

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Upon Original Jurisdiction

Case No _____

STATE OF WEST VIRGINIA, ex rel.

HOWARD STONE and

PATRICIA ADAMS

Petitioner,

v.

MAC WARNER,
SECRETARY OF STATE
OF THE STATE OF WEST VIRGINIA,
And TALLY REED,

Respondents.

.....
EMERGENCY PETITION FOR MANDAMUS
.....

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April 24, 2018

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EMERGENCY PEITTION FOR WRIT OF MANDAMUS

QUESTION PRESENTED

This petition presents the question of whether the one year residency requirement contained in West Virginia Constitution Article VI, §12 require the Secretary of State to exclude from the ballot a candidate whose filing for office, nomination, and election would violate this Constitutional residency requirement.

STATEMENT OF THE CASE

Petitioners Howard Stone and Patricia Adams are residents and registered voters in the 59th House District of the West Virginia Legislature, which is comprised of parts of Morgan and Berkeley Counties. Respondent Secretary of State, pursuant to W.Va. Code §3-5-9, has certified the list of primary candidates to include Respondent Tally Reed. App. at 1 (Ex.1). Contrary to the residency requirement, Reed has not been a resident of the 59th District to which she seeks nomination and possible election for one year next preceding the election. Upon notification of the failure to meet the residency requirements, Respondent Secretary has failed to remove Respondent Reed from the ballot.

The 59th House District is comprised of parts of Morgan and Berkeley Counties. W.Va. Code §1-2-2(c). The clear residency requirements in W.Va. Constitution Art. VI, §12 mandate that any candidate must have been a resident of the district outline in W.Va. Code §1-2-2(c) for one year prior to the general election. The general election is to be held on November 6, 2018. App. at 5 (Ex.2). In order to meet the clear residency requirements, Respondent Reed must have been a resident of the 59th District since November 5, 2017. However, the evidence shows she is not currently a resident of the 59th District nor has she been at any time between November 5,

2017, and the filing of the filing of her Candidate's Certificate of Announcement on January 25, 2018. App at 6 (Ex.3).

Reed has lived with her family at 4253 Martinsburg Rd., Berkeley, WV for several years. The 4253 property is a large home which sits on nearly 20 acres. App. at 7 (Ex.4). During the past several years, Respondent Reed has used the 4253 address as her residence and mailing address. The home at 4253 is currently assessed by the Morgan County Assessor at \$347,480 putting the appraised value at approximately \$579,133. App at 8 (Ex. 5). Importantly, the 4253 property is deeded to Reed and her husband personally. App. at 9 (Ex. 6). Moreover, as of April 23, 2018, Respondent has listed the 4253 property as Class 2, owner occupied exclusively for residential purposes for taxation. App. at 8 (Ex. 5). On November 21, 2017, Respondent Reed executed a Commercial Deed of Trust which listed her address as 4253 Martinsburg Rd. App at 12 (Ex. 7). As recently as January 18, 2018, Reed was still acting as Treasurer for a local Judicial candidate while still utilizing the 4253 Martinsburg Rd address. App. at 20 (Ex. 8). There is a clear trail of evidence showing Reed currently maintains 4253 Martinsburg as her residence or maintained this as her residence until January 2018. However, 4253 Martinsburg Rd. is not within the 59th House District.

Upon deciding to run for election to the open seat in the West Virginia House of Delegates District 59, Respondent Reed attempted to show she lived in the district. Reed changed her voter registration from the 4253 Martinsburg Rd property as her residence to a residence address of 11348 Martinsburg Rd. App. at 23 (Ex. 9). However, as late as the October 7, 2017, statewide road bond referendum, Reed voted in the 58th District precinct associated with the 4253 Martinsburg Rd residence. App. at 25 (Ex. 9).

The property located at 11348 Martinsburg road Reed now claims is her residence is actually deeded to Reed's Real Estate LLC. App. at 27 (Ex. 10). This property consists of a modest 3 bedroom, 1 bath home containing 1,232 square feet. App. at 29 (Ex. 11). Contrary to the exclusive residential purpose listed for the out of district residence, as of April 23, 2018, Reed has listed the 11348 property she claims is her residence as Class 3, non-owner occupied property for taxation with the Assessor. App. at 30 (Ex. 12). In Reed's West Virginia Ethics Commission Financial Disclosure Statement she lists Reed's Real Estate as a for profit business in which she owns more than \$10,000 of fair market value. App. at 36 (Ex. 13). From the totality of the objective evidence regarding the 11348 Martinsburg Rd property, it is clear Respondent purchased the property as an investment and only recently attempted to claim it as a residence. Perhaps the most convincing evidence showing Respondent Reed has failed to meet the durational residence requirements is the sworn affidavit of the person living across the street from the 11348 Martinsburg Rd. property. After being duly sworn, the neighbor verifies that he has not seen Reed maintain a residence at the claimed location prior to January 1, 2018. This witness lives directly across the street from the house at 11348 and has had opportunity to observe the comings and goings at the property. App. at 37 (Ex. 14).

The evidence contained with the Appendix clearly shows Respondent Reed has failed to meet the one year residency durational requirement set forth in West Virginia Constitution Article VI, §12 for the 59th District House of Delegates seat. As such, Reed is ineligible for nomination in the May 8, 2018, primary election or election in November 6, 2018, to hold such office.

SUMMARY OF ARGUMENT

Article VI, §12 of the West Virginia Constitution provides that “No person shall be a senator or delegate who has not for one year next preceding his election, been a resident within the district or county from which he is elected; and if a senator or delegate remove from the district or county for which he was elected, his seat shall be thereby vacated.” The 59th House District is comprised of parts of Morgan and Berkeley Counties. W.Va. Code §1-2-2(c).

Petitioners have standing to bring this mandamus action to compel the Secretary of State to discharge his duties to instruct the name of ineligible candidates to be removed from the ballot. *Syl. Pt. 1, State ex rel. Pack v Karnes*, 83 W.Va. 14, 97 S.E.302 (1918), overruled on other grounds, *Syl. Pt. 12, State ex rel. Booth v Board of Ballot Comm'rs*, 156 W.Va. 657, 196 S.E.2d 299 (1973). In addition, it is proper to name the Secretary of State as Respondent where the office is to be filled by voters from more than one county. *Syl. Pt. 5, State ex rel. Maloney v McCartney*, 159 W.Va. 513, 223 S.E.2d 607(1976), appeal dismissed sub nom. *Moore v. McCartney*, 425 U.S. 946, 96 S.Ct. 1689 (1976).

The one year residency requirement contained in West Virginia Constitution Art. VI, §12 serves a compelling state interest and does not violate the constitutional rights of either candidates or voters. *Syl. Pt. 12, White v. Manchin*, 173 W.Va. 526, 318 S.E.2d 470 (1984). In *White v Manchin*, the Court further recognized one of the reasons for the durational requirement includes preventing candidates who would seek frivolous or fraudulent expedient election to public office by district shopping. *Id. at 489*. In this matter, Reed could well have complied with the residency requirements of her home district where she lives at 4253 Martinsburg Rd. However, such candidacy would require her to compete in a primary election against the current Majority Leader of the House of Delegates, a contest which would prove very difficult. Instead, Reed chose to file to run for an open seat in the 59th District.

Accordingly, the appropriate remedy to remove the ineligible candidate from the ballot is the requested Writ of Mandamus removing her name from the Primary ballot. The Court has recognized that mandamus to the Secretary of State is the appropriate action to strike an ineligible candidate from the ballot prior to the election. *Syl. Pt. 3, State ex rel. Carenbauer v. Hechler, 208 W.Va. 584, 542 S.E.2d 405 (2000)*. For these reasons, the Court should grant the writ and order the Secretary of State to withdraw the certification of Reed's candidacy for the 59th House District, and further order the Secretary to direct the ballot commissioners for Morgan and Berkeley Counties to not include Reed on the primary election ballots, and further order the Secretary to direct all election officials, county commissioners, clerks of county commissioners, ballot commissioners, election commissioners, poll clerks, and all other persons associated with the administration of the primary election to disregard and refrain from tallying, tabulating, certifying, or returning any vote cast, absentee, write-in, or otherwise, for Respondent Reed.

STATEMENT REGARDING BRIEFING,
ORAL ARGUMENT AND DECISION

Petitioner requests that this Court forthwith enter an expedited briefing schedule sufficient to permit the Court to reach a decision prior to the May 8, 2018, primary election.

Petitioner believes the dispositive issues of law raised by this Petitioner have previously been authoritatively decided by this Court and that the facts and legal arguments may be adequately presented in briefs. Consequently, in light of the short timetable, oral argument is not necessary. However, if the Court determines oral argument is appropriate, Petitioner's counsel will be available any time prior to May 8, 2018.

Petitioner requests a published opinion be issued in this case. While the precedent is clear, the matter is of such public important as to warrant a restatement of the law on the issue.

However, given the timeframe involved, Petitioner respectfully suggests it would be appropriate for the Court to issue a summary order with a full opinion to follow in due course.

ARGUMENT

I. REED IS NOT ELIGIBLE FOR ELECTION AS DELEGATE FOR THE 59TH HOUSE DISTRICT IN 2018

Article VI, Section 12 of the West Virginia Constitution provides:

No person shall be a senator or delegate who has not for one year next preceding his election, been a resident within the district or county from which he is elected; and if a senator or delegate remove from the district or county for which he was elected, his seat shall be thereby vacated.

This provision sets the one year residency requirement for eligibility to be elected to represent a legislative district.

Under the provisions of W.Va. Code §1-2-2(c), the 59th House District is comprised of portions of Morgan and Berkeley Counties. Respondent Reed is a resident of the 58th District rather than the 59th District from which she seeks nomination and possible election. The constitutional provision requiring one year of residency next preceding her election prohibit Reed from becoming the Republican Party nominee or Delegate for the 59th District.

Consequently, Reed is ineligible to file a certificate of candidacy, to be her party's nominee, to be elected in the general election in November 2018, or to be seated as the Delegate representing the 59th District following that election. As such, her name must not appear on the May 8, 2018, primary election ballot as her inclusion would act to disenfranchise voters and residents of the 59th District.

II. THE RESIDENCY REQUIREMENT CONTAINED IN WEST VIRGINIA
CONSTITUTION ARTICLE VI, §12 SERVES A COMPELLING STATE
INTEREST AND IS CONSTITUTIONAL

This Court has previously determined the word “election” contained in Article VI, §12 to mean the general election at which the voters make the final choice for the office. And therefore the person seeking to hold office must meet the one year durational requirement by establishing domicile in the district one year prior to the impending November general election. *Syl. Pt. 11, White v Manchin*.

While the term “resident” appears in Article VI, §12, the Court has previously addressed the differences between residency as contemplated by the Constitution and residency in other areas of law. In the end, the precedent shows the term “resident” to hold the same meaning in election law as the term “domicile”. *Syl. Pt. 7, White v Manchin*.

The Court clearly stated in authoritative precedent that the state has a compelling state interest in the one year durational requirement. Specifically, three reasons have been offered as the primary reasons such requirements should be upheld.

First, these requirements promote candidate familiarity with the needs and problems of the people to be represented. Second, these requirements promote voter familiarity with the character, intelligence, and reputation of the candidates. Finally, durational residency requirements further the goal of precluding frivolous or fraudulent candidacies by those who are more interested in public office than in public service.

See White v Manchin, at 489.

The durational residency requirement works to promote the election of persons who have true interests in the district which they represent. Otherwise, voters

may be represented by elected officials who have little or no ties to the community over a period of time. Furthermore, a frivolous candidate may tend to be a frivolous representative. More directly, the ineligibility of Respondent Reed must be resolved prior to the May 2018 primary election. If Reed were permitted to remain on the ballot only to be challenged and removed *after* the primary election, it may leave voters of the district disenfranchised in their vote by leaving only the democrat nominee on the general election ballot. For these reasons, this Court should order the Secretary to direct election officials to strike Reed from the ballot for election as Delegate from the 59th District on the May 8, 2018, primary ballot.

III. THE APPROPRIATE METHOD TO CHALLENGE REED'S ELIGIBILITY IS VIA WRIT OF MANDAMUS

This Court has long recognized the appropriateness of writ of mandamus to challenge the eligibility of a candidate and that the Secretary of State is a proper party respondent.

In West Virginia a special form of mandamus exists to test the eligibility to office of a candidate in either primary or federal election. The proper party respondent in such special action in mandamus is the Secretary of State of the State of West Virginia in the case of an office to be filled by the voters of more than one county or the clerk of the circuit court in the case of an office to be filled by the voters of one county, and this action in mandamus, being a special creation of the evolving common law, is ripe for prosecution immediately upon a candidate's filing of his certificate of candidacy.

Syl. Pt. 5, State ex rel. Maloney v. McCartney, 159 W.Va. 513, 223 S.E.2d 607 (1976).

Moreover, the Court recognizes the need for resolution of the issue presented in a timely manner given the May 8, 2018, primary election. It should be noted that early voting for this election starts on April 25, 2018.

This Court is cognizant of the fact that election disputes very often demand expedited resolutions, and typically arise under circumstances allowing only a few days (and in some cases only a few hours) for the dispute to be resolved.

State ex rel. Boley v Tennant, 228 W.Va. 812, 724 S.E.2d 783 (2012) at 787.

Furthermore, the compelling interests of the public in making sure the election does not become a “mockery” require the court to act in haste.

Because there is an important public policy interest in determining the qualifications of candidates in advance of an election, this Court does not hold an election mandamus proceeding to the same degree of procedural rigor as an ordinary mandamus case.

Syl. Pt.2, State ex rel. Bromelow v. Daniel, 163 W.Va. 532, 258 S.E.2d 119 (1979).

Even yet, the court has held to the requirements of the general rule that a mandamus will not lie in a given case unless the elements are present.

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.

Syl. Pt. 2, State ex rel. Kucera v. The City of Wheeling, 153 W.Va. 538, 170 S.E.2d 367 (1969).

In the case at hand, the right to the writ is clear under the law. The public, through the petitioners, have a clear legal right to ensure the eligibility of the candidates. The Court has explained this right to relief as

the need for “some method of averting a void or voidable election” and that “some form of proceeding must be available by which interested parties may challenge in advance of a primary or general election the eligibility of questionable candidates in order to assure that elections will not become a mockery.

Maloney, 159 W.Va. at 527, 223 S.E.2d at 616.

After reviewing the legal precedent and the facts presented showing Reed has not met the one year durational residency requirement for eligibility, it is clear the Petitioners are entitled to the writ. Finally, it is well within the Secretary of State's authority to direct the ballot commissioner of Morgan and Berkeley Counties to strike the ineligible candidate's name from the ballot. *See White v Manchin, 173 W.Va. at 547, 318 S.E.2d at 491 (granting writ of mandamus commanding Secretary of State to direct all election officials to disregard votes cast for ineligible candidate); State ex rel. Maloney v. McCartney, 159 W.Va. at 527, 223 S.E.2d at 616 (granting writ against Secretary of State).*

CONCLUSION

Based upon the facts and law presented herein, Petitioners pray this Court grant a rule to show cause, enter an expedited briefing schedule if the Court believes additional briefing is necessary, and after consideration, grant Petitioners a writ of mandamus. Petitioners request such writ should (1) direct the Respondent Secretary of State to withdraw the certification of candidacy of Respondent Reed and declare Reed ineligible to run the West Virginia House of Delegates District 59 in the 2018 election; (2) further direct the Secretary, pursuant to his authority under W.Va. Code §3-1A-6(a), to direct the ballot commissioners, for Morgan and Berkeley Counties to not include Reed on the primary election ballots; and (3) further order the Secretary to direct all election officials, county commissioners, clerks of county commissioners, ballot commissioners, election commissioners, poll clerks, and all other persons associated with the administration of the primary election to disregard and refrain from tallying, tabulating, certifying, or returning any vote cast, absentee, write-in, or otherwise, for Respondent Reed.

Respectfully presented

Howard Stone and Patricia Adams

Through Counsel

A handwritten signature in black ink, appearing to read 'P. Lane', with a horizontal line underneath.

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CERTIFICATE OF SERVICE
AND MOEMORANDUM OF PERSONS TO BE SERVED

I, Patrick Lane, counsel for the State of West Virginia ex rel. Howard Stone and Patricia Adams, do hereby certify that on this the 24 day of April, 2018, I served the Emergency Petition for Writ of Mandamus and Petitioner's Appendix to Emergency Petition for Writ of Mandamus as set forth below. The Court's Rule to Show Cause should be served upon the same parties as the addresses set forth below.

The Honorable Mac Warner
West Virginia Secretary of State
Rm 157 K, Bldg 1
State Capitol
1900 Kanawha Blvd., East
Charleston, WV 25305
Via hand delivery

The Honorable Patrick Morrissey
West Virginia Attorney General
Bldg 1
State Capitol
1900 Kanawha Blvd., East
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Tally Reed
11348 Martinsburg Rd
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Via hand delivery and email



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MAC WARNER,
SECRETARY OF STATE
OF THE STATE OF WEST VIRGINIA,
And TALLY REED,

Respondents.

VERIFICATION

STATE OF WEST VIRGINIA

STATE AT LARGE to wit:

Howard Stone, being first duly sworn upon oath, states that he is the Petitioner in the above styled case, that he has read the Emergency Petition for Writ of Mandamus and the facts and allegations contained therein are true except so far as to be stated to be upon information and belief which he believes to be true.



Howard Stone

Taken and sworn to before me this 23rd day of April 2018.

My commission expires August 25, 2021



Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Upon Original Jurisdiction

Case No. _____

STATE OF WEST VIRGINIA, ex rel.
HOWARD STONE and
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Petitioners,

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MAC WARNER,
SECRETARY OF STATE
OF THE STATE OF WEST VIRGINIA,
And TALLY REED,

Respondents.

VERIFICATION

STATE OF WEST VIRGINIA

STATE AT LARGE to wit:

Patricia Adams, being first duly sworn upon oath, states that he is the Petitioner in the above styled case, that he has read the Emergency Petition for Writ of Mandamus and the facts and allegations contained therein are true except so far as to be stated to be upon information and belief which he believes to be true.

P. Adams

Patricia Adams

Taken and sworn to before me this 23rd day of April 2018.

My commission expires August 25, 2021



D. Phelps

Notary Public