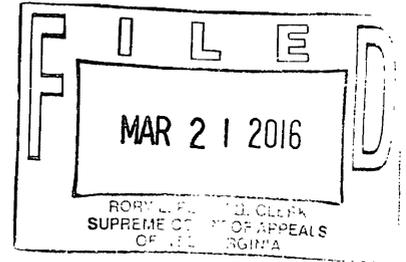


00415 IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 16-0183

STATE OF WEST VIRGINIA ex rel.
POTOMAC TRUCKING AND EXCAVATING, INC.
Petitioner



V.)

THE HONORABLE JAMES W. COURRIER, JR.
Judge of the Circuit Court of Grant
County, West Virginia, and
SHIRLEY BERGDOLL, on behalf of Joshua
Bergdoll, a protected person,
Respondents

FROM THE CIRCUIT COURT OF
GRANT COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 14-C-62

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Counsel for Respondent Shirley Bergdoll,

Dino S. Colombo (WV Bar 5066)
Travis T. Mohler (WV Bar 10579)
COLOMBO LAW
341 Chaplin Road, Second Floor
Morgantown, West Virginia 26501
Telephone: (304) 599-4229
dinoc@colombolawgroup.com
travism@colombolawgroup.com

TABLE OF CONTENTS

QUESTION PRESENTED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	8
ARGUMENT	9
A. THE INSTANT PETITION DOES NOT MEET THE STANDARDS NECESSARY FOR ISSUANCE OF THE EXTRAORDINARY REMEDY OF A WRIT OF PROHIBITION APPLICABLE TO DISCOVERY ORDERS.	9
B. THE RESPONDENT JUDGE COMMITTED NO CLEAR LEGAL ERROR AND WAS WELL WITHIN THE DISCRETION AFFORDED TO TRIAL COURTS TO COMPEL REASONABLE INSPECTIONS, TESTING, AND RELATED ACTS PURSUANT TO RULE 34 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE.	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES

<i>Hinkle v. Black</i> , 164 W.Va. 112, 262 S.E.2d 744 (1979)	10
<i>James M.B. v. Carolyn M.</i> , 193 W.Va. 289, 456 S.E.2d 16 (1995).....	9
<i>Nutter v. Maynard</i> , 183 W.Va. 247, 395 S.E.2d 491 (1990).....	9
<i>Paxton v. Crabtree</i> , 184 W.Va. 237, 400 S.E.2d 245 (1990)	9
<i>State ex rel. Arrow Concrete Co. v. Hill</i> , 194 W. Va. 239, 244, 460 S.E.2d 54, 59 (1995).....	6, 9
<i>State ex rel. Doe v. Troisi</i> , 194 W.Va. 28, 459 S.E.2d 139 (1995).....	9
<i>State ex rel. U.S. Fidelity and Guaranty Co. v. Canady</i> , 194 W.Va. 431, 460 S.E.2d 677 (1995).....	9, 10, 13
<i>State ex rel. Ward v. Hill</i> , 200 W.Va. 270, 489 S.E.2d 24 (1997).....	10
<i>State Farm Mutual Auto. Insur. Co. v. Stephens</i> , 188 W.Va. 622, 425 S.E.2d 577 (1992).....	6, 9

STATUTES

W.Va. Code § 58-5-1 (1925).....	9
---------------------------------	---

OTHER AUTHORITIES

<i>Peterson v. Union Pacific R.R. Co.</i> , No. 06-3084, 2007 WL 3232501 (C.D. Ill. Nov. 1, 2007)	13
--	----

RULES

W. Va. R. Civ. P. 34	7, 11
----------------------------	-------

TREATISES

63A Am. Jur.2d <i>Prohibition</i> § 62 at 194 (1984)	9
--	---

QUESTION PRESENTED

1. WHETHER THE CIRCUIT COURT COMMITTED A CLEAR LEGAL ERROR AND SUBSTANTIALLY ABUSED ITS DISCRETION BY FINDING THAT IT WAS REASONABLE TO COMPEL THE RESPONDENT (A) TO PRODUCE ITS TRUCK AND TRAILER FOR INSPECTION AT THE LOCATION WHERE THE TRUCK WAS ROUTINELY PARKED BY THE RESPONDENT AND WHERE THE COLLISION OCCURRED, AND (B) TO PERFORM SOME REASONABLE TASKS DURING THE INSPECTION.

STATEMENT OF THE CASE

The instant civil action, which was filed in the Circuit Court of Grant County, West Virginia on August 9, 2014, arises out of a March 7, 2014 collision that occurred on Route 28 near Petersburg, West Virginia. (A.R. 7-9). The collision occurred when an employee of Petitioner Potomac Trucking and Excavating, Inc. (hereinafter, "Potomac") – Douglas Wratchford – was backing, or had just backed, an eighteen wheel, Peterbilt semi-truck and logging trailer onto an active highway in the dark, blocking the lanes of travel for oncoming traffic. (A.R. 3). There is no dispute that, at the time of the collision, Petitioner routinely parked and stored the subject truck and trailer in the driveway of its employee's residence overnight and over the weekends. (A.R. 2). In fact, Petitioner permitted its truck and trailer to be parked at its employee's residence hundreds of times over a period of years. (Id.) It is also undisputed that the subject truck and trailer are now routinely parked approximately three-and-a-half (3 ½) miles from Mr. Wratchford's residence at Petitioner's office and that both the truck and trailer are routinely driven past Mr. Wratchford's residence in normal business operations. (Id).

Because of the configuration and slope of Mr. Wratchford's driveway, he was unable to make a right hand turn onto Route 28 when pulling out headfirst. (A.R. 74.) Although Mr. Wratchford acknowledges that it is dangerous to back his tractor-trailer out of his driveway onto an active highway, he did so routinely because it was easier. (A.R. 71-73.)

The Complaint alleges that Defendant Potomac is not only vicariously liable for the negligent conduct of its employee, but is also directly liable for its own negligence in permitting the truck and trailer to be routinely parked at its employee's residence when it knew, or should have known, that Mr. Wratchford could not exit his driveway in a safe manner and without illegally blocking the active lanes of traffic on the abutting highway. (A.R. 11-12.)

On October 22, 2015 – approximately five (5) months ago – Respondent served Petitioner with a request to inspect the subject truck and trailer at the location where the truck was routinely parked and where the collision occurred, i.e., the residence of its employee Wratchford. (A.R. 45-48.) After some initial back and forth between counsel, Petitioner ultimately agreed to permit (1) the inspection of the truck and trailer, and (2) the inspection of the property where the truck and trailer were routinely parked; however, Petitioner refused to permit the inspection of the truck and trailer to occur contemporaneously at its employee's residence. (A.R. 3; 53-54).

Petitioner based its refusal to produce the truck and trailer at the requested location upon its mistaken belief that "[t]he Rules of Civil Procedure do not permit

the requesting party to mandate where a vehicle must be produced for an inspection.” (A.R. 37, 57-58.) In an attempt to disabuse the Petitioner of its mistaken interpretation of Rule 34, counsel for Respondent pointed out that Rule 34 not only permits the requesting party to specify a location for the inspection, but requires it: “Rule 34 clearly states: *‘The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.’*” (A.R. 59-60.) The correspondence continued, “Rule 34 does not require the inspection to take place at your client’s place of business or at a location that is approved only by your client. Rule 34 only requires that the inspection take place at a *reasonable* time, place, and location.” (Id.) Furthering its attempt to obtain Petitioner’s cooperation without court intervention, counsel for Respondent explained why the designated location was unquestionably reasonable:

It would be very hard for the [Petitioner] to argue that an inspection that takes place at the exact location of the accident *and* at a place where the [Petitioner] allowed Mr. Wratchford to take this very truck and trailer hundreds of times is unreasonable. In other words, [Petitioner] knowingly permitted Mr. Wratchford to take this truck and trailer to his home hundreds of times over a period of several years. Now all of a sudden it is a hardship and an unreasonable request for the inspection of the truck and trailer to take place at this very same location?

Clearly, this is a reasonable location in which to perform this inspection. Further, as mentioned in my previous correspondence, I am willing to pay for the diesel fuel and other related expenses in bringing the truck and trailer to Mr. Wratchford’s residence and will take care of traffic control with local authorities.

(Id.)(emphasis in original). Counsel for Petitioner responded by stating that he “will not produce the truck/trailer [at] Mr. Wratchford’s residence.” (A.R. 61.)

Reaching the impasse detailed above, Respondent filed a motion to compel Petitioner to comply with the requested inspection pursuant to Rule 34 so that the truck and trailer could be inspected in conjunction with and in relation to the driveway from which the truck was being backed when the collision occurred. (A.R. 31-44.) In response, Petitioner argued that it should not be compelled to drive the truck and trailer to the requested location – which is only three-and-a-half miles away – because of an unfounded fear that it could potentially result in liability “if there would be an accident going to, while at, or travelling from the inspection.” (A.R. 3, 77-79). Additionally, Petitioner argued for the first time that the requested inspection and related testing was actually a request to create an accident reconstruction. (Id.)

After a hearing, the Circuit Court of Grant County granted Respondent’s Motion to Compel, holding, in pertinent part:

Rule 34 of the West Virginia Rules of Civil Procedure states that a party requesting an inspection of property or a tangible thing “*shall specify a reasonable time, place, and manner of making the inspection and performing the related acts*”. Nonetheless, Defendant Potomac objected to the plaintiff’s efforts to conduct the requested inspection at the very location where the collision occurred and where the truck and trailer were routinely parked claiming that the Rules do not permit the plaintiff to specify the location of the inspection. Clearly, the civil rules not only permit the plaintiff to specify the location, but require her to do so. This Court FINDS that the location specified by the plaintiff for the inspection of the truck and trailer is reasonable inasmuch as it is (1) where the collision occurred, (2) where Defendant Potomac parked the truck routinely, and (3) is only three-and-a-half miles from Defendant Potomac’s office. Further, the Plaintiff has agreed to pay the cost of fuel and other related expenses associated with the transportation of the vehicle to Mr. Wratchford’s property and arrange for traffic control with the local authorities. Inasmuch as the subject accident undisputedly occurred while the Defendant’s employee

was in the process of backing, or had just backed, the Defendant's truck and trailer out of the employees driveway and a material issue in this civil action is what the Defendant's employee, Douglas Wratchford, could or could not see while backing, it is the opinion of this Court that the plaintiff's inspection of Defendant's truck and trailer at the Defendant's employee's driveway and having the truck and trailer backed out of the driveway to determine the driver's line of sight is within the scope of Rule 34 of the West Virginia Rules of Civil Procedure. The Court **FINDS** that the location at which the plaintiff specified for conducting the inspection is reasonable, as is the proposed manner of making the inspection and performing the related acts; therefore, the inspection requested by the Plaintiff is reasonable, appropriate, and within what is permitted by Rule 34 of the West Virginia Rules of Civil Procedure.

(A.R. 4-5)(emphasis in original). The Circuit Court also found as follows:

[T]he Court finds that the plaintiff's proposed manner of conducting the inspection and performing the related acts is reasonable and permitted by the Rules of Civil Procedure; to wit, allowing the plaintiff's expert to be inside the subject truck at various spots on the driveway to determine sight lines and to determine what could and could not be seen by Defendant's employee while backing the truck out of the driveway. The Court does not place a limit on the number of times the subject truck can be backed out of the driveway; however, the Court emphasizes that the parties should act reasonably and the number of trips up the driveway should not be unreasonably limited or unreasonably demanded.

(Id.).

It is from this discovery order that Petitioner filed its Petition for the extraordinary relief of a writ of prohibition on February 26, 2016. Plaintiff in the underlying matter responds herein, in opposition.

SUMMARY OF ARGUMENT

The only thing extraordinary about this matter is that the Petitioner, in its continued refusal to act reasonably, is seeking to avail itself of the extraordinary remedy of a Writ of Prohibition over a discovery order which it knows, or should

know, is interlocutory in nature and not reviewable by this Court. The relevant request for inspection should have been, and routinely is, performed by agreement of counsel in trucking litigation; nonetheless, Respondent was forced to file a motion to compel and is now having to go through the extraordinary measure of responding to a misguided Petition for Writ of Prohibition – all over a routine discovery request.

This Court has been very clear that a Writ of Prohibition is an extraordinary remedy that is to be utilized only in extraordinary circumstances. Specifically, with regard to discovery orders, this Court has repeatedly reminded litigants that “a writ of prohibition is rarely granted as a means to resolve discovery disputes.” *State ex rel. Arrow Concrete Co. v. Hill*, 194 W. Va. 239, 244, 460 S.E.2d 54, 59 (1995). In fact, it is the general rule of this Court that discovery orders are not appealable until the litigation has finally ended unless the discovery order involves the probable invasion of the attorney-client privilege or work-product immunity; neither of which apply here.

Even if this Court were to undertake the interlocutory review of this routine discovery order, a writ of prohibition is only available to correct a clear legal error that results from a trial court’s substantial abuse of discretion in regard to discovery orders; neither applies here. Syl. Pt. 2, *State Farm Mutual Auto. Insur. Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992). If every litigant took such extraordinary measures to oppose routine discovery requests which are well-within the discretion of the trial court, as the Petitioner has done here, the gears of justice in this State would grind to a halt. Enough is enough.

Exacerbating Petitioner's unrelenting unreasonableness is the fact that there is no error at all to be found in the trial court's order, much less clear legal error, and the trial court certainly did not substantially abuse its discretion in granting the Respondent's motion to compel. By its terms, the touchstone for analysis of a Rule 34¹ inspection request is reasonableness. W.Va.R.Civ.P. 34. Rule 34 specifically authorizes a party to inspect and test any tangible things which are relevant to the litigation, as well as, any land or other property (including any designated object or operation thereon), so long as such request is reasonable as to time, place, and manner. *See id.* While the Petitioner objects to the place and manner of the requested inspection, Rule 34 not only permits the Respondent to specify the location and manner of the inspection, but requires it: "the request [for inspection] shall specify a reasonable time, place, and manner of making the inspection and performing the related acts." W.Va.R.Civ.P. 34(b).

Here, the item sought to be inspected is an over-the-road truck, the quintessential transportable item. Nonetheless, Petitioner refuses to drive the truck and trailer three-and-a-half miles to the location where Petitioner itself parked the truck for many years. The trial court considered the facts submitted by both parties and found that it was reasonable to require the Petitioner to drive its truck roughly six minutes to its employee's residence. With regard to the manner of making the inspection and related acts, the trial court likewise considered the facts submitted by both parties and found that it was reasonable to require Petitioner to

¹ Unless otherwise specified, all references to a "Rule" herein are to the West Virginia Rules of Civil Procedure.

perform some reasonable tasks during the inspection, i.e., to operate its truck and trailer along the driveway – as Petitioner had done hundreds of times before – so that Respondent’s expert witness could document what could and could not be seen from the vantage point of the truck.

The Rules of Civil Procedure allocate significant discretion to the trial court in making procedural rulings; the trial court in the underlying matter was well within its discretion to grant Respondent’s motion to compel and did not commit any legal error, much less the heightened requirement of clear legal error, nor did the trial court abuse its discretion even in the least, much less the heightened requirement of substantial abuse. Therefore, this Court should not issue a Rule to Show Cause, which would only cause further unnecessary delay.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent believes that the Petition for Writ of Prohibition should be denied without oral argument. Respondent believes that oral argument is unnecessary because the Petition for Writ of Prohibition is based upon the Circuit Court’s decision regarding a routine discovery dispute from which Petitioner may not avail itself of such an extraordinary remedy, and simply causes more unnecessary delay for Respondent over discovery that is routinely resolved by agreement of counsel, much less court order or requests for extraordinary remedies before this Court.

ARGUMENT

A. The Instant Petition Does Not Meet the Standards Necessary for Issuance of the Extraordinary Remedy of a Writ of Prohibition Applicable to Discovery Orders.

This Court has continuously emphasized the extraordinary nature of a writ of prohibition and, thus, has limited the exercise of its original jurisdiction in prohibition “to circumstances ‘of an extraordinary nature.’” *State ex rel. U.S. Fidelity and Guaranty Co. v. Canady*, 194 W.Va. 431, 436, 460 S.E.2d 677, 682 (1995), quoting, *State ex rel. Doe v. Troisi*, 194 W.Va. 28, 31, 459 S.E.2d 139, 142 (1995). With regard to discovery orders, a writ of prohibition is only available to correct a clear legal error that results from a trial court’s substantial abuse of discretion. Syl. Pt. 1, *Stephens*, 188 W.Va. 622. In fact, this Court has reminded litigants “that a writ of prohibition is rarely granted as a means to resolve discovery disputes.” *Arrow Concrete*, 194 W.Va. at 244. See also *Nutter v. Maynard*, 183 W.Va. 247, 250, 395 S.E.2d 491, 494 (1990) (“[R]eview of discovery matters is not generally appropriate through extraordinary remedies[.]”); 63A Am. Jur.2d *Prohibition* § 62 at 194 (1984) (“Ordinarily, a petition for a writ of prohibition to set aside a discovery order will be denied[.]” (footnote omitted)).

Orders granting discovery requests over timely objections, like other discovery orders, are interlocutory. *Fidelity*, 194 W. Va. at 437. They do not finally end the litigation and are generally reviewable only after the final judgment. *Id.*, citing W.Va. Code § 58-5-1 (1925); *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995); *Paxton v. Crabtree*, 184 W.Va. 237, 400 S.E.2d 245 (1990); see also

State ex rel. Ward v. Hill, 200 W.Va. 270, 275, 489 S.E.2d 24, 29 (1997) (most discovery orders are interlocutory in nature and are only reviewable by this Court after final judgment). Thus, the general rule in this State is “that discovery orders are not appealable until the litigation is finally ended.” *Id.* The only exception to this general rule is that this Court will exercise its original jurisdiction when a discovery order involves the probable invasion of confidential materials that are exempted from discovery under the attorney-client privilege or work product rule; neither of which apply here. *Id.*

This Court has previously set forth its general criteria for determining if a rule to show cause in prohibition should be issued as follows:

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Syl. Pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

The instant Petition for Writ of Prohibition should be rejected because no clear error of law has been committed and the trial court did not abuse its discretion at all, much less substantially abuse its discretion, as is required for issuance of such an extraordinary remedy. Although the Petition is somewhat convoluted, Petitioner essentially argues that the location and manner of carrying out the inspection and related acts is not reasonable. Respondent submits that the

reasonableness of a trial court's discovery order is interlocutory in nature and is well within the discretion of the trial court and is not the proper subject of a Writ of Prohibition. Therefore, this Court should refuse to issue a rule to show cause which would only serve to further delay this litigation and bolster Petitioner's obstructionist and dilatory tactics.

B. The Respondent Judge committed no clear legal error and was well within the discretion afforded to trial courts to compel reasonable inspections, testing, and related acts pursuant to Rule 34 of the West Virginia Rules of Civil Procedure.

Rule 34(a) permits a party to serve on another party a request "to inspect and copy, test, or sample any tangible things" which are relevant to the civil action and "to permit entry upon designated land or other property . . . for the purpose inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon". W.Va.R.Civ.P. 34(a). By its express terms, the touchstone for analysis of a Rule 34 inspection request is reasonableness. W.Va.R.Civ.P. 34(b) ("The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.").

Essentially, Petitioner disagrees with the Respondent Judge's findings that the location and manner of making the inspection and performing the related acts are reasonable. Concerning the location of the inspection of the truck and trailer, Petitioner argues that it is unreasonable to require it to drive its truck three-and-a-half (3 ½) miles from its office in Petersburg, West Virginia to the property where the truck was routinely stored at the time of the collision and for many years prior. Petitioner further argues that the location specified for the inspection is

unreasonable because it could potentially be exposed to liability if the truck is in an accident driving to or from the inspection location; this is despite the fact that Petitioner drives the truck and trailer hundreds of miles per week and routinely drives the subject truck and trailer past Mr. Wratchford's home in the normal course of business.

Petitioner's misguided standard of reasonableness aside, it would be difficult for anyone to argue that the trial court committed a clear legal error or substantially abused its discretion in finding that it is reasonable to conduct the inspection at Mr. Wratchford's residence when: (1) it is only a six (6) minute, three-and-a-half (3 ½) mile drive from its principal place of business, (2) Petitioner itself parked the truck in that location for years, (3) the truck is driven past Mr. Wratchford's residence on a regular basis during the normal course of business, (4) this is the location where the collision occurred, and (5) Petitioner drives this truck and trailer hundreds of miles per week in its normal course of business.

With regard to the manner of conducting the inspection, testing, and related acts, Petitioner argues that the inspection is unreasonable because it asks its employees to perform certain tasks during the inspection, i.e., move the truck to different locations on the driveway. After Respondent filed her Motion to Compel, the Petitioner for the first time began to oppose the requested inspection by referring to it as a "reenactment" as opposed to an inspection. Presumably, Petitioner began making this transparent and self-serving mischaracterization in a Hail Mary attempt to prevent legitimate discovery because it located an isolated

and non-controlling memorandum decision from the state of New York which used that term. It should be noted; however, that courts have not hesitated to direct the employees of a defendant to perform reasonable tasks during inspections. *See, e.g. Peterson v. Union Pacific R.R. Co.*, No. 06-3084, 2007 WL 3232501, at *2 (C.D. Ill. Nov. 1, 2007) (ordering railway employee to operate crossing signal and to open and close railway components and equipment, among other things, during inspection). More importantly, the Respondent is not asking for a recreation; she is simply asking the Petitioner to move the truck to different locations on the driveway to determine what can, or cannot, be seen from the vantage point of the truck driver.

Put simply, Petitioner's mischaracterization of the inspection is nothing other than a transparent attempt to obstruct legitimate discovery – one that the Respondent Judge considered and rejected; finding that the proposed manner of conducting the inspection and related acts is reasonable pursuant to Rule 34. This Court should not use this extraordinary remedy to disrupt a trial court's exercise of discretion in determining the reasonableness of a discovery request under Rule 34; rather, this Court should follow its general rule that “discovery orders are not appealable until the litigation is finally ended.” *Fidelity*, 194 W.Va. 436. If this Court begins reviewing a trial court's determination of reasonableness in Rule 34 discovery requests, it would only encourage obstructionist behavior by litigants and would grind litigation in this State to a halt.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Respondent respectfully requests that an Order be entered denying Petitioner's Petition for Writ of Prohibition.

Signed: 

Dino S. Colombo (WV Bar 5066)
Travis T. Mohler (WV Bar 10579)
COLOMBO LAW
341 Chaplin Road, Second Floor
Morgantown, West Virginia 26501
Telephone: (304) 599-4229
dinoc@colombolawgroup.com
travism@colombolawgroup.com
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2016, true and accurate copies of the foregoing **Response to Petition for Writ of Prohibition** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Counsel for Petitioner

Trevor K. Taylor, Esquire
Tiffany A. Cropp, Esquire
Taylor Law Office
34 Commerce Drive, Suite 201
Morgantown, WV 26501
ttaylor@taylorlawofficewv.com
tcropp@taylorlawofficewv.com

Signed: 

Dino S. Colombo (WV Bar 5066)
Travis T. Mohler (WV Bar 10579)
COLOMBO LAW
341 Chaplin Road, Second Floor
Morgantown, West Virginia 26501
Telephone: (304) 599-4229
dinoc@colombolawgroup.com
travism@colombolawgroup.com
Counsel of Record for Petitioner