

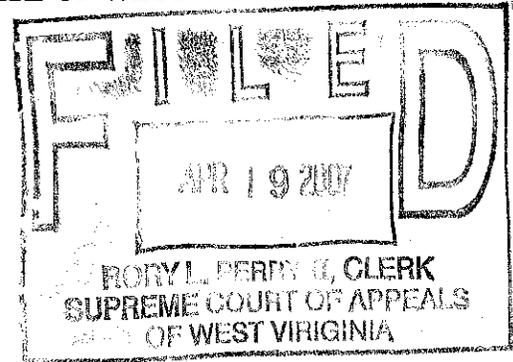
IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA

VS.

CASE NO.

TERRON GODFREY



**PETITION FOR WRIT OF PROHIBITION AND
APPEAL OF SANCTIONS**

In accordance with Rule 14 of the Rules of Appellant Procedure, your Petitioner hereby requests that this Court issue a Rule to Show Cause against the Honorable James Rowe, Judge of the Circuit Court of Greenbrier County, West Virginia, to show cause as to why an Order to show cause as to why the State should not be barred from retrying Terron Godfrey, your Defendant herein, on the criminal charges found in the attached indictment. Your petitioner contends a retrial would be in violation of the Fifth Amendment of the United States Constitution barring Double Jeopardy and Article III, Section 14 of the West Virginia Constitution; and in support thereof your Petitioner pleads as follows:

1. **THE KIND OF PROCEEDING AND THE NATURE OF THE RULING OF THE LOWER TRIBUNAL:**

This is a petition under Rule 14 of the West Virginia Rules of Appellant Procedure seeking a Writ of Prohibition against the Honorable James Rowe, Judge of the Circuit Court of Greenbrier County, West Virginia, seeking a writ barring the Court and the State of West Virginia from violating the Double Jeopardy rights of your petitioner herein, Terron Godfrey, and placing him twice in jeopardy against his will by trying him twice for the same crime in the Circuit Court of Greenbrier County.

2. **STATEMENT OF FACTS OF THE CASE:**

Your Petitioner herein was indicted on the 3rd day of October, 2006, for the offense of sexual assault in the third degree, a felony, which could impose a penalty of one to five years in the penitentiary. The Defendant entered a plea of not guilty and a trial was set for January 10, 2007. The indictment is attached hereto and marked as Exhibit A.

Following the arraignment, the Defendant filed a Petition for Discovery using an Omnibus Discover Motion and supplemented it with a further discovery request. The State partially complied with the request for discovery and partially failed to comply with the discovery requests.

At trial, the Defendant planned to assert a defense under 61-8B-12(a) of the West Virginia Code; that the defendant did not know that the alleged victim was under the age of sixteen. The State had information that the juvenile had been driving an automobile. The Defendant filed a Motion for Discovery requesting that all information dealing with the alleged victim's underage driving record be provided to the Defendant. The State failed to comply with this discovery request. The State knew of various times the child had been driving illegally, but failed to make this information available to the Defendant. This was in violation of a written discovery request and also Brady v. Maryland, 375 US, 83 (1969).

The State also failed to give the address of many of the key witnesses, including the juvenile who was the alleged victim, as required by W.Va. Rule of Criminal Procedure 16.¹

The State filed a counter motion for a list of the Defendant's witnesses as part of the reciprocal discovery. By inadvertence, the Defendant did not file a formal reply for this requested discovery. Each business day prior to the trial for a week, the defense counsel went to

¹ The State did supply a witness list. That list identified the States star witness as living in White Sulphur Springs when she testified she lived in Beckley.

the office of the prosecuting attorney to discuss the case. A possible plea bargain was considered and ultimately rejected. At no time, did the prosecuting attorney make any request for discovery or complain that there had been any failure to comply with any discovery. Defense counsel was not attempting to gain any tactical advantage by failing to respond. At all times defendant's counsel believed his witness would be used to impeach the State's witnesses. In fact, he thought the prosecutor had been provided with copies of the subpoenas. Defense counsel had indicated to the State that he was going to assert the defense that the Defendant did not know that the alleged victim was underage. The State also indicated it would comply with the discovery but never did comply with the discovery requested on her driving record.

In the discovery provided by the State, there was a 10 page statement taken by the police shortly after the events in which the alleged victim said that she had told the Defendant, he "was too old for her." No mention was made that she had told him her actual age.

Approximately, one week prior to the trial, a new prosecuting attorney was substituted in as counsel of record, Steve Dolly. On the morning of the trial, the newly substituted prosecuting attorney, Steve Dolly, met for the first time with the alleged infant victim. There he learned, if not procured, an oral statement from the alleged victim, that she had told the Defendant, prior to their having sexual intercourse, that she was only thirteen. This statement was completely contrary to a 10 page written statement that the victim had provided to the police at the time of the alleged offense.

The State did not reveal, prior to the trial and the empaneling of a jury, that the complaining witness or victim had, in fact, changed her statement and would be offering direct evidence in contradiction to what was anticipated to be the direct testimony of the defendant to be offered in his case in chief. The State took the position this added statement was not exculpatory

and did not have to be revealed as it was attorney's work product. Nor did the State reveal that the State also had the information regarding her driving. Nor did the State correct the address on the discovery.

After the jury was empaneled, but before the swearing in of the witnesses, a bench conference took place, in which the defense counsel, Paul S. Detch, indicated at that time he did not know what witnesses he would be needing. He had five witnesses waiting, all of whom were disclosed during voir dire; that the witnesses would be used to impeach the testimony of the complaining witness, if need be. Until the alleged victim testified, however, he would not know what portions of her testimony would be impeachable and which would not. None of the witnesses would be needed if the State's witness acknowledged what she had told those witnesses about her age and what she had told the defendant and her driving at times surrounding the alleged act.

The Court proceeded to swear in the jury and the witnesses and the trial began.

With the opening statement, the prosecuting attorney revealed for the first time that he believed that the complaining witness would alter her previous testimony and offer more damaging testimony. i.e. she would testify that she had told the defendant she was only thirteen years of age, prior to the act. Presumably, this information came to light to the State from his first meeting with the alleged victim the morning of the trial.² (T.R. January 11, 2007 P.19-21).

The defense counsel having anticipated that the State would coach their witness to fill in

² Stephen Dolly: "I think anything that I learned yesterday morning the first time I had any opportunity to talk to Kelsey McCoy, any information that I learned from her then, I don't think—unless it was exculpatory, I don't think I'm required to provide that to Mr. Detch. And the fact that she told me yesterday morning that she had specifically told the Defendant her age, although it is not included in the recorded statement that she gave, I don't think that there is anything in discovery that requires me to supply that to Mr. Detch at any time."

the missing blank, was prepared with five impeachment witnesses. The defense did not ask for a continuance following the opening statement in the belief that he would be able to offer impeachment evidence of the testimony by the alleged victim. Prior to this trial, counsel for the State and the defense did not have to reveal impeachment witnesses on discovery. This was the accepted practice. Only evidence for the case in chief was required.

The Defendant felt confident that an acquittal was likely after the alleged victim acknowledged that she had been driving her mother's automobile to places like Covington, Virginia, and Lewisburg, West Virginia and that she had even driven a truck illegally by herself on three occasions. The Defendant felt even more confident of an acquittal when the alleged victim testified she did not want the Defendant prosecuted; that he had done nothing wrong and hoped nothing bad would happen to him and she admitted that she had never included in the statement to the police that she was thirteen. She also added: (just as the prosecutor had prophesied) that she had told the Defendant she was thirteen. The new statement the defense was prepared to impeach.

On the second day of the trial, the Court met out of the presence of the jury, to determine whether the defense impeachment witnesses would be permitted to testify. In a discussion between the defense counsel and the Court, it was revealed that Steve Dolly, the prosecuting attorney, had not met with the complaining witness until the morning of the trial and had no written statement from her. (T.R. January 11, 2007 P. 21). Steve Dolly, the prosecuting attorney, had not revealed until his opening statement that he anticipated that the infant child would be altering her testimony to provide key rebuttal evidence to the defendant's case in chief. Prosecutor Steve Dolly admitted he did not have their statement until he had met with the victim on the morning of the trial.

The defense had indicated that any failure to comply with the discovery on his part was inadvertent and was not intended to be tactical. However, the Defendant further raised the issue that the State had not complied by providing the discovery information the defendant had sought, which would then permit "reciprocal discovery." Mr. Dolly indicated, then on the record for the first time, the State did have information involving the driving history of the alleged infant³ and had not complied with that request and the record shows the State failed to provide the current addresses of the witnesses as required by the Rules of Discovery. This was in addition to the fact the challenged witnesses were impeachment witnesses, which defense contends did not have to be disclosed on reciprocal discovery.

Even though it was the State, who was attempting to "sandbag" the defense with the new statement by the victim and change of testimony of the complaining witness, the Court accused the Defendant's counsel of attempting to "sandbag the State." The Court became frustrated when it was clear that it was the State who was attempting to ambush the Defendant with a new and undisclosed State witness, and the Defendant had come prepared with five rebuttal impeachment witnesses to rebut the State's witness⁴ new testimony. The Defendant asserted that he had no duty to provide reciprocal discovery for rebuttal or impeachment testimony. The rules of discovery only allow the State to discover witnesses for the Defendant's case in chief and that rebutting the State's witness on the victim's new and previously undisclosed statement was not

³ Stephen Dolly: "the only information I was able to learn until yesterday when I talked to Kelsey, herself, was that she had been driving. She had taken her mother's car. But the information that I had and which was hearsay, rumor, obtained from some of the police officers was that, that had occurred after the events that are the subject of this trial. It was only when I talked to Kelsey yesterday morning that she said yes, she had been driving before, too." Trial Record January 11, 2007, P. 19-20.

⁴(T.R. January 11, P.25).

case in chief, but rebuttal and impeachment.⁵

The Court Order reads in pertinent part as follows:

“Whereupon the State moved to suppress Defendant’s witnesses based on Defendant’s failure to disclose them pursuant to discovery requirements. The Court heard argument on the State’s motion out of the presence of the jury. The Court found that defense counsel’s failure to respond to the State’s request for discovery and to properly prepare for trial amounted to ineffective assistance of counsel and that the Defendant’s right to a fair trial had been materially prejudiced as a result. Based upon the Court’s finding that the Defendant had been deprived of effective assistance of counsel, the Court declared a mistrial and dismissed the jury.

ACCORDINGLY, the Court hereby further **ORDERS** as follows:

1. A mistrial is declared in this case;
2. Defendant shall continue on bond under the previously ordered terms and conditions pending the rescheduling of this matter for trial;
3. Jury costs are assessed as a judgment against counsel for Defendant, Paul S. Detch; and”

The Court committed the error to which this writ first addresses:

The Court ordered a mistrial over the objection of the defendant. The Court failed to follow any of the rules for granting a mistrial, (i.e. setting out the manifest necessity of declaring a mistrial as set out in Rule 26.3 of the Rules of Criminal Procedure.

The jury was thereupon dismissed to which action Defendant took exception.

Thereupon, the Court set the matter for the next term of Court when a new jury panel would be available and scheduled this matter to be tried a second time, all of which defendant contends is in violation of the Double Jeopardy Rights of the defendant. The defendant files this petition for relief.

⁵(The order is dated January 10, 2007 but was not filed until February 13, 2007). See Exhibit B.

3. **ASSIGNMENT OF ERROR RELIED UPON BY APPEAL AND THE MATTER IN WHICH THEY WERE DECIDED IN THE LOWER COURT**

A. The trial court erred when it dismissed a jury trial in progress without manifest necessity after jeopardy had attached in violation of Rule 26.3 of the West Virginia Rules of Criminal Procedure and ordering a new trial and in violation of the United States Constitution, Amendment V.

B. The Court erred in ordering the defense counsel to pay the costs of the proceedings when his only error was his failure to disclose the names of rebuttal or impeachment witnesses, who he would be using to impeach the testimony of the State's leading witness on a statement that was not disclosed until the State's opening statement.

4. **POINTS AND AUTHORITIES RELIED UPON, DISCUSSION OF LAW AND THE RELIEF PRAYED FOR:**

A. Amendment Five of the Constitution of the United States reads as follows: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Rule 26.3 of the West Virginia Rules of Criminal Procedure reads as follows:

"Before ordering a mistrial, the court shall provide an opportunity for the state and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives."

Jeopardy is generally assumed to attach whenever a jury is empaneled and testimony has begun in a Court having proper jurisdiction. Once a trial has begun, there are only a limited number of situations for a judge to declare a mistrial. The Court may declare a mistrial where there is "manifest necessity." See State v. Mills (2005) 631 S.E. 2d 586. In the case at hand, the Court did not even attempt to elicit from counsel from either side, how the alleged error, if one existed, could be corrected.

The Court also is duty bound to determine whether the failure to provide the names of

impeachment witnesses to the prosecution was done to obtain a tactical advantage or was done inadvertently. In this case, it would have been revealed that it was inadvertently done. The defense counsel had gone each day to the State to determine whether there were any problems. The defense had revealed his defense and believed the State had copies of the subpoenas for the witnesses. The State had made no inquiry throughout the entire time as to what witnesses the defense might present or that there was any problem.

At the very least, the Court should have determined what it could have done to correct the problem. The prosecutor could have been afforded the opportunity to interview the incoming witness. They were available for interview. The prosecution could have even been afforded some type of continuance or recess in order to prepare, if need be. If the shoe had been on the other foot, this is all the defense would have been allowed, if that.

The Court, however, did not do any of the foregoing. The Court summarily declared a mistrial. Claiming the defense counsel was not prepared even though he had five witnesses to rebut a statement that the State had not even disclosed until his opening statement.

It is a Constitutional Right of the Defendant, afforded under Fifth Amendment to the United States Constitution: a Defendant may not be twice placed in jeopardy.

The failure of the Court to make a special finding of "manifest necessity," after jeopardy attached and particularly, where no manifest necessity existed; constitutes an absolute and total bar from any further prosecution under the indictment attached: A Writ should issue against the said Judge James Rowe barring him and the State from retrying the case on the charges set out in the indictment attached.

B. Can sanctions be imposed because the defense counsel did not reveal in reciprocal discovery impeachment witnesses to be used to impeach the State's witness?

This issue needs to be addressed now, for if the above Writ issues protecting the double jeopardy rights of the Defendant, there will be no appealable issue dealing with the alleged sanctions imposed upon the defendant and his counsel. For that reason, the issue should be addressed at this time.⁶

The Rules of Discovery covered under West Virginia Rules of Criminal Procedure Rule 16 provide that the defendant on reciprocal discovery is only required to disclose his witnesses for the case in chief. No mention is made as to rebuttal or impeachment witnesses.

It has been long standing practice used by the prosecution, that impeachment witnesses would not be disclosed. The State has used this tactic in many trials. The Court has routinely maintained the position that impeachment witnesses are not discoverable. As a matter of fact, practically, neither side may know what impeachment is required until after cross examination.

For the first time, the Honorable Judge James Rowe decided that disclosure of impeachment witnesses is mandated, even before the State disclosed the statement for which the witness were called to impeach.

Even assuming *arguendo*, that the witnesses should have been disclosed, the Court had a duty to investigate as to whether this was done intentionally or to obtain some tactical advantage. In case at hand, it was done by inadvertence, if disclosure was required at all. The witnesses had been subpoenaed and the defense counsel had believed that the request for the subpoenas had been delivered to the prosecuting attorney's office, which it had not. The prosecuting attorney and defense counsel had met almost on a daily basis and no mention had been made as to the fact that the State felt in any way handicapped about the discovery requested. Nothing was mentioned at any of the so called discovery conferences before trial. The State made no proffer as to why

⁶The bill for the trial is attached as Exhibit C in the amount of \$2,118.98.

the State was prejudiced, or that if the reciprocal discovery was provided what they would have done had they had the witness list. Impeaching impeachment witnesses is problematic at best.

The witnesses were to be used for impeachment purposes. Had the State's alleged victim been consistent with the statements she had given the anticipated witnesses, there would have been no need to use the witnesses at all. In fact, two of the witnesses who had seen the alleged juvenile victim driving her automobile and otherwise representing that she was of legal age to drive were not planning to be used and were, in fact, released at the end of the first day of the trial by the defendant.

The Court, to impose sanctions upon defense counsel and order that he pay the costs of the trial when, in fact, he has done nothing wrong conveys a chilling affect to all defense counsel, who are simply attempting to represent their clients. To impose costs on a defendant when there has been no error made by the defense counsel, is a harsh and unreasonable rule, which constitutes an abuse of discretion by the Court and is a violation of the right to counsel.

The Court was not being evenhanded. The rebuttal witnesses were there in anticipation that the prosecuting attorney would coach the alleged victim to alter her written statement. Three witnesses were prepared to impeach the undisclosed statement. The prosecuting attorney did not reveal that the original statement offered in discovery had been altered on the day of trial. Only on his opening statement, did the State's prosecutor reveal that he had any evidence to rebut the defendant's case in chief. Yet it was the defense, who was accused of "sandbagging" the State by the Court.

To allow the Court to impose sanctions against a defense counsel, who was correct in his actions, is manifestly wrong and is an abuse of discretion. However, if the defense counsel is wrong as to his interpretation of the rules, imposing sanctions over a disagreement on an

evidentiary ruling is also an abuse of discretion. Lawyers should have some right to disagree with the judge without bearing the risk of the sanctions of paying for the trial and the jury costs. At worst, this was a correctable error. To impose sanctions when the State had a full day to interview the impeachment witnesses is an abuse of discretion.

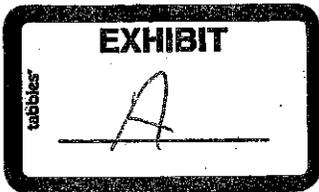
RELIEF PRAYER FOR:

Your petitioner prays that a writ issue against the Honorable James Rowe requiring that he show cause as to why a writ of prohibition should not be entered against him barring him from trying Terron Godfrey on the attached indictment on the basis of a violation for double jeopardy. Your petitioner further requests that the sanctions imposed against defense counsel by the court be overturned and held for naught and that the costs of the trial be assessed to the State.



PAUL S. DETCH
201 N. COURT STREET
LEWISBURG, W.VA. 24901
W.VA. BAR NO. 1002

TERRON GODFREY
By Counsel



INDICTMENT (FELONY)

STATE OF WEST VIRGINIA,

Plaintiff,

vs.

Criminal Action No. 06-F-101
(J)

TERRON GODFREY,

Defendant.

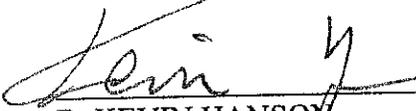
STATE OF WEST VIRGINIA,
COUNTY OF GREENBRIER, TO-WIT:

Count 1

SEXUAL ASSAULT - THIRD DEGREE

The grand jurors of the State of West Virginia, in and for the body of the county of Greenbrier, upon their oaths present that TERRON GODFREY, in or about June 11, 2006, in the said county of Greenbrier, feloniously, unlawfully and intentionally, committed the offense of sexual assault in the third degree by engaging in sexual intercourse with a female child who was less than sixteen (16) years of age when he was an adult who was older than sixteen (16) years of age, and the child was at least four (4) years younger than him and was not married to TERRON GODFREY. More specifically, in or about June 11, 2006, TERRON GODFREY, who was then twenty (20) years of age, engaged in sexual intercourse, by penetrating the vagina of a female child, known as K.M., with his penis. The child, K.M. was then thirteen (13) years of age and was not married to TERRON GODFREY. Such act was against the peace and dignity of the State of West Virginia and is a violation of West Virginia Code § 61-8B-5.

Found upon the testimony of Cpl. William Nestor of the White Sulphur Springs Police Department, who was brought before the Grand Jury and was duly sworn in open court to testify truthfully, this 3rd day of October 2006.



R. KEVIN HANSON
Greenbrier County Prosecuting Attorney



IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

vs.

Criminal Action No. 06-F-101(R)

TERRON GODFREY,

Defendant.

ORDER

The State of West Virginia (the "State"), by its counsel, Stephen R. Dolly, assistant prosecuting attorney of Greenbrier County, and the defendant Terron Godfrey (the "Defendant"), in person and by his retained counsel, Paul S. Detch, appeared before this Court on January 10, 2007, for the trial of the above-captioned case.

A jury of twelve persons were duly selected, empaneled and sworn and consisted of the following members: Jackie Lee Grubb, Jeffrey M. Owens, Rita Gaye Tincher, Cynthia Ann Sykes, William R. Morrison, Roger Michael Smith, Jr., Debbie A. Beard, Brenda Carroll Johnson, Benjamin R. Tuckwiller, Melanie Ruth Ford, Phyllis A. Martin, and Katherine C. Walker.

The State called as witnesses: Chief James Hylton of the White Sulphur Police Department, Alex Lombardini, and Kelsey McCoy, and rested.

Whereupon the State moved to suppress Defendant's witnesses based on Defendant's failure to disclose them pursuant to discovery requirements. The Court heard argument on the State's motion out of the presence of the jury. The Court found that defense counsel's failure to respond to the State's request for discovery and to properly prepare for trial amounted to ineffective assistance of counsel and that the Defendant's right to a fair trial had been materially prejudiced as

a result. Based upon the Court's finding that the Defendant had been deprived of effective assistance of counsel, the Court declared a mistrial and dismissed the jury.

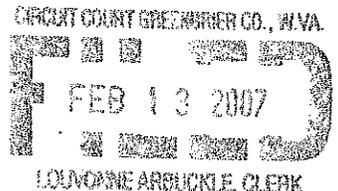
ACCORDINGLY, the Court hereby further **ORDERS** as follows:

1. A mistrial is declared in this case;
2. Defendant shall continue on bond under the previously ordered terms and conditions pending the rescheduling of this matter for trial;
3. Jury costs are assessed as a judgement against counsel for Defendant, Paul S. Detch; and
4. The Clerk of this Court shall forward a copy of this order to Paul S. Detch, counsel of record for Defendant, and to Stephen R. Dolly, assistant prosecuting attorney of Greenbrier County.

Entered this 10th day of January 2007.



JAMES J. ROWE
Circuit Court Judge
Eleventh Judicial Circuit



A True Copy:
ATTEST:



Clerk, Circuit Court
Greenbrier County, WV

By _____
Deputy



IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA
JURY COSTS FOR:

STATE OF WEST VIRGINIA
VS.
TERRON GODFREY

06-F-101
(R)

OCTOBER TERM, 2006, PETIT JURORS - PANEL B
TRIAL DATE(S): 1/10 TO 1/11/07

JUROR NAME	DAYS ATTEND	DUE ATTEND	MILES	MILEAGE DUE	TOTAL DUE
Gary L. Arbaugh	1	\$40.00	2	\$.97	\$40.97
Susan B. Ayres	1	\$40.00	20	\$ 9.70	\$49.70
Debbie A. Beard	2	\$80.00	28	\$13.58	\$93.58
Jerry Brackenrich	1	\$40.00	50	\$24.25	\$64.25
Nancy Y. Coleman	1	\$40.00	2	\$.97	\$40.97
Timothy G. Dalton	1	\$40.00	60	\$29.10	\$69.10
Deirdre D. Ford	1	\$40.00	12	\$ 5.82	\$45.82
Melanie R. Ford	2	\$80.00	60	\$29.10	\$109.10
Alan Freeman	1	\$40.00	30	\$14.55	\$54.55
Jackie L. Grubb	2	\$80.00	124	\$60.14	\$140.14
Kevin W. Gum	1	\$40.00	25	\$12.13	\$52.13
Mark A. Hinkle	1	\$40.00	8	\$ 3.88	\$43.88
Brenda C. Johnson	2	\$80.00	96	\$46.56	\$126.56
Carl D. Loudermilk	1	\$40.00	30	\$14.55	\$54.55
Phyllis A. Martin	2	\$80.00	42	\$20.38	\$100.38
Natalie M. Morgan	1	\$40.00	14	\$ 6.79	\$46.79
William R. Morrison	2	\$80.00	16	\$ 7.76	\$87.76
Nancy J. Osborne	1	\$40.00	70	\$33.95	\$73.95
Jeffrey M. Owens	2	\$80.00	16	\$ 7.76	\$87.76
Mary L. Presock	1	\$40.00	36	\$17.46	\$57.46
Mark W. Pusey	1	\$40.00	40	\$19.40	\$59.40
Roger M. Smith, Jr.	2	\$80.00	20	\$ 9.70	\$89.70
Cynthia A. Sykes	2	\$80.00	70	\$33.96	\$113.96
Rita G. Tincher	2	\$80.00	120	\$58.20	\$138.20
Benjamin R. Tuckwiller	2	\$80.00	16	\$ 7.76	\$87.76
Katherine C. Walker	2	\$80.00	12	\$ 5.82	\$85.82
Lonnie L. White	1	\$40.00	18	\$ 8.73	\$48.73
Joyce L. Workman	1	\$40.00	33	\$16.01	\$56.01
TOTAL		\$1600.00		\$518.98	\$2,118.98