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Volume 77 | Issue 1 Article 2

December 1974

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Recommended Citation

Willard A. Sullivan Jr., *An Extraordinary Rule: Rule XVIII, Rules of Practice in the Supreme Court of Appeals of West Virginia*, 77 W. Va. L. Rev. (1974).
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West Virginia Law Review

Volume 77 December 1974 Number 1

AN EXTRAORDINARY RULE: RULE XVIII, RULES OF PRACTICE IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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The West Virginia Supreme Court of Appeals has promulgated a new rule governing the exercise of original jurisdiction in the only class of cases that the Supreme Court of Appeals has original jurisdiction—the extraordinary cases of mandamus, prohibition, and habeas corpus. The new rule restricts access to the court, thereby limiting the availability of constitutional writs and raising the question of whether the new rule is reasonable, necessary, and constitutional.

By order entered February 19, 1974, the Supreme Court of Appeals promulgated and adopted Rule XVIII of the Rules of Practice in the Supreme Court of Appeals. Rule XVIII, effective July 1, 1974, governs the procedure of a petitioner's invocation of, and the court's exercise of, the original jurisdiction granted by the West Virginia Constitution in cases of habeas corpus, mandamus, and prohibition.[1] The eight paragraphs of the new rule provide for

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[1] W. VA. CONST. art VIII, § 3. This article was written prior to the general election of November 5, 1974, at which time the citizens of West Virginia ratified the Judicial Reorganization Amendment. The Amendment provides a totally new article VIII to the constitution, the basic purpose being to "provide for a unified system of courts to be established in the State." Berry, *A Proposed New Judicial Article for West Virginia*, 76 W. VA. L. REV. 481, 483 (1974). Since the Amendment has been ratified, the first sentence of section three of article VIII of the constitution reads as follows: "The supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari." Acts of the 61st W. Va. Leg., Comm. Substitute for S.J. Res. No. 6, Reg. Sess. (1974). A comparison of this sentence with the first sentence of the former section conferring original jurisdiction upon the Supreme Court of Appeals—article VIII, section three —reveals that the granting of jurisdiction is in the same words—"shall have original jurisdiction"—and the only real difference is that the Amendment adds certiorari as one of the extraordinary writs available in the Supreme Court of Appeals.

pleadings and exhibits, the filing of applications for writs, notice to the respondent, memoranda of law, depositions, and so forth. The primary purpose of Rule XVIII, however, is suggested in section one, which begins: "Original jurisdiction of this court should not be invoked if adequate relief appears to be available in a court of concurrent jurisdiction." A "court of concurrent jurisdiction" would be the circuit court of any county[2] or one of several statutory courts.[3] The court has as its obvious objective the reduction of its original jurisdiction caseload for the purpose of permitting it to take more cases on appeal, to spend more time on its decisions, or to insure against the expenditures of more time in the future on the historically-increasing number of original jurisdiction applications.[4]

The court's newly-stated policy finds further expression in section one of the new rule, which requires that if an application for the extraordinary writ can be

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[2] W. VA. CONST. art. VIII, § 12; W. VA. CODE ANN. §§ 53-1-1 to -12 (1966) (prohibition and mandamus); *Id.* §§ 53-4-1 to -13 (habeas corpus); *Id.* §§ 53-4A-1 to -11 (1974 Cum. Supp.) (post conviction habeas corpus). The Judicial Reorganization Amendment, discussed in note 1 *supra*, continues the concurrent jurisdiction of the circuit courts. Under section six of article VIII, they "have original and general jurisdiction . . . of proceedings in habeas corpus, mandamus, quo warranto, prohibition and certiorari." In addition, section thirteen continues "the laws of this State [that] are in force on the effective date of this article and are not repugnant thereto," which presumably means that the statutes, including the provisions of chapter fifty-three, pertaining to the extraordinary writs, would remain in full force and effect. Acts of the 61st W. Va. Leg., Comm. Substitute for S.J. Res. No. 6, Reg. Sess. (1974).

[3] For example, the Kanawha County Court of Common Pleas, an inferior civil court, has jurisdiction to grant writs of mandamus, prohibition, and habeas corpus, at least in certain circumstances. Acts of the 59th W. Va. Leg. ch. 36, Reg. Sess. (1970); Acts of the 56th W. Va. Leg. ch. 32, Reg. Sess. (1964); Acts of the 32d W. Va. Leg. ch. 109, Reg. Sess. (1915). As explained in note 1 *supra*, this article was written prior to the electorate's decision on the Judicial Reorganization Amendment which, as adopted, eliminates the statutory courts of limited jurisdiction. Under section five of article VIII as provided in the Amendment, the courts of limited jurisdiction are absorbed into the circuit courts and the judge of each "statutory court of record of limited jurisdiction . . . shall . . . become a judge" of the circuit court upon the effective date of the Amendment.

[4] Although no comprehensive statistical information on applications to the West Virginia courts for writs of habeas corpus is available, it is generally thought that the number of petitions in all courts has been increasing. This is indicated in West Virginia by the number of cases reaching the federal courts, following exhaustion of state remedies. *See State Post-Conviction Remedies and Federal Habeas Corpus*, 12 WM. & MARY L. REV. 149 (1970). For the experience of one state, see Schapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973).

> lawfully made to a lower court in the first instance, the petition, in addition to the matters required by law to support the application, shall also set forth the circumstances which in the opinion of the applicant render it proper that the writ or rule should issue originally from this Court and not from such lower court.[5]

This section further provides that if the court decides that it should not exercise original jurisdiction in a certain case, it "may" (presumably will) "refuse . . . the writ or rule prayed for . . . ." The refusal is "without prejudice" so that another request for relief may be made to "a proper court having [concurrent] jurisdiction."[6]

The effect of the new rule and the policy of section one will enable the court, openly and with apparent legitimacy, to exercise original jurisdiction at its own discretion. This result is not entirely illogical and, as a practical matter, may appear desirable or even necessary from the court's standpoint. Ultimately, the proceedings on any petition in a lower court are reviewable in the Supreme Court of Appeals by writ of error. Therefore, any errors committed by the lower court in extraordinary cases, as in ordinary cases, are reviewable on appeal in the Supreme Court of Appeals. The question arises, however: Is it constitutional for the West Virginia Supreme Court of Appeals to limit the exercise of its jurisdiction in original cases?

The West Virginia Constitution provides that the Supreme Court of Appeals *"shall have* original jurisdiction in cases of habeas corpus, mandamus, and prohibition."[7] The constitution does not expressly state that the court shall exercise jurisdiction whenever application is made for habeas corpus, mandamus, or prohibition, but, on the other hand, it does not merely state that the Supreme Court of Appeals *may have* jurisdiction, or that the court

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[5] W. VA. R. PRAC. SUP. CT. OF APP. XVIII, § 1. There is, therefore, a requirement by rule of court that the first pleading—the petition—contain an allegation which is in addition to the other allegations necessary to state a case for the writ sought. Another allegation required by Rule XVIII is the "option of the applicant" whether "the taking of evidence will be necessary for the proper disposition of the application." *Id.* § 3. A similar allegation must be stated by the respondent as one of his "grounds of defense". *Id.* § 4.

[6] For examples of the kinds of cases in which the Supreme Court of Appeals can be expected to decide to exercise its jurisdiction and for details of the mechanics of the new rule, see Sullivan, *Extraordinary Remedies — Introduction to Procedure in the Courts of West Virginia*, WEST VIRGINIA PRACTICE HANDBOOK, especially n.9.

[7] W. VA. CONST. art. VIII, § 3 (emphasis added).

may, in its discretion, exercise or refuse to exercise jurisdiction. In order to determine the constitutionality of Rule XVIII, it must first be ascertained what the Supreme Court of Appeals must do under the State Constitution in order to exercise its original jurisdiction.

The present West Virginia Constitution was ratified in 1872 and there have been no subsequent changes in the section pertaining to the jurisdiction of the Supreme Court of Appeals. This section had its genesis during the First Constitutional Convention, which was held during the years 1861 through 1863 and which preceded the formation of the State of West Virginia. At that convention, the committee charged with the responsibility of drafting the section of the constitution pertaining to the jurisdiction of the Supreme Court of Appeals proposed a section, the first sentence of which was: "The Supreme Court of Appeals shall have appellate jurisdiction only, except in cases of habeas corpus, mandamus, and prohibition."[8] The committee draft, however, was not deemed sufficient. It was defective, as Delegate James Henry Brown pointed out, in that the original jurisdiction of the Supreme Court of Appeals was only "by inference" and not stated expressly.[9] Discussing the prior practice, Mr. Brown stated that under the committee proposal, the Supreme Court of Appeals

> has original jurisdiction by inference in cases of habeas corpus, mandamus and prohibition just as the circuit courts have on the same subjects. Habeas corpus is that writ which secures to all men their freedom when illegally detained. It is considered of high importance that that writ should be of original jurisdiction in both courts. These are the only cases in which those writs have original jurisdiction and properly belong to the highest tribunal. Again, the writ of prohibition—that is a writ which commands an inferior tribunal not to do a thing which it is attempting to do and has no right to do. So it will be perceived at once that these three writs are the highest writs known to the law and properly belong to the highest tribunal, and is the means by which that highest tribunal commands and controls the inferior tribunal to compel it to do what it ought to do when it places a measure to prohibit it from doing what it ought not

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[8] II DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA 861 (1862)[1861-1863][hereinafter cited as DEBATES].

[9] *Id.* at 862. Mr. Brown was certainly one of the most talented delegates to the convention. He was a native of Cabell County who had gone to Kanawha County to practice law. Later, he was one of the first judges of the West Virginia Supreme Court of Appeals. For biographical information, see I DEBATES 62-63, which refers to other sources, and, appropriately, 1 W. Va. 89 (1927).

> to do. That high writ belongs to every freeman who is illegally detained without authority of law. It entitles him to be speedily brought into the proper forum and confronted with his accusers.
>
> The great jurisdiction, however, that belongs to the supreme court, however, is: "it shall have appellate jurisdiction in civil cases" and in other subjects detailed. In regard to the appellate jurisdiction in habeas corpus, etc., it is necessary to have this as well as original, because if a man should be brought on a writ of habeas corpus before a circuit court and his rights denied, it becomes proper that the supreme court should have appellate jurisdiction from the circuit court for the remedy which the appellant might have demanded of the supreme court in the first instance.[10]

This was the explanation and justification for Mr. Brown's substitute proposal, which was then adopted[11] and which stated expressly the jurisdiction of the court: "The Supreme Court of Appeals shall have original jurisdiction in cases of habeas corpus, mandamus and prohibition. It shall have appellate jurisdiction in civil cases . . . ."[12]

This adopted substitute, emphasizing and stating initially the court's original jurisdiction, is nearly identical to the 1872, and present, version of article eight, section three of the constitution.[13] Thus, it is clear that the framers of the West Virginia Constitution rejected the mere suggestion of the Supreme Court of Appeals's possible original jurisdiction in extraordinary cases in favor of a specific and emphatic statement of the court's jurisdiction. This specific statement has remained constant since 1863.

This was the historical context in which the Supreme Court of Appeals promulgated its rules of practice, effective November 1, 1884.[14] Rule XIII regulated original jurisdiction cases and appeared in the official report as follows:

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[10] II DEBATES 862-63.

[11] *Id.* at 865.

[12] III DEBATES 872-73.

[13] The only difference was the present identification of the Supreme Court of Appeals as "[i]t."

[14] 23 W. Va. 817 (1884). The Supreme Court of Appeals had first promulgated rules of practice in 1864. Rules of Court, 2 W. Va. xvii (1864). The first rules did not purport to establish a procedure in original cases. The most interesting of the first rules was Rule 20, limiting the number of counsel to argue a civil case to two, and limiting each counsel to argument of *two hours*, "except when the same counsel shall make the opening and concluding arguments, in which case he may be allowed that much time for each argument," apparently setting an outside limit in civil cases with two counsel, of six hours argument. Rule 20 *id.* at xxi. One wonders, then,

RULE XIII.
ORIGINAL JURISDICTION.
1. *Petition Must be Presented to Circuit Court.*

In case of *habeas corpus, mandamus* and prohibition, application should not be made to this Court in the first instance, unless there are special reasons for so doing. Petitions in such cases should, where it is at all practicable, be first presented to the circuit court, and when petition is presented to this Court, the reason for not first presenting it to a judge of circuit court must be set forth.[15]

This 1884 rule was the direct ancestor of the present Rule XVIII. The forerunner expressed a policy that the Supreme Court of Appeals should be saved from having to consider matters which could just as easily be presented by the petitioner to a lower court having concurrent jurisdiction, notwithstanding the Supreme Court of Appeals's constitutional jurisdiction. This precursory rule was followed by an identical Rule XIII in the rules promulgated by the court to be "[i]n Force February 2, 1904."[16] The 1904 version of the rule, requiring petitions to be presented first to the circuit courts, was in force when the Supreme Court of Appeals heard the application for a writ of habeas corpus in the case of *Ex parte Doyle*.[17]

Doyle applied for a writ of habeas corpus, asking for discharge pending the disposition of his appeal or, if not, "then bail".[18] The court found that the trial court had the authority to admit Doyle to bail pending appeal of the misdemeanor conviction, and ultimately concluded that Doyle should first seek bail in the trial court. Doyle was remanded "to the custody of the sheriff".[19] Nevertheless, the court quite convincingly rejected one of the respondent's arguments, saying:

The sheriff contends that this court should not entertain the

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how it was that in Rule 14 the Court presumed that "[t]en causes . . . shall be considered as liable to be called on each day during term . . . ." Rule 14 *id.* at xx.

[15] W. Va. R. Prac. Sup. Ct. of App. XIII, 23 W. Va. 829 (1884).

[16] W. Va. R. Prac. Sup. Ct. of App. XIII, 53 W. Va. x (1904). Note that in volume 53 of the West Virginia Reports there are two pages x, one in the front, prior to the pages numbered in consecutive Arabic numbers, and one in the back, following the Arabic numbers. The page which contains the rule is in the back, immediately after the Arabic numbers.

[17] 62 W. Va. 280, 57 S.E. 824 (1907).

[18] *Id.* at 280, 57 S.E. at 824. Doyle had obtained from the court a writ of error to the judgment of his misdemeanor conviction.

[19] *Id.* at 284, 57 S.E. at 826.

> writ because no application was made, before applying to a judge of this court, to the circuit court or its judge, as required by rule 13 of this court . . . .The Constitution . . . gives the Supreme Court original jurisdiction, concurrent with the circuit court, of habeas corpus, and we cannot deny to a person unlawfully imprisoned the right to come to this court in the first instance. The Constitution commands this court to exercise original jurisdiction in habeas corpus; and, if we refuse the writ for the reason stated, do we not violate the Constitution, and deny the person the great writ of liberty? Can a mere rule of court, though made to save this court labor, or, as we must rather say, to prevent its time from being consumed by numerous cases of original jurisdiction, deny that great writ given by the Constitution under a jurisdiction committed to this court? Can we shut the door of this court against one unlawfully imprisoned coming with petition in hand? It is true that courts may adopt rules for the orderly and convenient exercise of jurisdiction, but those rules cannot deny a jurisdiction plainly imposed upon them. Therefore, we refuse to dismiss the writ for this cause.[20]

The second syllabus point of *Doyle* stated: "Rule of practice 13 of the Supreme Court, requiring one asking a writ of *habeas corpus* to apply to a circuit court before applying to this Court, is invalid, and will not be enforced by this Court".[21] The notion that the 1904 rule—insofar as it required the denial of a jurisdiction "plainly imposed"[22] upon the Court—was invalid, was obviously a necessary point of decision and one which was "adjudicated" in the case.[23]

Curiously, while the opinion for the court stated that the court refused to dismiss the writ, as requested by respondent, on the basis that the court's time would be "consumed by numerous cases of original jurisdiction,"[24] it was the court itself which promulgated

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[20] *Id.* at 282, 57 S.E. at 825.

[21] *Id.* at 280, 57 S.E. at 824.

[22] *Id.* at 282. 57 S.E. at 825.

[23] W. VA. CONST. art. VIII, § 5 states that "it shall be the duty of the [Supreme] Court [of Appeals] to prepare a syllabus of the points adjudicated in each case . . . which shall be prefixed to the published report of the case." However, the case to which that section has specific reference is the case "[w]hen a judgment or decree is reversed or affirmed", in other words, an appellate case. There is no constitutional requirement of syllabus points in decisions in original proceedings, although those proceedings customarily do contain syllabus points. Thus, the question arises: is the law of the original proceeding case the syllabus point, the holding, both, neither, either, or some other?

[24] 62 W. Va. at 281, 57 S.E. at 825.

the 1904 Rule restricting the court's jurisdiction. The author of the *Doyle* opinion was Judge Brannon[25] who was on the Supreme Court of Appeals at the time of the promulgation of the 1904 Rule.[26] Although he was not on the court at the time of the promulgation of the 1884 rules, the provision complained of in *Doyle* later became a part of the 1904 rules. Subsequently, the court periodically promulgated new rules that eliminated the provision requiring the applicant for extraordinary relief to first pursue his remedy in the circuit courts. This was true of the Rules promulgated in 1910[27] and 1912,[28] while Judge Brannon was still on the court, and in 1915,[29] after his retirement.[30]

In 1926, the court again considered the question of whether an application for original relief which could have been made to a circuit court, but was not, would be denied on that ground. In *Midland Investment Corp. v. Ballard*[31] the court flatly stated, "wherever it appears that a [lower] Court is proceeding in a cause without jurisdiction, prohibition will issue, regardless of the existence, of other remedies."[32] The court's statement followed its discussion of the availability of relief in a circuit court:

> Should application have been first made to the circuit court? It is true that in some of our earlier decisions, in cases of habeas corpus, mandamus and prohibition, it was held that application should not be made to this court in the first instance, unless there are special reasons for doing so. However, at such time there existed a rule of this court to that effect. This rule does not now obtain. Article VIII, § 3, Const. West Virginia, provides that the Supreme Court "shall have original jurisdiction in cases of habeas corpus, mandamus and prohibition." It is an inescapable duty imposed upon this court.[33]

In *Midland*, then, the court clearly indicated that if an original

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[25] *Id.* at 279, 57 S.E. at 824.

[26] In the official West Virginia Reports there is no indication of whether the adoption of the 1904 rules was unanimous. There is no apparent dissent; but, on the other hand, the Reports contain only the rules, not the orders of promulgation or adoption, which presumably, would contain notations of dissenting votes.

[27] W. Va. R. Prac. Sup. Ct. of App., 66 W. Va. xxxix (1910).

[28] W. Va. R. Prac. Sup. Ct. of App., 71 W. Va. xlv (1912).

[29] W. Va. R. Prac. Sup. Ct. of App., 73 W. Va. xlvii (1915).

[30] Judge Brannon's 24 years of service on the Supreme Court of Appeals concluded with his retirement at the end of his last term, January 1, 1913. 71 W. Va. iii, xli-xlii.

[31] 101 W. Va. 591, 133 S.E. 316 (1926).

[32] *Id.* at 595, 133 S.E. at 317.

[33] *Id.* at 593-94, 133 S.E. at 317.

petition states a case for extraordinary relief, the constitution imposes the "inescapable duty" upon the court to grant the relief. This is in accord with the holding in *Ex parte Doyle* that jurisdiction in the extraordinary cases of habeas corpus, mandamus, and prohibition is "plainly imposed" upon the court.[34]

The position expressed in *Doyle* and in *Midland* is simply that the availability of the constitutional writ cannot be restricted. The scope of the constitutional remedy cannot be narrowed, and the remedy itself cannot be defeated. In a proper case—in a case sustaining the claim for relief—there is a right to the writ, a right which follows from the imposition of jurisdiction upon the court and its "inescapable duty" to act. A mere court rule cannot impair the availability of the remedy, thereby destroying the right to relief.[35]

In its prior decisions, the court has not only denied its own ability to restrict the exercise of constitutional remedies but has emphatically denied the authority of the Legislature to do so. In *Buskirk v. Judge*[36] the claim was made by a habeas corpus respondent that a legislative act required original cases from certain geographical regions be brought before the Supreme Court of Appeals at certain times and places. The suggestion was made that the prohibition case had to be brought at another term of the court meeting at another location. The court pointed out that the Legislature is precluded from inhibiting an assertion of jurisdiction and complained that

> the Legislature, by law, made in pursuance of the Constitution, had clearly restricted the exercise of that jurisdiction, and suffi-

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[34] 62 W. Va. at 282, 57 S.E. at 825.

[35] It is not a purpose of this article to purport to determine the difference between permissible rule making, procedure which does not affect substantive rights, and improper procedure, that is, procedure which unduly imposes upon and therefore unlawfully restricts substantive rights. *See* Curd, *Substance and Procedure in Rule Making*, 51 W. VA. L.Q. 34 (1948). The article is a bit dated—it was written before the promulgation of the West Virginia Rules of Civil Procedure—but it is a good introduction to the subject and states the opinion that "any rule of court made touching substantive law in any degree would be invalid as legislating." *Id.* at 48. Judge Curd seems to accept what he considers to be the view of Salmond, that while some law is substantive and some procedural, there is a "twilight zone" where it is difficult to tell the difference. *Id.* at 34, 36, 48-49. Indeed, it can be argued that any procedural rule affects substantive law and the difference, if there is any, between procedural law and substantive law merely involves questions of degree and of conflicting values, polices, and objectives.

[36] 7 W. Va. 91 (1873).

> ciently defined such restriction to make it manifest. Clearly this Court cannot beneficially or reasonably exercise original jurisdiction with effect in case of writs of *mandamus, habeas corpus* and prohibition if the exercise of the jurisdiction is confined or limited in any case to the [particular] terms of the Court. . . .[37]

In addition, the court made it clear in *Buskirk* that the constitutional provision, by providing for jurisdiction in the Supreme Court of Appeals, thereby provided "a remedy for the citizen."[38]

Similarly, in *Donaldson v. Voltz*[39] the court examined certain legislative restrictions enacted against the exercise of a constitutional exemption, and declared the restrictions to be void, saying:

> Where a constitution establishes a right but has not particularly designated the manner of its exercise, it is within the constitutional limits of the legislative power to adopt all necessary regulations in regard to the time and mode of exercising it, which are reasonable and uniform and designed to secure and facilitate the exercise of such right. Such a construction would afford no warrant for such an exercise of the legislative power, as under the pretense of regulating should subvert or destroy the right itself.[40]

Relying upon *Buskirk* and *Donaldson*, the Supreme Court of Appeals in 1971 decided the validity of certain provisions of the then recently-enacted Post-Conviction Habeas Corpus Act[41] in *State ex rel. Burgett v. Oakley*.[42] In *Burgett*, the respondent asserted that the provisions of the Act permitted "post-conviction habeas corpus relief only to a convicted defendant" who (1) "has begun to serve" his sentence and (2) "then only after he has exhausted his right to appeal or . . . after his appeal time has expired."[43] The court decided that the Legislature "did not intend" to do that which it had purported to do, namely limit the "use of the writ" to such an extent that the writ "would only be available after conviction and actual imprisonment and after the right to appeal has been exhausted or the appeal period has expired."[44]

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[37] *Id.* at 100.
[38] *Id.* at 99.
[39] 19 W. Va. 156 (1881).
[40] *Id.* at 158.
[41] W. VA. CODE ANN. §§ 53-4A-1 to -11 (1974 Cum. Supp.).
[42] 184 S.E.2d 318 (W. Va. 1971).
[43] *Id.* at 320.
[44] *Id.*

Such a limitation, thought the court, was unreasonable and, therefore, unconstitutional:

> To so limit the use of the writ of habeas corpus in criminal cases would be unreasonable and would restrict and limit rather than secure and facilitate the exercise of this constitutional right and would be clearly unconstitutional.
>
> We therefore hold that the intent of the Post-Conviction Habeas Corpus Act was to liberalize, rather than restrict, the exercise of the writ of habeas corpus in criminal cases.[45]

It is to be noted that the court considered the legislation to be *unreasonable*. The standard of reasonableness was earlier referred to in *Buskirk*, in terms of the court's reasonable "exercise" of its "original jurisdiction," which the court thought had been interferred with by the Legislature.[46] The Court appeared to be attempting to avoid the substance-procedure dichotomy,[47] by admitting that the Legislature has the authority to make *reasonable* rules, so long as the rules provide a logical mechanism for obtaining the desired remedy and do not limit the "exercise of" a "constitutional right."[48] Just how this is to be done is not clear.

The present rule, Rule XVIII, had as its apparent objective the saving of the court's time. The court recognized that circuit courts also have the constitutional authority to grant extraordinary writs and that the judgments of the circuit courts are reviewable on appeal to the Supreme Court of Appeals. As the court stated in *Fleming v. Commissioners*,[49] the rule encouraging prior application to a circuit court was

> intended to prevent the appellate court from being unnecessarily burdened with . . . cases [of original jurisdiction], which might just as well be determined in the circuit courts, and then, if errors were committed, a writ of error will lie to the appellate court [*i.e.*, the Supreme Court of Appeals].[50]

The present Rule XVIII, presumably resulted from the same intention: to save the court's time by refusing original cases which could be instituted elsewhere with the thought that if errors are commit-

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[45] *Id.* at 320-21.

[46] *See* notes 36 & 37 *supra*.

[47] This is a wise course. *See* note 35 *supra*.

[48] This statement quotes from and paraphrases State *ex rel.* Burgett v. Oakley, 184 S.E.2d 318 (W. Va. 1971).

[49] 31 W. Va. 608, 8 S.E. 267 (1888).

[50] *Id.* at 617, 8 S.E. at 272.

ted, they will be reviewable in the Supreme Court of Appeals on appeal.

Conceding the court's authority to make reasonable rules, nevertheless, the constitutional standard of reasonableness obviously cannot deprive a citizen of his right to his remedy and cannot unduly restrict the availability of the constitutional writ. The mere desire to save the court's time, while shifting the initial expenditure of court time to another court, reserving for the Supreme Court of Appeals the possibility of spending time on appeal, and, at the same time, increasing the time of litigants, is not a sufficient reason to withhold a constitutional remedy from the meritorious claimant. Moreover, there is no mechanical necessity for a rule of exclusion simply to protect the court from taking its time to consider relief obtainable elsewhere. It is the proliferation of applications for post-conviction habeas corpus relief which is plaguing the Supreme Court of Appeals and, indeed, most courts.[51]

In post-conviction cases the Supreme Court of Appeals has statutory authority to transfer the case, at its inception, to a local court.[52] The same is true of other types of habeas corpus cases.[53] Thus, under the statutes the court can easily avoid spending its time on the meritorious habeas corpus cases, while providing a remedy, by simply granting the writ and making it returnable before the appropriate circuit or statutory court. This is preferable to requiring a refiling of the petition and a reinstitution of the case in a lower court which, notwithstanding that the refusal of the Supreme Court of Appeals is "without prejudice,"[54] may be influenced by what it perceives to be the court's opinion that the case is either not meritorious or unimportant. Making the writ returnable before a lower court tells that court, in effect, that the petition states a claim and that the allegations, if proved, require the granting of relief. This procedure is especially advantageous to the post-conviction petitioner who seeks federal habeas corpus relief under

[51] The problem of the number of cases and, more fundamentally, the availability of federal review of the federal constitutional aspects of state criminal trials has strained relations between the federal and state judiciaries. One reason is that the lowest federal trial courts review the state convictions after they have been reviewed by the highest state appellate courts. Some suggestions for improving relations between the federal and state judiciaries are contained in Hopkins, *Federal Habeas Corpus: Easing the Tension Between State and Federal Courts*, 44 ST. JOHNS L. REV. 660 (1970). *See also* note 4 *supra* and note 56 *infra*.

[52] W. VA. CODE ANN. § 53-4A-3(b) (1974 Cum. Supp.).

[53] W. VA. CODE ANN. § 53-4-2 (1966).

[54] W. VA. R. PRAC. SUP. CT. OF APP. XVIII, § 1.

the United States Constitution and the pertinent federal statute.[55] By his application for a writ followed by a denial to hear the application in the Supreme Court of Appeals, the federal requirement that the petitioner "exhaust" his available State remedies has perhaps been fulfilled.[56]

In prohibition, the typical case is brought against a circuit judge to restrain him from proceeding in a criminal case when the indictment is improper or has been improperly returned.[57] This sort of case—and any case seeking to prohibit a circuit judge from proceeding in a case—obviously must be brought, if at all, in the Supreme Court of Appeals, the only court superior to circuit courts. Some prohibition cases are brought against statutory judges and other tribunals, but many of these cases have always been brought in the lower courts. There is nothing to suggest that prohibition cases which could be brought in lower courts are cluttering the docket of the Supreme Court of Appeals. Regarding mandamus, there are obviously cases involving the highest state officials and fundamental governmental policy which should be considered, and traditionally have been considered originally by the Supreme Court of Appeals.[58] Other cases have been brought in

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[55] 28 U.S.C. § 2254 (1971).

[56] Leftwich v. Coiner, 424 F.2d 157 (4th Cir. 1970), held that the filing of an original habeas corpus petition in the West Virginia Supreme Court of Appeals which summarily denied the petition was sufficient to exhaust state remedies preparatory to applying to the federal courts for relief. This was true notwithstanding the availability of relief in the lower state courts that had concurrent jurisdiction. The Fourth Circuit's opinion, however, contains dicta to the effect that if the petition were dismissed by the Supreme Court of Appeals "without prejudice to the petitioner's application for relief in a [lower] court of record," the petitioner should pursue his remedy in the lower court. *Id.* at 160-61. Under the new rule, the Supreme Court of Appeals will note "upon the face of" a petition upon which it refused to issue a writ or rule the fact that the dismissal, if on the ground that the applicant should have gone to a lower court, is "without prejudice". W. VA. R. PRAC. SUP. CT. OF APP. XVIII, § 1. It would appear, then, that Rule XVIII will create a new class of habeas corpus cases which have been summarily denied, but which cannot then proceed into federal court, because of the lack of exhaustion.

[57] An example is State *ex rel.* Burgett v. Oakley, 181 S.E.2d 19 (W. Va. 1971).

[58] At least two recent examples involved both the petitioner and the respondent as high officials. In State *ex rel.* Browning v. Blankenship, 154 W. Va. 253, 175 S.E.2d 172 (1970), in which the Governor was permitted to intervene, the court granted the Attorney General's petition to require the Clerk of the House of Delegates to publish a budget bill. In State *ex rel.* Kelly v. Moore, 197 S.E.2d 106 (W. Va. 1973), *appeal dismissed* 414 U.S. 1118 (1974), the Treasurer obtained a writ of mandamus to compel the Governor to transfer to the Treasurer moneys received by the Governor as revenue sharing funds from the federal government.

the lower courts, with the result that the court has simply not been swamped by applications for mandamus, or for mandamus and prohibition in combination. It was the great number of habeas corpus petitions which inspired the court to promulgate the new rule, ignoring the statutory procedure for remanding the cases to other courts.[59]

In conclusion, the court's rule restricting the availability of the constitutional writs has as its purpose the solving of an imaginary problem. The court was not being deluged with unimportant original petitions and, even if it were, the new rule will not be the time-saver it was designed to be. In fact, if anything, it will unreasonably increase the burdens placed upon the entire judicial system and its litigants and will result in delayed final decisions. More importantly, the history of the judicial article of the Constitution and the court's prior decisions have made it clear that the Rule, by restricting a citizen's right to a constitutional writ in a court having jurisdiction, is unconstitutional.

[59] Without actually going to the office of the Clerk of the Supreme Court of Appeals and counting petitions, analyzing the same, and noting the dispositions, there is no accurate method of judging the court's previous original jurisdiction caseload. However, a casual review of several issues of *The Syllabus Service* indicates that the number of original cases is rather slight. For example, the issue of July 30, 1974, reflected the disposition of the pending applications for writs immediately prior to the court's adjournment of that particular term of court. The court granted appeals in four cases, refused appeals in twelve cases, granted one rule in mandamus, denied two rules in mandamus, and denied two applications for habeas corpus. It did not consider any applications for prohibition.