CHAPTER 4
Original Actions in the Appellate Courts

§ 4.1 Exercise of Concurrent Jurisdiction

The Kansas Supreme Court has original jurisdiction in quo warranto, mandamus, and habeas corpus proceedings. Kansas Constitution art. 3, § 3. The Court of Appeals has original jurisdiction only in habeas corpus proceedings. K.S.A. 60-1501(a). Supreme Court Rule 9.01 establishes the procedures for original actions in the appellate courts.

Since district courts also have concurrent jurisdiction over quo warranto, mandamus, and habeas corpus proceedings, those actions should be filed in the district court. The original jurisdiction of the Kansas Supreme Court will not ordinarily be exercised if adequate relief appears to be available in the district court. See *Krogen v. Collins*, 21 Kan. App. 2d 723, 724, 907 P.2d 909 (1995); see also *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 656, 367 P.3d 282 (2016) ("[T]his court has traditionally been somewhat lenient on enforcement of that general rule").

If relief is available in the district court, the petition must state the reasons why the action is brought in the appellate court instead of the district court. Rule 9.01(b). Considerations relevant to the exercise of discretionary jurisdiction over a mandamus action include judicial economy, the need for speedy adjudication of an issue, and avoidance of needless appeals. *Ambrosier v. Brownback*, 304 Kan. 907, 909, 375 P.3d 1007 (2016). If the appellate court finds that adequate relief is available in the district

court, the action may be dismissed or ordered transferred to the appropriate district court. Rule 9.01(b). Even if district court relief is available, the appellate court has discretion to exercise its original jurisdiction. *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 405, 197 P.3d 370 (2008).

§ 4.2 Procedure Upon Filing an Original Action

The petition must contain a statement of the facts necessary to an understanding of the issues presented and a statement of the relief sought. The petition must be accompanied by a short memorandum of points and authorities, and such documentary evidence as is available and necessary to support the facts alleged. Rule 9.01(a)(1).

> **PRACTICE NOTE:** Since the appellate court may not choose to order further briefing, the memorandum should be complete as well as concise. Assume that there will not be an opportunity to present further briefing.

Pro se petitioners must file the original and one copy of the petition with the clerk of the appellate courts. Rule 9.01(a)(1); Rule 1.14(c). Kansas licensed attorneys who are active and in good standing must file electronically. Rule 1.14(a). The petition must contain proof of service on all respondents or their counsel of record. Rule 9.01(a)(1).

When the relief sought is an order in mandamus against a judge that involves pending litigation before that judge, the judge and all parties to the pending litigation are deemed respondents. Rule 9.01(a)(1). This is true regardless of whether the parties to the pending litigation are named.

> **PRACTICE NOTE:** An attorney representing a respondent should not file a response unless one is ordered under K.S.A. 60-1503(a). If the attorney for a respondent was not served a copy of the petition, the attorney may want to file an entry of appearance in order to receive electronic

notifications concerning the status of the case. However, be aware that there will never be an electronic notice of a pro se filing.

Habeas corpus petitions must be verified. They must state the place where the person is restrained and by whom; the cause or pretense of the restraint; and why the restraint is wrongful. Petitioners who are in the custody of the Department of Corrections must include a list of all civil actions, including habeas corpus actions, they have participated in or filed in any state court within the last five years. K.S.A. 60-1502.

PRACTICE NOTE: Where inconsistency or conflict exists between the procedure provided in the statutes and Rule 9.01, the latter governs actions filed in the appellate courts. See *State v. Mitchell*, 234 Kan. 185, 193-95, 672 P.2d 1 (1983).

§ 4.3 Docket Fees

The plaintiff in an original action in quo warranto or mandamus must either file a poverty affidavit under K.S.A. 60-2001(b) or pay the docketing fee of $145 and any applicable surcharge. If the petitioner is an inmate, the clerk will assess the initial $3 filing fee after a poverty affidavit and a certified statement of the inmate's trust fund are submitted. Upon receipt of the prescribed docket fee or poverty affidavit, the clerk of the appellate courts must docket the original proceeding and submit the petition to the court. Rule 9.01(a)(2).

No docket fee will be charged to file a petition for writ of habeas corpus. Rule 9.01(a)(2). No docket fee will be required for habeas corpus actions in the district court as long as the petitioner complies with the poverty affidavit provisions of K.S.A. 60-2001(b). K.S.A. 60-1501(a).

§ 4.4 Disposition

The court will deny a petition in an original action if it believes the relief should not be granted. Rule 9.01(c)(1). If the right to the relief sought is clear and it is apparent that no valid defense to the petition can be offered, the relief sought may be granted *ex parte*. Rule 9.01(c)(2).

If the petition is neither granted nor denied *ex parte*, the court will order that the respondent either show cause why the relief should not be granted or file an answer to the petition within a fixed time. Rule 9.01(c)(3). Two or more respondents may jointly respond to an order to show cause or to the petition. Rule 9.01(c)(3)(B). This response may include additional documentary evidence that is necessary for the court's understanding of the case. Rule 9.01(c)(3)(D).

K.S.A. 60-1503(a) contains a similar screening process. The petition must be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits attached thereto that the plaintiff is not entitled to relief in the district court, the petition will be dissolved. If the judge finds that the plaintiff may be entitled to relief, the judge will issue the writ and order the person to whom the writ is directed to file an answer within the period of time fixed by the court or to take such other action as the judge deems appropriate. K.S.A. 60-1503(a).

In a mandamus action, if a judge is named as a respondent and decides not to appear, the judge may so advise the clerk and the parties by letter. This does not mean that the petition will be taken as admitted. Rule 9.01(c)(3)(C). This does not exempt the parties to the pending litigation, whether named or not, from having to file a response if one is ordered.

> **PRACTICE NOTE:** If the Court has ordered a response, the respondents should focus on addressing the merits of the issue as opposed to procedural arguments as to whether the remedy sought is appropriate.

If the petition, response to the petition or response to an order to show cause, and record clearly indicate the appropriate disposition, the appellate court will enter an order without further briefs or argument. Rule 9.01(e).

If the petition, response and record do not clearly indicate the appropriate disposition, the court will enter an order fixing dates for the filing of briefs. The case will proceed thereafter under the rules of appellate procedure. The court may also order a prehearing conference to consider simplification of the issues and other matters that may aid in the disposition under Rule 1.04. Rule 9.01(e).

Original actions in habeas corpus filed in the Court of Appeals are initially considered by a three-judge motions panel. If the panel does not grant or deny the petition *ex parte*, a procedure similar to that in the Supreme Court is followed.

Since the appellate courts have original jurisdiction, no mandate to the clerk of the district court will issue when the decision becomes final. See K.S.A. 60-2106. The Kansas Court of Appeals has appellate jurisdiction over final orders of the district courts relating to mandamus, quo warranto, or habeas corpus. K.S.A. 60-2102(a)(2).

§ 4.5 The Record

The record in cases of original jurisdiction in the appellate courts consists of the petition, the response to an order to show cause or to the petition, and any documents accompanying them. The matter may be referred to a district court judge or to a commissioner for the purpose of taking testimony and making a report containing recommended findings of fact if it appears that there are disputed questions of material fact which can be resolved only by oral testimony. When this occurs, the commissioner's report and the transcript of the testimony must be filed with the clerk of the appellate courts as part of the record. Rule 9.01(d).

§ 4.6 Quo Warranto

"Quo warranto is an extraordinary remedy available when any person usurps, intrudes into, or unlawfully holds or exercises any public office. A writ of quo warranto may issue when it is alleged that the separation of powers doctrine has been violated." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, Syl. ¶1, 179 P.3d 366 (2008). "An original action in quo warranto is an appropriate procedure for questioning the constitutionality of a statute." *Wilson v. Sebelius*, 276 Kan. 87, 90, 72 P.3d 553 (2003); *State ex rel. Stephan v. Martin*, 230 Kan. 747, 748, 641 P.2d 1011 (1982). Quo warranto is also an appropriate means of attacking the validity of a municipal ordinance. *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, Syl. ¶1, 367 P.3d 282 (2016).

Relief in the nature of quo warranto and mandamus is discretionary. The Kansas Supreme Court may properly entertain an action in quo warranto if it decides the issue is of sufficient public concern. *Wilson v. Sebelius*, 276 Kan. at 90. Since quo warranto is a discretionary and extraordinary remedy, it should only be used in extreme cases and where no other relief is available. *State, ex rel., v. United Royalty Co.*, 188 Kan. 443, 461, 363 P.2d 397 (1961). K.S.A. 60-1201 *et seq.* sets forth the procedure for quo warranto actions.

§ 4.7 Mandamus

Mandamus is a proceeding to compel some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law. K.S.A. 60-801. The Supreme Court may properly entertain an action in mandamus if it decides the issue is of sufficient public concern. *Wilson v. Sebelius*, 276 Kan. 87, 90, 72 P.3d 553 (2003). An original action in mandamus is an appropriate procedure for compelling an official to perform some action. *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 697, 957 P.2d 379 (1998). Mandamus is a proper remedy where the

essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of the public business, notwithstanding the fact that there also exists an adequate remedy at law. *Landrum v. Goering*, 306 Kan. 867, 870-71, 397 P.3d 1181 (2017); *State ex rel. Slusher v. City of Leavenworth*, 279 Kan. 789, Syl. ¶ 5, 112 P.3d 131 (2005). Hence, the exercise of original jurisdiction is appropriate when the mandamus petition "presents an issue of great public importance and concern" and the exercise of jurisdiction will "settle the question." *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 52, 687 P.2d 622 (1984). Someone seeking an order (or writ) of mandamus must show that the respondent has a clear legal duty to take the action at issue. *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 620, 244 P.3d 642 (2010).

Mandamus provides the remedy of compelling a public officer to perform a clearly-defined duty imposed by law that does not involve the exercise of discretion. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, Syl. ¶ 21, 179 P.3d 366 (2008). In fact, courts generally require public officials to perform only those acts that are strictly ministerial in nature, meaning those acts the official clearly is obligated to perform in a prescribed manner, in obedience to the mandate of legal authority. *Schmidtlien Electric, Inc. v. Greathouse*, 278 Kan. 810, 833, 104 P.3d 378 (2005). Whether to issue a mandamus order depends on statutory interpretation regarding the duties of the officials involved. *Ramcharan-Maharajh v. Gilliland*, 48 Kan. App. 2d 137, 139-40, 286 P.3d 216 (2012). Mandamus is generally appropriate to compel a former public officer to return property belonging to the office. *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, Syl. ¶ 9, 197 P.3d 370 (2008). Mandamus has been recognized as a means for nonparties to address court orders directed to them from which they have no statutory right to appeal. *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 618, 244 P.3d 642 (2010) (discovery order directed to nonparty). See also *Board of Miami County Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 255 P.3d 1186 (2011) (mandamus was appropriate avenue for

county to pursue, when county and manager of rail-trail did not agree on amount of bond manager was required to post pursuant to the Kansas Recreational Trails Act).

Mandamus is not a common means of obtaining redress but is available only in rare cases, and as a last resort, for causes which are really extraordinary. Mandamus is not the correct action where a plain and adequate remedy at law exists. *Bohanon v. Werholtz*, 46 Kan. App. 2d 9, 12-13, 257 P.3d 1239 (2011) (inmate's mandamus action against Secretary of Corrections was improper because a plain and adequate remedy at law existed as provided under the habeas corpus statute).

The Supreme Court's jurisdiction is plenary. It may be exercised to control the actions of inferior courts over which the Supreme Court has superintendent authority. *State ex rel. Stephan v. O'Keefe*, 235 Kan. 1022, 1024, 686 P.2d 171 (1984). Relief in the nature of mandamus is discretionary. *Wilson v. Sebelius*, 276 Kan. at 90.

In addition to constitutional authority, the Kansas Supreme Court is guided by the Kansas statutes, as the procedure for mandamus actions is set forth in K.S.A. 60-801 *et seq.*

While mandamus will not ordinarily lie at the instance of a private citizen to compel the performance of a public duty, where an individual shows an injury or interest specific and peculiar to himself, and not one that he shares with the community in general, the remedy of mandamus and the other extraordinary remedies are available. *Mobil Oil Corp. v. McHenry*, 200 Kan. 211, 243, 436 P.2d 982 (1968).

§ 4.8 Habeas Corpus

K.S.A. 60-1501 *et seq*. sets forth the procedure for habeas corpus actions. An original action in habeas corpus is an appropriate vehicle for challenging a trial court's pretrial denial of a claim of double jeopardy under the Fifth Amendment to the United States Constitution and Section 10 of the Kansas

Constitution Bill of Rights. *In re Berkowitz*, 3 Kan. App. 2d 726, 730, 602 P.2d 99 (1999).

Incarcerated people may challenge the circumstances of their confinement, including administrative actions of the penal institution, under the provisions of K.S.A. 60-1501. *State v. Mejia*, 20 Kan. App. 2d 890, 892, 894 P.2d 202 (1995). See also *Safarik v. Bruce*, 20 Kan. App. 2d 61, 66-67, 883 P.2d 1211 (1994).

A person who has been involuntarily confined by the State can file a habeas corpus petition under K.S.A. 60-1501 to challenge the conditions of confinement. "To obtain relief, he or she must show either (1) shocking or intolerable conduct in his or her treatment or (2) continuing mistreatment of a constitutional nature." *Stockwell v. State*, 54 Kan. App. 2d 325, Syl. ¶1, 399 P.3d 873 (2017).

K.S.A. 60-1501 petitioners are not entitled to discovery as a matter of course. "The language of K.S.A. 60-1501 *et seq*. demonstrates the legislature's intent for district courts to resolve habeas proceedings in a summary manner. Additionally, the procedure established for the resolution of K.S.A. 60-1501 petitions does not specifically authorize extensive discovery. Based on the language of these statutes, the legislature likely did not intend the rules of discovery to apply to K.S.A. 60-1501 petitions. Furthermore, the purposes of civil discovery are not applicable to K.S.A. 60-1501 proceedings." *White v. Shipman*, 54 Kan. App. 2d 84, 93, 396 P.3d 1250 (2017).