

VIRGINIA:

In the Court of Appeals of Virginia on **Monday** *the 17th day of* **October, 2022.**

Fletcher, Heald & Hildreth, PLC,

Petitioner,

against

Record No. 1176-22-4

Circuit Court of Fairfax County,

Respondent.

Upon a Petition for a Writ of Mandamus

Before Judges Malveaux, White and Senior Judge Annunziata

On August 8, 2022, Fletcher, Heald & Hildreth, PLC, (“Petitioner”), filed a petition for writ of mandamus directed to the Circuit Court of Fairfax County. Petitioner prays that this Court compel Fairfax County Chief Circuit Court Judge Penney S. Azcarate (“Judge Azcarate”) to provide consent to release copies of the trial transcripts in and relating to *Depp v. Heard*, 1072-22-4. Alternatively, Petitioner prays that this Court compel the Office of the Clerk of the Fairfax County Circuit Court (“Clerk”) to furnish copies of all such transcripts to Petitioner. Upon consideration of the verified petition, we conclude that mandamus does lie for the Clerk of Fairfax County Circuit Court but does not as to Judge Azcarate.

As a preliminary matter, Judge Azcarate and the Clerk allege that this Court does not have jurisdiction to issue a writ of mandamus in this matter. This Court, however, has original jurisdiction to issue writs of mandamus, prohibition, and *habeas corpus* in cases in which it *would have* appellate jurisdiction. Code § 17.1-404 (emphasis added). In civil matters, this Court has appellate jurisdiction over “any final judgment, order, or decree of a circuit court in a civil matter” except as provided in subsection B of § 17.1-406. *Id.*¹ Accordingly, we find that we do have jurisdiction to issue a writ of mandamus.

¹ Although this Court has not had occasion to address the scope of our original jurisdiction pertaining to writs of mandamus specifically, in addressing writs of prohibition and *habeas corpus* we have already held that our scope encompasses the “subject matter of the case” where “the issues raised in the petition . . . fall within our subject matter jurisdiction”. *Hoffman P’ship, LLP by Hoffman v. Cir. Ct. of Spotsylvania Cnty.*, 72 Va. App. 206, 213-14 (2020). *See Also White v. Garraghty*, 2 Va. App. 117 (1986).

“Mandamus is an extraordinary remedy that may be used to compel performance of a purely ministerial duty, but it does not lie to compel the performance of a discretionary duty.” *Moreau v. Fuller*, 276 Va. 127, 135 (2008). A ministerial act, our Supreme Court has explained, is “one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done.” *Richlands Medical Ass’n v. Commonwealth*, 230 Va. 384, 386 (1985). By contrast, “when the act to be performed involves the exercise of judgment or discretion on the part of the court judge, it becomes a judicial act and mandamus will not lie.” *In re Commonwealth’s Att’y for City of Roanoke*, 265 Va. 313, 318 (2003).

First, Rule 1:3 states in relevant part, “When a reporter takes down any proceeding in a court, any person interested is entitled to obtain a transcript of the proceedings or any part thereof upon terms and conditions to be fixed in each case by the judge.” From this language, it is clear that the role of a judge is a discretionary one. *Moreau*, 276 Va. at 139.

Second, in regard to the Clerk, Code § 17.1-208(B) states in relevant part,

Except as otherwise provided by law, any records that are maintained by the clerks of the circuit courts shall be open to inspection in the office of the clerk by any person and the clerk *shall*, when requested, furnish copies thereof subject to any reasonable fee charged by the clerk pursuant to § 17.1-275. No person shall be permitted to use the clerk’s office for the purpose of making copies of records in such manner, or to such extent, as will, in the determination of the clerk, interfere with the business of the office or with its reasonable use by the general public.

(emphasis added).

Additionally, “[r]equests for copies of nonconfidential court records maintained in individual case files *shall* be made to the clerk of the circuit court.” Code § 17.1-208(C).² The clear purpose of this statute is

² The Clerk alleges that the line of the statute “[n]o person shall be permitted to use the clerk’s office for the purpose of making copies of records in such manner, or to such extent, as will, in the determination of the clerk, interfere with the business of the office or with its reasonable use by the general public” makes his duty a discretionary one, citing *Smith v. Richmond Newspapers, Inc.*, 261 Va. 113 (2001). We disagree. In *Smith*, our Supreme Court held that a circuit court clerk has discretion as to the *means* in which they allowed the petitioner to hear the record, however “that discretion simply does not extend to a complete denial of the

delegating a duty to the clerk. In the context where a duty is delegated, the use of the term *shall* means that the availability of discretion is absent. *See SHALL, Black's Law Dictionary* (11th ed. 2019) (defining “shall” as “[h]as a duty to; more broadly, is required to”); *see also Wal-Mart Stores East, LP v. State Corp. Comm’n*, 299 Va. 57, 70 n.5 (2020) (noting that “[t]he traditional, commonly repeated rule is that shall is mandatory and may is permissive”) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012)). Furthermore, mandamus is the appropriate remedy as to the Clerk since such responsibility lies solely with him under Code § 17.1-208.³ The potential availability of the trial record from this Court does not ignore the deprivation of petitioner’s right to access such records previously nor absolve the Clerk of his ministerial duties.

Therefore, we grant the writ of mandamus as to the Clerk but deny as to Judge Azcarate. It is so ordered.

A Copy,

Teste:

A. John Vollino, Clerk

By:



Deputy Clerk

right to listen.” *Id.* 261 Va. at 119. This is further evident by the preceding line of the statute that the clerk “*shall*, when requested, furnish copies.”

³ The proper place for any “interested party” to seek a copy of a transcript of a court proceeding is the circuit court pursuant to Code § 17.1-208 and Rule 1:3. *See Charlottesville Newspapers v. Berry*, 215 Va. 116, 118 (1974) (denying request by intervening parties for copies of transcripts, “without prejudice to their right to request such transcript in the Circuit Court, pursuant to the provisions of Rule 1:3, Rules of Court.”).