No. 11-1405 – *State of West Virginia ex rel. Thornton Cooper v. Natalie Tennant, Secretary of State of the State of West Virginia and Richard Thompson, Speaker of the West Virginia House of Delegates*

No. 11-1447 – *State of West Virginia ex rel. Stephen Andes and Joseph Haynes, individually and in official capacities as members of the County Commission of Putnam County, West Virginia; Brian Wood, individually and in official capacity as Putnam County Clerk; Bob Baird, Myles Epling and Rick Handley, individually and in official capacities as members of the County Commission of Mason County, West Virginia; and Diana Cromley, individually and in official capacity as Mason County Clerk v. Natalie Tennant, Secretary of State of the State of West Virginia and Richard Thompson, Speaker of the West Virginia House of Delegates*

No. 11-1516 – *State of West Virginia ex rel. County Commission of Monroe County, by and through its members: Michael Shane Ashley, Clyde Gum, Jr., and William Miller v. Richard Thompson, Speaker of the West Virginia House of Delegates; and Natalie E. Tennant, Secretary of State of the State of West Virginia*

No. 11-1517 – *State of West Virginia ex rel. Eldon A. Callen, Jim Boyce, Petra Wood, John Wood and Frank Deem v. Natalie Tennant, Secretary of State of the State of West Virginia*

No. 11-1525 – *State of West Virginia ex rel. Thornton Cooper v. Natalie Tennant, Secretary of State of the State of West Virginia*

FILED
July 20, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, J., dissenting, in part:

In its decision, the Majority finds no constitutional violations in either of our Legislature's new redistricting plans. Though I have lingering concerns about our westernmost senatorial district which extends from Mingo County to Mercer County, when viewed as a whole I do not disagree with the Majority that the redistricting plan for the Senate, which creates only multi-member districts with two representatives from each

district, satisfies minimum constitutional requirements. No matter where a voter may be in West Virginia, he or she has two, and only two, state senators.

However, I disagree with the majority's holding that the redistricting plan for the House of Delegates, which creates a strange mix of multi-member and single member districts, is constitutional. This particular mix of single and multi-member district representation in the House of Delegates—forty-seven single-member and twenty multi-member districts— impermissibly degrades the influence which a citizen may have *vis-a-vis* citizens elsewhere in the State. In my view, this mix of single and multi-member districts is constitutionally unacceptable.

Although not required by the federal Constitution, our state constitution requires that West Virginians be afforded equal representation in the state's government: "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." W. Va. Const. art. 2, § 4. Tied into the requirement of equal representation is the "one person, one vote" standard.[1] When a person is not adequately

[1]The "one person, one vote" standard was announced in *Gray v. Sanders*, 372 U.S. 368, 381 (1963):

> The conception of political equality from the Declaration of

(continued...)

represented in the government, his vote in electing the official(s) who represent(s) him or her counts for less. In other words, the person's vote is diluted. The concept of a representative democracy is degraded.

The concept of vote dilution is not one that our Court has previously addressed. It has been examined in other courts, both state and federal, and in scholarly publications, but largely in conjunction with § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.[2] Here, we are not dealing with the Voting Rights Act. Instead, we are dealing with a redistricting plan that gives much greater voting power to citizens of certain counties while giving little or no voting power to others.

(...continued)

> Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

[2]Section 2 of the Voting Rights Act involves vote dilution claims related to racial and language minorities. A violation of § 2 occurs

> where the "totality of the circumstances" reveal that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

Thornburg v. Gingles, 478 U.S. 30, 43 (1986) (quoting the Voting Rights Act) (omissions and alterations in original).

The theory of vote dilution is rooted in the premise that "voting" involves more than just casting a vote. Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663, 1677 (2001). It recognizes that a voter's representation and voice in government is limited if his vote counts for less than his neighbor's. "Under the structure of our representative system, an individual has the best chance of influencing the political process when she acts as part of a cohesive voting group that can cast its weight behind"a particular candidate or issue. *Id.* at 1678. In West Virginia, the most logical grouping is the county in which one lives. When some groups are given an opportunity to aggregate their votes in an effective way while others are not, the votes of those who cannot aggregate their votes are diluted. When dilution is so great that a citizen's vote does not effectively count, that person has effectively lost the benefit of his right to vote.[3]

Admittedly, it is difficult to design districts so that no vote dilution is ever present because there are many different factors that come into play, such as population, contiguity, compactness, race, preservation of communities of interest, and geography.[4] The

[3]There is no clearly delineated right to vote in the United States Constitution; however, the West Virginia Constitution does provide the right to vote in art. IV, § 1: "The male citizens of the State shall be entitled to vote at all elections held within the counties in which they respectively reside . . . ." Upon ratification of the Nineteenth Amendment to the United States Constitution in 1920, women became entitled to vote in West Virginia.

[4]"The many tangible and intangible factors to be considered in a legislative apportionment plan point to the inevitable conclusion that perfection cannot be attained in a workable plan satisfactory to all areas of our population today and tomorrow." *Goines v.*
(continued...)

factor the United States Supreme Court has declared the touchstone for redistricting is population. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("[T]he seats in both houses of a bicameral state legislature must be apportioned on a population basis."). The legislature is required to design districts of approximately equal population as practically as possible. *Id.* Although population is the primary consideration in developing a redistricting plan, the Legislature may not disregard all other factors. *Goines v. Heiskell*, 362 F. Supp. 313, 317 (S.D. W. Va. 1973).

The redistricting plan for the House of Delegates has a maximum population variance of 9.99%. While this maximum population variance is within acceptable bounds denoted by the federal courts,[5] the plan fails to adequately accommodate certain communities and counties. For instance, the redistricting plan splits the population of Kanawha County among seven districts. Of those seven districts, five—districts 35, 36, 37, 39, and 40—are completely within Kanawha County, and ten delegates are distributed among each of those five. Mason County, on the other hand, is split between two districts—districts 13 and 14. Three delegates are dedicated to these two districts, and none of these delegates is dedicated

[4](...continued)
Heiskell, 362 F. Supp. 313, 317 (S.D. W. Va. 1973).

[5]As the majority opinion notes, a number of cases have since addressed maximum percentage population variance and concluded that a deviation in populations from the ideal 10% or less is not *per se* violative of the principle of equal representation. *See, e.g.*, *Deem v. Manchin*, 188 F. Supp. 2d 651 (N.D. W. Va. 2002); *Holloway v. Hechler*, 817 F. Supp. 617 (S.D. W. Va. 1992).

to only Mason County. The residents of Mason County are not currently represented in the House of Delegates by a delegate from Mason County; all three of the delegates from these two districts are residents of Putnam County (which is a more populous county).

Under the redistricting plan, the residents of Mason County are not guaranteed to ever be represented by a delegate that is a resident of that county. Residents of Kanawha County, however, can aggregate their votes through at least ten delegates who are residents of Kanawha County. The voters in Kanawha County dilute the voting power of Mason County voters. Depending on election outcomes, Mason County may yet attain a resident delegate, but even if it does, the voting power of Mason County's residents will be at maximum 30% of the voting power of Kanawha County's residents. I find that this discrepancy is incongruent with the "one person, one vote" standard annunciated in *Gray v. Sanders*, 372 U.S. 368 (1963). Therefore, the redistricting plan for the House of Delegates violates the right to equal representation provided by W. Va. Const. art. 2, § 4.

For this reason, I respectfully dissent.