

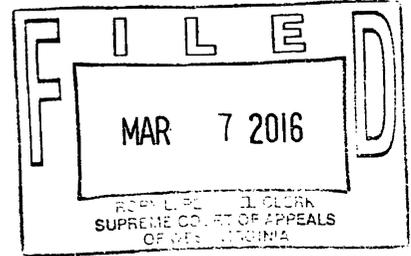
16-0223

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**(Upon Original Jurisdiction)**

**STATE OF WEST VIRGINIA ex rel.  
JUDICIAL INVESTIGATION COMMISSION,**

**Petitioner,**



**v.**

**Supreme Court Case No. \_\_\_\_\_**

**THE PUTNAM COUNTY BOARD OF BALLOT COMMISSIONERS  
(The Honorable Brian Wood, Putnam County Clerk and Chairman;  
Judy Jefferies, Member; and Joyce Surface, Member),**

**Respondents.**

---

**VERIFIED PETITION FOR WRIT OF MANDAMUS  
AND MEMORANDUM OF LAW IN SUPPORT**

**EXPEDITED RELIEF REQUESTED**

---

**Teresa A. Tarr, Counsel  
Brian J. Lanham, Assistant Counsel  
Judicial Investigation Commission  
WV Bar I.D. Nos. 5631 & 7736  
City Center East, Suite 1200A  
4700 MacCorkle Avenue, SE  
Charleston, WV 25304  
(304) 558-0169**

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
QUESTION PRESENTED.....	1
STATEMENT OF THE CASE.....	1
STANDING.....	7
SUMMARY OF ARGUMENT.....	10
STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	10
ARGUMENT.....	11
CONCLUSION.....	19
VERIFICATION.....	20
CERTIFICATE OF SERVICE.....	21

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<i>Calderon-Dominguez v. Mukasey</i> , 261 Fed. Appx. 671 (5 <sup>th</sup> Cir. 1/7/2008).....	15
<i>Committee on Legal Ethics v. Six</i> , 181 W. Va. 52, 380 S.E.2d 219 (1989).....	13
<i>Donley v. Davi</i> , 180 Cal. App. 4 <sup>th</sup> 447, 103 Cal. Rptr. 3d 1 (2009).....	15
<i>Ex parte Wall</i> , 107 U.S. 265 (1883) .....	16
<i>Lazaro v. Holder</i> , 390 Fed. Appx. 319 (5 <sup>th</sup> Cir. 7/26/2010).....	15
<i>Rogers v. Hechler</i> , 176 W. Va. 713, 348 S.E.2d 299 (1986).....	7
<i>Revolorio v. Holder</i> , 554 Fed. Appx. 344 (5 <sup>th</sup> Cir. 2/14/2014).....	15
<i>Smith v. Godby</i> , 154 W. Va. 190, 174 S.E.2d 165 (1970).....	19
<i>State ex rel. Booth v. Board of Ballot Commissioners of Mingo County</i> , 156 W. Va. 657, 196 S.E.2d 299 (1973).....	7
<i>State ex rel. Bromelow v. Daniel</i> , 163 W. Va. 532, 258 S.E.2d 119 (1979).....	12
<i>State ex rel. Cline v. Hatfield</i> , 145 W. Va. 611, 116 S.E.2d 703 (1960).....	16
<i>State ex rel. Haught v. Donnahoe</i> , 174 W. Va. 27, 321 S.E.2d 677 (1984).....	17
<i>State ex rel. Kucera v. City of Wheeling</i> , 153 W. Va. 538, 170 S.E.2d 367 (1969).....	11
<i>State ex rel. Maloney v. McCartney</i> , 159 W. Va. 513, 223 S.E.2d 607 (1976).....	12
<i>State ex rel. Manchin v. Lively</i> , 170 W. Va. 672, 295 S.E.2d 912 (1982).....	7
<i>State ex rel. Summerfield v. Maxwell</i> , 148 W. Va. 535, 135 S.E.2d 741 (1964).....	12, 17
<i>State ex rel. Tennant v. Ballot Commissioners of Mingo County</i> , 234 W. Va. 620, 568 S.E.2d 438 (2014).....	7
<i>Wysong v. Walden</i> , 120 W. Va. 122, 52 S.E.2d 392 (1938).....	18

**Constitution**

Art. VIII, § 3, W. Va. Const.....11  
Art. VIII, § 8, W. Va. Const.....8  
Art. VIII, § 10, W. Va. Const.....1

**Statutes**

Ohio Revised Code § 2911.12(A)(3).....6  
W. Va. Code § 6-6-7(a).....18  
W. Va. Code § 17C-5-2.....5  
W. Va. Code § 50-1-4.....1, 11, 19  
W. Va. Code § 50-1-5.....18  
W. Va. Code § 61-2-28(a).....2-3, 14  
W. Va. Code § 61-6-20(2).....4, 13  
W. Va. Code § 61-8-16.....4

**OTHER**

Canon 1, Code of Judicial Conduct.....10  
Canon 2, Code of Judicial Conduct .....10  
Canon 3, Code of Judicial Conduct.....10  
Canon 4, Code of Judicial Conduct.....9  
Application I(B), Code of Judicial Conduct.....9  
Rule 1.1, Code of Judicial Conduct .....10  
Rule 4.1, Code of Judicial Conduct.....9  
Rule 4.1(A)(9), Code of Judicial Conduct.....9  
Rule 4.2, Code of Judicial Conduct.....9  
Rule 4.2(A)(1), Code of Judicial Conduct.....9

	<u>Page</u>
Rule 4.2(A)(2), Code of Judicial Conduct .....	9
Rule 4.4, Code of Judicial Conduct .....	9
Rule 1, Rules of Judicial Disciplinary Procedure.....	8
Rule 1.11, Rules of Judicial Disciplinary Procedure.....	8
Rule 4.12, Rules of Judicial Disciplinary Procedure .....	17

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**STATE OF WEST VIRGINIA ex rel.  
JUDICIAL INVESTIGATION COMMISSION,**

**Petitioner,**

**v.**

**Supreme Court Case No. \_\_\_\_\_**

**THE PUTNAM COUNTY BOARD OF BALLOT COMMISSIONERS  
(The Honorable Brian Wood, Putnam County Clerk and Chairman;  
Judy Jefferies, Member; and Joyce Surface, Member)**

**Respondents.**

---

**VERIFIED PETITION FOR WRIT OF MANDAMUS  
AND MEMORANDUM OF LAW IN SUPPORT**

---

**I.**

**QUESTION PRESENTED**

**WHETHER RESPONDENTS MUST REMOVE TROY PALMER SEXTON FROM THE MAY 2016 BALLOT BECAUSE HE IS INELIGIBLE TO SERVE AS A MAGISTRATE BY VIRTUE OF HIS CONVICTIONS FOR MISDEMEANORS INVOLVING MORAL TURPITUDE.**

**II.**

**STATEMENT OF THE CASE**

Article VIII, § 10 of the West Virginia Constitution states that “[t]he legislature shall establish in each county a magistrate court or courts with the right of appeal” and “shall determine the qualifications and the number of magistrates for each such court to be elected by the voters of the county.” West Virginia Code § 50-1-4 sets forth the qualifications for magistrates and provides in pertinent part:

Each magistrate shall be at least twenty-one years of age, shall have a high school education or its equivalent, shall not have been convicted of any felony or **any misdemeanor involving moral turpitude** and shall reside in the county of his election. No magistrate shall be a member of the immediate family of any other magistrate in the county.

*Id.* (emphasis added).

Troy Palmer Sexton is a resident of Putnam County, West Virginia. On or about December 22, 2015, Mr. Sexton filed his precandidacy papers for Magistrate in the Putnam County Clerk's Office (Appendix-Exhibit No. 1). On or about January 11, 2016, Mr. Sexton officially filed to run for Magistrate in the 2<sup>nd</sup> Magisterial District of Putnam County (Appendix-Exhibit No. 1). He filed his Certificate of Announcement and paid a filing fee of \$575.00 in the Putnam County Clerk's Office. In the Certificate of Announcement, Mr. Sexton did "swear and affirm that I am a candidate for this office in good faith, that I am eligible and qualified to hold this office and that the information provided on this form is true." This document was properly notarized by a notary public (Appendix-Exhibit No. 1).

The precandidacy papers and the Certificate of Announcement do not ask whether a candidate has ever been convicted of a felony or misdemeanor offense. Putnam County Clerk Brian Wood told a Judicial Investigation Commission ("JIC" or "Petitioner") investigator that on one occasion when Mr. Sexton came to file precandidacy or candidacy papers for Magistrate, he stated that he did not think he would be on the ballot very long because he had moral turpitude issues (Appendix-Exhibit No. 2). Mr. Wood also told the JIC Investigator that Mr. Sexton's comment was made in the context of asking whether he could have a refund of his filing fee if he was removed from the ballot (Appendix-Exhibit No. 2).

In fact, Mr. Sexton has been convicted of multiple misdemeanors. On August 6, 2009, he was charged with two counts of misdemeanor domestic battery in violation of W. Va. Code § 61-

2-28(a) in Putnam County Magistrate Court Case Nos. 09-M-1643 and 09-M-1644. The criminal complaint stated:

On Thursday, August 6, 2009 Patrolman R.C. Flinn and myself received a radio call from Putnam County Dispatch alerting us to a domestic complaint on the ball field behind Winfield Elementary. We arrived and met up with Deputy Chad Weaver from the Putnam County Sheriff's Department and proceeded to locate the complainant, Melissa Cottrell. Ms. Cottrell pointed out the defendant, Troy Palmer Sexton, standing with his four children near a picnic shelter. I obtained a signed written statement from the complainant who stated that she witnessed the defendant throw one of his sons down hard on the ground. He then walked across the field and pinched and twisted his other son's hip really hard. He then grabbed that son by one ankle and picked him upside down and began walking back across the field banging his helmeted head off the ground more than once, dragging him along by the ankle. When he reached the fence bordering the ball field, he threw him across it hard onto the ground. The complainant ran onto the field and yelled, "Hey Mister, You can't do that to a child!" The defendant replied, "Mind your own F-ing business! The defendant admitted to Patrolman Flinn that he had done these things and didn't see why everyone was making such a big deal about it.

(Appendix-Exhibit No. 3). At the time of the incident, the victims were 6 years old.

Mr. Sexton pleaded no contest to the two offenses in Magistrate Court on December 4, 2009 (Appendix-Exhibit No. 3). He was sentenced to six months in jail on the first charge and one year in jail on the second charge. The Court ordered both sentences to run consecutive to one another. The Court then suspended the one year sentence and placed Mr. Sexton on probation for a period of two years (Appendix-Exhibit No3). Mr. Sexton only appealed his sentence to Putnam County Circuit Court in Case No. 09-MAP-39.

Following receipt of a pre-sentence investigation report, the Circuit Court again imposed the same sentence that Mr. Sexton had received in Magistrate Court. However, the Circuit Court ordered both sentences suspended except for 30 days in jail and placed Mr. Sexton on probation for two years (Appendix-Exhibit No. 4). The appeal period for all of Mr. Sexton's convictions have expired, and they represent final judgments.

On or about February 8, 2010, Mr. Sexton was charged with the misdemeanor offense of making harassing telephone calls in violation of W. Va. Code § 61-8-16 in Putnam County Magistrate Court Case No. 10-M-383 (Appendix-Exhibit No. 5). The criminal complaint stated:

On 02-08-2010 at approximately 2247hrs this officer spoke to Mrs. Natalie L. Wandling of Timberlake Circle Putnam County, WV. Mrs. Wandling stated that the defendant Mr. Troy Sexton called her home approximately four times. On the first call she hung up, second time Mr. Sexton hung up and the third call she advised that she recorded the conversation. She advised that Mr. Sexton was calling her and reading letters that were wrote to the Putnam County Probation in reference to an ongoing court case. Based on statements taken from the victim and photos of the caller ID the defendant is charged with Harassing Phone calls.

On March 24, 2010, Mr. Sexton pleaded guilty to the offense. He was sentenced to 20 days in jail with credit time served and a \$100.00 fine (Appendix-Exhibit No. 5). The appeal period for this conviction has expired and is a final judgment.

On January 23, 2014, Mr. Sexton was charged with the misdemeanor offense of falsely reporting an emergency incident in violation of W. Va. Code § 61-6-20(2) in Putnam County Magistrate Court Case No. 14-M-116 (Appendix-Exhibit No. 6). The criminal complaint provided:

On the above date the undersigned was dispatched to 139 Summit Ridge in Hurricane, Putnam County, WV for a disturbance. I was notified by Putnam County Dispatch that the defendant Troy Sexton had called 911 and stated that his kids were dead and that he had molested and beat them. Dispatch further informed me that the defendant had requested that the prosecutor arrive at his house because "they were the only ones who cared about his children." After arriving at the residence mentioned above I observed that some of the lights in the home quickly turned off. I then began to approach the residence with caution and notified dispatch to call the defendant back and request him step outside. I was informed by dispatch that they had made contact with the defendant. During the radio transmission the defendant slowly began to walk out of the front door. I then began a pat down on the defendant for his and my safety before detaining him. I then made contact with the defendant's wife and children and they were all in good health. The wife of the defendant stated that he had not been violent during the day, but had been drinking. She also stated that she did not know why the defendant felt the need to harass law enforcement and that all the allegations made to 911 were false. Before walking the defendant out of the residence he asked his

wife for a pair of shoes and stated “get them before I beat you again like I did for not having dinner ready.”

On March 26, 2014, Mr. Sexton pleaded guilty to the charge. He was sentenced to 90 days in jail and ordered to pay a fine of \$93.54. The jail sentence was then suspended, and Mr. Sexton was placed on probation for one year (Appendix-Exhibit No. 6). The appeal period for this conviction has expired and is a final judgment.

On April 9, 2014, Mr. Sexton was charged with the misdemeanor offense of 1<sup>st</sup> Offense DUI in violation of W. Va. Code § 17C-5-2 in Putnam County Magistrate Court Case No. 14-M-478 (Appendix-Exhibit No. 7). The criminal complaint stated:

On April 9, 2014, I was on routine patrol when I observed a dark colored Dodge Caravan bearing West Virginia registration D3139 traveling south on Rt. 34 in Teays Valley. I observed the vehicle cross over the center turn lane line and continued to straddle that line for approximately 100 feet. The vehicle went back to the center of the lane, and then veered back and straddled the center turn lane line again. The vehicle then made a left hand turn onto South Poplar Fork road from half way inside the center turn lane. I then observed the vehicle make a right hand turn onto Rt. 33 without stopping for a stop sign. At that time I activated my blue lights and pulled the vehicle over. When I approached the vehicle the driver, Troy Sexton, rolled the window down only approximately 3 inches. I instructed for the driver to roll the window all the way down. I observed that the driver’s eyes were glassy, and I could detect an odor of an alcoholic beverage on the driver’s breath. I asked the driver to step out of the vehicle. Upon exiting the vehicle Mr. Sexton was unsteady and staggered when walking. I then conducted three standard field sobriety tests. Mr. Sexton failed all three. Mr. Sexton was given a PBT and also failed that test. Two cans of Natural Lite, one empty and one unopened and cold, were found under the driver seat. Mr. Sexton refused a secondary chemical test of his breath. All events did occur in Putnam County. Mr. Sexton is being charged with DUI.

On July 9, 2014, Mr. Sexton pleaded guilty to the charge. He was sentenced to credit time served and fined \$100.00 (Appendix-Exhibit No. 7). The appeal period for this conviction has expired and is a final judgment.

Mr. Sexton has also been convicted of misdemeanors on two separate occasions in Ohio. He was first arrested in Cincinnati on or about June 17, 2008, in connection with an incident at

the Cincinnati Reds' Great American Ball Park. He was charged with the misdemeanor offenses of disorderly conduct while intoxicated and resisting arrest (Appendix-Exhibit No. 8). Based upon information and belief, Mr. Sexton subsequently pleaded guilty to disorderly conduct while intoxicated. The resisting arrest charge was dismissed pursuant to the plea. Mr. Sexton also received a lifetime ban from the ballpark. It is believed that the appeal period for this conviction has expired and is a final judgment.

Mr. Sexton violated the lifetime ban on or about June 10, 2014, by showing up at the ballpark after threatening to go there and "shatter lives." On June 20, 2014, a Hamilton County, Ohio grand jury indicted Mr. Sexton on a charge of felony burglary in violation of Ohio Revised Code § 2911.12(A)(3) (Appendix-Exhibit No. 8). On or about November 3, 2014, Mr. Sexton pleaded no contest to the misdemeanor offense of criminal trespass (reduced) in the Hamilton County Court of Common Pleas (Appendix-Exhibit No. 8). He was sentenced to 6 months of non-reporting community control and fined \$250.00. The Court informed Mr. Sexton that if he violated the terms and conditions of community control that he would receive a 30 month jail sentence. The Court also ordered Mr. Sexton to stay away from the ballpark (Appendix-Exhibit No. 8). The appeal period for this conviction has expired and is a final judgment.

Faced with the fact that Mr. Sexton was ineligible to hold the office of Magistrate because of his misdemeanor convictions involving moral turpitude, the JIC voted 9-0 at its February 26, 2016 meeting to file a Petition for Writ of Mandamus in the Supreme Court of Appeals of West Virginia seeking Mr. Sexton's removal from the May 2016 ballot.

### III.

#### STANDING

Traditionally, mandamus actions concerning election issues had to be brought by a citizen, taxpayer or voter. *See generally Rogers v. Hechler*, 176 W. Va. 713, 348 S.E.2d 299 (1986) (special public concern with integrity of electoral process gave any citizen, taxpayer or voter standing to bring a mandamus action). However, the Court has carved out exceptions for the executive committee of a political party and for the Secretary of State's Office.

In *State ex rel. Booth v. Board of Ballot Commissioners of Mingo County*, 156 W. Va. 657, 196 S.E.2d 299 (1973), this Court stated that as the statutorily presumed representative of the citizens and voters in the party, the Democratic Executive Committee of Mingo County had interest in and standing to bring a mandamus action on a ballot issue. In Syllabus point 2, the Court held that standing is not equivalent to a clear legal right, which is an affirmative burden placed on any relator in mandamus. *Id.*

In *State ex rel. Tennant v. Ballot Commissioners of Mingo County*, 234 W. Va. 620, 768 S.E.2d 438 (2014), the Secretary of State sought a writ of mandamus to compel the Ballot Commissioners of Mingo County to remove any and all references to an election to fill an unexpired term of a family court judge from the 2014 general election ballot. The Court stated:

The fact that the petitioner has the authority to bring this action is beyond dispute given her position as the chief election official for this state. *See Syl. Pt. 1, State ex rel. Manchin v. Lively*, 170 W. Va. 672, 295 S.E.2d 912 (1982) (“The Secretary of State of West Virginia does have standing to bring an action to obtain a constructive enforcement of the State’s election laws by virtue of his [or her] role as chief election official and the powers given to him [or her] in W. Va. Code [3-1A-6”]).

*Tennant* at 622, 768 S.E.2d at 440.

In applying the foregoing to the instant matter, it is clear that the JIC has standing to bring the writ of mandamus against the Respondents. The JIC is made up of nine members from across the State of West Virginia – three circuit judges, one family court judge, one magistrate, one senior status judge and three lay members. All nine members live in various counties in West Virginia -- although none reside in Putnam County. All nine members are citizens, taxpayers and voters of the West Virginia counties in which they reside.

Like the Secretary of State's Office, the JIC also has the authority to bring this action given its duties and obligations related to judicial elections in West Virginia. Article VIII, § 8 of the West Virginia Constitution states that under its inherent rule-making power, the Supreme Court "shall, from time to time, prescribe, adopt, promulgate, and amend rules prescribing a judicial code of ethics and a code of regulations and standards of conduct and performances" for justices, judges and magistrates.

Rule 1 of the West Virginia Rules of Judicial Disciplinary Procedure ("RJDP") states:

The ethical conduct of judges is of the highest importance to the people of the State of West Virginia and to the legal profession. Every judge shall observe the highest standards of judicial conduct. In furtherance of this goal, the Supreme Court of Appeals does hereby establish a Judicial Investigation Commission to determine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct promulgated by the Supreme Court of Appeals to govern the ethical conduct of judges or that a judge because of advancing years and attendant physical and mental incapacity, should not continue to serve.

Meanwhile, RJDP 1.11 gives the JIC the authority to:

- (1) determine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct or that a judge, because of advancing years and attendant physical and mental incapacity, should not continue to serve;
- (2) propose rules of procedure for judicial disciplinary proceedings for promulgation by the Supreme Court of Appeals;
- (3) file an annual report with the Supreme Court of Appeals on the operation of the Commission;
- (4) inform the public about the existence and operation of the judicial disciplinary system, the filing of formal charges, and the discipline imposed or recommended on formal

charges; (5) delegate, in its discretion, to the Chairperson or Vice-Chairperson, the authority to act for the Commission on administrative and procedural matters; (6) nominate, for selection by the Supreme Court of Appeals, candidates for the position of Judicial Disciplinary Counsel; and (7) engage in such other activities related to judicial discipline as it deems appropriate.

Application I(B) of the new Code of Judicial Conduct, in effect since December 1, 2015, states in pertinent part that “[a]ll judicial candidates for judicial office shall comply with the applicable provisions of this Code.” Comment [2] to Rule 4.1 states that “[w]hen a person becomes a judicial candidate, this Canon [Canon 4] becomes applicable to his or her conduct.”

The new Code defines “judicial candidate” as:

[A]ny person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office.

Canon 4 of the Code governs campaign activity and states that “[a] judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity and impartiality of the judiciary.” Rule 4.1 provides a list of activities that a judicial candidate “shall not” engage in while running for office. For example, Rule 4.1(A)(9) of the Code states that a judge or a judicial candidate shall not knowingly or with reckless disregard for the truth, make any false or misleading statement.”

Rule 4.2 prescribes how a judicial candidate is supposed to act while running for office. For example, Rule 4.2(A)(1) stated that a “candidate subject to public election shall act at all times in a manner consistent with the independence, integrity and impartiality of the judiciary” while Rule 4.2(A)(2) states that “[a] . . . candidate subject to public election shall comply with all applicable election, election campaign and election campaign fund-raising laws and regulations of this jurisdiction.” Rule 4.4 deals with a judicial candidate’s campaign committees.

Canons 1 through 3 govern the conduct only of a sitting or senior status judge. For example, Rule 1.1 of the Code states that “[a] judge shall comply with the law, including the West Virginia Code of Judicial Conduct. Sitting judges must also be mindful of and follow these Canons when running for judicial office.

Based upon the foregoing, the JIC clearly has the authority to regulate, in part, and an undivided interest in the judicial election process in West Virginia. In fact, the JIC and the Secretary of State work in tandem to ensure fair judicial elections. The JIC is charged with ensuring the independence, integrity and impartiality of the judiciary. Integrity means more than just probity, honesty, soundness or being of good moral principle when dealing with rules or statutes concerning public office, it also means that the person must have met the minimum qualifications necessary for leadership. Therefore, the JIC has an interest in and standing to bring this mandamus action against Respondents.

#### **IV.**

#### **SUMMARY OF ARGUMENT**

Mr. Sexton has been convicted of misdemeanors involving moral turpitude and is therefore ineligible to serve as a Magistrate for Putnam County. The appropriate remedy is for this Court to order Respondents to remove Mr. Sexton’s name from the May 2016 election ballot.

#### **V.**

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is not necessary and is not requested by Petitioner. Time is of the essence in this matter, because nonpartisan judicial elections are set for Tuesday, May 10, 2016; the ballots must be printed soon; and the statute setting forth the qualifications for Magistrate is clear and unambiguous. To the extent this honorable Court desires argument, this case qualifies for

both Rule 19 argument (a case involving a narrow issue of law and in which a hearing is required by law) and Rule 20 argument (a case involving issues of first impression and fundamental public importance).

## VI.

### ARGUMENT

#### A. Introduction.

This is a question of first impression in West Virginia. W. Va. Code § 50-1-4 sets forth the minimum qualifications necessary to be a magistrate. It is clear that a person cannot serve as a magistrate if he/she has been convicted of a felony or misdemeanor involving moral turpitude. If the Court determines that any one or more of Mr. Sexton's convictions include misdemeanors involving moral turpitude then it is axiomatic that his name must be removed from the ballot because he does not meet the requisite qualifications to serve as magistrate.

#### B. A Writ of Mandamus is the Appropriate Remedy.

Petitioner brings this action pursuant to this Court's "original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari." Article VIII, § 3, W. Va. Const. In Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969), this Court set forth the standard of review for mandamus proceedings:

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.

Petitioner seeks the writ to compel Respondents to remove Mr. Sexton's name from the official May 2016 election ballot.

This Court has held that a writ of mandamus is an appropriate means by which to challenge the eligibility of candidates for public office:

In West Virginia a special form of mandamus exists to test the eligibility to office of a candidate in either a primary or general 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). In *Maloney*, the Court explained 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.” *Id.* at 527, 223 S.E.2d at 616.

The Court found that election disputes often demand expedited resolutions and typically arise under circumstances allowing only a few days (and in some cases only a few hours) for the matter to be resolved. In recognition of this compressed time frame, the Court stated:

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). Further, the Court by writ of mandamus may direct that a candidate be removed from the ballot when that candidate has been determined to be ineligible for the office he or she sought:

The eligibility of a candidate for an elective office may be determined in a proceeding in mandamus and, upon a determination therein that a candidate is ineligible to be elected to or to hold the office for which he seeks nomination or election, a writ of mandamus will issue directing the board of ballot commissioners to strike or omit such candidate's name from the primary or general election ballot.

Syl. pt. 1, *State ex rel. Summerfield v. Maxwell*, 148 W.Va. 535, 135 S.E.2d 741 (1964).

Accordingly, the JIC requests that this matter be expedited and for the reason set forth below that

the Court grant the petition for writ of mandamus and order the Respondents to remove Mr. Sexton from the May 2016 election ballot.

**(1) Petitioner has a clear legal right to the relief sought.**

The West Virginia Legislature has never defined the term “moral turpitude” or listed what crimes are included within the meaning of the phrase. Importantly, this Court has stated:

Although “moral turpitude” is an elusive concept incapable of precise definition, it is generally described as importing “an act of baseness, vileness or depravity in the duties which one person owes to another or to society in general, which is contrary to the usual, accepted and customary rule of right and duty which a person should follow.” “Moral turpitude” has also been defined as any conduct that is “contrary to justice, honesty and good morals.” Whether a crime is one of moral turpitude is determined from the nature and elements of the offense itself and from the facts and circumstances giving rise to the conviction.

*Committee on Legal Ethics v. Six*, 181 W. Va. 52, 54, 380 S.E.2d 219, 221 (1989) (citations omitted). This Court has also recognized certain types of crimes as falling within the definition:

We have recognized, for example, that where fraud or a fraudulent intent is an essential element of the offense, the crime is one of moral turpitude *per se*. Crimes which involve corruption of the legal system or perversion of justice have been held to involve moral turpitude as a matter of law. Moral turpitude has also been held to be inherent in crimes involving **intentional dishonesty** or illegal activity for personal gain or other corrupt purpose.

*Id.* (citations omitted) (emphasis added).

Mr. Sexton was convicted of filing a false emergency report. W. Va. Code § 61-6-20 sets forth the elements of the crime:

**Falsely Reporting an Emergency Incident:**

[A] person is guilty of reporting a false emergency incident when knowing the information reported, conveyed or circulated is false or baseless, he:

(2) Reports, by word or action, to any official or quasi-official agency or organization having the function of dealing with emergencies involving danger to life or property, an alleged occurrence or impending occurrence of a fire, explosion, crime, catastrophe, accident, illness or other emergency in which it is likely that public alarm or inconvenience will result or that firefighting apparatus, ambulance apparatus, one or more

rescue vehicles or other emergency apparatus might be summoned, which did not occur, does not in fact exist.

This crime involves intentional dishonesty. Since moral turpitude is inherent in crimes involving intentional dishonesty, this Court should find that the crime of filing a false emergency report is a misdemeanor involving moral turpitude. Thus, Mr. Sexton's conviction for filing a false emergency report mandates his removal from the May 2016 election ballot.

Mr. Sexton's conduct giving rise to the conviction enhances the argument that the crime is a misdemeanor involving moral turpitude. His behavior was reprehensible. When Mr. Sexton called 911, he told the dispatcher that his children were dead and that he had molested and beat them. After law enforcement arrived at Mr. Sexton's house a short time later, the officers learned from his wife that the allegations were false and that everyone was in good health. Accordingly the elements of the crime and Mr. Sexton's conduct dictate a finding that the filing of a false emergency report is a misdemeanor involving moral turpitude.

Petitioner also asserts that Mr. Sexton's convictions for domestic battery constitute misdemeanors involving moral turpitude. W. Va. Code § 61-2-28(a) sets forth the definition for domestic battery and provides in pertinent part:

*Domestic battery.* -- Any person who unlawfully and intentionally makes physical contact force capable of causing physical pain or injury to his or her family or household member or unlawfully and intentionally causes physical harm to his or her family or household member, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not more than twelve months, or fined not more than \$500, or both fined and confined.

When the elements of the crime and the facts and circumstances giving rise to Mr. Sexton's convictions are considered, the Court should conclude that domestic battery is a misdemeanor involving moral turpitude. Domestic battery is a crime that requires an intentional act. The victim must be a family member. Family members owe a special duty of care to one

another that goes beyond the normal obligations owed friends, acquaintances or society in general. Perhaps the greatest duty of care is between a parent and a child of tender years. Six year old children are unable to fend for themselves and must rely on their father and mother for all the necessities of life -- including freedom from harm. In deportation cases, federal courts have said that domestic violence may be a crime of moral turpitude:

Simple assault or battery does not generally involve moral turpitude unless there is some aggravating factor indicative of moral depravity. This requisite element is satisfied where the offense involves the infliction of serious injury upon a person deserving special protection such as a family member or a peace officer.

*See generally Revolorio v. Holder*, 554 Fed. Appx. 344 (5<sup>th</sup> Cir. 2/14/2014) (citations omitted) (deportation reversed where documents used to determine assaults were on police officer and domestic partner were not part of the record of conviction). *See also Lazaro v. Holder*, 390 Fed. Appx. 319 (Mem) (5<sup>th</sup> Cir. 7/26/2010); *Calderon-Dominguez v. Mukasey*, 261 Fed. Appx. 671 (5<sup>th</sup> Cir. 1/7/2008). *See also Donley v. Davi*, 180 Cal. App. 4<sup>th</sup> 447, 103 Cal. Rptr. 3d 1 (2009).

The facts giving rise to Mr. Sexton's domestic battery convictions are egregious. The incident involved Mr. Sexton's young sons. Based upon information and belief, Mr. Sexton became angry with the boys for underperforming during team practice on the football field. Mr. Sexton picked one child up and threw him to the ground. He then grabbed the second child by the ankle, dragged him across the field, and threw him over a fence. Instead of calming down when a bystander attempted to intervene, Mr. Sexton swore at the woman and told her to mind her own business. Bruising appeared on at least one of the sons shortly after the incident occurred. Both Magistrate and Circuit Court recognized the gravity of the offenses in the sentences imposed upon Mr. Sexton.

Based upon the foregoing, Mr. Sexton's convictions for domestic battery clearly constitute misdemeanors involving moral turpitude. Therefore, Mr. Sexton should also be removed from the May 2016 ballot because of this conviction.

Petitioner concedes that Mr. Sexton's convictions for disorderly conduct, telephone harassment, 1<sup>st</sup> offense DUI and criminal trespass in and of themselves may not constitute misdemeanors involving moral turpitude given the elements of each crime and the facts and circumstances surrounding each conviction. While there is no totality of circumstances test, Petitioner would ask the Court to consider the sheer number of misdemeanor convictions that Mr. Sexton has obtained since 2008. Petitioner asserts that the cumulative nature of the charges is indicative of someone whose criminal conduct is "contrary to justice, honesty and good morals" and therefore constitutes misdemeanors involving moral turpitude. As the United States Supreme Court said in *Ex parte Wall*, 107 U.S. 265, 307 (1883), "A conviction of a felony or a misdemeanor involving moral turpitude implies the absence of qualities which fit one for an office of trust, where the rights and property of others are concerned."

**(2) The Respondent has a legal duty to remove Mr. Sexton from the ballot.**

Respondents have a legal duty to remove Mr. Sexton's name from the May 2016 election ballot since he is ineligible to serve as Magistrate. The Court has held that Ballot Commissioners have no authority to inquire into a candidate's eligibility and qualifications. *State ex rel. Cline v. Hatfield*, 145 W.Va. 611, 116 S.E.2d 703 (1960). However, Ballot Commissioners are tasked with preparing the ballot of candidates for offices to be filled at primary or general elections. No other individual or office has this legal duty and the task is not considered complete until Respondents have removed from the ballot the name of any individual

who is not qualified to be a candidate. *Summerfield, supra*. In Syllabus point 1 of *Summerfield*, the Court stated:

The eligibility of a candidate for an elective office may be determined in a proceeding in mandamus and, upon a determination therein that a candidate is ineligible to be elected to or to hold the office for which he seeks nomination or election, a writ of mandamus will issue directing the board of ballot commissioners to strike or omit such candidate's name from the primary or general election ballot.

*Id.* See also Syl. Pt. 1, *State ex rel. Haught v. Donnahoe*, 174 W.Va. 27, 321 S.E.2d 677 (1984).

It is clear in this case that Mr. Sexton does not have the requisite qualifications to serve as Magistrate. Therefore, Respondents, who are tasked with preparing the ballot, must remove his name from consideration for Magistrate in the May 2016 election.

**(3) There is no other adequate remedy than the removal of Mr. Sexton from the ballot.**

Petitioners have no other remedy available to remove Mr. Sexton's name from the ballot. There is no officer or person who has a duty to remove Mr. Sexton's name from the May 2016 election ballot except Respondents. *See Summerfield, supra*.

Petitioner does not have the authority to remove anyone's name from the ballot. Petitioner also doesn't have the authority to permanently remove a sitting judge from the bench. RJDP 4.12 sets forth the permissible sanctions in judicial discipline and judicial candidate disciplinary matters:

The Judicial Hearing Board may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a violation of the Code of Judicial Conduct: (1) admonishment; (2) reprimand; (3) censure; (4) suspension without pay for up to one year; (5) a fine of up to \$5,000; or (6) involuntary retirement for a judge because of advancing years and attendant physical or mental incapacity and who is eligible to receive retirement benefits under the judges' retirement system or public employees retirement system. Any period of suspension without pay shall not interfere with the accumulation of a judge's retirement credit and the State shall continue to pay into the appropriate retirement fund the regular payments as if the judge were not under suspension without pay. An admonishment constitutes advice or caution to a judge to refrain

from engaging in similar conduct which is deemed to constitute a violation of the Code of Judicial Conduct. A reprimand constitutes a severe reproof to a judge who has engaged in conduct which violated the Code of Judicial Conduct. A censure constitutes formal condemnation of a judge who has engaged in conduct which violated the Code of Judicial Conduct.

None of these sanctions would be appropriate in this case.

W. Va. Code §§ 50-1-5 and 6-6-7(a) provides for the possibility of impeachment but only after the person has been elected and takes office. W. Va. Code § 50-1-5 states:

A magistrate may be removed from office in the manner provided in section seven, article six, chapter six of this code. In addition to the grounds for removal enumerated in section three, article six, chapter six of this code, a magistrate may be removed from office for conviction of a felony, for conviction of a misdemeanor involving moral turpitude or a duty of the office, or for willful violation of this chapter or any rule, regulation or order provided for in this chapter. In addition to other methods provided by law, removal proceedings may be initiated upon the motion of a judge of the circuit court of the county.

A magistrate may be censured or temporarily suspended in accordance with the rules of the supreme court of appeals.

W. Va. Code § 6-6-7(a) provides:

Any person holding ... the office of magistrate .... may be removed from such office in the manner provided in this section for official misconduct, malfeasance in office, incompetence, neglect of duty or gross immorality or for any of the causes or on any of the grounds provided by any other statute.

However, removal has not always been recognized as a proper remedy for crimes occurring before a person takes office:

Though the decisions in the various jurisdictions are in conflict as to whether acts during a prior term constitute ground for removal of an officer, the rule supported by the weight of authority is that, in general, offenses committed or acts done by a public officer during a previous term of office are not cause for removal from office in the absence of disqualification to hold office in the future or additional penalty imposed by law upon the person removed from office. 67 C.J.S. Officers, Section 60c. The text in 43 Am. Jur., Public Officers, Section 262, contains this language: "According to many authorities, a public officer may not be removed or impeached for acts committed before his entry into office, including acts during a prior term of the same office, or acts of misconduct in another office." In *Wysong v. Walden*, 120 W.Va. 122, 52 S.E.2d 392, this Court, considering the statement

that a public officer is not subject to removal for acts committed before his entry into office, recognized that as a general proposition, that statement was a correct statement of the law.

*Smith v. Godby*, 154 W.Va. 190, 198, 174 S.E.2d 165, 171 (1970) (“noncompliance of the defendant with the minimum valuation requirements of the statute for the fiscal years beginning July 1, 1966 and July 1, 1967 was admissible in evidence to show a general course or pattern of conduct but it does not constitute ground for . . . removal of office” of Logan Assessor who was duly elected in November 1968 for a four year term beginning on January 1, 1969). Following this precedent, Mr. Sexton may be protected from impeachment based solely on past misdemeanor convictions. Therefore, the only available and appropriate remedy is for this Court to order Respondents to remove Mr. Sexton from the May 2016 election ballot.

## VII.

### CONCLUSION

Petitioner seeks a Writ of Mandamus from this Court ordering Respondents to remove Troy Sexton as a Magistrate Candidate from the May 2016 Election Ballot because he is ineligible to serve by virtue of having misdemeanor convictions of moral turpitude in violation of W. Va. Code § 50-1-4 and for such further and general relief as the Court deems just and proper.

Respectfully submitted,

State ex rel. Judicial Investigation Commission

By counsel,



---

Teresa A. Tarr, Counsel  
Brian J. Lanham, Assistant Counsel  
WV Bar I.D. Nos. 5631 & 7736  
City Center East, Suite 1200A  
4700 MacCorkle Avenue, SE  
Charleston, WV 25304  
(304) 558-0169

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.  
JUDICIAL INVESTIGATION COMMISSION,

Petitioner,

v.

Supreme Court Case No. \_\_\_\_\_

THE PUTNAM COUNTY BOARD OF BALLOT COMMISSIONERS  
(The Honorable Brian Wood, Putnam County Clerk and Chairman;  
Judy Jefferies, Member; and Joyce Surface, Member),

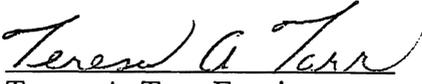
Respondents.

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, TO WIT:

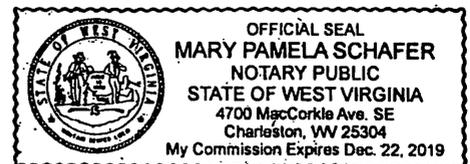
I, Teresa A. Tarr, Esquire, on behalf of the Petitioner named in the foregoing Petition for Writ of Mandamus, after being duly sworn upon oath do hereby state that the facts and allegations contained therein are true and correct, except insofar as they are therein stated to be upon information and belief, I believe them to be true.

  
Teresa A. Tarr, Esquire

Taken, sworn to, and subscribed before me this \_\_\_\_ day of March, 2016.

  
Notary Public

My commission expires: Dec. 22, 2019



## CERTIFICATE OF SERVICE

I, Teresa A. Tarr, Counsel for the Judicial Investigation Commission, do hereby certify that I have served a true and accurate copy of the Verified Petition for Writ of Mandamus and Memorandum of Law in Support by hand delivering the same to Respondents on the 7<sup>th</sup> day of March, 2016, at Putnam County Clerk's Office, 12093 Winfield Road, Suite #3, Winfield, WV 25213. I also certify that I have served a true and accurate copy on Troy Palmer Sexton, by hand delivering the same to him on the 7<sup>th</sup> day of March 2016, at 139 Summit Ridge Drive, Hurricane, WV 25526.



Teresa A. Tarr, Counsel  
Judicial Investigation Commission  
WV Bar I.D. No. 5631  
City Center East, Suite 1200 A  
4700 MacCorkle Avenue SE  
Charleston, WV 25304  
(304) 558-0169