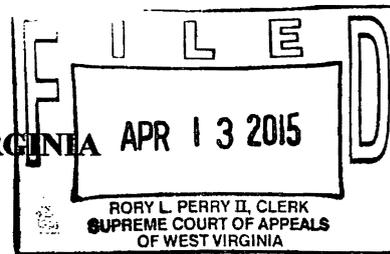


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 BRIEF**

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## ASSIGNMENTS OF ERROR

### Assignment of Error No. 1

Pristine Pre-Owned Auto, Inc. contends that it is entitled to the entry of a Writ of Mandamus compelling the Respondents to return both all of the books; papers; records; cell phones; and computers of Pristine, unreasonably and unlawfully seized by virtue of the Search Warrant issued on the 23<sup>rd</sup> day of October, 2014 by Magistrate Carol Sue Roby, Magistrate Court of Mineral County, West Virginia, as well as the return of a 2005 Ford Freestyle, VIN: 1FMDK06195GA63636, which was seized on September 9, 2014, forty-four (44) days prior to the issuance of the Search Warrant. Pristine unequivocally established before the lower Court that it had a clear legal right to the return of its property, as a result of the Respondents' wholesale violation of Pristine's Section 6, Article 3 rights under the West Virginia Constitution and its Fourth Amendment rights under the Constitution of the United States of America. The Respondents bear the legal duty of returning the property wrongfully seized. There is no other remedy that enforces a right or performance of a duty as effectively as Mandamus. The lower Court erred in not recognizing and applying Mandamus as the proper remedy to correct the egregious wrong committed by the Respondents. This Court should review this error so that Pristine's property may be forthwith returned and that Pristine's constitutionally protected right to be free from unreasonable searches and seizure may be restored.

Assignment of Error No. 2

Pristine contends that the Search Warrant prepared by Respondent Travelpiece was a general search warrant and should be considered void, *ab initio*. Moreover, Pristine contends that the issuance of that general search warrant was without probable cause. Mineral County Magistrate Sue Roby was deprived of certain documents known to have existed by Respondent Travelpiece. Pristine believes Magistrate Roby would not have found probable cause to issue the general search warrant if she would have had the benefit of reviewing those documents. Pristine further contends that the general search warrant failed to both particularly describe the place to be searched and the things to be seized. Respondent Travelpiece repeatedly testified that he had intended to seize all books, papers, documents, cell phones and computers that would be found on the premises of Pristine. Respondent Travelpiece invaded physical areas of Pristine that were not particularly described and were clearly private residences, exceeding the physical scope of the general search warrant. Respondent Travelpiece failed to substantiate a nexus between purported unlawful activity and the property seized. The lower Court erred in failing to quash the general search warrant and Order the immediate return of Pristine's property. This Court should review this error and reverse the lower Court's Order so that Pristine's right of privacy and freedom from unreasonable searches and seizures may be restored.

Assignment of Error No. 3

Pristine contends that as a result of the unreasonable search and seizure performed by the Respondents, all things seized and all information secured from all the items seized should be suppressed and excluded from any future criminal prosecution employed by the Respondents.

The lower Court erred in failing to apply the Exclusionary Rule. This Court should review this error and find that none of the evidence seized in violation of Pristine' Section 6, Article 3 rights under the West Virginia Constitution and its Fourth Amendment rights under the Constitution of the United States of America may be used in future prosecutions against Pristine without its consent. This Court should also Order the Respondents to expunge all records and information derived and destroy all information and computer data retained from the unreasonable search to insure that Pristine's privacy rights are protected and to thwart any potential breaches of sensitive identity data.

## STATEMENT OF THE CASE

Pristine has been a duly authorized dealer of used cars operating within Mineral County, West Virginia under the auspices of the West Virginia Department of Motor Vehicles since in or about June, 2006. (Amended Appendix of Record, Verified Complaint, Page 10). At the time of the filing of the Complaint for Mandamus, Pristine was in good standing with the West Virginia Department of Motor Vehicles. (Amended Appendix of Record, Verified Complaint, Page 9; Amended Appendix of Record, Page 118, Transcript, Pages 68-69).

Originally, Pristine had sold the automobile at issue to Benson B. Kelley on October 13, 2011. Thereafter on November 11, 2013, the vehicle was involved in a vehicle accident. The Claimant and insured was Marcella Kelley. At that time, Kelley retained ownership of the vehicle and allowed Pristine to perform the required repairs upon the vehicle. The market value of the vehicle at that time, as rendered by Progressive Group Insurance Companies, was \$6,920.11. With Kelley retaining ownership, she was paid \$1,138.11, less applicable fees and taxes by Progressive. The balance of \$4,617.97 was then issued to Pristine by Progressive. Thereafter, on November 26, 2014, Kelley decided to purchase another vehicle from the Plaintiff, trading the Ford Freestyle and conveying ownership of the Ford Freestyle to Pristine. Kelley then paid over the \$1,138.11 to Pristine as a down payment, with Pristine allowing \$1,025.54 trade allowance. (Amended Appendix of Record, Verified Complaint, Page 11; Amended Appendix of Record, Page 118, Transcript Pages 62-66).

The correct procedure would have been for the Kelley Title to have been signed by Kelley and returned to Progressive; however, due to a clerical error on Pristine's part, the vehicle remained on its premises until Kelley decided to trade the 2005 Ford Freestyle with Pristine for another vehicle, and the title to the Freestyle was then maintained in the repossession file due to a balance due by Kelley. As a result of that transaction and due to the clerical error committed by a former employee of Pristine, that employee internally processed the transaction as a repossessed vehicle. Repairs were made upon the vehicle; however the Title was mistakenly held by Pristine and not processed to Progressive. If the Title would have been processed to Progressive, the transaction would have been then processed through the West Virginia Department of Motor Vehicles and Title eventually conveyed unto Pristine. (Amended Appendix of Record, Verified Complaint Page 11; Amended Appendix of Record Page 118, Transcript, Page 64-65).

Approximately six (6) months later, after the completion of the repairs, Pristine sold the vehicle to a Shelly L. Jackson and Eric L. Dorman. The vehicle was sold as a vehicle with a reconstructed title salvage history. (Amended Appendix of Record, Verified Complaint Page 12; Amended Appendix of Record Page 118, Transcript, Page 25, 65; Amended Appendix of Record, Bill of Sale, Page 84). After subsequent repairs were made at the direction of Mr. Dorman, he executed a Voluntary Lien and Promissary Note created after issuance of original title form on the 25<sup>th</sup> day of July, 2014. (Amended Appendix of Record, Verified Complaint, Page 12; Amended Appendix of Record, Page 118, Transcript Pages 40-44, 60, 62; Amended Appendix of Record, Page 86, Voluntary Lien Form; Amended Appendix of Record, Page 87, Pristine Full Service and Quick Lube repair form; and Amended Appendix of Record, Pages 88 & 89, Promissory Note). Both the first lien of Pristine upon the sale of the vehicle to Jackson

and Dorman, as well as the second lien evidencing subsequent authorized repairs of Dorman, were listed as first and second liens upon the subject vehicle title (Amended Appendix of Record, Verified Complaint Page 12; Amended Appendix of Record, Page 118, Transcript Page 28, 29; Amended Appendix of Record, Page 85, Title).

On or about September 3, 2014, Elizabeth Mongold, Inspector II with the West Virginia Department of Motor Vehicles appeared upon the premises and inquired of representatives of the Plaintiff as to the Plaintiff's actions relating to the above referenced vehicle. Subsequent to meeting with Ms. Mongold, Fernando M. Smith, Chief Operating Officer wrote correspondence dated September 8, 2014, specifically outlining the events that transpired regarding the clerical error of this vehicle. (Amended Appendix of Record, Verified Complaint, Page 12; Amended Appendix of Record, Page 118, Transcript Pages 62-63; 65-66).

Thereafter, Dorman failed to honor the terms of the Promissory Note and Pristine proceeded to properly repossess the vehicle. Evidently upset that the vehicle was repossessed for non-payment, Ms. Jackson notified the West Virginia State Police as well as the Maryland State Police that the vehicle was stolen on or about September 9, 2014. Trooper Travelpiece arrived upon the premises of the Plaintiff on September 9, 2014 and seized/confiscated the Ford Freestyle in question. (Amended Appendix of Record, Verified Complaint Page 13; Amended Appendix of Record, Page 118, Transcript Pages 22-25; 57-62). While Trooper Travelpiece remained on the Plaintiff's premises, he communicated with State of Maryland law enforcement, as a result of Jackson's initially call to Maryland that the Freestyle had been stolen. (Id at Amended Appendix of Record, Page 118, Transcript Pages 22-25).

Notwithstanding Pristine's response to Ms. Mongold, a notice dated September 30, 2014 was processed by Marsha Tomlinson, Manager, Dealer Services Unit of the West Virginia Department of Transportation Division of Motor Vehicles, outlining certain violations alleged to have been performed by Pristine. (Amended Appendix of Record, Verified Complaint, Page 13 4; Amended Appendix of Record, Page 44). The Plaintiff did not receive the September 30, 2014 correspondence until October 22, 2014 as evidenced by a United States Post Office Tracking of Certified Mail Correspondence. (Amended Appendix of Record, Verified Complaint, Page 13; Amended Appendix of Record,, Page 46).

On October 23, 2014, Respondent Travelpiece prepared an affidavit and applied to Mineral County Magistrate Sue Roby for the issuance of the Search Warrant. (Amended Appendix of Record, Search Warrant Page 73, Amended Appendix of Record, Page 118, Transcript Pages 12-14). During the December 1, 2015 hearing, Respondent Travelpiece admitted that he failed to show Magistrate Roby exculpatory documents that contradicted Attachment C of the Search Warrant. Specifically, Respondent Travelpiece failed to disclose to Magistrate Roby the Bill of Sale to Jackson and Dorman which clearly reflected that the vehicle was being sold as a "reconstructed title salvage history". (Amended Appendix of Record, Page 118, Transcript Pages 25-26). Respondent Travelpiece also failed to disclose the Vehicle Title to Magistrate Roby which contained both a primary and secondary lien, in contradiction to his averments in Attachment C. (Amended Appendix of Record, Page 118, Transcript Pages 27-31). Respondent Travelpiece relied on Ms. Mongold's statements as well as "other complaints", none of which were sufficiently verified and all of which tainted Magistrate Roby's probable cause determination. Respondent Travelpiece also failed to disclose to Magistrate Roby a promissory

note and voluntary lien form signed by Dorman, which further contradicted his averments in Attachment C that Pristine improperly reflected its primary and secondary liens granted to it by Dorman. (Amended Appendix of Record, Page 118, Transcript Pages 41-46).

Respondent Travelpiece also testified that he not only searched the premises labeled as 474 S. Mineral Street, Keyser, West Virginia further described as a” two-story structure, with the lower half being brick, and the top with wide siding, also to include a detached two-story structure with the lower half being brick and the top half being white siding, and two (2) brown in color wooden sheds”. Trooper Travelpiece not only searched the garage area, and two (2) other detached structures, but also a personal separate office located at 454 S. Mineral Street, Keyser, West Virginia, as well as two (2) private residential apartments located at 474 ½ Apartment 1 and 474 ½ Apartment 2, which is directly above the business premises at 474 S. Mineral Street. Even though a fellow officer on the scene identified that private residences were searched, Respondent Travelpiece testified that the Search Warrant was specific as to the premises. (Amended Appendix of Record, Page 118, Transcript Pages 16-20). Moreover, Fernando Smith, officer of Pristine, testified that he informed Respondent Travelpiece that the apartments were private residences (Amended Appendix of Record, Page 118, Transcript Page 74), but Respondent Travelpiece search of that area was undeterred.

Respondent Travelpiece also testified that his Attachment B of the Search Warrant was specific, even though he was looking for everything and expected to take everything, including complete file cabinets, file cabinet drawers, file boxes, with most drawers and boxes being noted possessing “unknown contents”. (Amended Appendix of Record, Page 118, Transcript Pages 31-37). Respondent Travelpiece admitted that he seized several computers and cell phones that

were in desk drawers and on the person of both Fernando Smith, officer of Pristine, as well as employees. (Amended Appendix of Record, Page 118, Transcript Pages 37-38). When he was confronted with the fact that the Search Warrant did not specifically authorize him to search the person of employees, Respondent Travelpiece responded “It says we were searching everything on that property.” (Amended Appendix of Record, Page 118, Transcript Page 38, Line 18).

Respondent Travelpiece also admitted that he had not secured an additional search warrant to search the contents of both the cell phones and the computers. (Amended Appendix of Record, Page 118, Transcript Pages 39-40).

Notwithstanding the testimony of Fernando Smith, Chief Operating Officer of Pristine, which verified the general ransacking of his business premises and his clear right in the property taken; notwithstanding the evidence adduced through the cross-examination of Respondent Travelpiece that he executed a general warrant which is abhorred, resulting in an unreasonable search and seizure; notwithstanding the fact that neither Respondents offered any evidence during the December 1, 2014 hearing; and notwithstanding statements of the lower Court during the December 1, 2014 hearing to the contrary, the lower Court entered an Order on December 12, 2014, denying Pristine’s Complaint; holding that probable cause existed justifying the issuance of the Search Warrant; holding that the search was particular as to both the items seized and premises identified and therefore lawful. Inextricably, the lower Court directed the Respondents “to make further determinations of whether it has a continuing interest in the property it retains in a timely manner.”

As a result of the faulty Order of the lower Court, on December 12, 2014, the Petitioner timely filed its Notice of Appeal, asserting that the Order of the lower Court be reversed; that the

Search Warrant be quashed, inasmuch as: 1) Magistrate Roby's determination of probable cause was tainted by Respondent Travelpiece's failure to disclose exculpatory documents directly contradicting his averments withing the application for the Search Warrant. Magistrate Roby was denied the ability to discern a nexus between the criminal activity and things searched existed in order to substantiate probable cause; 2) that the search warrant was a general search warrant, thus being unreasonable search; 3) all items seized should both be returned to Pristine, as well as being excluded from any future criminal prosecutions. In compliance with the Scheduling Order entered by this Honorable Court, on January 27, 2015, the Petitioner timely filed its Appendix of Record, mutually agreed upon by the Respondents as containing the entire record of the case on February 27, 2015. On March 6, 2015, the Petitioner timely filed its Amended Appendix of Record, mutually agreed upon by the Respondents as containing the entire record of the case.

## SUMMARY OF ARGUMENT

On October 23, 2014, Pristine Pre-Owned Auto, Inc. was victimized by the execution of a general search warrant which constituted an unreasonable search and seizure in violation of Pristine's Section 6, Article 3 rights under the West Virginia Constitution and its Fourth Amendment rights under the Constitution of the United States of America. The general search warrant failed to indicate with particularity the items to be seized during the search. Respondent Travelpiece repeatedly testified during the December 1, 2014 hearing that he intended on seizing everything upon the premises of Pristine. The search resulted in Respondent Travelpieces's general rummaging through Pristine's private papers and files, resulting in a "catchall dragnet".

The general search warrant also failed to indicate with particularity the premises to be searched. Respondent Travelpiece testified that, while the Search Warrant only identified 474 S. Mineral Street, Keyser, West Virginia further described as a" two-story structure, with the lower half being brick, and the top with wide siding, also to include a detached two-story structure with the lower half being brick and the top half being white siding, and two (2) brown in color wooden sheds", a search of private residential apartments numbered 474 ½ Apartment 1 and 474 ½ Apartment 2, which are directly above the business premises at 474 S. Mineral Street occurred. Notwithstanding the inventory list prepared by a law enforcement officer on the scene and labeled "private residence west of garage", Trooper Travelpiece remained undeterred and invaded those spaces and indiscriminately seized property of Pristine.

Respondent Travelpiece testified that he did not disclose to Magistrate Roby several documents that contradicted his averments in applying for the search warrant. Respondent Travelpiece averred that Pristine attempted to misrepresent the sale of a vehicle as a non-

salvaged vehicle, unknown to the buyer; however the initial purchase contract clearly indicated that the buyer was purchasing a “reconstructed title salvage history”. Respondent Travelpiece also testified that he did not disclose to Magistrate Roby a Voluntary Lien document executed by the buyers, consenting to an additional lien being placed upon the vehicle. These omissions amount to a reckless disregard for the truth as it was presented to Magistrate Roby. These stark omissions prevented Magistrate Roby from ascertaining whether a nexus between the criminal activity and things searched existed in order to substantiate probable cause, thus making the search warrant invalid.

As a result of the Respondents’ actions, Pristine’s legitimate right to privacy in its person and papers as Constitutionally outlined and guaranteed, were decimated. The remedy for Fourth Amendment violations have been judicially crafted as the “Exclusionary Rule”: Any evidence seized in violation of our well defined rights is to be excluded in prosecution of a defendant. This Court should apply this concept to Pristine to both deter an over-zealous law enforcement regime, as well as to provide an example and hope to the citizens of Mineral County and all of West Virginia that such over-reaching will not be tolerated. Any derivative evidence, also known as “fruits from the poisonous tree” must likewise be suppressed to ensure Pristine’s Constitutional rights are not further abrogated.

Pristine was clearly entitled to the remedy of Mandamus. The lower Court completely ignored applying Mandamus to Pristine. Pristine clearly proved the elements of Mandamus. First, Pristine possesses a clear legal right to the relief sought. Pristine has a right to be free from unreasonable searches and seizures. Pristine is entitled to the return of all the property unlawfully seized from it and Pristine is entitled not to have any evidence unlawfully seized used

against it any future proceedings. Second, a legal duty on the part of the Respondents to do the thing which Pristine seeks to compel. Respondents, as law enforcement personnel and agencies, have a duty to exercise reasonableness in effecting any criminal investigation. The Respondents have a duty not to destroy Pristine's Constitutional rights in their zeal to make a conviction. The Respondents have a duty to uphold the law and right of all citizens of Mineral County and West Virginia. Thirdly, there is no other adequate remedy available to right the wrongs done to Pristine. "No remedy can be fully adequate unless it reaches the end intended and actually compels performance of the duty in question. Eureka Pipeline Co. v. Riggs, 75 W. Va 353, 83 S. E. 1020 (1915). The only adequate and fair remedy is to mandate the return of all property illegally seized to Pristine.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner respectfully requests oral arguments on this matter pursuant to Rule 19(a)(1), (2), and (3) of the West Virginia Rules of Appellate Procedure, because this case involves assignments of error in the application of settled law; in the unsustainable exercise of discretion by the lower Court where the law governing that discretion is settled; and where the result rendered by the lower Court was against the weight of the evidence.

## ARGUMENT

### I. STANDARD OF REVIEW

“A *de novo* standard of review applies to a circuit court’s decision to grant or deny a writ of mandamus.” State of West Virginia ex rel. Smith v. Mingo County Commission, 228 W. Va. 474 , 721 S. E. 2d 44 (2011). This Court has held the following to be the standard of review for suppression motions and other motions to exclude evidence:

When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State...therefore, the circuit court’s factual findings are reviewed for clear error. In contrast to a review of the circuit court’s factual findings, the ultimate determination as to whether a search or seizure was reasonable under [U. S. CONST. AMD. 4] ...and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo*. Similarly, an appellate court reviews *de novo* whether a search warrant was too broad. Thus, a circuit court’s denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made.

See State v. Lacy, 196 W. Va. 104, 468 S. E. 2d 719 (1996); State v. Legg, 207 W. Va. 686, 536 S. E. 2d 110 (2000).

Concerning other motions to exclude, this Court has held:

[a]lthough most rulings of a trial court regarding the admission of evidence are reviewed under an abuse of discretion standard...an appellate court reviews *de novo* the legal analysis underlying a trial court’s decision.

See State v. Wade, 200 W. Va. 637, 490 S. E. 2d 724, *cert denied*. 522 U. S. 1003, 118 S. Ct. 76, 139 L. Ed. 2d 415 (1997).

**II. THE LOWER COURT ERRED IN FAILING TO APPLY THE REMEDY OF MANDAMUS IN FAVOR OF PRISTINE.**

This Court has held the purpose of an action of Mandamus is well-settled:

[m]andamus is a 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... but it cannot be used to direct the specific actions of those entities. 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).

The lower Court concluded that since no one on Pristine's behalf had been arrested, Rule 41(e) of the West Virginia Rules of Criminal Procedure would be used to analyze whether Pristine was entitled to the return of its property seized. The lower Court's premise is fallacious. This Court provided in State ex rel. White vs. Melton 166 W.Va. 249, 273 S.E. 2d 81 (1980) the proper remedy for the return of property seized by authority of a search warrant:

Mandamus is a proper remedy because although petitioners can file in the circuit court per Code, 62-1A-6, they are not limited to that forum. The 62-1A-6 remedy is not exclusive for parties not being held to answer for the crime upon which is based the state's right to search.

The Lower Court's analysis solely under Rule 41(e) employs its at-law jurisdiction at the expense of its equitable power. Historically, equity powers of courts developed well established principles which governed the exercise of the discretion of the court, flexible and adaptable to achieve justice and fairness, rather than strict adherence to rigidity of rules and statutes. The lower Court's logic is flawed at the outset, resulting in a plainly erroneous ruling directly contradicting clear precedent, depriving Pristine of the remedy of Mandamus.

The holding in Melton is also supported on the Federal level. “Where, as here, “no criminal proceedings against the movant are pending or have transpired, a motion for the return of property is treated as [a] civil equitable proceeding, even if styled as being pursuant to Fed. R. Crim. P. 41[(g)].” Mora v. United States, 955 F.2d 156, 158-59 (2d Cir. 1992). See also United States v. Comprehensive Drug Testing, 621 F.3d 1162 (9th Cir. 2010) (*en banc*) (*per curiam*); Diaz v. United States, 517 F.3d 608 (2d Cir. 2008). United States v. Ritchie, 342 F.3d 903 (9th Cir. 2003).

Having established Mandamus as the proper remedy, we must now discern the elements necessary to merit the issuance of the writ:

A writ of mandamus will not issue unless three elements coexist: 1) A clear legal right in the petitioner to the relief sought; 2) a legal duty on the part of the Respondent to do the thing which the petitioner seeks to compel; and 3) the absence of another adequate remedy.

See State of West Virginia ex rel. Smith v. Mingo County Commission, 228 W. Va. 474 , 721 S. E. 2d 44 (2011) and State ex rel. Kucera v. City of Wheeling, 153 W. Va. 538, 170 S.E. 2d 367 (1969). “The right to Mandamus, though a remedy broad in scope and expanded and enlarged by jurisdiction, must exist when the proceeding is instituted... such legal right cannot be established in the proceeding itself.” See Veltri v. Parker, 232 W. Va. 1, 750 S. E. 2d 116 (2013). A “clear legal right” is defined as “a right inferable as a matter of law from uncontroverted facts.” See Blacks Law Dictionary, Deluxe, Sixth Edition, Page 251. It is undisputed that Pristine owns the property seized under the authority of the unreasonable and unconstitutional Search Warrant. This ownership and possessory control over the property unlawfully seized establishes Pristine’s clear legal right to the return of the property unlawfully

seized. A petitioner makes a *prima facie* case of lawful entitlement by asserting an ownership interest, e.g. direct ownership or prior lawful possession, of seized property. See United States v. Rodriguez-Aguirre, 264 F.3d 1195 (10th Cir. 2001). The fact that property was seized from a person may also constitute prima facie evidence of a lawful interest in the property. See United States v. Maez, 915 F.2d 1466 (10th Cir. 1990).

Duly elected prosecuting attorneys in West Virginia bear a special duty to the citizenry:

Prosecuting attorney occupies quasi-judicial position in trial of criminal case and, in keeping with such position, is required to avoid role of partisan, eager to convict, and must deal fairly with defendant as well as other participants in trial; it is prosecutor's duty to set tone of fairness and impartiality, and while he may and should vigorously pursue state's case, in doing so he must not abandon quasi-judicial role with which he is cloaked under law.

See State v. Hottinger, 194 W.Va. 716, 461 S.E.2d 462 (1995).

As outlined in West Virginia Code Section 15-2-12(a), the West Virginia State Police “shall have the mission of statewide enforcement of criminal and traffic laws with emphasis on providing basic enforcement and citizen protection from criminal depredation throughout the state and maintaining the safety of the state's public streets, roads and highways.” Both Respondents failed to live up to their duties as it pertains to Pristine. Respondent Travelpiece drafted a search warrant application which amounted to a general warrant. The lack of particularity in the items sought and places searched made the search of Pristine unreasonable and unconstitutional. Respondent Courier acted as undeterred and irresponsible as Travelpiece. At any time after receiving notice of Pristine’s Complaint for Writ of Mandamus, he could have mandated the return of Pristine’s property. Instead, Respondent Courier continues to be too eager to convict, insists on dealing unfairly with Pristine with a view

of ending Pristine's business and livelihood and depriving Pristine of its property, all in degradation of the duties outlined above. The Respondents' unreasonable, unconstitutional, and arbitrary actions can only be halted by the issuance of a writ of Mandamus.

Although equitable remedies are at times denied if there exists another sufficient remedy, this Court again in Melton held "Though the writ of Mandamus will be denied where another and sufficient remedy exists, if such other remedy is not equally as beneficial, convenient and effective, mandamus will lie." (*Id* at 169). This Court offered a further learned explanation in Eureka Pipe Line Co. vs. Riggs, 75 W. Va. 353, 83 S.E. 1020 (1915):

But the other remedy that would bar mandamus, must not only be adequate in the general sense of the term, but also specific and appropriate to the circumstances of the particular case, and as will enforce a right or performance of the duty, and such remedy can not be said to be fully adequate unless it reaches the end intended and actually compels performance of the duty in question. And as some of the books put it, the controlling question is not, has the party a remedy at law, but is that remedy fully commensurate with the necessities and rights of the party under all the circumstances of the particular case?

(See also 52 Am. Jur. Sections 34 - 39.).

Pristine clearly met its burden of proof meriting a writ of mandamus. The lower Court was plainly wrong in both its legal analysis and ruling denying Pristine mandamus relief.

**III. THE LOWER COURT ERRED IN FAILING TO FIND THAT THE SEARCH WARRANT SECURED BY THE RESPONDENTS WAS A GENERAL SEARCH WARRANT, RESULTING IN AN UNREASONABLE SEARCH AND SEIZURE.**

The United States Constitution, Amendment Four provides in pertinent part:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

The West Virginia Constitution and Article III, Section 6 provides in pertinent part:

The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures shall not be violated. No warrants shall issue except upon probable cause, supported by oath or affirmation, particularly describing the places to be searched or the persons or thing to be seized.

The Fourth Amendment applies to the States through the application of the Fourteenth Amendment of the United States Constitution. See Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). In most cases, the protections afforded West Virginia citizens under the search and seizure provisions of the State Constitution are coextensive and are generally construed in harmony with the Fourth and Fourteenth Amendments to the United States Constitution. See State of West Virginia v. Clark, 232 W. Va. 480, 752 S. E. 2d 907 (2013); Ullom v. Miller, 227 W. Va. 1, 705 S. E. 2d 111 (2010).

For any search warrant to be valid, three (3) requirements are necessary:

1. Jurisdictional control over the person or property to be searched;
2. Showing of probable cause where right of privacy exists and the probable cause must be established under oath;

3. The warrant to search must indicate with particularity the place to be searched and the items to be seized during the search.

See F. Cleckley, Handbook on West Virginia Criminal Procedure at Pages I-254 to I-355 (1993 Edition.), *citing* State v. White, 167 W. Va. 374, 280 S.E. 2d 114 (1981).

The first point is conceded by Pristine since jurisdictional control over it and the property seized from Pristine occurred in Mineral County, West Virginia.

The probable cause standard is not defined by bright lines and rigid boundaries. See F. Cleckley, Handbook on West Virginia Criminal Procedure at Pages I-357 (1993 Edition.). The standard of probable cause is a probability, and not a prima facie showing of criminal activity. U.S. v. Hodges, 705 F. 2d at 108 (4<sup>th</sup> Cir. 1983) *quoting* Spinelli v. U.S., 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969);

This Court has held in State v Corey, 233 W.Va. 297, 758 S.E. 2d 117 (2014):

Probable cause for the issuance of a search warrant exists if the facts and circumstances provided to a Magistrate in a written affidavit are sufficient to warrant the belief of a prudent person of reasonable caution that a crime has been committed and that the specific fruits, instrumentalities, or contraband from that crime presently may be found at a specific location; it is not enough that a Magistrate believes that a crime has been committed.

Respondent Travelpiece repeatedly testified that he was aware of exculpatory documents, but failed to disclose them to Mineral County Magistrate Roby. Respondent Travelpiece admitted to not disclosing the Bill of Sale for Jackson and Dorman which reflected that the vehicle was sold with a “reconstructed title salvage history”. Respondent Travelpiece failed to disclose the

vehicle Title which contained both a primary and secondary lien, in direct contradiction to his averment in Attachment C of the Search Warrant. Respondent Travelpiece also failed to disclose the existence of a promissory note and voluntary lien form which contradicted his averments in Attachment C of the Search Warrant. Pristine contends that the validity of the Search Warrant is irreparably flawed as a result of the false information contained in Respondent Travelpiece's Affidavit. This Court in State v Lilly, 194 W. Va. 595 461 S.E. 2d 101 (1995) held:

To successfully challenge the validity of a search warrant on the basis of false information in the warrant affidavit, the Defendant must establish by a preponderance of the evidence that the Affiant, either knowing and intentionally or with reckless disregard for the truth, included a false statement therein. The same analysis applies to omission of fact. The defendant must show that the facts were intentionally omitted or were omitted in reckless disregard of whether their omission made the affidavit misleading.

The Ninth Circuit held similarly in U.S. v Reeves, 210 F. 3d 1041 (2000) where the validity of an affidavit underlying a search warrant is at stake when both the affidavit contains intentional or recklessly false statements or misleading omissions and the affidavit cannot support a finding of probable cause without the alleged false information. Magistrate Roby was in no position to ascertain whether a nexus between the criminal activity and the things search existed in order to substantiate probable cause. See F. Cleckley, Handbook on West Virginia Criminal Procedure at Pages 1-357 & 358 (1993 Edition), State v Corey, 233 W.Va. 297 758 S.E. 2d 117 (2014) and State v Lilly, 194 W. Va. 595 461 S.E. 2d 101 (1995).

The lower Court found probable cause by merely relying on the concept's definition. The lower Court's logic is necessarily flawed. The lower Court was required to look beyond the legal

definition of probable cause and actually review whether such a nexus between the criminal activity and the things searched existed in order to substantiate probable cause. The lower Court made no review whatsoever. Pristine contends that the validity of the warrant fails as a result. “Reviewing courts will not defer to a warrant based on an affidavit that does not provide the Magistrate with a substantial bases for determining the existence of 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”. U.S. v Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed2 677 (1984).

“The Fourth Amendment does not denounce all searches or seizures, but only those that are unreasonable.” Carroll v U.S. 267 U.S. 132 45 S. Ct. 280, 69 L. Ed. 543 (1925).

The Fourth Amendment protects the individual’s right of privacy in his house, papers, and effects from the unlawful intrusion of Governmental authority. Katz v U.S., 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) and State v. Peacher, 167 W.Va. 540, 280 S.E. 2d 559 (1981). These Fourth Amendment protections apply to business and corporation property. Cleckley, Handbook on West Virginia Criminal Procedure at Page I-240 & 241 (1993 Edition) *citing* U.S. v Articles of Hazardous Substance, 588 F. 2d 39 (4<sup>th</sup> Cir. 1978). Business premises are protected by the Fourth Amendment and Corporations have Fourth Amendment rights. Thus, the warrant clause of the Fourth Amendment protects commercial buildings as well as private homes and such expectations of privacy are particularly strong in private residences and offices. Notwithstanding the strong language regarding privacy, in the final analysis, the Fourth Amendment protects property as well as privacy against unreasonable Government intrusion. Sodalb v Cook County, 113 S. Ct. 538, 506 U.S. 56, 121 L. Ed 2d 450 (1992).

Civilized societies as early as 350 A. D. recognized an inherit right of privacy. This privacy right flourished in the concept of being safe and secure in one's home. Interestingly enough, the roots of "a man's home is his castle" is firmly entrenched in Great Britain as early as the year 1505. William J. Cuddihy in his famed treatise The Fourth Amendment, Origins and Original Meaning, 682-1791 (2009) is inarguably the leading authority on the Fourth Amendment and the intricacy therein.<sup>1</sup> Cuddihy explains that general warrants emerge as the most egregious of the unreasonable processes that the Fourth Amendment renounces, (*Id* at Page 771). Cuddihy states that general warrants did not limit searches to designated people, locations or things. They were a legal pass key to all doors, (*Id* at Page IXV).

This Court has repeatedly held that the Fourth Amendment and Article Three, Section Six of the West Virginia Constitution both prohibit the issuance of general warrants allowing officials to burrow through a person's possession looking for any evidence of a crime. State v Lacy, 196 W. Va. 110 468 S. E. 2d 719 (1996). "A search warrant shall not be made a catch all dragnet" State ex rel. White v Melton 166 W. Va. 249, 273 S.E. 2d 81 (1980). (See also Marron v U.S. 275 U.S. 192 48 S. Ct. 74 72 L. Ed. 231 (1927), "General searches violate fundamental rights that are forbidden by the Forth Amendment". "The blanket searches are intolerable and unreasonable" Carroll v U.S. 267 U.S. 132 45 S. Ct. 280, 69 L. Ed. 543 (1925). Again Professor Cleckley, Handbook on West Virginia Criminal Procedure at Page I-371 (1993 Edition), in *citing* Coolidge v New Hampshire, 403 U.S. 443 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1970) states:

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<sup>1</sup>Another excellent review is Framing of the Fourth, Tracy Maclin and Julia Miradella, 109 Michigan Law Review 1049 (2011).

The chief limitation on content is that a warrant cannot be so general that the officers can seize almost anything they wish under it; the origins of the Fourth Amendment probably lie in the revulsion against general warrants of an earlier era. To be clear the Fourth Amendment requires that a search warrant describe the things to be seized with sufficient particularity to prevent a general exploratory rummaging.

A warrant with a long undifferentiated list of categories of properties subject to seizure will be stricken down as not particularly describing the property to be seized. Dragnet searches are improper.

Most recently the Ninth Circuit in the U.S. v Bridges, 344 F. 3d 1010 (9<sup>th</sup> Cir. 2003) was presented with a fact pattern similar to that of Pristine's. In Bridges, the Internal Revenue Service obtained a search warrant from the Federal District Court and seized computer systems, client files, tax bills, correspondence from the defendant's clients, seminar videos and other business documents and equipment found on the premises. The Bridges Court found that the scope of that warrant was overly broad. "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." Upon reading the attachment of specific items in Bridges, that list is eerily similar to Respondent Travelpiece's Attachment B. The Bridges Court found the list of items and categories of property "was so expansive that its 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 its scope." Clearly the search warrant secured by the Respondents is a general warrant which is blatantly

unreasonable and unconstitutional. The general ransacking performed by Respondent Travelpiece had no legitimate basis.

Federal Courts have held that the quantity of evidence subject to seizure amounts to unreasonableness in instances when the impounding of the entire of the contents of the cabin in which the Defendant was arrested and transported and transportation of them to an FBI Office two hundred miles away was unreasonable (Kremen vs. United States, 353 U.S. 346, 77 S. Ct. 828, 1 L. Ed. 2d 876 [1957]); the seizure of the Plaintiff's entire office files coupled with the refusal to permit him to even copy parts of them was held unreasonable. United States vs. Kleefer, 275 F. Supp. 761 (S. D. N.Y. 1967). See also F. Cleckley, Handbook on West Virginia Criminal Procedure Second Addition Volume One Page I 385 and 386).

The lower Court strained to conclude that the search was reasonable based upon this Court's ruling in In Re: Brining, Docket No.:12-1409 W. Va. (October 4, 2013), since Respondents stated that they have a continuing interest as a result of some ongoing investigation. That ruling though fails to recognize that, since the property was unlawfully seized at the outset, a balancing test as to whether the Government has a continuing interest cannot be reached. In fact, the "continuing interest theory" does not even rise to the level of a permeation of fraud which on occasion has been used to justify a search warrant that is broader in scope. The Bridges Court found that in order to succeed on that theory "the business searched must have as a central purpose to serve as a front for defrauding." Respondent Travelpiece certainly did not aver that the alleged wrongdoing and fraud was inseparable from other business documents or that Pristine's business was permeated with fraud since it's inception in 2006.

Respondent Travelpiece testified that not only did he take computers from Pristine, but he also seized cellular phones from the chief operation officer of Pristine and employees.

Respondent Travelpiece also testified that from October 23, 2014 through December 1, 2014, no additional search warrant was secured to search the contents of those electronic devices.

Pristine's Counsel argued to the lower Court that the seizure of the electronic devices was unconstitutional as defined by the United States Supreme Court in Riley v California, 134 S. Ct. 2473, 189 L. Ed. 2d 430, 82 US L W 4558 (2014). Notwithstanding the Court's stating on the record that it was familiar with the Riley case, it made reference to neither the Riley case, nor the return of the electronic data within the Court's Order. Riley unequivocally states that "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple – get a warrant." The only remedy for such an over broad search warrant is suppression of the seized evidence and the return of the property to the wronged individual. (U.S. v Clark, 31 F.3d 831, [9<sup>th</sup> Circuit, 1993].)

The Search Warrant secured by Respondent Travelpiece also fails to identify with specificity and clarity the physical premises to be searched. Respondent Travelpiece testified that not only did he search 474 South Mineral Street, Keyser, West Virginia described as a two-story structure and detached two-story structure and two brown in color wooden sheds, but he searched locations delineated as 454 South Mineral Street and two (2) residential apartments as 474 ½ Apartment 1 and 474 ½ Apartment 2. Respondent Travelpiece testified that he discovered on the scene that these were separately numbered and that these were private residences. He acknowledged that the inventory sheet delineated "private residences". Notwithstanding that private residences were indeed searched, the lower Court found that these private residences were

controlled by Pristine. Notwithstanding Fernando Smith's testimony that the residences were private, the Court nonetheless found that Pristine controlled the area thus justifying the search. The act of searching private residences which was discernable by law enforcement at the scene as indeed private residences further indicate the excessiveness and generality of the warrant. The old adage that "two wrongs do not make a right" is simplistic but equally applies here. The Respondents cannot use an initial description of Pristine's business address to justify a broad search of private residences separately numbered. The Respondent testified that separate doors and entrances existed for 474 ½ Apartment 1 and 2 as well as for 454 South Mineral Street. The prudent course would have been for Respondent Travelpiece to secure an additional warrant, rather than conducting a broad search based on imprecise and non particular identification of the premises to be searched. "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness generally requires the obtaining of a judicial warrant, so as to ensure that the inferences to support a search are drawn by a neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime...Ultimate touchstone of the Fourth Amendment is reasonableness." (Riley v. California, 134 S. Ct. 2473, 189 L. Ed.2d 430, 82 USLW 4558, 2014).

**IV. THE LOWER COURT ERRED IN FAILING TO APPLY THE EXCLUSIONARY RULE TO PRISTINE AS A RESULT OF THE UNCONSTITUTIONAL SEARCH AND SEIZURE PERFORMED BY THE RESPONDENTS.**

Now that it is clear that the Respondent's conduct was unreasonable and prohibited by the Fourth Amendment and Article Six Section Three of the West Virginia Constitution, a second question requires review: whether the evidence obtained by means of the Fourth Amendment violation should be available as proof in criminal trials and other proceedings. Again Justice Cleckley has espoused: "The overwhelming authority in this Country is that the remedy for an unconstitutional search and seizure is exclusion". See F. Cleckley, Handbook on West Virginia Criminal Procedure at Page I-201 - 203 (1993 Edition). This Court in State v Flippo, 212 W. Va. 560, 575 S.E. 2d 170 (2002), held "when evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." In fact, it has been held that the function of the rule is to deter unlawful police conduct and to compel respect for the constitutional guarantee in the only effectively available way- by removing the incentive to disregard it." Elkins v U.S., 364 U.S. 206 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960). The Ninth Circuit in the U.S. v Clark, 31 F. 3d 831 (9<sup>th</sup> Cir 1993) held that "the remedy for an over broad search warrant is suppression of the seized evidence." This Court as early as in the case of State v Andrews, 114 S.E. 257 W.Va. (1922) held:

If goods or other property of evidential value be taken from one accused of an offence by an unlawful search and seizure, the same should on his application by petition be restored to him if they be such as he is lawfully entitled to have the possession of, and whether so or not, if objected to, neither the goods or other property, nor the evidence of the officers or persons engaged, obtained thereby, should be admitted in evidence against the accused on his trial.

The corollary of the exclusionary rule is the “fruit of the poisonous tree” doctrine. The exclusionary rule reaches not only primary evidence obtained as a direct result of illegal search and seizure, but also evidence later discovered and found to be a derivative of an illegality or “fruit of the poisonous tree.” It extends as well to the indirect as the direct products of unconstitutional conduct. Segura v U.S., 468 U.S. 796 104 S. Ct. 3380 82 L. Ed. 2d 599 (1984). Evidence that is derivatively received as a result of an illegal search and seizure is also inadmissible under the poisonous tree doctrine.

The effect of the general warrant executed by the Respondents is an unreasonable search and seizure of the highest order. Pristine’s Fourth Amendment constitutional rights were trampled. The Respondent has had the benefit of Pristine’s records and especially it’s computers and cellular phones of Pristine as well as their employees since October 23, 2014. Undoubtedly, the Respondents have forensically examined the computers and electronic data devouring it as termites would devour an oak tree. The only adequate remedy to both protect Pristine from further constitutional violations as well as to deter rabid arbitrary and unlawful police conduct of the Respondents is to suppress and exclude all information gleaned therefrom. This Court should Order the Respondents to expunge any information secured as a result of the unconstitutional search and seizure. This Court must apply the exclusionary rule and the fruit of the poisonous tree doctrine to right the terrible constitutional wrong.

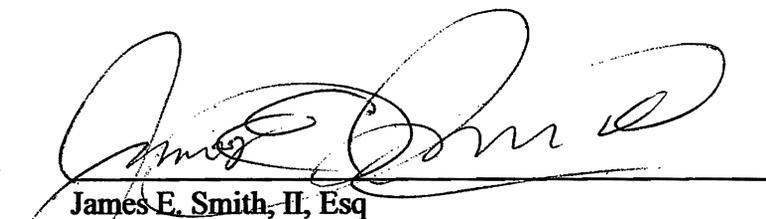
## CONCLUSION AND RELIEF REQUESTED

“Democracy dies behind closed doors.” (Judge Damon Keith, Detroit Free Press v. Ashcroft, 303 F. 3d 681, 683 [6<sup>th</sup> Cir., 2002]). Whether the unreasonable search and seizure of Pristine’s property as a result of the issuance of the general search warrant was a result of the Respondents’ jaded and acrimonious opinion against Pristine, or was borne out of contemptuous incompetence is not fully known. Clearly, however, the Respondents can not be allowed to exercise their statutory power by bastardizing Pristine’s Federal and State constitutional rights. Respondent Travelpiece admitted that he failed to disclose exculpatory documents to the Magistrate when applying for the warrant, thus tainting the Magistrate’s ability to ascertain whether a nexus between the criminal activity and the things search existed. A flawed finding of probable cause is the result.

Respondent Travelpiece admitted that he intended on taking everything on Pristine’s premises. The effect of Attachment B of the Search Warrant was a “catch-all dragnet; a long, undifferentiated list of categories of properties” resulting from the issuance of the general search warrant. (*Id* at Cleckley, Page I-371). Respondents seizure of all of Pristine’s property, as well as all of its computers and cell phones, even those cell phones of employees, amounts to an unconstitutional search and seizure. Lastly, Respondent Travelpiece admitted that he searched areas of the Pristine’s premises that were not specifically described, including searching two (2) apartments that were clearly understood even by other law enforcement officers as being private residences. These Respondents’ actions are in degradation to Pristine’s Federal and State constitutional rights.

A dangerous precedent will be established without this Honorable Court's reversal of the lower Court's Order. No resident of Mineral County, nor any resident of the State of West Virginia can possibly enjoy any expectation of privacy if general search warrants will now be considered normal police action. This Honorable Court must protect our Section 6, Article 3 rights under the West Virginia Constitution and our Fourth Amendment rights under the Constitution of the United States of America. 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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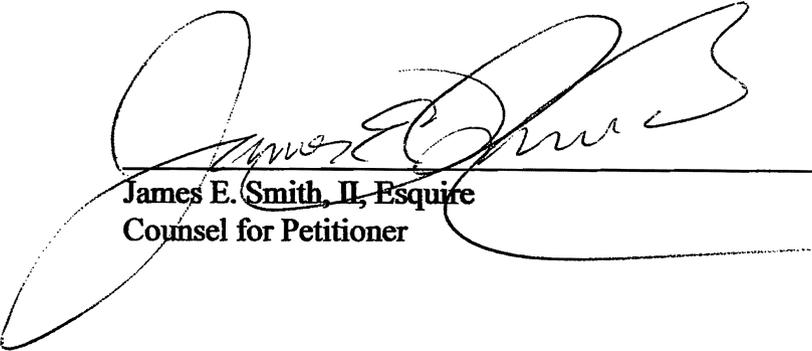
**CERTIFICATE OF SERVICE**

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 Brief was duly served upon the following:

1. James W. Courier, Jr. by hand delivery 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 was 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 Capitol Building, Room E-317, 1900 Kanawha Blvd. East, Charleston, West Virginia 25305, for filing on the 9<sup>th</sup> day of April, 2015.



James E. Smith, II, Esquire  
Counsel for Petitioner