

# POST AUDIT DIVISION

LEGISLATIVE AUDIT REPORT

## SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPORT SUMMARY

1. Some Justices of the Supreme Court of Appeals of West Virginia Used State Vehicles and Rental Cars Paid for by the State for Personal Use, While Ignoring Federal Law for Taxable Fringe Benefits.
2. Supreme Court Justice Ketchum has Repaid the State \$1,663.81 for Incorrect Travel Reimbursements.
3. Personal Use of State Vehicles and an Antique Desk May Violate the Ethics Act's Provision Prohibiting the Use of Public Office for Private Gain.
4. The Supreme Court Does Not Comply With §17A-3-23(a) Which Requires a License Plate on the Front of State Vehicles.



## GENERALLY ACCEPTED GOVERNMENT AUDITING STANDARDS STATEMENT

We conducted this performance audit in accordance with Generally Accepted Government Auditing Standards (**GAGAS**). Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

POST AUDIT DIVISION  
Director, Denny Rhodes



# POST AUDIT DIVISION

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APRIL 16, 2018

LEGISLATIVE AUDIT REPORT

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### LEGISLATIVE AUDITOR'S STAFF CONTRIBUTORS

Denny Rhodes ..... Director  
Justin Robinson ..... Audit Manager

Ben Agsten ..... Auditor  
Christian Baumgarner ..... Auditor  
Perry Bennett ..... Photographer  
Melissa Bishop, CPA ..... Assistant Director  
Doren Burrell ..... Legal Counsel  
Christopher Canada ..... Auditor  
Anne Ellison ..... Legal Counsel  
Adam Fridley ..... Audit Manager  
Nathan S. Harris ..... Assistant to the Director  
Nathan Hamilton ..... Referencer  
C. Michelle Krompecher ..... Assistant to the Legislative Auditor  
Judy Strawderman ..... Auditor

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## Introduction

The Post Audit Division was assigned the audit of the Supreme Court of Appeals of West Virginia by the Legislative Auditor in January 2018. Based on issues that had been brought to our attention during our preliminary information gathering phase of the audit process, the initial focus of our audit concerned the use of state vehicles and other employer-provided benefits that may have not been treated properly for state and federal tax purposes. As a result of this work, we have identified the following four issues:

- 1. Some Justices of the Supreme Court of Appeals of West Virginia Used State Vehicles and Rental Cars Paid for by the State for Personal Use, While Ignoring Federal Law for Taxable Fringe Benefits.**
- 2. Supreme Court Justice Ketchum has Repaid the State \$1,663.81 for Incorrect Travel Reimbursements.**
- 3. Personal Use of State Vehicles and an Antique Desk May Violate the Ethics Act's Provision Prohibiting the Use of Public Office for Private Gain.**
- 4. The Supreme Court Does Not Comply With §17A-3-23(a) Which Requires a License Plate on the Front of State Vehicles.**

## Issue 1: Some Justices of the Supreme Court of Appeals of West Virginia Used State Vehicles and Rental Cars Paid for by the State for Personal Use, While Ignoring Federal Law for Taxable Fringe Benefits.

The Supreme Court of Appeals of West Virginia provides the five Justices with exclusive access to three Buicks – a 2007 Lucerne, a 2009 Lucerne, and a 2012 LaCrosse. While the most likely intention for use of the vehicles is for business purposes, such as attending meetings and conferences, visiting circuit courts, or speaking to groups, the Legislative Auditor has found that at least two of the Justices have used the vehicles for significant personal use. Justice Ketchum used the 2007 Buick Lucerne for over four years to commute from his home in Huntington and for golf outings in Virginia. Justice Loughry used both the 2009 Lucerne and the 2012 Buick LaCrosse, along with additional Court vehicles, for multiple periods of undocumented use. The Legislative Auditor questions whether Justice Loughry's use of the state provided vehicles was all for business purposes. Justice Ketchum's and Justice Loughry's use of the vehicles should have been, but was not, included in their respective IRS W-2s as a taxable fringe benefit, **although there is evidence to suggest that the Justices and their staff knew that the personal use should have been included.**

**Figure 1**  
**Picture of Buicks Used by the Supreme Court Justices**



## West Virginia Supreme Court Justice Ketchum

### **Justice Ketchum Had Almost Exclusive Access to a 2007 Buick Lucerne for Approximately Four Years That He Used for Commuting to Charleston from His Home in Huntington, West Virginia and for Personal Trips Out-of-State.**

Beginning in 2012 and with the formal approval of the other four Justices who were in office at the time, Justice Ketchum was given access to a 2007 Buick Lucerne, which he used for some business trips but generally for commuting to the State Capitol from his home in Huntington. Justice Ketchum used that same vehicle for other personal trips, including golf outings in Virginia. According to Justice Ketchum, he commuted in the 2007 Lucerne from Huntington for approximately four and half years from January 9, 2012 until June 15, 2016. He stated that he didn't always have possession of the vehicle, as he left it at the State Capitol for extended periods. The Legislative Auditor's review of the fuel card records tied to the 2007 Lucerne confirm Justice Ketchum's assertion that the vehicle was occasionally unused for extended periods of times. According to the gas card records, in thirty-eight instances the vehicle went more than seven days between fuel purchases over the course of the four and a half years that Justice Ketchum used the vehicle. This includes one instance where the vehicle went 52 days between fuel purchases. However, the Legislative Auditor's review of the corresponding odometer readings for these fuel purchases indicate that the 2007 Lucerne had *de minimis* use in the time between fuel purchases. Therefore, the Legislative Auditor concludes that Justice Ketchum had almost exclusive use of the 2007 Lucerne between January 9, 2012 and June 15, 2016.

Justice Ketchum also used a state fuel card to purchase gas for his commute from Huntington. Based on fuel records, during the time that Justice Ketchum was provided with the vehicle, he drove the vehicle 78,423 miles<sup>1</sup>, purchased fuel 312 times, and spent a total of \$12,250.04 on the Supreme Court's gas card paid for by the state. Many of those gas purchases were made in the Huntington area, primarily Milton, WV, which is within 20 miles from Justice Ketchum's personal residence. The Legislative Auditor analyzed those fuel purchases and found that fuel was purchased 275 times at locations within 20 miles of Justice Ketchum's home for a total of \$10,689.37 from January 9, 2012 to June 15, 2016. Additionally, fuel was purchased a total of 280 times for \$10,947.05 along the route that Justice Ketchum would be driving from his home in Huntington to the State Capitol in Charleston on Interstate 64. Thus, most of Justice Ketchum's fuel purchases appear to be for commuting. This issue, concerning the use of a state vehicle for the primary purpose of commuting, is not unlike many other state agencies who allow employees to do the same.

### **Justice Ketchum Used the State Vehicle for Traveling to Virginia for Personal Golf Trips and Charged the Fuel Purchases to the State.**

Justice Ketchum informed the Legislative Auditor that he had traveled out-of-state in the 2007 Buick Lucerne. Specifically, there were five out-of-state gas purchases totaling \$202.71 that caused the Legislative Auditor to question if the trips were for business or personal purposes:

<sup>1</sup> When a state employee uses the state fuel cards to purchase gasoline, the user is prompted to enter the vehicle's odometer reading. Thus, individual entry errors can occur.

- April 14, 2012 purchase in Abingdon, Virginia for \$45.92;
- May 26, 2012 purchase in Lebanon, Virginia for \$35.24;
- June 23, 2012 purchase in Bristol, Virginia for \$32.23;
- May 11, 2013 purchase in Glade Springs, Virginia for \$44.24;
- June 20, 2013 purchase in Abingdon, Virginia for \$45.08.

The Legislative Auditor received correspondence from Justice Ketchum on February 26, 2018, in response to questions about these trips. In that correspondence, Justice Ketchum addressed four of the five gas purchases and stated that he:

*...reviewed the Court gas card records and found four instances of out-of-state gas charges that could have been out-of-state trips to play golf. I did not recall taking the 2007 Buick Lucerne for golf. I was not certain but out of an abundance of caution I reimbursed the State the full potential value.*

As such, Justice Ketchum calculated the round-trip mileage from Huntington, WV to Abingdon, VA at 396 miles and reimbursed the State on January 25, 2018, for \$863.28. He arrived at this rate by calculating the number of miles for four round-trips at a rate of \$0.545 cents per mile.

On April 4, 2018, Justice Ketchum provided a memo with a copy of a check he submitted to reimburse the state for the personal use of a state vehicle regarding the May 26, 2012, Lebanon, VA fuel purchase. The amount of reimbursement repaid to the state concerning this instance was \$215.82 calculated by the same method as previously described and which addressed the last of the five instances noted above.

**Beginning in 2016, Justice Ketchum Claimed Mileage Reimbursement for His Commute from Huntington to Charleston in Lieu of Commuting in a State Vehicle. in Several Instances, Justice Ketchum Claimed and Received Reimbursement When He Was Not Eligible to Do So.**

In reviewing travel reimbursements for Justice Ketchum, the Legislative Auditor noted that beginning on August 23, 2016, approximately two months after he ceased using the 2007 Buick Lucerne, Justice Ketchum began claiming mileage reimbursement for his commute from his home in Huntington to Charleston. In support of his mileage reimbursement claim, Justice Ketchum cited W.Va. Code §6-7-5 on his reimbursement forms, which states in part:

*A judge of the Supreme Court of Appeals and of a circuit court shall be entitled to an allowance for mileage at the rate of fifteen cents for each mile . . . to the place of holding of any term of court in a county other than that of his residence . . . (Emphasis added)*



The Legislative Auditor reviewed travel reimbursement documents submitted by Justice Ketchum and noted 131 instances from August 23, 2016 to August 10, 2017, in which Justice Ketchum claimed the \$0.15 cents per mile reimbursement for his commute to the Capitol from his home in Huntington. Each 104-mile round-trip was reimbursed for \$15.60. In total, **Justice Ketchum received \$2,028 in travel reimbursements** for his commute to the Capitol during this time frame that the Legislative Auditor believes should have been included on his W-2s as taxable income.

The Legislative Auditor cross-referenced each of Justice Ketchum's travel reimbursements, issued under W.Va. Code §6-7-5, with the Supreme Court's Judicial Calendars for 2016 and 2017. For each of these two years, the Supreme Court of Appeals had two terms of Court:

➤ Spring Term:

- January
- February
- March
- April
- May
- June

➤ Fall Term:

- September
- October
- November

Each Judicial Calendar designates the dates which the Supreme Court of Appeals held court or held judicial or other conferences. Additionally, each calendar shows the date upon which the Court ended each term *sine die*. A copy of the Court's 2016 and 2017 Judicial Calendars can be viewed in Appendix C of this report.

Of the 131 days Justice Ketchum claimed and received mileage reimbursements, for 16 of those days the Supreme Court had ended its term of court *sine die*. The reimbursements associated with those 16 days total \$249.60. Since the term of court had ended, Justice Ketchum was not eligible under W.Va. Code §6-7-5 for mileage reimbursement for traveling to Charleston on these days. Justice Ketchum responded quickly to the Legislative Auditor after being informed of the incorrect reimbursements. On April 2, 2018, Justice Ketchum provided the Legislative Auditor with a copy of a memo to the Director of the Court's Division of Financial Management and a copy of a check reimbursing the state for \$249.60. The memo stated:

*Enclosed is my check for \$249.60. This is to reimburse the State for mileage charges set out in the post audit division's draft report dated March 29, 2018.*

*The \$249.60 is for \$0.15 cents a mile reimbursement to me for commuting pursuant to W.Va. Code §6-7-5 while Supreme Court was sine die.*

In addition to the mileage reimbursements issued pursuant to W.Va. Code §6-7-5, the Legislative Auditor identified ten instances totaling \$448.82 in which Justice Ketchum claimed the full mileage reimbursement rate of \$0.54 cents per mile for commuting from Huntington to Charleston. Four trips were to Yeager Airport, three trips were to attend a training conference at the Embassy Suites Hotel in Charleston, and three trips were to attend the swearing-in ceremony for circuit court judges.

Under federal tax law, reimbursements for commuting are not exempted from an employee's reportable income. Therefore, the Legislative Auditor recommends that the Supreme Court of Appeals of West Virginia issue amended W-2s to Justice Ketchum including as taxable income the \$2,476.82 he received in mileage reimbursements for commuting. Additionally, the Legislative Auditor finds that W.Va. Code §6-7-5 may need clarification as to whether the intention is for Justices of the Supreme Court to be reimbursed for mileage to drive from their homes while Court is in session. Additionally, the statute authorizes circuit court judges to be reimbursed \$0.15 cents per mile for driving to the holding of court outside the county of their residence. The statute has not been amended since 1975; thus, the Legislative Auditor recommends that the Legislature consider increasing the \$0.15 cents per mile to reflect inflationary increases.

**The Supreme Court Did Not Report the Taxable Fringe Benefit of Justice Ketchum's Use of State Vehicles on His W-2s as Required by Federal Tax Law.**

In accordance with IRS regulations, the Supreme Court should have calculated the value of Justice Ketchum's personal use of state vehicles and included those amounts in his W-2s as a taxable fringe benefit. **The Supreme Court Administrative Office has not correctly calculated Justice Ketchum's W-2s since at least 2012.** According to the IRS, a fringe benefit is a form of pay for the performance of services. Any fringe benefit provided by an employer is taxable and must be included in the recipient's pay. Thus, the Supreme Court ignored IRS guidance. On March 29, 2018, the Administrative Director of the Supreme Court issued a memorandum to Justice Ketchum stating:

*Per your instructions and our agreement, we are issuing you amended W-2's for your use of the 2007 Buick Lucerne.*

A copy of the memorandum is included in Appendix D of this report.

## West Virginia Supreme Court Justice Loughry

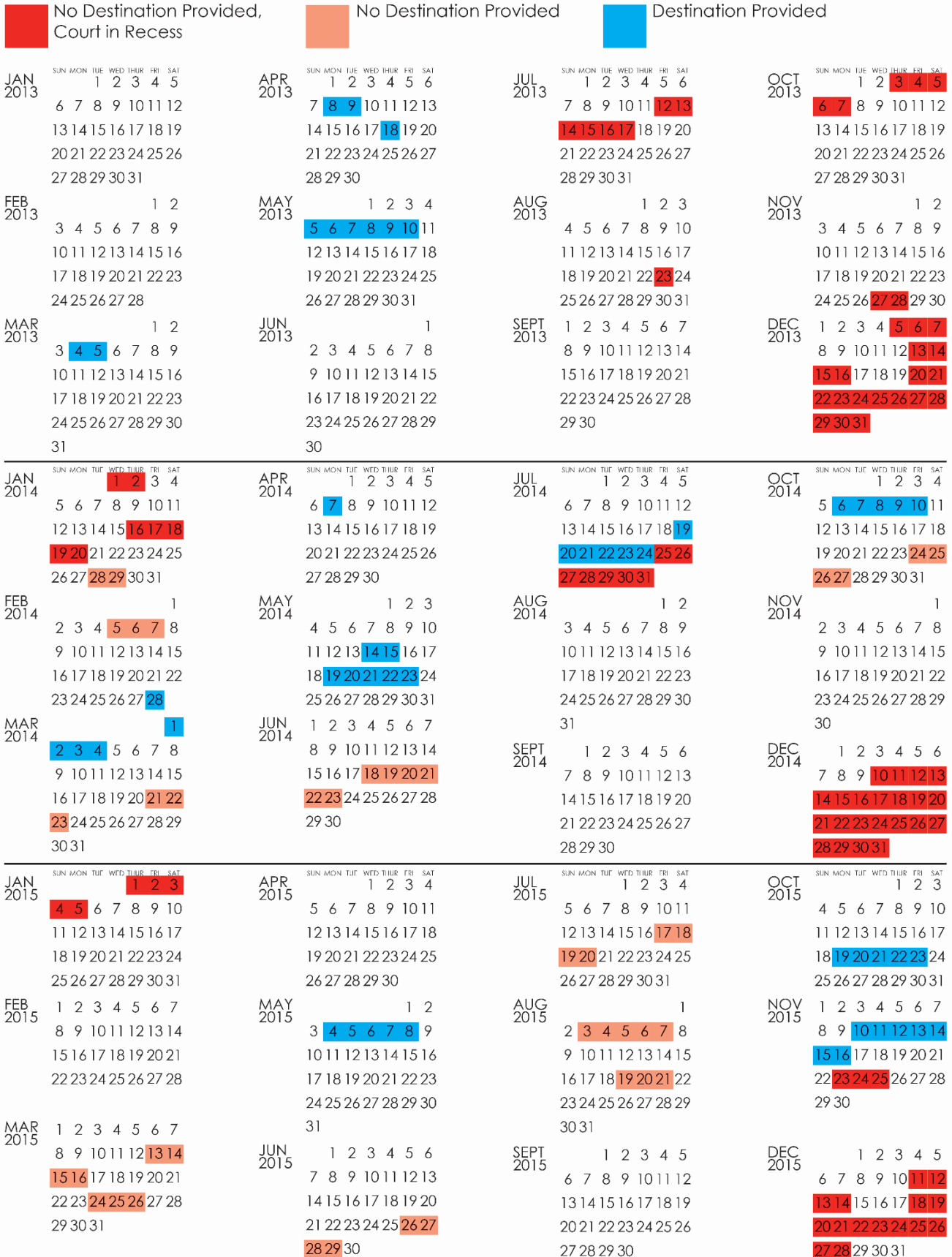
### Justice Loughry Had Frequent Use of State Vehicles Without Declaring A Business Purpose for Vehicle Use.

The Supreme Court does not have formal written policies or procedures for the use of vehicles. In order for a Justice to reserve a vehicle, the Court has created an internal reservation system, essentially a calendar, to request the use of a vehicle. This is the only record that the Court maintains of vehicle usage. Notably, mileage logs and/or destination logs detailing use are not maintained. Thus, there are significant limitations in determining the mileage and the purpose of vehicle usage. The Legislative Auditor was provided a copy of the Court's reservation system and noted the frequent amount of time that Justice Loughry reserved the vehicle from January 2013 – September 2016. After September 16, 2016, Justice Loughry no longer frequently appears as reserving a vehicle in the reservation system. While there are notes of the destination for some of Justice Loughry's reservations, many do not include a destination. Justice Loughry reserved a car from 2013 – 2016 for 212 days. **Of those, 148 days or 70 percent of Justice Loughry's reservations had no destination or substantiation listed.** Table 1 displays the total number of days the vehicle was in use and number of days without substantiation for use of the vehicle, followed by a calendar (Figure 2) with reservation dates for 2013 – 2015.

<b>Year</b>	<b>Total Days of Vehicle Use</b>	<b>Number of days without substantiation</b>	<b>Percentage of usage without substantiation</b>
<b>2013</b>	44 days	33 days	75%
<b>2014</b>	78 days	54 days	69%
<b>2015</b>	63 days	46 days	73%
<b>2016</b>	27 days	15 days	56%
<b>Totals</b>	212	148	69.81%

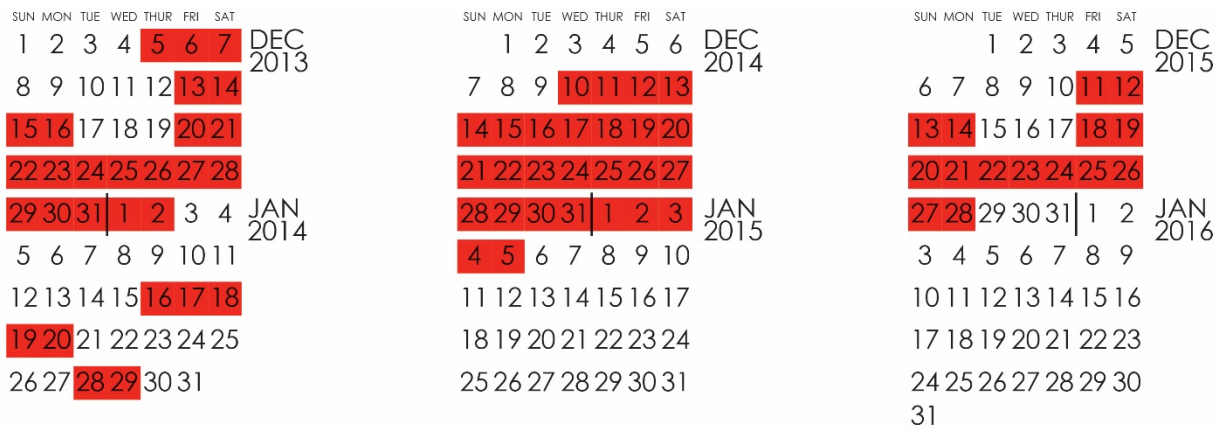
*Source: Supreme Court of Appeals of West Virginia vehicle reservation log.*

**Figure 2**  
**Justice Loughry's Vehicle Reservation**  
**2013 - 2015**



One noted pattern of use is that Justice Loughry reserved a vehicle for significant amounts of time in the months of December for three straight years from 2013 to 2015, carrying over into January twice, as shown in Figure 3 below. In those December months, Justice Loughry had reserved a court vehicle for 19 days in 2013, 22 days in 2014, and for 15 days in 2015; each instance over the Christmas holiday. **Notably, Justice Loughry had a state vehicle for 27 consecutive days through the Christmas and New Year’s holidays from December 10, 2014 to January 5, 2015. The Supreme Court of Appeals was in recess during all the December dates, and no destination or substantiation is listed for any of these time frames. The Legislative Auditor is unable to find any purposes for which Justice Loughry used the vehicles during the December months.**

**Figure 3**  
**Dates Justice Loughry Reserved State Vehicles in December 2013, 2014, and 2015**



The Legislative Auditor was provided a memo written by both the Director and Deputy Director of Supreme Court Security; it appears Justice Loughry may have refused to provide destination information. The memo states in part:

*The only person we can recall that failed to provide a destination when asked was Justice Loughry [sic].*

Court memos show that other Justices of the Supreme Court questioned in writing whether Justice Loughry’s use of a state car was for business purposes, to which Justice Loughry made it clear that in his view, he should not have to report a destination or a purpose. His position was that once he said he was traveling on state business, that should be the end of any inquiry. In turn, Justice Loughry questioned whether the use of state vehicles by Justices Davis and Benjamin was for business purposes.<sup>2</sup>

<sup>2</sup> The Legislative Auditor will report any possible issues with Justice Davis and Justice Benjamin at the May interim meetings.

## The Legislative Auditor Questions Justice Loughry’s Need and Use of State-Paid Rental Vehicles During Out-of-State Trips.

The Supreme Court regularly rented cars from Enterprise Rent-A-Car<sup>3</sup> for Justice Loughry when he flew to out-of-state conferences. Based on Enterprise Rent-A-Car receipts, he would generally pick up the rental car at the airport. On many of these trips, there is a widely disproportionate number of miles recorded on the odometer reading section of the receipts, compared to the actual round-trip mileage from the airport to the hotel where Justice Loughry stayed. The hotels in which he stayed were generally at the conference location or close to the conference location.

The Legislative Auditor concludes the rental cars that Justice Loughry rented with state money were for personal use. There are significant differences in the miles necessary to travel to the hotel that could only have been personal use by Justice Loughry. Seven instances were found that Justice Loughry rented vehicles with mileage driven during out-of-state trips which appear to be for purely personal reasons, which are shown below in Table 2.

<b>Dates</b>	<b>Location</b>	<b>Round-Trip Distance Airport to Hotel</b>	<b>Mileage on Rental Car Receipt</b>	<b>Difference</b>	<b>Total Cost (Car, Parking, Fuel Option)</b>
<b>July 19 – 25, 2013</b>	San Francisco, CA	27 miles	472 miles	445 miles	\$364.71
<b>January 23 – 29, 2015</b>	San Antonio, TX	17 miles	407 miles	390 miles	\$441.54
<b>July 10 – 16, 2015</b>	Montréal, QC	27 miles	607 miles*	580 miles*	\$549.99
<b>July 24 – 29, 2015</b>	Omaha, NE	8 miles	475 miles	467 miles	\$223.06
<b>January 29 – February 4, 2016</b>	Monterey, CA	6 miles	177 miles	171 miles	\$337.92
<b>January 27 – February 2, 2017</b>	Scottsdale, AZ	25 miles	523 miles	498 miles	\$303.46
<b>July 21 – 26, 2017</b>	Boston, MA	13 miles	336 miles	323 miles	\$447.96
				<b>TOTAL</b>	<b>\$2,668.64</b>
* Converted from Kilometers into Miles					
Sources: Justice Loughry’s travel reimbursements from wvOASIS, P-Card transactions, and Google Maps.					

As shown in Table 2, Justice Loughry rented a car at Montréal Pierre Elliott Trudeau International Airport and stayed at the Hyatt Regency Montréal. The airport is 21.9 kilometers or

<sup>3</sup> With the exception of the Monterey, CA rental, which was made through the Hertz Corporation, the remaining rentals were made through Enterprise Rent-A-Car.

13.6 miles from the hotel for a round-trip of approximately 44 kilometers or 27 miles. Yet, according to the Enterprise Rent-A-Car receipt, the car was driven 607 miles while rented under Justice Loughry's name. This rental cost the state \$549.99. In Arizona, Justice Loughry rented a car at the Phoenix Sky Harbor International Airport which was 25 miles round-trip from his hotel in Scottsdale. Yet, according to the Enterprise Rent-A-Car receipt, the car was driven 523 miles while rented under Justice Loughry's name. This unnecessary rental cost the state \$303.46. One other instance not included in the table due the fact that the State was reimbursed for the rental car after Justice Loughry was dissatisfied with the rental, was in Jackson Hole, Wyoming from July 22 through July 28, 2016. There are two different receipts for this instance; one showing that Justice Loughry drove the rental car 494 miles and another showing 1,749 miles driven. Thus, the Legislative Auditor is uncertain of the actual miles driven. The round-trip distance to the hotel from the point of rental in this instance was 20 miles, leaving 474 miles or 1,729 miles driven, based on the differing receipts, that appear to be for personal use. The original cost to the State for this was \$748.64, which as stated before was fully refunded to the state.

In addition to the cost of the rental cars, there were other unnecessary costs related to renting a car such as hotel parking and fuel that increased the expenses incurred by Justice Loughry that were paid by the state, as opposed to him taking a taxi, shuttle, or public transportation. It must be noted that Justice Loughry regularly selected the "fuel option" when he rented vehicles, which automatically charged a full tank of gas to the state for part of his fuel usage. These seven car rentals in question cost the State a total of approximately \$2,669 in unnecessary expenditures but, more importantly, appear to have been for personal use. Based on this analysis, it appears possible that Justice Loughry, or a travel companion allowed to use the rental cars, vacationed on the state's dollar.

### **The Supreme Court of Appeals' Travel Regulations Filed with the West Virginia State Auditor's Office Granted Justices Different Treatment Regarding Rental Car Reimbursements Than Other Court Employees.**

Based on the travel regulations filed by the Supreme Court with the West Virginia State Auditor's Office, the Supreme Court Justices were exempted from the requirements for rental car reimbursements that other court employees were subject to. These regulations, provided from the State Auditor's Office and effective October 2016, state in part:

*... Except for vehicles rented by Supreme Court Justices, reimbursement will be allowed for car rental only if the Administrative Director or his designee has granted approval in advance, and rental cars must be driven within the travel requirements for personal vehicles; [Emphasis Added]*

Under this policy the Justices of the Supreme Court had far more discretion to use a rental car and to be reimbursed for those related expenses without prior approval. Further, the policy does not even require the Justices to follow the basic rule of driving the most direct and practical route for approved activities.

Thus, rental car use by Justices of the Supreme Court that falls outside of the definition of "driving, by the most direct and/or practical route, from and return to headquarters to perform

*duties or engage in other approved activities*”, and which was highlighted in Table 2 concerning Justice Loughry’s rental car use, appears to be allowed under these regulations. **The Legislative Auditor questions if such a policy has caused the State to incur additional and unnecessary costs due to the use of rental cars that may appear to have been for more than business purposes.** The Supreme Court’s complete travel regulations, as provided by the State Auditor’s Office, are available in Appendix E of this report.

### **The Supreme Court Did Not Report the Taxable Fringe Benefit of Justice Loughry’s Use of State Vehicles on His W-2s as Required by Federal Tax Law.**

In accordance with IRS regulations, the Supreme Court should have calculated the value of Justice Loughry’s personal use of state vehicles and included those amounts in his W-2s as a taxable fringe benefit. **The Supreme Court Administrative Office has not correctly calculated Justice Loughry’s W-2s since at least 2013.** According to the Internal Revenue Service (IRS), a fringe benefit is a form of pay for the performance of services. Any fringe benefit provided by an employer is taxable and must be included in the recipient’s pay. Thus, the Supreme Court ignored IRS guidance. With no Court records indicating a valid business use of the vehicles by Justice Loughry, the Court should have determined the fair market value (FMV) of the vehicles for the miles traveled, along with the cost of the gas used and included those amounts in Justice Loughry’s W-2s as taxable fringe benefits.

### **On March 28, 2018, the Legislative Auditor Sent Justice Loughry a Letter to Inquire if He Had Made Any Reimbursements to the State Concerning Personal Use of State Vehicles, Rental Cars, or Use of an Antique Cass Gilbert Desk Owned by the State He Had at His Personal Residence.**

On March 28, 2018, the Legislative Auditor sent an inquiry to Justice Loughry to determine if he had made any reimbursements to the State for any instances of personal use of a state vehicle, similar to the reimbursements made by Justice Ketchum. Further, this inquiry sought to determine if he had also made reimbursements concerning the use of rental cars paid for by the State that appeared to be for personal use, as well as the use of an antique Cass Gilbert desk valued at approximately \$42,000 that he had in his personal residence. Justice Loughry did not respond to this inquiry, which can be found in Appendix G of this report. Justice Loughry did respond to the Administrative Director of the Court concerning the draft copy of this report he had been provided, where he stated the following:

*I have reviewed the revised draft audit report, dated April 10, 2018, from the legislative auditor's office. I have also reviewed the proposed response of our Court, which has been agreed to by all five Justices. The draft audit report refers to me in at least two of the four designated issues. I disagree with the factual and legal assumptions made, the standards and definitions applied, and the conclusions ultimately reached in the draft audit report.*

Justice Loughry’s response concerning the draft of this report can be found in Appendix H of this report.



## Use of State-Owned Vehicles by Justices of the Supreme Court of Appeals of West Virginia Constitutes a Taxable Fringe Benefit Per Federal Tax Law.

According to IRS Publication 15B, a fringe benefit is defined as a form of pay in addition to stated pay for work performed. The form of pay includes property, services, cash, or cash equivalents. The IRS also highlights the following example of a fringe benefit by stating:

*For example, you provide an employee with a fringe benefit when you allow the employee to use a business vehicle to commute to and from work.*

As it relates to the tax implications for an employer-provided vehicle, IRS guidance indicates that if the vehicle is used **exclusively** for business use, there are no tax consequences, **but commuting is specifically excluded from the definition of business use.** Since the vehicles used by the Justices of the Supreme Court are used for both business and personal reasons, any substantiated business use of the vehicles is not included as taxable income for the Justices. To satisfy the IRS's substantiation requirements, separate records for business use and personal mileage are required. **If records documenting the business and personal mileage separately are not provided, then the value of all use of the vehicle is considered taxable income to the employee.** The Supreme Court has not complied with federal tax law to appropriately document the use of the vehicle.

For example, as noted previously, the Legislative Auditor reviewed gas card records linked to the 2007 Buick Lucerne, almost exclusively used by Justice Ketchum between 2012 and 2016. Analysis of these records finds that the vehicle was primarily used by Justice Ketchum to commute from his home in Huntington, West Virginia to the Capitol. As evidence of this, 275 of the 312 documented fuel purchases between 2012 and 2016, or approximately 88 percent, were made in Huntington, Milton, or Barboursville within 20 miles of Justice Ketchum's home. Over the course of these four and a half years, Justice Ketchum put approximately 78,000 miles on the 2007 Lucerne. Because the Supreme Court did not maintain records documenting the business and personal mileage in any form whatsoever, **all use of the vehicle is considered taxable income to Justice Ketchum.**

Under the general valuation rule for fringe benefits established by the IRS, the amount to include in income is the FMV. The FMV is generally the lease value of the vehicle. Although the IRS provides three different methods for determining the FMV of using an employer-provided vehicle to drive from one's home to place of employment, only one method is allowable in these circumstances. IRS Publication 15B describes:

- the *Commuting Rule*,
- the *Vehicle Cents-Per-Mile Rule*, and
- the *Automobile Lease Valuation Rule*.

The *commuting rule*, which is calculated by multiplying the number of one-way commuting trips by \$1.50, cannot be used by any of the Justices because they are *Control*

**Employees.** By definition, an elected official in a governmental organization (the Justices) is defined as a “control employee”, according to the IRS. Publication 15B states:

*Personal use of a vehicle by a “control employee” cannot be valued using the commuting valuation rule (\$1.50 rule).*

The *vehicle cents-per-mile rule*, which is calculated by multiplying the number of commuting miles by the Federal standard mileage rate, cannot be used for the Court’s 2007 Buick Lucerne. This is because the value of the vehicle in the year it was first made available to Justice Ketchum for commuting exceeds the IRS limit, which was \$15,900 during 2012. The 2007 Buick Lucerne used by Justice Ketchum for commuting was purchased for \$36,894, then valued at \$16,275 in 2012.

**Therefore, the automobile lease valuation rule must be used to report the Justices’ additional income.** The automobile lease valuation rule uses the FMV of the vehicle to determine the annual lease value. The vehicle FMV is calculated when the person starts driving the vehicle, and the value stays the same for four full-calendar years. Then after that, the FMV is reevaluated for the next four years. The annual lease value is then allocated to the percentage of personal use. It must be noted that generally, the statute of limitations for the IRS to assess taxes on a taxpayer expires three years from the due date of the return, unless the omitted amount is greater than 25 percent of the tax filers gross income, which then increases the statute to six years. However, no deadline applies where the IRS can establish that there is a willful attempt to evade taxes. Additionally, in the circumstance of providing a corrected W-2 to the employee, IRS section 6501(c)(3) dictates that there is no statute of limitations for penalties.

## **The Supreme Court Should Have Included Taxable Fringe Benefits on Justices’ W-2s Between 2012 – 2017.**

As stated above, because there were no records maintained to determine personal vs. business use, 100 percent of the use of the vehicle is taxable. Additionally, fuel is not included in this calculation and must be added to the final amount or \$0.055 cents per mile must be added to the taxable fringe benefit calculation. Under this rule, the Supreme Court should have reported an additional income on Justice Ketchum’s W-2s.

Finally, the Supreme Court should have reported additional income for Justice Ketchum in 2016 and 2017 for reimbursements that he received from the state for traveling from his home to Charleston. This includes the \$0.15 cents per mile he claimed for “court” and the full mileage rate (\$0.545 cents per mile) he claimed for conferences or the airport in Charleston. Reimbursements for travel are only excludable from income if they are incurred for temporary travel on business away from the general area of an employee’s tax home. The tax home is considered the general vicinity of the employee’s principal place of business. In the case of the Supreme Court Justices the tax home is Charleston. In total, Justice Ketchum received \$2,477 in reimbursements.

Concerning Justice Loughry's use of the Supreme Court's vehicles, detailed records were not maintained to distinguish between the miles Justice Loughry accumulated on the vehicles and that of other employees. Although certain days were recorded in the Supreme Court's vehicle reservation system, there are no records to differentiate between the business use and personal use. *As noted earlier in the report, only 30 percent of the days Justice Loughry reserved a vehicle had a destination noted and could be substantiated that at least part of the travel was for business purposes.* However, the remaining trips had no information noted in the reservation and would be considered 100 percent taxable income to Justice Loughry. Again, the value of all use of an employer-provided vehicle is considered taxable income to the employee if separate records for business use and personal use are not maintained. It is the legal responsibility of the Supreme Court and Justice Loughry to determine the fair market value (FMV) of his use of the vehicles and report that amount to the IRS as additional income. Thus, the Supreme Court needs to calculate the number of miles driven by Justice Loughry for which there is no business purpose stated from fuel and service records and include 100 percent of the value as a taxable fringe benefit on amended W-2s.

## **The Justices of the Supreme Court and the Administrative Office Were Aware That the Use of State Vehicles for Commuting and Personal Use Were Supposed to be Reported as Taxable Income.**

The tax implications regarding commuting in a state vehicle and using the vehicle for personal use were known by the Supreme Court Justices and the Administrative Office. The Legislative Auditor is aware of four sources of evidence that show Supreme Court officials were aware of the IRS requirements. The evidence is listed as follows, and then discussed in more detail:

1. A Supreme Court information technology employee had his commuting in a state vehicle reported on his W-2 as income.
2. The current Director of the Division of Financial Management – a CPA – stated that she informed the former Administrative Director that Justice Ketchum’s commuting was taxable.
3. In July 2016, a former Administrative Counsel for the Court wrote a memo informing the former Administrative Director of the use of state vehicles being taxable.
4. The Justices discussed the use of state vehicles in a September 2016 administrative conference and reviewed draft policies on the use of state vehicles but took no action.

### **A Supreme Court information technology employee had his commuting in a state vehicle reported on his W-2 as income.**

In 2008 – 2009, the Supreme Court supplied one of its information technology employees with a van to commute from his home to his work location. This employee used the van to work in all counties. The former Finance Manager of the Court required the employee to list dates on which he used the vehicle for commuting, then the former Finance Manager used the IRS commuter rule of \$1.50 per day to do a fringe benefit adjustment. While this is the only instance the Legislative Auditor is aware of a Court employee having his wage reporting adjusted, it is clear evidence that wages have been adjusted for at least one.

### **The current Director of the Division of Financial Management – a CPA – stated that she informed the former Administrative Director that Justice Ketchum’s commuting was taxable.**

At some point after the Court’s current Director of the Division of Financial Management became aware of Justice Ketchum’s commuting from Huntington in a state vehicle, she stated that she informed the Court’s former Administrative Director that it was a taxable event under the IRS Taxable Fringe Benefit guidelines. At that time, she was not involved in payroll or the production or accuracy of employee W-2s. This was the responsibility of Human Resources/Payroll which was a separate division. She informed the Legislative Auditor that she did not know whether the benefit was ever reported on Justice Ketchum’s W-2s.

### **In July 2016, a former Administrative Counsel for the Court wrote a memo informing the former Administrative Director of the use of state vehicles being taxable.**

At the request of Justice Robin Davis, on July 21, 2016, the former Administrative Counsel for the Supreme Court submitted a memorandum by email to the former Administrative Director which discussed the use of state owned vehicles. The full memorandum is in Appendix F of this report. In it, the former Administrative Counsel outlined: Legislative Rule Title 148, Series 3 regarding State Owned Vehicles in which “commuting” and “official business” are defined; the Legislative Auditor’s Office report on the former Commissioner of the Division of Corrections and his travel expenses; the IRS Commuting Rule (IRS Publication 15-B); the Code of Judicial Conduct regarding extrajudicial activities, reimbursement of expenses, and reporting requirements; and the applicability to the Judiciary of state rules governing use of state vehicles. Notably, the former Administrative Counsel closed the memorandum with a section on “Possible Consequences of Improper Use of State Vehicles.” He wrote:

*Use of a state vehicle in a manner that contravenes the provisions of an applicable West Virginia legislative rule, or an Internal Revenue Service (IRS) regulation, could result in a determination that untaxed wages were accrued that must be reported to the IRS.*

*Contravention of the relevant provisions of the Code of Judicial Conduct could result in the filing of an ethical violation complaint with the Judicial Investigations Commission.*

According to the Justice’s Administrative Conference Agenda dated August 29, 2016, the July 21, 2016 memorandum from the former Administrative Counsel was provided to the Justices.

**The Justices discussed the use of state vehicles in a September 2016 Administrative Conference and reviewed draft policies on the use of state vehicles but took no action.**

According to notes, agendas, and memos regarding the Justices’ administrative conferences, it appears that the issue of the Justices’ use of vehicles was brought up in June 2016 by Justice Robin Davis, who requested the legal research that was outlined in the aforementioned July 21, 2016 memorandum. Justice Davis was concerned due to several news stories at that time regarding the Legislative Auditor’s Office surveys concerning travel and the use of state cars. Several memoranda, including a memorandum from Justice Loughry, show that Justice Davis was questioning Justice Loughry’s state vehicle use. In his memorandum Justice Loughry stated that:

*This fishing expedition is also clearly retaliation for inquiries I made regarding the unilateral authorization of payments by our (former) Court administrator Steve Canterbury, to Mark Starcher totaling approximately \$1 million and the depletion of the Court’s so-called rainy day fund in the amount of \$26 million, which has never been accounted for despite numerous inquiries from more than one justice.<sup>4</sup>*

Thus, at Justice Davis’s request, “Agenda Item 6” related to the Justices’ use of state vehicles was included on the August 29, 2016, Administrative Conference Agenda. Although, meeting notes from Justice Ketchum indicate that the use of state vehicles was not discussed until

<sup>4</sup> The Legislative Auditor plans to review the issue of the alleged \$1 million payment and depletion of the “rainy day fund” as part of the audit of the Supreme Court of Appeals.

a meeting held on September 8, 2016. A suggested vehicle policy was discussed, yet no action was taken. According to Justice Ketchum from a memorandum dated December 7, 2017:

*I do not remember the issue of a car policy being discussed again.*

Thus, the Justices and the Administrative Office of the Supreme Court of Appeals were clearly informed of the Court's responsibility to properly account for the Justices' use of state vehicles and report the taxable fringe benefit associated with this use to the IRS.

**In October 2016, the Supreme Court Submitted Its Travel Regulations to the State Auditor's Office; Which Exempted All Justices' Travel Reimbursements from the Requirements Set Forth for All Other Court Employees in These Same Regulations.**

While the Supreme Court did not adopt a vehicle use policy after the Justices discussed the issue in a September 2016, Administrative Conference, updated travel regulations were submitted to the State Auditor's Office in October 2016. As reflected by the minutes of the Administrative Conference held on September 15, 2016, this issue arose because the State Auditor's Office would not approve Court employees' requests for travel reimbursements without an updated set of travel regulations per W.Va. Code §12-3-11(a). These regulations were updated and presented to the Court with the Justices asked to respond with a vote yes or no by Monday, September 19, 2016.

Subsequently, in the October 3, 2016 Administrative Conference, these travel regulations were discussed further. There were concerns raised regarding the limitations that the regulations would impose on the Justices' requests for travel reimbursements. This was based on the fact that the travel regulations were copied from the Court's personnel manual which applied to all Court employees and made no special consideration for the Justices. The agenda for this conference states the following:

**1. TRAVEL REGULATIONS**

***Discussion:***

*At the last Administrative Conference, the Administrative Director distributed a memorandum from Finance Director Sue Troy reporting that the newly hired travel reimbursement director in the Auditor's Office had requested a copy of the Court's travel regulations for the Auditor's Office file. Sue also referred to WV Code 12-3-11 which reinforces the Auditor's Office demand.*

*A copy of the travel regulations was distributed and the Administrative Director hoped to get approval of these regulations so that they could be sent to the Auditor's Office. **However, several points were made regarding the limitations that these regulations could impose on Justices' requests for reimbursement. The regulations, incidentally, were just copied verbatim from the Personnel Manual.***  
[Emphasis Added]

*Therefore, an addition has been made to the regulations, an addition which will not be part of the Personnel Manual since it applies only to the Justices and to no other employee. The entire set of regulations is attached. However, for ease of discussion, the additional passage is as follows:*

#### **10.4 JUSTICES' TRAVEL**

***An expense account submitted by a Justice of the West Virginia Supreme Court of Appeals policies shall be honored irrespective of any of the language in these travel regulations.*** [Emphasis Added]

The minutes of this same conference show that the matter concerning the adoption of the proposed travel regulations was discussed and, **by a unanimous vote, the Court approved the travel regulations with one minor revision to the addition of 10.4 Justices' Travel. This revised language stated, "An expense account submitted by a Justice of the Supreme Court of Appeals pursuant to Judicial Branch policies shall be honored irrespective of any of the language in its travel regulations submitted to the State Auditor's Office.**

The Court's travel regulations granted special rules for the Justices' use of rental cars. However, this revision to these regulations went further than granting the Justices special treatment regarding rental cars, it exempted them entirely. **The Legislative Auditor questions the purpose of these travel regulations, if they are not to be applied equally to all employees of the Court and if, in exempting the Justices, it creates a situation of disparate treatment. Further, the Legislative Auditor questions whether exempting the Justices from those regulations has contributed to or justified excessive and unnecessary travel expenses.**

## **Conclusion**

The Legislative Auditor finds that the instances documented in this report, taken together with media reports, show a complete lack of regard for the principles of fiscal prudence and responsibility. The decision by the Court to not follow federal and state tax laws is particularly troublesome given the substantial evidence that suggests the Court did, in fact, know how to properly calculate and apply the taxable income from these fringe benefits going back to at least 2012.

The July 2016 legal memorandum regarding the appropriate use of state vehicles explained in great detail the ways in which the Court's usage of state vehicles could run afoul of state law, IRS tax laws, the State Ethics Act, and the Code of Judicial Ethics. The memorandum, went so far as to provide an example from the Legislative Auditor's reports of inappropriate usage of state vehicles. And yet, the issues identified in this report are many of the same issues warned against in the Court's own legal research that was written nearly two years ago.

The Legislative Auditor will continue his review of the use of vehicles and state assets by other Justices, former Justices, and other former and current Court staff. As information is

continually being received, the Legislative Auditor will assess the applicability of additional findings.

## Recommendations

- 1.1 *The Legislative Auditor recommends that the Supreme Court of Appeals of West Virginia immediately suspend use of state vehicles by its employees without requiring documentation by any driver that the use of the vehicle is clearly for business purposes only.*
- 1.2 *The Legislative Auditor recommends that the Supreme Court of Appeals of West Virginia adopt a written policy on the use of state vehicles. At a minimum the policy should clearly outline the requirement that Supreme Court employees document the purpose for travel and the recording of odometer readings before and after each use. This policy should be provided to the Post Audits Subcommittee during its May 2018 meeting.*
- 1.3 *The Legislative Auditor recommends that the Supreme Court of Appeals of West Virginia amend the yearly W-2s for Justice Ketchum based on issues contained in this report. The Supreme Court should report the status of this recommendation to the Post Audits Subcommittee at its May 2018 meeting.*
- 1.4 *The Legislative Auditor recommends that the Supreme Court of Appeals of West Virginia use gas purchase records and service records to determine the total number of miles driven by Justice Loughry for non-business purposes. The Supreme Court should then calculate taxable fringe benefits for the personal use by Justice Loughry of state vehicles and any other state property that should be reported as income. The Supreme Court should amend Justice Loughry's W-2s for personal use of state vehicles. The Supreme Court should report the status of this recommendation to the Post Audits Subcommittee at its May 2018 meeting.*
- 1.5 *The Legislative Auditor recommends that the Legislature consider updating West Virginia Code §6-7-5 to clarify its intent for whether Justices of the Supreme Court of Appeals of West Virginia are eligible for travel reimbursement for attending Court. The Legislature should also consider increasing the reimbursement amount of \$0.15 cents per mile for circuit judges traveling out of his or her home county to preside over court in another county.*
- 1.6 *The Legislative Auditor recommends that the Supreme Court of Appeals of West Virginia adopt and submit new travel regulations with the West Virginia State Auditor's Office that are applied equally to all employees, including the Justices.*



**Issue 2: Supreme Court Justice Ketchum Has Repaid the State \$1,663.81 for Incorrect Travel Reimbursements.**

During the Legislative Auditor’s review of various travel expense reimbursements made to the Justices of the Supreme Court, six instances were noted where Justice Ketchum was reimbursed for mileage associated with the use of a personal vehicle, when in fact he had used the 2007 Buick Lucerne owned by the Supreme Court. After being informed of these instances by the Legislative Auditor, **Justice Ketchum promptly repaid the state in the amount of \$1,495.33** for the mileage reimbursements he should not have received. He cited that an employee at the time must have made a mistake, and these errors were not caught prior to him being reimbursed for the mileage in question. The amount of erroneously reimbursed mileage to Justice Ketchum is detailed in the table below.

<b>Table 3 Justice Ketchum’s Repayments to the State</b>		
<b>Date</b>	<b>Trip Purpose/Location</b>	<b>Amount Repaid</b>
May 15-18, 2012	Spring Circuit Judges Conference / Pipestem, WV	\$109.89
July 20-25, 2012	CCJ/COSCO Conference / St. Louis, MO	\$509.49
September 30, 2012	Duke Law School Civil Legal Aid Panel / Durham, NC	\$379.62
October 2-5, 2012	Fall Judicial Conference / Morgantown, WV	\$174.28
May 6-8, 2013	Spring Judicial Conference / Bridgeport, WV	\$145.77
June 26-29, 2013	Fourth Circuit of Appeals Conference / White Sulphur Springs, WV	\$176.28
	<b>Total</b>	<b>\$1,495.33</b>

Further, we noted one additional instance where a travel reimbursement was submitted twice for the same trip, resulting in Justice Ketchum receiving a reimbursement of \$168.48 that he should not have received. Again, after being informed by the Legislative Auditor of this error, **Justice Ketchum immediately reimbursed the state for \$168.48**. Further review of travel reimbursements of the other current Justices is still ongoing, and any issues found will be reported at a later date.

### **Issue 3: Personal Use of State Vehicles and an Antique Desk May Violate the Ethics Act's Provision Prohibiting the Use of Public Office for Private Gain.**

W.Va. Code §6B-2-5(b) establishes a proscription against the personal use of state-owned resources:

*A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.*

The use of public resources for personal purposes without specific legal authority is a violation of this provision.

#### **Justice Ketchum's Use of State Vehicles May Violate the Ethics Act.**

As previously discussed in this report, Justice Ketchum used the Court's 2007 Buick Lucerne for both commuting to Charleston from his home in Huntington, West Virginia and for several personal trips out of state. In addition, he used the state's gas card to purchase fuel for his commute and personal trips. To the extent that the use of the vehicle and gas card were for Justice Ketchum's private gain, his actions may constitute a violation of the West Virginia Ethics Act.

#### **Justice Loughry's Use of State Vehicles, Rental Cars, and Antique Desk May Violate the Ethics Act.**

Also, as previously described in this report, the Legislative Auditor's review of Justice Loughry's use of state vehicles and his use of rental cars while attending out of town conferences appears to have been at least partially for personal use. Justice Loughry's personal use of state-funded vehicles could constitute private gain, and potentially violates the Ethics Act.

In 2013, Justice Loughry had an antique desk brought to his home from the Office of the Supreme Court. The desk, referred to as a "Cass Gilbert desk", was an original desk used by Supreme Court Justices when the East Wing of the Capitol opened in 1927. The desk is owned by the State of West Virginia and has been appraised at \$42,000. Following a media inquiry regarding the propriety of having state property inside a personal residence, Justice Loughry returned the desk to the Court.

In 2013, the West Virginia Ethics Commission addressed a "common misconception" that public employees may use public equipment for personal purposes so long as it is not for commercial purposes and does not interfere with the government's use of the property. The commission rejected this proposition and declared that the test for a violation of the statute is not the cost to the state, but the benefit that public official or employee enjoys from the use of the state property. In Advisory Opinion No. 2012-52 dated February 10, 2013, the Ethics Commission stated:

*[I]f an individual derives a benefit from the use of public equipment, that constitutes a private gain. Even if an individual's use does not result in a cost to the government; still the individual benefitted from the use of the public equipment. Absent access to the use of public equipment, the individual would have incurred the expense of renting or purchasing the equipment.*

Based upon the Ethics Commission’s prior opinions, it appears that Justice Loughry’s use of state equipment for personal purposes could constitute private gain and possibly violate the Ethics Act.



WV Legislative Photography, Photo by Perry Bennett

The West Virginia Ethics Commission has the jurisdiction to determine whether these uses of state property are a violation of the Ethics Acts, and the Legislative Auditor has reported its concerns to the commission and defers to its determinations as to whether any violations have occurred.

## **Issue 4: The Supreme Court Did Not Comply with §17A-3-23(a) Which Requires a License Plate on the Front of State Vehicles.**

Under W.Va. Code §17A-3-23(a) any passenger vehicle owned or leased by the State of West Virginia:

*...may not be operated or driven by any person unless it has displayed and attached to the front thereof,... A plate of the same size as the regular registration [plate with white lettering on a green background bearing the words “West Virginia” in one line and the words “State Car” in another line...*

An on-site inspection by the Legislative Auditor of three WV Supreme Court of Appeals’ fleet vehicles found a lack of the required green and white plate on the front of those vehicles. The 2013 gray Chevy Impala, the 2012 black Buick LaCrosse, and the 2007 Black Dodge Caravan are all lacking front plates as required by W.Va. Code §17A-3-23(a). **The failure to display the required plate increases the risk of improper usage of the vehicle.** It inhibits the public’s ability to report instances of what is perceived to be improper usage, possibly creating an issue of transparency. The Legislative Auditor recommends that the Supreme Court of Appeals comply with W.Va. Code §17A-3-23(a).

### **Recommendation**

*4.1 The Legislative Auditor recommended the Supreme Court of Appeals of West Virginia comply with West Virginia Code §17A-3-23(a) and add front plates to its vehicles in accordance with this code section.*

*April 12, 2018 The Supreme Court complied to the Legislative Auditor's recommendation and has brought their vehicles into accordance with §17A-3-23(a).*





## Appendices

**Appendix A**  
**WEST VIRGINIA LEGISLATIVE AUDITOR'S OFFICE**  
*Post Audit Division*

1900 Kanawha Blvd. East, Room W-329  
Charleston, WV 25305-0610  
(304) 347-4880



**Denny Rhodes**  
Director

March 29, 2018

Gary L. Johnson, Administrative Director  
Office of the Courts  
1900 Kanawha Boulevard East  
Building One, Room E-100  
Charleston, WV 25301


Dear Director Johnson:

This is to transmit a draft copy of the West Virginia Supreme Court audit report. This report is scheduled to be presented during the April 16, 2018 interim meeting of the Post Audits Subcommittee. We will inform you of the exact time and location once the information becomes available. It is expected that a representative of the agency be present at the meeting to respond to the report and answer any questions committee members may have during or after the meeting.

We need to schedule an exit conference to discuss any concerns you may have with the report. Please notify Nathan Harris, Assistant to the Director at 304-347-4880 by April 3, 2018. In addition, we need your written response by noon on Thursday, April 12, 2018 in order for it to be included in the final report.

Please understand, the enclosed is a working draft. It is our practice with every agency to provide a draft report prior to release of the final version. This practice allows time for the agency to discuss corrections and areas of disagreement prior to the agency's official response. Thank you for your cooperation.

Sincerely,

  
Denny Rhodes

Enclosure

cc. Chief Justice Margaret L. Workman  
Justice Robin Jean Davis  
Justice Menis E. Ketchum, II  
Justice Allen H. Loughry II  
Justice Elizabeth D. Walker



## Appendix B

### Objective, Scope, and Methodology

The Post Audit Division within the Office of the Legislative Auditor conducted this audit pursuant to Chapter 4, Article 2, Section 5 of the *West Virginia Code*, as amended.

#### Objectives

This is the first in a series of audits of the Supreme Court of Appeals of West Virginia. The first issue contained several audit objectives. The initial objective was to determine whether the Justices used the Court's vehicles for commuting and/or personal use, to what extent those vehicles were used for commuting and/or personal use, and whether the taxable fringe benefits were appropriately included on the Justices' W-2s. When it was determined that the taxable fringe benefits were not included, an objective was to determine why the taxable fringe benefits were not included, and if the Justices and/or Administrative Office of the Supreme Court were aware that the benefits should be reported. An additional objective was to determine the frequency that Justice Loughry rented vehicles paid for by the State during out-of-state conferences, and whether the vehicles were for personal use. The objective of the second issue was to calculate Justice Ketchum's incorrect travel reimbursements from 2012 – 2018. Issues three and four were identified as concerns during the course of the audit that need to be addressed by the West Virginia Ethics Commission and the Supreme Court respectively.

#### Scope

The scope of this audit consists of the use of state-owned vehicles by Justice Ketchum from 2012 – 2018 and Justice Loughry from 2013 – 2018. The scope for the vehicles rented by Justice Loughry was from 2013 to 2018. Evidence gathered includes all reservations made in the Supreme Court's vehicle reservation system; travel expense reimbursements; rental car receipts and documentation; memos, Justice Administrative Conference notes, and other documents discussing the Court's use of state-owned or rented vehicles; and maintenance and fuel card records for the Court owned Buicks for use by the Justices. The auditors did not complete a full analysis on the use of these assets by **all** Justices and Court employees, and while subsequent reports may focus on additional Justices and employees' usage of state-owned and rented vehicles, it is not the intention of the Post Audit Division to audit the use of state assets by **every** employee of the Court over the scope of this audit.

#### Methodology

Post Audit staff gathered and analyzed many sources of information and assessed the sufficiency and appropriateness of the information used as evidence. Testimonial evidence was gathered through interviews with various individuals who oversee, collect, or maintain information for the Court. The purpose for testimonial evidence was to gain a better understanding or clarification of certain issues, to confirm the existence or non-existence of a condition, and/or to understand the Court's position on an issue. Such testimonial evidence was confirmed by either written statements or the receipt of corroborating or physical evidence.

Auditors requested and received documentation from the Supreme Court Justices and staff in order to conduct this audit, including policies, memos, Administrative conference minutes, and other documentation relating to the use of any state-owned or rented vehicles by Justices and employees of the Court. Auditors also analyzed travel reimbursements, fuel card records, Court vehicle reservation records, and vehicle service records to determine the usage of the vehicles.



# Appendix C

## SUPREME COURT OF APPEALS OF WV

### 2016 JUDICIAL CALENDAR

Court  
 Conference  
 Judicial Conference  
 Holidays   
 Sine Die

JANUARY						
January 2016 Term						
SUN	MON	TUE	WED	THU	FRI	SAT
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FEBRUARY						
January 2016 Term						
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28	29					

MARCH						
January 2016 Term						
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March 1 - WVU College of Law

APRIL						
January 2016 Term						
SUN	MON	TUE	WED	THU	FRI	SAT
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MAY						
January 2016 Term						
SUN	MON	TUE	WED	THU	FRI	SAT
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May 24-26 - Judicial Conference

JUNE						
January 2016 Term						
SUN	MON	TUE	WED	THU	FRI	SAT
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SEPTEMBER						
September 2016 Term						
SUN	MON	TUE	WED	THU	FRI	SAT
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OCTOBER						
September 2016 Term						
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October 18-20 - Judicial Conference

NOVEMBER						
September 2016 Term						
SUN	MON	TUE	WED	THU	FRI	SAT
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13	14	15	16	17	18	19
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27	28	29	30			



# SUPREME COURT OF APPEALS OF WV

## 2017 JUDICIAL CALENDAR

Court   
 Conference   
 Judicial Conference   
 Holidays   
 Sine Die

JANUARY						
January 2017 Term						
SUN	MON	TUE	WED	THU	FRI	SAT
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FEBRUARY						
January 2017 Term						
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MARCH						
January 2017 Term						
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February 28 - WVU College of Law

APRIL						
January 2017 Term						
SUN	MON	TUE	WED	THU	FRI	SAT
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April 4 - LAWS (Parsons)

MAY						
January 2017 Term						
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May 9-11 - Judicial Conference

JUNE						
January 2017 Term						
SUN	MON	TUE	WED	THU	FRI	SAT
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SEPTEMBER						
September 2017 Term						
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September 6 - Independence Hall, Wheeling

OCTOBER						
September 2017 Term						
SUN	MON	TUE	WED	THU	FRI	SAT
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15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

October 24-27 - Judicial Conference

NOVEMBER						
September 2017 Term						
SUN	MON	TUE	WED	THU	FRI	SAT
			1	2	3	4
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**SUPREME COURT OF APPEALS  
STATE OF WEST VIRGINIA**

GARY L. JOHNSON  
ADMINISTRATIVE DIRECTOR



ADMINISTRATIVE OFFICE  
BUILDING 1, ROOM E-100  
1900 KANAWHA BOULEVARD, E.  
CHARLESTON, WV 25305-0832  
(VOICE) 304/558-0145  
(FAX) 304/558-1212  
[www.courtswv.gov](http://www.courtswv.gov)

MEMORANDUM

TO: Justice Menis Ketchum

FROM: Gary L. Johnson 

DATE: March 29, 2018

SUBJECT: Amended W-2's

Per your instructions and our agreement, we are issuing you amended W-2's for your use of the 2007 Buick Lucerne.

## Appendix E

### Travel Regulations for Court Employees

#### SECTION 10: TRAVEL REGULATIONS

*The regulations set out in this section supersede the travel regulations previously promulgated by the Supreme Court of Appeals, effective October 3, 2016.*

##### 10.1 GENERAL PROVISIONS

- A. An employee's official headquarters is the same as that of the court for which he or she works. A judge's county of residence determines his or her headquarters within the Circuit. If a judge's employee's headquarters is different from that of the judge, such different headquarters must be designated by the Chief Judge in writing and approved by the Chief Justice. An employee will not be reimbursed for commuting from his or her residence to headquarters, except for judges as provided in W.Va. Code § 6-7-5 and for judges' secretaries and court reporters or electronic recording operators who demonstrate an undue burden to, and receive approval by, the Administrative Director. The Administrative Director will consider requests on a case-by-case basis, and determination of whether undue burden is demonstrated shall be in his or her sole discretion.
- B. Individuals conducting official business or who are being interviewed for employment within the state judicial system will be allowed reimbursement for expenses under the regulations of this section.
- C. The standard state *Travel Expense Account* form (available on the publicly accessible internet) must be used for submission of all claims. Claim items and amounts must be listed day-by-day for each date of travel, and receipts must be attached for items requiring documentation. The claimant must sign the expense account. Expense accounts of employees other than judges must be certified by the appropriate supervising Circuit Judge, Chief Magistrate, or chief probation officer; all other expense accounts must be certified by an Administrative Office staff member having signature authority.
- D. No "miscellaneous" listing claimed on an expense account will be reimbursed.
- E. Expenses paid by or reimbursed by a third party will not be otherwise reimbursed.

- F. The following expense claims, if otherwise allowable, require documentation submitted with the expense account:
1. Airfare: original customer receipt portion of the airline ticket. The Administrative Office has a direct-billing arrangement with National Travel for booking airfare. Call the Administrative Office Finance Division for details;
  2. Lodging: original hotel bill showing full credit or zero balance, the original customer copy of the credit card slip, or a photocopy of both sides of the cancelled check together with the original hotel bill;
  3. Parking: original receipt;
  4. Ground transportation (taxi, airport bus, van, or limo; car rental and gasoline): original receipt;
  5. Conference tuition, registration, or other fees for educational opportunities: original receipt or photocopy of both sides of cancelled check -- unless, for out-of-state conferences, billed directly to the Supreme Court.
- G. Expense accounts for in-state conferences and for out-of-state travel must be submitted within one month of the return date. Expense accounts for other in-state travel must be submitted within three months of any date of travel.

## 10.2 IN-STATE TRAVEL

- A. TRANSPORTATION -- PERSONAL VEHICLE: Reimbursement will be allowed for driving, by the most direct and/or practical route, from and return to headquarters to perform duties or engage in other approved activities. The mileage reimbursement rate follows that set annually by the United States General Services Administration. Charges for tolls, parking or other travel expenses must be documented by original receipt.
- B. TRANSPORTATION -- RENTAL VEHICLE
1. Except for vehicles rented by Supreme Court Justices, reimbursement will be allowed for car rental only if the Administrative Director or his designee has granted approval in advance, and rental cars must be driven within the travel requirements for personal vehicles;
  2. Allowable reimbursements will be for rental charges (but not optional insurance) and gasoline, both of which must be documented by original

receipts; toll charges; and parking, which also must be documented by an original receipt.

C. TRANSPORTATION: COMMON CARRIER OR PUBLIC CONVEYANCE

1. Reimbursement will be allowed for commercial airline, train, or bus (at tourist or economy rates, unless the travel time exceeds three hours).
2. The Administrative Office has a direct-bill arrangement for booking airfare. Contact the Finance Division for details. Otherwise, allowable reimbursement will be for the following: ticket or supersaver reduced-price airfare cost, which must be documented by original customer ticket stub, original receipt, or photocopy of both sides of cancelled check; mileage; and parking (the latter must be documented by original receipt). The Administrative Director may approve reimbursement to employees holding a non-refundable airline ticket if approved travel is cancelled for a reason deemed by the Administrative Director to be an unavoidable emergency.
3. Reimbursement for ground transportation expense at destination site will be allowed only from airport or station to hotel and return (which must be documented by original receipt).

D. LODGING

1. Reimbursement or direct billing to the Supreme Court will be allowed for overnight stays more than 40 miles from headquarters when required for the employee to perform official duties or to engage in other approved activities.
2. Allowable reimbursement or direct billing to the Supreme Court will be at the single-occupancy (and, if available, government or conference) rate; the cost (unless direct-billed) must be documented by the original hotel bill showing full credit or a zero balance; or by either the original customer copy of the credit card slip or a photocopy of both sides of the cancelled check together with the original hotel bill.
3. Reimbursement will be allowed for necessary transfer or storage of baggage on the check-in or check-out dates not to exceed 10% of the daily single-occupancy hotel rate, with presentation of receipt.
4. No reimbursement will be allowed for such extra hotel charges as entertainment, bar bills, laundry, valet service, or personal telephone calls or for any lodging or meal charges for an employee's guest(s).



E. MEALS

1. Reimbursement for meals will be allowed (except for judges receiving the statutory *per diem*) when travel outside an employee's headquarters county is required to perform official duties or to engage in other approved activities when there is an overnight stay away from home.
2. Reimbursement is limited to actual expenses for food, service, and gratuities, not to exceed the Authorized Daily Rates as established by the U.S. General Services Administration (GSA), accessible on the internet at <http://www.gsa.gov/portal/content/104877>. Specifically excluded are alcoholic beverages and entertainment expenses. Where a percentage of the maximum daily rate is used, the traveler may round the calculated amount up to the next whole dollar.
3. When meals are provided for a traveling employee, the employee must deduct from the maximum daily rate as detailed by the GSA in the online chart of Meals and Incidental Expenses (M&IE) Breakdown, accessible online following links from the above web address.
4. On the first and last days of travel on a multi-day trip, the meal reimbursement rate is 75% of a full travel day's rate, regardless of arrival and departure time. As in Subsection 3 above, if meals are provided on these days, meal expenses submitted for reimbursement must be deducted accordingly.
5. Employees who attend a banquet at a conference sponsored by the Supreme Court may be reimbursed for the banquet cost or have the cost directly billed to the Supreme Court, regardless of the event location.
6. The costs of all coffee breaks or refreshments during functions sponsored by the Supreme Court will be paid directly by the Court and will not reduce the meal allowance for personnel participating in the functions.

F. DIFFERING REGULATIONS FOR EDUCATION TRAVEL: For specific variations in allowances for education-related travel, prevailing over this section's regulations, see Section 9., which follows below.

G. CIRCUIT JUDGE OUT-OF-COUNTY DUTY TRAVEL: A Circuit Judge traveling outside of his or her county of residence to hold court may opt either for the *per diem* allowance under W.Va. Code § 6-7-5 or for expense reimbursement under the regulations above.

### 10.3 OUT-OF-STATE TRAVEL

- A. APPROVAL: All out-of-state travel, except that made by Supreme Court Justices, must be approved in advance by the Administrative Director or Director of Judicial Education or either of their designees. Requests by employees other than Circuit Judges, unless initiated by the Administrative Director, must be recommended by the selecting authority. Requests must include information sufficient to show justification and estimated costs. An exception to the approval requirement and procedure above is that expense accounts by probation officers for out-of-state duty travel need only be accompanied by a court order directing such travel.
- B. CONFERENCE TUITION, REGISTRATION, AND OTHER FEES: Unless billed directly to the Supreme Court, reimbursement will be allowed at actual cost for approved seminars, workshops, or conventions as documented by original receipt or photocopy of both sides of a cancelled check.
- C. TRANSPORTATION: Allowances for transportation will be the same as previously described for in-state travel, except when out-of-state travel is by personal auto, reimbursement for transportation, meals, and hotel together on the days *en route* may not exceed the round-trip coach fare for travel by commercial airline to and from the destination.
- D. LODGING: Allowances for lodging will be the same as previously described, except for approved attendance at programs conducted by the National Judicial College, the American Academy of Judicial Education, the National Center for State Courts, and other national providers. In these instances, reimbursement will be limited to the amounts charged for the accommodations provided or made available by the program sponsor.
- E. MEALS: meal expenses are reimbursed as previously described for in-state travel.
- F. CASH ADVANCES
  1. The Administrative Director, the Director of Judicial Education, or either of their designees for doing so may, upon timely request, approve a cash advance for out-of-state travel.
  2. A request for a cash advance for out-of-state travel must be communicated to the Administrative Office at least three weeks in advance of the expected departure date.
  3. A cash advance reflects an estimate of expenses to be incurred for approved out-of-state travel. A cash advance is not a minimum

allowance or guarantee, and any surplus (amount beyond actual allowable expenditures) must be refunded to the state at the time of settlement by the employee who received the advance.

4. Anyone receiving a cash advance is personally responsible for filing actual allowable expenses and making final settlement, through the Administrative Office, within one month after the return date of the out-of-state trip.

#### 10.4 JUSTICES' TRAVEL

An expense account submitted by a Justice of the West Virginia Supreme Court of Appeals pursuant to Judicial Branch policies shall be honored irrespective of any of the language in these travel regulations.

### SECTION 9: EDUCATION TRAVEL REGULATIONS

- 9.3 MILEAGE REIMBURSEMENT: Employees may receive reimbursement for mileage to attend approved education courses offered outside the county of residence. Reimbursement will be for actual mileage from work place or residence to the course or program location and return. Reimbursement for such expenses is subject to Supreme Court travel regulations and any further limitations set in particular instances by the Director of Judicial Education or the Administrative Director.
- 9.4 LODGING AND MEALS REIMBURSEMENT: Employees may receive reimbursement for lodging and meals associated with attendance at in-state courses and programs only in special circumstances and with advance approval by the Director of Judicial Education or Administrative Director. Reimbursement for such expenses is subject to Supreme Court travel regulations and to any further limitations set in particular instances by the Director of Judicial Education or Administrative Director.
- 9.5 APPLICATION AND REIMBURSEMENT PROCEDURES: Employees must submit the following to the Director of Judicial Education:
  - A. Approved, signed *Application for Education Benefits* (form available on the publicly accessible internet);
  - B. Within six weeks after the successful completion of the college course: a completed *Employee Reimbursement Request* form (available on the publicly accessible internet), together with either an original receipt for tuition and/or

registration fees, OR two photocopies of both sides of the canceled check for tuition and/or registration fees.

- C. If reimbursement has been approved for mileage, lodging, and/or meals, submit a separate *Travel Expense Account* (form available on the publicly accessible internet.) Reimbursement for such expenses is subject to Supreme Court travel regulations and to any further limitations set in particular instances by the Director of Judicial Education or Administrative Director.

## 9.6 OUT-OF-STATE EDUCATION PROGRAMS

Requests to attend out-of-state education programs at state expense must be submitted to the Administrative Director or Director of Judicial Education for approval. Requests by personnel other than judges, unless initiated by the Administrative Director, must be accompanied by a favorable recommendation from the supervising judge. Cash advances and/or reimbursement allowances for attendance at out-of-state programs are governed by the Supreme Court travel regulations.

## Appendix F

### MEMORANDUM

**TO:** Steven D. Canterbury, Administrative Director  
**FROM:** J. Kirk Brandfass, Administrative Counsel  
**DATE:** July 21, 2016  
**RE:** State Owned Vehicles

#### Legislative Rule

#### Title 148, Series 3: State Owned Vehicles

In West Virginia, “[l]egislative power may be constitutionally delegated to an administrative agency to promulgate rules and regulations necessary and proper for the enforcement of a statute. W. Va. Const. art. VI, § 1; art. V, § 1.” Syl. Pt. 3, *State ex rel. Callaghan v. W. Va. Civil Serv. Comm’n*, 166 W.Va. 117, 273 S.E.2d 72 (1980). W. Va. Code § 29A-1-2(d) [1982], and such a legislative rule has the force and effect of law.” Syl. Pt. 5, *Smith v. W. Va. Human Rights Comm’n*, 216 W.Va. 2, 602 S.E.2d 445 (2004). *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 226 W. Va. 138, 143, 697 S.E.2d 730, 735 (2010).

Legislative rules are those “affecting private rights, privileges or interests,” in what amounts to a legislative act. W.Va. Code, 29A-1-2(i) (1982). Legislative rules have “the force of law [.]” W.Va. Code, 29A-1-2(d) (1982). See also *Chico Dairy Co. v. West Va. Human Rights Comm’n*, 181 W.Va. 238, 382 S.E.2d 75 (1989) (to be valid, the promulgation of legislative rules must be authorized by the West Virginia Legislature). *Appalachian Power Co. v. State Tax Dep’t of W. Virginia*, 195 W. Va. 573, 583, 466 S.E.2d 424, 434 (1995).

Title 148, Series 3, of the *West Virginia Code of State Rules* [2015], is designated “State Owned Vehicles.” This rule was passed by the West Virginia legislature on March 14, 2015, and became effective on July 1, 2015.

§ 148-3-1.1, designated “Scope,” provides “[t]his Rule governs all State owned vehicles and aircraft, including the minimal requirements for all state spending units that have a state vehicle and/or aircraft in their possession.”

§ 148-3-2.3, provides, “‘Commuting’ means an employee who has a state vehicle assigned to them, whether permanently assigned or temporarily assigned, and they drive the vehicle to and from their home and office.”

§ 148-3-2.11 provides, “‘Official business’ means business on behalf of the State of West Virginia.”

§ 148-3-2.17 provides, “‘State owned vehicle’ means a vehicle owned by the State of West Virginia.”

§ 148-3-9.3.2 provides that a State owned vehicle “cannot be used for personal purposes except for de minimis personal use as allowed by the Internal Revenue Service (IRS) Publication 15-B, *Employer’s Tax Guide to Fringe Benefits*, published under U.S. Code Title 26.”

IRS Publication 15-B, on page 18, in a section designated “De Minimis Benefits,” provides, “[y]ou can exclude the value of any de minimis transportation benefit you provide to an employee from the employee’s wages. A de minimis transportation benefit is any local transportation benefit you provide to an employee if it has so little value (taking into account how frequently you provide transportation to your employees) that accounting for it would be unreasonable or administratively impracticable. For example, it applies to occasional transportation fare you give an employee because the employee is working overtime if the benefit is reasonable and isn’t based on hours worked.”

#### **Legislative Auditor’s Office: Compliance Audit**

A compliance audit of practices utilized by the West Virginia Division of Corrections, which audit was conducted by the Legislative Auditor’s Office for the period of July 1, 2013, through June 30, 2014, (hereinafter, “Auditor’s Report”) stated that “Legislative 148-3 subsection 9.3 requires that the [State] vehicle be **‘assigned to an employee that has been required by the spending office *in writing* to commute to and /or from work for bona fide noncompensatory reasons.’**” (emphasis in the original)

Pursuant to IRS guidelines, in order for a travel expense to be deductible, the employee must be traveling away from home or on a temporary assignment or job. IRS Pamphlet 463 explains that an employee’s “tax home” is, generally, “your regular place of business or post of duty, regardless of where you maintain your family home and includes the entire city or general area in which their place of business is located.” Therefore, if a person were to use a State owned vehicle to travel from Charleston, their tax home, to their family home, for non-business purposes, those travel expenses would not qualify as a deductible travel expense. Rather, any amounts reimbursed for such travel would have to be reported as wages, and would be taxed as wages.

As set out in the Auditor’s Report, “[t]he IRS stipulated that in order for a travel expense to be deductible, the employee must be traveling away from home on a temporary assignment or job. The IRS generally defines an employee’s tax home as “your regular place of business or post of duty, regardless of where you maintain your family home and includes the entire city or general area in which their place of business is located.” The Auditor’s Report then summarized the factual situation that was being addressed:

“With the application of IRS Publication 463, it was determined the former Deputy Commissioner’s tax home was Charleston, WV because it was his official headquarters. As a result, when the former Deputy Commissioner traveled to Charleston, WV from his home, it did not qualify as a deductible travel expense per the IRS definitions. Therefore, any amounts reimbursed by DOC for travel expenses should have been reported as wages paid to the former Deputy Commissioner.”

### **IRS Commuting Rule (IRS Publication 15-B)**

Under the IRS Commuting Rule, you determine the value of a vehicle you provide to an employee for commuting use by multiplying each one-way commute (that is, from home to work or from work to home) by \$1.50. If more than one employee commutes in the vehicle, this value applies to each employee. This amount must be included in the employee’s wages or reimbursed by the employee. You can use the commuting rule if all the following requirements are met.

(1) You provide the vehicle to an employee for use in your trade or business and, for bona fide noncompensatory business reasons, you require the employee to commute in the vehicle. You will be treated as if you had met this requirement if the vehicle is generally used each workday to carry at least three employees to and from work in an employer-sponsored commuting pool.

(2) You establish a written policy under which you don’t allow the employee to use the vehicle for personal purposes other than for commuting or de minimis personal use (such as a stop for a personal errand on the way between a business delivery and the employee’s home). Personal use of a vehicle is all use that isn’t for your trade or business.

(3) The employee doesn’t use the vehicle for personal purposes other than commuting and de minimis personal use.

(4) If this vehicle is an automobile (any four-wheeled vehicle, such as a car, pickup truck or van), the employee who uses it for commuting **isn’t** a control employee. (emphasis added)

IRS Publication 15-B states that for a government employer, an elected official constitutes a “control employee.”

### **West Virginia Division of Highways Administrative Operating Procedures**

The *State of West Virginia Fleet Management Policies and Procedures Manual*, Edition 7, in Section VII, addresses the issue of commuting in connection with the use of State owned

vehicles. It defines commuting as “[t]he act of driving a vehicle, whether permanently or temporarily assigned, to and from an employee’s home and office.”

**Subsection 1: Commuting General:**

**1.0 Permissible Uses:**

- 1.1. State-owned or leased vehicles will not be used for the convenience of the employee .
- 1.2. Use is required for bona fide non-compensatory business reasons with respect to the duties of the employee to which the vehicle is assigned.
- 1.3. State-owned, leased, or rented vehicles will not be used as a compensatory mechanism to circumvent hiring, salary, longevity, or other restrictions imposed by federal, state, or spending unit directives, policies, orders, or statute.
- 1.4. State-owned or leased vehicles will not be used for personal purposes except for de minimis personal use as allowed by the Internal Revenue Service (IRS) Publication 15-B, Employer’s Tax Guide to Fringe Benefits, published under U.S.Code Title 26.
- 1.5. State-owned or leased vehicles will not be used for commuting without formal approval by the employee’s assigned cabinet secretary or designee using DOA-FM- 006, Fleet Duty Appointment. Commuting vehicle authorizations may be issued for periods up to one year. In cases where the spending unit is not assigned a cabinet secretary, the Cabinet Secretary, Department of Administration, will fulfill that responsibility.

**Code of Judicial Conduct**

**Rule 3.1 Extrajudicial Activities in General**

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- (A) participate in activities that will interfere with the proper performance of the judge’s judicial duties;
- (B) participate in activities that will lead to frequent disqualification of the judge;
- (C) participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality;
- (D) engage in conduct that would appear to a reasonable person to be coercive; or



(E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

#### Rule 3.14 Reimbursement of Expenses and Waivers of Fees or Charges

(A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law, a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.

(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner, or guest.

(C) A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall publicly report such acceptance as required by Rule 3.15.

#### Rule 3.15 Reporting Requirements

(A) A judge shall publicly report the amount or value of:

- (1) compensation received for extrajudicial activities as permitted by Rule 3.12;
- (2) gifts and other things of value as permitted by Rule 3.13(C), unless the value of such items, alone or in the aggregate with other items received from the same source in the same calendar year, does not exceed \$150; and
- (3) reimbursement of expenses and waiver of fees or charges permitted by Rule 3.14(A), unless the amount of reimbursement or waiver, alone or in the aggregate with other reimbursements or waivers received from the same source in the same calendar year, does not exceed \$500.

(B) When public reporting is required by paragraph (A), a judge shall report the date, place, and nature of the activity for which the judge received any compensation; the description of any gift, loan, bequest, benefit, or other thing of value accepted; and the source of reimbursement of expenses or waiver or partial waiver of fees or charges.

(C) The public report required by paragraph (A) shall be made annually by July 1 for the preceding calendar year, and must be filed as a public document in the office of the Clerk of the Supreme Court of Appeals.

### **Applicability to the Judiciary of State Rules Governing Use of State Vehicles**

In *State ex rel. Lambert v. Stephens*, 200 W. Va. 802, 490 S.E.2d 891 (1997), the Court stated:

In upholding a lower court's inherent authority to order a county commission to provide security to a courthouse, the Supreme Court of Colorado reiterated the basic principle that a court holds those "powers reasonably required to act as an efficient court." *Board of County Comm'rs v. Nineteenth Judicial Dist.*, 895 P.2d 545, 547-48 (Colo.1995) (internal quotations omitted). The court also quoted one of its prior decisions where it eloquently stated that it is the responsibility and duty of the courts to be completely independent. Such independence 'is not only axiomatic, it is the genius of our government.... It is abhorrent to the principles of our legal system and to our form of government that courts, being a coordinate department of government, should be compelled to depend upon the vagaries of an extrinsic will.... [It] would interfere with the operation of the courts, impinge upon their power and thwart the effective administration of justice. These principles, concepts, and doctrines are so thoroughly embedded in our legal system that they have become bone and sinew of our state and national polity.'" *Board of County Comm'rs v. Nineteenth Judicial Dist.*, 895 P.2d 545, 547-48 (Colo.1995) (quoting *Smith v. Miller*, 153 Colo. 35, 40-41, 384 P.2d 738, 741 (1963)).

Importantly, however, the Colorado court recognized the inherent power of the judiciary is not unfettered and generally is "limited to matters that are reasonably necessary for [its] ... proper functioning..." *Id.* (citations omitted). The judiciary must be wary not to overstep its boundaries and violate the separation of powers doctrine it is trying to protect by encroaching upon legislative and executive affairs. It is the prudent use of the judiciary's inherent power which will advance "the public interest of a cooperative and harmonious governmental structure." *Id.* (citation omitted); see also *Board of Comm'rs v. Riddle*, 493 N.E.2d 461, 463 (Ind.1986) (finding the issue to be resolved is whether the mandate for office space "is reasonably necessary for the operation of the court or court related functions, and if so, whether the mandate adversely affects any governmental interest"); *Anderson County Quarterly Court v. Judges*, 579 S.W.2d 875, 879 (Tenn.Ct.App.1978) (holding "however broad and justifiable the use of inherent powers may be, it is not a license for unwarranted flexing of the judicial power.

The generally recognized standard for applying the inherent powers doctrine requires its use to be reasonable and necessary.”)

### **Possible Consequences of Improper Use of State Vehicles**

Use of a state vehicle in a manner that contravenes the provisions of an applicable West Virginia legislative rule, or an Internal Revenue Service (IRS) regulation, could result in a determination that untaxed wages were accrued that must be reported to the IRS.

Contravention of the relevant provisions of the Code of Judicial Conduct could result in the filing of an ethical violation complaint with the Judicial Investigations Commission.

**Appendix G**  
**WEST VIRGINIA LEGISLATURE**  
*Joint Committee on Government and Finance*

1900 Kanawha Blvd. East, Room E-132  
Charleston, WV 25305-0610  
(304) 347-4800  
(304) 347-4819 FAX

**Aaron Allred**  
**Legislative Manager**



March 28, 2018

Justice Allen Loughry  
Supreme Court of Appeals of West Virginia  
1900 Kanawha Blvd., East, E-100  
Charleston, WV 25305

Justice Loughry:

As you are aware, we recently met with Supreme Court staff, including Sue Racer-Troy, to discuss travel expenses reported by Supreme Court staff and Justices. According to Ms. Racer-Troy, you have never reimbursed the state for personal use of state vehicles, the Cass Gilbert Desk, nor rental cars paid for by the State of West Virginia.

If Ms. Racer-Troy's statement is inaccurate, please provide our office an image of the front and back of your canceled checks by April 3, 2018. Feel free to contact me, if I can be of assistance to you in completing this request.

Sincerely,

  
Denny Rhodes

## Appendix H



### SUPREME COURT OF APPEALS

CHARLESTON, WEST VIRGINIA

25305

**MARGARET L. WORKMAN**  
CHIEF JUSTICE

April 12, 2018

Mr. Aaron Allred  
1900 Kanawha Blvd. East, Room E-143  
Charleston, WV 25305

Hand Delivered

Dear Mr. Allred:

This response is submitted on behalf of the Supreme Court of Appeals of West Virginia to the report of the West Virginia Legislative Auditor's Office, Post Audit Division, the most recent draft of which was issued on April 10, 2018. Since the beginning of this audit, the Court has provided all requested information promptly and completely, dedicated numerous staff hours to both information production and personal interviews, and otherwise cooperated fully in every way with the Legislative Auditor and his staff.

In response, the Court has made a number of reforms:

- We have consulted with the Executive Director of the West Virginia Fleet Management, Department of Administration and have adopted the State of West Virginia Motor Vehicle Use Policy. We are also joining the State Fuel and Maintenance Program available through Automotive Resources International.
- We have adopted a procedure wherein full documentation of any request for vehicle use by a Justice or employee of the Supreme Court will be required, including the purpose of the use, the destination(s), the mileage in and out, and the specific vehicle assigned.
- By April 13, 2018, all of the Court's nineteen vehicles will bear a tag identifying it as state-owned pursuant to West Virginia Code § 17A-3-23(a).

- The IRS conducted an audit of the Supreme Court beginning in April of 2017 and concluding in 2018. Based upon the results of the IRS Audit resolution process, the Court does not believe that it is necessary to issue any revised/amended W-2s for the referenced IRS Audit time frames of 2014, 2015, 2016, 2017, and 2018 through March 31. **However, at Justice Ketchum's request and insistence, the Court is in the process of issuing amended W-2s for Justice Ketchum based upon the issues as discussed in the herein response of the Court to the Legislative Auditor's report.**
- The Court is in the process of revising all of its travel related policies. The new travel policy will be ready for review and approval of the Court at its May Administrative Conference. The revised travel policy will apply even-handedly to all Judicial Employees, including the Justices. The Court will strive to have the approved travel policy ready for presentation to the Post Audits Subcommittee at its May 2018 meeting.

However, the Court offers the following clarifications:

## **IRS Matters**

### **Audit Resolution:**

The IRS Audit Agents assigned to the previously mentioned IRS Audit of the Supreme Court requested and reviewed detailed fleet data and determined that the fleet did not present issues sufficient to spur further inquiry, issuance of any Proposed Adjustment, or assessment of any monies due.

The Court reached a resolution with the IRS on a number of other items, and one of the terms of the agreement was that issues related to tax years 2014, 2015, 2016, 2017, and 2018 through March 31, 2018, would be closed relative to the scope of the IRS Audit. Further, the IRS Auditors advised the Court as the IRS Audit was in the final settlement phase that it would not be necessary to issue revised W-2s for employment tax issues encompassed by the IRS Audit for tax years 2014, 2015, 2016, 2017, and 2018 through March 31, 2018. Moreover, the Court understands that the IRS agreement achieves resolution for employment tax matters for the referenced time frame. This is a standard term of settlement in IRS matters such as the Court's IRS Audit.

### **West Virginia Code § 6-7-5:**

As the Court provided in a previous Audit Response, the IRS Audit addressed payments under this section of the West Virginia Code. The IRS Auditors advised the Court

that since mileage reimbursement payments made by the Court pursuant to this code section is for “commuting,” these payments should always be considered taxable income to the recipient going forward from April 1, 2018. Based upon this, the Court does not believe that any amended W-2s are necessary relative to these payments for the tax years encompassed by the IRS settlement.

On April 10, 2018, Administrative Director Gary Johnson, Administrative Counsel Lori Paletta-Davis, and I met with Legislative Auditor Aaron Allred and members of his staff for an exit interview. It was agreed that there would be continued communication and a joint cooperation in continuing to improve fiscal procedures and accountability.

Sincerely,

A handwritten signature in black ink, appearing to read "Margaret Workman". The signature is fluid and cursive, with the first name being the most prominent.

Margaret Workman  
Chief Justice

## Appendix I



### SUPREME COURT OF APPEALS

CHARLESTON, WEST VIRGINIA  
25305

**ALLEN H. LOUGHRY II**  
JUSTICE

April 11, 2018

Mr. Gary Johnson  
Administrative Director  
Supreme Court of Appeals of West Virginia  
State Capitol, Room E-100  
Charleston, WV 25305

Joint Committee

APR 12 2018

Post Audit Committee

Dear Mr. Johnson:

I have reviewed the revised draft audit report, dated April 10, 2018, from the legislative auditor's office. I have also reviewed the proposed response of our Court, which has been agreed to by all five Justices. The draft audit report refers to me in at least two of the four designated issues. I disagree with the factual and legal assumptions made, the standards and definitions applied, and the conclusions ultimately reached in the draft audit report.

I look forward to working with the Court to enact, or further refine, our administrative policies.

Sincerely,

A handwritten signature in blue ink that reads "Allen H. Loughry II".

Allen H. Loughry II  
Justice

AHL:vs



## Appendix J

### **Statement of Justice Menis Ketchum Concerning Income Taxes for Commuting**

April 15, 2018

I used a Supreme Court vehicle to commute to work from Huntington to Charleston from January 9, 2012, to June 15, 2016, as the Legislative Auditor found is not an uncommon practice in other state agencies when authorized. The Court authorized my use of the vehicle for commuting. I discontinued use of any state vehicle on June 15, 2016, and have not driven any state car since then.

Later, a memo from the Court's then-legal counsel dated July 21, 2016, (first seen by the Justices as an attachment to the August 29, 2016, administrative agenda) stated that use of a state car for commuting may be taxable. Upon reading this memo, I contacted my tax accountant and he told me that I did not need to file an amended return for taxes because the personal use was not on my state-issued W-2 form.

In December 2017 or January 2018, we received the Auditor's letter stating that there would be an audit on the commuting use of state cars. I contacted my accountant again. He told me again that I did not need to report for taxes my use of the car. He said that if it would make me feel better or protect my reputation to send him the mileage and make of the car and that he would figure the tax and prepare amended returns. In the interest of fully complying with all tax law, I sent the mileage used to the accountant. (I believe that I also gave a copy to Mr. Allred of the mileage calculations that I sent to my accountant). The accountant calculated the use and called me stating that I owed no taxes on the car use because of the age of the car and because I was entitled to charge 15 cents a mile under W.Va Code 6-7-5 for commuting. He sent me a bill for his services in rendering this conclusion for which I paid \$1,225.00 on January 19, 2018.

When the Court received the Auditor's first draft report discussing the issuance of amended W-2's, I honestly had never heard of amended W-2's. I thought a person just filed an amended tax return upon learning of a mistake. After learning of the Auditor's recommendation that I be issued amended W-2 forms (and despite being advised by the the Court counsel that it was their opinion that I owed no taxes pursuant to the IRS audit of the Court), I instructed the administrative office chief financial officer to calculate the figures and prepare amended W-2's for me. I gave a copy to Mr Allred.

When the amended W-2s are given to me, I will fully comply by paying any taxes due for use of the state automobile.





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*Post Audit Director:* Denny Rhodes

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Building 1, Room W-329  
1900 Kanawha Boulevard East  
Charleston, West Virginia 25305  
Phone: (304) 347-4880