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JAN 15 2020

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NUMBER 19-1132

STATE OF WEST VIRGINIA, ex rel.,
JAMES CONLEY JUSTICE, II,
Governor of the State of West Virginia,

Petitioner,

v.

THE HONORABLE CHARLES E. KING, JR.,
Judge of the Circuit Court of Kanawha County,
and G. ISAAC SPONAUGLE, III,

Respondents.

DO NOT REMOVE
FROM FILE

RESPONDENT, G. ISAAC SPONAUGLE, III'S, RESPONSE TO PETITIONER'S PETITION FOR WRIT OF PROHIBITION

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QUESTION PRESENTED

Whether Petitioner is entitled to a writ of prohibition dismissing the Respondent's petition for writ of mandamus against him for his failure to meet a nondiscretionary requirement that he shall reside and keep his records, books and papers pertaining to the office of West Virginia Governor at the seat of government pursuant to Section 1 of Article VII of the West Virginia Constitution and W.Va. Code § 6-5-4 without showing the circuit court had no jurisdiction or exceeded its legitimate power OR where it is claimed that the Circuit Court exceeded its legitimate powers by (1) whether the Petitioner has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the Petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the Circuit Court's order is clearly erroneous as a matter of law; (4) whether the Circuit Court's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the Circuit Court's order raises new and important problems or issues of law of first impression?

STATEMENT OF CASE

HISTORY OF SECTION 1 OF ARTICLE VII OF THE WEST VIRGINIA CONSTITUTION

West Virginia has had two constitutions. The first ratified in 1863 and a second in 1872. The West Virginia Constitution of 1872 was ratified by the voters on August 22, 1872, which is the same constitution that governs the State of West Virginia today subject to certain amendments to it. Section 1 of Article VII of the West Virginia Constitution of 1872 provided the following:

The Executive department shall consist of a Governor, Secretary of State, State Superintendent of Free Schools, Auditor, Treasurer and Attorney General, who shall be *ex officio* reporter of the Court of Appeals. They shall, except the attorney General, reside at the seat of government during their terms of office, and keep there the public records, books and papers, pertaining to their respective offices, and shall perform such duties as may be prescribed by the fifth section of same

article declares that "the chief executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed.

"A 1934 amendment added the commissioner of agriculture to the list, and a 1958 amendment deleted the state superintendent of schools. The first of those amendments also changed the inauguration date from March to January, in order to shorten an outgoing administration's lame-duck period, and dropped an exception for the attorney general from the residency requirement." Bastress, Robert M. Jr., The West Virginia State Constitution (Oxford Commentaries on the State Constitutions of the United States) (pp. 219 of 381). Oxford University Press. Kindle Edition.

In 1876, three years after the voters of the State of West Virginia ratified the West Virginia Constitution, the Supreme Court of Appeals of West Virginia distinguished between nondiscretionary duties and discretionary duties in a case that centered around a legal fight over legislation that moved the seat of government from the city of Charleston to the city of Wheeling. The Supreme Court set forth that the state constitution unequivocally requires that the Governor shall reside at the seat of government during his term of office and keep there the public records of his office, was a nondiscretionary duty. 'It was his duty to do so, in fidelity to his oath of office to support the constitution of the State; and the constitution of the State unequivocally requires that he shall reside at the seat of government during his term of office, and keep there the public records of his office, and commands him, as the chief executive officer, in whom is vested the chief executive power, to "take care that the laws be faithfully executed.'" *Slack v. Jacob*, 8 W.Va.612, 657 (1875).

The 1875 language of Section 1 of Article VII of the West Virginia Constitution only granted discretion to the Attorney General regarding the place of residency of the officeholder. All other members of the executive department were constitutionally bound by the

nondiscretionary (mandatory) requirement that they shall reside at the seat of government. The discretion granted the Attorney General as to his place of residence was amended by the voters in 1934 and it is now a nondiscretionary (mandatory) constitutional requirement that the Attorney General also reside at the seat of government.

PETITIONER WAS ELECTED GOVERNOR & SWORE AN OATH TO OFFICE

On November 8, 2016, Petitioner was elected Governor by the citizens of the State of West Virginia. On January 16, 2017, his Inauguration took place at 1:00 p.m. at the West Virginia State Capitol, the seat of state government. Chief Justice Allen H. Loughry, II, administered the oath or affirmation of Office for Governor to the Respondent, wherein he swore the following:

“I, James Conley Justice, II, do solemnly swear that I will support the constitution of the United States of America, and the constitution of the State of West Virginia, and that I will faithfully discharge the duties of the office of Governor of the State of West Virginia to the best of my skill and judgment, so help me God.”

PETITIONER FAILS TO COMPLY WITH
NONDISCRETIONARY REQUIREMENT OF GOVERNOR

Petitioner has not resided at the seat of government during his term of office from January 16, 2017 through the filing of Respondent’s Petition for Writ of Mandamus. Petitioner, based on his own public admissions, has not spent more than a handful of nights, if any, at the West Virginia Governor’s Mansion located at 1716 Kanawha Blvd E, Charleston, West Virginia, since January 16, 2017 or at any other residence located within the seat of government, Charleston. In fact, Petitioner continues to reside in Greenbrier County, West Virginia. When he decides to go to work, which is not a regular occurrence, at the seat of government he drives himself to and from Greenbrier County. Petitioner has made consistent and repeated public remarks that he has not, is not and will not reside at the seat of government.¹

¹ App: 56;

Members of the West Virginia Legislature have publicly raised concerns about the chronic absenteeism of Petitioner and its effect on the productivity of state government that was a major cause of the various scandals by way of a press release.²

Petitioner has held press conferences publicly declared that he would not move into the Governor's Mansion nor would he be reporting to work daily at the seat of government. Petitioner further advised the public that he works from his residence in Greenbrier County, West Virginia. It was implied by the Petitioner that most of his records, books and papers pertaining to the office of West Virginia Governor are scattered between Greenbrier County and Kanawha County. Specifically, Petitioner stated in regards where he works, "It doesn't matter whether I do it in the back of a Suburban or from the top of the dome."³

Petitioner further advised the public at a press conference that he doesn't reside in Charleston, West Virginia, and "I'll only stay at the Mansion when it's convenient to me."⁴

Certain scandals, mismanagement of public monies, no communication with cabinet secretaries and a decrease in productivity of state government has occurred under the Petitioner's tenure as Governor.⁵

Petitioner has and continues at the time of the filing of this Petition, to violate his oath of office and the nondiscretionary (mandatory) requirement that he shall reside and keep his records, books and papers pertaining to the office of West Virginia Governor at the seat of government pursuant to Section 1 of Article VII of the West Virginia Constitution and W.Va. Code § 6-5-4. Petitioner's refusal to perform his nondiscretionary (mandatory) duties

² App: 61; 71

³ App: 67, 77, 79

⁴ App: 140

⁵ App: 86; 105; 111; 117; 122; 126, 146

violates his oath of office that he will support the constitution of the State of West Virginia and will faithfully discharge the duties of the office of Governor of the State of West Virginia.

RESPONDENT FILED WRITS OF MANDAMUS TO MAKE PETITIONER COMPLY WITH
NONDISCRETIONARY REQUIREMENT OF GOVERNOR

As a result of the aforesaid, Respondent as a West Virginia citizen and taxpayer, and not as a member of the West Virginia House of Delegates, believing he had been and continues to be injured by Petitioner's poor job performance due to his habitual absenteeism. Lacking any other means of compelling Petitioner to comply with his duties under the West Virginia Constitution, Respondent filed a Petition for Writ of Mandamus to compel Petitioner to perform his constitutional nondiscretionary duty that he resides at the West Virginia seat of government and keep all his records, books and papers pertaining to the office of West Virginia Governor there, rather than Greenbrier County.

Respondent first filed a Petition for Writ of Mandamus in the Kanawha County Circuit Court in June 2018 and it was assigned with a Civil Action 18-P-217. Petitioner filed a motion to dismiss Civil Action 18-P-217 due to Respondent not providing Petitioner with thirty days written notice pursuant to W.Va. Code §55-17-3. The circuit court, after a hearing on said motion, granted Petitioner's motion to dismiss, without prejudice, due to the failure to provide thirty days written notice.

Respondent on September 18, 2018 then filed the Petition for Writ of Mandamus with this court, Case No. 18-0810, and requested that it exercise its original jurisdiction powers to hear the case. Petitioner then filed a response on October 16, 2018 with a response. This court didn't issue a rule and the writ prayed for by Respondent was refused by that certain order dated November 14, 2018.

Respondent filed a Petition for Writ of Mandamus in the Kanawha County Circuit Court on December 11, 2018 and it was assigned with a Civil Action 18-P-442. Petitioner filed a motion to dismiss Respondent's the Petition for Writ of Mandamus. A hearing was held on June 5, 2019 on Petitioner's motion to dismiss, wherein the Circuit Court denied the request.

Petitioner filed a motion requesting a more detailed Order setting forth findings of fact and conclusion of law in support of the Circuit Court's decision to deny Petitioner's motion to dismiss due to the Petitioner seeking an extraordinary writ to challenge the Court's ruling, which the same was completed by the Circuit Court and entered on October 21, 2019.

Petitioner filed this Petition for Writ of Prohibition due to the Circuit Court denying Petitioner's Motion to Dismiss.

For the reasons set forth herein, Respondent contends that the Petitioner's argument is unsound. Accordingly, the Petitioner's Writ of Prohibition should be denied.

SUMMARY OF ARGUMENT

Petitioner's petition for writ of prohibition merits refusal. A writ of prohibition should not issue to reverse a denial of a motion to dismiss in this case. The Petitioner's argument is based upon an incorrect interpretation of legal precedent and does not establish the existence of any substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

For these reasons, Respondent respectfully requests that the Petition for Writ of Prohibition be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The writ of prohibition filed by Petitioner is improper, frivolous, and does not merit oral argument under Rule 18(a)(2) of the West Virginia Rules of Appellate Procedure. If this Court deems the matter proper for consideration, based upon the assertions set forth in Petitioner's writ, Respondent requests oral argument under Rule 19.

ARGUMENT

THE REQUIRED ELEMENTS FOR A WRIT OF PROHIBITION ARE NOT SATISFIED

The required legal elements for a writ of prohibition to be issued by this court have not been met by the Petitioner.

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code, 53-1-1.*" Syllabus point 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977).

"[T]his Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.' Syl. Pt. 1, in part, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), *superseded by statute on other grounds as stated in State ex rel. Thornhill Group, Inc. v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014)." Syllabus point 3, *State ex rel. Almond v. Rudolph*, 238 W. Va. 289, 794 S.E.2d 10 (2016).

"In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded

its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syllabus point 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). "[i]n determining the third factor, the existence of clear error as a matter of law, we will employ a *de novo* standard of review, as in matters in which purely legal issues are at issue." *State ex rel Gessler v. Mazzone*, 212 W. Va. 368, 372, 572 S.E.2d 891, 895 (2002)." *State ex rel. Nelson v. Frye*, 221 W. Va. 391, 395, 655 S.E.2d 137, 141 (2007).

The circuit court in that certain *Order with Findings of Fact and Conclusions of Law in Support of Court's July 17, 2019, Order Denying Respondent's Motion to Dismiss* made the following conclusions of law:

1. The West Virginia Supreme Court of Appeals has explained that "[t]he purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint." *Mey v. Pep Boys-Manny, Moe & Jack*, 717 S.E.2d 235, 239 (W.Va. 2011).
2. Accordingly, "courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true." *Sedlock v. Moyle*, 668 S.E.2d 176, 179 (W.Va. 2008).
3. Nevertheless, dismissal for failure to state a claim is proper "where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Mey*, 717 S.E.2d at 239.
4. Respondent's motion to dismiss required this Court to appraise the sufficiency of the Petition, and refrain from dismissing the Petitioner "unless it

appears beyond doubt that the plaintiff can prove no set of facts to support [its] claim which would entitle [it] to the relief sought. See State ex rel Smith v. Kermit Lumber & Pressure Treating Company, 200 W.Va. 221, 226, 488 S.E.2d 901, 906 (1997), quoting, Syl Pt. 3, Chapman v. Kane Transfer Co., 160 W.Va. 530, 236 S.E.2d 207 (1977).

5. The West Virginia Supreme Court of Appeals has long held that a “[a] writ of mandamus will not issue unless three elements coexist – (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syl. Pt. 2, State ex rel. Kucera v. City of Wheeling, 170 S.E.2d 367 (1969);

6. In his Petition, Petitioner alleged (1) he is a citizen of the State of West Virginia which gives him the clear legal right to the relief he seeks; (2) the Respondent has a Constitutional and statutory duty to reside and keep public records at the seat of government; and (3) there is not any other adequate remedy.

7. A citizen and taxpayer may maintain a mandamus proceeding to compel any public officer to perform a nondiscretionary legal duty. Delardas v. County Court, 155 W.Va. 776, 186 S.E.2d 847 (1972). Petitioner is a citizen and taxpayer of the State of West Virginia.

8. Mandamus will not be denied on the ground that there is another remedy unless such other remedy is equally convenient, beneficial, and effective. Hardin v. Fogleson, 117 W.Va. 554, 544, 186 S.E. 308 (1936). Waiting for a future election and waiting an impeachment procedure to take place, alternative remedies Respondent argued were available to Petitioner, are not remedies that are as equally convenient, beneficial and effective as this mandamus action.

9. Petitioner alleged that there is a legal duty to do the thing which Petitioner seeks to compel. Respondent, however, sought to have this Court make the determination as to whether that duty is non-discretionary or discretionary. The Court believed that such determination was premature and that factual development would aid the Court in making such determination and related decisions. Respondent argued that the Petition should be dismissed because the phrase “reside” at the seat of government was not a specific, discrete, nondiscretionary duty that can be compelled through mandamus and that for that reason mandamus would not lie as a matter of law.

10. The purpose of a petition for writ of mandamus is to have a court compel a public official perform a duty, i.e. to act. If the duty is non-discretionary, then the court in granting a mandamus petition will tell the public official to act, to perform the duty. Nobles v. Duncil, 202 W.Va. 523, 505 S.E.2d 442 (1998).

11. A non-discretionary duty is one that “is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance[.]” Nobles v. Duncil, 505 S.E.2d 453.

12. For example, the West Virginia Supreme Court found in Walter v. Ritchie, 191 S.E.2d 275, 283 (W.Va. 1972), that the West Virginia Department of Highways Commissioner (“highway commissioner”) had the non-discretionary duty to issue a renewal of a salvage yard operator’s license once a proper application and fee had been submitted. In Walter, the highway commissioner believed he had the

discretion to decide whether to grant and/or renew such licenses. *Id.* at 283. The highway commissioner denied Mr. Walters's request for a license renewal because his salvage yard was "an unsightly place and detracted from the surrounding community." *Id.* at 277. The Court, after examining the statute at issue, found the highway commissioner's authority to regulate certain salvage yards, like the one owned by Mr. Walter, was limited to only the issuance and renewal of the annual license. *Id.* at 282. Because Mr. Walter had complied with the statutory requirements of submitting a proper application and fee, the Court awarded the writ of mandamus to compel the highway commissioner to issue Mr. Walter a renewal license to operate his salvage yard. *Id.* at 283.

13. The duty can also be discretionary in nature, meaning the public official has discretion in how that duty is performed. In granting a mandamus petition in such cases, the court will tell the public official to act, to perform the duty, but the court cannot tell the official how to perform that duty, i.e. how to exercise his/her discretion. *Nobles v. Duncil*, 505 S.E.2d 453.

14. In *Nobles*, the appellants alleged that the circuit court exceeded its authority in mandamus action by prescribing how prison officials were to carry out their discretionary duties. *Id.* at 444. The circuit court found that certain conditions at the Huttonsville Correctional Center violated constitutional standards and ordered the correctional center to follow very specific steps to correct those violations. *Id.* at 446. The West Virginia Supreme Court found that the circuit court exceeded its powers in a mandamus action by prescribing how prison officials were to carry out their discretionary duties. *Id.* at 454. The circuit court had ordered the specific manner in which the appellants were to conduct inmate disciplinary hearings and to provide medical services. Appellants argued that the law is clear that "where an official is to perform a discretionary duty, mandamus will lie only to complete the exercise of the duty and not to compel the specifics of the performance." *Id.* at 453. The Supreme Court agreed finding that the circuit court exceeded its powers in mandamus "by prescribing how prison officials are to carry out their duties." *Id.*

15. Mandamus is a proper remedy to compel the performance of duties that are non-discretionary and discretionary in nature. *Id.* at 454. If the Court ultimately determines that the duty at issue is a discretionary duty as the Respondent has argued, mandamus will lie to require that discretion be exercised, provided discovery shows that the Respondent is not already exercising his discretion. Mandamus cannot be used to control the manner in which discretion is exercised.

16. Assuming all of the alleged facts contained in Petitioner's Petition to be true, as this Court is required to do, the Petitioner sufficiently pleaded and provided theories under which relief could be granted. This Court believed that claims set forth in the Petition for Writ of Mandamus were sufficient to withstand a motion under West Virginia Rule of Civil Procedure 12(b)(6). For these reasons, this Court on July 17, 2019 entered an Order that denied Respondent's Motion to Dismiss.

As will be demonstrated herein below, the circuit court's conclusions of law are correct.

The Petitioner's claims are based upon an incorrect interpretation of legal precedent and does

not establish the existence of any substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

CIRCUIT COURT HAS JURISDICTION OVER

RESPONDENT'S PETITION FOR WRIT OF MANDAMUS

The circuit court clearly has jurisdiction over the subject matter contained within the Respondent's Petition for Writ of Mandamus. "Mandamus lies to require the discharge by a public officer of a nondiscretionary duty." Syl. Pt. 3, *State ex rel. Greenbrier County Airport Authority v. Hanna*, 151 W.Va 479, 153 S.E.2d 284 (1967); Syl. Pt. 1, *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W.Va. 636, 171 S.E.2d 545 (1969). Syl. Pt. 1, *State ex rel. Williams v. Department of Mil. Aff.*, 212 W.Va. 407, 573 S.E.2d 1 (2002). It is well-established that a writ of mandamus requires three elements:

(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969); accord Syl. Pt. 2, *State ex rel. Blankenship v. Richardson*, 196 W.Va. 726, 474 S.E.2d 906 (1996); Syl. Pt. 1, *Hickman v. Epstein*, 192 W.Va. 42, 450 S.E.2d 406 (1994); Syl. Pt. 1, *State ex rel. McGraw v. West Virginia Ethics Comm'n*, 200 W.Va. 723, 490 S.E.2d 812 (1997).

A. Respondent possesses a clear legal right to the relief sought

Respondent is a citizen and taxpayer of the State of West Virginia, more particularly Pendleton County. "A citizen and taxpayer of this State has a right to maintain a mandamus proceeding in order to compel a public official to perform a nondiscretionary constitutional duty." Syl. Pt. 1, *State ex rel. Brotherton v. Moore*, 159 W.Va. 934, 230 S.E.2d 638 (1976); *State ex rel.*

Brotherton v. Blankenship, W.Va., 214 S.E.2d 467 (1975); *Delardas v. County Court*, 155 W.Va. 776, 186 S.E.2d 847 (1972). No special or pecuniary interest must be shown by individuals who sue in this capacity. *Frantz v. County Court*, 69 W.Va. 734, 73 S.E. 328 (1911).

The Governor during his term of office is to reside and keep there the public records of his office at the seat of government is a nondiscretionary constitutional duty pursuant to Section 1 of Article VII of the West Virginia Constitution and W.Va. Code § 6-5-4. 'It was his duty to do so, in fidelity to his oath of office to support the constitution of the State; and the constitution of the State unequivocally requires that he shall reside at the seat of government during his term of office, and keep there the public records of his office, and commands him, as the chief executive officer, in whom is vested the chief executive power, to "take care that the laws be faithfully executed."' *Slack v. Jacob*, 8 W.Va.612, 657 (1875).

All the conditions have been satisfied and Respondent has a clear legal right to the relief sought in this petition.

B. Petitioner, during his term of office, has a nondiscretionary constitutional duty to reside and keep the public records, books and papers pertaining to his public office at the seat of government.

Section 20 of Article VI of the West Virginia Constitution provides as follows:

6-20. Seat of government.

The seat of government shall be at Charleston, until otherwise provided by law.

Section 1 of Article VII of the West Virginia Constitution provides as follows:

7-1 Executive department.

The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general, who shall be ex officio reporter of the court of appeals. Their terms of office shall be four years, and shall commence on the first Monday after the second Wednesday of January next after their election. They shall reside at the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices, and shall perform such duties as may be prescribed by law.

W.Va. Code § 6-5-4 provides as follows:

§6-5-4. Residence of officers.

The Governor, Secretary of State, state superintendent of free schools, Auditor, Treasurer, Attorney General and Commissioner of Agriculture, shall reside at the seat of government during their term of office, and keep there the public records, books and papers pertaining to their respective offices. Every judge of a circuit court shall, during his continuance in office, reside in the circuit for which he was chosen. Every county and district officer, except the prosecuting attorney, shall, during his continuance in office, reside in the county or district for which he was elected. And the removal by any such officer from the state, circuit, county or district for which he was elected or chosen shall vacate his office.

The constitution and statutory language are explicit, in plain ordinary clear English, in setting forth unequivocally that residing at the seat of government during the term of office, and keeping there the public records, books and papers pertaining to that office is a nondiscretionary duty of holding the office of Governor. "Where a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." Syl. Pt. 3, *State ex rel. Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791 (1965). "Words used in a state constitution, as distinguished from any other written law, should be taken in their general and ordinary sense." Syl. Pt. 6, *State ex rel. Trent v. Sims*, 138 W. Va. 244, 77 S.E.2d 122 (1953). "Questions of constitutional construction are in the main governed by the same general rules applied in statutory construction." Syl. pt. 1, *Winkler v. State School Building Authority*, 189 W.Va. 748, 434 S.E.2d 420 (1993). "The provisions of the Constitution, the organic and fundamental law of the land, stand upon a higher plane than statutes, and they will as a rule be held mandatory in prescribing the exact and exclusive methods of performing the acts permitted or required." Syl. Pt. 2, *Simms v. Sawyers*, 85 W. Va. 245, 101 S.E. 467 (1919).

Section 1 of Article VII of the West Virginia Constitution uses the word "shall" reside at the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices. The word shall when used in constitutional provisions has

been determined to be used in the mandatory sense and not discretionary sense. "As used in constitutional provisions, the word 'shall' is generally used in the imperative or mandatory sense." Syl. Pt. 3, *State ex rel. Trent v. Sims*, 138 W. Va. 244, 77 S.E.2d 122 (1953). "Courts are not concerned with the wisdom or expediencies of constitutional provisions, and the duty of the judiciary is merely to carry out the provisions of the plain language stated in the constitution." Syl. Pt. 3, *State ex rel. Casey v. Pauley*, 158 W. Va. 298, 210 S.E.2d 649 (1975).

The Supreme Court of Appeals of West Virginia has interpreted Section 1 of Article VII of the West Virginia Constitution to be nondiscretionary constitutional duty of the executive department. This has been the rule of law for over 140 years in this state. 'It was his duty to do so, in fidelity to his oath of office to support the constitution of the State; and the constitution of the State unequivocally requires that he shall reside at the seat of government during his term of office, and keep there the public records of his office, and commands him, as the chief executive officer, in whom is vested the chief executive power, to "take care that the laws be faithfully executed."' *Slack v. Jacob*, 8 W.Va.612, 657 (1875).

On November 8, 2016, Petitioner was elected Governor by the citizens of the State of West Virginia. On January 16, 2017, his Inauguration took place at 1:00 p.m. at the West Virginia State Capitol, the seat of state government. Chief Justice Allen H. Loughry, II, administered the oath or affirmation of Office for Governor to the Petitioner at the Inauguration. Petitioner has not resided at the seat of government, will not move to the seat of government and continues to work from his residence located in Greenbrier County, West Virginia. Petitioner is violating nondiscretionary duties of holding the office of Governor by refusing to reside at the seat of government during his term of office and keep there the public records, books and papers pertaining to his respective office, as mandated by Section 1 of Article VII of

the West Virginia Constitution and W.Va. Code § 6-5-4.

All the conditions have been satisfied and Petitioner is violating a nondiscretionary duty of holding the office of Governor.

C. Respondent possesses no other adequate remedy

Respondent lacks any adequate alternative remedy. The existence of *any* remedy will not suffice. "Mandamus will lie, notwithstanding the existence of another remedy, if such other remedy is inadequate or is not equally beneficial, convenient and effective." *State ex rel. Wheeling Downs Racing Ass 'n v. Perry*, 148 W. Va. 68, 73, 132 S.E. 2d 922 (1963). "A remedy cannot be said to be fully adequate to meet the justice and necessities of a case, unless it reaches the end intended, and actually compels a performance of the duty in question." *State ex rel. Bronaugh v. Parkersburg*, 148 W. Va. 568, 573, 136 S.E. 2d 783, 786 (1964).

"Mandamus will lie against a State official to adjust prospectively his or her conduct to bring it into compliance with any statutory or constitutional standard." Syl. Pt. 2, *Gribben v. Kirk*, 466 S.E.2d 147, 195 W.Va. 488 (W. Va., 1995).

Respondent is concerned about Petitioner's habitual absenteeism and its effect on the poor productivity of state government and declining morale among many state workers due to it. Respondent strongly believes that the recent scandals that appear in the daily newspapers on a regular occurrence are due to Petitioner's neglect of his constitutional duties and the office of Governor is not in proper order.

Respondent is further concerned about the inability of citizens and taxpayers of West Virginia having access to the Governor of the State of West Virginia due to his habitual absenteeism.

Section 16 of Article III of the West Virginia Constitution provides as follows:

3-16. Right of public assembly held inviolate.

The right of the people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate.

Citizens have the right to assemble in a peaceable manner, to consult for the common good, to instruct their representative, or to apply for redress of grievances. In short, the right to speak with elected officials while they are performing their elected governmental functions is a constitutional right. To deny this accessibility hurts citizens and taxpayers' confidence in state government. An example would be the teacher and school service personal 9-day work stoppage earlier this year. Thousands of citizens came to the Capitol to assemble in a peaceable manner, to consult for the common good of their class, request change to their elected representatives and applied for relief over numerous grievances with their livelihoods. They wanted to address Petitioner who had made several unpopular policy decisions with PEIA and pay increases that triggered the work stoppage. These citizens were disappointed daily due to Petitioner not appearing at the seat of government on a regular basis during the work stoppage. No citizen, or legislator for that matter, knew the whereabouts of Petitioner during that time. Respondent believes that Petitioner's regular attendance at the seat of government would provide a greater confidence in state government to the public and show empathy rather than the appearance of indifference or "no one cares" image presented by Petitioner. If Petitioner is not present and does not reside at the seat of government then he is violating every West Virginia citizen and taxpayer's constitutional rights. An individual cannot instruct and apply for a redress of grievances to an empty chair. This is not allowed under the West Virginia Constitution and every West Virginia citizen and taxpayer's rights are being violated by Petitioner.

Respondent is further concerned about who is providing Petitioner with his daily reports

of state government since he is not present to witness it first hand and may be only getting reports from one or two individuals that may have a desire to not keep him properly inform for other reasons. One of the individuals is a controversial adviser with ties to the Oil and Gas Industry, among other industries, that Petitioner relies on significantly, and possibly exclusively, to provide him with an update on state government.⁶ There has been a gag order placed on state government, so all information must go through one or two individuals before it reaches Petitioner according to news reports.

Habitual absenteeism and keeping one's public records, books and papers pertaining to the respective office scattered across several counties in a disorganized manner is fret with problems that should be avoid. The West Virginia Constitution and W.Va. Code have safeguards built into it to avoid these basic problems in the form of mandatory attendance of officeholders of the executive department when they hold that office. Petitioner has not and refuses to address his habitual absenteeism and chaotic bookkeeping of his records.

If a writ of mandamus is issued against Petitioner to adjust prospectively his conduct to bring it into compliance with the constitutional and statutory standards, then the aforesaid concerns regarding state government will be remedied.

Respondent would further assert that he DID NOT bring this action as a member of the West Virginia House of Delegates, G. Isaac Sponaugle, III, but rather as G. Isaac Sponaugle, III, a citizen and taxpayer of this State of West Virginia. As a citizen and taxpayer, the Respondent has no legal authority or method to impeach the Petitioner, which is what the Petitioner continues to argue.

For the aforesaid reasons, Respondent lacks any other adequate remedy.

⁶ App: 78

CIRCUIT COURT DID NOT EXCEED ITS LEGITIMATE POWERS

The Respondent failed to meet the burden of proof that the circuit court exceed its legitimate powers by denying Petitioner's motion to dismiss Respondent's Petition for Writ of Mandamus.

"In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). "[i]n determining the third factor, the existence of clear error as a matter of law, we will employ a *de novo* standard of review, as in matters in which purely legal issues are at issue." *State ex rel Gessler v. Mazzone*, 212 W. Va. 368, 372, 572 S.E.2d 891, 895 (2002)." *State ex rel. Nelson v. Frye*, 221 W. Va. 391, 395, 655 S.E.2d 137, 141 (2007).

Factor One - whether the party seeking the writ has no other adequate means, such as a direct appeal, to obtain the desired relief - the Petitioner simply asserts that that a writ of prohibition is its only means.

Factor Two - whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal - the Petitioner states that requiring it, the Governor, to proceed then all of the time and resources that the Governor was forced to devote to the underlying proceedings will have been wasted.

Both arguments for factors one and two have carried little weight with this Court as evident by its most recent ruling in State ex rel. W.Va. Regional Jail Auth. v. Webster, 19-0595 (W.Va. 2019).

Factor Three - whether the circuit court's order is clearly erroneous as a matter of law - the Petitioner contends that the circuit court's failure to grant the Petitioner's motion to dismiss was clearly erroneous as a matter of law. It is impossible for the circuit court or this court or any court to make a ruling on a residency action without first being presented with evidence regarding the facts of where the Petitioner resides. The issue isn't purely legal, but mostly fact based, which hasn't been completed and no court has enough information to make a ruling on a fact-based question regarding residency regardless of what legal test is used.

West Virginia case law about residency and domicile dates to 1888. In *White v. Tennant*, 31 W.Va. 790, 8 S.E. 596, 597, the Court stated: "Two things must concur to establish domicile,-the fact of residence, and the intention of remaining. These two must exist, or must have existed, in combination.... The character of the residence is of no importance; and if domicile has once existed, mere temporary absence will not destroy it, however long continued."

"The question of residence is one of intention, and the old residence is not considered as lost or abandoned as long as the animus revertendi remains." *Maslin's Executors v. Hiatt*, 37 W.Va. 15, 16 S.E. 437, 439 (1892). The Supreme Court further elaborated in *State ex rel. Linger v. County Court of Upshur County*, 150 W.Va. 207, 144 S.E.2d 689, 702-703 (1965):

"Two fundamental elements are essential to create a residence, and these elements are: (1) Bodily presence in a place. (2) The intention of remaining in that place. Residence is thus made up of fact and intention, the fact of abode and the intention of remaining, and is a combination of acts and intention. Neither bodily presence nor intention alone will suffice to create a residence. There must be a combination and concurrence of these elements and when they occur, and at the very moment they occur, a residence is created." ... A person is not considered to have lost his residence when he leaves his home and goes into another state, territory or county, for temporary purposes merely, with the intention of returning.... A person does not lose his residence by leaving it with an uncertain, indefinite, half-formed purpose to take up residence elsewhere, and until his purpose to remain has become fixed, he does not abandon his former residence.

The aforesaid basic concepts in law have been reiterated many times by the Supreme Court of Appeals of West Virginia. E.g., *Shaw v. Shaw*, 155 W.Va. 712, 187 S.E.2d 124, 127 (1972); *Ward v. Ward*, 115 W.Va. 429, 176 S.E. 708 (1934). Accord, *State-Planters Bank and Trust Company v. Commonwealth*, 174 Va. 289, 6 S.E.2d 629, 632 (1940); *White v. Manchin*, 173 W.Va. 526, 318 S.E.2d 470, 482 (1984).

Factor Four - whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law – the Petitioner acknowledges that this factor doesn't apply due to the novelty of an individual filing an action to get the Governor to reside at the seat of government and speculating as to possible outcomes that the circuit court hadn't issued a ruling on yet.

Factor Five - whether the lower tribunal's order raises new and important problems or issues of law of first impression – the Petitioner again asserts similar hypotheticals as to what the circuit court may rule, but has not at the time of the filing of the Petitioner's Petition for Writ of Prohibition. Frankly, the circuit court and this court need additional evidence to make any informed ruling on whether the Petitioner has resided at the seat of government, which is lacking in the record.

The Circuit Court has jurisdiction over the subject matter in this action and did not exceed its legitimate powers by not granting Petitioner's motion to dismiss.

CONCLUSION

Based on the aforesaid, Respondent respectfully prays that the Supreme Court of Appeals deny the Petitioner's Petition for Writ of Prohibition.

Given under my hand this 15th day of January 2020.

G. Isaac Sponaugle, III
Respondent

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G. Isaac Sponaugle III
State Bar #9720
Respondent

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

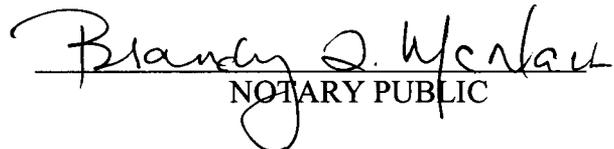
I, G. Isaac Sponaugle, III, Respondent named in the foregoing *Response to Petitioner's Petition for Writ of Prohibition*, being first duly sworn, say that the facts and allegations set forth therein are true and correct, except insofar as they are therein stated to be upon information and belief, and insofar as therein stated to be upon information and belief, they believe them to be true and correct.



G. Isaac Sponaugle, III

Taken, sworn to and subscribed before me, a Notary Public in and for the county and state aforesaid, this the 15th day of January 2020.

My commission expires Nov. 29, 2020.



NOTARY PUBLIC

