

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WILLIAM MILLS, JR.,

Appellant,

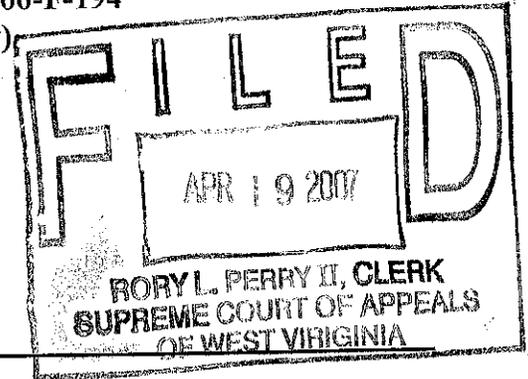
v.

Supreme Court No. <sup>33346</sup>070054

Circuit Court No. 06-F-194  
(Kanawha County)

STATE OF WEST VIRGINIA,

Appellee.



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BRIEF OF APPELLANT

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## INTRODUCTION

William Mills, Jr. expected he would have a fair trial, with all his rights protected when he stood before the jury who would decide his fate. His defense counsel had assured him he would get a jury panel free from bias, without any question as to whether they had ties to the State and law enforcement. Unfortunately, it was not to be. Instead, there was a member of the jury panel, Theodore Douglas who had a close ties to the public safety community and who worked with a key police witness. Everyone could see the bias, except the trial judge.

Theodore Douglas is a hardworking member of the public safety force of Kanawha County. He serves daily as a medic for Kanawha County Emergency Medical Services (EMS), and then volunteers on his personal time as a firefighter with the Pinch Volunteer Fire Department. Every day, he puts his life on the line, out on the streets, serving the community. Whether the problem is a fire, a car wreck, a child beaten by her parents, or a police officer shot in the line of duty, Mr. Douglas is there to help. His service – in this way – to his community is invaluable.

There is a lot of family feeling on the streets. Those who carry a badge, whether they are firefighters, paramedics, or police, depend on each other to get the job done so they can come home alive at the end of their shift. They respond to the same calls, with each depending on the other to hold up their end in a crisis. Police depend on Fire and EMS to wade into the gunfire and pull them out when they go down, and Fire and EMS depend on the Police to protect them from all the dangers they face from people on the streets, while they save lives and property. No one questions this; and no one should. This family bond keeps them strong and alive.

But in a courtroom, the equation is very different. There, Mr. Douglas' service has a different value. Jurors are supposed to be impartial; they are supposed to be unbiased against

one side or the other. They have to be as able to listen to the interests of the accused as much as law enforcement. When a member of the family of the street, the family of public safety, is on the jury panel, that balance is jeopardized.

In court, Mr. Douglas was a study in contrasts. On the one hand, he was sitting in court wearing his EMS uniform – the uniform of the State’s guardians of the street, admitting he knew and served on the fire department with a police officer scheduled to be a witness and stating he regularly worked with the police on the street. On the other, he was pledging to the court to be impartial as a juror. Clearly, something was amiss. These two did not match.

Defense counsel could see the problem. There was a venireman closely associated with law enforcement on the panel. She went out of her way to bring it to the trial judge’s attention. It made no difference; the judge actually went out of his way to tip the balance in favor of keeping Mr. Douglas on the panel by asking forbidden “rehabilitative” questions. In the end, the motion to strike Mr. Douglas for cause was denied, leaving Mr. Mills little choice but to use a preemptory challenge to remove a juror who was not without exception.

The trial went on, and the jury ultimately sided with the prosecutor and convicted Mr. Mills. This trial had this fundamental, reversible error:

- The trial judge denied Mr. Mills his statutory right to a jury panel of twenty jurors, free from exception, by allowing Mr. Douglas, a person closely associated with law enforcement and an officer scheduled to testify in the case, to remain on the jury panel and requiring the use of a preemptory challenge to strike him, in violation of W.Va. Code § 62-3-3 (1949) (2005 Repl. Vol.).

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## PROCEEDINGS AND RULINGS BELOW

William Mills, Jr. was brought to trial on 7 August 2006, in the Circuit Court of Kanawha County for distribution of cocaine. This occurred after several false starts, where the police originally apprehended a different William Mills, Jr.

As the trial began, the usual jury venire of twenty-four persons was placed in the jury box to begin the process of *voir dire*. Of those twenty-four people, one immediately stood out. Prospective Juror Theodore Douglas was wearing a uniform, the lone jury member to do so. His uniform declared him to be a paramedic with Kanawha County Emergency Medical Services, a member of the public safety departments of the State of West Virginia -- the same group law enforcement officers are drawn from.

Defense counsel quickly noticed this problem, further compounded when the juror admitted, on preliminary group questioning by the trial judge, he was a friend of a police officer who was scheduled to be a witness for the State. Closer questioning revealed, not only was he personal friends with the officer, but also he was a member of the Pinch Fire Department with the officer, was employed by an agency with strong ties to the oversight of both his duties and the police, and he depended on the police for his own personal safety on a daily basis while working as a paramedic on the streets. Despite all this, he denied he would give greater weight to the State's evidence.

All of this came out in the presence of the trial judge, showing Juror Douglas had a bias toward the State in conflict with his claims to the contrary. The evidence showed there was at least some doubt as to his bias, thus meeting the legal standard in West Virginia for the dismissal of a potential juror for cause.

The trial judge denied the motion to remove Juror Douglas, refusing to recognize the bias that was staring him in the face. The judge made no statement as to why there was no doubt as to the juror's lack of bias. The fact went unaddressed, despite this Court's requirements, with the judge looking only at the juror's statements claiming impartiality and even asking the juror "rehabilitative" questions to create an appearance the juror was unbiased. All of this occurred in spite of visual evidence of the juror's bias. This Court's decree demanding a judge must look behind the juror's bald statements to investigate the truth of the juror's bias went unheeded.

As a result, Mr. Mills had to expend a preemptory challenge to remove Juror Douglas, thereby denying him his statutory right to a panel of twenty jurors, free from exception. Mr. Mills was ultimately convicted of distribution of cocaine and sentenced to an indeterminate sentence of one to fifteen years incarceration.

## STATEMENT OF FACTS

Three pages of trial transcript, estimated to have taken no more than two minutes of trial time, decided whether or not William Mills, Jr. would receive a fair trial. Trial Transcript (Tr.) 75 – 77.<sup>1</sup> Those three pages were the moment where the trial judge declined to enforce Mr. Mills' statutory right to a jury panel of twenty persons, free from exception, as required by W.Va. Code § 62-3-3 (1949) (2005 Repl. Vol.).

From the moment the jury venire entered the courtroom, it was apparent to everyone there was an unusual situation afoot. One of the prospective jurors, Theodore Douglas, was wearing a uniform. Tr. 75. His uniform was that of a paramedic for the Emergency Medical Services department of Kanawha County, West Virginia. *Id.*

The trial judge began the *voir dire* process in a familiar way, first greeting the prospective jurors and seating the first group of twenty-four (24) to start the questioning process. Tr. 63 – 65. Theodore Douglas was number sixteen (16) of the group. Tr. 64.

Soon afterwards, the questioning began, led by the trial judge. As is quite common in criminal cases, the judge asked, “Does any member of the jury panel have a relationship or acquaintanceship with any of the lawyers, the witnesses, or the parties to this case?” Tr. 71. Counsel took note of the responses, for further individual inquiries later. One of those with a positive response to this question was Juror Theodore Douglas. Tr. 75.

With the completion of the preliminary questions, the individual follow-ups began. When it was Juror Douglas' turn, defense counsel immediately brought his attire to the attention of the trial judge. Tr. 75. She also elicited from the juror the specifics of his relationship with the police, both professionally and personally. Tr. 75 – 77.

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<sup>1</sup> Mr. Mills would note that, while the remainder of the record was paginated, the pages of the transcript were not. All citations are to the page numbers of the trial transcript.

Juror Douglas revealed he was closely associated with one of the witnesses scheduled to testify for the State: Officer Dan Armstrong, who was supposed to testify on behalf of the State. Tr. 71.

Juror Douglas' link to Officer Armstrong had several connections. First, they were both members of Pinch Fire Department. Tr. 75. This alone created an employment relationship between them. As members of the same fire department, they almost certainly had a close friendship, an absolute necessity for those who routinely put their lives in their crewmates hands to respond to fires and emergencies.

Second, they also had a connection as Juror Douglas had close, daily, inseparable ties with the police every day as he worked for Kanawha EMS as a paramedic. Tr. 75. He admitted the police were involved in nearly every emergency call he responded to, and it is a matter of common knowledge, in such dangerous situations, paramedics are necessarily indebted for their safety and lives to the police who protect them while they save the injured.

Finally, there was an additional connection between the police and Juror Douglas that was not as obvious. As both are members of the public safety community, they have some oversight from the same department of state government, the Department of Military Affairs and Public Safety. This creates a question of what pressures could be placed upon the juror in his employment if he failed to support the State in its case.

During the questioning, despite all these links to the police and the State being brought out, Juror Douglas protested he could be fair and not partial to the State. Tr. 76. Although his answers were technically the "correct" ones, they were belied by both his personal position and his appearance. In fact, the situation was so obviously suggestive of a problem that a curious event next occurred.

The trial judge entered the discussion, asking a “rehabilitative” type question, that is, one suggesting an answer affirming the juror’s impartiality; essentially putting words in the juror’s mouth. The Judge said – not really asking, but testifying himself – “...you’re not going to disbelieve a police officer compared to other witnesses?” and “You’re going to treat all witnesses the same, and give them all the same consideration in accordance with the Court’s instructions?” Tr. 76. This discredited practice resulted in the juror affirming the trial judge’s words, claiming once more he had no bias. Tr. 76. Notice how these “questions” suggest the proper answers; the answers that, if accepted on their face, create an appearance of no bias, assuming one ignores the facts staring one in the face.

As a result of all of these links and the clear conflict between what Mr. Douglas claimed and his actual situation, defense counsel sought Juror Douglas’ removal from the jury panel for cause. Tr. 76. This was denied by the trial judge. Tr. 77. As justification for his decision, he cited the juror’s claims of no bias, including the words he put in the juror’s mouth. Tr. 77. He failed to address at all any of the links Juror Douglas had to the police or the State’s witness or any balancing between the juror’s situation and his claims. Tr. 77.

Consequently, defense counsel had to expend a preemptory challenge to remove Juror Douglas from the jury panel. *See generally*, Tr. 86. Thus, the panel did not constitute twenty jurors, free from exception, as required by statute.

Mr. Mills was convicted at trial. Tr. 311.

**ASSIGNMENTS OF ERROR**

- I. THE TRIAL JUDGE DENIED MR. MILLS HIS STATUTORY RIGHT TO A JURY PANEL OF TWENTY JURORS, FREE FROM EXCEPTION, BY ALLOWING A PERSON CLOSELY ASSOCIATED WITH LAW ENFORCEMENT AND AN OFFICER SCHEDULED TO TESTIFY IN THE CASE, TO REMAIN ON THE JURY PANEL, REQUIRING THE USE OF A PREMPTORY CHALLENGE TO STRIKE HIM, IN VIOLATION OF W.VA CODE § 62-3-3 (1949) (2005 Repl. Vol.).

## DISCUSSION OF LAW

**I. THE TRIAL JUDGE DENIED MR. MILLS HIS STATUTORY RIGHT TO A JURY PANEL OF TWENTY JURORS, FREE FROM EXCEPTION, BY ALLOWING A PERSON CLOSELY ASSOCIATED WITH LAW ENFORCEMENT AND AN OFFICER SCHEDULED TO TESTIFY IN THE CASE, TO REMAIN ON THE JURY PANEL, REQUIRING THE USE OF A PREMPTORY CHALLENGE TO STRIKE HIM, IN VIOLATION OF W.VA CODE § 62-3-3 (1949) (2005 Repl. Vol.).**

An impartial jury is one of the most important parts of our criminal justice system. West Virginia recognizes this by providing statutory rights regarding the selection of jurors to the accused, allowing him six preemptory strikes from “a panel of twenty jurors, free from exception[.]” W.Va. Code § 62-3-3 (1949) (2005 Repl. Vol.). Jurors with biases affecting their viewpoints, either from their personal opinions or from their personal situation are to be excluded. This can be either actual bias or a suspicion of improper prejudice. State v. Schermerhorn, 211 W.Va. 376, 380, 566 S.E.2d 263, 267 (2002). When the trial judge fails to exclude a juror with bias and the defendant necessarily uses a preemptory challenge to remove him, prejudice results. State v. Mills, 211 W.Va. 532, 537, 566 S.E.2d 891, 897 (2002). In this case, Mr. Mills was forced to expend a preemptory challenge to remove a biased juror whom the trial judge refused to remove for cause, to Mr. Mills’ prejudice.

**A. STANDARD OF REVIEW**

When determining error in refusing a motion to strike a juror for cause, the standard of review is a three-step process. The review is plenary as to legal questions, clearly erroneous for facts supporting the disqualification, and abuse of discretion as to the reasonableness of the procedure and ruling on disqualification. State v. Nett, 207 W.Va. 410, 412, 533 S.E.2d, 43, 46 (2000), *citing* State v. Miller, 197 W.Va. 588, 600, 476 S.E.2d 535, 547 (1996).

## B. PROCEDURE FOR DETERMINING BIAS

Jury selection can be a complicated affair, with many rules and considerations overlapping and competing for the court's interest. For this reason, it requires close scrutiny by an appellate court to be certain the law of *voir dire* has been complied with.

The relevant test for determining whether a juror is biased is:

[W]hether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.

Nett, 207 W.Va. at 412, 533 S.E.2d at 45, *citing* Miller, Syl. Pt. 4.

It is not enough the juror believes or states he can be impartial and fair. The court must look behind the facial assertions and find from all the facts and circumstances the juror will actually be impartial and not biased subconsciously. O'Dell v. Miller, 211 W.Va. 285, 289, 565 S.E.2d 407, 411 (2002). Often this requires the court to examine the juror closely, both in what he says and how he appears, in order for the court to make an accurate determination on the juror's bias. *Id.*

A prospective juror is presumed to be impartial, but such a presumption is rebuttable. Mills, 211 W.Va. at 538, 566 S.E.2d at 897, *citing* State v. Phillips, 194 W.Va. 569, 588, 461 S.E.2d 75, 94 (1995), *quoting* Irvin v. Dowd, 366 U.S. 717, 723 (1961). In the same vein, courts also must pay due respect to the oath taken by jurors in the absence of a stated intention to disregard it. Miller, 197 W.Va. at 605, 476 S.E.2d at 552.

The law governing jury selection is the same for both civil and criminal cases. *Cf.* O'Dell, 211 W.Va. at 292, 565 S.E.2d at 414 (Maynard, J. dissenting). This Court has made clear in its rulings that civil and criminal juries both have the same considerations for fairness

and commonly utilize authorities for both types of cases interchangeably. *E.g.*, Doe v. Wal-Mart Stores, Inc. 210 W.Va. 664, 671, 558 S.E.2d 663, 670 (2001), *citing* Davis v. Wang, 184 W.Va. 222, 226 n. 7, 400 S.E.2d 230, 234 n. 7 (1990), *citing* State v. Bennett, 181 W.Va. 269, 272, 382 S.E.2d 322, 325 (1989); State v. Wilcox, 169 W.Va. 142, 286 S.E.2d 257 (1982).

Once there have been doubts raised about the bias of a juror, West Virginia case law has long held the trial court MUST resolve ANY doubt of possible bias or prejudice in favor of the party seeking to strike for cause. O'Dell, 211 W.Va. at 288, 565 S.E.2d at 411 (multiple internal citations omitted) (emphasis added). In fact, this Court has long pointed out that “The process to select jurors should endeavor to secure jurors who are not only free from prejudice, but who are also free from the suspicion of prejudice.” State v. Finley, 177 W.Va. 554, 557, 355 S.E.2d 47, 50 (1987), *citing* State v. West, 157 W.Va. 209, 219, 200 S.E.2d 859, 865-66 (1973) and State v. Siers, 103 W.Va. 30, 33, 136 S.E. 503, 504 (1927).

The key item to be gleaned from this point of law is the defendant need only raise any doubt to require the trial judge to strike the prospective juror for cause. For example, this Court has held that a single “wrong” answer will suffice. *See, e.g.*, State v. Griffin, 211 W.Va. 508, 511, 566 S.E.2d 645, 648 (2002).

#### C. JURORS WITH LINKS TO THE OPPOSING PARTY ARE BIASED

One of the thorniest problems occurring in determining bias is when a juror admits during *voir dire* he has some connection with law enforcement. When this happens, the question becomes one of whether the connection actually exists. In other words, does this juror have only a casual acquaintance with some law enforcement officer, or does he have a genuine relationship with the officer or law enforcement agency?

This Court has addressed the question of connections of a juror with a bias in two contexts, creating a clear roadmap trial judges ought to be able to follow without difficulty. Casual acquaintances, such as a distant social connection, long-ago former employment, or once attending public school with someone who one day would become a police officer, have been considered by this Court and rejected as raising any doubt as to the prospective juror's bias. State v. White, 171 W.Va. 662, 301 S.E.2d 615, 618 (1983); Mills, 211 W.Va. at 538, 566 S.E.2d at 897.

On the other hand, closer connections create a showing of bias sufficient to trigger the standard of "any" bias. These connections have been determined by this Court to inherently create a situation where their holder, if a prospective juror, can be shown to have the necessarily minimal standard of "any bias" to trigger a situation where the juror ought to be excused for cause.

This Court recently addressed one of these situations. In the case of Mikesinovich v. Reynolds Memorial Hospital, Inc. \_\_\_ W.Va. \_\_\_, 640 S.E.2d 560 (2006), the circuit court was reversed for allowing a juror who had an employment relationship with the opposing party to remain on the panel. The Court noted there was an employment relationship where the defendant employed the juror's wife, and she had similar duties and other connections to a person likely to be a witness for the defendant. Mikesinovich, 640 S.E.2d at 561. Although not explicitly stated by the Court in its factual recitation, it can be logically inferred the juror's wife could have worked with the witness.<sup>2</sup> *Id.*

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<sup>2</sup> Interestingly, Mr. Mills' case did not contain the problem of "the judge counting noses" and being concerned with running out of prospective jurors, as described during oral argument by Justice Starcher in Mikesinovich. It is clear from the record that there was not a shortage of prospective jurors in Mr. Mills' case that might cause a trial judge to hedge on a close decision.

Another situation arising in our jurisprudence has been when the juror has connections of a closer nature with law enforcement officers. The key case in West Virginia on this topic is State v. Schermerhorn, 211 W.Va. 376, 566 S.E.2d 263 (2002). In that case, the juror in question had connections to law enforcement. Specifically, she had a stepfather who was a police officer for a different police department than the one involved in the case.<sup>3</sup> This Court found this connection with the police was more than merely a casual acquaintance; the juror had a substantial connection, enough so she should have been excused for cause. Schermerhorn, 211 W.Va. at 380, 566 S.E.2d at 267. This ruling resulted in spite of the fact the trial court had specifically obtained an affirmative answer to a question of whether or not, given the connections she had with law enforcement, the juror could be impartial. *Id.*

This Court has taken these connections seriously, enough so to point out the “any” doubt standard can be met by even some quite extended connections. In West, this Court reversed a conviction solely because the trial judge failed to exclude from the jury panel a person who was employed by the state Department of Public Safety<sup>4</sup>. West, 157 W.Va. at 219, 200 S.E.2d at 865. The Court did not address the manner in which he was employed; his employment there alone was sufficient. *Id.* The Court noted, “when the defendant can demonstrate even a tenuous relationship between a prospective juror and any prosecutorial arm of State government, defendant’s challenge for cause should be sustained by the court.” West, 157 W.Va. at 219, 200 S.E.2d at 866.

Taken together, it is apparent when a prospective juror provides information during *voir dire* showing he has an existing link to the prosecution, whether by the fact he has connections to

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Tr. 78-79. In any case, that reasoning was rejected by this Court in Mikesinovich, and the situation with Prospective Juror Douglas is not a close case. Mikesinovich, 640 S.E.2d at 564.

<sup>3</sup> The juror had some other tangential connections with the Office of the Prosecuting Attorney.

<sup>4</sup> Today, this department is known as the Department of Military Affairs and Public Safety.

law enforcement, through his employment, or his personal relationships, the standard of “any” doubt is met, and the juror should be excused by the trial judge for cause.

D. JUROR DOUGLAS WAS BIASED BY HIS LINKS TO LAW ENFORCEMENT

The links to law enforcement generally, and one of the witnesses for the State specifically, were clearly present during *voir dire* when Juror Douglas was being questioned by the court and counsel. The record reveals he arrived for court wearing his EMS uniform and admitted being friends with Officer Dan Armstrong, one of the officers who was introduced by the prosecutor as a witness who would testify against Mr. Mills on a critical factual issue, admitted to working with Officer Armstrong on the Pinch Fire Department, and agreed he worked closely with the police on a regular basis in his employment as a paramedic for Kanawha County. Tr. 74 – 76. Although he denied any of this would affect his judgment on the case, it is necessary, as required by O'Dell, to look behind this assertion at Juror Douglas' biases. Tr. 76; O'Dell, 211 W.Va. at 289, 565 S.E.2d at 411.

First, there is the fact that Juror Douglas, as a member of the Pinch Fire Department along with Officer Armstrong, is both a co-worker in a stressful, trust-based job with the State's witness, as well his probable personal friend. This employment<sup>5</sup> with Officer Armstrong alone reaches the standard of Schermerhorn and Mikesinovich, but takes on an even greater significance when the special circumstances of the job are taken into account. Schermerhorn, 211 W.Va. at 380, 566 S.E.2d at 267; Mikesinovich, 640 S.E.2d at 562. Firefighters, like all emergency services workers, police included, rely on a system of trust and brotherhood in order to successfully take on the risks they encounter for each of us. It is common knowledge, given the events of 9/11, the bonds between these men and women are strong; so strong, the idea of

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<sup>5</sup> On information and belief, Pinch Fire Department is a volunteer organization. However, members of such departments are considered "employees" for all purposes at law. See Wriston v. Raleigh County Emergency Services Authority, 205 W.Va. 409, 421, 518 S.E.2d 650, 662 (1999).

one of them disbelieving another is unthinkable. This clearly creates a “thumb on the scales” toward the testimony of Officer Armstrong for Juror Douglas; in other words, a bias.

The same logic applies to Juror Douglas’ employment with Kanawha County Emergency Medical Services. Juror Douglas declared openly, by his words and appearance, his allegiance to the government as a paramedic. He admitted he worked daily with the police and he had a close working relationship with them; they were involved with nearly every call he responded to. This is essentially employment with the very same group of people whom he would in this case be called upon to judge. In other words, he would be judging the actions of the very people whom he had to entrust his life to every day. This is exactly the sort of close contact with the state and law enforcement condemned by the Schermerhorn court. Schermerhorn, 211 W.Va. at 380, 566 S.E.2d at 267. It is bias.

Interestingly, as a paramedic and firefighter, Juror Douglas has an additional connection to the State and law enforcement of which he may have been aware. As a member of the emergency services, he has some responsibility to the West Virginia Department of Military Affairs and Public Safety. This department has responsibility for homeland security and emergency management, a function for which Kanawha County’s emergency services, including both Kanawha County Emergency Medical Services and Pinch Fire Department, are certain to feature prominently.<sup>6</sup> West Virginia Department of Military Affairs and Public Safety, West Virginia Division of Homeland Security and Emergency Management (visited 19 December 2006), <http://www.wvs.state.wv.us/dmaps/es.htm>. This same department also has responsibility for supervision of the West Virginia State Police. West Virginia Department of Military Affairs and Public Safety, West Virginia State Police (visited 19 December 2006),

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<sup>6</sup> This Department does not directly supervise Kanawha County EMS. However, they do have influence over issues of concern, including the distribution of federal and state funding.

<http://www.wvs.state.wv.us/dmaps/sp.htm>. Thus, the same relationship between the juror and the State causing this court to reverse West was also present with Juror Douglas. West, 157 W.Va. at 219, 200 S.E.2d at 866. This too creates an impermissible bias.

Taken alone, any one of these events would be enough to conclude the “any” doubt standard has been met. O’Dell, 211 W.Va. at 288, 565 S.E.2d at 411. But taken in aggregate, with both the words of Juror Douglas as he answered the question, as well as the clear image of a servant of public safety, in his uniform in court, asked to judge the credibility of another servant of public safety, a police witness, cannot result in any other conclusion than bias on the part of the juror.

#### E. TRIAL JUDGE’S REHABILITATION WAS IMPROPER

“Rehabilitation is the ‘commonly accepted terminology to describe the questioning of a juror who has made a statement indicating bias or prejudice.’” O’Dell, 211 W.Va. at 289, 565 S.E.2d at 411, *citing* Daniel J. Sheehan, Jr. and Jill C. Adler, Voir Dire: Knowledge is Power, 61 Tex. B.J. 630, 633, FN 11 (1998). The practice of a judge asking “rehabilitative” questions of a prospective juror, attempting to “cleanse” them of perceived bias has been roundly condemned by this Court. O’Dell, 211 W.Va. at 290, 565 S.E.2d at 412; Schermerhorn, 211 W.Va. at 380, 566 S.E.2d at 267.

The rule adopted in West Virginia is that once a prospective juror meets the disqualifying standard of any bias against a party, the juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair. *Id.* This Court has pointed out that “[t]rial judges must resist the temptation to ‘rehabilitate’ prospective jurors

simple by asking the ‘magic question’ to which jurors respond by promising to be fair....” .  
O’Dell, 211 W.Va. at 290, 565 S.E.2d at 412.

This is exactly what the trial judge did in Mr. Mills case. When confronted by Prospective Juror Douglas, in his uniform of the State’s guardians of the street, admitting that he was connected with the police in general and a probable police officer witness in the case specifically, and knowing the duty Mr. Douglas owed to those who protect his life and whose trustworthiness he depends on every day, the trial judge recognized he had a problem with this juror. But instead of simply allowing him to be excused for cause, he chose to interfere and see if he could ask questions to “rehabilitate” Mr. Douglas and make him appear to be unbiased.

The trial judge said: “...you’re not going to disbelieve a police officer compared to other witnesses?” and “You’re going to treat all witnesses the same, and give them all the same consideration in accordance with the Court’s instructions?” Tr. 76. To each question, Mr. Douglas gave an affirmative response. Tr. 76. As the “questions” by the judge were not really questions at all, but rather statements that the judge desired Mr. Douglas to affirm, which, when confronted with the power and authority of the judge towering above him on the bench, he did without hesitation.

This is the same question and response colloquy prohibited by this Court in O’Dell. The question cited as the model is even the same: “‘After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law?’ Not so remarkably, jurors confronted with this question from the bench almost inevitably say, ‘yes’.” O’Dell, 211 W.Va. at 290, 565 S.E.2d at 412, *citing* Walls v. Kim, 549 S.E.2d 797, 799 (Ga., 2001).

It was clear from Mr. Douglas' appearance and the answers he gave to the questions regarding his employment, his professional connections with law enforcement, and his personal connections with the police officer witness, that he met the standard of any bias and should have been excused for cause. This rehabilitation attempt by the trial judge, acting against the authority of this Court, added insult to injury as an attempt to thwart that dismissal, and through it, denied Mr. Mills a fair trial.

#### F. CONCLUSION

The law and the facts are undisputed in this case. The facts elicited at *voir dire* show Juror Douglas was biased through his close working relationship with a key State's witness and with law enforcement generally. The ruling on the disqualification, when viewed in the light of this Court's decisions on jurors with such connections, and the trial judge's act of disregarding the rule forbidding rehabilitation of jurors, rises to the level of an abuse of discretion. It should be reversed.

**RELIEF REQUESTED**

Mr. Mills respectfully requests this Court to reverse his conviction and sentence and remand his case for a new trial.

Respectfully submitted,

WILLIAM MILLS, JR., Appellant

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CERTIFICATE OF SERVICE

I, E. Taylor George, hereby certify that on 14 April 2007, a copy of the foregoing **Brief for Appellant** was mailed to Ms. Dawn Warfield, Office of the Attorney General, 1900 Kanawha Boulevard, East, State Capitol Room E26, Charleston, West Virginia 25305.



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