STATE OF NEW JERSEY

LAW REVISION COMMISSION

Final Report

Relating to

Title 2A – Capias Writs

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I. Introduction

In 2009, the Commission began a comprehensive revision of Title 2A, which includes the capias writs. The Commission recommends that the statutes establishing both capias ad respondendum and capias ad satisfaciendum be repealed. First, the writs raise grave constitutional problems related to due process and equal protection. Second, the writs needlessly duplicate powers given to the courts under the civil contempt statutes. Third, while the law requires civil prisoners to be held separately from criminal prisoners, it has proven impractical to effect such a separation. Fourth, even if separation of civil and criminal prisoners were possible, it is not clear who would pay for the incarceration of a civil prisoner jailed under a writ of capias.

II. Background

The writ of capias ad respondendum (ca. re.), part of New Jersey law since at least 1877, allows a plaintiff to commence a civil action by putting the defendant in jail. The writ begins the action and no judgment is entered before the incarceration. If the action is one in contract, the plaintiff must allege fraud. *N.J.S.A.* 2A:15-42. If the action is one in tort, the plaintiff must allege willful conduct. *N.J.S.A.* 2A:15-41; *see also, Iaria v. Public Service Mutual Ins. Co.*, 31 *N.J.* 386, 389 (1960). The writ was designed to compel attendance at trial, but a defendant may be released upon depositing a cash bail or posting a bail bond. *Iaria,* 31 *N.J.* at 389.

The related writ of capias ad satisfaciendum (ca. sa.) has been recognized in New Jersey since at least 1898. It is a "body execution enabling a judgment creditor...to cause the arrest of the judgment debtor and his retention in custody until he either pays the judgment or secures his discharge as an insolvent debtor." *Perlmutter v. DeRowe*, 58 *N.J.* 5, 13 (1971). With ca. sa., unlike ca. re., a judgment precedes the incarceration. A writ of ca. sa. issues in tort for personal injury or property damage if the court finds willfulness or malice. *N.J.S.A.* 2A:17-79. The writ issues on a judgment in contract when ca. re. has already issued and not been quashed or when proof is made that ca. re. could have issued as first process. *See id.*

The practice of jailing debtors existed in New Jersey until the State Constitution of 1844 prohibited imprisonment "in any action, or on any judgment founded upon contract, unless in cases of fraud." N.J. CONST. 1844, Art. I, par. 17. The present Constitution continues this prohibition. N.J. CONST. 1947, Art. I, par. 13. The writ statutes determine what constitutes fraud in a contract case, and case law has indicated that a ca. sa. writ may be used in any case involving a tort judgment without violating the constitutional prohibition against imprisonment for debt. *Duro v. Wishnevsky*, 126 *N.J.L.* 7, 8 (Sup. Ct. 1940).

The validity of ca. re. was attacked by the defendant in *Perlmutter v. DeRowe*, 58 *N.J.* 5 (1971), who argued that imprisonment prior to a judicial determination of fraud violated the state prohibition against imprisonment for debt as well as his right to due process of law. The Court found that "civil arrest under a [capias ad respondendum] is substantially analogous to arrest under a criminal complaint and a defendant should have all the same procedural rights and protections as if he were arrested on a criminal charge for the same fraud upon which the civil action and the capias ad respondendum are based." 58 *N.J.* at 17-18, fn6. The *Perlmutter* Court

held that the Legislature had the constitutional authority to provide for civil arrest in cases of fraud, but recognized that the procedures followed in civil arrest must give the defendant the same protections that apply in a criminal arrest. *See id.*

After *Perlmutter*, the Supreme Court revised *Rule* 4:51, to provide some procedural protections. Upon arrest, a defendant is to be brought before a judge and advised of the rights: 1) to be released on bond and 2) to bring a motion attacking the basis for issuance of the writ, for which the plaintiff bears the burden of proof. The judge, at the initial appearance, will set the bail amount in accordance with *R.* 4:51-2(a) and (b). The judge may "fix bail in an amount less than that which plaintiff claims to be due, despite the provision of *N.J.S.A.* 2A:15-42" and the bond furnished is no longer required to be in the "anachronistic sum of double the amount of the bail fixed...despite the provision of *N.J.S.A.* 2A:15:43." *Perlmutter v. DeRowe*, 58 *N.J.* at 17 n.6. Instead, as in criminal cases, a weighing of all circumstances should determine the amount of bail. *Id.*

In 1997, the Law Revision Commission issued a report that called for the repeal of both writs. *See* NEW JERSEY LAW REVISION COMM., FINAL REPORT RELATING TO CIVIL ARREST CAPIAS AD RESPONDENDUM ET SATISFACIENDUM (1997) ("NJLRC Report"). The Commission asserted that the statutes "consist of archaic terms of art" and that they are "poorly drafted and present due process problems." NJLRC Report, 3. Even if the statutes were modernized and protections for the due process rights of debtors were added, the Commission remained troubled by the seemingly duplicative nature of the writs since civil contempt and other measures present in the New Jersey Court Rules[1] protected litigants' rights at least as well as capias. *Id.* at 4. Finally, the Commission was deeply concerned by ca. re.'s ability to jail a person neither charged with a crime nor in violation of a court order. *Id.* The 1997 Report has not been acted on by the Legislature.

Several years later, the Appellate Division decided *Marshall v. Matthei*, 327 *N.J.Super.* 512 (App. Div. 2000). *Marshall* involved the jailing of an individual who, delinquent on post-marital support obligations, also refused to pay his lawyer for services rendered. The lawyer received a judgment against the client and sought a writ of ca. sa. The Appellate Division affirmed issuance of the writ and held that confinement was proper so long as its purpose was coercive and not punitive. *Id.* at 529-30. Because "the key to the jail is in the prisoner's pocket, that key being compliance with the order," the court would uphold the incarceration as long as the debtor had the ability to pay the debt owed. *Id.* at 528. Once a debtor can demonstrate that he no longer has the ability to pay, however, incarceration has become punitive and may not be continued. *Id.*

Like the *Perlmutter* Court with ca. re., the *Marshall* court was troubled enough by post-deprivation due process concerns to create a framework of procedural protections for ca. sa. After *Marshall*, a person confined on a writ of ca. sa., like one confined on a civil contempt charge, has the right to a periodic review to determine whether circumstances have changed. *Id.*

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[1] Court Rules provide that a judgment debtor may be compelled to disclose his assets and that a court may order use of those assets to pay the judgment. *R.* 4:59-1(e). A court may use the contempt power to compel compliance with these court orders. *See R.* 1:10.

at 527 (citing *In re Acceturo*, 242 *N.J.Super*. 281, 288-89 (App. Div. 1990)). The burden of proving the change of circumstances is upon the individual seeking release, with an evidentiary hearing being held no less frequently than (a) 18 months after the last hearing (the maximum term that may be imposed for criminal contempt under *N.J.S.A*. 2C:29-9a and 2C:43-6a(4)), or (b) sooner upon a prima facie showing by the party subject to the order that circumstances have changed. *Marshall*, 327 *N.J.Super*. at 529. Once it is apparent the defendant cannot pay the judgment against him, "'legal justification for [incarceration] ends and further confinement cannot be tolerated.'" *Id.* at 527 (quoting *Catena v. Seidl*, 65 *N.J.* 257, 262 (1974)).

III. Why the Writs Should Be Repealed

A. Constitutional Problems

Both writs pose serious constitutional concerns. Capias ad respondendum, which allows imprisonment before any finding of civil liability, raises due process concerns not assuaged by the writ statutes or the post-*Perlmutter* revisions to *R*. 4:51.

While other provisional remedies, such as temporary restraining orders and preliminary injunctions, permit deprivations of liberty or property before a case is fully adjudicated, the standard for receiving such relief is high. *See, e.g., B & S Ltd., Inc. v. Elephant & Castle Intern., Inc.*, 388 *N.J.Super.* 160, 167 (Ch. Div. 2006) ("(1) [A]n injunction is necessary to prevent imminent and irreparable harm; (2) the movant asserts a settled legal right supporting its claim; (3) the material facts are not controverted; and (4) in balancing the equities or hardships, if injunctive relief is denied then the hardship to the movant outweighs the hardship to the non-movant."); *Morris County Transfer Station, Inc. v. Frank's Sanitation Serv., Inc*., 260 *N.J.Super.* 570, 574 (App.Div.1992) (citing *Crowe v. DeGioia*, 90 *N.J.* 126, 132-34 (1982)). The ca. re. statute, on the other hand, does not require that standard to be met. Instead, all a plaintiff must show is that a contract was founded on fraud, that defendant might remove property from the jurisdiction, or that one of a few kinds of torts was committed. *See, N.J.S.A.* 2A:15-41 and -42.

Ca. re. allows the jailing of a person neither charged with a crime nor in violation of a court order without a showing akin to that required for an injunction and, as a result, raises significant constitutional due process concerns. In addition, the writ is not necessary since the court may take other actions under its general powers to assure that the defendant's assets will be available to pay a judgment if one is obtained.

Though two appellate cases have upheld the constitutionality of the capias writs in recent years, it does not appear that the writs would survive review by the United States Supreme Court or the lower federal courts. The United States Supreme Court's procedural due process jurisprudence suggests that the writs would likely be found to violate the Due Process Clause of the Fourteenth Amendment. Since its 1969 decision in *Sniadach v. Family Finance Corp.* 395 *U.S.* 337 (1969), the U.S. Supreme Court has held even prejudgment remedies depriving civil defendants of *property* before trial or dispositive motion to be subject to stringent procedural due process restrictions. *Connecticut v. Doehr*, 501 *U.S.* 1 (1991); *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 *U.S*. 601 (1975); *Fuentes v. Shevin,* 407 *U.S*. 67 (1972) The deprivation of

liberty by incarceration clearly infringes upon a liberty interest protected under the Due Process Clause and would arguably be subject to procedural due process restrictions more stringent than those applied to deprivations of property.

The U.S. Supreme Court has made clear that in deciding "what process is due" in the context of prejudgment remedies, a modified version of the standard *Mathews v. Eldridge* , 424 *U.S.* 319 (1976) balancing test governs the inquiry. *Connecticut v. Doehr*, 501 *U.S.* 1 (1991). In *Doehr*, the Court explained that in such a case

> the relevant inquiry requires, as in *Mathews,* first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews,* principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.

Id. at 11.

The first factor weighs heavily against the constitutionality of the capias procedure. The loss of liberty through incarceration to which civil defendants are exposed by the capias writs is one of the most serious deprivations that a person can suffer. None of the prejudgment remedy cases considered by the United States Supreme Court have involved so serious a deprivation since they concerned restraints on the use of property. Indeed, incarceration is such a serious deprivation of liberty that it is not a remedy in civil suits even *after* judgment (except for civil contempt orders to compel a person to obey a court order). Moreover, the harm resulting from wrongful incarceration is essentially irreparable.

Only the most compelling interest should outweigh a *civil* defendant's liberty interest in freedom from incarceration. The State's interest in providing civil plaintiffs pre-judgment remedies to ensure that they can collect upon a potential monetary judgment is far less substantial than the civil defendant's interest in freedom from custody. Even the limited interest in affording the pre-judgment remedy must be discounted due to the existence of alternative means to ensure that the civil defendant will not be able to dispose of or disperse his or her assets prior to judgment, as explained below. Further, the capias writ does not require any showing that defendant "is about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his [property] unavailable to satisfy a judgment", which the U.S. Supreme Court has also deemed significant. *Doehr*, 501 *U.S.* at 16. Thus, the second factor does not change the balance so as to favor of the capias writ.

As to the third factor, there is clearly a substantial risk of error in deciding the merits of a claim before conducting a trial or considering a dispositive motion. The risk is great in deciding whether willful conduct was involved in a tort case or whether fraud was involved in a contract

case. Neither issue is likely to turn solely on documentary evidence. *See, Doehr*, 501 *U.S.* at 14; *Mitchell v. W.T. Grant Co.*, 416 *U.S.* 600, 609 (1974).

In addition, the writ of capias ad satisfaciendum is unconstitutional because *N.J.S.A.* 2A:17-77 prohibits courts from issuing the writ against women. Thus, the statute contains a gender classification that has not been upheld by any court in the modern era, and which would almost certainly be invalidated. The U.S. Supreme Court has long held that statutes which treat the sexes differently "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 *U.S.* 190, 198-99 (1976). Gender classifications, whether invidious or benign, are subject to intermediate level scrutiny, which means they must serve important governmental objectives and that the gender classification must be substantially related to the achievement of those objectives. *U.S. v. Virginia*, 518 *U.S.* 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 *U.S.* 718 (1982). More particularly, there must be an "exceedingly persuasive" justification for such a classification. *U.S. v. Virigina*, 518 *U.S.* at 531.

If the purpose of ca. sa. is to permit litigants to recover money owed after judgments entered in their favor, it is difficult to argue that precluding the issuance of the writ against women is substantially related to that purpose. A similar New Jersey statute prohibiting "the arrest or imprisonment of women by virtue of any mesne process or process of execution in any civil action" was repealed by the legislature in 1993. *See N.J.S.A.* 2A:15-40 (repealed). The immunity of women from incarceration is clearly based on outmoded stereotypes and originated in an era in which there were substantial gender inequalities. In the criminal context, women are subject to incarceration on the same terms as men. It is hard to envision a justification for subjecting men to incarceration, but not women.

B. Unnecessary Duplication of Contempt Rules and Equitable Remedies

Also troubling is the fact that the writs of ca. sa. and ca. re. needlessly duplicate remedies already available in the New Jersey Court Rules.

The writ of capias ad satisfaciendum duplicates the power of courts to enforce judgments through proceedings in aid of litigants' rights. The Court Rules provide that a judgment debtor may be compelled to disclose its assets and that a court may order use of those assets to pay the judgment. *R.* 4:59-1(e). A court may use the contempt power to compel compliance with these such orders. *See, R.* 1:10. Ca. sa. adds nothing to these powers and, to the extent that it is construed to allow incarceration for mere failure to pay a judgment, it amounts to imprisonment for debt. *See, e.g.*, N.J. CONST. art. I, par. 13.

The writ of capias ad respondendum allows a court to imprison the defendant in a civil action before the trial of a claim. This is no longer necessary in light of the general power of the courts to issue temporary restraints and interlocutory injunctions. *See* R. 4:51 and 4:52. Because *Rules* 4:52-1 and -2 allow the court to take substantial pre-judgment action when emergent circumstances exist or irreparable harm to the plaintiff will occur, the ca. re. accomplishes nothing that the equitable remedies of injunction and restraining order do not presently

accomplish. *See, Solandz v. Kornmehl*, 317 *N.J.Super*. 16, 20 (App. Div. 1998) Since ca. sa. and ca. re. do not provide benefits beyond those provided by civil contempt or injunctive relief, they are duplicative and should be repealed.

C. Inability of Jails to Keep Debtors and Criminals Separate

In addition to the foregoing, the writs place an unnecessary strain on the state's jails and endanger the debtors imprisoned. The Legislature has commanded that imprisoned debtors shall not be jailed alongside criminals, *N.J.S.A.* 30:8-5, and those imprisoned on writs of capias are considered debtors for the purposes of this statute. *See, Bona v. Wynn*, 311 *N.J.Super.* 257, 266 (L. Div. 1997). In practice, this requirement has not been followed.

In *Bona*, an insolvent debtor who had defrauded Atlantic City investors out of millions of dollars was jailed on a writ of ca. sa. Imprisoned on the writ for nearly two years, Bona had to be hospitalized after he was attacked in his cell by a criminal prisoner. *Id.* at 261-2. The injuries sustained included a broken rib. *Id.* at 262 n.2. Bona sued for recovery under the Tort Claims Act, *N.J.S.A.* 59:9-1, alleging, *inter alia,* that the warden violated *N.J.S.A.* 30:8-5 by placing him with the general prison population. The Law Division held that "[t]o find a correctional official who did not separate debtors from other prisoners liable for an injury by one inmate to another, in violation of a statute that originated 120 years earlier when prison overcrowding was not the problem that it is today, would ignore the realities of prison overcrowding as well as the regulatory grant of discretion to separate inmates 'insofar as space permits.'" *Id.* at 272. It was enough that the warden placed Bona in an area that housed inmates charged with minor offenses with no history of violence because "[c]orrectional officials may be unable, despite their best efforts, to properly care for the safety of prisoners while in custody." *Id.* at 271-2.

Many prison wardens do not have the space or resources to house all of their criminal prisoners, let alone to house debtors in separate quarters. In response to the problem of prison overcrowding, which had reached "crisis dimensions" by the early 1980s, Governor Byrne's Executive Order No. 106 declared state prison overcrowding to be an emergency under the Disaster Control Act. *Worthington v. Fauver*, 88 *N.J.* 183, 188-89 (1982). The Legislature ultimately passed the County Correctional Policy Act, which addressed the overcrowding by establishing a "long-term, financial assistance program to provide State grants to participating counties". *N.J.S.A.* 30:8-16.5(a). In return, the Act permitted the Department of Corrections to house certain state prisoners in medium and minimum security county facilities. *N.J.S.A.* 30:8-16.5(b). Thus, in addition to housing relatively nonviolent criminals, county jails took in hundreds of prisoners from the larger, tougher state prisons that could no longer house them.

As of 2009, it is estimated that New Jersey's prisons have 5,500 more inmates than they were designed for. Alexi Friedman, "New state initiative seeks to reduce prison overcrowding," NJ.COM, May 10, 2009. Exacerbating the problem, 65% of New Jersey's 14,000 annually-released inmates are back behind bars within five years. *Id.* Since the State's prisons remain overcrowded, it is unreasonable to expect that wardens will be able to keep debtors separate from criminal prisoners. Moreover, *Bona* suggests that a warden need only try to follow the guidelines of *N.J.S.A.* 30:8-5. As a result, maintaining the capias writs not only adds to the overcrowding

problem, it endangers the welfare of jailed debtors.

D. Costs of Imprisonment

Further, the cost of jailing a debtor is high and it is not clear who is responsible for paying that cost. The average annual cost of incarceration for a prisoner in New Jersey is $38,700, which is roughly the average annual salary in New Jersey. Jonathan Tamari, "N.J. lawmakers want inmates to pay jail, monitoring costs," PHILADELPHIA INQUIRER, May 14, 2009. So significant is the cost to the State that bills are presently being considered that would charge State prisoners for the cost of their incarceration. *Id.* The Camden County Correctional Facility assesses its prisoners a user fee of $5 per day for room and board and $10 per day for use of the infirmary. *Id.* It costs the state $106 a day to house each prisoner. It is no surprise, then, that the conceptualization of prison costs as the cost of a safer society, properly borne by taxpayers, is under attack in New Jersey and elsewhere. *See, e.g.,* Robert Weisberg, *Pay-to-Stay in California Jails and the Value of Systemic Self-Embarassment*, 106 MICH. L. REV. 55 (2007). Charging the taxpayers for the imprisonment of civil debtors is just as costly and likely to be even less popular than charging taxpayers for the costs of criminal imprisonment.

The costs of imprisoning those charged with civil contempt are currently paid by the taxpayers. It is not, however, clear who should bear the costs associated with the imprisonment of an individual as a result of a capias writ. There is no mechanism by which to impose that cost on the private litigant. If such a mechanism existed, the cost to the person seeking the writ would likely be so prohibitive as to make the writ a nullity. In the *Marshall* case, for example, the debtor was jailed in 1999 and remained in jail at least through 2005. *See Marshall v. Matthei,* 2005 *WL* 2447782 (App. Div. 2005) (denying, once again, debtor's appeal for release). Six years' imprisonment at a rate of $38,700 would be a cost to the taxpayer of $232,500. At such a rate, the fees charged to a plaintiff will eventually exceed the judgment amount sought from the debtor, negating any benefit from the writ. Thus, the capias writs are an unduly expensive proposition no matter how the cost is apportioned.

IV. Conclusion

In the absence of any countervailing constitutional rights, judicial doctrine sets the floor for constitutional rights, and legislatures can grant more robust rights. Recognition that incarceration of civil defendants as a pre-judgment remedy in a suit for monetary damages unduly infringes of such defendant's liberty fully justifies exercising the power to set into law more robust due process rights than recognized by the Appellate Division in the very limited case law in this area.

The Commission believes the writs of capias ad respondendum et satisfaciendum are constitutionally deficient, no longer necessary, and are too impractical and costly to be administered effectively. For the foregoing reasons, the Commission recommends repeal of the writs of ca. sa. and ca. re.