State of West Virginia
Office of the Attorney General

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Jason A. Wharton
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Dear Prosecutor Wharton,

You have asked for an Opinion of the Attorney General pertaining to the appropriate treatment of votes for a candidate in a primary election, where the candidate filed a statement of withdrawal after the deadline for removing himself from the ballot has lapsed. This Opinion is being issued pursuant to West Virginia Code § 5-3-2, which provides that the Attorney General "may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your letter to the Attorney General's Office.

You explain that questions have arisen concerning the withdrawal of a candidate for a county election. According to your letter, one of the four candidates for the Republican nomination for a seat on the County Commission has filed a notarized statement of withdrawal, citing a recent illness. The candidate made this filing, however, after the deadline for removing his name from the ballot under West Virginia Code § 3-5-11(a) had lapsed. You also explain that absentee voting has already begun, so votes for the candidate who has sought to withdraw may have already been cast.

Your letter raises the following legal question:

How to handle votes cast for a candidate in a multi-candidate primary election and determine the winner where one candidate withdraws from the race after the deadline to remove his name from the ballot.

The West Virginia Code provides that a candidate who has previously filed a valid certificate of announcement for a primary can withdraw his name from the ballot, so long as the candidate does so sufficiently in advance of the primary election. Specifically, Section 3-5-11(a) provides that a candidate who "wishes to withdraw and decline to stand as a candidate for the office shall file a signed and notarized statement of withdrawal with the same officer with whom the certificate of announcement was filed." *Id.* "If the statement of withdrawal is received not later than the third Tuesday following the close of candidate filing, the name of a candidate who files that statement of withdrawal may not be printed on the ballot." *Id.* But, "*[n]o candidate who files a statement of withdrawal after that time may have his or her name removed from the ballot.*" *Id.* (emphases added).

Given the specifically enumerated timeframe for withdrawing a candidate's name from the ballot under Section 3-5-11(a), we conclude that any untimely attempt to withdraw must be disallowed. Although this is a question of first impression under West Virginia law, case law from our Supreme Court of Appeals supports this reading of the statute. The Court has recognized that while "a candidate has a natural or inherent right to resign at any time and to have his name deleted from the ballot[, t]his right . . . must give way to reasonable legislative restrictions." *State ex rel. Cravotta v. Hechler*, 187 W. Va. 790, 793, 421 S.E.2d 698, 701 (1992) (quotation omitted). Moreover, the Court's decision in *State ex rel. Carenbauer v. Hechler*, 208 W. Va. 584, 542 S.E.2d 405 (2000), strongly suggests that it would find the time limitation in Section 3-5-11(a) to be such a "reasonable legislative restriction." In that case, the Court acknowledged the need to grant "extraordinary relief" in order to remove an ineligible candidate from the ballot because the time period provided by Section 3-5-11(a) had run. As the Court explained, "[p]ursuant to the provisions of [Section 3-5-11(a)], [the candidate] could have withdrawn his certificate of candidacy until February 15, 2000." But "[a]fter such time," the Court stressed in its March 31 opinion, "no candidate is permitted to remove his/her name from the ballot." *Hechler*, 208 W. Va. at 587 & n.8, 542 S.E.2d at 408 & n.8. The Supreme Court of Appeals's reasoning suggests that it would find the deadline in Section 3-5-11(a) to be a legislative restriction that must be respected.

West Virginia Code § 3-5-11(b)—the very next subsection in the West Virginia Code—further supports this conclusion. That subsection specifically sets forth procedures for addressing the circumstance in which "a candidate dies after the ballots are printed but before the election." In that case, "the clerk of the county commission shall give a written notice which shall be posted with the sample ballot at each precinct with the county to the following effect: 'To the voter: (name) of (residence), a candidate for (office) is deceased.'" The statute includes no such contingent procedure for candidates who untimely attempt to withdraw. This absence reinforces the conclusion that an untimely withdrawal must simply be disallowed. *Cf.* Syl. Pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984) ("In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.").

Finally, authorities from other States with similar laws are consistent with this conclusion. An election law treatise explains that absent extraordinary circumstances, "to be valid and effective it is essential that [a candidate's] withdrawal be . . . filed within the time prescribed by statute." 29 C.J.S., Elections, § 184. Thus, in *State ex rel. White v. Franklin Cty. Bd. of Elections*, 65 Ohio St. 3d 5, 598 N.E.2d 1152 (1992) (per curiam), the Ohio Supreme Court held that the board of elections was duty-bound to count all ballots cast for a primary candidate who had filed an untimely statement of withdrawal and to certify the results. In *Anderson v. Hooper*, 498 F. Supp. 898 (D.N.M. 1980), the United States District Court rejected as "spurious" the argument that the plaintiff had "withdr[awn] his consent to be a candidate in the Republican primary before the primary was actually held," concluding instead that the plaintiff's "fail[ure] to timely withdraw from the Republican primary" left him as "a legitimate candidate in the Republican primary." *Id.* at 902 & n.1. Courts in other jurisdictions have reached similar conclusions under similar laws. *See Bruno v. Rettaliata*, 122 A.D.2d 976, 976, 506 N.Y.S.2d 124, 125 (3d Dept. 1986) (explaining that a candidate's "failure to file his certificate of declination within the time period prescribed . . . requires its rejection"); *Manser v. Secretary of Com.*, 301 Mass. 264, 266, 16 N.E.2d 868, 870 (1938) (concluding that the Secretary of the Commonwealth was "prohibited from receiving" a candidate's "request for withdrawal [that] was not made seasonably").

Having concluded that a candidate's untimely notification of withdrawal must be rejected, we further conclude that West Virginia law requires that votes for such a candidate be treated as if no attempt to withdraw had been made. West Virginia Code § 3-5-15 provides procedures that election officers must follow in counting and certifying primary election results: among other things, "[t]he election officers shall enter the name of each office and the full name of each candidate on the ballot and the number of votes, in words and numbers, received by each," return those officially certified results to the clerk of the county commission and the Secretary of State, and post the results on "outside of the front door of the polling place." These procedures, the West Virginia Supreme Court of Appeals has explained, are "mandatory in character." *State ex rel. Thompson v. Fry*, 137 W. Va. 321, 335, 71 S.E.2d 449, 457 (1952). Accordingly, it is *mandatory* that all votes must be counted for a candidate who attempts, but fails, to withdraw. And if the candidate receives the requisite number of votes to be declared the winner, that candidate *must* be certified as the winner.

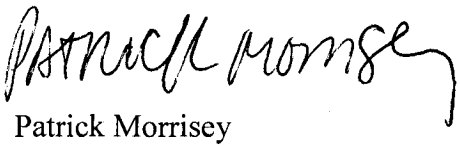
If the candidate wins the nomination and reaffirms his desire to withdraw, the West Virginia Code sets forth specific procedures for filling that vacancy. *See* W. Va. Code § 3-5-19. At least one court in another State has found that a candidate who untimely sought to withdraw need not reaffirm that withdrawal if he wins the election, but rather should automatically be deemed withdrawn after the election results are certified. In that court's view, the prior (though untimely) statement of withdrawal did not remove the candidate's name from the ballot or excuse the board of elections from counting his votes, but it was nevertheless "sufficient to renounce [the candidate's] personal candidacy" because "no one can be compelled against his or her will to accept an elective office." *State ex rel. White v. Franklin Cty. Bd. of Elections*, 65 Ohio St. 3d

45, 51 600 N.E.2d 656, 661 (1992). This reasoning suggests that even though a candidate must be certified as the winner, he may thereafter be replaced as the party's candidate with no further action on his part. At the same time, the reasoning in other cases suggests that a candidate may need to take some post-election steps to reconfirm his desire to withdraw. *See Anderson*, 498 F. Supp. at 902 & n.1 (candidate who untimely sought to withdraw remains "a legitimate candidate"); *Bruno*, 122 A.D.2d at 976, 506 N.Y.S.2d at 125 (a candidate's "failure to file his certificate of declination within the time period prescribed . . . requires its rejection"). In light of this uncertainty and the categorical language in our statute, we believe that a candidate who wins an election after untimely seeking to withdraw should not be automatically replaced, but rather should be required to take the (nominal) post-election step of reasserting his intent to withdraw. If and when the candidate does so, the vacancy in the nomination could then be filled pursuant to the procedures in West Virginia Code § 3-5-19.

In your letter, you asked about the possibility that votes for the candidate seeking untimely withdrawal be treated as "void" or, in the alternative, be treated as votes to create a vacancy for the nomination. Specifically, you cited to *Jackson v. County Court of McDowell County*, 152 W. Va. 795, 166 S.E.2d 554 (1969), where the West Virginia Supreme Court of Appeals adopted the "American rule" for the counting of votes for candidates declared "dead, ineligible, or disqualified" before an election. Under the American rule, votes for that candidate are not treated as "void" but, rather, are counted as votes creating a vacancy. *Id.* at 802, 166 S.E.2d at 558 (quotation omitted); *accord Evans v. State Election Bd. of Oklahoma*, 804 P.2d 1125, 1130 (Okla. 1990).

We do not believe that *Jackson* is applicable here, though we note that the practical outcome may be the same. The "American rule" adopted in *Jackson* is inapplicable to the present case because, given the analysis above that an untimely withdrawal must be rejected, the candidate seeking an untimely withdrawal is not "ineligible" or "disqualified." Nevertheless, where the candidate wins the election and simply reasserts his desire to withdraw, the outcome would not be significantly different than the creation of the vacancy envisioned by *Jackson*.

Sincerely,



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