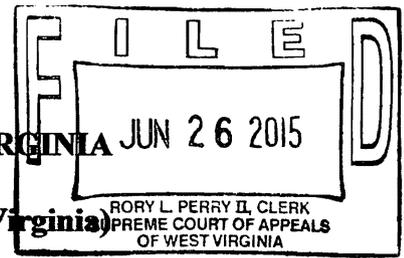


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**  
**DOCKET NO.: 15-0008**  
**(Lower Tribunal: Circuit Court of Mineral County, West Virginia)**  
**(Civil Action No.: 14-C-137)**



PRISTINE PRE-OWNED AUTO, INC,  
a West Virginia Corporation,

Petitioner,

v.

JAMES W. COURRIER, JR.,  
Prosecuting Attorney for Mineral  
County, West Virginia

and

TROOPER M.L. TRAVELPIECE, individually and  
in his official capacity as a West Virginia State Trooper,

Respondents.

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**PETITIONER'S REPLY TO THE BRIEF OF RESPONDENT JAMES W. COURRIER,  
JR., PROSECUTING ATTORNEY FOR MINERAL COUNTY, WEST VIRGINIA**

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**COUNTER-STATEMENT OF THE CASE AND**  
**COUNTER- ARGUMENTS**

The Petitioner reasserts and reiterates its Statement of the Case and Argument(s) sections of its Brief as if fully set forth below. Where there are inconsistencies between the Petitioner's and Respondent Courier's Statement of the Case and Argument(s) sections, the Petitioner specifically objects and challenges such inconsistencies.

## ASSIGNMENT OF ERROR AND ARGUMENT

### I. PRISTINE IS ENTITLED TO THE ENTRY OF A WRIT OF MANDAMUS.

Notwithstanding Respondent Courier's assertion that he understands the "heightened role and duties of prosecutors in our criminal justice system," his actions as it pertains to Pristine speak louder than his words. As previously cited by Pristine, an action for Mandamus is the proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse to so do, in violation of their duties. (Nobles v. Duncil, 202 W. Va. 523, 505 S. E. 2d 442 [1998]; County Com'n of Greenbrier County v. Cummings, 228 W. Va. 464, 720 S.E.2d 587 [2011]). This Court in State ex rel Skinner v. Dostert, 166 W. Va. 743, 278 S. E. 2d 624 [1981]) held "The prosecuting attorney is a constitutional officer who exercises the sovereign power of the State at the will of the people and he is at all times answerable to them." (See also West Virginia State Constitution in Article 2, Section 2). Also, this Honorable Court in Nicholas v. Sammons, Jr., 178 W. Va. 631, 363 S.E. 2d 516 (1987), in citing the United States Supreme Court in Berger v. United States 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935), identified the universally recognized principle that a prosecutor's duty is to obtain justice and simply to convict:

[He] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

As previously cited in State v. Hottinger, 194 W. Va. 716, 461 S.E. 2d 462 (1995) as well as in State v. Boyd, 160 W. Va. 234, 233 S.E. 2d 710 (1977), Respondent Courier failed and

continues to fail to recognize his quasi-judicial position and his duty to “set a tone of fairness and impartiality.” This Honorable Court in State v. Britton, 157 W. Va. 711, 203 S.E. 2d 462 (1974)

held:

A prosecutor’s duty as a public officer is to serve the interest of the Sate in securing convictions of those who violate the laws of this organized society. On a concomitant parity with the former duty is the duty that a prosecutor must conduct his office always to insure justice for those subjected to prosecution.

Consequently, a prosecutor’s duty to the accused is fairness. Though the public interest demands that a prosecution be conducted with energy, skill and zealously, the State’s attorney should see that no unfair advantage is take of the accused. It is as much the prosecutor’s duty to see that a person on trial in not deprived of any of his statutory or constitutional rights as it is to prosecute him for the crime of which he may be charged.

Respondent Courier abused his prosecutorial discretion and acted in complicity with

Respondent Travelpiece in arbitrarily and capriciously violating Pristine’s clear legal rights.

Respondent Courier argues that he “at no point had custody or control over any seized items”;

however he, as the lead law enforcement officer of the County, possesses the responsibility to oversee his law enforcement officers to insure the proper administration of their duties.

Respondent Courier could have acted anytime after Pristine’s filing of its Complaint for Writ of Mandamus and after the lower Court’s ruling to reverse these miscarriages of justice, but he chose instead to continue persecuting Pristine.

Respondent Courier’s actions violated Pristine’s clear legal right to be free from unreasonable searches and seizures. At the time of the issuance of the Warrant up and to the time of the filing of the Complaint for Writ of Mandamus, no other remedy as beneficial, convenient and effective could have best served Pristine in the restoration of its rights and property. Respondent Courier proudly argues (as did Counsel for Respondent Travelpiece) since

an indictment has been returned against representatives of Pristine, suppression hearings can be conducted in the instant criminal matter to address. That assertion completely ignores the affect of Respondent Courier's dereliction of his duties has had on Pristine. The issuance of the general search warrant set in motion the series of unconstitutional events that have victimized Pristine.

Respondent Courier states the State Police have attempted to make arraignments to return the items to Pristine; however, no specific attempts have been made to Pristine's undersigned Counsel of record. Notwithstanding, neither Pristine nor any other reasonable person would sanction a dump of truckloads of documents from over a decade of conducting business with no way of verifying whether each file is complete and remains intact as it did upon seizure. Mandamus is and remains the only remedy to safeguard Pristine's clear legal right to be free from the unreasonable search and seizure inflicted upon Pristine.

**II. PRISTINE WAS THE VICTIM OF AN UNCONSTITUTIONAL SEARCH AND SEIZURE AS A RESULT OF THE LOWER COURT' FAILURE TO SET ASIDE THE GENERAL SEARCH WARRANT.**

Respondent Courier is as stubborn and desperate as Counsel for Respondent Travelpiece in ignoring the substance and effect of the general search warrant issued against Pristine. Respondent Courier has made several extemporaneous and false statements that are not found in the Amended Appendix of Record in an attempt to mislead this Honorable Court. Respondent Courier states on Page Two of his brief that payments were made by Ms. Jackson after Pristine notice of default; however this contradictory evidence was not introduced during the December 1, 2014 hearing before the lower Court. On Page Seven of his Brief, Respondent Courier states

that “Despite claims from Pristine, the Kelleys deny ever trading this wrecked vehicle in to Pristine or in any other way conveying title back to Pristine, which further supports Trooper Travelpiece’s contention in his affidavit that Pristine did not have the legal standing to sell that vehicle to anyone else nor to repossess it.” That statement is not supported by the evidence adduced before the lower Court and is false. No such statement is in the Amended Appendix of Record. In fact, Fernando Smith’s uncontroverted testimony on Page 63 and 64 of the Amended Appendix of Record Page 118, states that Kelley purchased another vehicle after trading in the Ford Freestyle. Again, on Page Eight of Respondent Courier’s Brief, he invents another statement never in evidence before the lower Court: “Therefore, the bill of sale was not exculpatory at all because the buyers did not see the small print saying that the vehicle had a salvage history and at no time were they told by Pristine of the vehicle’s history.” Neither Jackson nor Dorman was present to offer testimony during the December 1, 2014 hearing. In fact, page thirty-four of the Amended Appendix reflects Jackson’s and Dorman’s signature upon the bill of sale. In fact, upon this Honorable Court’s review of Page thirty-four of the Amended Appendix, it is evident that the print is not small, but highlighted with bold print. Respondent Courier complains that “the small print was circled by Pristine or its attorney.” Again, no objection was made at the introduction of the item into evidence. In fact, the undersigned Counsel for Pristine has no idea how or why it is circled but it is clear that the disclaimer was boldly and prominently placed on the face of the bill of sale. In any event, Respondent Courier’s fabricated statements are an attempt to masquerade the fact that probable cause did not exist to justify the issuance of the general search warrant and that Magistrate Roby was misled and her determination was hopelessly tainted.

Equally clear and unrefuted is that Respondent Travelpiece knew of the exculpatory documents and did not disclose them to Magistrate Roby:

(Mr. Smith) Q. Did you have any opportunity to show those documents to Magistrate Roby when you applied for the search warrant?

(M. L. Travelpiece) A. Yes, sir. I previously spoken with Magistrate Roby about several of the items of the investigation.

(Mr. Smith) Q. Okay. Now, I want you to listen to my question.

(M. L. Travelpiece) A. Okay.

(Mr. Smith) Q. Did you show her those two documents when you applied for this search warrant?

(M. L. Travelpiece) A. The title – you're asking sir?

(Mr. Smith) Q. The title.

(M. L. Travelpiece) A. No sir, I did not show her the title.

(Mr. Smith) Q. And the buyer's order – repair order – that contract we just went over, did you show her that one?

(M. L. Travelpiece) A. No, sir, I did not.

(Mr. Smith) Q. But you had seen that one previously; correct?

(M. L. Travelpiece) A. Correct.

See Amended Appendix of Record, Page 118, Transcript Pages 30 and 31

(Mr. Smith) Q. Can you identify this document and tell me if you have ever seen it before?

(M. L. Travelpiece) A. Looks like a voluntary lien to be filed with DMV.

(Mr. Smith) Q. Have you seen it before?

(M. L. Travelpiece) A. Yes, sir, I have seen it.

(Mr. Smith) Q. Did you see it prior to the time that you would have requested your warrant from Magistrate Roby?

(M. L. Travelpiece) Yes, sir.

(Mr. Smith) Q. So did you show that document to Magistrate Roby when you went to apply for the search warrant?

(M. L. Travelpiece) A. No, sir. I did not.

See Amended Appendix of Record, Page 118, Transcript Pages 41-42.

(See also Amended Appendix of Record, Page 118, Transcript Page 43, Line 1 through 24 and Page 44, Line 1 through 20).

Respondent Courier refuses to acknowledge that, based upon Respondent Travelpiece's failure to provide Magistrate Roby with the above itemized exculpatory evidence, she was denied the ability to determine whether a nexus between the criminal activity alleged and the things searched existed in order to substantiate probable cause. No "prudent person of reasonable caution" could make such a probable cause determination without the above exculpatory documents. The United States Supreme Court in U.S. v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed2 677 (1984) acknowledged that failure and correctly held that without a substantial basis for determining probable cause; "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."

Respondent Courier also refuses to acknowledge the failure of the conclusory assertion within Respondent Travelpiece's Affidavit regarding "complaints from other customers."

Respondent Travelpiece testified at length that he relied on Department of Motor Vehicles Investigator Ms. Mongold's statements and investigation. (See Amended Appendix of Record, Page 118, Transcript Pages 27-30; 45 and 46). Even though Respondent Travelpiece did not receive an affidavit from Ms. Mongold, he relied on her information to create the Affidavit for the Warrant. At no time did Respondent Travelpiece testify as to any other specific complaints, nor did he offer testimony that Ms. Mongold was aware of any other "complaints" that would have substantiated his Affidavit. Pristine reiterates that such conclusory assertions fall short of the level of substance required to establish probable cause for the issuance of a warrant. State vs. Adkins, 176 W. Va. 613, 346 S.E. 2d 762 (1986) provides:

The conclusory probable cause affidavit based on hearsay does not establish probable cause under the totality of information test required the Forth Amendment and the State Constitution, unless there is a substantial basis for crediting hearsay set out in the affidavit which can include collaborative efforts of the police officers.

The Adkin's Court relied on State vs. White, 167 W. Va. 374, 280 S. E. 2d 114 (1981). It stated:

The question presented is whether it is proper for a Court to look outside the "four corners" of a search warrant affidavit and consider at a suppression hearing testimony that was given to the Magistrate at the time the warrant was issued in order to determine if there was adequate probable cause to issue the warrant.

Respondent Courier poses the same argument as Counsel for Respondent Travelpiece in that Pristine contributed to the "overtaking" of files, since Fernando Smith refused to assist him. In fact, Respondent Courier complains that Respondent Travelpiece "did not say that he intended to take everything on Pristine's premises - that was Attorney James Smith placing words in the Trooper's mouth." (See Page 16 of Respondent Courier's Brief). This is another assertions that is based on Respondent Courier's imagination and not evidentiary proof:

- (Mr. Smith) Q. Now, if we can, on that search warrant, let's review Attachment B. Now, it's true that you didn't list specifically the items that you were going to search for correct?
- (M.L. Travelpiece) A. Everything I was searching for falls under Attachment B.
- (Mr. Smith) Q. Year would have been a great - -
- (M.L. Travelpiece) A. - 2013 tax returns?
- (Mr. Smith) Q. Year would have a great start, but by any metric, did you specifically identify anything?
- (M.L. Travelpiece) A. Yes, sir, I did. I put in for bills of sales, warranty contracts, repossession paperwork.
- (Mr. Smith) Q. So you consider in and all to be a specific itemized list?
- (M. L. Travelpiece) A. Any and all for vehicle title? Yes, that's saying I'm looking for all titles.
- (Mr. Smith) Q. Okay. And it doesn't matter whether it been 10 or 15 or 20 years worth?
- (M. L. Travelpiece) A. No, sir. I was taking all the titles.
- (Mr. Smith) Q. So you don't believe that listing items within a search warrant with particularity is the same as saying any and all?
- (M. L. Travelpiece) A. Are you asking if would you have rather me put down a title number for every vehicle sold through Pristine?
- (Mr. Smith) Q. I'm asking you what you understand that makes a particular search warrant. If you're going to specifically search for something, how do you justify saying any and all?
- (M. L. Travelpiece) A. Because it tells you for the titles there that they had dealt with is what I would be looking for, or bill of sales or anything like that, rather than breaking it down for each and every title number.
- (M. Smith) Q. So it's true then that you believe that a general warrant is acceptable rather than a specific particular warrant?

(M. L. Travelpiece) A. This was specific in what I wan looking for, sir.

(Mr. Smith) Q. Just everything?

(M. L. Travelpiece) A. Any paperwork dealing with repossession, vehicle titles, information for vehicles on the lot-

(Mr. Smith) Q. Everything.

(M. L. Travelpiece) A.- is what I was looking for.

Amended Appendix of Record, Page 118, Transcript Pages 31, 32 and 33.

Clearly, the reality of the testimony was that Respondent Travelpiece intended to take everything from the premises. There was no way that Fernando Smith could assist and cooperate with Respondent Travelpiece, since the effect of the general search warrant was to institute blanket, dragnet rummaging through all of the papers and records of Pristine. Pristine's assistance would have been construed as consent to the search.

Respondent Courier attempts to make the leap in justifying the general warrant in that Pristine's business was "permeated with fraud." Again, the reality of the testimony is the exact opposite. Neither Respondent Travelpiece nor Investigator Mongold ever indicated or substantiated any other complaints, beyond the mere conclusory statements within the Affidavit.

Again, the Court in U.S. v Bridges, 344 F. 3d 1010 (9<sup>th</sup> Cir. 2003) correctly stated:

Search warrants, including this one, are fundamentally offensive to the underlying principles of the Fourth Amendment when they are so bountiful and expansive in their language that they constitute a virtual, all encompassing dragnet of personal papers and property to be seized at the discretion of the State... (the list of items and categories of property) was so expansive that it's language authorizes the Government to seize almost all of ATC's property, papers, and office equipment and billings. The list is a comprehensive laundry list of sundry goods and inventory that one would readily expect to discover in any small or medium size business in the United States... the warrant deliberates no clear material limitation or boundary to it's scope.

If Respondent Travelpiece was truly concerned that Pristine operated its ten year business permeated with fraud, he would have consulted with Investigator Mongold and together, they would have audited Pristine's files and other documents, under the statutory power of the Division of Motor Vehicles. In that way, the investigation would have proceeded without trampling Pristine's constitutional right to be free from unreasonable searches and seizures. By conducting an investigation in an orderly and logical manner, Respondent Travelpiece would not have acquired a free pass to rummage and burrow through Pristine's entire records since its inception in 2006.

Respondent Courier fails to justify the seizure of Pristine's telephones and computers as well as telephones belonging to employees of Pristine. Respondent Courier confuses the time line in straining to make his argument. The lower Court entered its Order denying the Mandamus on December 12, 2014. Neither Respondents attempted to secure a subsequent warrant from December 12, 2014 up until May 4, 2015. The Respondents had possession and control of the property from October 23, 2014.

(Mr. Smith) Q. Now it's true that you have taken a number of electronic devices; correct?

(M. L. Travelpiece) A. Correct.

(Mr. Smith) Q. Some computer towers - I presume those are just like full computers - not a laptop - but just a tower computer?

(M. L. Travelpiece) A. Yes, sir, it was a tower computer.

(Mr. Smith) Q. You took - what - three or four of those?

(M. L. Travelpiece) A. Yes, sir, a couple.

(Mr. Smith) Q. I'm sorry?

(M. L. Travelpiece) A. Yes, sir, there were a couple.

(Mr. Smith) Q. Well, a couple is two, and several's three. And so are we talking about two computers, three computers?

(M. L. Travelpiece) A. Well, we'll say several, then, sir.

(Mr. Smith) Q. And you took several Samsung phones; correct?

(M. L. Travelpiece) A. There were several different kinds of phones. I don't believe they were all Samsung.

(Mr. Smith) Q. Did they have labels on the saying "property of Pristine"?

(M. L. Travelpiece) A. No, sir, they did not say property of Pristine.

(Mr. Smith) Q. But you took them anyway?

(M. L. Travelpiece) A. Yes, sir.

(Mr. Smith) Q. The phones were they on - laying in, like, one desk drawer?

(M. L. Travelpiece) A. Some of them were in desk drawers; yes, sir.

(Mr. Smith) Q. Where were the others?

(M. L. Travelpiece) A. Some - they were on Fernando and some of their employees.

(Mr. Smith) Q. So you took the phones off the employees as well as Fernando?

(M. L. Travelpiece) A. Yes, sir.

(Mr. Smith) Q. Search warrant doesn't say that you're searching employees though; does it?

(M. L. Travelpiece) A. They were there on the ground, sir

(Mr. Smith) Q. It doesn't say that you were searching employees; does it?

(M.L. Travelpiece) A. It says we were searching everything on that property.

Amended Appendix of Record, Page 118, Transcript Pages 37-38.

Respondent Courier's statement in no way complies with the United States Supreme Court in Riley vs. California, 134 S. Ct. 21473, 189 L. Ed. 2d 430, 82 USLW 4558 (2014). Respondent Courier continues to strain to justify the unconstitutional search warrant and the illegal actions of Respondent Travelpiece. In so doing, he is ignoring the United States Supreme Court in Riley and the chilling and absolute denial of Pristine's Fourth Amendment rights.

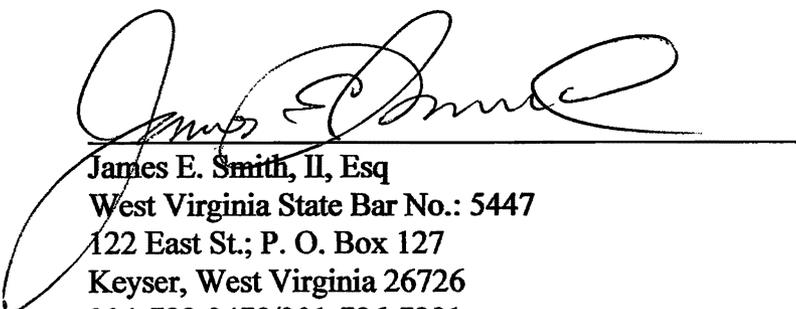
### **CONCLUSION**

Respondent Courier refuses to appreciate the terrible affect the general search warrant and Respondent Travelpiece's actions have had on Pristine and will have on the citizens of Mineral County, West Virginia. This Court in Nicholas identified a second policy position that prosecutors should be concerned with, that being "that public confidence in the criminal justice system is maintained by assuring that it operates in a fair and impartial manner." The United States Supreme Court in Riley opined that "The ultimate touchstone of the Fourth Amendment is reasonableness." Nothing regarding the general search warrant in this case can ever be found to be a reasonable application of the law. From Respondent Travelpiece's failure to properly investigate any allegations; from his failure to substantiate Inspector Mongold's complaints and allegations; from his creation of a blanket dragnet search warrant in order to prove a case that he failed to investigate, all amount to a clear violation of Pristine's Federal and State right to be free from unreasonable searches and seizures. By virtue of this action, Pristine is entitled to the entry of a Writ of Mandamus. Respondent Courier fails to understand that his refusal to properly supervise law enforcement officers under his control weakens public confidence in his Office. Pristine was not only victimized by the issuance of a general search warrant, but by Respondent

Courrier's failure to protect and uphold Pristine's rights.

For the foregoing reasons, and any others that may be apparent to this Honorable Court, your Petitioner respectfully prays that the relief requested herein be granted; that the Petitioner be admitted to the Rule 20 argument docket; and reverse the lower Court and enter an Order of Mandamus compelling the Respondents to return all of Pristine's property wrongfully seized; preclude them from using any information as evidence against Pristine in any proceeding; and Order the Respondents to expunge all such information.

PRISTINE PRE-OWNED AUTO, INC., a  
WEST VIRGINIA CORPORATION,  
PETITIONER, BY COUNSEL



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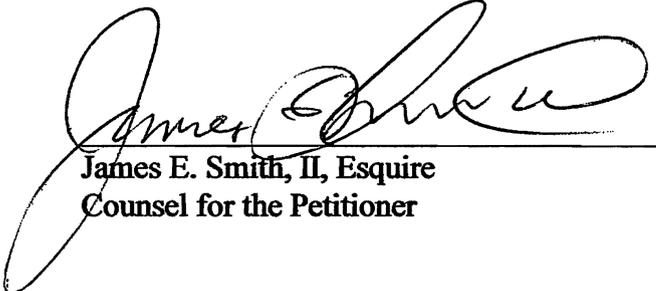
**CERTIFICATE OF SERVICE**

I, James E. Smith, II, Esquire a practicing West Virginia attorney, pursuant to Rule 37 of the West Virginia Rules of Appellate Procedure, do hereby certify that, a true copy of the foregoing Petitioner's Reply to the Brief of Respondent James W. Courier, Jr., Prosecuting Attorney for Mineral County, West Virginia was duly served upon the following:

1. James W. Courier, Jr., by United States Mail, First Class, postage prepaid to the Mineral County Prosecuting Attorney's Office, Mineral County Court House, 150 Armstrong Street, Keyser, West Virginia 26726;

2. Virginia Grottendieck-Lanham, Esquire, by United States Mail, First Class, postage pre-paid to West Virginia State Police, Legal Division, 725 Jefferson Road, South Charleston, West Virginia 25309; and

3. That the original and ten (10) copies of the same were duly served by United States Mail, First Class, postage pre-paid to the Office of the Clerk, Attn. Claudia, Supreme Court of Appeals of West Virginia, State Capital Building, Room E-317, 1900 Kanawha Blvd. East, Charleston, West Virginia 25305, for filing on the 24<sup>th</sup> day of June, 2015.

  
James E. Smith, II, Esquire  
Counsel for the Petitioner