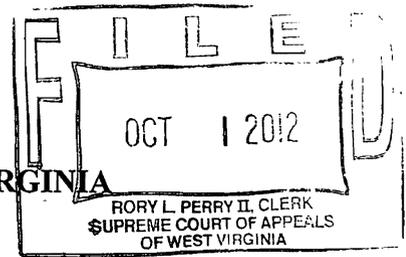


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Antony J. Veltri, Respondent Below,

Petitioner,

v.

Docket No. 12-0619

**Diane Parker, in her capacity as
Chair of the Democratic Executive
Committee of Taylor County, West Virginia; and
John Michael Withers, Petitioners Below,**

Respondents.

RESPONDENTS' RESPONSE TO BRIEF OF PETITIONER ANTHONY J. VELTRI

Presented by:

Vincent Trivelli (W.V. Bar No. 8015)
The Law Office of Vincent Trivelli, PLLC
178 Chancery Row
Morgantown, WV 26505
(304) 291-5223
Email: vmtriv@westco.net

TABLE OF CONTENTS

Table of Contents ii

Table of Points and Authorities iii

Introduction 1

Statement of the Case 2

Summary of Argument 6

Statement Regarding Oral Argument and Decision 7

Argument 7

Standard of Review and the Law 7

 The Law of Changes to Magisterial Districts and Voting Precincts 11

 The Law of Summary Judgment 11

 West Virginia Code § 7-1-1b 12

 The Law of Writs of Mandamus 12

Responses to Assignments of Error 13

 Mandamus is Proper 13

 The Circuit Court’s Reliance on *Burkhart v. Sine* (200 W.Va. 328 (1997)) .. 15

 The Petitioner’s Interpretation of the Constitution of the State of
 West Virginia 19

 Laches 20

 Mr. Veltri’s Attorney’s Fees 22

 Motion to Amend 23

 Redistricting Takes Effect at Next Election 24

 Mr. Veltri is a Year Too Late 26

Conclusion 27

TABLE OF POINTS AND AUTHORITIES

West Virginia Constitution:

Article 9 § 10 6, 8, 12, 18, 19, 25

W. Va. Code:

West Virginia Code §1-2-1 24

West Virginia Code §1-2-2 25

West Virginia Code § 3-1-7 11, 22

West Virginia Code § 3-5-7(c) 26

West Virginia Code § 3-7-6 13

West Virginia Code § 3-7-7 13

West Virginia Code § 6-6-7 14

West Virginia Code § 7-1-1b 19, 12, 26

West Virginia Code § 7-2-2 11

W. Va. Cases:

Andrik v. Town of Buckhannon, 187 W.Va. 706, 421 S.E.2d 247 (1992) 11

Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W.Va. 160 12

State ex rel. Booth v. Board of Ballot Commissioners of Mingo County, 156 W.Va. 657, 196, S.E.2d 299 (1972) 14, 15

Burkhart v. Sine, 200 W.Va. 328 489 S.E.2d 485 (1997) 15, 16, 17, 19, 20

State ex rel. Depue v. Matthews, 44 W.Va. 372 (1898) 16, 17

Dryden v. Swinburne, 20 W.Va. 89 (1882) 16, 17

Griffith v. Mercer County Court, 80 W.Va. 410, 92 S.E. 676 18

<i>E.H. v. Matin</i> , 189 W.Va. 102, 428 S.E.2d 523 (1993)	21
<i>State ex rel. Harden v. Hechler</i> , 421 S.E.2d 53, 187 W.Va. 670 (1992)	18
<i>Isaacs v. Bd. Of Ballot Comm'rs</i> , 122 W.Va. 703, 12 S.E.2d 510 (1940)	8
<i>State ex rel. Jackson v. County Court of McDowell County</i> , 152 W.Va. 795 (1969)	16, 17
<i>Kline v. McKelvey</i> , 57 W.Va.29, 49 S.E. 896	14
<i>State ex rel. Kucera v. City of Wheeling</i> , 153 W.Va. 538, 170 S.E.2d 367 (1969)	12
<i>State ex rel. Lochart v. Rogers</i> , 134 W.Va. 470, 477, 61 S.E.2d 258 (1950)	10
<i>MacCorckle v. Hechler</i> , 183 W.Va. 105, 106, 394 S.E.2d 89 (1990)	10
<i>Martin v. Jones</i> , 186 W.Va. 684 (1992)	24
<i>Miller v. Board of Education of Mason County</i> , 27 S.E.2d 599 (1943)	16, 17
<i>In re Election Contest Between John C. Moore and Edward Powell</i> , 200 W.Va. 335, 498 S.E.2d 492 (1997)	14
<i>Orndorff v. Potter</i> , 125 W.Va. 785, 25 S.E.2d 912 (1943)	16, 17, 18
<i>Painter v. Peavy</i> , 192 W.Va. 189, 451 S.E.2d 755 (1994)	7
<i>State ex rel. Porter v. Bivens</i> , 151 W.Va. 665, 155 S.E.2d 827 (1967)	13, 14
<i>Roe v. M & R Pipeliners, Inc.</i> , 157 W.Va. 611, 202 S.E.2d 816 (1974)	19
<i>Shafer v. Stanley</i> , 593 S.E.2d 629 (2003)	20
<i>Slater v. Varner</i> , 136 W.Va. 406, 68 S.E.2d 757 (1952)	18, 19
<i>State ex rel. Sowards v. Cnty. Comm'n of Lincoln Cnty.</i> , 196 W.Va. 739, S.E.2d 919 (1996)	10
<i>Stowers v. Blackburn</i> , 141 W.Va. 328, 90 S.E.2d 277 (1955)	13
<i>State ex rel. Thomas v. Wysong</i> , 125 W.Va. 369, ___, 24 S.E.2d 463 (1943)	8
<i>Vance v. Arthur</i> , 142 W.Va. 737 (1957)	12
<i>Williams v. Precision Coil, Inc.</i> 194 W.Va. 52, 59, 459 S.E.2d 329 (1995)	11

Other Authority:

See 20.C.J.S § 111 24

Beaubien v. Ryan, 198 Ill. 2d 294, 298 (Ill. 2001) 23

In re Legislative Districting of State, 370 Md. 312,397, 805 A.2d 292,
343 (Md. App. 2002) 23

COME NOW the Respondents, by and through counsel, Vincent Trivelli and The Law Office of Vincent Trivelli, PLLC, and file this *Respondents' Response to Brief of Petitioner Veltri* and in support thereof states as follows:

Introduction

On or about March 6, 2011 the Respondents in this matter filed a *Petition for Writ of Mandamus* praying that the Circuit Court of Taylor County issue a Writ of Mandamus Ordering that then Respondent Veltri at all times is and was ineligible and therefore not qualified to be elected to the County Commission of Taylor County from the Tygart District and that then Petitioner Withers is entitled to be sworn in as a member of the County Commission of Taylor County from the Tygart District. Following a full consideration of the facts and arguments raised by the Parties, on March 16, 2012 Senior Status Judge Larry V. Starcher Granted the Petitioners' Motion for Summary Judgment in all respects and Ordered that Mr. Veltri be removed from serving as a member of the County Commission of Taylor County and the Petitioner now Respondent Mr. Withers be sworn in as a member of the Commission.

On or about March 23, 2012 Judge Starcher issued an Order that Granted Mr. Veltri's Motion for Stay of Enforcement of Summary Judgment Motion Pending Appeal. On April 16, 2012 Judge Starcher Denied Respondent Veltri's Motion to Alter or Amend Judgment and Granted Respondent Veltri's Motion to Amend Order Granting Stay of Enforcement. This Court modified the Stay of Enforcement by its Order of July 13, 2012 in vacation.

On August, 16, 2012 Petitioner Veltri filed his "Brief of Petitioner Anthony J. Veltri" with this Court. This, pursuant to this Court's Scheduling Order, is Respondents' Response thereto.

I. STATEMENT OF THE CASE

In December of 1983 the Taylor County Commission undertook changes to certain Magisterial Districts and Voting Precincts in Taylor County, West Virginia. The changes made by the Commission in December of 1983 resulted in the residence of Tony Veltri being placed in the Western Magisterial District. As detailed below, over the next year the Commission undertook a series of discussions and moves to attempt to amend or reverse the December 1983 action as it concerned the area of Mr. Veltri's residence. It is clear, however, from the record and the Order (AR 450-476) and minutes of the Commission (AR 113 –117) that the efforts by the Commission in April of 1984 and December of 1984 to make such changes were simply inadequate and ineffectual. The current Clerk of Taylor County also admitted (AR 140-142) "to the extent that said matters are consistent with the records maintained in the Office of the Clerk of the County Commission of Taylor County" that: the December 1983 changes moved Mr. Veltri's residence into the Western District, that General Elections were held in June and November of 1984 in accordance with the boundaries set by the December 1983 action, and that the voters of Taylor County were not given notice of the December 1984 attempt by the Taylor County Commission to reverse their December, 1983 action. The records provided by the Clerk in this matter are consistent with these admissions. (AR 102-121) Therefore, the action of the County Commission of Taylor County in December 1984 to reverse its action of December 1983 was not undertaken in compliance with the law and is not valid. In Mr. Veltri's Brief (at pg. 3) he attempts to show 1984 redistricting actions in the form of a chart "[p]resuming compliance with procedural requirements...". However, in that the 1984 actions listed in the chart were found by the Circuit Court, based on the record in this matter, to fail to comply with statutory mandates, those actions do not warrant a presumption of compliance with proper procedure.

Rather, those actions were merely unsuccessful attempts to change magisterial boundaries. At all times relevant to this action, the boundaries of the Magisterial Districts remain as they were in December 1983. The result being that Mr. Veltri's residence is in the Western District while he was elected to represent the Tygart District. This result is not only reflected in the official maps of the Redistricting Office of the West Virginia Legislature (AR 122 – 126) but in the map of the Magisterial Districts currently hung in the office of the Clerk of Taylor County (AR 146) that reflect the boundaries between the Western and Tygart Magisterial Districts as enacted by the Taylor County Commission in December of 1983 – with Mr. Veltri residing in the Western Magisterial District.¹ It was not until after the 2010 General election that the Respondents learned that in 2010 Mr. Veltri stood for and was elected to the Taylor County Commission from the Tygart Magisterial District – a District in which he did not reside.

Briefly stated, the facts of how the Respondents came to this matter are as follows. On approximately March 23, 2010, Respondent Parker sent a Freedom of Information Act (“FOIA”) request to the County Clerk, Ms. Fowler, (AR 55) requesting maps of Taylor County with clear boundaries of each magisterial district and a list of polling places for the primary election. At some time following the 2010 primary election, the County Clerk responded to Ms. Parker's FOIA request with a copy of the Order that followed the December 30, 1983 hearing on magisterial districts and an attached map. The Order produced by the County Clerk was missing page 6 of the Order and the attached map was from 1977 and did not correspond to the description of the magisterial boundaries in the Order. (AR 56-63)

¹ Appendix Record 126, a magnified version of AR 125, has a small “x” in the lower left corner of the darkly outlined nearly rectangular “notch” to illustrate the location of Mr. Veltri's residence. The location of Mr. Veltri's residence on this map is uncontested by the parties. (See AR 422, Withers Deposition at p. 74)

In December of 2010 Respondent Withers spoke with Ms. Jo Vaughn of Legislative Services regarding maps of magisterial districts in Taylor County. In early January of 2011, Ms. Vaughn sent Mr. Withers maps of Taylor County with no distinguishing characteristics and no boundary descriptions. Following another communication from Mr. Withers, Ms. Vaughn, on January 11, 2011, emailed Mr. Withers the maps and the meets and bounds for Taylor County. (AR 127 - 129)

On February 11, 2011, Mr. Withers located, at the County Commission office, large maps of Taylor County showing magisterial districts and with an attached letter dated November 16, 2008 from the Legislative Redistricting Office. (AR 122–126) (AR 421-423, Deposition of Mr. Withers) These maps indicated that Mr. Veltri's residence was located in the Western District of Taylor County and not in the Tygart District from which he was serving on the Commission.

There are key facts in this matter that are uncontested by the Parties:

- The December 1983 changes made by the Taylor County Commission to the Magisterial boundaries of Taylor County, if undertaken properly, place the residence of Mr. Veltri in the Western Magisterial District of Taylor County.
- Mr. Veltri ran for election, in 2010, as a representative to the Taylor County Commission from the Tygart District and occupies the seat for the Tygart District on the Taylor County Commission.
- Mr. Withers ran for election for Taylor County Commission in 2010 to be a representative from the Tygart District and received the second highest number of votes.

The record demonstrates the following:

- The actions of the Taylor County Commission undertaken in 1983 to change the boundaries of the magisterial districts were taken in compliance with the law of the State of West Virginia. That is, the changes were legally advertised providing notice to the public, a public hearing was held, the Taylor County Commission adopted the changes in open meetings and the then-Clerk of Taylor County, Nancy V. Fowler, testified in this proceeding that all legal procedures were undertaken and completed. (AR 242-243)
- The Taylor County Commission actions of April 1984 to reverse the 1983 action was not successful. The Commission minutes of April 17, 1984 (AR 113 – 114) indicate that a vote taken on the changes was to be posted on the Court House door. However, on April 25, 1984 – well before the passage of the required thirty-days – the Taylor County Commission unanimously voted to withdraw the action of April 17, 1984. (AR 116) Thus, the December 1983 changes were left in place.
- The minutes of the Taylor County Commission regarding the attempt by the Commission on December 17, 1984 to “reverse” the December 1983 changes as they concern the area containing Mr. Veltri’s residence reflect that the Commission merely voted on a motion. (AR 117) The minutes indicate no effort to notify the public of the actions, no legal advertisement of any kind, no placement of information about the action on the Court House door. The current Clerk of Taylor County produced no documents or minutes that demonstrate that the required notice, advertisements and postings were in fact undertaken.

II. SUMMARY OF ARGUMENT

The Circuit Court correctly found that the redistricting actions of the Taylor County Commission in December of 1983 were “taken in compliance with the law” (Order, AR 474) and resulted in the residence of Petitioner Veltri being placed in the Western Magisterial District of Taylor County. Subsequent attempted actions by the Taylor County Commission in 1984 to reverse the redistricting of December 1983 in regard to the residence of Mr. Veltri, were not done in compliance with statute requiring public notice. Mr. Veltri’s residence has at all times relevant to this matter been located in the Western Magisterial District of Taylor County. In 2010 Petitioner Veltri ran for and was elected to the Taylor County Commission as a representative for the Tygart Magisterial District, a district in which he did not reside.

Article 9 § 10 of the Constitution of West Virginia provides that no two County Commissioners shall be elected from the same magisterial district. Given that a Commissioner, Mr. Gobel, was and continues to be in place as the Commissioner representing the Western Magisterial District, the district in which Mr. Veltri actually resides, Mr. Veltri was not constitutionally qualified to be elected from that same district. (*Id.* AR 475)

Respondent Mr. Withers was also a 2010 candidate for the Taylor County Commission from the Tygart Magisterial District, a district in which he does reside. Therefore, Mr. Withers, who got the second highest number of votes, being constitutionally qualified to run for the office in question, “is entitled to be declared the winner of that election...” (*Id.*)

The record is clear that the Respondents had no knowledge regarding the potential eligibility issues of Mr. Veltri prior to the 2010 election, only became aware in early 2011 and diligently acted on that information by filing a Petition for Writ of Mandamus on March 6, 2011. Respondents attempted to enforce a clear legal right that their elected County Commissioner comply with the

Constitution and laws of the State of West Virginia and thereby met the criteria for a writ of mandamus.

The Circuit Court was correct in holding that redistricting actions of the Taylor County Commission in 2012, do not alter the fact that Mr. Veltri “did not reside in the proper district when elected [to the Commission] in 2010.” (AR 539) Therefore, the Circuit Court correctly denied Mr. Veltri’s Motion to Alter or Amend Judgment.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents state that this matter need not be set for oral argument in that the dispositive issues raised by this Petition are clear and have been authoritatively decided. If the Court were to determine that oral argument is appropriate the Respondents believe that oral argument pursuant to Revised Rules of Appellate Procedure 19 is appropriate in this matter in that, while the matter is of public importance, this matter involves assignments of error in the application of settled law and the findings of the Circuit Court are consistent with prior holdings by this Court.

IV. ARGUMENT

A. Standard of Review and the Law

This Court has long held that it reviews a circuit court’s entry of summary judgment under a de novo standard of review. (Syl Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994)).

Included in the Petitioner’s discussion of Standards of Decision and Review (Veltri Brief, pp. 9-11) and in support of the Petition the Petitioner states as follows:

Importantly, as Commissioner Veltri’s eligibility is at the heart of this case, this Court should be guided by the longstanding principle that the right to hold office

is the general rule and ineligibility the exception. Syl Pt. 2, *Isaacs v. Bd. Of Ballot Comm'rs*, 122 W.Va. 703, 12 S.E.2d 510 (1940); *State ex rel. Thomas v. Wysong*, 125 W.Va. 369, ___, 24 S.E.2d 463,467-68 (1943).

When one reviews the entirety, rather than Mr. Veltri's shortened or paraphrased version of this Court's holdings in the two 1940's cases cited by Mr. Veltri, a fair reading finds a holding in direct support of the Circuit Court's Order and the Respondents' arguments and not those of Mr. Veltri. This Court's clear holding is that ineligibility to hold office is the exception – *except where there are clear and explicit constitutional or statutory requirements*. Quoting from this Court's Decision in *Thomas v. Wysong* (125 W.Va. 369, 377) wherein this Court quoted its Decision on *Isaacs*:

In our own jurisdiction a liberal view with respect to eligibility to office has been adopted as appears from the following: "The right of a citizen to hold office is the general rule; ineligibility the exception. Courts are hesitant to take action resulting in deprivation of the privilege to hold office, *except under clear and explicit constitutional or statutory requirement*." *Isaacs v. Ballot Commissioners*, 122 W. Va. 703, 12 S. E. 2d 510. (emphasis added)

What Mr. Veltri fails to explain, and likely why the Petitioner failed to cite the entirety of this Court's holding, is that in the instant matter the Circuit Court's Order is based on *clear and explicit constitutional and statutory requirements*. First, Article 9 § 10 of the Constitution of West Virginia, the provision at issue in this proceeding, provides that no two County Commissioners shall be elected from the same magisterial district as follows:

9-10. Terms of office of county commissioners.

The commissioners shall be elected by the voters of the county, and hold their office for a term of six years, except that at the first meeting of said commissioners they shall designate by lot, or otherwise in such manner as they may determine, one of their number, who shall hold his office for a term of two years, one for four years, and one for six years, so that one shall be elected every two years; but no two of said commissioners shall be elected from the same magisterial district. If two or more persons residing in the same district shall receive the greater number of votes cast at any election, then only the one of such persons receiving the highest number shall be declared elected, and the person

living in another district, who shall receive the next highest number of votes, shall be declared elected. Said commissioners shall annually elect one of their number as president. The commissioners of said commissions, now in office, shall remain therein for the term for which they have been elected, unless sooner removed therefrom, in the manner prescribed by law.

Second, as this Court is aware, *West Virginia Code* § 7-1-1b entitled “Legislative findings; qualifications for county commissioners” was enacted in 2009 and became effective on August 15, 2009. The statute provides that a candidate for county commission shall be a resident from the magisterial district for which he or she is seeking election:

§7-1-1b. Legislative findings; qualifications for county commissioners.

- (a) The Legislature finds that:
 - (1) There is confusion concerning when a candidate for county commission must be a resident of the magisterial district he or she wants to represent;
 - (2) The supreme court has discussed the residency requirement in several cases and has conflicting interpretations;
 - (3) It is imperative that this issue be permanently resolved at the time of filing to ensure the citizens have choice on the ballot;
 - (4) It is essential the citizens know they are voting for a person who is qualified to be a candidate; and
 - (5) With the expense of holding an election, tax payer moneys should not be wasted on officials who could never serve.
- (b) A candidate for the office of county commissioner shall be a resident from the magisterial district for which he or she is seeking election:
 - (1) By the last day to file a certificate of announcement pursuant to section seven, article five, chapter three of this code; or
 - (2) At the time of his or her appointment by the county executive committee or the chairperson of the county executive committee.

In the instant matter the record is clear and uncontroverted that Mr. Veltri was elected to represent a Magisterial District where another Commissioner was already serving and wherein Mr. Veltri did not reside – in violation of the Constitution and the Code. Obviously there are clear and explicit constitutional and statutory requirements that have been violated which can and must overcome any hesitation of the Courts.

In the same section Petitioner Veltri looks to a trio of cases in support of the proposition that, “[A] liberal application of any statute should be made as to afford the citizens of this State ... an opportunity to vote for the persons of their choice.” (Veltri Brief, p. 10, quoting *MacCorckle v. Hechler*, 183 W.Va. 105, 106, 394 S.E.2d 89, 90 (1990) which was in turn quoting from *State ex rel. Lochart v. Rogers*, 134 W.Va. 470, 477, 61 S.E.2d 258, 262 (1950)). The other case in Veltri’s trio is *State ex rel. Sowards v. Cnty. Comm’n of Lincoln Cnty.*, 196 W.Va. 739, 749-50, 474 S.E.2d 919, 929-30 (1996). It is worth noting that in each case this Court looked and could not find a statutory requirement to support the disqualification of a candidate. In fact, in *Sowards* this Court quotes the full *Isaacs* holding note above and then states that,

It is only when an election has been subverted by a candidate's *clear constitutional or statutory disqualification*, bribery, fraud, intimidation, or similar unlawful conduct that a court should invalidate the preference of the voters and, in effect, annul the election. (*Sowards, Supra* at 750, 930) (emphasis added)

In the instant matter, as discussed above, Mr. Veltri is clearly disqualified by the West Virginia Constitution and statutory provisions. In the instant matter the Circuit Court was correct in taking action and Granting the Motion for Summary Judgment.

The Law of Changes to Magisterial Districts and Voting Precincts –

Voting Precincts - Changes in voting precincts are governed by West Virginia Code § 3-1-7. At the time of the actions at issue in this proceeding that provision stated with regard to the changing of the boundaries of voting precincts:

No order effecting such change, division or consolidation shall be made by the county court within ninety days next proceeding an election nor without giving notice thereof at least one month before such change, division or consolidation, by publication of such notice as a Class II-0 legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county in which such precinct or precincts are located. Such court shall also, within fifteen days after the date of such order, cause a copy thereof to be published aforesaid.

Magisterial Districts – Changes in magisterial districts are governed by West Virginia Code §7-2-2. This provision states at relevant part, “... before such districts shall be increased or diminished, or the boundary lines changed, the court shall cause a notice of its intention to do so to be posted on the front door of the courthouse of the county, and at some public place in each district affected thereby, for at least thirty days prior to the term of court at which such action is proposed to be taken.”

The Law of Summary Judgment –

As this Court is well aware, the standard for granting Motions for Summary Judgment has been often stated by the West Virginia Supreme Court of Appeals as, “[a] Motion for Summary Judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” *Williams v. Precision Coil, Inc.* 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) quoting Syllabus Point 1, *Andrik v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992), quoting

Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)

West Virginia Code § 7-1-1b --

West Virginia Code § 7-1-1b entitled “Legislative findings; qualifications for county commissioners” was enacted in 2009 and became effective on August 15, 2009. The statute provides that a candidate for county commission shall be a resident from the magisterial district for which he or she is seeking election. (§ 7-1-1b(b))

Chapter 7 of the Code of West Virginia is entitled “County Commissions and Officers” and includes twenty-one provisions that concern county and district boundaries, county property and county commissions generally. It is the Legislative enactments pursuant to the county government provisions of the Constitution, particularly Art. 9 § 10 of the West Virginia Constitution entitled “Terms of Office of County Commissioners” which provides in relevant part that “no two of said commissioners shall be elected from the same magisterial district.”

The Law of Writs of Mandamus –

The standard for issuing a writ of mandamus is well established:

A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969)

As this Court is well aware, it has long been held that a writ of mandamus will issue to require a public official to discharge a nondiscretionary duty. (See *i.e.*, *Vance v. Arthur*, 142

W.Va. 737 (1957)) It is also the law that public officials have such a duty to comply with the laws and Constitution of this State.

B. Responses to Assignments of Error

Mandamus is Proper

The foundation of the Petitioner’s argument in this matter is that, as stated by the Petitioner, “West Virginia law expressly prohibits the post-election use of mandamus to challenge the electoral qualifications of another or to try the ultimate title to office.” (Petitioner’s Brief, p. 11) The Petitioner also asserted, “West Virginia law specifically forbids the use of mandamus for resolving the eligibility issues presented, and also identifies a proper alternative procedure that the Circuit Court wrongly avoided.” (Petitioner’s Brief, p. 1, ¶ A) The Petitioner, as held by the Circuit Court, is simply incorrect.

In support of the assertion that “West Virginia law expressly prohibits the post-election use of mandamus to challenge the electoral qualifications of another or to try the ultimate title to office,” the Petitioner looks to *State ex rel. Porter v. Bivens*, 151 W.Va. 665, 155 S.E.2d 827 (1967) (Petitioner’s Brief, p. 11). The Petitioner’s reliance on this Court’s holdings in *Bivens* is severely misplaced for several reasons. Not only did this Court issue a writ of mandamus in *Bivens*, but more importantly, in a holding that Mr. Veltri failed to cite, this Court held in *Bevins* that *it was not reaching the issue of whether a writ of mandamus is a proper proceeding*²,

² Later in the Petitioner’s Brief, Mr. Velti argues at some length that this Court in *Porter v. Bevins* set out the exclusive “proper” proceedings for resolving issues such as those raised by the instant matter (Veltri Brief, pp. 14 – 16). Of course, the Court did no such thing. In addition, it is important to note that this Court has long held that the existence of another remedy will not supersede relief by mandamus unless that remedy is “equally convenient, beneficial and effective.” (Syl. Pt. 2, *Stowers v. Blackburn*, 141 W.Va. 328, 90 S.E.2d 277 (1955)). In the instant matter West Virginia Code §§ 3-7-6 and 3-7-7 (which the Petitioner has argued, “bestows exclusive jurisdiction to decide election contests upon the county commissioner for the county in which the election is held” (AR 16)) is unavailable in that the

Whether mandamus is or is not the proper proceeding to try title to office, however, need not be and is not determined in the decision of this case, in which the relief sought by the petitioner is granted and this Court now declares, as it did in *Kline v. McKelvey*, 57 W.Va.29, 49 S.E. 896 that, for the purposes of this case, the writ of mandamus is a proper remedy to admit the petitioner to the office of Commissioner of the County Court of Logan County because he has a clear legal prima facie right to that office. (*Bivens, Supra*, 834)³

In fact, the Petitioner cites no case which supports their assertion that West Virginia law prohibits the use of mandamus in post-election situations such as the current proceeding. Rather the Petitioner, in addition to *Bevins*, looks to Syl. Pt. 3 in *State ex rel. Booth v. Board of Ballot Commissioners of Mingo County*, 156 W.Va. 657, 196, S.E.2d 299 (1972) which, by its words, holds that mandamus was never intended to permit “the trial of an election contest by the use of Writ of Mandamus.” (*Id.*) The instant matter, however, is not an election contest case nor is it a situation where a writ is being sought in order to compel a lower tribunal or county court “having

Respondents were unaware of the underlying issues in this matter until after the 10-day period mandated therein for election contests. In addition, West Virginia Code § 6-6-7, also cited by the Petitioner (Veltri Brief, pp. 15-16) is simply not “equally convenient, beneficial or effective” in that it requires the involvement of at least 50 persons and is designed for matters of “official misconduct, malfeasance, neglect of duty or gross immorality...” and grounds for removal are to be strictly construed. (See *In re Election Contest Between John C. Moore and Edward Powell*, 200 W.Va. 335, 498 S.E.2d 492, 495 (1997)) Given that the instant action is not an election contest and that removal petitions are utilized for official misconduct, misfeasance or malfeasance by a public official, it was reasonable and appropriate for the Circuit Court to find that the Respondents’ Constitutional challenge was appropriate as a writ of mandamus. (AR 460, Order at p. 11)

³ In addition it is important to note that in the Petitioner’s attempt to utilize this Court’s holding in *Porter* in support of the Petitioner’s argument that mandamus is not permitted post-election, the Petitioner once again shortens a quotation from this Court. On page 11 of the Petitioner’s Brief he includes the following:

This Court rejected the holdover’s attempt to use mandamus to try title to office, stating that “[t]hough he may challenge the eligibility and qualification of the petitioner to hold the office in question in the pending election contest or other proper proceeding to try the title to the office or to remove the petitioner from it, he may not ...do so in this mandamus proceeding.” *Id.* At 672, 155 S.E.2d at 832

However, when one reviews the entire quotation it is clear that in *Porter* this Court’s statement was relative to that matter alone. In fact, the language omitted by the Petitioner in the middle of his quotation from this Court (at the ... above) states, “in view of the facts and circumstances shown by the record.”

jurisdiction in the first instance, how to decide the case” (*Booth, Supra*, Syl. Pt.5) as it was in *Booth*. Nor is the instant matter an “election Mandamus” which, according to this Court, “may not be employed to try title to contested political offices, with the possible exception that we must recognize Mandamus has been successfully used to find, in advance of the election, the disqualification of a particular candidate by reason of pre-existing ineligibility.” (*Booth, Supra*, p. 312)⁴

In the instant matter, at the time of the filing of the verified petition, the Respondents met the criteria for a writ of mandamus. In the instant matter, at the time of the filing of the verified petition, the Respondents attempted to enforce a clear legal right that their elected County Commissioner comply with the Constitution and laws of the State of West Virginia. The Petitioner’s assertions that the Respondents’ rights were not clear when they filed this matter are incorrect based on the clear record of this proceeding.

The Circuit Court’s Reliance on Burkhart v. Sine (200 W.Va. 328 (1997)).

The Petitioner argues that West Virginia Supreme Court’s decision in *Burkhart* lends no support for the removal of a sworn commissioner and the installation of a “losing candidate.” The Petitioner is again incorrect.

The Circuit Court’s decision discusses at length this Court’s holdings in *Burkhart* (AR 466 - 472) and the Respondents will not repeat that discussion here in that the Petitioner fails to

⁴ Neither is Syl. Pt. 11 of *Booth* helpful in the instant matter. At Syl. Pt. 11 this Court held that a certificate of election is conclusive of the result of an election and not subject to collateral attack by Mandamus. In that instance the Court was referring to an attack on the procedures of the election and the total number of votes for each candidate. In the instant matter the Respondents, as noted by the Circuit Court, have not attacked the procedural aspects of the election nor the number of votes cast. In the instant matter the Respondents challenge the Constitutional qualifications of a person who has been seated in a public office. (AR 460) This is not a collateral attack on a certificate of election.

bring additional arguments to the discussion. In fact, the focus of the discussion remains the Petitioner's assertion that post-election mandamus actions are forbidden.

The Respondents will briefly address a few points. First, the Petitioner fails to address the clear holding that this Court "cannot accept" the excuse that a candidate or commissioner "was ignorant of the fact that redistricting changed the boundary lines," and that "[a] candidate for public office has a duty to know in which district he resides and from which district he is running." (*Burkhart*, 490) In the instant matter Mr. Veltri violated that duty and cannot be excused from it. Secondly, the Petitioner strangely argues that the Circuit Court in the instant matter "should not be permitted to make up and then rely on imaginary reasoning." (Veltri Brief, p. 20) Nothing of the like occurred in the instant matter. This Court held that Mr. Dunham, the focus of Mr. Veltri's imaginary claim, was elected from the district in which he resided at the time of the election. Of course, given the Constitution of this State, it would be impossible for Mr. Dunham to have been elected to a magisterial district where a current member resides. (*Burkhart*, p. 490) Neither this Court in *Burkhart*, nor the Circuit Court in the instant matter, was engaging in made-up imaginary reasoning – just the application of this State's Constitution.

Mr. Veltri urges this Court to turn away from its holding in *Burkhart* regarding the filling of the seat of an unqualified candidate and instead look to older West Virginia Supreme Court cases including *State ex rel. Jackson v. County Court of McDowell County*, 152 W.Va. 795 (1969); *Miller v. Board of Education of Mason County*, 27 S.E.2d 599 (1943); *Dryden v. Swinburne*, 20 W.Va. 89 (1882); *State ex rel. Depue v. Matthews*, 44 W.Va. 372 (1898); and *Orndorff v. Potter*, 125 W.Va. 785, 25 S.E.2d 912 (1943) which concern various election contests generally when the people elect a deceased or ineligible candidate for offices other than

for the County Commission.⁵ This line of cases, however, is not applicable to the instant matter and the Circuit Court held so. (AR 470)

In this regard the Court should note that the West Virginia Supreme Court in *Burkhart* briefly looked to its Decision in *Jackson* stating that the focus of the Court in the *Jackson* Decision was on a contested or disputed election regarding the number of votes cast for each candidate. (*Burkhart, supra*, 490-491) Such is not the focus in the instant case.

In addition, as noted by the Circuit Court, the situation before the *Jackson* Court concerned the election of justices of the peace and did not involve the Constitutional provision at issue in this proceeding regarding the election of candidates for County Commission who do not receive the most votes. (See below) Likewise the West Virginia Supreme Court of Appeals in its *Miller* Decision concerned the election of members of the Board of Education, and while considering statutory provisions, did not involve the West Virginia Constitution as does the instant matter. Much earlier, in 1882, the West Virginia Supreme Court considered the matter of *Dryden v. Swinburne* which concerned an election of clerk of the Circuit Court of Kanawha County and as such did not involve the Constitutional provisions at issue herein. The Court made a similar holding in *Depue v. Matthews*, in 1898, concerning the election of the office of sheriff of Roane County. Again the issues in *Depue* do not involve the Constitutional provisions concerning the office of county commissioner. The Petitioner also looks to the case of *Orndorff v. Potter* which involves an election contest concerning Fayette County Board of Education and once again does not concern the constitutional issues before this Court.⁶ The election contest

⁵ The West Virginia Supreme Court in *Jackson*, as well as the cases cited therein, rest on what is referred to as the American rule and the impact thereof. Generally the Court held that the election of a deceased individual does not, in effect, elect the individual that came in second.

⁶ The Court in *Orndorff* was interpreting a statute that provided that no more than two members of the Board could be elected from the same Magisterial District. The statute at issue made no mention of what

case of *Slater v. Varner* (136 W.Va. 406, 68 S.E.2d 757 (1952), cited by Mr. Veltri involved an election to the office of Clerk of the Circuit Court, and again does not involve the Constitutional issues involved in the instant matter regarding the election of county commissioners. Likewise the case of *State ex rel. Harden v. Hechler*, 421 S.E.2d 53, 187 W.Va. 670 (1992), in that it concerns an election contest for the office of State Senator, does not reach Article 9 § 10 of the Constitution of this State at issue in this proceeding. These cases simply are not controlling on the matters raised in the instant case.

More importantly, as discussed by the Circuit Court, the concept of electing individuals that receive fewer votes is a long-established Constitutional requirement with regard to the County Commissions of West Virginia. Article 9 § 10 of the Constitution of West Virginia, the provision at issue in this proceeding, provides, “If two or more persons residing in the same district shall receive the greater number of votes cast at any election, then only the one of such persons receiving the highest number shall be declared elected, and the person living in another district, who shall receive the next highest number of votes, shall be declared elected.” In the instant matter, Mr. Veltri, a resident of the Western District, received more votes than Mr. Withers, a resident of the Tygart District. In that Mr. Veltri resided in a district for which another Commissioner had previously been elected, Mr. Withers, the person living in another district (the Tygart District) having received the next highest number of votes, shall be elected.

action to take in the event that more than two members from the same Magisterial District receive the highest number of votes. It is instructive that Judge Fox in his dissent argued that the Court should have held that the Legislature intended to follow “the same policy that has been adopted in respect to county courts.” Judge Fox then looked to the West Virginia Constitutional proviso, similar to the current Constitution, which provided that in the event that two persons from the same Magisterial District receive the highest number of votes only the one of those persons who received the highest number of votes shall be declared elected and the person living in another district who shall receive the next highest number of votes shall be elected. Judge Fox then stated, “In *Griffith v. Mercer County Court*, 80 W.Va. 410, 92 S.E. 676, where two commissioners were to be elected, and the party who received the second highest number of votes was ineligible under the constitution to hold office, the party who received the third highest number of votes was declared elected.” (*Orndorff, supra* 913-914)

The Petitioner's Interpretation of the Constitution of the State of West Virginia

The Petitioner urges this Court to adopt several novel interpretations of the Constitution of this State. First, Mr. Veltri argues that Article 9 § 10 “envisions an eligibility determination before anyone is sworn in, like in *Burkhart*, not a post-election mandamus removal action.” (Veltri Brief, p. 23) Such a reading appears to be an attempt to permit ineligible persons to hold important public offices and become eligible for so long as they survive the 10-day notice requirement provided by the law. Such a reading ignores not only the importance of the Constitution but this Court’s holding that if a person is not qualified to hold office before the commencement of his or her regular term and the basis of the disqualification exists at and continues after “the beginning of such term, this disqualification of the contestee has become permanent and irremovable” and would be “ineligible to the office” (*Slater v. Varney* 136 W.Va. 406, 68 S.E.2d 757, 771 (1952)) Mr. Veltri is ineligible to hold the office of Commissioner and the passage of time is irrelevant.

Secondly, Mr. Veltri argues that the Constitutional provision which permitted then duly elected Commissioners to remain in office for the remainder of their term following the adoption of the new Constitution is somehow a justification for permitting an ineligible individual to remain in the office. The instant matter bears no resemblance to Constitutional transition and is hardly a precedent to permit the continued violation of the Constitution.

Third, Mr. Veltri compares the instant matter, which urges this Court to act to uphold the Constitution of the State of West Virginia, with “frivolous litigation over technicalities.” (Veltri Brief, p. 28) Mr. Veltri looks to the presumption that public office holders discharge their duties in a regular and proper manner in order to avoid frivolous litigation (*Roe v. M & R Pipeliners, Inc.*, 202 S.E.2d 816, 157 W.Va. 611 (1974)) as support for his efforts to remain in office. With all due

respect, the upholding of the Constitutional and statutory requirements for eligibility for the office of County Commissioner is not frivolous and not the type of litigation envisioned by this Court in *Roe*. Mr. Veltri then speculates that the Circuit Court placed the burden of proof onto the non-challenging parties. In fact, the Circuit Court reviewed the entirety of the record and found that the Respondents met the requirements for a motion for summary judgment including that there were no genuine issues of fact for a jury. The Petitioner's contention is inconsistent with the record in this proceeding.

Laches

Late in this proceeding Petitioner Veltri joined Ms. Thompson, in arguing that the Respondent's Petition is barred by the doctrine of laches.⁷ Respondent Veltri is again mistaken. The doctrine of laches requires "a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right." (*Shafer v. Stanley*, 593 S.E.2d 629, 638 (2003)) A fair reading of the depositions in this matter demonstrates that the facts in the instant situation include: testimony of the Petitioners that it was not until early in 2011 that they discovered the facts regarding the magisterial and voting

⁷ This assertion of laches based on delay in asserting a right is in direct contradiction to Mr. Veltri's earlier filings before the Circuit Court in this matter. In Mr. Veltri's Memorandum of Support of Motion for Summary Judgment filed on or about November 16, 2011, on page 12 (AR 165) at footnote four Mr. Veltri stated, "It should be understood that Mr. Veltri is not insinuating that Petitioner's, or anyone else, had any knowledge of a potential eligibility issue prior to the election and deliberately waited until after the election to raise it. To the contrary, Petitioners testified that their pre-election efforts to procure voting district maps of Taylor County (e.g., FOIA requests) had nothing to do with determining Mr. Veltri's residency status or eligibility for office, and that they had no reason to even suspect a potential ineligibility issue involving Mr. Veltri until after the November 2010 election. Accordingly, this is clearly a post-election challenge, and is wholly distinct from pre-election mandamus proceedings in *Burkhart*."

precinct boundaries at issue⁸; testimony that prior to that, in preparation for redistricting and campaigns, Petitioner Parker submitted a Freedom of Information Act request to the Office of the County Clerk and that after much delay incomplete documents with decades old maps of the County were provided by the Clerk in response to the FOIA (AR 55 – 63 and AR 369 - 370); and, that the admission by the Clerk that the required well-bound election precinct record book has never been kept by the Office of the Clerk. It is impossible to conclude from the clear facts that the doctrine of laches applies to this matter.⁹

⁸ See AR 371- 374, Parker Deposition Transcript, and AR 406 – 407, Withers Deposition Transcript. Additionally, Petitioner Withers (AR 417) was clearly understood to have learned of the facts regarding Mr. Veltri’s residence only in early 2011 by the following exchange:

Q. [by Mr. Johns] ... One, I get the sense that from what we discussed here today that prior to getting these maps, and looking about canvassing, and door to door stuff, and later the redistricting, you had no reason to think Tony Veltri was in the wrong district; is that fair?

A. That’s fair.

Q. When he had run in campaigns in the past, from that district you didn’t have any reason to suspect that there was anything inappropriate about that or wrong?

A. That’s correct.

Q. When you decided to run [for county commission in 2010], how did you determine what district you were in?

A. I proceeded to ask – I normally check myself, and I checked Mr. Veltri. I check the voter registration list that I obtained from Miss Parker.

Q. That had him in Precinct 6 –

A. That’s correct.

Q. – in the Tygart District?

A. That’s correct. It didn’t say Tygart, I believe it just said precinct – it doesn’t deal with – you know, it is in Precinct 6, and I know 6 is in Tygart. So the assumption is yes.

Q. So all along you would have thought Precinct 6 is in the Tygart District just like he had?

A. Yes.

⁹ Mr. Veltri argues that Respondent Parker’s position in a case three years ago that Mr. Veltri resided in the Western District in some manner disqualifies her from taking the position that he does not in the instant case. (Veltri Brief p. 35). Ms. Parker’s apparent change of position supports the fact that she was not aware of the actual location of the boundary at issue in this proceeding at the time of the earlier case. In fact, she only became aware of the critical fact shortly before filing the instant case – thus demonstrating that laches is inapplicable. Unlike the argument of Mr. Veltri, in looking to Syl. Pt. 3 . *E.H. v. Matin*, 189 W.Va. 102, 428 S.E.2d 523 (1993), Ms. Parker was not changing positions in reference to the same fact or state of facts (in *Matin* the issue was changing position on whether a hospital should be built) but rather stating what she understood the facts to be at different points in time having later received new information.

Of course, not only is Petitioner’s argument contradictory on its face, it completely neglects to consider that the Commission and the Clerk of Taylor County are required by West Virginia Code § 3-1-7(d) to keep an “election precinct record” of all proceedings and every order creating a precinct or precincts in a well-bound book and to make that book available to the public. A well-bound book that the record in this matter shows the Taylor County Commission failed to keep.¹⁰ The failure of the Commission of Taylor County and the Clerk to keep such a book has been a violation of the law of West Virginia. This well-bound book would have been the location that citizens of Taylor County could well have looked if they had questions regarding the eligibility of Petitioner Veltri for election to the County Commission from the Tygart District. Having failed to comply with the law of this State, the Petitioner now asks this Court to hold that gleaning information from decades old newspapers is sufficient to place the Respondents and the entire County – except apparently for Mr. Veltri and the Office of the Clerk – on notice of Mr. Veltri’s potential eligibility issues. It is not a credible argument.

The record is clear that the Respondents had no knowledge regarding the potential eligibility issues of Mr. Veltri prior to the 2010 election, only became aware in early 2011 and diligently acted on that information. Any other version of the Respondents’ actions and knowledge is speculative and false.

Mr. Veltri’s Attorney’s Fees

In another extraordinary argument Mr. Veltri, after acknowledging that he is not entitled to be indemnified from public funds, argues - without one citation to a fact - that the Respondents, in

¹⁰ At the October 26, 2011 meeting of the Taylor County Commission the following occurred: “Clerk advised that we need an Election Precinct Book which we presently do not have and have never had one in the Clerk’s Office. Commission advised to order one.” (AR 211)

attempting to uphold the Constitution of this State, have acted in a “bad faith, vexatiously, wantonly or for oppressive reasons”. (Veltri Brief, p. 36) With all due respect, there is nothing in the record and no law in this State supports such charge and this Court should ignore it.

Motion to Amend

Mr. Veltri briefly argues that the Circuit Court wrongly rejected relevant evidence regarding recent redistricting of Taylor County. Once again Mr. Veltri’s assertions are incorrect. On or about March 27, 2012 Respondent Veltri filed a *Motion to Alter or Amend Judgment* and a *Memorandum of Law in Support* thereof. (AR 481 – 495) While the Motion and Memorandum briefly raised some additional issues, the bulk of Respondent Veltri’s Motion and Memorandum concerned the unsupported legal assumption that the recent changes in the magisterial districts of Taylor County that are alleged to bring Mr. Veltri’s residence into the Tygart District means that the “composition of the Taylor County Commission is fully compliant with West Virginia law.” (AR 481) The Petitioner raises those arguments herein stating that the January 2012 redistricting “brought the composition of the Commission into harmony with the Constitution.” (Veltri Brief, pp. 27-28)

Simply stated, Petitioner Veltri has cited no West Virginia law – or any other jurisdiction’s law¹¹ – for the proposition that changes to the boundaries of a magisterial district enacted during an ongoing 6-year term are retroactive and therefore effective during the six-year term and effective prior to the next election for the County Commission from that magisterial district. Petitioner Veltri has cited no law, because in fact there is no law that supports such a troubling, undemocratic

¹¹ In his earlier Motion Petitioner Veltri looks briefly to *In re Legislative Districting of State*, 370 Md. 312, 397, 805 A.2d292, 343 (Md. App. 2002) and *Beaubien v. Ryan*, 198 Ill. 2d 294, 298 (Ill. 2001) cited therein, in support of the proposition that redistricting plans have the force of law and presumption of validity. (AR 487) While likely true, the cases do not address the matter raised by Mr. Veltri regarding the changes to the boundaries of a magisterial district during a term of office. Therefore, the cases are of no value in the Court’s consideration of the pending matter.

proposition. If this Court were to adopt Mr. Veltri's argument, the democratic electoral process of West Virginia would be open to partisan chaos and chicanery. If this Court were to adopt Mr. Veltri's argument, the possibility of manipulation by political parties would likely be too strong to resist. If this Court were to adopt Mr. Veltri's argument, whenever a party controls, for example, two of the three Commissioners on a County Commission, the two majority party Commissioners could simply adjust the magisterial district boundaries in such a way as to cause the minority party Commissioner to be a resident of a district from which a member is already elected and thereby cause the minority party candidate or commissioner to lose his ability to serve on the County Commission. The number of ways that manipulation could occur if this Court were to adopt Mr. Veltri's argument are numerous and are all damaging to this State. This Court must reject this argument.

Redistricting Takes Effect at Next Election - It is fundamental to this country's and this State's democracy that elected representatives – at the federal, state or county levels – are elected for a term of office and continue to serve the entirety of that term of office even if redistricting changes the boundaries of the district from which they serve.¹² That is, the district remains the same for the elected office until the term for which they were elected ends. The redistricting changes take effect in the next election for the office at issue. This can be seen throughout the law of West Virginia.

For example, with regard to the election of State Senators, West Virginia Code §1-2-1 states:

(g) Regardless of the changes in senatorial district boundaries made by the provisions of subsection (d) of this section, all senators elected at the general

¹² See 20.C.J.S § 111, “A change of boundary lines of commissioner districts, or a redistricting, does not deprive a county commissioner of the right to hold office for the rest of the term” even if the change results in the Commissioner's residence falling outside of the new district. Similarly, *Martin v. Jones*, 186 W.Va. 684 (1992).

election held in the year 2008 and at the general election held in the year 2010 shall continue to hold their seats as members of the Senate for the term, and as representatives of the senatorial district, for which each thereof, respectively, was elected. Any appointment made or election held to fill a vacancy in the Senate shall be for the remainder of the term and as a representative of the senatorial district, for which the vacating senator was elected or appointed, and any such election shall be held in the district as the same was described and constituted at the time the vacating senator was elected or appointed.

Likewise, with regard to the election of Delegates, West Virginia Code §1-2-2 states:

(d) Regardless of the changes in delegate district boundaries made by the provisions of subsection (c) of this section, the delegates elected at the general election held in the year 2010 continue to hold their offices as members of the House of Delegates for the term, and as representatives of the county or delegate district, for which each was elected. Any appointment made to fill a vacancy in the office of a member of the House of Delegates shall be made for the remainder of the term, and as representative of the county or delegate district, for which the vacating delegate was elected or appointed.

As the Court is aware, the Constitution of the State of West Virginia sets the term for County Commissioners in West Virginia as six years. Therefore, the boundaries of the magisterial districts remain the same for the six year terms. The Constitutional provision follows.

9-10. Terms of office of county commissioners.

The commissioners shall be elected by the voters of the county, and hold their office for a term of six years, except that at the first meeting of said commissioners they shall designate by lot, or otherwise in such manner as they may determine, one of their number, who shall hold his office for a term of two years, one for four years, and one for six years, so that one shall be elected every two years; but no two of said commissioners shall be elected from the same magisterial district. If two or more persons residing in the same district shall receive the greater number of votes cast at any election, then only the one of such persons receiving the highest number shall be declared elected, and the person living in another district, who shall receive the next highest number of votes, shall be declared elected. Said commissioners shall annually elect one of their number as president. The commissioners of said commissions, now in office, shall remain therein for the term for which they have been elected, unless sooner removed therefrom, in the manner prescribed by law.

Thus, the boundaries for the Tygart Magisterial District of Taylor County remain the same for the purposes of the term of office for which the election was held in November 2010 for

a six-year term of office beginning January 2011. For this or any Court to hold otherwise would be inconsistent with the law and reason.

Mr. Veltri is a Year Too Late – If this Court wished not to look to the Constitutional issues raised by Mr. Veltri’s extraordinary proposition, it is important to note that it is also clear that the proposed argument by Mr. Veltri violates *West Virginia Code* § 7-1-1b which provides that a candidate for county commission shall be a resident from the magisterial district for which he or she is seeking election by the last day to file a certificate of announcement:

- (b) A candidate for the office of county commissioner shall be a resident from the magisterial district for which he or she is seeking election:
 - (1) By the last day to file a certificate of announcement pursuant to section seven, article five, chapter three of this code¹³; or
 - (2) At the time of his or her appointment by the county executive committee or the chairperson of the county executive committee.

Thus, even if the recent boundaries changes by the Taylor County Commission were accomplished legally and correctly and in some manner controlling in the instant case – which the Respondents strongly contest - according to Mr. Veltri he did not become a resident of the Tygart Magisterial District until January 7, 2012 – approximately a year too late to be in compliance with the statute. Thus, the recent Taylor County redistricting can have and has had no impact on the instant matter or the Circuit Court’s Order Granting Petitioners’ Motion for Summary Judgment.

¹³ West Virginia Code § 3-5-7(c) provides that the certificate of announcement shall be filed “not earlier than the second Monday in January next preceding the primary election day, and not later than the last Saturday in January next preceding the primary election day...”

V. CONCLUSION

There are certain facts that the Petitioner simply cannot avoid – he was elected from a Magisterial District in which he does not live and the Constitution and statutes of the State of West Virginia prevent him from serving on the Taylor County Commission because of that fact. Also, because of that fact the Petitioner has brought to this Court a Petition that misrepresents key aspects of the law, charges the Circuit Court with making things up, argues that the Constitutional violation is a frivolous technicality and alleges bad faith on behalf of the Respondents. Because of that fact, and others, the Circuit Court Granted the Respondents Motion for Summary Judgment, held that the Respondents met the requirements of a Writ of Mandamus and that any other potential remedies were not equally convenient, beneficial or effective. Because of that fact and the law of this State, the Circuit Court held Respondent Withers should be seated on the County Commission of Taylor County for the remainder of the term of office. Because of that fact, the undisputed record and the law and Constitution of this State, this Court must uphold the decision of the Circuit Court, lift the stay and permit the law to operate as it is intended.

Respectfully submitted this 28th day of September, 2012.

Respondents,
by Counsel



Vincent Trivelli (WV Bar # 8015)
The Law Office of Vincent Trivelli, PLLC
178 Chancery Row
Morgantown, WV 26505
(304) 291-5223

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Anthony J. Veltri, Respondent Below

Petitioner,

v.

Docket No.: 12-0619

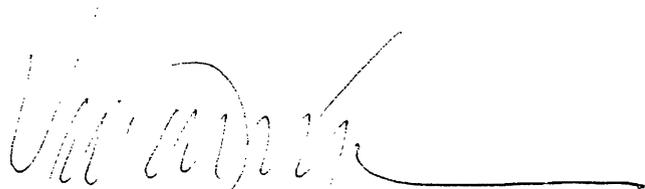
Diane Parker, in her capacity as Chair of
the Democratic Executive Committee of
Taylor County, West Virginia and
John Michael Withers, Petitioners Below

Respondents.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on September 28, 2012 a true and correct copy of **Respondents' Response to Brief of Anthony J. Veltri** was served upon the following via U.S. Mail, postage prepaid, and addressed as follows:

James M. Wilson, Esq.
Charles F. Johns, Esq.
Devin C. Daines, Esq.
Steptoe & Johnson PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330



Vincent Trivelli (WV Bar # 8015)
The Law Office of Vincent Trivelli, PLLC
178 Chancery Row
Morgantown, WV 26505
(304) 291-5223