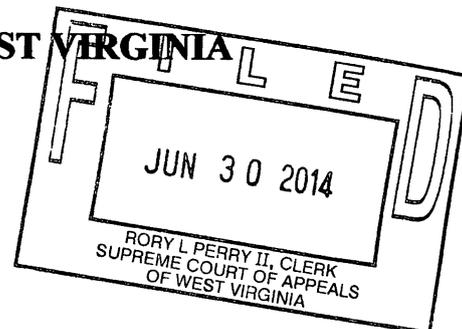


IN THE SUPREME COURT OF APPEALS WEST VIRGINIA

No. 14-0194



BEVERLY TRUMAN-GILMORE,

Petitioner herein -- Respondent below,

Appeal from a final order
of the Circuit Court of
Kanawha County (No. 10-D-469)
Hon. Tod J. Kaufman, Judge
(Hon. Sharon M. Mullens, Family
Court Judge)

v.

BOYD GILMORE

Petitioner Below -- Respondent herein.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. **THE FAMILY COURT ERRED IN FAILING TO DISMISS RESPONDENT’S CLAIMS PURSUANT TO WEST VIRGINIA’S LONG STANDING “CLEAN HANDS” RULE.**
2. **THE FAMILY COURT ERRED IN FINDING THE PARTIES’ PRENUPTIAL AGREEMENT WAS VALID AND ENFORCEABLE**
3. **ASSUMING ARGUENDO THE PRENUPTIAL AGREEMENT IS VALID AND ENFORCEABLE, THE FAMILY COURT ERRED IN ORDERING THE RESPONDENT TO REPAY FUNDS WITHOUT ANY FINDING THE RESPONDENT HAD COMPLIED WITH THE TERMS OF THE AGREEMENT.**

STATEMENT OF THE CASE

I. Background Facts

Gilmore’s Previous Marriage To Kimberly Gilmore

Boyd Gilmore (“Gilmore”) first met Kimberly Gilmore (“Kimberly”) when she was referred to him for psychological counseling when she was twelve years old. Their relationship became an intimate one when Kimberly was between the ages 15 and 18 and still under his care. Joint Appendix (“App.”), pp. 134-135, ¶¶ 25, 27. Kimberly subsequently became pregnant, and they married. Kimberly was Mr. Gilmore’s fifth and seventh wife. After the birth of their first child, Gilmore and Kimberly divorced but remained in touch. App., pp. 134-135, ¶¶ 25, 27.

While divorced, Kimberly gave birth to four additional children – all of them fathered by Gilmore. Together and apart they produced five children – two girls and three boys with each of the boys being named Boyd¹. During their separation, Gilmore married and divorced a sixth time. Kimberly and Gilmore remarried after the birth of their fifth child. They separated for the last time during June 2002. App., pp. 131, 134-135, ¶¶ 5, 25, 27.

Gilmore Attacks Ex-Wife Kimberly Gilmore With A 200,000 Volt Stun Gun

¹ Boyd “Tyler”, Boyd “Bodie” and Boyd “Kade” Gilmore

Following their separation, Kimberly Gilmore obtained a Personal Protection Order against Gilmore in early August 2002. App., pp. 137, ¶ 35. The protection order notwithstanding, on August 29, 2002, Gilmore broke into Kimberly's home and attacked her with a 200,000 volt stun gun. Deputies from the Kanawha County Sheriff's department were sent to Kimberly's home at #14 Toney Drive, St. Albans, WV. Upon their arrival, Kimberly came running out of the home and told the deputies Gilmore had broken into her home, tackled her to the floor and attacked her with a stun gun. A search of the residence was immediately conducted by the deputies. A 200,000 volt stun gun, black stocking mask, a screw driver and wire ties were recovered from inside the residence. A surgical glove was later recovered. App., pp. 130, ¶ 3.

Gilmore was arrested at the scene and taken to the Kanawha County Jail where he was initially charged with Domestic Battery. Gilmore refused to make any statement other than to claim Kimberly had picked him up and taken him to her residence. When informed by the deputies his vehicle had been found nearby on Barrett Street, Gilmore admitted driving his car to that location. App., pp. 133, ¶ 3.

Grand Jury Returns Four Count Indictment Against Gilmore

The Kanawha County Grand Jury subsequently returned a four count indictment against Gilmore during its May 2003 term: Count One - Burglary By Breaking and Entering; Count Two --Burglary By Entry Without Breaking; Count Three -- Domestic Battery; and Count Four - Violation Of A Protective Order. App., pp. 130 ¶ 1. Kimberley also filed a complaint with West Virginia's psychological counseling board alleging Gilmore had initiated sexual relations with her while she was still a minor and he was her counselor. Before any evidence was taken by the board, Gilmore relinquished his professional counseling license.

Gilmore blamed Kimberly for “killing my counseling license”.... App., pp. 134, 137, ¶¶ 27, 38.

Kimberly Gilmore Files Civil Action To Recover Compensatory and Punitive Damages

Following Gilmore’s criminal indictment, Kimberly Gilmore filed a civil lawsuit against him in Kanawha County Circuit Court on July 30, 2003. In her Complaint, Kimberly sought compensatory and punitive damages on several claims that included Assault, Battery, Intentional Infliction of Emotional Distress, Outrage, Trespass and False Imprisonment. App., pp. 61-69.

On September 3, 2003, Gilmore filed his Answer and a Counterclaim for malicious prosecution alleging the purpose of Kimberly Gilmore’s lawsuit was to get money from him that he had before they were married. App., pp. 70, 75, ¶2.

Gilmore Initiates Plan To Hide Assets Through Fraudulent Conveyances

a. Gilmore’s August 2004 Marriage To Beverly Truman-Gilmore

After his criminal indictment and the filing of the civil action by Kimberly Gilmore, Gilmore met the Petitioner Beverly Truman. After a whirlwind courtship, they married in Putnam County on August 23, 2004. App., pp. 126, ¶ 2. Prior to their marriage, Gilmore disclosed to the Petitioner he was under a criminal indictment brought by his ex-wife and she had sued him. Gilmore claimed to Petitioner the whole thing was nothing more than a domestic dispute his ex-wife had blown out of proportion in an effort to get money from him that he had before they were married. Gilmore told Petitioner he did not attack Kimberly Gilmore and he did not expect to go to jail. App., pp. 127, ¶¶ 7, 8, and 10.

b. The Prenuptial Agreement Dated August 10, 2004²

Prior to their marriage, on or about August 10, 2004, Petitioner met Gilmore at a Charleston Bank where he handed her a prenuptial agreement for her immediate signature.

At the time Petitioner signed the prenuptial agreement, she had never seen a prenuptial agreement. Petitioner's formal education ended with her graduation from high school. She did not understand the terms of the agreement. Gilmore informed Petitioner he had drafted the agreement and explained it to her. Petitioner was not given any opportunity to have it reviewed by any attorney (independent or otherwise) either before or after she signed the prenuptial agreement.³ App., pp. 126, ¶¶ 2, 3, 4 and 5.

² At trial, Gilmore presented a second prenuptial agreement dated August 9, 2004. It was identical to the August 10, 2004 prenuptial agreement Gilmore presented except the August 9, 2004 agreement was notarized but was not signed by either party. <<>>

³ THIS ANTE NUPTIAL AGREEMENT, Entered into this 10th day of August, 2004, by and between Boyd Gilmore, party of the first part, and Beverly Ann Truman, party of the second part.

WHEREAS, the parties to this agreement contemplate entering into marriage in the near future and it their wish and desire to surrender, relinquish, and to release unto one another any and all rights in kind and character which either party may acquire by reason of the marriage, including any right which may be acquired by virtue of the statute of descent and distribution, in the property of the other party, and to enter into this agreement as a settlement of all duties, property rights, and responsibilities which the parties may have by reason of said marriage in the event that it becomes necessary to legally dissolve said marriage relationship.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: that for and in consideration of the above premises and covenants and conditions to be hereinafter be performed, the parties agree as follows:

1. Each of the parties to this agreement hereby releases, remises, surrenders and relinquishes unto the other party all claims of dower and rights of inheritance by descent and distribution in and to all property, real and personal, now owned or hereafter acquired by the other party to this agreement, and to any and right or claim in and to the estate of the other party which may in any manner arise or accrue by virtue of their marriage to each other. Both Husband and Wife have and hold, free and from any claim of dower, inchoate or other-wise(sic) on the part of the Husband or Wife, any and all real property that he or she may now own and the Husband or Wife shall at any time and from time to time hereafter, execute and acknowledge or join a party to executing and acknowledging any instrument which may be requested by the Husband or Wife for the purposes of transferring any such property or divesting any claim of dower, inchoate or otherwise, in such property.
2. The parties agree not to assert and hereby expressly waive and release, any and all rights to renounce the Will of deceased party as provided in Section 1, Article 3, Chapter 42, of the West Virginia Code 931, as amended.

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3. Any debts contracted by either party to this agreement prior to their marriage shall be paid by the party who shall have contracted the same, and the other party shall not in any respect be liable for the payment thereof, unless it is otherwise (sic) agreed in writing by the parties at the time the indebtedness is made.
 4. Any property, real, personal, and mixed, owned by a party at the time of the marriage or subsequently acquired thereafter, including any and all business assets or indebtedness and any and all personal bank accounts or other assets accruing after the marriage, and this shall include all interests, rents, and profits that in time may accrue or result in any manner from increases in value, or be collected for the use of the same in any way, shall remain the exclusive ownership of the person owning or acquiring the same; and, unless otherwise agreed upon at the time of acquisition, any property acquired jointly by the parties shall be held as tenants in common and not as joint tenants without the right of survivorship.
 5. It is agreed and understood that in the event the parties become estranged or legally separated, or divorced, that neither party shall be responsible for the care, upkeep, and maintenance of the other, and that both parties hereby waive any right to maintenance, support, and alimony as well as any claim for dower against the property of the other, either real or personal.
 6. It is agreed that each party shall be responsible for the payment of their own attorney fees in the event of separate maintenance, divorce, or any litigation brought for the purpose of enforcing this agreement.
 7. It is agreed that in the event of divorce, or separate maintenance any property jointly owned by the parties shall be sold and that any proceeds remaining after the payment of any indebtedness against the same shall be equally divided between the parties and each party agree to sign, acknowledge, and deliver any documents that may be required to affect (sic) any such sale.
 8. Each party agree to execute and acknowledge at the request of the other or his or her heirs, devisees, personal representatives or which may be requested in order to carry out any of the provisions of this agreement.
 9. It is agreed that the support and maintenance of any child or children resulting from this marriage shall be the sole responsibility of the parent having physical custody of the child as decreed by a court of law.
 10. It is agreed that there shall be no claims of sweat equity by any party or claims of community property there must be written agreements for any claims to assets, investments, and any type of property both real and personal both prior to marriage or during the marriage. It is agreed that only written claims signed by both parties are recognized by any court of law. Any assets or investments of any kind that might be held by the other spouse for any reason must be returned to the other spouse or heirs. However, any resulting tax burden must be bore by the recipient of any taxable gains that might be held by the other spouse. A current list of all property, bank accounts, and investments for each spouse shall be attached to this agreement with additional terms and agreements. (Attachment A.)
 11. It is agreed that the terms and provisions of this agreement may be considered by a court of competent jurisdiction in any proceeding for divorce or separate maintenance that may be brought by either party and incorporated into any court order that may be obtained by either party in any such proceeding and enforceable by contempt proceedings if necessary.

Both parties having been read the provisions of this agreement or have been read by the parties hereto and the provisions are hereby approved and accepted by the said parties hereto as being a full, complete and final settlement of the individual rights of each of them. (SIGNATURES). App., pp. 36, 38-41, ¶¶ 1-11.

The Prenuptial Agreement was drafted by Gilmore. Gilmore claimed he used the “exact same” agreement with six of his seven ex-wives. App., pp. 186, ¶ 10. The attachment A. to the prenuptial agreement does not disclose Gilmore’s income, net worth or the value of the assets, investment accounts or property listed on Attachment A to the agreement. App., pp. 36. At the time the Petitioner signed the prenuptial agreement, she did not know the value of the US Treasury Securities owned by Gilmore. App., pp. 126, ¶6. As noted by the State’s Presentence Investigator Rebecca Bostic, “Gilmore’s character in society [was] one of anonymity for the most part....” App., pp. 144.

c. Gilmore’s Transfer of US Treasury Direct Securities To Beverly Truman-Gilmore

Immediately after their August 23, 2004 marriage, Gilmore and Petitioner traveled to Florida for their honeymoon. While in Florida, on or about August 26, 2004, Gilmore took Petitioner to a Florida bank and transferred to Petitioner sole ownership of his US Treasury Direct Securities (“US Treasury Securities”) with a value in excess of \$1,000,000. App., p. 93, ¶¶ 22-23 and App., p. 126, ¶7. The prenuptial agreement at paragraph 10 requires a written agreement signed by both parties “ for any claims to assets, investments, and any type of property both real and personal both prior to marriage or during the marriage.” App., p. 40, ¶10. Gilmore did not present the Family Court with any agreement providing a transfer of the securities to the Petitioner to manage them for Gilmore during his incarceration and for their transfer back to Gilmore upon his release for prison. App., p. 119.

Paragraph 10 of the prenuptial agreement also requires “any resulting tax burden must be bore by the recipient of any taxable gains that might be held by the other spouse.” App., p. 40, ¶10.

Petitioner paid all income taxes on the US Treasury Securities. App., p. 119 and App. Pp. 157-163.

d. Gilmore's Sale of His Home and Supposed Sale of Rental Properties

Gilmore next sold his former home in Charleston, WV for \$210,000 during September, 2004. App., p. 95, ¶ 33 and App., pp. 137-138, ¶ 37. On May 6th and 7th of 2005, Gilmore transferred two pieces of rental property to his friend Brenda Kuhn. The first rental property (located in Charleston, WV) was transferred to Brenda Kuhn doing business as B.K. Properties for a declared value of \$27,000. App., p. 97, ¶43 and App., p.p. 145-146. The supposed transfer or sale to Brenda Kuhn notwithstanding, the Charleston property remained insured under Boyd Gilmore's name with an insured for value thousands of dollars in excess of the declared value stated on the transfer deed to Brenda Kuhn. App., p. 150. The second property (a three unit rental property located in South Charleston, WV) was transferred to Brenda Kuhn personally by deed that stated a declared value of \$30,000.⁴ App., pp. 147-148.

After All His Assets Are Transferred Gilmore Enters Plea Agreement

On May 20, 2005, after Gilmore had: (1) transferred his US Treasury Securities to the Petitioner; (2) sold his residence; and (3) the supposed transfer of title of his rental properties in South Charleston and Charleston, WV to his friend Brenda Kuhn. Gilmore signed a plea agreement with the State of West Virginia. Under the basic terms of the agreement, Gilmore agreed to plead guilty to a single felony count of Burglary. In

⁴ In 2008, the Charleston rental property was substantially destroyed by fire. Even though Brenda Kuhn was the supposed owner, the insurance check in the amount of \$50,446.62 was issued in named insured Boyd Gilmore. App., P.150. Gilmore's claim that he had sold the Charleston property to Brenda Kuhn ("B.K. Properties") notwithstanding, during April 2010, the Mr. Gilmore obtained a construction permit from the city of Charleston to make repairs as the claimed owner of the property. App., p. 149.

exchange for Gilmore's plea, the State agreed to forego prosecution of the remaining charges and agreed to recommend home confinement for Gilmore rather than prison. App., pp. 153-155. Gilmore testified at trial he was led to believe the Court would accept the State's recommendation of home confinement in lieu of incarceration in a state prison facility. App., p. 96, ¶36.

Presentence Investigation: Gilmore Fails To Disclose His Ownership of the Securities

After Gilmore signed the plea agreement, the State initiated a presentence investigation conducted by investigator Rebecca Bostic. App., pp. 130-138. One purpose of the investigation was to evaluate Gilmore's finances, net worth, and income to assess his ability to pay restitution to his victim Kimberly Gilmore and fines and costs to the State of West Virginia. Gilmore was required to disclose all of his assets and income to the Kanawha County Circuit Court. Gilmore reported the total value of his assets to the investigator as being \$70,000. App., pp. 136-137, ¶33. Gilmore did not report his claimed ownership in the US Treasury Securities he transferred to the Petitioner. *See*, App., pp. 136-137, ¶33.

Gilmore also submitted a copy of his 2004 Federal Income Tax Return to the investigator. Gilmore's 2004 tax return does not disclose any income being received from the US Treasury Securities Gilmore transferred to Petitioner in August 2004. Gilmore's 2004 tax return reports income in the amount of \$15,300 from rental properties (the two rental properties supposedly transferred to Brenda Kuhn in 2005) and oil & gas royalties in the amount of \$6,617. App., pp. 136, ¶33. Gilmore also reported he had obtained a reduction in his child support obligations, which, as a result of the reduction was set at \$213.60 for all five children or \$42.72 per child. App., pp. 135, ¶27. Gilmore also

failed to disclose to the investigator the \$210,000 cash Gilmore received from his September 2004 sale of his home. The investigator learned about Gilmore's sale of his home from ex-wife Kimberly Gilmore. App., pp. 136-137, ¶33. Gilmore did report he was disabled and had filed a claim for disability with Social Security Administration.⁵ App., pp. 137-138, ¶37.

After receiving the presentence investigation report, Gilmore directed his attorney to Peter A. Hendricks to write a letter to the investigator to correct errors in the report. On July 5, 2005, Mr. Hendricks did send a four page single spaced letter to Ms. Bostic detailing all errors Gilmore wanted to bring to the investigator's attention. Mr. Hendrick's letter does not mention Gilmore's failure to disclose his claimed ownership interest in the US Treasury Securities to the Petitioner. See, App., pp.139-142.

Court Rejects Home Confinement And Orders Gilmore To State Prison

At the Gilmore's sentencing hearing held July 25, 2005, Judge Bloom heard damning testimony from Gilmore's ex-wife Kimberly Gilmore regarding the years of emotional and physical abuse she suffered during their marriage. Kimberly further expressed her fear of what would happen to her if Gilmore ever got out of prison. (BEV AFF>>>>) At the conclusion of the sentencing hearing, Judge Bloom rejected the State's recommendation of home confinement and sentenced Gilmore to a state prison facility for an indeterminate sentence of 1 to 15 years. App., p. 127, ¶¶33-34.

⁵ On March 23, 2012, Gilmore was awarded annual social security disability benefits in the annual amount of \$23,903 and received a cash award of back payments in the amount \$67,143.20. Each of Respondent's minor children are now receiving a monthly benefit payment in the amount of \$217 per month. or Petitioner received a corrected social security benefit statement detailing his 2011 lump sum payment in the amount of \$67,143.20 (Respondent's Proffered Exhibit 13.>>>>)

Gilmore's Continuing Fraud During His Entire Prison Confinement

Gilmore was released from prison during January 2010. During his four and one-half years in prison, Gilmore stayed quite busy as a *pro se* litigator. Gilmore continued to pursue his criminal appeal; defend Kimberly Gilmore's civil action; and initiate two civil actions in Federal court against Judge Bloom and others he blamed either for sending him to prison or keeping him there. App., pp. 194-223. In each of these State and Federal actions, Gilmore filed multiple declarations and affidavits claiming to be an indigent person (*informa pauperis*) to obtain waivers of filing fees, transcription costs, court costs, copying fees and ultimately, free representation by an attorney. App., p. 188, ¶1-3 and App., pp. 194-223.

In his multiple declarations of indigent status, Gilmore swore under oath he had no money, accounts or securities and no one was holding any money, accounts or securities or receiving any income on his behalf. App., pp. 196-197. Gilmore repeatedly claimed his only source of income was what he earned from his prison employment and the small gifts received from relatives to purchase toiletries. App. 205, ¶3. Both the State and Federal courts granted the waivers of costs and fees, and free copying and transcriptions services on the basis of Gilmore's claimed indigent status. App. 118. Ultimately, Federal Magistrate Judge Mary Stanley asked Thomas J. Gillooly to represent Gilmore in his two Federal civil actions *pro bono*, and Mr. Gillooly agreed. App., 188, ¶3. On December 8, 2008, Mr. Gillooly filed his initial appearance as the Gilmore's attorney in Federal Court in case no. 2:08-0326. App., p. 218.

THE DIVORCE ACTION

Gilmore was released from prison on January 10, 2010. He filed his petition for divorce on March 15, 2010. App., p. 14. Along with his divorce petition, Gilmore filed a motion for an ex-parte order to Petitioner to return the US Treasury Securities to him. Gilmore claimed he transferred the securities to Petitioner for the sole purpose of having her manage them during his incarceration. App., p.14. At trial Gilmore admitted it was not necessary to transfer the securities to Petitioner for her to manage them during his incarceration. The securities could have been managed by Petitioner or anyone via direct dial to the US Treasury's computer. All that was needed to manage these funds electronically was knowledge of the Respondent's account number and his password. A transfer of ownership was never required to manage them. App., p. 94, ¶¶24-25.

Final Hearing

With the facts of the *prima facie* previously stipulated at an earlier hearing on September 2, 2010, three issues remained for the Family Court's Decision: (1) Whether or not Gilmore's claim for return of the funds transferred to the Petitioner should be dismissed pursuant to West Virginia's Clean Hand's Rule (App., p. 120); (2) If the Clean Hands Rule was not applicable, the validity of the parties' prenuptial agreement must be determined (App., p. 3); and (3) If the prenuptial agreement were determined to be valid, was Gilmore entitled to a return of the funds under the terms of the prenuptial agreement. App., p. 118.

As reflected in the Court's final order, the Court held the prenuptial agreement was valid and enforceable and ordered Petitioner to return the funds to Gilmore

without addressing Petitioner's argument for dismissal on the basis of West Virginia's Clean Hands Rule or making any factual determination that Gilmore was entitled to a return of the funds under the express terms of the prenuptial agreement. *See, App.*, pp.1-12.

The parties and their counsel first appeared for final hearing in this case on November 30, 2011. After some testimony was taken from Petitioner's and Respondent's handwriting analysis experts, the Family Court convened a conference with both attorneys and recessed the final hearing until a court ordered mediation could be completed. On August 22, 2012, following the parties' unsuccessful efforts to exchange discovery and information, the Court ordered the parties to complete all discovery by September 28, 2012. Following additional discovery, the final hearing was reconvened on December 3 and was concluded on December 4, 2012. *See, App.*, pp. 1-12.

Gilmore's Changing Explanations For His Filing Multiple Affidavits And Motions In State And Federal Court Claiming Indigent Status During His Incarceration

In his ex-parte motion filed in Family Court on March 15, 2010, Gilmore claimed Petitioner Truman stopped talking to him about the money in August of 2009. *App.*, p. 180, ¶5. During his December 6, 2010 deposition Gilmore was questioned about the affidavit of poverty (*informa pauperis*) he filed with the Kanawha County Circuit Court in December 2006. Specifically, Gilmore was asked why he claimed to be indigent if he had only transferred the US Treasury Securities to the Petitioner to manage them for him while he was in prison. Gilmore testified he claimed indigent status because as of

December 2006, the Petitioner was no longer talking to him about the money or what she was doing with it. App., pp. 167-178.

At trial, Gilmore again changed his story for a third time. At trial, Gilmore claimed for the first time it was his “jailhouse lawyers” who instructed him to file multiple false claims of indigent status⁶. App., p.109, ¶73. These ever changing explanations notwithstanding, Gilmore continued to file false claims of indigent status in Federal court more than nine months after Mr. Gillooly replaced his “jailhouse lawyers. App., pp. 211-214.

II. Family Court’s Findings And Final Order

The Family Court Ignored Petitioner’s Unclean Hands Argument

In her proposed findings and conclusions of law, Petitioner argued for dismissal of Gilmore’s claim on the basis of West Virginia’s “clean hands” rule. App., pp. 120-125. The Family Court’s Order did not address the Petitioner’s argument for application of West Virginia’s “clean hands” rule or discuss the undisputed evidence submitted by the Petitioner supporting its application. *See*, App., pp. 1-12.

The Family Court Held The Prenuptial Agreement Is Valid

The Family Court held the Prenuptial Agreement dates August 9, 2004 was valid under *Ware v. Ware*, 224 W.Va. 599, 687 S.E.2d 382 (2009) at Syllabus points 3 and 4 which states:

‘A prenuptial agreement is presumptively valid if both parties to the agreement were represented by independent counsel at the time it was entered into. In addition, if only one party was represented by counsel,

⁶ It should be noted that when the Gilmore’s Presentence Investigation was conducted by the State of West Virginia in May 2005, Gilmore was not in jail; he was still talking to the Petitioner about the money; and he did not have his “jailhouse lawyers” to advise him when he failed to disclose the US Treasury Securities to the Presentence Investigator Rebecca Bostic.

there is no presumption of validity, and the burden of proving the agreement's validity rests on the party who seeks to enforce it.'

Id. at 687 S.E.2d 390. App., p.4.

In reaching this conclusion, the Family Court held that no special burden of proof existed because neither party had counsel at the time the agreement was signed. App., p. 4.

The Court further found:

There was no evidence to suggest that the Respondent was under any disability or lack of education that might have undermined the validity of her decision to enter into the Agreement. This is particularly so (in retrospect) in light of the extremely sophisticated trust agreement she entered into after the parties separated.

App., p.4.

On the basis of these limited findings, the Family Court held the Prenuptial Agreement dated August 9, 2004 is valid and enforceable, and that:

[Gilmore] placed the Treasury Direct funds under the [Petitioner's] control as a matter of convenience, to enable her to manage the funds, at his direction, during his incarceration.

* * *

[I]t is simply not credible that the Petitioner would give away what was essentially his entire estate, almost everything he owned in the world, to a woman he had just married, who he had insisted sign a prenuptial agreement keeping all of their financial affairs separate. Such a gift would have left the Petitioner with essentially no assets.

App., p.5.

SUMMARY OF ARGUMENT

GILMORE'S RECOVERY IS BARRED BY THE UNCLEAN HANDS RULE

Gilmore's fraudulently transferred more than \$1,000,000 in US Treasury Securities to the Petitioner to: (1) Avoid the claim of his former wife Kimberly

Gilmore for compensatory and punitive damages arising from injuries she sustained when Gilmore broke into her home and attacked her with a 200,000 volt stun gun; (2) avoid the claim of the State of West Virginia for restitution and court costs; and (3) obtain a reduction of his support obligation to each of his five children.

Gilmore testified he transferred the US Treasury Securities to the Petitioner to manage them for him while he was in prison. The undisputed facts do not support his testimony. Gilmore transferred his ownership interest in the US Treasury Securities to the Petitioner in the face of substantial claims of the State of West Virginia and Kimberly Gilmore arising from Gilmore's burglary of Kimberly Gilmore's home and attack on her with a 200,000 volt stun gun. During the presentence investigation, Gilmore failed to disclose his claimed ownership interest in the US Treasury Securities to presentence investigator when he had a duty to disclose all of his assets.

If Gilmore had transferred the securities to the petitioner to manage as claimed. Gilmore had an absolute duty to disclose them to the sentencing court and the State of West Virginia during the presentence investigation. If he had transferred the securities to the Petitioner to manage as claimed, Gilmore committed additional fraud on the courts in obtaining free services and legal representation claiming to be an indigent person.

At trial, Gilmore admitted that it was not necessary for him to transfer ownership of the US Treasury Securities to the Petitioner to enable the Petitioner to manage them while he was in prison. The US Treasury Securities could be

managed via direct dial with knowledge of Gilmore's account number and password. A transfer of ownership was never required!

In the light of these facts, the Family Court had an obligation to dismiss Gilmore's claims on the basis of West Virginia's well settled "unclean hands" rule. If not corrected by this Court, Gilmore will have been allowed to make a mockery of the judicial system of the United States and the State of West Virginia. A system, that if left uncorrected by this Court, allowed Gilmore to fraudulently transfer the US Treasury Securities to the Petitioner and avoid the financial consequences of his crimes; continue the fraud while in prison to obtain additional benefits. and then allowed Gilmore to abuse its substantial equitable powers to recover the fraudulently transferred securities. Gilmore should be left exactly where he placed himself and his claims dismissed.

The Prenuptial Agreement Is Not Valid Under either *Gant or Ware*

The Family Court did not make sufficient factual findings to support its conclusion the Prenuptial Agreement of August 10, 2004 was valid and enforceable. The Family Court determined the Prenuptial Agreement was valid and enforceable based on its finding the Ms. Gilmore's signature on the documents was genuine, and there was no evidence presented of any undue influence or coercion on the Respondent to sign the agreement. The Family Court further found there

was no evidence to suggest that the Respondent was under any disability or lack of education that might have undermined the validity of her decision to enter into the Agreement." This is particularly so (in retrospect) in light of the extremely sophisticated trust agreement she entered into after the parties separated.

⁷ *Ware v. Ware*, 224 W.Va. 599, 687 S.E.2d 382 (2009) and Syl. Pt. 2, *Gant v Gant*, 174 W.Va. 740, 329 S.E. 2d 106 (1985)

App., p. 4.

The Family Court's determination the Petitioner understood the legal effect of the prenuptial agreement she signed on the basis of this *non sequitor* is absurd. It simply does not follow that Ms. Gilmore's signing of a sophisticated trust agreement with advice of counsel more than five years after signing the prenuptial agreement without advice of counsel has any evidentiary value in the determination of the validity of the prenuptial agreement in this action. The undisputed facts remain:

- (1) Petitioner has a high school education and no legal training;
- (2) The Petitioner did not understand the agreement;
- (3) The Petitioner was not given any opportunity to have the agreement reviewed by independent counsel; and
- (4) Gilmore did not disclose the value of his assets, his net worth, his income or indebtedness to the Petitioner prior to their marriage.

These undisputed facts, which the Family Court did not address, confirm the Family Court committed reversible error in finding the Prenuptial Agreement valid and enforceable.

Gilmore Did Not Comply With The Express Terms of the Prenuptial Agreement

Paragraph 10 of the prenuptial agreement requires a written agreement signed by both parties to establish Gilmore's claim for the return of the US Treasury Securities upon his release from prison. Gilmore did not present any written agreement concerning his claim the US Treasury Securities were transferred to the Petitioner to be managed while he was in prison and returned to him upon his release. Paragraph 10 further requires that Gilmore was to have paid all taxes on income earned from the securities transferred to the Petitioner. Thus, even if it is assumed the

prenuptial agreement is valid and enforceable for the sake of argument only, Gilmore's failure to comply with paragraph 10 of the prenuptial agreement is fatal to his claim for their return.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues in this case regarding the unclean have been authoritatively decided. However, in view of the unique facts presented, Petitioner believes oral argument under R.A.P. 18(a) is necessary and this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

1. THE FAMILY COURT ERRED IN FAILING TO DISMISS RESPONDENT'S CLAIMS PURSUANT TO WEST VIRGINIA'S LONG STANDING "CLEAN HANDS" RULE.

This Court has long recognized: "Equity never helps those who engage in fraudulent transactions, but leave them where it finds them." *Foster v. Foster*, 655 S.E.2d 172, 177 (W.Va., 2007) (Citations Omitted). This doctrine has been expressly and specifically made a part of the organic law in this State." *Id.*

The unclean hands rule is raised only because of conduct connected with the particular transaction sought to have redressed. *Bias v. Bias*, 109 W.Va. 621, 155 S.E. 898 (1930)(quoting *Ihrig v. Ihrig*, 78 W.Va. 360, 88 S.E. 1010 (1916)). Whenever and if it is made to appear to the court that by reason of fraudulent or other unconscionable conduct, the plaintiff has lost his right to invoke a court of equity, the court will, on the motion of a party, or its own motion, wash its hands of the whole." *Wheeling Dollar Sav. & Trust Co. v. Hoffman*, 127 W.Va. 777, 779-80, 35 S.E.2d 84, 86 (1945) (quoting *State v. Altizer Coal Land Co.*, 98 W.Va. 563, 128 S.E. 286 (1924)). Indeed, this Court may, *sua sponte*, invoke the doctrine of unclean hands to invoke an equitable and just result.

We have held that:

The unconscionable character of a transaction between the parties need not be pleaded or set up as a defense. Whenever it is disclosed the court will of its own motion apply the maxim. It does not matter at what state of the proofs or in what

order a lack of clean hands is discovered. A party cannot waive application of the clean hands rule at the instance of the court, nor does such application depend on the wish of counsel.

Foster v. Foster, 655 S.E.2d 172, 178 (W.Va., 2007)(quoting *Wheeling Dollar Sav. & Trust*, *supra* at 779-80.

Fraud has also been said to consist of conduct that operates prejudicially on the rights of others and is so intended; *388 a deceitful design to deprive another of some profit or advantage; or deception practiced to induce another to part with property or to surrender some legal right, which accomplishes the end desired. Fraud therefore, in its general sense, is

deemed to comprise anything calculated to deceive, including all acts, omissions, and concealments involving a breach of legal or equitable duty, trust, or confidence justly reposed, resulting in damage to another, or by which an undue and unconscientious advantage is taken of another....
37 Am.Jur.2d, Fraud and Deceit § 1 (1968) (footnotes omitted).

Wallace v. Wallace, 291 S.E.2d 386, 388 170 W.Va. 146 (W.Va., 1982)

The record in this case is replete with substantial and undisputed facts that establish Gilmore's transfer of the US Treasury Securities to the Petitioner was a fraudulent conveyance. It cannot be reasonably questioned that Gilmore did not transfer ownership of the US Treasury Securities to the Petitioner to avoid the financial consequences of his criminal acts arising from the claims of the State of West Virginia and his ex-wife Kimberly Gilmore.

On August 29, 2002, Gilmore broke into the home of his estranged wife Kimberly Gilmore and attacked her with a 200,000 volt stun gun. The police called to the scene found a mas, a stun gun and surgical glove. Gilmore was arrested and initially charged with domestic battery. Gilmore initially claimed that he had not broken in and that Kimberly actually drove him to her residence until informed by the police his car had been found parked on a nearby street and towed away. App., pp. 130-131, ¶7. In May 2003, the Kanawha County Grand Jury issued a four count indictment against him. App.,

pp. 130, ¶1

Gilmore next set into action a plan to hide his assets from Kimberly Gilmore, the State of West Virginia and his five children. In furtherance of his plan, Gilmore met and married the Petitioner after a whirlwind courtship they became engaged. On August 10, 2004, Gilmore and the Petitioner entered into a prenuptial agreement App., pp. 126, ¶2 Gilmore and the Petitioner married on August 23, 2004 and left immediately for a Florida honeymoon. While in Florida, Gilmore took the Petitioner to a bank and transferred 100% of his ownership of US Treasury Securities with a value in excess of \$1,000,000 to the Petitioner as the sole owner. App., pp. 126, ¶7.

At the time Gilmore transferred ownership of the securities, he did not expect he would go to prison. He characterized the criminal charges as a domestic dispute blown out of proportion by his ex-wife to get money from him that he had before they were married. < App., pp. 127, ¶¶9-10. Nevertheless, Gilmore claims he transferred the securities to the Petitioner so she could manage them while he was in prison. Gilmore, however, failed to produce any written agreement signed by both of them as required by paragraph 10 of the prenuptial agreement to support this claim. Moreover, at trial, Gilmore admitted it was not necessary to transfer the securities in order to manage them. The securities could be managed by anyone with knowledge of his account number and password (PIN). App., pp. 94, ¶24.

After his fraudulent transfers of the securities and rental properties were completed, Gilmore executed a plea agreement with the State of West Virginia on May 20, 2005. Gilmore pled guilty to burglary in exchange for the State's agreement not to prosecute three of the criminal charges and a promise of a recommendation of home

confinement. App., pp. 153-155. The State then initiated a presentence investigation. App., pp. 130-138.

One purpose of the investigation was to determine Gilmore's net worth and income for determination of his financial ability to pay restitution. Gilmore falsely reported to the investigator that the total value of his assets was \$70,000. App., pp. 136-137, ¶33. Gilmore did not disclose his claimed ownership interest in the US Treasury Securities. Gilmore also provided a copy of his 2004 Federal Income Tax Return to the presentence investigator. His 2004 income tax return did not disclose his ownership of or receiving any income from the US Treasury Securities transferred to the Petitioner. *See*, App., pp. 136, ¶33. Gilmore did disclose to the investigator his child support obligations had been reduced to a total amount for his five children to \$213.60 per month or \$42.72 per child. App., pp. 135, ¶27.

At the sentencing hearing, Kimberly Gilmore described the years of emotional and physical abuse she suffered during the marriage and her fear of what Gilmore would do to her if ever released from prison. Judge Bloom then rejected the State's recommendation of home confinement and sentenced Gilmore to prison on an indeterminate sentence of 1 to 15 years. App., p.127, ¶¶14-15.

During his four and one-half years in prison, Gilmore continued the fraud. Gilmore filed multiple affidavits and motions in Federal & State Court claiming to be an indigent person entitled to waiver of costs, filing fees, free copy and transcription services and appointment of counsel. App., 194-223. While in prison, Gilmore received everything he was entitled based on his claimed indigent status. He received free copying

and transcription services, and a waiver of filing fees. Ultimately, Thomas J. Gillooly⁸ agreed to represent Gilmore *pro bono* at the request of US Magistrate Judge Mary Stanley. App., pp. 188, ¶3. These facts notwithstanding, the Family Court failed to even address the Petitioner’s argument for application of the “clean hands” rule and dismiss Respondent’s claims.

The unclean hands rule is not test of whose hands are most clean. The unclean hands rule is simple its application. When either or both of the parties to a transaction come in to the court with dirty hands, it is well settled in this state a court of equity is not required:

to act as umpire in a controversy growing out of transactions in which both parties are equally guilty of fraudulent or otherwise unconscionable conduct in connection with the matter of litigation, but will leave them where they have placed themselves. (Citations omitted.) These basic rules of equity were not devised, and are not applied, for the benefit of either litigant, but exist for the purpose of maintaining the dignity and integrity of the court acting only to administer equity.

Wheeling Dollar Sav. v. Hoffman, 35 S.E.2d 84, 127 W.Va. 777 (W.Va., 1945)

A party guilty of fraud in a transaction on which he relies for recovery can have no relief in equity against another person, even though that person may be equally guilty. Equity will grant no relief to either party ... when a contract has been entered into through fraud, or to accomplish any fraudulent purpose, a court of equity will not, at the suit of one of the parties participating in the fraud, compel its enforcement. It will leave such parties in exactly the position in which they place themselves by their own acts, and will refuse affirmative aid to either. (Citations Omitted)

Dye v. Dye., 39 S.E.2d 98, 128 W.Va. 754 (W.Va., 1946)(Emphasis added.)

By any definition of the term “fraud” or “fraudulent conveyance”, Gilmore’s transfer of his United States Treasury Securities to the Petitioner to avoid substantial

⁸ Petitioner filed a Motion For Mr. Gillooly’s removal with the Family Court. Petitioner argued that Mr. Gillooly, was aware Gilmore had claimed indigent status when he agreed to represent Gilmore *pro bono* at the request of Magistrate Judge Mary J. Stanley. As such, Mr. Gillooly was aware Gilmore’s claim to have continually owned the US Treasury Securities in Family Court was entirely adverse to his multiple claims of indigent status in Federal court. The Family Court never ruled on Petitioner’s motion.

claims of the State of West Virginia and his ex-wife Kimberly Gilmore and obtain a reduction in his child support obligation constituted a fraudulent conveyance. In making the transfer, Gilmore intended to and did avoid the substantial claims for restitution and damages to Kimberly Gilmore and the State of West Virginia and obtained a reduction in his child support⁹ obligations. Gilmore must be left in the position he placed himself and his claims must be dismissed under the “clean hands” rule.

2. **THE FAMILY COURT ERRED IN FINDING THE PARTIES’ PRENUPTIAL AGREEMENT WAS VALID AND ENFORCEABLE.**

West Virginia has clear standards the courts must apply when making a determination of the validity of a prenuptial agreement. Syllabus point 2 of *Gant v. Gant*, 174 W.Va. 740, 329 S.E.2d 106 (1985). The following requirements must be satisfied in order for a prenuptial agreement to be held valid:

2.The validity of a prenuptial agreement is dependent upon its valid procurement, which requires its having been executed voluntarily, with knowledge of its content and legal effect, under circumstances free of fraud, duress, or misrepresentation; however, although advice of independent counsel at the time parties enter into a prenuptial agreement helps demonstrate that there has been no fraud, duress or misrepresentation, and that the agreement was entered into knowledgeably and voluntarily, such independent advice of counsel is not a prerequisite to enforceability when the terms of the agreement are understandable to a reasonably intelligent adult and both parties have had the *opportunity to consult with independent counsel.*”

Syl. Pt.2, *Gant, supra*. (Emphasis added.); *See also, Ware v. Ware*, 687 S.E.2d 382 (W.Va. 2009) *quoting favorably* Syl. Pt. 2, *Gant v. Gant, supra*.

In this case, the prenuptial agreement was invalid for two independent reasons. First, Petitioner did not have knowledge of its legal effect because Gilmore did not disclose his substantial wealth, net worth, his income or his indebtedness to the Petitioner

⁹ In 2011 Gilmore was determined to be totally disabled by the Social Security Administration. Each of Gilmore’s minor children now receive in excess of \$200 a month directly from the Social Security Administration and Gilmore has been relieved of any further personal payment of child support.

prior to their marriage on August 23, 2004. Petitioner was not aware Gilmore had in excess of a \$1,000,000 in US Treasury Securities. App., pp. 126, ¶7. As noted by the State's Presentence Investigator Rebecca Bostic "Gilmore's character in society [was] one of anonymity for the most part..." App., p. 144. The agreement could also be invalidated on the basis the Petitioner did not have an opportunity to have the agreement reviewed by independent counsel.

On August 10, 2004, the Petitioner met Gilmore at a Charleston Bank where he handed her a prenuptial agreement for her immediate signature. He was in a hurry to get it signed. The Petitioner's formal education ended with her graduation from high school. The Petitioner read the agreement but did not understand most of its terms. Gilmore, who is not a lawyer, drafted the agreement. Gilmore, ignoring the clear conflict of interest, provided the Petitioner, a non-lawyer, provided the Petitioner with her only explanation of the legal effect of the agreement. Petitioner did not have any opportunity to have the agreement reviewed by independent counsel and she was not provided a copy of the agreement. App., p. 126, ¶¶2,4 and 7. The agreement is difficult to read, and its key provision paragraph 10 is vague and ambiguous. App., p. 40, ¶10. The prenuptial agreement does not provide any waiver of the required disclosures. *See, Foot Note #3.*

With respect to the Petitioner's ability to understand the Prenuptial Agreement The Family Court held:

There was no evidence to suggest that the Respondent was under any disability or lack of education that might have undermined the validity of her decision to enter into the Agreement. **This is particularly so (in retrospect) in light of the extremely sophisticated trust agreement she entered into after the parties separated.**

App., p. 4 (Emphasis added.).

The Family Court concluded the agreement was valid and enforceable based in part, on its finding that Gilmore was not “under any disability or lack of education that might have undermined the validity of her decision to enter the Agreement” The Family Court dismissed the fact Petitioner was not given any opportunity to have the document reviewed by independent counsel “(in retrospect)” based on the fact that more than five years after the fact, the Petitioner entered into an “extremely sophisticated trust agreement” with advice of counsel. The Family Court’s finding the Petitioner had sufficient knowledge to understand the legal effect of the agreement on the basis of this *non sequitor* is patently absurd and cannot be sustained.

Having an opportunity to have the agreement reviewed by independent counsel is significant. If a party opposing validity of a prenuptial agreement did not have this opportunity, the agreement cannot be held to be valid in the absence of a waiver. This is not the most significant factor in the validity analysis. Disclosure is the single most significant factor.

Gilmore did not disclose his net worth, income or the value of any of his assets the Petitioner prior to their marriage. Attachment (A) to the agreement lists the account numbers for Gilmore’s checking account and US Treasury Securities and the address for each of Gilmore’s two rental properties located in South Charleston and Charleston, West Virginia. The Attachment does not provide: (1) any values for any of the accounts or property listed; (2) Gilmore’s net worth; or (3) his income. His failure to make a full disclosure is fatal to his claim of the validity of the prenuptial agreement at issue here.

In antenuptial agreements a confidential relationship exists between the contracting parties and it is the duty of the prospective husband to fully disclose the amount of his property and to deal fairly with his prospective bride and to honestly carry out the provisions of the contract.

Williamson v. First National Bank of Williamson et al., 111 W. Va. 720, 164 S. E. 777; Dehart V. Dehart, 109 W. Va. 370, 372, 154 S. E. 870; Hinkle v. Hinkle, 34 W. Va. 142, 11 S. E. 993. The first knowledge plaintiff had of the fact that her husband had not fully informed her with reference to his property was after the filing of the appraisal.

Gieseler v. Remke, 117 W.Va. 430, 185 S.E. 847 (W.Va., 1936)

The significance of full disclosure was affirmed in the very recent case of *Morris v. Morris* (Memorandum Decision, W.Va., No. 13-0742, March 28, 2014). *Morris* confirms full and accurate financial disclosure is the most significant of the requirements of valid and enforceable prenuptial agreement. er requirements of a valid prenuptial agreement have been satisfied.

In *Morris*, Ms. Morris had been married to the Respondent several years when she agreed to sign a postnuptial agreement demanded by her father-in-law as a condition for his advancement of funds to complete the couple's new home. Ms. Morris had the agreement reviewed by independent counsel who advised her not to sign the agreement. Her own counsel's advice notwithstanding, Ms. Morris signed the prenuptial agreement against her independent counsel's advice. These undisputed facts notwithstanding, this Court declared the Prenuptial Agreement was invalid because:

it misrepresented the character and value of the parties' property that was purportedly subject to the agreement and failed to include all of the parties' assets and liabilities within its terms.... In addition to the noted glaring omissions, the postnuptial agreement's property lists also contain gross inaccuracies insofar as other information contained therein either received an uncharacteristic classification or was grossly misrepresented in terms of value.

* * *

Given the glaring omissions and gross inaccuracies in the postnuptial agreement's listing of the parties' assets and liabilities, we find that the family court correctly set aside such agreement. We further conclude that, based upon the foregoing discussion, the circuit court erred by reversing the family

court's order and upholding the parties' postnuptial agreement.

Morris v. Morris (Memorandum Decision, W.Va., No. 13-0742, March 28, 2014)

After nearly 20 years of marriage, Ms. Morris was generally aware of her husband and his family's substantial wealth. She had an opportunity to have the agreement reviewed by independent counsel and signed it after being advised by her independent counsel not to sign it. These facts notwithstanding, the Family Court determined the agreement was not valid because it failed to make a full disclosure of Mr. Morris' assets, liabilities, indebtedness and income.

In this case, it is undisputed the Petitioner was not aware of Gilmore's substantial wealth prior to their marriage and the prenuptial agreement does not disclose the value of Gilmore's assets, his net worth or income. As such, on the basis of Gilmore's non-disclosure of his wealth alone, the Family Court's determination the prenuptial agreement is valid and enforceable cannot be sustained.

3. ASSUMING ARGUENDO THE PRENUPTIAL AGREEMENT IS VALID AND ENFORCEABLE, THE FAMILY COURT ERRED IN ORDERING THE RESPONDENT TO REPAY FUNDS WITHOUT ANY FINDING THE RESPONDENT HAD COMPLIED WITH THE TERMS OF THE AGREEMENT.

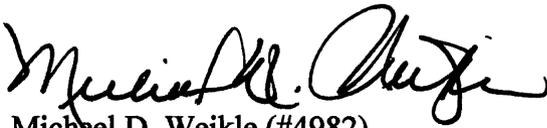
Paragraph 10 of the Prenuptial Agreement contains a key provision. Paragraph 10 required a written agreement for any claims to assets by either party against the other. It also required Gilmore to pay the taxes on any asset claimed pursuant to the terms of the written agreement. *See, Foot Note #3 at ¶10.* Gilmore presented no written agreement supporting his claim for a return of the US Treasury Securities. Furthermore, the Petitioner reported all income and paid all taxes on the interest earned from the US Treasury Securities. App., p.40, ¶10.

Petitioner argued Gilmore's claim for the return of the US Treasury Securities must be denied because Gilmore had not complied with the requirements of paragraph 10 of the Prenuptial Agreement. The Family Court made no findings or conclusions of law with respect to Petitioner's argument of non-compliance. Accordingly, even if the Prenuptial Agreement was valid and enforceable, Gilmore failed to comply with its terms and was thus not entitled to any return of the securities.

CONCLUSION

For the reasons set forth herein, the Court should reverse the Family Court and order Gilmore's claim be dismissed pursuant to the "Clean Hands" Rule. If, however, the Court should determine, the rule does not apply, the Family Court's ruling the prenuptial agreement is valid and enforceable should be reversed for non-disclosure and/or the fact Petitioner was not provided the opportunity to have the agreement reviewed by independent counsel before or after she signed it. Finally, if the Court should determine the agreement is valid and enforceable, the matter should be returned to the Family Court for further hearing on the issue of Gilmore's compliance with the express terms of paragraph 10 of the agreement.

Respectfully submitted,

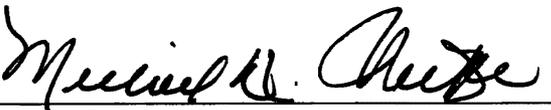


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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on June 30, 2014, a copy of the Petitioner's Brief was served via regular U.S. Mail (postage prepaid) up Respondent's Counsel:

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