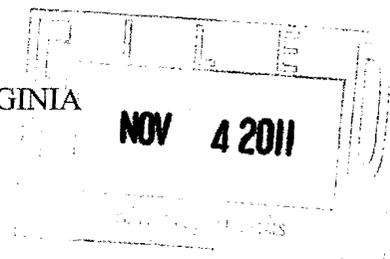


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 11-1516

STATE OF WEST VIRGINIA ex rel.  
THE COUNTY COMMISSION OF  
MONROE COUNTY, WEST VIRGINIA,  
acting by and through its members:  
Michael Shane Ashley, Clyde Gum, Jr.  
and William Miller, in their  
official capacities, and as citizens and  
residents of Monroe County, West Virginia;

Petitioners,

v.

RICHARD THOMPSON, in his official  
capacity as Speaker of the House of  
Delegates of the State of West Virginia; and,  
NATALIE E. TENNANT, in her official  
capacity as Secretary of State of  
the State of West Virginia;

Respondents.

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PETITION FOR WRIT OF PROHIBITION

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NOW COME the Petitioners herein, and respectfully Petition this Honorable Court for a Writ of Prohibition, pursuant to Rule 16 of the West Virginia Revised Rules of Appellate Procedure, and for a permanent injunction restraining the enforcement, operation and execution of W.Va. Code § 1-2-2, as amended by Enrolled House Bill 201, and relating to the apportionment of membership of the House of Delegates.

#### **QUESTIONS PRESENTED**

- I. Does the Constitution of West Virginia require that counties with insufficient population to create their own delegate district be kept whole when they are combined with other counties, or parts of counties, to form a delegate district?
- II. Does the Constitution of West Virginia imply a preference for the creation of single-member delegate districts, at least with respect to counties that would have qualified for a delegate under former law?
- III. Has the Constitution of West Virginia been violated by the requirements of W.Va. Code § 1-2-2, as amended, which divides Monroe County in two, and then puts the parts into two separate multi-member delegate districts?

## STATEMENT OF THE CASE

Monroe County has a long and valued history of sending respected representatives to sit in the West Virginia House of Delegates.<sup>1</sup> Since the time our state was formed, Monroe County citizens have enjoyed the privilege of collectively voting together for the same delegate candidates. However, due to the recent changes in the apportionment of members of the House of Delegates, Monroe County voters are now split between two different delegate districts, and face the very real prospect of not having a voice in Charleston for the first time in the history of our state.

Monroe County is one of the less populous counties in West Virginia, having a total population of 13,502 as of 2010 per the United State Census figures summarized by the legislature and published on its website as part of the redistricting process.<sup>2</sup>

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<sup>1</sup>Our current representative is Gerald L. Crosier who succeeded Mary Pearl Compton. The Honorable W. Marion Shiflet served in the legislature for over 20 years beginning in 1964, and held numerous offices including majority leader, speaker pro tem and majority whip.

<sup>2</sup>The census numbers used in the redistricting process by the legislature as shown on Petitioners' Exhibit 1, A.R. 1, suggest that Monroe County had a fairly substantial population loss of 1,081 residents, or -7.4%, between 2000 and 2010. As also noted on this Exhibit, Summers County allegedly gained 928 residents, or 7.1%, during this same period of time. However, there was actually no significant population change in either county. In 2000, the U.S. Census Bureau counted the inmates at Alderson Federal Prison as part of the Monroe County population. Although part of the prison grounds are indeed located in Monroe County, the living quarters are situated in Summers County, and the inmates have historically been counted as part of the Summers

(continued...)

County Population Change Report, Petitioners' Exhibit 1, A.R. 1. Consequently, although there have been some state senators elected from Monroe County in the past,<sup>3</sup> due to the small population of our county we principally depend upon electing a member of the House of Delegates as our sole voice in state government matters.<sup>4</sup> Absent such a representative, Monroe County will essentially be without any direct agent acting on its behalf at our state capitol.

Prior to the recent changes in delegate apportionment, Monroe County had been left wholly intact within a single-member delegate

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<sup>2</sup>(...continued)

County population. In 2010 the Census corrected this one-time error, but the resulting change in the population numbers between 2000 and 2010 present the false impression that Monroe County lost population during this decade. In reality, the Petitioners are informed and believe that the corrected 2000 census population for Monroe County is 13,194, which means that Monroe County actually saw an increase in population of 308 persons, or 2.3%, to reach the 2010 number of 13,502 (which is roughly equal to the state's overall increase of 2.5% as shown on Petitioners' Exhibit 1, A.R. 1).

<sup>3</sup>Frederick L. Parker represented Monroe County in the state senate from 1983-90; and, his father, Otey Roy Parker, served in that body from 1955-66. Grover C. Mitchell, Sr., also served as a state senator from Monroe County for one term beginning in 1932.

<sup>4</sup>As part of the 2011 reapportionment process, Monroe County has now been placed in the 10<sup>th</sup> State Senatorial District along with Greenbrier (population 35,480), Fayette (population 46,039) and Summers County (population 13,927). See County Population Change Report, Petitioners' Exhibit 1, A.R. 1. There are currently two incumbent senators in this district who also hail from the two most populous counties: Senator Ronald F. Miller from Greenbrier County and Senator William R. Laird, IV, from Fayette County. Realistically, Monroe County does not appear to have any chance at electing a state senator from within its own borders at any time in the foreseeable future.

district designated as the 26<sup>th</sup> District for the past twenty years. This district included all of our county and approximately one-third of the area of Summers County (but not the county seat of Hinton). House District 26 Map, Petitioners' Exhibit 2, A.R. 3.<sup>5</sup> And, although there was some mention in news accounts during the redistricting process that population losses in the southern counties required drastic changes in the alignment of delegate districts, the population of the old 26<sup>th</sup> District was absolutely stable between 2000 and 2010, having lost only 49 persons during that period.<sup>6</sup> See House Districts Population Change Report, Petitioners' Exhibit 3, A.R. 4. Accordingly, there was no rational basis upon which to justify modifying the 26<sup>th</sup> District since there had been no statistically significant change in the population therein, and the citizens located within its boundaries already

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<sup>5</sup>The remaining portion of Summers County was included with all of Raleigh County in the 27<sup>th</sup> District which elected a total of five delegates. However, the prior version of W.Va. Code § 1-2-2(b)(27) creating this district included a proviso that no more than four delegates could be elected from one county thereby guaranteeing that Summers County would elect one delegate who was a resident of that county.

<sup>6</sup>This complete lack of any population change in the former 26<sup>th</sup> District also serves to confirm that Monroe County's population did not change either as erroneously reported by the U.S. Census Bureau. The Alderson Federal Prison is located completely within the 26<sup>th</sup> District despite straddling the Monroe/Summers County line. Therefore, the decision by the census takers to count the prison population with Monroe County in 2000, and then back with Summers County in 2010, had no effect whatsoever on the population figures for the 26<sup>th</sup> District overall.

enjoyed the benefits of having a responsive and locally-based single-member district.<sup>7</sup>

Unfortunately, and for reasons which remain unclear to the Petitioners herein even at this date, the legislature determined that it was necessary to alter the delegate apportionment scheme affecting Monroe County despite the complete lack of any change in the population of our area. The legislature first attempted to split Monroe County into three different delegate districts,<sup>8</sup> but after the Petitioners herein bitterly complained on behalf of their citizens, the end result was mitigated only slightly by carving the county into two pieces, rather than three, and thereby throwing our

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<sup>7</sup>One can certainly argue that the configuration of the 26<sup>th</sup> District was not entirely fair to our sister county of Summers because it was not left intact, and that this disparity therefore justified a reapportionment in this area. However, as discussed *infra*, the new scheme likewise carves up Summers County once again and leaves it without a guaranteed delegate as before.

<sup>8</sup>Under the initial redistricting plan which was passed as part of House Bill 106 in early August, 2011, the northern end of Monroe County was to be included with Greenbrier County as part of the new 41<sup>st</sup> District where there would have been a population disparity of 33,589 to 5,294 in favor of Greenbrier County; the extreme southern end of our county was to have been included with parts of Mercer County in the new 27th District where it was to be outnumbered by a total of 55,513 to 2,826; and, the middle part of our county was to be aligned with the entirety of Summers County as part of the new 28th District where it faced a population differential of 13,927 to 5,382. See generally, House Bill 106 Plan Components Report, Petitioners' Exhibit 4, A.R. 8-10. Not even our county seat of Union would have been left whole, as the area around it was to have been split between the new Districts being formed with Greenbrier and Summers counties. Fortunately, House Bill 106 was vetoed by Acting Governor Tomblin for "technical" errors, after the Petitioners vocalized their complaints with this proposal to his office.

residents into two separate multi-member districts. Accordingly, unless this Court grants the relief requested herein, the citizens of Monroe County will be voting for members of the House of Delegates in both the newly formed 28<sup>th</sup> and 42<sup>nd</sup> Districts, as per the amendments to W.Va. Code § 1-2-2, included in Enrolled House Bill 201 which became effective on August 21, 2011.<sup>9</sup>

As shown by the Enrolled House Bill 201 Map,<sup>10</sup> Petitioners' Exhibit 5, A.R. 13, a large part of Monroe County is now joined with part of Summers County, and a part of Raleigh County, to form the 28<sup>th</sup> District, which will elect two members to the House of Delegates. See also District 28 Regional View, Petitioners' Exhibit 6, A.R. 14; and, District 28 Map, Petitioners' Exhibit 7, A.R. 15. A look at the map, Petitioners' Exhibit 5, A.R. 13, suggests this is probably one of the 7 or 8 largest districts, size-wise, in the state. Per the House Bill 201 Plan Components

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<sup>9</sup>Due to the overall length of Enrolled House Bill 201, and the fact that only a small portion of it actually deals with Monroe County, an entire copy of the Bill has not been included with the Appendix Record submitted herewith. (The Petitioners are also cognizant of the fact that certain companion Petitions have already been filed with regard to this matter, and that complete copies of Enrolled House Bill 201 have been previously provided to this Court.) However, the Petitioners will supplement the Appendix Record herein provided if deemed necessary by this Court.

<sup>10</sup>This map may be accessed online at the legislature's website, and is much easier to view and understand in color. The website address is:  
<http://www.legis.state.wv.us/legisdocs/2011/2x/maps/house/House%20Bill%20201%20Final%20Map.pdf>

Report (as prepared by the legislative staff), Petitioners' Exhibit 8, A.R. 18, although Monroe County probably has the largest land area included in the 28<sup>th</sup> District of the three counties involved, it also has the lowest population total. Raleigh County has 15,990 citizens in this district; Summers 11,759; and, Monroe comes in last at 11,160. Id.

When the Petitioners learned of the legislature's revised plans for Monroe County prior to passage of House Bill 201 (after the initial redistricting bill, House Bill 106, was vetoed by the Acting Governor), it once again protested (to those in Charleston willing to listen)<sup>11</sup> that if the county were placed in such a district with those population totals, then the voters of Raleigh County could simply elect the two delegates from this new district by themselves. Consequently, House Bill 201 was amended on the floor prior to the final vote, and a proviso was added so that the final language creating the 28<sup>th</sup> District reads as follows:

District twenty-eight is entitled to two delegates; not more than one delegate may be nominated, elected or appointed who is a resident of any single county within the district[.]

W.Va. Code § 1-2-2(b)(28) (as amended by Enrolled House Bill 201).

Thus, as it stands now, of the three counties which have parts of

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<sup>11</sup>It is worth noting that the Petitioners herein, as the governing body of Monroe County, were given no formal warning that our county delegate configuration was about to be drastically altered in a negative fashion, nor were the Petitioners provided with notice of any hearing they could attend to learn of such plans or to protest them.

their territory included within the 28<sup>th</sup> District, only two will have a representative in the House of Delegates at any one time. And, since Monroe County has the lowest total of voters within the district, it certainly seems more likely than not that it will be the county without any representation most of the time.

Unfortunately, the situation is drastically worse for the remaining voters of Monroe County. The enlarged view of the Monroe County region on Petitioners' Exhibit 6, A.R. 14, shows that the extreme northern portion of Monroe County has now been included with a part of eastern Summers County, and the vast majority of Greenbrier County, to form the new 42<sup>nd</sup> District. See also District 42 Map, Petitioners' Exhibit 9, A.R. 23. As confirmed by the House Bill 201 Plan Components Report (prepared by the legislative staff), Petitioners' Exhibit 8, A.R. 20, the Monroe County (2,342) and Summers County (2,168) voters in this district are hugely outnumbered by those in Greenbrier County (34,361). It therefore appears to be a virtual impossibility for any resident of Monroe or Summers County to ever be elected as one of the two delegates from this district (and there is no proviso attached to this portion of the amended statute preventing both delegates being elected from Greenbrier County).

There seems to be no rational reason for having combined portions of Monroe and Summers with Greenbrier for the purpose of making a two-member delegate district. Per the Population Summary

Report (prepared by the legislative staff), Petitioners' Exhibit 10, A.R. 25, the ideal size for a two-member delegate district as noted thereon is 37,060. However, as shown on the County Population Change Report (also prepared by the legislative staff), Greenbrier County had a 2010 population of 35,480 by itself. Petitioners' Exhibit 1, A.R. at 1. That total is only 1,580 persons less than the ideal number and deviates therefrom by only 4.26%. Greenbrier County could therefore have stood on its own as a two-member delegate district without adding or subtracting any additional population from or to it.

Of course, that would only have worked if no territory had been taken away from Greenbrier County and added to another delegate district. However, the map of the new districts created by House Bill 201, Petitioners' Exhibit 5, A.R. 13, along with the companion House Bill 201 Plan Components Report, Petitioners' Exhibit 8, A.R. 19, indicates that the northwestern corner of Greenbrier County was cut away and added to a part of Nicholas County to form the new 41<sup>st</sup> District. This move displaced 1,119 Greenbrier County voters thereby requiring that approximately 846 voters be added back to Greenbrier to get within the apparent goal of a 5% or less deviation. However, it is clear from simple addition and subtraction that even if there was some valid and rational reason to disregard the Greenbrier County boundary lines and take population away from it, there was still no need to take

so many voting citizens out of Monroe and Summers counties to achieve the goal of getting Greenbrier County back inside the accepted deviation range from the ideal population number.

The end result of the passing of House Bill 201 is a severe dilution of the voting power of Monroe County citizens. The residents of our county will be in the minority in each of the two delegate districts in which they have been placed. The Petitioners, as the governing body of Monroe County, thereby feel compelled to file this Petition on behalf of its citizens who are aggrieved by this serious deprivation of their rights as citizens of our county and this state. This situation is made even worse by the already limited voice that Monroe County has as a result of its small population. A county with a larger population might yield some of its excess population for the purpose of equalizing the size of voting districts, but Monroe County cannot afford to lose a single resident due to its already diminutive stature.

To break apart Monroe County into different delegate districts also ignores the fundamental role that counties play in West Virginia government. For small, rural counties such as Monroe, the county government is the primary governing body.<sup>12</sup> The county levies and collects taxes, provides law enforcement and

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<sup>12</sup>Monroe County has two small towns entirely within its borders, Union and Peterstown, which do have mayors and town councils. Also, the town of Alderson is partially located in Monroe County. However, the vast majority of Monroe County residents are governed solely by county-level authorities.

prosecution, collects and indexes property and estate records, and provides circuit, family and magistrate courts for the resolution of civil and criminal matters. And, in a small county such as Monroe, the county board of education is typically the largest single employer. To the persons who live here, Monroe County is our collective identity.

The importance of the role of county governments, and the shared identity of the persons living within the same county cannot be overstated. As the Supreme Court of North Carolina observed when considering the importance of respecting county lines in the redistricting process:

Counties serve as the State's agents in administering statewide programs, while also functioning as local governments that devise rules and provide essential services to their citizens. This Court has long recognized the importance of the county to our system of government:

The counties of this state . . . are . . . organized for political and civil purposes . . . . The leading and principal purpose in establishing them is[ ] to effectuate the political organization and civil administration of the state, in respect to its general purposes and policy which require local direction, supervision and control, such as matters of local finance, education, provisions for the poor, . . . and in large measure, the administration of public justice. It is through them, mainly, that the powers of government reach and operate directly upon the people, and the people direct and control the government. They are indeed a necessary part and parcel of the subordinate instrumentalities employed in carrying out the general policy of the state in the administration of government. They constitute

a distinguishing feature in our free system of government. It is through them, in large degree, that the people enjoy the benefits arising from local self-government, and foster and perpetuate that spirit of independence and love of liberty that withers and dies under the baneful influence of centralized systems of government.

Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 385-86 (2002) (citing White v. Commissioners of Chowan Cty., 90 N.C. 437, 438 (1884); see also Southern Ry. Co. v. Mecklenburg Cty., 231 N.C. 148, 150-51, 56 S.E.2d 438, 439-40 (1949)).

Even our own legislature previously recognized the fundamental importance of giving each and every county in our state its distinct voice in the House of Delegates, as it actually defied the state constitution in order to do so. For the first half of the 20<sup>th</sup> century the legislature apparently gave a delegate to each county regardless of strict population requirements forbidding such a practice. See Robertson v. Hatcher, 148 W.Va. 239, 255-56, 135 S.E.2d 675, 685-86 (1964) (noting that just because the legislature had been assigning a delegate to every county in the state for more than 50 years contrary to the clear and unambiguous language of the state constitution was not a justification to continue to do so, and distinguishing language to the opposite effect in State ex rel. Armbrrecht, et al. v. Thornburg, et al., 137 W.Va. 60, 70 S.E.2d 73 (1952) as mere dicta).

## SUMMARY OF ARGUMENT

The Petitioners herein contend that they are entitled to a Writ of Prohibition, and a permanent injunction restraining the enforcement, operation and execution of W.Va. Code § 1-2-2, as amended by Enrolled House Bill 201, and relating to the apportionment of membership of the House of Delegates, upon the grounds that the statute, as amended, is unconstitutional in its application to Monroe County.

The Petitioners believe that although the House of Delegates apportionment scheme as set out in our state constitution in Article VI, Sections 6 and 7, has been permanently altered as the result of federal equal protection concerns under the 14<sup>th</sup> Amendment to the Constitution of the United States, the plain language of said provisions, and the history of delegate apportionment in our state, still require that counties such as Monroe County be left whole, and their boundaries respected, when they are added to a delegate district. W.Va. Code § 1-2-2, as amended, instead directs that Monroe County be split into two parts which are then added to two different multi-member delegate districts.

The Petitioners likewise believe that it is inappropriate to place a county such as Monroe County into a multi-member delegate district where it is outnumbered by the other participants in said district. Breaking a county up and then putting it into a multi-member district where it is numerically outnumbered raises a

question of equal protection under Article II, Section 4, of the Constitution of West Virginia, if the county, as a political subdivision, still merits protection and safeguarding under West Virginia jurisprudence.

In addition to the apparent state constitutional violations, the Petitioners can also demonstrate mathematically that the seemingly random and highly prejudicial reapportionment of the House of Delegates membership in the region where Monroe County is located was simply unnecessary, as other simple and reasonable alternatives existed. For these reasons, the Petitioners believe they are entitled to the relief sought herein.

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

This case is appropriate for a Rule 20 argument because it involves: (1) Issues of first impression; (2) issues of fundamental public importance; and, (3) constitutional questions regarding the validity of a statute.

#### **ARGUMENT**

W.Va. Code § 1-2-2, as amended by Enrolled House Bill 201, violates the provisions of the Constitution of West Virginia in its application to Monroe County. The legislature was not entitled to reapportion delegates by placing parts of Monroe County in two different delegate districts. Neither was the legislature permitted to assign these parts of Monroe County to multi-member

delegate districts in the absence of a compelling state interest requiring it to do so. For these reasons, W.Va. Code § 1-2-2, as amended, should be declared unconstitutional and invalid, and the Respondent Secretary of State should be directed not to hold or conduct elections for the House of Delegates pursuant to its provisions.

- I. The Constitution of West Virginia requires that counties with insufficient population to create their own delegate district be kept whole when they are combined with other counties, or parts of counties, to form a delegate district.**

Article VI, Sections 6 and 7, of the Constitution of West Virginia sets out the procedure for the apportionment of membership in the House of Delegates among the counties of our state, and requires that such membership be reapportioned after each decennial census. These provisions must be interpreted and construed in light of federal equal protection requirements. However, it is clear that the primary focus of our state constitution based apportionment scheme for the House of Delegates is the individual counties themselves, and county boundary lines should be respected throughout the redistricting process.

- A. Our state constitution provisions for apportionment in the House of Delegates are whole-county based.**

Article VI, Sections 6 and 7, of the Constitution of West Virginia sets out the following method for apportioning membership in the House of Delegates:

For the election of delegates, every county containing a population of less than three fifths of the ratio of representation for the House of Delegates, shall, at each apportionment, be attached to some contiguous county or counties, to form a delegate district.

After every census the delegates shall be apportioned as follows: The ratio of representation for the House of Delegates shall be ascertained by dividing the whole population of the state by the number of which the House is to consist and rejecting the fraction of a unit, if any, resulting from such division. Dividing the population of every delegate district, and of every county not included in a delegate district, by the ratio thus ascertained, there shall be assigned to each a number of delegates equal to the quotient obtained by this division, excluding the fractional remainder. The additional delegates necessary to make up the number of which the House is to consist, shall then be assigned to those delegate districts, and counties not included in a delegate district, which would otherwise have the largest fractions unrepresented; but every delegate district and county not included in a delegate district, shall be entitled to at least one delegate.

Constitution of West Virginia, Article VI, Sections 6 and 7 (emphasis supplied). This Court has previously found these provisions of Article VI, and the mathematical procedure set out therein, to be clear and unambiguous. See generally, Robertson v. Hatcher, 148 W.Va. 239, 135 S.E.2d 675 (1964).

Apart from the mathematical requirements of Sections 6 and 7, what is equally clear and unambiguous about this language is that it is premised upon leaving counties whole as part of the delegate assignment process. At no point in the constitution is there any leeway permitted for the splitting of a county, nor can this even be envisioned from this wording. The plain intent of these sections is that delegates can only be apportioned to either

counties or delegate districts, and that delegate districts are formed from whole counties. If a county does not have enough population to merit its own separate delegate, then Section 6 makes it quite clear that the "county" shall be placed into a delegate district as opposed to authorizing some part or portion of a county to be so situated.<sup>13</sup>

One might try to suggest that because the constitutional provisions for the creation of senatorial districts specifically forbids the crossing of county lines that the absence of such a restriction in Section 7 permits county boundaries to be disregarded when apportioning delegates. Article VI, Section 4 of the Constitution of West Virginia is certainly quite detailed in providing requirements to which senatorial districts must adhere:

For the election of senators, the state shall be divided into twelve senatorial districts, which number shall not be diminished, but may be increased as hereinafter provided. Every district shall elect two senators, but, where the district is composed of more than one county, both shall not be chosen from the same county. The districts shall be compact, formed of contiguous territory, bounded by county lines, and, as nearly as practicable, equal in population, to be ascertained by the census of the United States. After every such census, the Legislature shall alter the senatorial districts, so far as may be necessary to make them conform to the

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<sup>13</sup>The federal court in Goines v. Rockefeller, 338 F.Supp. 1189 (S.D.W.Va. 1972) reached a different conclusion in dicta at the end of its opinion stating: "The Court does not read in Section 7 any clear requirement that delegate districts be 'bounded by county lines.'" However, the Court seemed to ignore the plain wording of this section which does not authorize the creation of delegate districts in the first place for anything other than the lumping together of counties. Id. at fn 2.

foregoing provision.<sup>14</sup>

However, the constitutional provisions for the drawing of senatorial districts do not diminish or detract from the county-centric nature of the delegate apportionment language at all.

When one compares the sections there is an immediately obvious difference between the two. The delegate provisions in Sections 6 and 7 provide a precise mathematical formula for dividing up and assigning delegates to various whole counties (or delegate districts comprised of whole counties), while the senatorial district provisions have more of a vague requirement for keeping the population equal across districts "as nearly as practicable". Since there would obviously be a need for considerable jigsaw puzzle type work in order to equalize populations in senatorial districts, it was clearly necessary for the framers of our constitution to include restrictive language in Section 4 precluding the crossing of county lines. That same language was completely unnecessary in Section 7 because the drafters never even foresaw counties being split due to their use of the mathematical formula to equalize delegate assignment within population tolerance limits acceptable at the time.

The only conclusion that one can reach after reading these provisions of our state constitution is that it was never intended

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<sup>14</sup>These same constitutional requirements for the creation of senatorial districts have also been codified in W.Va. Code § 1-2-1.

for counties to be split up in any fashion when it came to the apportionment of delegates. The authors of our constitution did plan for combining low-population counties together with adjacent counties in order to achieve a certain threshold level of population prior to permitting the assignment of a delegate, but they obviously never predicted nor permitted the use of large multi-member districts joining various pieces and parcels of multiple counties together. This conclusion is further strengthened by the initial apportionment of delegates as set out in Article VI, Sections 8 and 9, of the Constitution of West Virginia, wherein whole counties were used in the formation of delegate districts (apparently where required by virtue of population concerns), and then delegates were assigned to either delegate districts and/or whole single counties. No counties were split or divided in any way, shape or form, by the persons who wrote and approved our current constitutional language.

Consequently, although the mathematical procedure of Article VI, Sections 6 and 7, must now yield to modern federal equal protection concerns, the clear intent of the language to preserve county boundary lines as part of the apportionment process should not be cast aside. Our state has a long history of honoring county boundaries in the delegate selection process, and counties are integral and important parts of the life of all West Virginians. This Court should therefore hold that the provisions of Article VI,

Sections 6 and 7, provide a mandate for observing the sanctity of county lines - especially with regard to keeping smaller counties intact - when forming delegate districts, subject only to the requirements of federal equal protection law. See generally Butcher v. Bloom, 203 A.2d 556, 415 Pa. 438 (1964) (construing the Pennsylvania state constitution as requiring that county and other political subdivision lines be respected in the redistricting process unless equal protection population concerns cannot otherwise be satisfied); and, Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377 (2002) (upholding specific whole-county provisions in that state's constitution subject only to the Voting Rights Act and equal protection requirements).

**B. Federal equal protection law does not preclude keeping smaller counties whole, or respecting county boundary lines, as part of the delegate reapportionment process.**

The problem with the current apportionment scenario is that the legislature has apparently taken the position that federal equal protection concerns have completely abrogated our state constitution provisions regulating the apportionment of membership in the House of Delegates. A quick look at the map showing the end result of Enrolled House Bill 201, Petitioners' Exhibit 5, A.R. 13, reveals that in many areas of the state there is a hodgepodge of delegate districts with numerous dashed lines indicating where county lines have been crossed by delegate district lines. These various districts also contain a mixture of single-member and

multi-member districts without any apparent cohesive rationale or plan. See Population Summary Report, Petitioners' Exhibit 10, A.R. 24-26.

In this legal environment the legislature obviously feels that it can operate with impunity in the creation of delegate districts subject only to staying within the limits of federal equal protection concerns and the population equality requirements therein. It is obvious that the legislature perceives little obligation to conform its delegate district plans to adhere to county, political subdivision, historical and natural boundary lines. And, as based upon the amount of public input which the House of Delegates sought and permitted for its plan, it seems equally clear that the membership there cares little for the concerns of the public. The legislature is essentially acting under the guise of federal equal protection concerns to disregard and ignore any and all state constitutional mandates for legislative redistricting which remain viable. Therefore, the task facing this Court is to instruct the legislature with specific guidelines setting out just what it can and cannot do pursuant to the provisions of our state constitution in the formation of delegate districts as modified by federal law.

Any student of federal equal protection law is intimately familiar with the "one person, one vote" standard as applied to the apportionment of state legislatures in Reynolds v. Sims, 377 U.S.

533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). And, as a result of Reynolds, it is undisputed that the mathematical formula set out in Article VI, Sections 6 and 7, of our state constitution for apportionment of the House of Delegates can no longer be used as written. See generally Goines v. Rockefeller, 338 F.Supp. 1189 (S.D.W.Va. 1972). As a result of the Reynolds decision, state legislatures must generally comply with a maximum deviation of no more than 10% from the ideal population number for a voting district, see, e.g., Connor v. Finch, 431 U.S. 407, 418, 97 S.Ct. 1828, 1835, 52 L.Ed.2d 465 (1977).<sup>15</sup>

These variances were permitted because the Reynolds Court never suggested that political subdivisions such as counties should simply be disregarded in the reapportionment process. In fact, that Court stated quite the opposite in recognizing that population variances are permissible for the express reason that such political subdivisions are worthy of protection:

A consideration that appears to be of more substance in justifying some deviations from population-based

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<sup>15</sup>A deviation of up to 16.4% was approved for a Virginia state legislature reapportionment plan on the basis of maintaining the integrity of state political subdivisions such as counties and cities, Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973); and, a deviation of 11.9% was upheld for a New York plan for the same reasons, Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971). The Supreme Court went even further in Brown v. Thomson, 462 U.S. 835, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983), permitting an 89% maximum deviation for a single Wyoming county, but that decision was expressly limited to the unique facts presented therein and is of no real precedential value.

representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called legislation, directed only to the concerns of particular political subdivisions.

Reynolds, 377 U.S. at pp. 580-81. In fact, the Court went on to point out that "a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering." Id. at 581. So while the county-centric provisions of our state constitution with regard to the House of Delegates apportionment must yield to the "one person, one vote" requirements of the 14<sup>th</sup> Amendment, they cannot, and should not, simply be disregarded.

This Court needs to confirm for the legislature that although the mathematical basis for assigning delegate districts under our state constitution may no longer be completely constitutionally valid, the fundamental concept of respecting county boundary lines must still be given as much effect as possible. To permit the legislature to apportion delegates without any care at all for political subdivisions, and to tear counties apart for no rational reason, is simply unacceptable. As the Reynolds Court warned: "Indiscriminate districting, without any regard for political

subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." Reynolds, 377 U.S. at 578-79. And at this point in West Virginia, it appears very clear that we have crossed over the precipice of such "indiscriminate districting", and the only question now is how far we are willing to permit the legislature to go.

**II. The Constitution of West Virginia implies a preference for the creation of single-member delegate districts, at least with respect to counties that would have qualified for a delegate under former law.**

The Population Summary Report, Petitioners' Exhibit 10, A.R. 24-26, shows that the latest round of delegate redistricting has resulted in the creation of sixty-seven delegate districts. Of that number, twenty, or almost one-third, are multi-member districts (and nine of those have three or more members). It is difficult to argue that the Constitution of West Virginia does not permit the formation of multi-member districts since Article VI, Sections 8 and 9, included twelve multi-member districts in the initial apportionment of forty-seven total delegate districts.<sup>16</sup>

However, the individuals who approved our state constitution only sanctioned multi-member districts that consisted of one whole county, or multiple whole counties which were placed together

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<sup>16</sup>Of course, our state constitution also provides for two state senators to be elected from each senatorial district. Article VI, Section 4. However, the senatorial multi-member districts are uniform across the entire state, and no voter has any advantage or disadvantage over another by their use.

because at least one of them had an insufficient population total for its own delegate. Therefore, the type of multi-member districts approved by the framers of our constitution are not the same as the multi-member district into which Monroe County has been placed along with pieces of two other counties.

Furthermore, multi-member districts are generally looked upon with disfavor because of the potential for a voter in a multi-member district to have a disproportionate level of influence by being permitted to vote for more legislative members than a voter in a single-member district. However, although the United States Supreme Court has directed its District Courts to exercise a preference for single-member districts, Connor v. Johnson, 402 U.S. 690, 692, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971) ("We agree that when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter."); it has thus far failed to hold such districts to be unconstitutional per se, Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971).

On the other hand, at least three state courts have found the general use of multi-member districts to be objectionable or even unconstitutional. In Kruidenier v. McCulloch, 258 Iowa 1121, 142 N.W.2d 355, cert. denied, 385 U.S. 851, 87 S.Ct. 79, 17 L.Ed.2d 80 (1966), the Iowa Supreme Court stated:

Any scheme of legislative apportionment in which there are multi-member districts and single-member districts in

the same house impairs the right of a resident of a single-member district to have the laws operate uniformly as guaranteed by Section 6, Article I of the Constitution of Iowa. Such impairment violates his constitutional rights unless it can be shown such peculiar circumstances exist that a rational plan of apportionment cannot be achieved by using all single-member districts. We do not foreclose the possibility that in some instances there may be legitimate considerations which would make some multi-member districts constitutionally permissible.

Kruidenier, 142 N.W.2d at 371.

Likewise, the Supreme Court of North Carolina recently reached a similar conclusion, and as part of its analysis made the following observations:

We observe, as amicus alleges, that voters in single-member legislative districts, surrounded by multi-member districts, suffer electoral disadvantage because, at a minimum, they are not permitted to vote for the same number of legislators and may not enjoy the same representational influence or "clout" as voters represented by a slate of legislators within a multi-member district. Conversely, voters in multi-member districts invariably suffer the adverse consequences described by the United States Supreme Court: unwieldy, confusing, and unreasonably lengthy ballots; and minimization of minority voting strength.

Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377 (2002) (citing Thornburg v. Gingles, 478 U.S. 30, 47, 106 S.Ct. 2752, 2765, 92 L.Ed.2d 25, 44 (1986); Chapman v. Meier, 420 U.S. 1, 15, 95 S.Ct. 751, 760, 42 L.Ed.2d 766, 778 (1975); Fortson v. Dorsey, 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401, 405 (1965)). Thereafter, that Court determined to apply a "strict scrutiny" standard to the use of multi-member districts since it involved the fundamental right of voting, Stephenson, 562 S.E.2d at 393, and

then ultimately decided:

In our view, use of both single-member and multi-member districts within the same redistricting plan violates the Equal Protection Clause of the State Constitution unless it is established that inclusion of multi-member districts advances a compelling state interest.

Id. at 395.

Finally, the Pennsylvania Supreme Court also weighed in on the issue of multi-member districts and noted its objection to their indiscriminate use and the pitfalls that awaited:

While we do not believe that the creation of multi-member districts of itself, would violate the Federal Constitution simply because the voters in a particular district (where justified by population) would vote for two or more representatives while those in another district would vote for a lesser number, we do believe that a legislative scheme which creates singlemember districts and multi-member districts in an arbitrary manner would be objectionable. We would agree with the district court, however, that in the absence of any reasonable justification (historical or otherwise), such districting might be the result of gerrymandering for partisan advantage and, in that event, would be arbitrary and capricious. In light of the constitutional pitfalls inherent in such a districting scheme, it would be more prudent to approach the matter of apportionment by setting up single-member districts unless valid and compelling reasons exist which require the creation of some multi-member districts.

Butcher v. Bloom, 415 Pa. 438, 467-68, 203 A.2d 556, 572-73 (1964).

In addition to these general concerns about the use of multi-member districts, there are at least two specific concerns of peculiar interest to Monroe County. First, the citizens of Monroe County must question the rationale behind allowing some of the more populous counties, such as Kanawha, to have large multi-member

districts completely within their borders, while other populous counties close to Monroe (and which potentially affect its configuration) such as Greenbrier, Raleigh and Mercer are treated differently? Secondly, what part of our state constitution allows three pieces of three separate counties to be put together to form one multi-member delegate district (which is so dysfunctional that it needs a proviso added just to keep one of the pieces from dominating the other two)?

It seems that these are equal protection arguments which should be covered by the equal protection provision of our state constitution, Article II, Section 4, which states:

Every citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved.

Certainly Monroe County is being denied equal representation when the state legislature is permitted to create multi-member districts at its whim anywhere in the state without stating a compelling reason it was required to do so. This is particularly true when our county is placed in a dysfunctional multi-member district, while the more populous counties next to us are denied large multi-member districts within their own borders.

Furthermore, is Monroe County receiving equal representation under the law when our state constitution provides that if a county does not have sufficient population to merit its own delegate, then the whole county is to be placed into a delegate district rather

than just a piece of it, or does the trumping of the mathematics by federal equal protection concerns wipe out this language as well? And, since Monroe County would have been entitled to its own delegate under the now invalid "three fifths" rule of Article VI, Section 7 (since its population level is more than 60% of the ideal number), does that not suggest that it should at least be given preference for its own single-member district in combination with excess population from an adjoining county if such a possibility exists?

What little voice Monroe County had in state politics has been seriously diluted by splitting it in two, and putting the remnants in multi-member districts where they are outnumbered by the other participants. Such a result can certainly not equate to equal representation under our state constitution equal protection provision. If there is some compelling reason that Monroe County needed to be treated this way for the first time in the history of our state, then please make the legislature explain. If not, then this plan must fail because it does not treat Monroe County as equally as it does so many other counties whose borders have been preserved throughout this process.

**III. W.Va. Code § 1-2-2, as modified by Enrolled House Bill 201, violates the Constitution of West Virginia as applied to Monroe County.**

The Petitioners concede that it will never be possible to comply 100% with the requirements of the 14<sup>th</sup> Amendment in the

drawing of delegate districts and to also honor all county lines. However, when determining which county lines to adhere to first, there should be no doubt that those counties with the smallest population must be the initial focus, as they need the most protection in order to preserve their already limited voice in state government. That result is demanded by our state constitution which speaks only in terms of whole counties, and such a concept is in no way repugnant to federal equal protection requirements. The population equalization mandates of federal law must be complied with, but they only require breaking from county lines when absolutely necessary.

There is of course no debate that Monroe County cannot have the delegate given to it by the wording of our state constitution due to those equal protection mandates. Although Monroe County meets the "three fifths" rule set out in Article VI, Sections 6 and 7,<sup>17</sup> to give Monroe County its own delegate would clearly violate the 14<sup>th</sup> Amendment.<sup>18</sup> The citizens and residents of this county can understand and appreciate the importance of creating uniformly

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<sup>17</sup>The ideal population size for a delegate district as based upon the 2010 census results is 18,530, which is arrived at by dividing the total population of our state (1,852,994), by the total number of delegates (100). Monroe County is 5,028 citizens short of reaching that number which results in a population deviation from the ideal of 27.13%.

<sup>18</sup>The 27.13% deviation clearly exceeds the maximum limit of 10% as allowed under federal law (and even exceeds the 16.4% deviation permitted in Mahan, supra).

equal voting districts within the required deviation range, and can therefore accept that they will never have a delegate solely for their county unless there is a significant increase in our population. But what they cannot comprehend is why their small county has been torn in two, and become even more of a minority player than it already was, in its two delegate district homes.

If Monroe County is not to have its own delegate, then it should be placed in a single-member district using excess population from an adjoining county if that option is available. In that manner its citizens would still enjoy the privilege of exercising their political influence as a unit with a common bond. This result is completely consistent with our state constitution which contemplates counties staying together as a whole, and also avoids the pitfalls of multi-member districts (where a smaller population such as ours loses its influence and political clout).

Perhaps most importantly, this is an option which it appears was very much open to the legislature during this round of redistricting. A quick glance at the County Population Change Report, Petitioners' Exhibit 1, A.R. 1, demonstrates that the populations of the counties surrounding Monroe (Greenbrier, Summers, Mercer and Raleigh), and which therefore affect how it may be configured, all were very stable from 2000 to 2010 (with the exception of the census error affecting Monroe and Summers which is discussed *supra*, fn. 2). The largest change was in Greenbrier

County which had a population increase of 3.0%. Id.

As discussed *supra*, pp. 8-9, the population increase in Greenbrier County was actually a good thing, as it qualified that county to continue to maintain its own separate multi-member delegate district wholly within its own borders. Its population of 35,480 put it well within federal equal protection limits with a total deviation of 4.26%. Of course, as also mentioned *supra*, pp. 8-9, our legislature inexplicably decided in its infinite wisdom to take citizens out of Greenbrier County and add them to a Nicholas County delegate district which did not even need them.<sup>19</sup>

Similarly, Raleigh County, with 78,859 citizens, id., had enough population for four delegate districts (totaling 74,120) with an excess population of 4,739 which could have then been joined with a wholly intact Summers County (13,927), id., to create an almost perfect single-member district consisting of 18,666 persons with a deviation of 0.7%. Finally, Mercer County, with a total population of 62,264, id., had more than enough citizens for

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<sup>19</sup>As noted *supra*, pp. 8-9, 1,119 citizens from northwestern Greenbrier County were moved into the new 41<sup>st</sup> District with a part of Nicholas County. However, those residents did not even need to be added to the Nicholas County district as it already contained 17,679 people on its own. Since the ideal size of a single-member district is 18,530, the Nicholas County portion of this district only lacked a total of 851 persons, for a total deviation of 4.59% which is within the federal equal protection limits, and is better than the deviation of *both* the districts into which the pieces of Monroe County have been placed. There is simply no rhyme or reason for these decisions which totally ignore political subdivision lines for some ulterior motive which cannot be discerned through rational thought processes.

three delegate districts (55,590), leaving 6,674 in excess population. If 5,000 persons from Mercer County were then combined with Monroe County into a single-member district (and the remaining 1,600 stayed with Mercer County), then the resulting districts would be well within the range of federal tolerance.<sup>20</sup>

This arrangement would have resulted in two very large counties giving up a small portion of their population to create single-member districts with two smaller counties, without in any way giving up a single delegate from either of the larger counties. Meanwhile, the smaller counties would each have then had a very good prospect of electing a resident from within their own borders, although the contingent added to them from the larger counties must to be acknowledged and respected by any potential candidates.

This solution must certainly be the constitutionally preferred result for this area of West Virginia rather than the current mess. If there was population loss in other areas of the state which requires adjustment in the delegate district lines, then let those

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<sup>20</sup>Another possible arrangement would be to simply combine Monroe with Mercer County, and Summers with Raleigh County. However, unless a proviso were added requiring that one delegate come from the smaller county in each such district, then these two counties would once again have virtually no chance at electing a delegate. This result would seem particularly unfair since both counties are guaranteed a delegate under the state constitution prior to consideration of federal equal protection concerns. Moreover, with a single-member district, any representatives who might be elected would need to be responsive to all citizens in their district, not just the ones from the whole counties.

adjustments be made in those counties where the population actually changed by any significant amount. There was, in the final analysis, no valid reason to tear Monroe County asunder. Our county could easily have been preserved in the manner set forth above which would have been not only fair to our citizens, but also more fair to the constituents residing in Greenbrier, Summers, Raleigh and Mercer counties. The end result of historic old Monroe County being ripped in two for unknown, and apparently irrational reasons, is both repugnant to the citizens who live here, and unconstitutional.

#### **CONCLUSION**

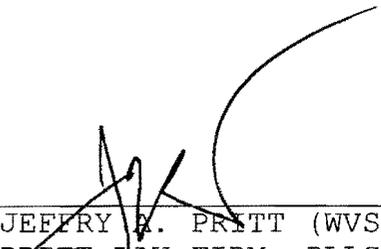
W.Va. Code § 1-2-2, as amended by Enrolled House Bill 201, violates the Constitution of West Virginia in its application to Monroe County. It is not permissible under our state constitution to divide a county into different delegate districts unless required to satisfy the population equalization provisions of the 14<sup>th</sup> Amendment to the Constitution of the United States. Even then, a county with a smaller population, such as Monroe County, should not be the county so divided as such division further erodes the limited political power it possesses. It should likewise not be permissible under our state constitution to place a smaller county, such as Monroe, into a multi-member district, where the voting power of its citizens are further diluted by being the least populous county so included.

Our legislature seems to be taking advantage of the legal vacuum that has been created by the federal invalidation of the mathematical procedure formerly used to apportion membership in the House of Delegates. As a result of the lingering uncertainty over the vitality of our state constitutional language in this area, the legislature has been permitted to operate with no guidelines, and no checks or balances. As a result, smaller counties such as Monroe, and its neighbor Summers, are suffering a deprivation of the limited political strength that they possess. This Court therefore needs to seize this opportunity to help define the state constitutional parameters under which our legislature may allocate its membership each decade for the benefit of not only Monroe County, but for all of the citizens of this state.

For these reasons this Court should issue a Rule to Show Cause to the Respondents asking that they demonstrate why the Petitioners' requested relief should not be granted; permit oral argument before the Court pursuant to Rule 20 of the West Virginia Revised Rules of Appellate Procedure; declare that Enrolled House Bill 201, as codified in W.Va. Code §1-2-2, violates Article II, Section 4, and Article VI, Sections 6 and 7, of the Constitution of the State of West Virginia; prohibit and restrain the Respondents from performing any official functions or taking any action which would implement the provisions of Enrolled House Bill 201; and, that the Court grant such other and further relief as to it may

seem proper.

THE COUNTY COMMISSION OF  
MONROE COUNTY, WEST VIRGINIA,  
acting by and through its members:  
Michael Shane Ashley, Clyde Gum, Jr.  
and William Miller, in their  
official capacities, and as citizens and  
residents of Monroe County, West Virginia  
By Counsel



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JEFFERY R. PRITT (WVSB #5573)  
PRITT LAW FIRM, PLLC  
P.O. Box 708  
Union, West Virginia 24983  
Counsel for Petitioners

**VERIFICATION**

I, Michael Shane Ashley, one of the Petitioners named in the hereto annexed PETITION FOR WRIT OF PROHIBITION, being by me first duly sworn according to law, upon his oath, states that the facts and allegations contained therein are true, except insofar as they are therein stated to be upon information and belief, and that insofar as they are therein stated to be upon information and belief, he believes them to be true.

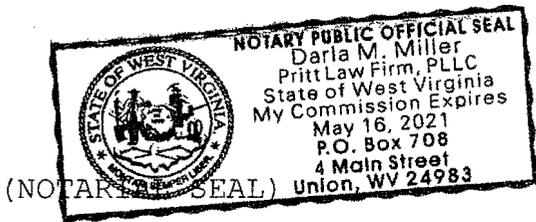
  
Michael Shane Ashley

STATE OF WEST VIRGINIA,

COUNTY OF Monroe, to-wit:

Taken, subscribed and sworn to before me this 3rd day November, 2011.

My commission expires May 16, 2021.



  
NOTARY PUBLIC

**CERTIFICATE OF SERVICE**

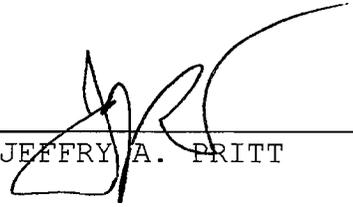
I, Jeffrey A. Pritt, counsel for the Petitioners, do hereby certify that service of the attached PETITION FOR WRIT OF PROHIBITION has been made upon the Respondents, and the Attorney General for the State of West Virginia, by depositing a true and correct copy thereof in the U.S mail, postage prepaid, by certified mail, return receipt requested with restricted delivery, and properly addressed as follows:

The Honorable Natalie E. Tennant  
Secretary of State  
Bldg. 1, Suite 157-K  
1900 Kanawha Blvd. East  
Charleston, West Virginia 25305-0770

The Honorable Richard Thompson  
Speaker of the House of Delegates  
Room 228M, Building 1  
State Capitol Complex  
Charleston, West Virginia 25305

The Honorable Darrell McGraw  
Attorney General  
State Capitol Complex,  
Bldg. 1, Room E-26  
Charleston, West Virginia 25305

this 3<sup>rd</sup> day of November, 2011.

  
\_\_\_\_\_  
JEFFRY A. PRITT