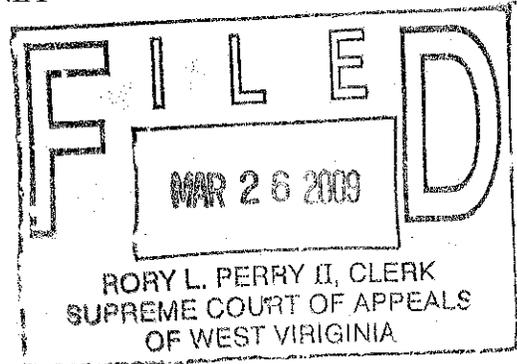


IN THE SUPREME COURT OF APPEALS  
STATE OF WEST VIRGINIA  
At Charleston

STATE OF WEST VIRGINIA EX REL,  
JOHN DOE, A CERTAIN INDIVIDUAL SUBPOENAED  
IN A MATTER CURRENTLY PENDING  
BEFORE THE MINGO COUNTY  
GRAND JURY,

Petitioner,



v.

RE: Grand Jury Subpoena,  
January 2009 Term

THE HONORABLE MICHAEL THORNSBURY,  
Circuit Court Judge of the Thirtieth Judicial Circuit,

Respondent.

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**PETITION FOR WRIT OF PROHIBITION**

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Submitted by:

H. Truman Chafin (State Bar No. 684)  
Letitia Neese Chafin (State Bar No. 7207)  
The H. Truman Chafin Law Firm, PLLC  
P.O. Box 1799  
Williamson, WV 25661  
(304) 235-2221

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**PETITION FOR WRIT OF PROHIBITION**

Comes now John Doe, by counsel, H. Truman Chafin and Letitia Neese Chafin of The H. Truman Chafin Law firm, PLLC, and files this verified Petition For Writ of Prohibition pursuant to the provisions of West Virginia Code § 53-1-3 *et seq.* Based upon good cause shown, Petitioner seeks a ruling from this Court to prohibit Respondent, Judge Michael Thornsby, from denying Senator H. Truman Chafin legislative immunity and/or entering any order issuing a *capias* in said Grand Jury matter for Senator Chafin's Client who was issued Subpoena *Duces Tecum* to produce records to the Grand Jury on Feb 20, 2009 and returnable March 24, 2009, all while Senator Chafin was and is presently serving as Senate Majority Leader in regular legislative session.

## STATEMENT OF JURISDICTION

1. This Petition for Writ of Prohibition is filed pursuant to Article 8, § 3 of the West Virginia Constitution, granting the Supreme Court of Appeals original jurisdiction in prohibition, and W. Va. Code § 53-1-1. This Petition is also filed with this Honorable Court pursuant to Rule 14(a) of the *West Virginia Rules of Appellate Procedure*.
2. Pursuant to the original jurisdiction of this Court, John Doe seeks relief in the form of a Writ of Prohibition on the basis that the trial court abused its discretion by entering an Order Denying John Doe's Untimely Notice of Legislative Immunity.
3. Prohibition lies as a matter of right in all cases of usurpation and abuse of power by an inferior tribunal or where the tribunal exceeds its legitimate powers. *West Virginia Code* § 53-1-1 (1994); Glover v. Narick, 184 W.Va. 381, 400 S.E.2d 816 (1990).
4. A Writ of Prohibition will lie where the abuse of power is so flagrant and violative of a party's rights so as to make the remedy of appeal inadequate. State ex rel. UMWA Internat'l Union v. Maynard, 176 W.Va. 131, 342 S.E.2d 96 (1985).
5. Petitioner asserts that the rulings of the Respondent as set forth in the Order referenced herein constitute a flagrant abuse of authority and exceed the trial court's legitimate powers.
6. A Writ of Prohibition is appropriate and the only available remedy for your Petitioner in this matter for the following reasons:
  - a. The error committed by the trial court is substantial, clear-cut, and plainly in violation of West Virginia law;
  - b. The trial court's order denying legislative immunity operates as a violation

of Petitioner, John Doe's constitutional right to an attorney for counsel and advise.

- c. Petitioner, John Doe, has no other adequate means, such as an appeal, to prevent the enforcement of the circuit court's denial of legislative immunity hiring for his counsel of record, Sen. H. Truman Chafin.

#### **PARTIES**

7. The Petitioner is the records custodian and president of a corporation authorized to do business in the State of West Virginia. Petitioner is the subject of a Grand Jury Subpoena Duces Tecum in the Circuit Court of Mingo County, West Virginia.

8. Respondent, Judge Thornsby, is the Circuit Court Judge in the 30<sup>th</sup> Judicial Circuit which is one of the State's only single judge circuits. Judge Thornsby is the presiding judge of the currently impaneled Grand Jury. As circuit judge in Mingo County, Judge Thornsby is responsible for selecting the Foreman of the Grand Jury.

9. Sen. H. Truman Chafin is the Majority Leader of the West Virginia State Senate and is currently serving in that capacity during the 2009 regular session. Sen. Chafin is a member of The H. Truman Chafin Law Firm, PLLC and is lead counsel in the captioned matter.

10. Letitia Neese Chafin is a member of The H. Truman Chafin Law Firm, PLLC and spouse of H. Truman Chafin.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

11. A detailed statement of facts is set forth in the Memorandum of Law in Support of Petition for Writ of Prohibition, to which reference is hereby made.

#### **ISSUES**

12. Petitioner seeks relief in the form of a Writ of Prohibition on the following bases:
- I. The Respondent exceeded his judicial authority by denying Sen. Chafin legislative immunity and incorrectly instructing the Grand Jury that legislative immunity did not apply.

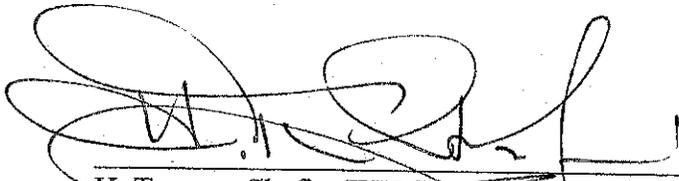
**PRAYER FOR RELIEF**

WHEREFORE, the Petitioner prays as follows:

- a. That the Petition for Writ of Prohibition be accepted for filing;
- b. That all proceedings in the Circuit Court of Mingo County be stayed until resolution of the issues raised in this Petition;
- c. Award a Writ of Prohibition against the Respondent reversing the trial court's order denying legislative immunity;
- d. That this Court hold that Petitioner, by and through, counsel has properly invoked legislative immunity; and
- e. Such other and further relief as the Court may deem just and proper.

JOHN DOE,

By Counsel



H. Truman Chafin (WV State Bar No. 684)  
Letitia Neese Chafin (WV State Bar No. 7207)  
The H. Truman Chafin Law Firm, PLLC  
P.O. Box 1799  
Williamson, WV 25661  
(304) 235 - 2221

**MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION**

**I. PROCEEDINGS AND RULINGS BELOW**

A Grand Jury Subpoena Duces Tecum was served upon a certain company's records custodian to produce documents on or before March 24, 2009.<sup>1</sup> On March 19, 2009, said company by and through its president employed the services of Senator H. Truman Chafin and The H. Truman Chafin Law Firm, PLLC. On the same day, the president of said company produced numerous and voluminous documents which he believed may be the subject of the said Subpoena Duces Tecum.

Your undersigned is a member of the West Virginia Senate and currently serving in the 2009 regular session of the legislature. On March 20, 2009, your undersigned, by written correspondence to the Mingo County Prosecuting Attorney, invoked his legislative immunity pursuant to West Virginia Code § 4-1-17.<sup>2</sup>

On March 24, 2009, your undersigned's law firm received a call from the Mingo County Prosecutor, Michael Sparks, who informed Letitia Neese Chafin, Senator Chafin's spouse and law partner, that Senator Chafin's legislative immunity would not be recognized in this matter. Thereupon, the written notice of Senator Chafin's invocation of his legislative immunity was faxed to Judge Thornsby.<sup>3</sup> Shortly thereafter, your undersigned received an Order from Judge Thornsby denying Senator Chafin's invocation of his legislative immunity.<sup>4</sup>

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<sup>1</sup> Said Grand Jury Subpoena Duces Tecum has been filed herein underseal.

<sup>2</sup> Said notice has been filed underseal herein.

<sup>3</sup> Said letter has been filed underseal herein.

<sup>4</sup> Said order has been filed underseal herein.

Petitioner now seeks a Writ of Prohibition from this Honorable Court prohibiting Judge Thornsby from enforcing the Order he entered denying legislative immunity and from entering any further orders in this matter during the legislative immunity period afforded to members of the West Virginia Legislature serving in a regular legislative session as set forth in West Virginia Code § 4-1-17.

## **II. STATEMENT OF FACTS**

The underlying action is a Subpoena Duces Tecum issued by the Grand Jury of the Mingo County Circuit Court to John Doe, the records custodian of a certain company. Your undersigned was hired by Petitioner and as a member of the West Virginia State Senate, currently in regular session, served notice of his legislative immunity upon the Mingo County Prosecutor attorney on March 20, 2009.

Petitioner's counsel was notified that the Grand Jury rejected the notice of legislative immunity and the trial court issued an order denying legislative immunity as untimely filed. Thereafter the Grand Jury, through the trial court, issued a *capias* for the records custodian of the certain corporation.<sup>5</sup>

## **III. STANDARD FOR GRANTING A WRIT OF PROHIBITION**

A Writ of Prohibition will issue "in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W.Va. Code § 53-1-1 (1923)(2006); Glover v. Narick, 184 W.Va. 381, 400 S.E.2d 816 (1990). When determining whether to entertain and issue a writ of

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<sup>5</sup> Neither the Prosecutor or the trial court made inquires to counsel to ascertain the name of the company's record's custodian. A copy of said *capias* has not been provided to counsel.

prohibition where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will consider the following five factors: (1) whether petitioner has no other adequate means, such as direct appeal, to obtain the desired relief, (2) whether petitioner will be damaged or prejudiced in a way that is not correctable on appeal, (3) whether the lower tribunal's order is clearly erroneous as a matter of law, (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law, and (5) whether the lower tribunal's order raises new and important problems or issues of first impression. Brown v. Wilkes, 216 W.Va. 293, 607 S.E.2d 399 (2004). While each of these five factors may be considered, it is the third factor, the existence of clear error as matter of law, that "should be given substantial weight." Id. citing State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).

The trial court's order denying legislative immunity is a "clear error as a matter of law." And, because the Order denying legislative immunity is not an appealable order, and Petitioner has filed a Motion to Disqualify Judge Thornsbury, Petitioner's only means of relief is through the issuance of a Writ of Prohibition from this Court.

#### IV. ISSUES

1. **THE RESPONDENT EXCEEDED HIS JUDICIAL AUTHORITY BY DENYING LEGISLATIVE IMMUNITY AND INCORRECTLY INSTRUCTING THE GRAND JURY THAT LEGISLATIVE IMMUNITY DID NOT APPLY**

#### V. ARGUMENT

A writ of prohibition will lie where the abuse of power is so flagrant and a violation of a party's rights so as to make the remedy of appeal inadequate. State ex rel. UMWA Internat'l

Union v. Maynard, 176 W.Va. 131, 342 S.E. 2d 96 (1985). Accordingly, a writ of prohibition will issue where substantial, clear-cut legal errors are committed. Petitioner asserts that the Order of Judge Thornsby, in Mingo County's single judge circuit, constitutes a flagrant and deliberate abuse of authority and exceeds the Trial Court's legitimate powers.

West Virginia Code § 4-1-17(a) provides members of the Legislature are not required to attend to matters pending before tribunals of the executive and judicial branches of government when the timing of those matters may present conflicts with the discharge of public duties and responsibilities that are incumbent upon members of the Legislature. Notice of legislative immunity to a tribunal operates as an automatic stay of a judicial or administrative action commenced before or after the notice. *See State ex rel. Drake v. Hill*, 214 W.Va. 47, 585 S.E.2d 47 (2003). The automatic stay is in effect during the regular legislative session and for a thirty-day time period immediately following the adjournment sine die of any regular session.

On March 20, 2009, the Mingo County Prosecuting Attorney was faxed a copy of Senator Chafin's Notice of Legislative Immunity. On the morning of March 24, 2009, the Mingo County Prosecutor placed a call to Senator Chafin's office at the West Virginia State Capitol. When the Prosecutor was unable to reach Senator Chafin he then called Senator Chafin's law office and informed Ms. Chafin that the Grand Jury would not except Senator Chafin's notice of legislative immunity. Thus, indicating that the Grand Jury, by and through the Mingo County Prosecutor, had received notice of Senator Chafin's invocation of legislative immunity. Judge Thornsby was faxed a copy of said notice on March 24, 2009 at approximately 11:15 a.m. by Senator Chafin's law office. Judge Thornsby then incorrectly informed the Grand Jury that legislative immunity did not apply. Senator Chafin's law office was then informed by the Prosecuting

Attorney that the Grand Jury had issued a *caus* for his client.

Any and all proceedings involving Senator Chafin's client before for the Grand Jury were automatically stayed by the invocation of the legislative immunity notice served upon both the Mingo County Prosecuting Attorney and with the Respondent. *See* W. Va. § 4-1-17(c). Any sentence, judgment, order, decree, finding, decision, recommendation or award made contrary to the provisions of West Virginia Code § 4-1-17 in any action or proceeding in any tribunal, without the consent of the member is void. *See* W.Va. Code § 4-1-17(i). Senator Chafin does not and has not consented to Judge Thornsburys order denying legislative immunity, thus every order entered herein is void.

Judge Thornsburys incorrectly ruled that the immunity issue "is not entirely one-sided and does not rest entirely on the Court, and counsel has an obligation to act in a reasonable manner." *See* the last page of Respondent's order. West Virginia Code § 4-1-17 places no such burden on the legislative member. Contrary to Respondent's order, § 4-1-17 is indeed entirely one-sided and gives the legislative members the option to invoke immunity whenever in session or attending legislative meetings. Nor does West Virginia Code § 4-1-17 impose a reasonable notice requirement upon legislative members invoking the privilege, Respondent's order notwithstanding. However, given that Petitioner employed Senator Chafin and his law firm on March 19, 2009, notice of legislative immunity sent on March 20, 2009 to the Mingo County Prosecuting Attorney is certainly reasonable.

Respondent's order also incorrectly suggests that Ms. Chafin is not a legislator and therefore not subject to the legislative immunity invoked by Senator Chafin. The clearly worded statute also affords immunity to the Senator's co-counsel, partner, associate, spouse or employee.

Ms. Chafin is both Senator Chafin's spouse and law partner and cannot be compelled to make an appearance or do any act during any applicable time period in the place and stead of the Senator. See West Virginia Code § 4-1-17(h).

"Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968). The Court in State ex rel Drake noted that the intent of the legislature in enacting § 4-1-17 was expressly set forth in the statute. A plain reading of § 4-1-17 leaves no room for the Respondent's incorrect interpretation that Senator Chafin's invocation of legislative immunity during a regular legislative session was "untimely received by the Court" and "unapplicable [sic] to the situation." In fact, the Court's holdings in State ex rel Drake, § 4-1-17 leaves no room for interpretation. Legislative immunity notice given during the regular session of the legislature acts as an automatic stay throughout the regular session and thirty days thereafter.

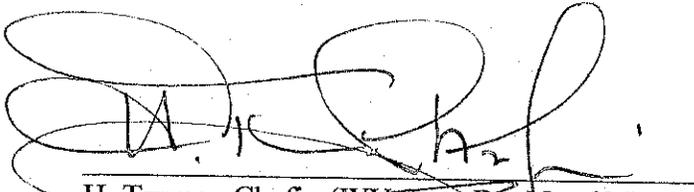
Respondent's error is clear-cut and in plain violation of West Virginia law and he misinformed the Grand Jury as to the clear meaning of West Virginia Code § 4-1-17.

### CONCLUSION

WHEREFORE, Petitioner, John Doe, prays that this Honorable Court GRANT his Writ of Prohibition; that the Respondent's order denying legislative immunity to his counsel be reversed; that any orders entered by Respondent subsequent to Senator Chafin's invocation of legislative immunity on March 20, 2009 be reversed; that the trial court be ordered to recognize Senator Chafin's legislative immunity pursuant to the clear reading of W.Va. Code § 4-1-17, and for such further relief as this Honorable Court deems just, fair, and equitable.

JOHN DOE,  
PETITIONER

By Counsel

A handwritten signature in black ink, appearing to read 'H. Truman Chafin', written over a horizontal line.

H. Truman Chafin (WV State Bar No. 684)

Letitia Neese Chafin (WV State Bar No. 7207)

The H. Truman Chafin Law Firm, PLLC

P.O. Box 1799

Williamson, WV 25661

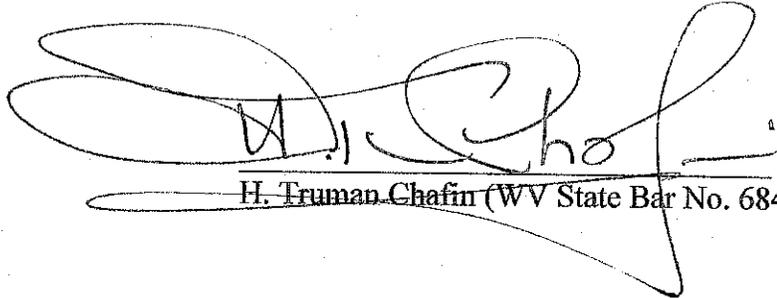
(304) 235-2221

CERTIFICATE OF SERVICE

I, H. Truman Chafin, counsel for Joe Doe, do hereby certify that I have served the foregoing **Writ of Prohibition** upon Respondent on this 25<sup>th</sup> day of March, 2009, by depositing a true and exact copy in the United States mail, postage prepaid, addressed as follows:

Hon. Michael Thornsby  
Mingo County Circuit Judge  
P.O. Box 1198  
Williamson, WV 25661

C. Michael Sparks  
Mingo County Prosecuting Attorney  
Mingo County Courthouse  
P.O. Box 2236  
Williamson, WV 25661



H. Truman Chafin (WV State Bar No. 684)