No. 03-1223

In The Supreme Court of the United States

MOUNTAIN ENTERPRISES, INC.,

Petitioner,

v.

DANIEL R. FITCH AND GREGORY ADAM PLUMLEY, CO-ADMINISTRATORS OF THE ESTATES OF TYLER FITCH AND HARLEY FITCH, DECEASED, DANIEL R. FITCH, INDIVIDUALLY, JERRY GALLOWAY, INDIVIDUALLY AND D/B/A GALLOWAY'S TRUCKING, AND BILLY D. KIRK,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF *AMICUS CURIAE* OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The American Academy of Appellate Lawyers submits this brief as *amicus curiae* in support of Mountain Enterprises, Inc.'s petition for a writ of certiorari to the Supreme Court of Appeals of West Virginia. The parties to the action have consented in writing to the filing of this brief pursuant to Rule 37.2(a) of the Rules of this Court. The letters of consent have been filed with the Clerk.[1]

INTEREST OF THE *AMICUS CURIAE*

The Academy of Appellate Lawyers (the "Academy") is a non-profit, national professional association of lawyers skilled and experienced in appellate practice and related post-trial activity in state and federal courts, dedicated to the improvement and enhancement of the standards of appellate practice, the administration of justice, and the ethics of the profession as they relate to appellate practice. Membership in the Academy is by nomination or invitation only and the Academy currently has approximately 250 member "Fellows." The activities of the Academy are

[1] Pursuant to Supreme Court Rule 37.6, the Academy states that this brief was written by an attorney who is a Fellow of the Academy, and was produced and funded exclusively by the Academy or its counsel. Although one of the counsel for the petitioner is a member of the Academy, he took no part in the decision whether to file this brief or in its preparation. Some of the Fellows of the Academy are active or former judicial officers. No active judicial officer has participated in the decision to file this brief or in its preparation. The brief has been reviewed by at least one Fellow who has served as a judicial officer of a state appellate court but who no longer serves in that capacity.

The Academy takes no position with respect to any issue or argument presented other than those expressed in the Academy's own brief.

supported entirely by the dues and initiation fees paid by the Fellows.

By publishing newsletters and reports, organizing retreats and conferences, teaching appellate courses and seminars, and establishing a network of lawyers, the Academy brings together the leading attorneys in the nation who devote their practices to appellate representation. The Academy has submitted its views to Congress on legislative changes affecting appellate practice. The Academy has chosen to file this *amicus* brief, because the case presents the opportunity for the Court to address the conflict between two apparently conflicting lines of cases.

The Supreme Court of Appeals of West Virginia is that state's only appellate court, and its jurisdiction is entirely discretionary. The court declined to hear petitioner's appeal of the jury's large punitive damage award, an issue to which this Court has extended constitutional limits and standards of review. The Academy believes the Court may wish to consider whether due process requires an appeal as of right in any case in which the Constitution requires a constraint on the fact-finder's potentially arbitrary power.

The Fellows of the Academy bring to this subject comprehensive knowledge of the roles of state and federal appellate courts and the impact of their decisions on the fabric of American life. The Fellows share a concern that courts not deprive litigants of liberty or property without a process that guarantees at least one level of review as of right.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THIS COURT REGARDING THE AVAILABILITY OF APPELLATE REVIEW IN CIVIL CASES PRESENT A CONFLICT REQUIRING THIS COURT'S ATTENTION.

For over a century, this Court has steadfastly maintained, often in dicta, that "[t]he Constitution does not . . . require States to create appellate review in the first

place." *Smith v. Robbins*, 528 U.S. 259, 270 n.5 (2000).[2] Yet in more recent history the Court has also identified constitutional issues where appellate review of certain trial determinations must be *de novo*. For example, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), this Court held that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of

[2] *See also*, *e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) ("[T]he Federal Constitution guarantees no right to appellate review. . . ."); *Abney v. United States*, 431 U.S. 651, 656 (1977) ("[I]t is well settled that there is no constitutional right to an appeal."); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review [citations omitted], and the continuing validity of these cases is not at issue here. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (Black, J.) ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all[,]" but if it does provide such review, it cannot discriminate against some because of their poverty.); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937) (respondent is not entitled to an appeal as of right); *Ohio ex rel. Bryant v. Akron Metro. Park Dist*., 281 U.S. 74, 80 (1930) ("As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance.") (citations omitted); *Reetz v. Michigan*, 188 U.S. 505, 508 (1903) (Neither is the right of appeal essential to due process of law); *McKane v. Durston*, 153 U.S. 684, 687-88 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now, a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. . . . It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. . . . [W]hether an appeal should be allowed, and if so, under what circumstances, or on what conditions, are matters for each State to determine for itself.").

punitive damages awards." The Court has also recognized that in cases raising First Amendment issues appellate courts must "'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression," *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)), and that "the clearly erroneous standard of [Fed. R. Civ. P. 52(a)] does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times v. Sullivan*." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984).

There is tension between these lines of cases that is highlighted by the West Virginia Supreme Court of Appeals' decision to deny review in this case. This Court requires an appellate court to review a finding of punitive damages *de novo*. Where there is no appeal as of right, as there is not in West Virginia, and the appellate court exercises its discretion to decline review, as the West Virginia Supreme Court of Appeals did in this case, the appellant is denied the exacting *de novo* appellate review required by this Court. It means that litigants in cases where *de novo* review is a necessary component of the enforcement of certain constitutional limitations on the substantive powers of state courts are also deprived of that appellate review. This case offers the Court an opportunity to resolve that conflict.

II. APPELLATE REVIEW IS REQUIRED IF APPELLATE COURTS ARE TO CLARIFY AND TO MAINTAIN CONTROL OF CONSTITUTIONAL STANDARDS.

In a trio of seminal decisions, this Court has held that the Due Process Clause of the Fourteenth Amendment imposes substantive limits on the power of state courts to assess punitive damages against a civil defendant. *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996) (establishing

guideposts for testing punitive damage awards) ("*Gore*"); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (requiring *de novo* review of punitive damage awards); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (establishing guidelines for compensatory versus punitive damage ratios).

In each case, the matter was remanded to the appellate court that had previously approved the award – *Gore* to the Alabama Supreme Court; *Cooper* to the Ninth Circuit; and *State Farm* to the Supreme Court of Utah – with the responsibility of examining the record in order to make an independent judgment as to whether the award was consistent with the constitutional guidelines. The Court reasoned that "[r]equiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." *Cooper*, 532 U.S. at 436 (quoting concurring opinion of Breyer, J., in *Gore*, 517 U.S. at 587).

Yet as the Court explained in *Cooper*, 532 U.S. at 443, it did not intend to "prejudge the answer to the constitutional question;" rather, that was the duty of the court of appeals under the *de novo* standard of review. Recognizing a right to appeal in West Virginia likewise will not determine the outcome of this appeal. It will, however, materially advance the interests not only of the immediate parties to this case, but of all whose liberty and property is subject to the power of that state's courts, in circumstances requiring judicial review for compliance with judicial safeguards.

Gore, *Cooper*, and *Campbell* have begun to spawn a rich jurisprudence of appellate decisions at both the state and federal level. For example, many state courts have ordered remittitur of punitive awards so that they remain

within the 4:1 ratio referred to in *State Farm* as "close to the line of constitutional impropriety."[3] On the other hand, the federal courts have been less inclined to treat the 4:1 ratio as a bright line of demarcation; they have been more willing to uphold awards with relatively high punitive/compensatory ratios in cases where the defendant's conduct has been "particularly egregious" but has resulted in only a small amount of economic damages.[4] The ultimate contours of the *Gore* and *State Farm* decisions will emerge over time as they are applied by the appellate courts. But there is no assurance that the constitutional constraints

[3] *See*, *e.g.*, *Waddill v. Anchor Hocking, Inc.*, 190 Or. App. 172, 78 P.2d 570 (Or. Ct. App. 2003) (instructing remittitur of $1 million punitive award to $400,000 in product liability action against fishbowl manufacturer, where jury awarded $100,000 in compensatory damages); *Harris v. Archer*, No. 07-01-0071-CV, 2004 WL 178398 (Tex. Ct. App. Jan. 29, 2004) (instructing remittitur of $1.5 million punitive award in action for fraud and breach of fiduciary duty, where compensatory damages were $200,000); *Honzawa v. Honzawa*, 766 N.Y.S.2d 29 (App. Div. 2003) (affirming trial court's remittitur of punitive damages to $15 million in malicious prosecution case, where compensatory damages were $11 million, but observing jury's original punitive award of $50 million was "excessive"), *appeal dismissed*, 1 N.Y.3d 564 (2003).

[4] *E.g.*, *DiSorbo v. Hoy*, 343 F.3d 172, 187 (2d Cir. 2003) (finding that use of multiplier was simply "not the best tool" to assess punitive award in abuse of process claim against police officer involving nominal compensatory damages); *Lincoln v. Case*, 340 F.3d 283, 293-94 (5th Cir. 2003) (upholding $55,000 punitive damage award that exceeded compensatory damages by ratio of 110:1, reasoning that high ratio of punitive to compensatory damages is "far less troubling" in cases involving housing discrimination); *Asa-Brandt, Inc. v. ADM Investor Serv., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003) (upholding $1.25 million punitive damage award for breach of fiduciary duty where compensatory damages were nominal, reasoning that potential harm could have exceeded punitive damage award had defendant's scheme succeeded); *Mathias v. Accord Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003) (upholding $186,000 punitive award 18 times compensatory damages awarded in case involving hotel managers who were grossly negligent in maintaining their hotel free of bedbugs).

these decisions require will be applied in situations where there is no guaranteed (*i.e.,* non-discretionary) appellate review.

For proof that appellate review is the *sine qua non* for ensuring that constitutional standards have been met, we need look no further than (i) this Court's decisions in punitive damage cases pre-dating *Gore*, and (ii) the field of libel law, where the constitutional safeguards accorded to the media have been preserved primarily through the process of appellate review.

A. The Punitive Damages Cases

One of the first cases in which this Court examined a punitive damages award in light of the Due Process Clause was *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). Although the Court upheld the award, it did so in large part because it was convinced that the Alabama Supreme Court's review constituted sufficient protection against the jury's exercise of unfettered discretion. As Justice Blackmun wrote:

> By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion. It first undertakes a comparative analysis. *See*, *e.g.*, *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1053 (1987). It then applies the detailed substantive standards it has developed for evaluating punitive awards. In particular, it makes its review to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence." *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (1989); *Wilson v. Dukona Corp.*, 547 So. 2d 70, 73 (1989). This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition. *Id*. at 20-21.

After reviewing the standards adopted by the Alabama Supreme Court for punitive damage awards (standards similar to those subsequently adopted in *Gore*), the Court concluded that:

> The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. The Alabama Supreme Court's postverdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. *Id*. at 22.

The importance of appellate review of punitive damage awards is exemplified by *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), where the Court struck down an amendment to the Oregon Constitution that prohibited judicial review of punitive damage awards, unless there was a finding that there was "no evidence" to support the jury's verdict. Writing for the Court, Justice Stevens pointed out that:

> Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded. *Id*. at 421.

Justice Stevens went on to note that Oregon's abrogation of this "well-established common-law protection against arbitrary deprivations of property" raised a presumption that the amendment violates the Due Process Clause. *Id*. at 430. Concluding that the presumption had not been refuted, the Court stated:

> Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger. Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time. For these reasons,

> we hold that Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment. *Id*. at 432.

In *Cooper*, this Court ruled that, in reviewing punitive damage awards to determine whether they are constitutionally sustainable, the appellate courts are required to make a *de novo* review, rather than reviewing for abuse of discretion. Explaining why this heightened standard is necessary, the Court stated that, like standards such as "reasonable suspicion" and "probable cause," the punitive damage standard of "gross excessiveness" is a "fluid concept" that can acquire meaningful content only through case-by-case application at the appellate level. *Cooper*, 532 U.S. at 436.

The requirement of *de novo* review demonstrates why West Virginia's policy of discretionary review is inadequate. *De novo* review requires that the appellate court actually review the record afresh and, where an affirmance is in order, articulate the reason why the award is consistent with Due Process. Where, as in West Virginia, the appellate court is free to refuse even to hear the appeal, the requirement of *de novo* review is simply not met. By declining to review awards of punitive damages, the West Virginia Supreme Court of Appeals also relinquishes the other benefits that this Court identified in *de novo* review: maintaining control of, and clarifying, legal principles through the case-by-case review at the appellate level and unifying and stabilizing precedent by "assur[ing] the uniform treatment of similarly situated persons that is the essence of law itself." *Id.* at 436 (quoting concurring opinion of Breyer, J., in *Gore*, 517 U.S. at 587).

This Court's precedents recognize that the constitutional constraints on punitive damage awards can be ensured only by appellate review. By depriving persons or entities subjected to punitive damage awards of appellate review, West Virginia has effectively insulated such

judgments from the constitutional scrutiny mandated by *Gore* and *State Farm*.

B. The Libel Analog

The importance of appellate review of punitive damage awards has an analog in the area of libel law. Beginning with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court constitutionalized the law of defamation with respect to media defendants. It did so by requiring that public officials and public figures suing a media defendant prove that the defendant published the falsehood in question with "actual malice." *Sullivan*, 376 U.S. at 279-80. This Court has also held that the actual malice requirement must be proven with "convincing clarity."[5]

In its decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. at 514, which held that the scope of review in libel cases was *de novo* and not limited by Fed. R. Civ. P. 52(a), this Court recognized the importance of appellate review in ensuring that *Sullivan's* constitutional safeguards are followed. As the Court explained:

> The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges – and particularly Members of this Court – must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not

[5] *Id.* at 285-86; *see Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967).

> merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice." *Id.* at 510-11.

Various studies demonstrate the crucial role that has been played by the appellate courts in ensuring that the *Sullivan* principles are observed. In the earliest years for which statistics are available, an extremely high percentage of libel verdicts were reversed on appeal. For example, it has been reported that 70% to 80% of all jury verdicts against publishers between 1980 and 1985 were reversed.[6] As one commentator said about the high reversal rate during this period:

> Had appellate courts not been able to implement a true actual malice standard, the national media surely would be less vigorous and competitive in bringing information to the public. This high reversal rate demonstrates the tendency of trial judges and juries to disregard the constitutional privilege accorded the press in order to reach more intuitively "fair" verdicts.[7]

For the 1980s as a whole, a somewhat higher percentage of verdicts remained intact. According to the Libel Defense Resource Center (now known as the Media Law Resource Center), 149 libel awards survived post-trial motions during the 1980s. Of those awards, 33% remained intact (*i.e.,* were not appealed or were affirmed) while 67%

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[6] Scott M. Matheson, *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 Tex. L. Rev. 215, 280 & n.375 (1987).

[7] Gary Anthony Paranzino, *The Future of Libel Law and Independent Appellate Review: Making Sense of Bose Corp. v. Consumers Union of United States, Inc.*, 71 Cornell L. Rev. 477, 483 (1986).

were modified or reversed on appeal. During the 1990s, 106 libel awards survived post-trial motions; of those, 40% survived intact while 60% were modified or reversed on appeal.[8]

Just as no one would seriously contend that the *Sullivan* standard could have "taken hold" without the assistance of the appellate courts, the constitutional standards announced in *Gore* and *State Farm* cannot be expected to "take hold" without the active assistance of the state and federal appellate courts.

The Academy discusses punitive damages and libel as examples, only. A right to independent review of a fact-finder's initial decision is a necessity to assure application of any constitutional constraints on initial decisionmaking, to bring consistency and predictability to the application of law, to guarantee against arbitrary deprivations of liberty and property, and to promote public confidence in the judicial system as a legitimate branch of a tripartite government.

III. APPELLATE REVIEW PLAYS AN INDISPENSABLE ROLE IN ENSURING THAT LITIGANTS IN STATE COURTS ARE ACCORDED DUE PROCESS OF LAW.

The time has come when at least some category of cases requires nondiscretionary appeal as a matter of due process. The number of states and the number and diversity of their populations have increased; the laws that govern our lives have grown dramatically; the increasing complexity of business and social relations brings to the courts ever more complex issues; the number of filed

[8] Libel Defense Resource Center, Inc., Press Release: *Trial Records Set in 2002: Highest Media Victory Rate, Lowest Number of Trials* (2003) at http://www./ldrc.com/Press_Releases/bull2003-2.html.

cases has exploded; and more frequently than ever in our history, peoples' lives and fortunes are determined by the courts. Due process requires at least one non-discretionary appeal to permit appellate courts to fulfill their traditional roles of error correction, supervision of inferior courts, and shaping and harmonizing laws, especially in cases such as this requiring enforcement of constitutional limitations on the powers of judges and juries.

Owing to an early ordinance of Edmund Andros, the colonial governor of Massachusetts Bay, the concept of one superior court to which lower courts could appeal was widely copied in the colonial judicial systems of this country.[9] This model mirrored the English system of local courts, each with a right of appeal to some more superior court, which had been part of England's developing common law tradition since the 13th century. It provided a solution to the colonies' need for dispute resolution without travel to courts at great distance.[10] This long history of appeals undoubtedly accounts for every citizen's expectation that if not satisfied at trial, "I will appeal." While this popular response may misunderstand the deference that the appellate process pays to the trial court, it reflects a common understanding that there is the possibility – even the right – to have the merits and process of the trial court be reviewed at least once.

The need for appeals reflects the most important function of appellate courts: the correction of error and the general recognition that the determination of disputes by a sole, fallible human being is not a satisfactory method for resolving disputes, especially where the decisionmaker may be subject to local prejudices or voters' pressure. The

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[9] 1 JULIUS GOEBEL, JR., *Antecedents and Beginnings To 1801*, in THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 13-14 (Macmillan Co. 1971) ("GOEBEL").

[10] GOEBEL, *supra* n.9 at 5.

appellate process gives an appellant the opportunity to identify the error that he believes infects the lower court's decision and to persuade the appellate court, usually including several judges, that the trial court committed reversible error. Oral argument, when granted, gives a litigant the opportunity literally to see an appellate court confront the issues of his case. Even when an appeal does not bring the result the appellant seeks, it gives the loser the satisfaction of knowing that his loss does not depend upon the conclusion of a single judge, and thus brings both repose and a measure of acceptance and confidence in the process.

In some instances, the appellate process also shows the litigant the weaknesses of his case and the experience of hearing the skepticism of the judges as they question appellant's counsel. While disappointing, the realization that thoughtful people who have discussed and reflected upon the case agree with the determination of the trial court brings psychological acceptance of the loss and, eventually if not immediately, acceptance of the judicial process. Roscoe Pound "emphasized that the appeal, if it does nothing else, is necessary to assure the litigants and the public that the judicial power is not vested in a single individual, but is exercised only by a larger institution."[11]

Acceptance of the legitimacy of the entire process is essential to a country that relies so heavily on its state courts to resolve the complex matters that confront society. (As Alexis de Tocqueville observed in 1835, "Scarcely any question arises in the United States which does not become sooner or later, a subject of judicial debate."[12])

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[11] Paul D. Carrington, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound's Structural Solution*, 15 J. L. & Pol. 515, 526 (1999).

[12] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 207 (Oxford Univ. Press 1946). *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*,

(Continued on following page)

While federal case law is often the focus of legal study, "the state courts are the front-line adjudicators in this country, and the amount of appellate work they perform is vastly greater than that done by the federal courts"[13]

Appellate oversight of trial courts brings consistency to the legal system as a whole. In the process of correcting error, state appellate courts play a lawmaking function as they harmonize the decisions within their jurisdictions, and as they fill the "gaps" in the "fissures in the common law"[14] in their published decisions. Through this function private disputes essentially unknown to all but the participants begin to have a broader impact. Publication draws the wider public into debate on the work of the courts. Cases which are appealed include those raising the more challenging legal issues. Disagreement with appellate decisions spawns commentary, both academic and in the political arena, which in turn influences later decisions and legislation.[15] That the appellate courts' lawmaking

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70 N.Y.U. L. Rev. 1, 7 & nn.22-35 (1995) ("Kaye") (describing the staggering variety of tort issues brought before the state courts of New York).

[13] DANIEL J. MEADOR, MAURICE ROSENBERG & PAUL D. CARRINGTON, APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES AND PERSONNEL 3 (The Michie Co. 1994) ("MEADOR"); *see* Edward W. Najam, Jr., *Caught in the Middle: The Role of State Intermediate Appellate Courts*, 35 Ind. L. Rev. 329, 330 (2002); *compare* National Center for State Courts, *Examining the Work of State Courts 2002*, *available at* http://www.ncsconline.org/D_Research/csp/2002_Files/2002_Main_Page.html (caseload statistics) *with* Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics*, *available at* http://www.uscourts.gov/caseload2002/contents.html (federal caseload statistics).

[14] Kaye, *supra* n.12 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921)).

[15] *See* Burton Atkins, *Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States*, 24 Law & Soc'y Rev. 71, 75-76 (1990).

function is tested in this public debate also reinforces the legitimacy of the process.

An appellate system, like the one in West Virginia, that does not afford litigants at least one appeal as of right in cases subject to constitutional standards and limitations does not guarantee the process due to such a case on appeal. Discretionary review cannot adequately fulfill the obligations of the appellate process.

West Virginia is one of only three states that do not provide for an appeal as of right to all litigants. New Hampshire likewise does not provide for appeals as of right in any case. Virginia's relatively new Court of Appeals and its Supreme Court hear appeals as of right in only specified categories of civil appeals; for most civil cases, there is still no appeal as of right.[16]

Because the jurisdiction of the West Virginia Supreme Court of Appeals is wholly discretionary, litigants in West Virginia – unlike those in 47 other states – are not assured that their cases will be reviewed on the merits by judges who have reviewed the briefs and the record, including the trial transcript, and issued a reasoned decision. As a result, they are deprived of the historical benefits of full appellate review. Commentators have suggested, mistakenly in the Academy's opinion, that the review of a petition

[16] "*All* appeals to the Supreme Court are discretionary (through the petition for appeal) *except* for appeals from the State Corporation Commission and from a conviction in the circuit court in which a sentence of death is imposed." APPELLATE PRACTICE: VIRGINIA AND FEDERAL COURTS § 1.203A (Hon. R. Terrence Ney, ed., Virginia Law Found. 3d ed. 2003) (emphasis in original). "Appeal will lie *as a matter of right* to the Court of Appeals from a final decision or an interlocutory order granting or denying injunctive relief in the following cases: [three categories, none of which includes civil cases other than domestic relations cases.]. . . . Appeal is discretionary (a party must petition for appeal to the Court of Appeals) from final decisions in . . . criminal convictions by the circuit court." *Id.* § 1.303B (emphasis in original).

in a discretionary jurisdiction is not functionally different from the review and disposition of a routine case in jurisdictions where there is an right of appeal.[17] But a review that is not public and provides no written explanation of its reasoning cannot assure a litigant that the case has been accorded the thorough review sufficient to identify and correct error. As Justice Douglas noted, "once the search for the grounds, the examination of the grounds that had been advanced is made, sometimes those grounds crumble."[18]

The lack of "public" view of the appellate process is exacerbated in a jurisdiction that is burdened with such a heavy caseload as is West Virginia. Inevitably, the assumption must be that the pressure of keeping abreast of increasing filings diminishes the likelihood of thorough and considered review.

There are only five judges on the West Virginia Supreme Court of Appeals, which was described in a 1998 report by the National Center for State Courts as "beset by incredibly high caseloads."[19] In 1999, 3,439 petitions were filed, a 10 percent increase over the previous 1991 record of 3,180, creating a caseload that a former Chief Justice of that Court has described as "daunting."[20] On December 1, 1998, the Commission on the Future of the West Virginia Judicial System recommended the creation of an intermediate court

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[17] *See*, *e.g.*, MEADOR, *supra* n.13 at 1153-54.

[18] *Conversations Between Justice William O. Douglas and Professor Walter F. Murphy*, Transcription of Cassette No. 10: June 9, 1962, *available at* Seeley G. Mudd Manuscript Library, Princeton Univ., http://infoshare1.princeton.edu/libraries/firestonerbsc/finding_aids/douglas/douglas10.html.

[19] Elliott E. Maynard, *West Virginia Needs an Intermediate Appellate Court*, W. Va. L. Rev. 8 (July 2000).

[20] Jennifer Bundy, *State Supreme Court Busiest of Its Kind*, Charleston Gazette, May 1, 1997 at P5A.

of appeals as soon as possible and recommended that each litigant should be guaranteed an appeal as of right at either the intermediate court of appeals or at the Supreme Court.[21] Those recommendations have not been adopted.

The "daunting" workload of the West Virginia Supreme Court affects all aspects of the judicial function. Even the most conscientious judges laboring under such a caseload cannot give adequate attention to the detection of error and the development of case law that is required by an appellate system that accords due process to the cases before it. And while no court is free from error, an example of the danger posed by a judicial scheme that does not allow review of right may be seen in the West Virginia case of *United States v. Flippo*, 528 U.S. 11 (1999). There, this Court summarily reversed a judgment directly conflicting with *Mincey v. Arizona*, 487 U.S. 1230 (1988) (per curiam), where the defendant had been sentenced to a term of life without parole, and the West Virginia Supreme Court of Appeals had unanimously refused review.

Two judges of the West Virginia Supreme Court of Appeals have provided their own reasons why mandatory appeal should be granted.[22] Although speaking about criminal cases where the sentence is life imprisonment without parole, the general tenor of their comments are equally applicable to this and similar cases. Justices Starcher and Albright gave six reasons for their position:

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[21] Commission on the Future of the West Virginia Judicial System, Final Report, Issue 5.1 and 5.1(h) (Dec. 1, 1998), *available at* http://www.state.wv.us/wvsca/Future/Report/contents.htm.

[22] *State ex rel. Penwell v. Painter*, No. 012191 (W. Va. May 1, 2002) (unpublished decision). The Academy has lodged copies of this decision with the Clerk of the Court. We understand that Justices Starcher and Albright routinely use this dissent in cases involving life imprisonment. *See* Russell S. Cook, *In Pursuit of Justice: The Right to Appeal a Life Sentence or Its Equivalent in West Virginia*, W. Va. Law. Rev. 18 (Oct. 2002).

(1) without full appellate review, convictions do not have any presumption of correctness in subsequent or collateral proceedings;

(2) the Supreme Court of Appeals was deprived of the views of the state Attorney General, who ordinarily offers his views only if review is granted, often resulting in acknowledgement of clear error;

(3) appellate review assures that important issues are brought to the general attention of the bar, which may also invite the participation of *amici* on important issues;

(4) criminal jurisprudence is better reasoned and developed when cases are briefed and addressed in a written opinion, requiring the court to articulate its reasoning;

(5) where appropriate, the court can appoint counsel who can assist with the preparation of a petition because the quality of a petition can affect whether it is granted; and

(6) cases should be argued and briefed where the consequences of error are most extreme.

The loss of liberty is of course the most compelling argument for requiring a direct appeal, but the factors described by two judges, who are familiar with how the West Virginia Supreme Court of Appeals works, apply generally to the case of any litigant whose case is governed by constitutional standards and limitations. Lacking mandatory review, there is no assurance that error has been examined; the appellant does not receive the assurance that the case has been thoroughly scrutinized and considered by judges other than the trial judge; and the bar and the general public are deprived of the opportunity to examine the court's reasoning. The matter is exacerbated if petitions are disposed of with unpublished opinions that do not come to the attention of the wider bar. As a result, error is more likely to go uncorrected, the development of the law is hindered, and it is less likely that the

court's decisions will be discussed and tested by other litigants, legal commentators, and public opinion.

The fact that only three states still maintain a wholly discretionary appellate system by itself casts doubt on the adequacy of such systems. The evidence from caseload statistics, the recommendations of the 1998 Commission on the Future of the West Virginia Judicial System, and members of the West Virginia Supreme Court of Appeals all suggest that the litigants of that state faced with the loss of liberty or substantial property are not being accorded the process now recognized as "due" on appeal throughout America.

CONCLUSION

The Academy urges this Court to grant the petition for a writ of certiorari to the West Virginia Supreme Court of Appeals.

Respectfully submitted,

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