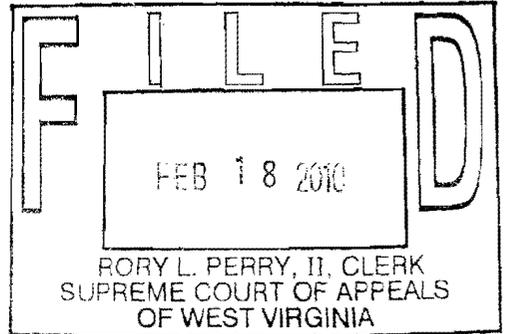


In the Supreme Court of Appeals of West Virginia

No. 35444



**WEST VIRGINIA STATE POLICE,
D.M. NELSON, A.S. PERDUE, and C.E. AKERS,**

Appellants,

v.

BETTY JARVIS and WANDA CARNEY,

Appellees.

Honorable Paul Zakaib, Jr.
Circuit Court of Kanawha County
Civil Action Nos. 09-C-770 & -771
(consolidated for purposes of discovery and pleadings)

BRIEF OF APPELLANTS

Counsel for Appellants

Michael D. Mullins, Esquire
W. Va. State Bar No. 7754
Robert L. Bailey, Esquire
W. Va. State Bar No. 8902
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, W. Va. 25326-1588
Telephone: (304) 353-8000
Facsimile: (304) 353-8180

Counsel for Appellees

Lonnie C. Simmons, Esquire
W. Va. State Bar No. 3406
Robert M. Bastress, III, Esquire
W. Va. State Bar No. 9616
Ditrapano, Barrett & Dipiero, PLLC
604 Virginia Street, East
Charleston, W. Va. 25301
Telephone: (304) 342-0133

I. INTRODUCTION

Appellees broke into the home of a suspect in a drug and murder investigation in Mingo County, West Virginia, and stole some of the suspect's property. They also tampered with witnesses in the same investigation. They were thereafter arrested (although not by Appellants) for breaking and entering, larceny, and conspiracy. The Mingo County prosecuting attorney's office decided, however, to prosecute Appellees for obstructing the police, and a grand jury returned an indictment against Appellees.

At trial in the Circuit Court for Mingo County, West Virginia, Appellants—then State Police officers—testified against Appellees. The circuit court denied Appellees' pre-trial and mid-trial dispositive motions, where Appellees made the same First Amendment argument that they press here. The jury convicted both Appellees, and the circuit court denied Appellees' post-trial motions. On appeal, focusing on Appellees' statements to the witnesses and suspects in the drug and murder investigations, this Court set aside the convictions, holding that the convictions violated Appellees' First Amendment and corresponding State constitutional rights.

Unsatisfied, Appellees sued the police officer witnesses, alleging that they engaged in retaliatory and "negligent" prosecution. Because they are entitled to qualified immunity, Appellants moved to dismiss, but the circuit court denied Appellants' motion. Pending before the Court is Appellants' interlocutory appeal of that denial. Because the circuit court erred by denying Appellants' qualified immunity defense, Appellants respectfully request the Court to grant their appeal and reverse the circuit court's determination.

II. STATEMENT OF FACTS

A. **The drug and capital murder investigations.**

This case forms the most recent chapter in the investigation and prosecution of the sale of illegal drugs in Mingo County, West Virginia. *See* Order at 2. During the investigation,

Carla Gail Collins began cooperating with law enforcement's investigation of George "Porgy" (or "Porgie") Lecco, a local drug dealer, and Lecco's up-stream drug supplier. *Id.*

In April 2005, Collins disappeared, and around the same time, a trailer in a nearby rural area was burned. *Id.* During their investigation, the police developed evidence that Valerie Friend had shot and beaten Collins to death at Lecco's direction; Collins's body was eventually discovered in a shallow grave near the burned-out trailer. *Id.* Several other people were also implicated in Collins's murder. Carmella Blankenship and Patricia Burton were present during the murder, *id.*; Charles Burton was eventually convicted of burning related evidence, *id.*; and Walter Harmon was eventually convicted of burning the trailer, destroying evidence, and digging a grave for Collins's dead body, *id.* A federal jury convicted Friend and Lecco of capital murder. After their death-penalty sentences were overturned because a juror lied on his jury questionnaire, Friend pleaded guilty to distributing cocaine and admitted to killing Collins, and was sentenced to life in prison; Lecco is still awaiting retrial. *Id.* at 2 n.1.¹

B. Appellees break into the suspect's home and steal her property, including evidence potentially material to the murder investigation, and they abscond with at least one witness, delaying, at least, her ability to assist the police.

Attorney Michael Clifford represented Walter Harmon. *Id.* Clifford hired Appellee Wanda Carney as an "investigator," *id.*, and Appellee Better Jarvis—who is Harmon's aunt and is also related to several of the other suspects—offered to "assist" Clifford. *Id.* During their "investigation," while Carney waited outside in the car, Appellee Jarvis and another woman, Patricia Jablensky, broke into a house that Valerie Friend rented from Charles Burton, even though neither had obtained the tenant, Ms. Friend's, permission. *Id.* at 3. While inside, Jarvis stole several items from Ms. Friend that law enforcement believed at the time might have been relevant to their murder investigation. *Id.* The items did not belong to either Appellee, they

¹ See also <http://www.wsaz.com/newswestvirginia/headlines/62663177.html>.

did not belong to Burton, and they did not belong to Jablensky. They belonged to Friend, and Friend did not give her permission for Jarvis or Jablensky to take them. When demanded, Appellees eventually turned the items over to the United States Attorney, although some stolen film was blank when returned. *Id.* Because Friend had not given Appellees or Jablensky permission to enter her home, and because Friend had not given Appellees or Jablensky permission to take her property, Friend asked that Jarvis be arrested. *Id.* at 3-4.²

Also, Carmella Blankenship, a cooperating witness, was "temporarily relocated from Mingo County to Kanawha County by Plaintiffs Jarvis and Carney." *Id.* at 4. Law enforcement believed that this was done to hamper their access to Jablensky, although Appellees denied this. *Id.*

After a police officer who is not a party to this action filed a criminal investigation report on Appellees' conduct, arrest warrants were issued charging Jarvis and Jablensky (the two who entered Friend's home and stole the items) with burglary, conspiracy to commit burglary, and petit larceny for the incident. *Id.* at 5. Carney (who waited outside during the unlawful entry into Friend's home) was charged as Jarvis's accessory and co-conspirator. *Id.*

For reasons known only to the prosecuting attorney, that office decided to prosecute not for the burglary and related charges, but instead for obstruction and conspiracy to obstruct a police officer in violation of W. VA. CODE § 61-5-17. *Id.* A grand jury indicted the women for those charges. *Id.* Jablensky pleaded guilty for her conduct related to the burglary.

The Circuit Court for Mingo County, West Virginia, denied Appellees' pre-trial motion to dismiss that was made based on the First Amendment, that court denied Appellees' mid-trial motion to dismiss, and it denied Appellees' post-trial motions. *Id.* Appellants, then

² Although this Court later held that the breaking and entering and theft were not material to the prosecutor's case, Appellees' conduct in this regard has never been held to have been lawful.

State Police officers, testified at Appellees' trial that Appellees' conduct interfered with their investigation of Collins's murder.³ As noted, it is undisputed that Appellants did *not* arrest Appellees, they did *not* complete the criminal investigation report on Appellees' conduct, and, of course, they are *not* Appellees' prosecutors. The jury convicted both Appellees, but this Court overturned the convictions in a *per curiam* opinion holding that the convictions violated the First Amendment and the corresponding provisions of the State's constitution.⁴

C. Procedural background

Appellees have now sued the police officer witnesses for money. (*See generally* Compl.) In their complaints, which are materially the same, Appellees claim that the police retaliatorily (Count I) and "negligently" (Count II) prosecuted them. Because, as demonstrated below, Appellants (defendants below) are entitled to qualified immunity, they moved to dismiss. Applying the wrong standard to retaliatory prosecution claims, the circuit court erroneously denied Appellants' motion. *See generally* Order. The circuit court's denial of Appellants' motion to dismiss based on qualified immunity is immediately appealable. Syl. pt. 2, *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009).

Pending before the Court is Appellants' Petition for Appeal. Because they are entitled to qualified immunity, Appellants respectfully request the Court to grant their appeal.

III. ASSIGNMENT OF ERROR

The Circuit Court erred by failing to hold that Appellants' conduct did not violate a clearly established statutory or constitutional rights of which a reasonable police officer would have known.

The Circuit Court erred by failing to hold that a plaintiff claiming retaliatory prosecution against the police must allege and prove lack of probable cause.

³ Trooper Akers has since retired.

⁴ *See State v. Carney*, 222 W.Va. 152, 663 S.E.2d 606 (2008) (*per curiam*) ("*Carney I*").

IV. DISCUSSION OF LAW

A. This Court will review the decision below *de novo*.

The issues in this case (whether Appellants' conduct violated a clearly established statutory or constitutional rights of which a reasonable police officer would have known, and whether a plaintiff alleging retaliatory prosecution against the police must allege and prove lack of probable cause) are legal questions.⁵ The circuit court's decisions, therefore, are entitled to no deference, and this Court's review thereof will be *de novo*.⁶

B. The scope of qualified immunity.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *State v. Chase Sec., Inc.*, 188 W. Va. 356, 362, 424 S.E.2d 591, 597 (1992) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see also* syl. pt. 6, *J.H. v. W. Va. Div. of Rehabilitation Servs.*, 224 W. Va. 147, 680 S.E.2d 392 (2009) ("In cases arising under W. VA. CODE § 29-12-5, and in the absence of express provisions of the insurance contract to the contrary, the immunity of the State is coterminous with the qualified immunity of a public executive official whose acts or omissions give rise to the case. However, on occasion, the State will be entitled to immunity when the official is not entitled to the same immunity; in others, the official will be entitled to immunity when the State is not. The existence of the State's immunity of the State must be

⁵ *See* syl. pt. 1, *Hutchinson v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996) ("The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. . . .").

⁶ *See Keese v. Gen. Refuse Serv., Inc.*, 216 W. Va. 199, 204, 604 S.E.2d 449, 454 (2004) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.") (internal quotations and citation omitted).

determined on a case-by-case basis.") (citation and internal quotations omitted).⁷ As a result, a government official is not liable if his conduct was *objectively* reasonable. *See, e.g., Hunsberger v. Wood*, 570 F.3d 546, 557 (4th Cir. 2009) ("Because defendant's response to the emergency he perceived was objectively reasonable, he is entitled to qualified immunity. The order denying defendant qualified immunity is reversed, and the case is remanded for further proceedings consistent with this opinion."); *Robinson*, 679 S.E.2d at 666.

Analysis of a public official's entitlement to qualified immunity, then, follows the familiar model set out in *Harlow* and its progeny: (1) the official is entitled to (albeit unnecessary) immunity if his conduct did not violate the law, (2) the official may escape liability by showing that the right "was not so clearly established that a reasonable official would have been aware of it," 188 W. Va. at 362, 424 S.E.2d at 597,⁸ and (3) an official is, in any event, entitled to qualified immunity if his conduct was objectively reasonable.

As demonstrated herein, Appellees' claims fail to overcome Appellants' qualified immunity at every step. They cannot prove a constitutional violation; the relevant state law on retaliatory prosecution is *still* unsettled; and no matter what, because there was probable cause, Appellants' conduct was objectively reasonable.

C. The circuit court erroneously failed to require Appellees to allege and prove lack of probable cause.

Citing a line of West Virginia *employment-law* cases, the circuit court adopted *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) ("*Mt. Healthy*"), but ignored

⁷ Qualified immunity applies to Appellant State Police officers, who are not covered by the West Virginia Governmental Tort Claims and Insurance Reform Act. Syl. pt. 1, *Chase Sec.* ("A public executive official who is acting within the scope of his authority and is not covered by the provisions of W. Va. Code [§] 29-12A-1, *et seq.*, is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known. . . ."); *Pruitt v. W. Va. Dept. of Public Safety*, 222 W. Va. 290, 664 S.E.2d 175, 184 (2008).

⁸ *Accord Hutchison*, 198 W. Va. at 149, 479 S.E.2d at 659.

the Supreme Court of the United States' later decision in *Hartman v. Moore*, 547 U.S. 250 (2006), specifically governing (as here) *retaliatory prosecution* cases. (See Order at 7 (citing syl. pt. 3, *McClung v. Marion County Comm'n*, 178 W. Va. 444, 360 S.E.2d 221 (1987) ("In a retaliatory discharge action . . . "); syl. pts. 4-6, *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431, 675 S.E.2d 907 (2009) (retaliatory discharge action); *Neely v. Mangum*, 183 W. Va. 393, 396 S.E.2d 160 (1990) (same); *Freeman v. Poling*, 175 W. Va. 814, 338 S.E.2d 415 (1985) (same); syl. pts. 3 & 4, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983) (same); *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 479 S.E.2d 561 (1996) (wrongful discharge).)

Respectfully, that decision was clearly erroneous, but it was at the very least incorrect. The same court that wrote *Mt. Healthy* and applied that case to employment claims also later went on to write *Hartman* and apply that case—not *Mt. Healthy*—to retaliatory prosecution claims. This Court likewise applies *Mt. Healthy* to employment cases; there is simply no reason to reject application under state law of *Hartman* to prosecution cases.

In *Mt. Healthy*, the Supreme Court of the United States addressed what has become the paradigmatic First Amendment retaliation case: the firing of a government employee in retaliation for his or her speaking out on some matter of public concern.⁹ Mr. Doyle was a public school teacher without tenure. See 429 U.S. 281-83. The defendant board of education fired Doyle because, they said, he was a misfit who got into arguments with other teachers, made an obscene gesture toward two female students, and so on. *Id.* Doyle, however, argued that the board fired him because he sent a local radio station a copy of the board's (supposedly internal) memorandum on dress codes for teachers, which station read the memo over the air. *Id.*

⁹ See also *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593 (1972).

Doyle sued. The trial court refused to allow the board to offer evidence that it would have fired Doyle because of his other problems even if it had never found out about his transmittal of the dress code memo. Finding that retaliation formed at least some part of the board's motivation, the trial court held that Doyle was entitled to reinstatement and back-pay, *id.* at 283, and the Court of Appeals affirmed, *id.*

The Supreme Court of the United States reversed, noting that such a result was not only inconsistent with the law, it would allow a person who was about to suffer an adverse employment decision because of a legitimate reason simply to make a First Amendment-protected statement and thereby immunize himself from the otherwise legitimate consequence about to befall him. *Id.* at 285. Causation, said the Court, was the critical issue:

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Id. at 285-86. The Court looked to criminal cases (involving exclusion of evidence) to affirm the notion that if a plaintiff cannot establish causation, his claim must fail.¹⁰

In retaliatory *employment* cases, then, the plaintiff must prove three elements: (1) that the plaintiff engaged in protected conduct (typically, protected speech), (2) that the plaintiff subsequently suffered an adverse action that would deter a person of ordinary firmness from continuing to engage in the protected conduct (typically, loss of employment), and (3) that element (2) was *caused by* element (1).

Both before and after *Mt. Healthy*, courts had applied a two-step burden-shifting framework to the causation element. The plaintiff must show by a preponderance of the evidence that his conduct was a "substantial" or "motivating" factor in the adverse decision. If he does, then the burden shifts to the defendant to show by the same standard that it would have reached the same decision as to the adverse decision even in the absence of the protected conduct. *See, e.g.,* syl. pt. 6, *Alderman*.¹¹

¹⁰ *See id.* at 286-87 ("In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused.").

¹¹ One important difference, then, between the framework applicable to certain *discriminatory* employment-decision cases and the one applicable to *retaliatory* employment-decision cases is that in the former, if the defendant employer meets its burden (which is only one of production; the burden of persuasion at all times remains with the plaintiff), the burden-shifting entirely drops from the case. *See, e.g., Skaggs*, 198 W. Va. at 71-72, 479 S.E.2d at 581-82 ("once the employer meets this burden of production, the presumption raised by the *prima facie* case is rebutted," the "presumption cease[s] to be relevant at that point, and the onus is once again on the employee to prove that the proffered legitimate reason is a mere pretext rather than the true reason for the challenged employment action") (citing *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Tex. Dept. of Comm'y Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

In the latter case, if the defendant meets its burden (by demonstrating that it would have reached the same decision as to the adverse decision even in the absence of the protected conduct), the defendant is entitled to summary judgment. *See, e.g.,* syl. pt. 4, *Orr* ("In a suit under 42 U.S.C. § 1983, where the plaintiff claims that he was discharged for exercising his First Amendment right of free speech, the burden is initially upon the plaintiff to show: (1) that his conduct was constitutionally protected; and (2) that his conduct was a substantial or motivating factor for his discharge. *His employer may defeat the*

Thirty years later, in *Hartman v. Moore*, 547 U.S. 250 (2006) ("*Hartman*"), the Supreme Court faced another retaliation case.¹² Instead of an adverse employment decision, however, the adverse fate that befell Mr. Moore was prosecution for a criminal matter allegedly in retaliation for his protected speech.¹³ The Court again stressed that in all retaliation cases, it remained the plaintiff's burden of persuasion to prove but-for causation: As the Court put it, recovery is allowed only "*when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences.*" 547 U.S. at 256 (emphasis added).

The Court acknowledged that, as in retaliatory employment action cases, the ultimate question in a retaliatory prosecution case asks whether the defendant *would* have taken the same action. But that is where the similarity ended. For a number of crucial reasons—including the fact that whether the defendant *would* have taken the same action absent the proscribed reason necessarily turns on the question of whether the defendant *could* have legally done so—the Court went on to hold that the converse was also true: *i.e.*, when nonretaliatory grounds are objectively *sufficient* to provoke the adverse consequences, recovery must be disallowed.¹⁴ Thus, "want of probable cause must be alleged and proven." 547 U.S. at 252.

claim by showing that the same decision would have been reached even in the absence of the protected conduct.") (emphasis added).

¹² *Hartman* was a *Bivens* case. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). The *Hartman* court, however, made it perfectly clear that it would have applied the same rule if the case had been a § 1983 case, see discussion, *infra*, at 11, and there is also no reason to distinguish *Hartman* in this equivalent state-law case.

¹³ Appellants assume *arguendo* that Appellees' conduct was "speech" protected by the relevant constitutional provisions.

¹⁴ The *Mt. Healthy* court had faced this same issue in the related context addressed there. See, e.g., 429 U.S. at 285 ("One plausible meaning of the [district] court's statement is that the Board and the Superintendent not only could, but in fact would have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a 'substantial part' in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.").

First, observed the Court, in employment cases, there was a necessary nexus between the defendant employer's motivation and that *same* defendant's adverse decision visited on the plaintiff: *i.e.*, the motivation at issue was that of the defendant himself, and the adverse decision was, too, that of the defendant. But in a retaliatory prosecution case, that nexus is absent, because police officers do not prosecute cases:

... [A] retaliatory-prosecution case is different [because of] the causation that a . . . plaintiff must prove; the difference is that the requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases, and the need to show this more complex connection supports a requirement that no probable cause be alleged and proven. A *Bivens* (or § 1983) action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute. Instead, the defendant will be a nonprosecutor, an official, like an inspector here, who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute. The consequence is that a plaintiff . . . must show that the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging.

Thus, the causal connection required here is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another.

Herein lies the distinct problem of causation in cases like this one. Evidence of an inspector's animus does not necessarily show that the inspector induced the action of a prosecutor who would not have pressed charges otherwise.

Id. at 261-63 (citations and footnotes omitted).

Because of this break in the chain—or more accurately, because of this insertion of an additional link in the chain over which the defendant police officer has no control—between the defendant officer and the plaintiff's alleged injury, police officers will rarely if ever have access to the kind of proof that they need to defend themselves:

It would be open to us, of course, to give no special prominence to an absence of probable cause in bridging the causal gap, and to address this distinct causation concern at a merely general level, leaving it to such pleading and proof as the circumstances allow. A prosecutor's disclosure of retaliatory thinking on his part, for example, would be of great significance in addressing the presumption and closing the gap. So would evidence that a prosecutor was nothing but a rubber stamp for his investigative staff or the police. *Cf. Mt. Healthy*, 429 U.S., at 281-283 (evidence that the board of education, which formally decided not to rehire a teacher, was only nominally distinct from the school superintendent, who allegedly bore the retaliatory animus). In fact, though, these examples are likely to be rare and consequently poor guides in structuring a cause of action. In most cases, for instance, it would be unrealistic to expect a prosecutor to reveal his mind even to the degree that this record discloses, with its reported statement by the prosecutor that he was not galvanized by the merits of the case, but sought the indictment against Moore because he wanted to attract the interest of a law firm looking for a tough trial lawyer.

Id. at 264 (parallel citation and footnote omitted). So while creating a rule to handle cases where there *was* direct evidence of prosecutorial motivation might be possible in the abstract, the Court likened dispensing with the requirement that a plaintiff prove the absence of probable cause to "proposing that retirement plans include the possibility of winning the lottery." *Id.* at 264 n.10.

Second, in employment cases, there is no presumption that the employer acted in good faith. There is, however, a presumption in federal law that a prosecutor's decision to prosecute was made in good faith:

Moreover, to the factual difficulty of divining the influence of an investigator or other law enforcement officer upon the prosecutor's mind, there is an added legal obstacle in the longstanding presumption of regularity accorded to prosecutorial decisionmaking. And this presumption that a prosecutor has legitimate grounds for the action he takes is one we do not lightly discard, given our position that judicial intrusion into executive discretion of such high order should be minimal.

Id. at 263 (citations omitted).

And lastly, found the Court, requiring plaintiffs in retaliatory prosecution cases against the police to prove lack of probable cause imposes little if any added burden on plaintiffs, because the Court found it all but impossible to envision a case where probable cause, *vel non*, would not already be a critical element in the *plaintiff's* case:

Our sense is that the very significance of probable cause means that a requirement to plead and prove its absence will usually be cost free by any incremental reckoning. The issue is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time or expense.

Id. at 265; see also *id.* at 260-61.

In a balanced effort to ameliorate these problems in such cases, the Supreme Court of the United States held that a plaintiff alleging retaliatory prosecution against the police must prove that the officers lacked probable cause:

Some sort of allegation, then, is needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity. And at the trial stage, some evidence must link the allegedly retaliatory official to a prosecutor whose action has injured the plaintiff. The connection, to be alleged and shown, is the absence of probable cause.

Id. at 263.

After *Hartman*, then, there can be absolutely no doubt that under federal standards, alleging and proving lack of probable cause is part of a retaliation plaintiff's *prima facie* case, as the United States Court of Appeals for the District of Columbia Circuit observed after remand from *Hartman*: "Under the Supreme Court's decision, the three elements of a retaliatory prosecution claim are that: (1) the appellant's conduct allegedly retaliated against or sought to be deterred was constitutionally protected; (2) the government's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that

conduct; and (3) the government lacked probable cause to bring the criminal prosecution against the appellant." *Moore v. Hartman*, 571 F.3d 62, 65 (D.C. Cir. 2009). *See, e.g., Leonard v. Pryne*, No. 1:07-CV-283, 2008 WL 2557248 (S.D. Ohio June 24, 2008) ("In addition [to the three elements of a claim for First Amendment retaliation], 'want of probable cause must be alleged and proven' by a plaintiff bringing a § 1983 . . . suit for retaliatory prosecution.") (citations and internal quotations omitted).

There is no reason (and neither the circuit court nor Appellees offered any adequate reason) to believe that this Court would or should send West Virginia constitutional jurisprudence down a path different from the one set forth by the Supreme Court of the United States in *Hartman*. As noted, *supra*, the Supreme Court of the United States wrote both *Mt. Healthy* and *Hartman*, holding that *Hartman*—**not** *Mt. Healthy*—applies to retaliatory prosecution cases. Borrowing one without the other would be arbitrary and illogical.

As a general matter, cases where this Court has looked to the Supreme Court of the United States' interpretation of the federal constitution when interpreting corresponding provisions of the State's constitution are too numerous to count, and citing more than just a few is unnecessary. *See, e.g., Kincaid v. Mangum*, 189 W. Va. 404, 414, 432 S.E.2d 74, 84 (1993) ("[A]lthough . . . we are not obligated to follow the federal scheme when we are dealing with a state constitutional question[,] . . . we do find the reasoning of the United States Supreme Court to be persuasive on this issue."); *State ex rel. W. Va. Magistrates Ass'n v. Gainer*, 175 W. Va. 359, 360-61, 332 S.E.2d 814, 815-16 (1985) ("Our test for determining whether there has been an equal protection violation under State law is substantially the same [as the federal test].").¹⁵

¹⁵ To the extent that (as the circuit court stated) this question is ultimately one of jurisprudential, rather than constitutional, dimension, the result would be no different, because this Court also routinely refuses to reinvent common-law wheels, as well, when federal courts have so thoroughly considered the

More specifically, all of the reasons discussed in *Hartman* apply with full force and effect under West Virginia law. Like its federal counterpart, West Virginia law recognizes that prosecutors—not the police—prosecute people for crimes:

"It shall be the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is elected and qualified, and when he has information of the violation of any penal law committed within such county, he shall institute and prosecute all necessary and proper proceedings against the offender. . . ."

The prosecutor is obliged to participate in the prosecution of misdemeanants in his or her county. . . . Failure of the prosecutor to perform the duties imposed by [§] 7-4-1 would make him liable under W. VA. CONST. art. 9, § 4; W. VA. CODE § 6-6-7 . . . ; and W. VA. CODE § 11-1-5

The prosecuting attorney has a duty to vindicate the public's constitutional right of redress for a criminal invasion of rights.

The prosecutor, like any other executive officer, must have sound reasons for his actions.

A prosecuting attorney who does not investigate the facts of a sworn complaint so as to enable him to make an informed decision abuses the discretion of his office.

Syl. pts. 4-8, *State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 278 S.E.2d 624 (1981) (citation omitted); cf. syl. pt. 2, *State ex rel. Preissler v. Dostert*, 163 W. Va. 719, 260 S.E.2d 279 (1979) ("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.") (citation omitted).

And, like federal law, West Virginia law presumes that public officials—including prosecutors—perform their duties lawfully. Compare *State ex rel. Smith v. Boles*, 150 W. Va. 1, 4, 146 S.E.2d 585, 587 (1965) ("[I]t is presumed that a public official will perform his

matter before. See, e.g., *Robinson v. Pack*, 679 S.E.2d at 663-64 (looking to federal qualified immunity and collateral order doctrines).

duties as required by law."); *Adkins v. State Comp. Dir.*, 149 W. Va. 540, 544, 142 S.E.2d 466, 469 (1965) ("It is true that there is a presumption that public officials will perform their duties."); *and* syl. pt. 5, *Liberty Coal Co. v. Bassett*, 108 W. Va. 293, 150 S.E. 745 (1929) (holding in part that "it is presumed that public officials will perform their duty"), *with United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (holding that a "presumption of regularity" attends decisions to prosecute).

Finally, *Hartman* should not be mistaken as somehow toughening the burden on a plaintiff and, thus, as being inconsistent with any liberal approach to remedies that might apply, as the circuit court held, because *Hartman* did nothing but restore the burden back to plaintiffs to prove the elements of *their* claim. As noted, in the classical (*i.e.*, employment) retaliation case, whether the defendant "could have" taken the adverse action absent the retaliatory motive will be relevant evidence (indeed, a *sine qua non*) to the defendant's defense that it "would have" done so (*i.e.*, a defendant cannot show that "I [legally] would have" fired the plaintiff without necessarily showing that "I [legally] could have" fired the plaintiff). For policy reasons, in such employment retaliation cases, courts have made proving the "could have" part of the defendant's absolute but affirmative defense.

But this relaxation of the respective allocations of burden between plaintiff and defendant in the plaintiff's favor was always the exception rather than the rule, for outside of the wrongful employment context, every part of the burden to show but-for causation has always remained with the plaintiff. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 589 (1998) ("Thus, although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case.") (emphasis added). It is therefore

important to note that all *Hartman* did was—for very good reasons applicable under both federal and West Virginia state law—return the burden back to the plaintiff to prove her claim by controverting the defendant's (inevitable) argument that it could have and thus would have taken the same action notwithstanding the prohibited (*i.e.*, retaliatory) motive.¹⁶

The remaining step—whether Appellants here had probable cause to effect Appellees' arrest—is foregone, because it is not only beyond dispute but in fact *undisputed* that probable cause existed to support Appellants' role in Appellees' convictions. A grand jury indicted Appellees.¹⁷ The trial court—more than once—denied Appellees' dispositive motions.¹⁸ And most importantly, a jury convicted Appellees.¹⁹ There was, thus, undisputedly probable

¹⁶ Indeed, many courts held well before *Hartman* that *Mt. Healthy* itself suggested this result. See, e.g., *Brown v. Rogers*, No. 87-CV-6419, 1990 WL 11657, at *1 (E.D. Pa. Feb. 8, 1990) ("However, a plaintiff whose conduct gave rise to probable cause for arrest, but who happened to be arrested by a racially biased officer, cannot prove, without more, that the arrest was unlawful. Cf. *Mt. Healthy* . . . (where unlawful motive underlies decision, no constitutional violation if the same decision would have been made in the absence of the unlawful motive)."). In fact, almost a decade before *Hartman*, the Supreme Court of the United States itself had presaged that it would require district courts to place additional burdens on plaintiffs making claims against public officials that required proof of motive. See *Crawford-El v. Britton*, 523 U.S. 574, 597-99 (1998).

¹⁷ See, e.g., *Rhodes v. Smithers*, 939 F. Supp. 1256, 1274 (S.D. W. Va. 1995) ("Although the converse principle is variously stated, it is equally well established that where an officer presents all relevant probable cause evidence to an intermediary, such as a prosecutor, a grand jury, or a magistrate, the intermediary's independent decision to seek a warrant, issue a warrant, or return an indictment breaks the causal chain and insulates the officer from a section 1983 claim based on lack of probable cause for an arrest or prosecution.").

¹⁸ The Circuit Court of Mingo County denied Appellees' pretrial motions to dismiss the charges and their post-trial motions for a judgment of acquittal. (Compl. ¶ 30.) See also *Carney I*, 222 W. Va. at 155 n.9, 663 S.E.2d at 609 n.9; *Torchinsky v. Siwinski*, 942 F.2d 257, 261 (4th Cir. 1991) (finding it "noteworthy" that court had twice determined officer named in civil rights suit "had demonstrated probable cause" to arrest plaintiffs).

¹⁹ (See Compl. ¶ 32 (admitting that a Mingo County jury convicted Appellees of obstructing and conspiracy to obstruct a police officer).) See syl. pt. 2, in part, *Boxer v. Slack*, 124 W. Va. 149, 19 S.E.2d 606 (1942) ("A conviction for offense charged, though subsequently reversed, is conclusive evidence of 'probable cause' . . ."); see also syl. pt. 2, *Hoffman v. Hastings*, 116 W. Va. 151, 178 S.E. 812 (1935) (holding that conviction before justice of the peace, even though later reversed, "is conclusive of the existence of probable cause"); *Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co.*, 120 U.S. 141, 159 (1887) (noting rule that "the judgment or decree of a court having jurisdiction of the parties and of the subject-matter, in favor of the

cause. *See, e.g.*, Order at 8 ("Defendants' position that the findings of the grand jury, the pretrial rulings of the criminal court, the conviction and the post trial rulings of the criminal court conclusively establish probable cause is well founded.").

Earlier this year, in *Alderman*, this Court expressly adopted as West Virginia law the federal-law test for retaliatory employment decisions from *Mt. Healthy*, as initially discussed in *Orr* (a § 1983 state-court case). It was erroneous for the circuit court to hold that this Court would not also go on to adopt the federal-law test for retaliatory prosecution decisions from *Hartman*.²⁰

D. At the very least, the contours of a claim for retaliatory prosecution will not be clearly established until after this Court decides this very case.

Appellees argue that it was clearly established at the time of the conduct in question that prosecuting a person in retaliation for their protected speech violated the Constitution. But this truism states the question far too broadly, and proper application of qualified immunity in a particular case employs far sharper tools:

This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable.

In this litigation, for instance, there is no doubt that [*Graham v. Connor*, 490 U.S. 386 (1989)], clearly establishes the *general* proposition that use of force is contrary to the Fourth

plaintiff, is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal"); *see generally Carney I*.

²⁰ Appellees and the circuit court inexplicably focus on the fact that in this case, the underlying offense of conviction was for the allegedly protected speech (or "criminalizing" Appellees' speech, as they put it), whereas in the more typical case the underlying charge is alleged to be something trumped up and caused by, but not directly based on, the protected speech. This is a distinction without a difference. The entire premise of a retaliation claim is that the adverse decision (*e.g.*, prosecution) is made to deter a person of ordinary firmness from continuing to engage in the protected conduct. It simply makes no difference what specific conduct is charged in a retaliatory prosecution case, so long as the prosecution is alleged to have been intended to deter the speech.

Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in [*Anderson v. Creighton*, 483 U.S. 635 (1987),] "that the right the official is alleged to have violated must have been 'clearly established' *in a more particularized, and hence more relevant, sense*: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that *his conduct* was unlawful in the situation he confronted. *See Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("[A]s we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established").

Saucier v. Katz, 533 U.S. 194, 201-02 (2001) (parallel citations omitted) (emphasis added), *overruled on other grounds*, *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

Any objectively reasonable police officer would believe that the existence of probable cause meant there could be no unconstitutional retaliatory prosecution. As demonstrated *supra*, such a belief is not only objectively reasonable, but also legally correct. Even if, however, the Court were to decide here that it will part company with the United States Supreme Court and not follow *Hartman*, that is a fact that no reasonable police officer could have foretold at the time of Appellants' conduct.²¹ It was not, therefore, established *at all*—much less clearly—that under West Virginia law, the existence of probable cause did not mean there was no retaliatory prosecution.

²¹ The Supreme Court of the United States decided *Hartman* in April 2006. It is unclear from their Complaints precisely when Appellees believe that Appellants engaged in the allegedly unconstitutional conduct. Nevertheless, as noted in *Hartman*, the Supreme Court granted *certiorari* because even the United States Courts of Appeals could not agree on the law. *See* 547 U.S. at 255-56 ("The Courts of Appeals have divided on the issue of requiring evidence of a lack of probable cause in 42 U.S.C. § 1983 and *Bivens* retaliatory-prosecution suits. Some Circuits burden plaintiffs with the obligation to show its absence. Others . . . impose no such requirement.") (citations omitted).

E. Even if the Court does not apply *Hartman*, Appellants are still entitled to qualified immunity because the existence of probable cause necessarily creates qualified immunity.

As noted, all else aside, a public official is nonetheless entitled to qualified immunity if his conduct was *objectively reasonable*. This standard is, expressly, wholly objective. It does not look at subjective motivation at all. *See, e.g.,* syl. pt. 4, *Robinson* ("The subjective motivations of a police officer are not relevant to a determination of whether qualified immunity exists in connection with allegations of an unreasonable search and seizure, an unlawful detention, or the use of excessive force.") (adopting *Whren v. United States*, 517 U.S. 806 (1996)). Accordingly, the existence of probable cause in any claim alleging an unconstitutional prosecution does not look to motive. So even if the Court holds that *Hartman* is not the law in West Virginia, the result here will nevertheless be identical, because qualified immunity requires treating (even if only at this step) a retaliatory prosecution claim allegedly violating the right to free speech exactly the same as a false arrest claim allegedly violating the right to be free from unreasonable search and seizure: *i.e.*, the presence of probable cause makes the conduct *objectively reasonable*.

Judge Stengel accurately summarized why qualified immunity cannot be read as subjectively or as broadly as Appellees and the circuit court read it:

The necessity of the application of qualified immunity for a First Amendment retaliation claim when probable cause existed for the alleged retaliatory arrest is justified not only because of my concern with the ease of stating a retaliation claim. If probable cause did not defeat the retaliation claim based on an arrest, qualified immunity could not defeat the plaintiff's *prima facie* case because "the First Amendment right to be free from retaliation in response to constitutionally-protected speech is clearly established ... and ... a reasonable officer should know that it is constitutionally-protected behavior." This result, at the summary judgment stage of a case, would be contrary to a recent warning from the Third Circuit. The Third Circuit cautioned that "a court in considering a First Amendment retaliation claim against a police

officer should be cautious in allowing it to proceed to trial in the face of the officer's summary judgment motion. . . . Society may pay a high price if officers do not take action when they should do so."

Based on the persuasive authority cited above and the Third Circuit's warning . . . , I find that the existence of probable cause to arrest the plaintiff provides Taveras with qualified immunity and defeats Morales's First Amendment retaliation claim.

Morales v. Taveras, No. 05-CV-4032, 2007 WL 172392, at *15 (E.D. Pa. Jan. 18, 2007) (citations omitted). *See also Crawford-El v. Britton*, 523 U.S. 574, 588 (1998) ("Under [the qualified immunity standard in *Harlow*], a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense.").

Application here is, again, simple: Because Appellants had probable cause to play whatever role they played in Appellees' prosecution, their conduct was objectively reasonable. Appellants are, therefore, entitled to qualified immunity and, thus, dismissal.

F. Qualified immunity bars Appellees' claims for negligence.

In *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995), Dunn was a West Virginia Division (then Department) of Natural Resources ("DNR") officer. 195 W. Va. at 274, 465 S.E.2d at 376. In the process of investigating suspected illegal hunting, Officer Dunn encountered, *inter alia*, Eugene Bailey and the plaintiff-appellant, Clark:

Both the appellant [Clark] and Eugene Bailey testified that Dunn told them to lay down their guns and get out their hunting licenses. The appellant put down his gun, and Eugene Bailey reached to get his license without putting his gun down. Dunn drew his revolver and held it at a ready position. When Dunn attempted to remove the firearm from Eugene Bailey's lap, the firearm discharged, and the appellant was shot in the left leg.

Id. "The appellant subsequently filed a civil complaint alleging negligence against Dunn and the Department of Natural Resources by reason of the discharge of the firearm." *Id.*

Clark's and Dunn's theories over the scope of qualified immunity differed dramatically. As noted, *supra*, that rule provides that government officials performing discretionary functions are shielded from liability for civil damages *insofar as their conduct does not violate clearly established statutory or constitutional rights* of which a reasonable person would have known. Dunn pointed out the obvious fact that an allegation that a defendant's conduct is negligent is *not* an allegation that such conduct "does not violate clearly established *statutory or constitutional rights*," and so by the plain language of the rule, qualified immunity requires that defendant government officials are shielded from liability from such claims.

Clark, on the other hand, argued, in essence, that this formulation of the qualified immunity rule had somehow "overlooked" claims that were not made to vindicate statutory or constitutional rights at all, which claims, Clark argued, were not covered by—*i.e.*, not forbidden by—the rule. As Clark saw it, the rule should be read as including the italicized clause: "Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, *but not for any other kind of claims.*"

Fatal to Clark's claim (and, likewise, Appellees' claim here), of course, is that the rule does not include any such passage:

In the case now before us, the appellees argue that summary judgment was proper because *Chase Securities* requires that claims against public officials be based upon violation of a right clearly established by statute or constitutional requirements. We agree.

195 W. Va. at 278, 465 S.E.2d at 380. This Court thus held:

If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that

decision, at the suit of a private individual claiming to have been damaged thereby.

Syl. pt. 4, *Clark*; accord syl. pt. 7, *J.H. v. W. Va. Div. of Rehab. Servs.*, No. 33918, 2009 WL 1835936 (W. Va. July 27, 2009).

Applying the law to those circumstances, the Court wrote:

Officer Dunn is properly considered a public officer, employed by a State agency not covered by the provisions of . . . the West Virginia Governmental Tort Claims and Insurance Reform Act. His attempt to disarm the appellant's companion, Eugene Bailey, did not give rise to a deprivation of a right clearly established by statutory law or constitutional rights. Moreover, . . . Officer Dunn was engaged in the performance of discretionary judgments and actions within the course of his authorized law enforcement duties. In performing those discretionary duties, Officer Dunn should not be faced with the choice of either inaction and dereliction of duty or "being mulcted in damages" for doing his duty.

* * * *

As a conservation officer employed by the Department of Natural Resources, Officer Dunn is a public officer and official entitled to the benefit of the doctrine of qualified or official immunity. Accordingly, in the absence of an insurance contract waiving the defense, we conclude that the doctrine of qualified or official immunity bars a claim of mere negligence against the Department of Natural Resources, a State agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act . . . , and against Officer Dunn, an officer of that department acting within the scope of his employment, with respect to the discretionary judgments, decisions, and actions of Officer Dunn which are the subject of the complaint in this action.

Id. & 195 W. Va. at 278-79, 465 S.E.2d at 380-81 (footnotes omitted).

This rule from *Clark*—that negligence claims are, axiomatically, not claims that "give rise to a deprivation of a right clearly established by statutory law or constitutional rights"—is still the law and is still applied. See, e.g., 63C AM. JUR. 2D *Public Officers & Employees* § 324 ("A public officer is generally not liable for negligence in the performance of discretionary acts in furtherance of his or her official duties.") (footnote citing *Clark* omitted);

Yoak v. Marshall Univ. Bd. of Governors, 223 W. Va. 55, 672 S.E.2d 191, 194 (2008) (affirming circuit court's application of *Clark* to dismiss negligence counts as failing to state a claim because in such a claim, "the appellant has not alleged that the appellees' 'actions violated any clearly established statutory or constitutional rights of which a reasonable person . . . would have known'"); *Lavender v. W. Va. Reg'l Jail & Corr'l Fac. Auth.*, No. 3:06-CV-1032, 2008 WL 313957 (S.D. W. Va., Feb. 4, 2008).

And just like Officer Dunn, whatever role Appellants here played in Appellees' prosecution was the result of analogous conduct on Appellants' part. Appellees do not claim to have been involved in a car crash or a slip-and-fall caused by Appellants. They claim that Appellants decided to "prosecute" Appellees.²² Accordingly, no claim for negligence lies against Appellants as a matter of law.

The circuit court thus erred in not applying qualified immunity to Appellees' claims of negligence against Appellants.

V. CONCLUSION

Allegations of government misconduct are " 'easy to allege and hard to disprove.' " *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). For that reason, courts have universally implemented certain burdens that a plaintiff alleging retaliatory prosecution against police officers must cross before being allowed to proceed to discovery. If such a plaintiff fails to allege and prove that the defendant officers lacked probable cause to effect the plaintiff's

²² Appellees argued at length in their opposition to Appellants' motion to dismiss that "the long history of qualified immunity in this State" required that qualified immunity does not apply to the State. This assertion is wrong, as *Clark* made it perfectly clear that if the officers here are entitled to qualified immunity, so is the State Police. See syl. pt. 6, *Clark* ("In the absence of an insurance contract waiving the defense, **the doctrine of qualified or official immunity bars a claim of mere negligence against a State agency . . . and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer.**") (emphasis added). (Appellees do not contend that the governing insurance policy waives any relevant defenses.)

arrest, or if the plaintiff fails to prove that the officers violated a clearly established statutory or constitutional right, then the officers are entitled to judgment as a matter of law.

There is no reason for West Virginia not to apply *Hartman* to claims under the State's Constitution, and in any event, it was error to deny Appellants qualified immunity. Appellants therefore respectfully request the Court to **GRANT** their Appeal and **REVERSE** the circuit court's denial of qualified immunity.

Dated this 17th day of February 2010.

**WEST VIRGINIA STATE POLICE, D.M.
NELSON, A.S. PERDUE, and C.E. AKERS,
By Counsel**



Michael D. Mullins (W. Va. Bar No. 7754)
Robert L. Bailey (W. Va. Bar No. 8902)
P.O. Box 1588
Charleston, W. Va. 25326-1588
Voice: 304.353.8000
Fax: 304.353.8180

Counsel for Appellants

STEPTOE & JOHNSON PLLC
Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2010, I served the foregoing *Brief of Appellants* on all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Lonnie C. Simmons, Esquire
Robert M. Bastress, III, Esquire
Ditrapano, Barrett & Dipiero, PLLC
604 Virginia Street, East
Charleston, W. Va. 25301
Telephone: (304) 342-0133



Robert L. Bailey