings at an

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1514 446 S.E.2d 912 (W. Va. 1994).
1515 Id. at Syl. Pt. 3.
1517 Id. at Syl. Pt. 3.
annual rate plus a percentage based upon the square footage of space contained in each structure on the lot for the sole purpose of defraying the cost of fire and flood protection services is a user fee rather than a tax and therefore, is not in violation of the Tax Limitation Amendment found in W. Va. Const. Art. X, § 1.1519

R. Article 6, Section 52 Road Funds

Justice McHugh was called upon in Contractors Ass'n of West Virginia v. West Virginia Department of Public Safety, Division of Public Safety1520 to explain the constitutional road fund provision. The court held that

[the only purposes for which the funds described in W.Va. Const. art. VI, § 52 may be spent are for the “cost of administration and collection” and for the cost of “construction, reconstruction, repair and maintenance of public highways.” The term “cost of administration” includes the cost of administering the duties of the Division of Motor Vehicles. The term “maintenance” includes the following activities which are directly related to ensuring the safety of our public highways: the road patrol, traffic, and traffic court activities of the Department of Public Safety; and the motorcycle safety and licensing program, but the term “maintenance” will not be construed to include activities which are remotely connected to highway safety such as the construction and operation of police barracks.1521

Justice McHugh also ruled that

[the reimbursements by the Division of Motor Vehicles to the Department of Public Safety for the following activities: road patrol, traffic, traffic court, operator examinations, and assistance to the Division of Motor Vehicles with its administrative duties are authorized by W.Va. Code, 15-2-12(i) [1990] because the above activities are “related” to the duties of the Division of Motor Vehicles since the Department of Public Safety is responsible for enforcing traffic laws and regulations which the Division of Motor Vehicles has the duty to administer.1522

1519 Id. at Syl. Pt. 6.
1520 434 S.E.2d 357 (W. Va. 1993).
1521 Id. at Syl. Pt. 1.
1522 Id. at Syl. Pt. 2.
S. Article 3, Sections 10 and 14 Due Process

Justice McHugh expressed concern with the extent to which law enforcement officials could use an informant to infringe upon the rights of a defendant in *State v. Leadingham*. The court held that

- Under the Fourteenth Amendment of the United States Constitution and article III, § 10 of the West Virginia Constitution, due process and fundamental fairness dictate that the police and the prosecuting attorney be precluded from using an undercover informant to penetrate the clinical environment of a psychiatric institution in order to elicit incriminating statements from a defendant who is undergoing a court-ordered psychiatric evaluation. Any incriminating statements elicited from a defendant under these circumstances, upon proper motion by the defendant, shall be suppressed in the trial on the criminal charges to which the incriminating statements relate.

The case of *State v. Blair* involved the criminal prosecution of a water company executive under a statute challenged as being void for vagueness. Justice McHugh wrote:

> W.Va. Code, 24-3-1 [1923] is unconstitutionally vague in violation of W.Va. Const. art. III, §§ 10 and 14 because the language “establish and maintain adequate and suitable facilities” and “perform such service . . . as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees” does not provide adequate standards for adjudication or set forth with sufficient definiteness the specific acts which are prohibited.


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1523 438 S.E.2d 825 (W. Va. 1993).
1524 Id. at Syl. Pt. 2.
1525 438 S.E.2d 605 (W. Va. 1993).
1526 Id. at Syl. Pt. 4 (alteration in original).
1527 460 S.E.2d 636 (W. Va. 1995).
1528 Id. at Syl. Pt. 3.
Justice McHugh held in *State v. Kelley*\(^{1529}\) that

[a] defendant’s constitutional rights to due process and trial by a fair and impartial jury, pursuant to amendment VI and amendment XIV, section 1 of the United States Constitution and article III, sections 10 and 14 of the West Virginia Constitution are violated when a sheriff, in a defendant’s trial, serves as a bailiff and testifies as a key witness for the State in that trial.\(^{1530}\)

Justice McHugh indicated in *State v. Farmer*\(^{1531}\) that

[p]ursuant to West Virginia’s kidnapping statute set forth in *W.Va. Code, 61-2-14a* [1965], a trial judge, for purposes of imposing a sentence on a defendant for a term of years not less than twenty or a sentence for a term of years not less than ten, has the discretion to make findings as to whether a defendant inflicted bodily harm on a victim and as to whether ransom, money, or any other concession has been paid or yielded for the return of the victim. Because the findings by the trial judge are made solely for the purpose of determining the sentence to be imposed on a defendant and are not elements of the crime of kidnapping, West Virginia Constitution art. III, §§ 10 and 14, relating to a defendant’s due process rights and right to a trial by jury, are not violated.\(^{1532}\)

In *State v. Jenkins*,\(^{1533}\) Justice McHugh was concerned with the impact of due process on the admissibility of evidence generally. The court held that

[w]hile ordinarily rulings on the admissibility of evidence are largely within the trial judge’s sound discretion, a trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as the right to examine witnesses against him or her, to offer testimony in support of his or her defense, and to be represented by counsel, which are essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the Constitution of the United States and article III, § 14 of the West Virginia Constitution.\(^{1534}\)

\(^{1529}\) 451 S.E.2d 425 (W. Va. 1994).

\(^{1530}\) Id. at Syl. Pt. 3.

\(^{1531}\) 454 S.E.2d 378 (W. Va. 1994).

\(^{1532}\) Id. at Syl. Pt. 1.

\(^{1533}\) 466 S.E.2d 471 (W. Va. 1995).

\(^{1534}\) Id. at Syl. Pt. 3.
In *State ex rel. White v. Todt*,{1535} Justice McHugh addressed the nature of due process that must be afforded a dangerous or potentially dangerous person who escaped from a mental institution in another state. The opinion noted as a general matter that "[t]he due process clause found in article III, § 10 of the Constitution of West Virginia requires that laws provide explicit standards for those who apply them so as to prevent arbitrary and discriminatory enforcement of the laws."{1536} Justice McHugh then held that

[w]hen a dangerous or potentially dangerous patient who has escaped from a mental health facility in another state is being detained in this State pursuant to article V of the Interstate Compact on Mental Health found in *W.Va. Code,* 27-14-1 [1957], the due process clause found in article III, § 10 of the Constitution of West Virginia requires, at a minimum, that before this State returns the dangerous or potentially dangerous patient to the state from where he or she has escaped, the dangerous or potentially dangerous patient be informed of the reason he or she is being detained, the dangerous or potentially dangerous patient be afforded a hearing to determine identification and the dangerous or potentially dangerous patient be afforded the opportunity to have the representation of counsel in the event he or she decides to challenge the identification.{1537}

Justice McHugh was concerned with the due process impact of workers' compensation legislation on injured workers in *State ex rel. Blankenship v. Richardson*.{1538} The court observed initially that "[s]though a workers' compensation statute, or amendment thereto, may be construed to operate retroactively where mere procedure is involved, such a statute or amendment may not be so construed where, to do so, would impair a substantive right."{1539} The court then held that

[w]here a workers' compensation claimant has been previously awarded permanent partial disability benefits that would have entitled the claimant to file for permanent total disability review, legislation that attempts to immediately preclude the claimant's substantive right to seek such review prior to the expiration of the ordinary ninety days provided in *W.Va. Const.* Art. VI, § 30, violates principles of fundamental fairness embodied in the due

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1535 475 S.E.2d 426 (W. Va. 1996).
1536 *Id.* at Syl. Pt. 4.
1537 *Id.* at Syl. Pt. 3.
1539 *Id.* at Syl. Pt. 6.
process provisions of W.Va, Const. Art. III, § 10.\textsuperscript{1540}

Justice McHugh wrote in \textit{State ex rel. Hechler v. Christian Action Network}\textsuperscript{1541} that "[t]he due process clause found in article III, § 10 of the Constitution of West Virginia requires that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may act accordingly."\textsuperscript{1542}

\textbf{T. Article 3, Section 14 Right to Jury Trial}

Justice McHugh held in \textit{State ex rel. Collins v. Bedell}\textsuperscript{1543} that

\textit{W.Va. Code}, 50-5-13 [1994], which sets forth the appeal procedure in a criminal proceeding from magistrate court to circuit court, but which does not give the defendant a statutory right to a jury trial de novo on the appeal to circuit court, does not violate W.Va. Const. art. III, § 14 or art. VIII, § 10.\textsuperscript{1544}

Justice McHugh addressed the constitutionality of the state’s criminal abuse and neglect statute in the case of \textit{State v. DeBerry}.\textsuperscript{1545} The opinion stated that

\begin{quote}
[t]he term “neglect,” as defined by \textit{W.Va. Code}, 61-8D-1(6) [1988], is not unconstitutionally vague in violation of due process principles contained in U.S. Const. amend. XIV, Sec. 1, and W.Va. Const. art. III, § 10. Therefore, \textit{W.Va. Code}, 61-8D-4(b) [1988] is not unconstitutionally vague in violation of due process principles contained in U.S. Const. amend. XIV, § 1, and W.Va. Const. art. III, § 10, because such statute’s use of the term “neglect” gives a person of ordinary intelligence fair notice that his or her contemplated conduct is prohibited and it also provides adequate standards for adjudication.\textsuperscript{1546}
\end{quote}

\begin{footnotes}
\item[1540] \textit{Id.} at Syl. Pt. 7.
\item[1541] 491 S.E.2d 618 (W. Va. 1997).
\item[1542] \textit{Id.} at Syl. Pt. 7.
\item[1543] 460 S.E.2d 636 (W. Va. 1995).
\item[1544] \textit{Id.} at Syl. Pt. 2.
\item[1545] 408 S.E.2d 91 (W. Va. 1991).
\item[1546] \textit{Id.} at Syl. Pt. 3.
\end{footnotes}