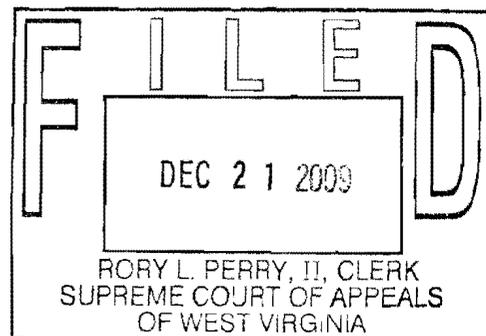


No. 35273

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

Charleston

APPELLANT'S APPEAL



State of West Virginia, Plaintiff Below, Appellee

v.

Christopher Shane Dellinger, Defendant Below, Appellant

**Appeal Granted on October 8, 2009 from Judgment of January 26, 2009
From the Circuit Court of Braxton County**

Justices:

**Hon. Brent D. Benjamin, Chief Justice
Hon. Robin Jean Davis
Hon. Margaret L. Workman
Hon. Menis E. Ketchum
Hon. Thomas E. McHugh**

Rory L. Perry, II, Clerk

**Presented by:
Barbara Harmon-Schamberger, Esq.
WVSNB 7296
P.O. Box 456
Clay, WV 25043
304. 587. 6026**

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Abbreviations and notes:

RV2TT = The Record, Volume 2, Trial Transcript, from trial of 12-14 February 2008;

P. or PP.= Page or Pages;

EHT= The Record, Volume 1, Evidentiary Hearing Transcript from 11 June 2008

Memorandum of Defendant= The Record, Volume 1, Page 370, et seq., Defendant’s Post-Trial Memorandum in Support of Motion for New Trial Based Upon Juror Misconduct.

**APPEAL AND MEMORANDUM OF LAW IN SUPPORT OF
FOR APPEAL OF CHRISTOPHER SHANE DELLINGER**

COMES NOW Christopher Shane Dellinger, Defendant, by and through his counsel, Barbara Harmon-Schamberger, Esq. with his Appeal to this Honorable Court appealing his convictions on three counts of Falsifying Accounts, all felonies and one count of Obtaining Money, Goods, Services or Property by Fraudulent Pretense Using a Common Scheme, a felony and says as follows in support thereof:

I. KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

This Appeal comes before this Honorable Court from a jury verdict entered the 14th day of February 2008, a final amended sentencing order entered the 24th day of January 2009 and from relief from the Orders of the Circuit Court of Braxton County denying Petitioner post conviction relief in his motions to set aside the verdict based upon juror misconduct, state's misuse of subpoena power¹ and statements made by the prosecution commenting on Petitioner's failure to provide a statement to investigating officers in violation of Petitioner's 5th Amendment Right to Remain Silent, and the Court's failure to grant judgment of acquittal. Your Petitioner now seeks an appeal to this Honorable Court of his case, a reversal of his convictions, vacation of the sentences imposed, a new trial and such further and other relief as this Court may deem appropriate based upon juror misconduct, juror bias, insufficiency of the evidence, and ineffective assistance of counsel.

II. STATEMENT OF FACTS:

Christopher Shane Dellinger (hereinafter "Appellant", "Defendant", "Shane Dellinger" and "Deputy Dellinger"), for 13 years, was a certified law enforcement officer and paramedic. Officer and EMT Dellinger received extensive awards for his service to the State of West Virginia and his community. In his capacity as a Braxton County Deputy Sheriff, Deputy Dellinger, applied for numerous grants to support and enhance the operations of the Braxton

¹ The State issued subpoenas returnable not to a case or grand jury but rather to the *prosecutor*. This Court, in its ruling in Gazette v. Stucky, rendered moot Petitioner's arguments as to the substance of the information obtained by the use of the illegal subpoenas; the information obtained through the State's use of illegal subpoenas was FOIAble. Nonetheless, Petitioner opines that although FOIAble, the Petitioner was entitled to notice and due process of law to show why his personnel record should have been redacted before being delivered to the State.

County Sheriff's Department. Alleged abuse of three of these successful grant applications, the trial resulting therefrom, conviction and denial of Petitioner's motions for post verdict relief are the subjects of Petitioner's appeal.

On the 3rd day of February 2005, the 25th day of May 2005 and the 13th day of October 2005 the Braxton County Sheriff's Department and Braxton County Commission entered into Grant Agreements with the Governor's Commission on Drunk Driving Prevention whereby Braxton County would be reimbursed, up to \$8,000.00 (eight thousand dollars) per Grant Agreement (hereinafter the "Grant Agreement" "Grant" or collectively the "Grant Agreements" or "Grants") for road patrols and other activities related to prevention of drunken driving. The Record, Vol. 2 Trial Transcript (hereinafter "RV2TT") at PP. 98 & 99. Said Grant Agreements were to be completed during certain calendar periods, specifically: under Grant Agreement One, from the 11th day of February 2005 until the 11th day of May 2005; under Grant Agreement Two from the 1st day of July 2005 until the 30th day of September 2005; and, finally, under Grant Agreement Three, from the 28th day of October 2005 until the 27th day of January 2006. During those periods of time Deputy Dellinger was responsible for the collection of data related to the implementation of the Grant Agreements. Specifically, each Grant Agreement provided:

"The Grantee shall do, perform and carry out in a satisfactory manner, as determined by the Commission all duties, tasks and functions necessary to implement the grant application which is attached hereto and made a part hereof . . ." See Attachment C Grant Agreement 2005 Exemplar, Paragraph 1.

Although the subject of much discussion and parol evidence during the trial,² neither the Grant Application written by Defendant Dellinger, nor any of the Grant Agreements to which the State was a party, disallowed billing for administrative services. The allegation that time billed to the Grants for administrative services was a violation of the terms of the Grants was a significant issue used by the State as evidence of Defendant Dellinger's intent to commit the crimes with which Defendant Dellinger was charged. This position the State took, despite there being no prohibition on such billing in either the Grant Agreement or Applications.

² RV2 TT at pages: State's Witness Lt. Chuck Zerckle: 98 lines 6-20; 99 lines 1-4; 105, lines 4-7; State's Witness W.Va. State Trooper (formerly Braxton Co. Dept.) Phil Huff, P. 249 lines 9-11; State's Witness W.Va. State Trooper (now, again, Braxton County Deputy) Travis Flint, P. 279 lines 4-7; State's Witness, Deputy Ronnie Clay, successor to Shane Delinger as Grant Administrator , PP 285 lines 17-19, 286 lines 1-25, 287 lines 2, 5, 11-25 (including questions).

Deputy Dellinger's grant writing skills eventually became a necessary part of the Braxton County Sheriff's Department Budget, and retention efforts providing funds for overtime and enhancement of the paychecks of the Department's deputies. RV2TT at P. 218 Line 18; P. 223 lines 20-24. Indeed, when Deputy Dellinger expressed a desire to discontinue several grants, he was lobbied by the Deputies not to do so. RV2TT at P. 272 lines 11-25. Two deputies had already attempted to leave the Sheriff's Dept. and enter the West Virginia State Police Academy but were denied or failed to complete the trooper course. RV2TT at P. 257 lines 20-25. (Those two deputies, after providing evidence, against Shane Dellinger, to West Virginia State Police Sergeants Trader and Bonazzo, were subsequently admitted to the West Virginia State Police Academy. One of those deputies, again was unable to complete the Academy Course and is now back with the Braxton Co. Sheriff's Dept.)

Thereafter it was rumored that a reduction in force was coming. Coincidentally and simultaneously, Shane Dellinger was reported by Sgt. John Bonazzo of the West Virginia Department of Public Safety (hereinafter the "West Virginia State Police" or "State Police"), Sutton Detachment, to the West Virginia State Police, not to have worked all the hours for which Deputy Dellinger was paid out of the Governor's Drunk Driving Prevention Grant. RV2TT at P. 249 Line 2; P. 252 lines 10-17. An investigation commenced with the cooperation of the Braxton County Prosecuting Attorney's Office.

The direction of the limited investigation by the Braxton County Prosecuting Attorney's Office (hereinafter the "Braxton County Prosecuting Attorney's Office" or "BCPAO") is significant because the BCPAO issued administrative subpoenas returnable to the BCPAO for the collection of evidence used by the West Virginia State Police in the State Police's investigation and indictment of Deputy Dellinger. Those subpoenas were subsequently found by the trial court to have been illegally issued because a subpoena must be returnable to either a Court or a Grand Jury. Code of West Virginia, §57-5-1 and §62-6-4. There is no provision in the Code of West Virginia, 1931 as amended, The Rules of Criminal Procedure, Rules for Trial Courts of Record or the West Virginia Constitution permitting the return of a subpoena to a prosecuting attorney. One presumes, from this limitation, that the Founders and subsequent Legislatures desired to elevate the importance of due process of law over the unregulated power of the state and prevent the accumulation of evidence against citizens without the protections of either the judicial process or the oversight of the grand jury.

During the trial, once the Defendant learned of the existence of the administrative subpoenas from the testimony of a State witness, the Defendant again reviewed the file, spoke to the prosecution, finally learned of the location of the subpoenas and objected to the use of the information collected by the administrative subpoenas. RV2TT at P.347. The trial court ruled in a conference in chambers that, although the Defendant had no prior knowledge of the existence of the administrative subpoenas, because Defendant had *cross examined* the State's witnesses based upon the witnesses' testimony that used the information illegally obtained, Defendant had waived his objection to the use of the information. Moreover, trial counsel Mr. Clifford, as an extremely experienced trial attorney, knew or should have known how the State had obtained its evidence. Included in the information illegally obtained and used against Defendant when he took the stand in the trial was Defendant's personnel record which had been turned over to the State by the Sheriff's Department without a subpoena, without notice to the Defendant and without said personnel record being provided by the State in its Discovery. RV2TT at PP. 455-458.

The trial began on the 12th day of February 2008 with co-counsel, Mike Clifford, and Defendant conducting voir dire (Appellate counsel herein, that morning, was before the Supreme Court of Appeals of West Virginia arguing a civil matter). The Court asked all of the jurors if "any of [them] have a business or social relationship with Christopher Shane Delinger?" RV2TT at P. 26 line 19 & 20. In response thereto, venire persons made the following disclosures:

JUROR [FRAME]: I'm the manager of Braxton Motor. He deals with us. RV2TT at P. 26 lines 21 & 22.

The trial court then inquired of Juror Frame if this would cause her to have any bias or prejudice for either the state or the defendant, could she follow instructions, listen to testimony, etc., to which the juror replied in the affirmative. The court then inquired if there was "anybody else?" RV2TT at P. 27, line 17. In reply thereto came:

JUROR: Joan Mace. Me and my husband was acquaintances of Shane when he was--- RV2TT at P. 27 lines 18 & 19

THE COURT: A Deputy? RV2TT at P. 27, line 20

The court then inquired of Juror Mace if this would cause her to have any bias or prejudice for either the state or the defendant, could she follow instructions, listen to testimony, etc., to which the juror replied in the affirmative. The court then inquired if there was "anybody else?" RV2TT at P. 29 line 13. In reply thereto came:

JUROR: I am Tom Simmons. I worked with Deputy Dellinger through the fire department, also on car wrecks and things like that. RV2TT at P. 29 lines 14-16.

The court then inquired of the juror if this would cause him to have any bias or prejudice for either the state or the defendant, could he follow instructions, listen to testimony, etc., to which the juror replied in the affirmative. The court then inquired if there was "anybody else?" RV2TT at P. 30 line 18. No further response from the jurors was had. RV2TT at P. 30 line 19.

The Court then inquired as to whether any juror had any personal knowledge of the case, and again no response was had. RV2TT at P 30 lines 20-22. The trial court then asked about media knowledge: "Have any of you read anything in the newspaper, heard anything on the radio or TV about this case, or looked at anything on any internet site as such?. . .Okay, so nobody has?" RV2TT at P. 30 lines 23-25 & P. 31 lines 1-3. In reply to this further inquiry came:

JUROR: Your Honor, I've seen something on this case on T.V. RV2TT at P. 31 line 4.

The court then inquired of the juror if this would cause him to have any bias or prejudice for either the state or the defendant, could he follow instructions, listen to testimony, etc., to which the juror replied in the affirmative. etc. RV2TT at P. 31 lines 5-22. The Court then inquired if there was "anybody else?" RV2TT at P. 31 line 23. In reply thereto came:

JUROR: John Schiefer. I think that I recall reading something in the newspaper, perhaps at the time it occurred. RV2TT at P. 30 lines 24-25.

The court then inquired of the juror if this would cause him to have any bias or prejudice for either the state or the defendant, could he follow instructions, listen to testimony, etc., to which the juror replied in the affirmative. The court then inquired if there was "anybody else?" RV2TT at P. 32 line 18. Juror Frame was then acknowledged by the court.

JUROR: Your Honor, I remember reading about it in the Lewis County paper. RV2TT at P. 32 lines 19 & 20.

The court then inquired of the juror if this would cause him to have any bias or prejudice for either the state or the defendant, could he follow instructions, listen to testimony, be impartial etc., to which the juror replied in the affirmative. The Court then inquired if there was “anybody else” to which no response was had. RV2TT at P. 33.

The Court then inquired of venire persons various other voir dire questions before asking:

THE COURT: Okay. And are any of you, or your immediate family members, employees of any law enforcement agency? And when I say law enforcement agency, I mean anybody in the state police, West Virginia Department of Public Safety, the Department of Natural Resources, any deputy sheriff or any sheriff of any county, Central Regional Jail, a federal correctional facility, any regional jail, any law enforcement capacity, any municipal police officer? Okay.

JUROR: Pamela Bender. I was a previous employee of the Central Regional Jail. My husband is at the Federal Prison. RV2TT, P. 34, lines 5-15.

The court then inquired of Juror Bender the name of her husband, (inaudible) Bender. The court then inquired of the juror if this would cause her to have any bias or prejudice for either the state or the defendant, could she follow instructions, listen to testimony, etc., to which the juror replied in the affirmative. RV2TT at P. 34 16-25 and P. 35 lines 1-12. The Court then inquired if there were “anybody else” to which no response was had. RV2TT at P. 35 line 13.

The court then inquired about whether any juror had a relationship with any of the State or defense counsel, to which no response was made. The court then moved on to relationships with any of the witnesses to be called by either the State or the Defense,

THE COURT: And are any of you related by blood or connected by marriage to or have any business or social relationship with any of these witnesses?

JUROR: Yes, Your Honor. Patricia Moss. Terry Frame [a Braxton County Commissioner] and I still—(inaudible).

THE COURT: Okay.

JUROR: ---(inaudible) together previously, not now but previously.

THE COURT: Okay. You're not working with Ms. Frame now?

JUROR: No, Sir.

THE COURT: Okay, and the fact that you—when did that relationship cease approximately?

JUROR: Approximately October.

THE COURT: So it's been several months?

JUROR: Yes, sir. RV2TT at PP. 37 lines 22-25 and 38 lines 1-9.

The court then inquired of the juror if this would cause her to have any bias or prejudice for either the state or the defendant, could she follow instructions, listen to testimony, could she be impartial etc., to which the juror replied in the affirmative. The Court then inquired if there was "anybody else"? RV2TT at P. 39, line 25. To which again came a response from Juror Bender:

JUROR: Pamela Bender. I know [Deputy] Clay, [Trooper] Jordan and [DPS Sgt.] Bonazzo.

THE COURT: Okay. And the fact that you know Sergeant Bonazzo, you know Deputy Jordan who is now Trooper Jordan, and you know Deputy Clay, do you visit in any of their homes?

JUROR: No.

THE COURT: Do they visit in your home?

JUROR: Not them in particular, but wives.

THE COURT: Okay, and so you're more friends with the wives than you are them?

JUROR: Yes.

THE COURT: Okay. And would you characterize the relationship that you have with each of these officers as a close, personal friend relationship, or is it just a friend relation?

JUROR: Just friends. RV2TT at P. 40 lines 1-5.

The court then inquired of the juror if this would cause her to have any bias or prejudice for either the state or the defendant, could she follow instructions, listen to testimony, be impartial etc., to which the juror replied in the affirmative.

Sua sponte, Tom Simmons, juror, disclosed that he knew “Brenda Slaughter [Braxton County 9-1-1 Director] and all the deputies and the sheriff.” RV2TT at P. 42 lines 3-4. The Court then made inquiry of the juror.

THE COURT: Okay. Now when you say that you know all the deputies and you know the sheriff and you know Ms. Slaughter, would you characterize any of those relationships as a close personal friendship?

JUROR: Just one; Brenda Slaughter.

THE COURT: Okay. And the others, you just know them when you see them?

JUROR: Yes. RV2TT at P. 42 lines 5-12.

The Court then inquired of the juror where he saw these witnesses, visits between the juror and witnesses etc. Juror Simmons disclosed that he was the Chief of the Gassaway Fire Department (RV2TT P. 43 line 13) and that Brenda Slaughter’s husband, Fred, was the juror’s “assistant chief at the [Gassaway] firehouse.” RV2TT at P. 43 lines 7 & 8. The court then inquired of the juror if this would cause him to have any bias or prejudice for either the state or the defendant, could he follow instructions, listen to testimony, be impartial etc., to which the juror replied in the affirmative. The trial court then asked, “any body else?” RV2TT at P. 45 line 3. In response thereto, Joan Mace again drew the court’s attention.

JUROR: Joan Mace. . . I know Deputy Jordan. RV2TT at P. 45, lines 4-7.

THE COURT: [N]ow Trooper Jordan, do you go on vacations with him or attend church with him?

JUROR: Well occasionally when we’re camping in Kanawha Run they’re usually there too and we—you know.

THE COURT: You meet up?

JUROR: Yeah.

The court made further inquiry about the relationship. The court then inquired of the juror if this would cause her to have any bias or prejudice for either the state or the defendant, could she follow instructions, listen to testimony, be impartial etc., to which the juror replied in the affirmative. The Court then inquired if there were “anybody else”? To which Juror Frame brought to the Court’s attention that he knew former Deputy Wes Frame. The court then inquired

of the juror if this would cause him to have any bias or prejudice for either the state or the defendant, could he follow instructions, listen to testimony, be impartial etc., to which the juror replied in the affirmative. The Court then asked if there were “anybody else?” RV2TT at P. 49, line 14. At that time Juror Tom Simmons again rose and advised that he knew witnesses “Fred Thompson and Willie Alderman.”

The court then inquired about Juror Simmons relationship with those witnesses and a colloquy was briefly had. The court then inquired of the juror if this would cause him to have any bias or prejudice for either the state or the defendant, could he follow instructions, listen to testimony, be impartial, etc., to which the juror replied in the affirmative. RV2TT at PP. 49 lines 1-25 and 50 lines 1-17. The court then inquired if there were “anybody else?” RV2TT at P. 50, line 18.

At that point, one juror inquired of the court if the court would repeat the question “regarding any association with state law enforcement officers, agencies, DNR--” RV2TT at PP 50, lines 23-25 and 51 line 1. The court did not repeat its question. Instead, the court replied,

THE COURT: “Let me clarify it this way, ladies and gentlemen: I mean, probably everybody on this jury panel, quite frankly, comes in contact or sees most of the law enforcement officer’s in this county at any one time. You may just see them and know who they are. If you just see them and you know them and you know who they are, that is not a situation that’s a problem. What we need to know is this: Do they visit in your home; do you visit in their home; do you go on vacation with them; do you attend church with them; things of that sort. Okay. And the fact that you may know these officers, okay, would it cause you any bias or prejudice for or against the State or for or against the defendant. [sic] Okay. Does that clarify it?”

JUROR: Yes, sir, it does. Thank you. RV2TT, P. 52, lines 2-15

The court then followed up and inquired of the juror if this would cause him to have any bias or prejudice for either the state or the defendant, could the juror follow instructions, listen to testimony, etc., to which the juror replied in the affirmative. RV2TT at P. 51 lines 16-23. The court then asked if there were “anybody else?” to which there was no reply. The total number of times the court asked the jury if they had any relationship, social or business, with any witness or the Defendant was fourteen (14) times before the trial commenced. All total, nine (9) jurors disclosed relationships with either the Defendant or witnesses. The State and the defense both

then argued their strikes for cause, all of which the court denied. RV2TT at P. 57 line 6. The State and the defendant then used their peremptory strikes to remove the jurors who would otherwise have been removed for cause. RV2TT at P. 70. Thereafter, all witnesses of the State and Defense were then sequestered and the trial began.

The State put on ten (10) witnesses. RV2TT at P.3 (list of witnesses and their appearances). Of the State's witnesses *none* could testify that in 2005 they had: (a) personally observed the Defendant not working (only that they had never heard him on the radio); or (b) seen him billing the Grants for the allegedly unworked time. For example, Trooper Travis Flint admitted that he neither knew of any particular date that Deputy Dellinger claimed to have worked and had not nor could Deputy Flint narrow the alleged offenses down to any one year. RV2TT at P. 280 lines 17-21.

The State's first witness was Lieutenant Chuck Zerckle of the West Virginia State Police. RV2TT at P. 90. Although Lt. Zerckle testified that the West Virginia Department of Public Safety (hereinafter the "DPS" or "West Virginia State Police") did not permit billing for administrative time in its Grants (RV2TT at P. 106 lines 4-6), he at no time read, recited or referred to any part of the Grant Agreements containing that prohibition. *See Generally* testimony of Lt. Chuck Zerckle, RV2TT at PP. 90-110. Indeed, the Grants *do not* contain any such explicit prohibition. Lt. Zerckle further testified that under the Grant Agreements, grant recipients were permitted discretion and flexibility in defining reportable achievements that complied with the Grant. RV2TT at P. 92 lines 16-22. Finally, Lt. Zerckle noted that while Shane Delinger was administering the Grants, Braxton County saw a decrease in the number of DUI crashes and incidents. RV2TT at P. 102 9-12. Lt. Zerckle testified that "Braxton County did an admirable job as far as activity and contacts and DUI arrests and checkpoints. They did a good job." RV2TT at P. 102, lines 19-20.

The investigating officer, Sgt. Charles Trader, (Ret.) of the West Virginia State Police, testified next and described, exhaustively, how he had put together arrest records, various reporting forms and the radio log from Braxton County 9-1-1 to determine when Mr. Dellinger had or had not worked, yet had billed for time. *See generally* testimony of Sgt. Trader, RV2TT at PP.110-171 (describing the investigative process he used to draw his conclusions leading to the indictment of Defendant Dellinger). Indeed, Sgt. Trader opined that the best evidence he had was the radio log demonstrating radio silence for the work days of the Defendant which were at issue.

THE STATE: . . . Now the radio log in this case, how would you consider those with your case against the defendant?

SGT. TRADER: Radio logs are crucial. I will say about Braxton County's radio log, at the beginning of the investigation the radio logs were very pitiful”
RV2TT at P. 116 lines 16-18.³

Despite acknowledging the poor quality of the Braxton County Radio Logs, Sgt. Trader used those logs extensively to build his case against Shane Dellinger. Sgt. Trader's rationale was:

“[I]f an officer doesn't have a whole lot of activity that would maybe throw a flag to the radio operation. . . [The radio log's] just got documentation throughout the course of [an officer's] duty tenure or status of his activity that he's working.”
RV2TT at P. 117 lines 2-8⁴

The State and Sgt. Trader repeatedly referenced the radio logs as the basis for establishing at least one third of the liability of any one count charged against the Defendant. The State referred to the radio logs as part of a “triad of documents” RV2TT P. 116 lines 12-16. Sgt. Trader testified, “[y]ou just don't go out and not have any radio traffic; it's unheard of.” RV2TT at P. 126 lines 4-5. Yet, only a few minutes later, Sgt. Trader testified as to the Braxton County radio logs that on the 21st day of April 2005, “[t]he radio log was of no assistant [sic] and there were no citations issued on that date as well.” RV2TT at P. 131 lines 21-22. Thus, if the radio logs turned out to be unreliable then the State's case would have a serious flaw.

In addition to hammering on the radio logs, the State doggedly persisted in developing the issue of administrative billing. This raised two issues. From the State's witnesses' testimony, it was apparent that the Appellant believed that he was allowed to bill administrative time and expenses against the Grants. Second, the manner in which Braxton County calculated its payroll required that officers and all personnel in the county submit their time *in advance, rather than in*

³ Towards the end of the case the radio record keeping substantially improved. “The radio logs, probably, I'd say July they progressively got better. But towards July, August, the radio logs were then real sufficient, really efficient. You could tell they definitely made changes in their 911 system with the documentation of the officers' radio traffic.”RV2 TT at P. 152 lines 6-10.

⁴ The radio logs were referenced numerous times, at least as many as follows: RV2TT at P. 116 lines 16-25; 117 lines 1-19; P. 118 line 18; P. 122 line 22-25; P. 123 lines 16-18; P. 124 line 15; P. 125 lines 10-23; P. 131 lines 21-22; P. 138 line 24; P. 139 line 12; P. 140 line 14; P. 143 line 8; P. 151 line 7; and P. 152 lines 6-10; and 296 lines 22-25.

arrears, so that officers and employees had to speculate as to the actual amount of time they *intended* to work rather than the amount of time they had worked.⁵

As to the allegedly mis-billed administrative time, the State's witnesses repeatedly echoed Deputy Dellinger's understanding of what was permitted under the Grant. Deputy Huff (most of whose testimony was stricken from the record for lack of relevance) stated: "It was my understanding that six hours could be counted a month for administrative purposes, paperwork purposes, if you were the administrator of the grant." RV2TT at P. 249 at lines 9-11. Deputy Flint also understood that the grant administrator could bill for administrative duties associated with the grant. Deputy Flint stated:

Mr. Dellinger contacted me when it was brought up before and stated that that he got administrative pay for times that—to do the paperwork, which I didn't know no different then. You know, he was the man over that and I trusted that." RV2TT at P. 279 lines 4-7.

Deputy Clay stated, "[w]hat Shane had basically explained to me was that he could claim administrative time for working on paperwork for the grant." RV2TT at P. 285 lines 17-19. Subsequently, Deputy Clay took over the administration of the Grant after Shane ceased to administer it. Deputy Clay disclosed further,

"[No one] [n]ever actually told me I couldn't [bill administrative time]; it was just later on after Sheriff Carpenter put me in charge of the grant. . .later on I found out that [Shane] was being investigated for that. So what I did was I quit doing it." RV2TT at P. 286 lines 7-10.

The State rested after the testimony of Teresa "Terry" Frame, President of the Braxton County Commission who testified as to the reimbursement method of payment to the Braxton County Commission from the DPS for the hours worked under the Grant by the Sheriff's Deputies.

The Defense called, as its first witness, Brenda Slaughter, Director of the Braxton County 9-1-1 Dispatching. Ms. Slaughter's testimony went to the heart of the "triad" of the State's evidence: the radio logs. Ms. Slaughter testified that the total 9-1-1 record was made up of several different logs. RV2TT at PP. 323-324. When asked if she ever received requests to

⁵ See testimony of Sheriff Howard Carpenter confirming that deputies submitted their time in advance of hours worked and then made up any time that might have been missed. Make up time would not show on time sheets for purposes of keeping make up time separate from proposed work time. RV2TT at P. 224 lines 7-25, P. 225 line 1; See testimony of Trooper Jordan RV2TT at P. 271 lines 1-5 and 11-13 and P. 288 lines 6-25.

reproduce something for lawyers or officers she opined “Yes.” RV2TT at P. 324, line 10. When asked what was the most accurate way of doing that she replied:

“The most accurate way is if I received the request I’ll first initially go to their dispatch log; most of the time that information’s there, some of the time it is not. But the most accurate log, the log that’s 100 percent, would be the recorder that records all radio traffic and records all phone traffic. . . .” RV2TT at P. 324.

When asked if the law enforcement activity log would contain a complete day to day record of everything that went on in law enforcement Ms. Slaughter replied, “It does not reflect everything,” RV2TT P. 325 line 6. When asked if the log would be enough to establish whether someone worked on a particular day or not, Ms. Slaughter, 9-1-1 Director for Braxton County replied, “That’s not going to be enough.” RV2TT at P. 329 line 18.

Counsel then asked Ms. Slaughter about days contained in the law enforcement radio log submitted as evidence by the State that showed only one call on several days. Bearing in mind that the Troopers and Deputies opined that it would be impossible for them to have only received one call or less any day, counsel asked Ms. Slaughter to refer to April 20th 2005.

COUNSEL: How many entries [in the log] do you count for April 20th [2005]?

MS. SLAUGHTER: One.

COUNSEL: Is it possible that 911 only got one law enforcement call all day long, any traffic all day long? Probably not?

MS. SLAUGHTER: No, ma’am.

COUNSEL: How many entries are there for April 18th?

MS. SLAUGHTER: Five.

COUNSEL: So you may get busy or you may have somebody that just didn’t write things down?

MS SLAUGHTER: That’s correct. RV2TT at P. 354 lines 11-21.

The Defense then put on a number of witnesses, local chiefs of police and such, who had worked evening checkpoints at different times on various evenings throughout the period subject of the indictments. *See* testimony: RV2TT at PP. 358-364 Ed Cutlip, Chief of Police, town of Flatwoods; RV2TT at PP. 364-367 William Alderman, Chief of Police, town of Gassaway; RV2TT at PP. 367-372 Larry Emgee, Chief of Police town of Sutton. Various persons from the Governor’s Highway Safety Program testified that there is no prohibition on administrative

billing for their Grants. Rev. Jason Allen, a neighbor of Mr. Dellinger's testified about ride alongs with Mr. Dellinger while Mr. Dellinger was conducting DUI patrols, Sutton Lake dam patrols, and regular duties. RV2TT PP. 387 & 388. All patrols were in the evening (RV2TT at P. 388 lines 10-17) but, as numerous witnesses testified, Shane Dellinger worked day shift. Thus, Mr. Dellinger could have only been patrolling in the evening on an additional specific shift, such as Governor's Highway Safety or Drunk Driving Prevention, dam patrol or some other specific reason. Next came defense witness Danny Roop, a former law enforcement officer who testified that he personally observed Deputy Dellinger working on paperwork for the DUI grant while at Deerforest Apartments in an office that the apartment management had gratuitously provided for law enforcement. Finally, Deputy Dellinger testified and the Defendant rested his case.

The jury retired to deliberate on the 14th day of February 2008. Co-Counsel, Mike Clifford, then departed for Charleston, stating that he had to go meet a client. During deliberations, but just before the jury rendered its verdict, it was brought to appellate counsel's attention that one of the jurors may have contacted the Defendant. Counsel immediately met with the Defendant and went over the circumstances of the contact.

Defendant Dellinger then apprised counsel that he *thought* but *was not sure* that one of the Jurors had contacted him through the computer via a "My Space" message. Counsel asked if the Defendant still had the e-message and the Defendant stated that he wasn't sure. Under the circumstances, counsel found this untimely disclosure highly questionable. A man facing up to seventy years in prison might do anything to undermine a conviction. Counsel then inquired as to why the Defendant hadn't disclosed this information earlier and Defendant Dellinger explained that his suspicions as to the identity of the sender were not confirmed until a sequestered witness, Brenda Slaughter, had been released as a witness and had voluntarily come back over to the courthouse and spoken to him. Ms. Slaughter had been on both the State and Defense's list of witnesses and was a long time acquaintance of Defendant Dellinger. Ms. Slaughter was able to confirm that a woman on the jury by the name of Amber Hyre was the wife of Theron Hyre, a sometime volunteer fireman with the Gassaway Volunteer Fire Department where Fred Slaughter had been chief and was now assistant chief. Thus, Mr. Dellinger determined that Ms. Hyre on the jury was probably the same person as the "Amber" who had sent him the message. Significantly, Ms. Hyre sent Defendant Dellinger said message at a time when she knew she was

part of the jury pool⁶ and after Defendant Dellinger's indictment had been significantly covered by state and local papers.

Ms. Hyre, during voir dire did not disclose to the Court, the State or counsel that she knew Mr. Dellinger in any way, or that she had communicated with him prior to trial. As will become evident from the facts as discussed below, Amber Hyre could not possibly have mistaken Shane Dellinger for another Shane Dellinger or have forgotten in six days her rather extensive message which she sent to Defendant Dellinger. Importantly, only two cases were set for trial that week: that of Jordan Grubb, (son of Magistrate Carolyn Cruickshanks) presided over by Judge Hatcher because of the conflict in that case; and, that of Shane Dellinger. RV2TT at P. 22 lines 24-25. With these two high profile cases being the only ones on the docket, and jurors having to call in to see if they were needed, it wouldn't take a rocket scientist to figure out that whatever chances one had of being called for jury duty, it would be on one of those two cases.

Witness Brenda Slaughter also disclosed to Shane that she knew another one of the jurors, Theresa Teets Lane, former in-home care-giver for William Slaughter, the father of another Witness, Fred Slaughter (Brenda's husband). This disclosure surprised Defendant Dellinger since Theresa Lane also had failed to disclose in *voir dire* to the Court, the State or counsel her relationship to either Fred Slaughter or Brenda Slaughter. (Defendant Dellinger had not had any contact with Theresa Lane and did not know her so as to disclose to the Court that the juror was withholding information). Witness Brenda Slaughter left the courthouse to return to her job. Defendant Dellinger, subsequently disclosed all this to his counsel, however, he could not recall the name of the juror who knew the witnesses Slaughter.

Counsel, frankly, failed to know what to do at this point. Counsel sought to preserve the point for appeal and was not confident as to how best to do so without tampering with the judicial process with information concerning the jury that she could not substantiate and might not be true. Counsel decided to err on the side of caution and apprise the court of Amber Hyre's communication with a post verdict motion.

The jury returned from deliberations and found the Defendant guilty of Count Two, Count Five, Count Six and Count Seven of the indictment. Counsel then disclosed to the Court that she did not know how to best preserve the point for appeal and placed upon the record the information which had just been imparted to her.

⁶ EHT at P. 14 lines 20-25, P. 15 lines 1-3

The trial court, understandably, was irate and ordered everyone connected with the case investigated for obstruction. The West Virginia State Police were ordered to investigate the juror. The Defendant and Defendant's counsel were barred from interviewing any of the jurors.

The Defendant, his family and counsel met at a local café in one of its meeting rooms. After an intense discussion, Defendant's father, Ron Dellinger, disclosed that he had his laptop computer with him with Wi/Fi access. Fortuitously, Ron Dellinger found a Wi/Fi signal through the local NAPA store and went to Mr. Dellinger's My Space Account.

Simultaneously, counsel contacted her sister in Parkersburg, and asked her sister to get on the Internet, find Mr. Dellinger's account and print off what was there. As Ron Dellinger accessed Shane Dellinger's account, counsel's sister did so as well and began to search for the message from juror Hyre to print off. Counsel's sister then read a message which was not consistent with the prior message. After much discussion, counsel realized that there were *not one but two messages from Juror Hyre*, one sent to Defendant Dellinger six days before the trial and one sent *during* the trial, on the 13th of February 2008. Attachments A1 & A2.

At counsel's instruction, Ron Dellinger downloaded Shane Dellinger's entire public MySpace page, then followed the hyperlink to Amber Hyre's MySpace page and downloaded all of her public information. Counsel then used a cell phone to contact witness Brenda Slaughter, who confirmed that she and her husband, witness Fred Slaughter, did indeed know Theresa Lane as the woman who had taken care of Fred Slaughter's elderly father. After this, the Defendant, family and counsel agreed to meet at a later date so that counsel could obtain and review the downloaded messages from juror Hyre.

Upon review of the account messages, counsel discovered that Amber Hyre, juror, in addition to writing the Defendant a detailed and personal message, had approximately *seven additional connections to different* witnesses of both the State and Defense, all of which she had failed to disclose to the Court, the State and defense counsel. The first message from juror Hyre to Shane Dellinger was sent the 7th day of February 2008 and read:

Hey, I don't know you very well But [sic] I think you could use some advice! I haven't been in your shoes for a long time but I can tell ya that God has a plan for you and your life. You might not understand why you Are hurting right now but when you look back on it, it will make perfect Sence [sic]. I know it is hard but just remember that God is perfect and has the Most perfect plan for your life. Talk soon. Attachment A1.

Mr. Dellinger responded with a MySpace message and afterwards became one of Juror Hyre's MySpace Friends. His reply message and acceptance of MySpace friendship brought with it Mr. Dellinger's photograph which was placed on Ms. Hyre's Friends page. In that photograph, Mr. Dellinger appears in uniform. *See* Memorandum of Defendant, Attachment _____. Deputy Dellinger was tried for falsifying records and having a plan or scheme to defraud while serving as *a uniformed law enforcement officer*. It therefore becomes impossible for the Appellant to believe that Juror Hyre may have mistaken the Defendant for some other "Shane Dellinger". Significantly, Ms. Hyre appeared in court greatly changed in appearance. Gone was the significantly overweight and somewhat dowdy woman from her MySpace page. Instead, Juror Hyre appeared trimmed down (*See*, Memorandum of Defendant, Attachment _____, MySpace page comments regarding her new weight loss), beautiful flowing chestnut colored hair (her hair on her my space page was pulled back tightly into a bun or pony tail) and elegantly made up. She bore no resemblance to the person who had e-messed Shane Dellinger. Thus Mr. Dellinger did not recognize Ms. Hyre his juror as "Amber" from MySpace.

While Ms. Hyre's initial contact might, possibly through a stretch of the imagination, have been innocent, her concealment of her knowledge and contact with Mr. Dellinger cannot be presumed to be innocent and reflects juror bias as discussed *infra*. More importantly, during the trial, at a time when Amber Hyre had to have known that her MySpace Friend, Shane Dellinger, was the Defendant before her, Juror Hyre sent a *second* email message to all her MySpace Friends, which read:

Amber: *just got home from Court and getting ready to get James and head to church! Then back to court in the morning!*
Mood: *blah.* Attachment A2.

In addition to Amber Hyre's troubling commentary on Mr. Dellinger's trial, there was also on Juror Hyre's MySpace page a comment from an "Anna Rae", dated the 11th day of February 2008 which was thought to have presented a problem of *a third juror* who may have had the same contacts and knowledge as Amber Hyre and who, similarly apparently did not disclose said contacts and knowledge. Anna Rae's comment reads:

"Hey Amber

My Sister [sic] is on Jury Duty tomorrow too! I think she is just as bummed about it as you are!" Memorandum of Defendant, Attachment ____.

Ms. Rae's statement begged the question, who was Anna Rae's sister? In which county and on which jury was Anna Rae's sister serving? Upon learning of this third possible juror, counsel for the Petitioner contacted the West Virginia State Police who were investigating the matter of juror misconduct or obstruction by anyone else. Counsel then made arrangements along with Defendant Dellinger, to meet with the State Police and disclose what was known of Amber Hyre. At that meeting counsel and Defendant Dellinger and produced the MySpace contacts as well as the comments of "Anna Rae" and further information about juror Theresa Lane. Sgt. Kelly, of the West Virginia State Police, Summersville Detachment, who had been assigned the case, *refused to make any other* inquiry, stating that he had only been ordered to investigate the matters related to Amber Hyre, and nothing else. Given that the trial court had barred counsel from contacting any of the jurors, counsel was dependent upon the West Virginia State Police to make a proper inquiry, thus no further information was developed related to the other jurors who may have compromised the constitutional composition of the jury.

After making such inquiry as was permissible by the court, counsel learned the following:

1. That Amber Hyre, a juror, on the 7th and the 13th of February 2008 contacted the Defendant and, in her second email commented on the trial or her attitude towards the trial. Juror Hyre never disclosed to the trial court, the State or defense counsel that she knew and had emailed the Defendant with her rather cryptic message.
2. That Amber Hyre knew witness Brenda Slaughter, and, despite being presented with fourteen (14) opportunities to do so, failed to disclose the same to the Court, the State or defense counsel.
3. That Juror Hyre knew witness Fred Slaughter, and failed to disclose the same to the court, the State or defense counsel.
4. That Juror Hyre failed to disclose that her family was acquainted with or good friends with witness Fred Slaughter.
5. That Juror Hyre, based upon her comments and contacts on her public MySpace pages, was a close personal friend of Kirk Frame. Kirk Frame is the daughter of State and Defense witness, Braxton County Commissioner Theresa "Terry" Frame. Contacts between Ms. Hyre, Kirk Frame, MySpace friend "Brandy" and others indicate that

Ms. Hyre was in contact with Kirk Frame both on and off MySpace. *See* Court Record, Memorandum of Defendant Attachments (all discussing various nights out with Kirk Frame, among others, missing Kirk Frame at church, wanting to go out again, Kirk Frame discussing photographs of Amber with Amber's mother and inquiring where Amber's mother obtained her "boobs"). At a subsequent hearing on the matter, Amber Hyre testified that she did not know witness Theresa Frame. It is inconceivable that Amber Hyre did not know that her close friend's mother was witness Theresa Frame, particularly since Theresa Frame is a Braxton County Commissioner and, in 2008, was running for re-election. Is it actually conceivable that Kirk Frame wouldn't ask her friends to vote for her mom?

6. That Amber Hyre formerly resided in the same apartment complex as Shane Dellinger. Attachment B, Sgt. Kelly's Report.
7. That Amber Hyre belongs to the Gassaway Baptist Church which was also attended by State's witness Sgt. John Bonazzo of the West Virginia State Police. Sgt. Bonazzo, for reasons discussed below, would have been well or reasonably known to Juror Hyre; and, finally,
8. That despite being "bummed" about jury service and after seeing others excused because of their relationship to the Defendant or witnesses, Juror Hyre and Juror Lane both failed to take the opportunity to get off the jury.

Although the State, in its reply briefs to Defendant's memoranda to the trial court on the point of juror misconduct attempted to diminish the role of the Gassaway Baptist Church in the lives of Ms. Hyre and Sgt. Bonazzo, the State was either unaware of the sincere importance of the Gassaway Baptist Church in the Braxton County Community or the State failed to investigate the advocacy role this House of God played in publicly defending Sgt. John Bonazzo when others in the community attempted to have Sgt. Bonazzo removed from the West Virginia State Police. Specifically, beginning in 2001 and lasting until approximately 2003, Sgt. Bonazzo became the subject of a removal effort by a resident, who, upon information and belief, was Braxton County Magistrate, Carolyn Jack Cruickshanks. The Gassaway Baptist Church congregation and its leadership defended Sgt. Bonazzo both with written petitions and oral communications to the Colonel of the West Virginia State Police, particularly after Sgt. Bonazzo was suspended. Memorandum of Defendant, Attachment B including Article, Fanny Seiler

column, Charleston Gazette, 16 July 2002; Attachment____ Hur-Herald Electronic Website Article of 02/02/2002 (stating: that “church members say the [sic] have been involved in supporting the officer. One member described Sgt. Bonazzo as ‘being under attack’”). *See also* Memorandum of Defendant Attachment ____ (referencing numerous articles from Hur-Herald discussing various difficulties facing Sgt. Bonazzo). Sgt. Bonazzo is a very public figure in Central West Virginia and it is inconceivable that Juror Hyre’s husband having been a volunteer fire fighter/first responder, had no knowledge of who the troopers and deputies were who made up Braxton County’s law enforcement and never discussed the same with his wife.

Ultimately, the State’s investigation of Ms. Hyre revealed that, inexplicably, Juror Hyre claimed that she contacted Defendant Dellinger because “she had heard that Mr. Dellinger was going through a divorce and wanted to provide some advice for him.” Attachment B, Report of Sgt. Kelly. First, this disclosure begs several questions: From whom did Juror Hyre learn that Shane Dellinger was having *marital* difficulties? Why would she send an unsolicited message to him? Second, and perhaps most interestingly, Shane Dellinger *wasn’t going through a divorce* at the time Juror Hyre wrote to him. Shane Dellinger’s divorce decree had been entered the 6th day of March 2006, *seven hundred and two* days before the Defendant’s trial. Divorce Decree of Shane Dellinger v. Jamie Dellinger, of record in the Office of the Circuit Clerk of Braxton County, Domestic Orders Book 16, at Page 451. Given the improbability of Shane Dellinger’s need for marital advice, Ms. Hyre’s explanation, frankly, is fallacious.

A hearing on the matter was commenced on the 11th day of June 2008. The State called Juror Hyre to the stand and proceeded to question her.

THE STATE: [T]here was a question asked of you, “Do you know the Defendant?”
MS. HYRE: Right.
THE STATE: You didn’t say anything, did you?
MS. HYRE: I did not.
THE STATE: How come?
MS. HYRE: Bad judgment, I guess.

Upon cross examination Ms. Hyre then admitted,
MS. HYRE: “I believe[d] that God was telling [me] that I should’ve [told about my relationship to Defendant Dellinger and the witnesses] and [I] disobeyed.

So, yeah, I figure I probably would have said something just to keep my heart in the right place.” EHT at P. 19, lines 3-5.

Whether it was God talking to Juror Hyre directly telling her to disclose her connections, or her conscience, it is apparent that Amber Hyre knew that she should disclose what she knew about all the witnesses and the defendant and chose not to do so. Her failure to disclose violated the Defendant’s constitutional right to have a constitutionally composed jury.

After counsel questioned Juror Hyre, the trial court inquired of Ms. Hyre about her relationship to the Defendant and witnesses. In all, the court asked fifty (50) questions of Juror Hyre. RV2TT at P. 21 line 14; PP 25-30 line 13. However, it appeared to the Defendant that the more the trial court questioned Juror Hyre, the more apparent it was that the trial court was concerned about Juror Hyre’s responses but was going out of its way to resolve any doubts in the juror’s favor. Indeed, the trial court opined that “It troubles me that the juror had, what I’ll characterize as a blog, though it’s not a blog. . . . But the juror, during the trial, did go on the internet and put on “Well I had jury duty today and I reckon I’ll have it tomorrow. . . . Probably, it would have been prudent that she not do that.” RV2TT at P. 38 lines 22-25; P. 39 lines 1-4.

While the court made every effort to resolve the matter in the trial court’s mind, the trial court, nonetheless, appeared to be using the wrong legal standard to resolve the matter, as is discussed *infra*. Questions about a juror’s qualifications for duty are to be resolved *against* seating the juror. Assurances and protestations by the prospective juror that he or she would be fair and impartial, in the totality of the circumstances, are not dispositive nor can they be used to rehabilitate the juror.

Despite Ms. Hyre’s admission that her withholding of relevant evidence about her qualifications to serve as a juror was “bad judgment” and that she “disobeyed” God, the trial court, then upheld the convictions of Shane Dellinger, finding that the court, as a matter of law, had to believe the juror. The court opined that once the juror was challenged and assured the court that she had been fair and unbiased, the court had to accept the juror’s testimony as a matter of law. This finding was error.

The trial court made no ruling as to Juror Lane. Defendant had not produced juror Lane (from whom counsel, the Defendant, his agents or assigns were barred from speaking) and the matter of Theresa Lane’s fitness to serve was not investigated. Importantly, Defense witness

Fred Slaughter, who had assured the Defendant he did not need a subpoena for the hearing, was unable to appear to testify. Because Mr. Slaughter was not subpoenaed and because counsel was barred from confirming with Ms. Lane that she had been Mr. Slaughter's father's in-home care giver, nothing further was done about Ms. Lane. Amber Hyre, however, did elucidate counsel and the court about Ms. Lane in one respect. The message from Amber Hyre's MySpace friend Anna Rae relating to her sister also being "bummed" out about jury duty, as it turned out, was about Ms. Lane. Amber Rae and Ms. Lane the juror are sisters. The court then inquired of Ms. Hyre:

THE COURT: Ms. Hyre, did you discuss your jury service or this particular case with Anna Rae?

MS. HYRE: I don't think I told her anything in particular. I just told her that, I can't really remember what I said to her. I can't honestly remember if I said anything, you know, directly about this or not. EHT at P. 25 lines 8-14.

The court made further inquiry and Ms. Hyre changed her testimony.

THE COURT: Well did you tell her that you were on the Dellinger trial?

MS. HYRE: No. . . . I didn't talk to her or even have her as a friend on My Space until after the trial was even over. EHT P. 25 lines 19-24.

The problem with Ms. Hyre's declarations and protestations is that Anna Rae's message to Ms. Hyre was clearly responsive, not inquisitive. Ms. Hyre *had* to have spoken to Anna Rae about jury service prior to the trial based on the date of the messages.

More interesting, however, were Ms. Hyre's explanations for why she did not disclose her relationship or link with witnesses Theresa "Terry" Frame and Brenda Slaughter.⁷ Counsel for the Defendant inquired,

COUNSEL: Now, your brother-in-law, Theron?

⁷ With regard to Sgt. Bonazzo, according to Ms. Hyre she didn't know Sgt. Bonazzo because they have multiple services at her church where they both attend, and she had only attended for approximately two years, but that her husband had gone to the church since 1983, well within the time frame of the removal effort related to Sgt. Bonazzo as discusses *supra*. RV2TT at P. 20 lines 13-24

MS. HYRE: Yes.

COUNSEL: He seems like a pretty good guy?

MS. HYRE: He is, very good.

COUNSEL: Can you tell the Court, if you know, what he does for a living?

MS. HYRE: He's an EMT.

COUNSEL: And where does he work?

MS. HYRE: Braxton EMS.

COUNSEL: Do you know who he works for?

MS. HYRE: Yes, I do.

COUNSEL: Who?

MS. HYRE: Brenda Slaughter.

COUNSEL: Now, when Brenda Slaughter's name was given as a witness you didn't feel compelled to tell the Court?

MS. HYRE: I don't know her. I don't—I've never talked to her before, ever.

COUNSEL: But you knew of her?

MS. HYRE: I knew her face and I know that my brother-in-law works for her, but other than that, I do not know her.

COUNSEL: Now, I'd like to ask you a little bit about a young lady with whom you seem to share a great deal of messages, Kirk Frame?

MS. HYRE: Yes.

COUNSEL: Could you tell us how you know Kirk Frame?

MS. HYRE: She is my sister-in-law.

COUNSEL: She's your sister-in-law?

MS. HYRE: Yes, she is.

COUNSEL: Really?

MS. HYRE: Yes. Not—just recently. I mean they've only been married a short time.

COUNSEL: And her mother is Terry Frame [Braxton County Commissioner], right?

MS. HYRE: Yes.

COUNSEL: And, I guess, did they have any kind of church wedding or anything like that?

MS. HYRE: It wasn't a church wedding, no.

COUNSEL: Any kind of reception?
MS. HYRE: Yeah, they had a reception.
COUNSEL: I guess what I'm getting at is when they called Terry Frame's name you didn't disclose that—
MS. HYRE: I don't know her. I still have never spoke to her to this day.
COUNSEL: But you didn't feel like disclosing, "That's my sister-in-law's mother."?
MS. HYRE: Because I don't know her. They asked "if you know these people", and I do not know her. I've never, ever to this day spoke to her." EHT, P. ____,
Lines

Juror Hyre's responses to defense counsel's questions raise two issues: First, the trial court has specifically asked if any of the jurors were "connected. . . by marriage. . . to [any of the witnesses], to which juror Hyre responded with silence. Second, is Juror Hyre's questionable, rather literal and narrow interpretation of what "knowing" someone means. Admittedly, while it is entirely possible that the family of the bride and the family of the groom did not speak to each other at the wedding reception, given that Commissioner Terry Frame was running for re-election, is it feasible that a politician, looking at a contested race, would *not* to have spoken to as many people as possible? It is more reasonable to conclude that Ms. Hyre's definition of "knowing someone" and that of the rest of the world just might be at variance.

ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to grant a mistrial for juror misconduct where a juror had emailed the Defendant before and during his trial, failed to disclose numerous and personal connections between the Defendant and witnesses which, in the totality of the circumstances, would have resulted in her being struck from the jury panel for cause.
2. The trial court erred when it failed to grant a mistrial for juror bias when, in the totality of the circumstances, the juror made significant omissions, failed to take any one of fourteen opportunities to disclose her connections to the Defendant and the witnesses, and subsequently admitted that her failure to disclose was "bad judgment" and that, based upon her own value system she had "disobeyed" God by not disclosing the information she withheld.

3. The trial court erred in failing to grant Defendant's motions to strike jurors for cause where the venire persons had significant contacts and relationships with witnesses who were also law enforcement, thereby causing Defendant to use his peremptory strikes to remove said jurors from the panel.
4. The trial court erred in failing to grant Defendant's motion for judgment of acquittal when the evidence presented by the State failed to establish beyond a reasonable doubt that the Defendant committed the *actus reas* and possessed the *mens rea* necessary for each element of the offences charged.
5. The Defendant received ineffective assistance of counsel when his trial counsel failed to move for a change of venue, enlargement of the jury panel or change of veniremen when the defendant was a well known deputy sheriff in the community, a volunteer in the community, where there had been significant pre trial press and the majority of the jury panel appeared to have contacts or connections to either the Defendant or the witnesses.

ARGUMENT AND DISCUSSION OF LAW

*"The jury, passing on the prisoner's life,
May in the sworn twelve have a thief or two
Guiltier than him they try."*

SHAKESPEARE, *Measure for Measure, Act ii, Scene 1,*

L. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT DELLINGER A NEW TRIAL BECAUSE JURORS HYRE AND LANE FAILED TO ANSWER HONESTLY NUMEROUS MATERIAL QUESTIONS RELATED TO THEIR RELATIONSHIP(S) WITH AND TO STATE AND DEFENSE WITNESSES, AS WELL AS ANY RELATIONSHIP TO THE DEFENDANT.

A. Juror Failure to Answer Honestly Questions Asked During Voir Dire that Caused Material Information to be Withheld, that Otherwise Would Be Grounds to Strike Juror For Cause, Requires Defendant be Granted a New Trial.

A motion for a new trial may be based upon the misconduct of the jury. *Handbook on West Virginia Criminal Procedure*, Vol. II, P. 287, Cleckley, (1993). The conduct of a juror during a criminal proceeding must comport with the requirement of impartiality. *Id.* To overturn a verdict on proof of jury misconduct, the defendant must (1) prove evidence which is not barred by the rule of jury incompetency, and (2) produce evidence sufficient to prove grounds

recognized as adequate to overturn the verdict. *Handbook on West Virginia Criminal Procedure, Vol. II*, P. 287, Cleckley (1993). The Fourth Circuit Court of Appeal in Jones v. Cooper, 311 F.3d 306 (4th Cir. 2002), recited the United States' Supreme Court of Appeals holding in McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984) creating a particularized test for determining whether a new trial is required in the context of juror deceit during *voir dire* or on jury questionnaires," precisely the issue presented here:

"In order to obtain a new trial, the defendant "must first demonstrate that a juror failed to answer honestly a material question. . . And then further show that a correct response would have provided a valid basis for a challenge for cause."

Id. at 310 (*quoting: McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)). The standard applies both to the most narrow of applications to the broadest. The United States Supreme Court of Appeals in Williams v. Taylor, 529 U.S. 420, 441-442 (2000), opined that a juror's negative response to a question based upon a theoretically correct but "technical or literal interpretation" of a question may suggest "an unwillingness to be forthcoming," which in turn, "could bear on the veracity of [his or her] explanation for not disclosing" information in response to other questions.⁸ The Fourth Circuit opined "[that the] test applies equally to deliberate concealment and to innocent non-disclosure. . . (citations omitted)." Jones v. Cooper, 311 F.3d 306, at 310 (4th Cir. 2002). *See also* Williams v. Netherland, 181 F.Supp. 2d 604 (E.D. Va. 2002) (*holding: "[w]hen juror gives a knowingly false response to a material question on voir dire, the defendant is entitled to a new trial"*)(On remand from Williams v. Taylor, 529 U.S. 420 (2000), *aff'd, sub nom Williams v. True*, 39 Fed. Appx. 830 (4th Cir. 2002). In Burton v. Johnson, 948 F.2d 1150, at 1158-59. (10th 1991), the Tenth circuit rejected the findings of the state trial court that a juror's failure to disclose her own family's history of abuse was "honest[], (not conscious)" where as here, the juror had failed to take advantage of the opportunity to be "individual[ly] question[ed] on these sensitive topics." *See also* Jackson v. State of Alabama State Tenure Commission, 405 F.3d 1276 at 1288 (11th Cir. 2005) (*observing: that "the point is*

⁸ On remand from the Supreme Court in Williams, the Court stated: "United States v. Bynum, 634 F.2d 768 (4th Cir. 1980) teaches two important lessons for the case at hand. First, a finding by this Court that [the juror] intentionally concealed material information during voir dire mandates relief. Second, in making this determination, [the juror's] individual response at the evidentiary hearing cannot be viewed in isolation. *In particular, a finding that [she] intentionally concealed information on one occasion (or more) undermines the credibility of her other responses.*" Williams v. Netherland, 181 F. Supp. 2d at 613.

that this juror had several opportunities to come clean with the court about her murder conviction”).

In Dyer v. Calderone, 151 F.3d 970 at 983 (9th Cir 1998), the Court, *en banc*, Judge Kozinski writing, made clear that what the Court was faced with was “a clear violation of a fair trial:

A juror . . . who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process. . . . Writing for a unanimous Court, Justice Cardozo concluded that a juror who lies his way into the jury room is not really a juror at all: “the judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are willfully evasive or knowingly untrue, the talisman, when accepted, *is a juror in name only.*” Clark. v. United States, 289 U.S. 1 at 11 (1933). [Emphasis added].

“[C]ertainly, when possible non-objectivity is secreted and compounded by the deliberate untruthfulness of a potential juror’s answer on *voir dire*, the result is deprivation of the defendant’s rights to a fair trial .”United States v. Bynum, 634 F.2d 768 at 771; State v. Dean, 134 W.Va. 257, 58 S.E.2d 860 (W.Va. 1950). *See also*, United States v. Columbo, 869 F.2d 149 at 151-152 (2nd Cir. 1989) (“Knowingly lying during the voir dire violated [several statutes]. . . but it is also quite inconsistent with an expectation that a prospective juror will give truthful answers concerning her or his ability to weigh the evidence fairly and obey the instructions of the court”)(*citing*: Bynum 634 F.2d 768 at 771.) Regardless of whether a juror’s motive for lying was innocent or intentional, his or her repeated failures to disclose make clear that his or her omissions were “dishonest” not inadvertent, thereby depriving Appellant of his right to a constitutionally composed jury. *See e.g.*, United States v. Bynum, 634 F.2d 768, at 771 (4th Cir. 1980)(*Finding*: that false statements by juror motivated by “shame and embarrassment” about relatives’ criminal records violated defendant’s due process rights despite court’s “sympathy with [juror’s] predicament”)⁹

As to material information that would lead to a strike for cause, this Court has held that “[w]hen considering whether to excuse a prospective juror for cause, a trial court is *required to consider the totality of the circumstances* and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry, to examine those circumstances and to *resolve any*

⁹ The decision in Bynum was abrogated by McDonough on another point. The Bynum Court found a violation based on the conclusion that the juror’s misconduct impaired the defendant’s ability to exercise his peremptory strikes. McDonough requires that a truthful response create a cause to strike.

doubts in favor of excusing the juror.” State v. Hatley, W.Va. 33919, ___ W.Va. ___, ___ S.E.2d ___, (W.Va. 2009). [Emphasis added]. In evaluating the totality of the circumstances, “as far as practicable in the selection of jurors, trial courts should endeavor to secure those jurors who are not only free from but who are not even subject to any well-grounded suspicion of any bias or prejudice.” O’Dell v. Miller, 211 W.Va. 285 at 289, 565 S.E.2d 407 at 411 (W.Va. 2002). See e.g. United States v. Denman, 100 F.3d 399, 404 (5th Cir. 1996) (*holding*: strike for cause “would not [have be[en] inappropriate” where potential juror was a “not very close” relative of a target of a “high profile investigation” by the same prosecutor”). Thus, if truthful answers to *voir dire* would have “provided a valid basis for a challenge for cause,” a new trial *must* be ordered. McDonough v. Greenwood, 464 U.S. 548, at 556 (1984). In the instant case suspicions about the jury service of juror Lane are certainly well grounded, but in the case of juror Hyre, those suspicions are not merely well grounded, they are concrete and cause so many problems with all of the court’s proceedings that the Appellant was denied a fair trial. State v. Cecil, 2007 WVSC 33298-112107 (*discussing*: the multiple problems with certain jurors and the cumulative effect of such problems as preventing the defendant from receiving a fair trial).

In sum,

“[T]here is a fine line between being willing to serve and being anxious, between accepting the grave responsibility for passing judgment on a human life and being so eager to serve that you court perjury to avoid being struck. The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent. Whether the desire to serve is motivated by an overactive sense of civic duty, by a desire to avenge past wrongs, by the hope of writing a memoir or by some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out. . . .If a juror treats with contempt the court’s admonition to answer *voir dire* questions truthfully, she can be expected to treat her responsibilities as a juror—to listen to the evidence, not consider extrinsic facts, to follow the judge’s instructions—with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people’s veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.” Dyer v. Calderone, 151 F.3d 970, PP. 982-983 (9th Cir. 1998).

B. The Case At Bar.

Under the facts of this case both parts of the two part test established in McDonough have been met. First, Jurors Hyre and Lane “failed to answer honestly a material question” on *voir dire* which, succinctly, was: do you know the Defendant or any of the witnesses?” In Juror Hyre’s case, she failed to take the opportunity to disclose fourteen (14) times. She failed to answer a material question five (5) times: Do you know Shane Dellinger? Do you know Sgt. John Bonazzo? Do you know Brenda Slaughter? Do you know Fred Slaughter? Do you know Theresa Frame? From juror Hyre’s silence in the face of clear questioning it is apparent that juror Hyre provided false material information to the Court and counsel. Juror Hyre’s own conscience told her she had used “bad judgment” and had, in failing to disclose this information, “disobeyed” God. RV2TT, P. 19 Lines 3-5. Juror Hyre, by her omissions, also disobeyed the Court. The Court specifically asked if any of the jurors were “connected. . .by marriage. . .[to any of the witnesses].” RV2TT at P. 37, Lines 23-24. Juror Hyre answered the Court with silence.

In Juror Lane’s case, she too provided material false information by failing to disclose her connection to Fred and Brenda Slaughter (Do you know Fred Slaughter? Do you know Brenda Slaughter?). Given that multiple other jurors disclosed relationships with the Defendant and the witnesses that were far more tenuous than those of Jurors Lane and Hyre, the only fair and legal presumption is that Jurors Hyre and Lane impermissibly and deliberately failed to answer honestly material questions. Therefore, based upon the omissions, failures and refusals of Jurors Hyre and Lane to provide material information that could have led to their removal for cause, Defendant has plainly established the first part of the two part test of McDonough.

Second, Appellant’s evidence also satisfies the second part of the McDonough test and rulings of this Court. Had Jurors Hyre and Lane answered some or all of the questions of *voir dire* truthfully they would have been subject to strike for cause. Specifically, as to Amber Hyre, it is one thing for Ms. Hyre to know one witnesses or even two, but it is another to know *five*, as well as contacting the Defendant and formerly residing in the same small apartment complex as the Defendant. Even if there were not a presumption in favor of disqualification in close cases, this combination of circumstances and undisclosed relationships, combined with Juror Hyre’s highly suspect conduct, would have given the Appellant a “valid basis for a challenge for cause.” To a lesser extent, the same charges apply to Juror Lane. In any event, these omissions need not support a challenge for cause on their own. Rather they must be considered in connection with the totality of the circumstances along with the significant problems their acts

and omissions caused. Therefore, because Appellant can show that both Juror Hyre and Juror Lane made material omissions, that said omissions were presumptively dishonest, that such omissions would have provided grounds for both jurors to be stricken from the jury pool, thereby meeting both prongs of the McDonough test and the rulings of this Court, and that their acts and omissions caused such problems as to deny the Appellant a fair trial, Appellant is entitled, by law, to a new trial on the counts on which he was convicted.

II. THE EVIDENCE ESTABLISHES ACTUAL AND IMPLIED BIAS BY JURORS HYRE AND LANE

A. Bias by a Juror, Proven by Actual, Implied or Inferred Facts Requires that Defendant be Granted a New Trial

In addition to the disqualification of Jurors Hyre and Lane dictated by McDonough, the record also establishes that both jurors were actually and impliedly (or inferentially) biased under the applicable law. It is long standing law in West Virginia that “[t]he object of the law, in all cases in which juries are impaneled is to try the issue, to secure men of that responsible duty whose minds are wholly free from bias or prejudice[.]” Syl. Pt. 1, State v. Hatfield, 48 W.Va. 561, 37 S.E. 626 (1900). In felony criminal cases, however, where an individual’s liberty interests are at stake, additional factors must be considered to ensure that the defendant receives a fair trial by an impartial jury of his/her peers. Davis v. McBride, 2007 WVSC 33199-101207 (W.Va. 2007). Thus where a jury or juror is biased against a defendant so as to make it likely that the defendant would not or did not receive a fair trial, the defendant is entitled to a new trial. State v. Dean, 134 W.Va. 257, 58 S.E.2d 860 (1950).

The Court in State of West Virginia v. Billie Dawn Hatley, No. 33919, ___ W.Va. ___, ___ S.E.2d ___ (2009) found that “[a]ctual bias can be shown either by a juror’s own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that *bias is presumed*.” Quoting Syl. Pt. 1 O’Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (W.Va. 2002)[Emphasis added]. State v. Hutchinson, 215 W.Va. 313, at 319, 599 S.E.2d 736, at ___ (2004). Promises of impartiality by a compromised venireperson are insufficient to meet the constitutional demands of a jury trial.

“Even though a juror swears that he or she could set aside any opinion he or she might hold and try the case on the evidence, *a juror’s protestations of impartiality should not be credited* if other facts in the record indicate to the

contrary. State v. Miller, Syl. Pt. 4, 197 W.Va. 588, 476 S.E.2d 535, (W.Va. 1996). *Emphasis added*.

The 10th Circuit Court of Appeal also rejected jurors' denials of bias, finding that a juror's dishonesty [in *voir dire* response], of itself, is evidence of bias". Burton v. Johnson, 948 F.2d 1150 at 1159 (*citing* United States v. Columbo, 869 F.2d 149, at 152 (2nd Cir. 1989)); United States v. Scott, 854 F.2d 697 at 699 (6th Cir. 1988) (other citations omitted). Further, "doubts about the existence of bias should be resolved *against* permitting the juror to serve. United States v. Buckhalter, 986 F.2d 875, 879 (8th Cir. 1993) (*citing*: United States v. Neil, 526 F.2d at 1230 (5th Cir. 1976); Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir. 1991); People v. Torpey, 472 N.E.2d 298, 303 (N.Y. 1984) (venirepersons should be dismissed for cause in close cases rather than leaving doubt as to impartiality).

In United States v. Perkins, 748 F.2d 1519, at 1531-1533(11th Cir. 1984) and McCoy v. Goldstone, 562 F.2d 564 at 659 (6th Cir. 1981) the Courts of Appeals held that bias is presumed where a juror deliberately conceals information. Thus a juror's dishonesty is strongly an indication of bias. United States v. Carpa, 271 F.3d 962 at 967 (11th Cir. 2001). The Court has held that "[o]nce a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair. State v. Hutchinson, 215 W.Va. 313, 599 S.E.2d 736, at ___ (2004). Implicitly, then, subsequent questioning, later retractions or promises that the juror *had been* fair in his or her service and deliberations cannot rehabilitate the juror's service when his or her omissions would have disqualified him or her from serving on the jury. In the instant case, the inexplicable behavior of Jurors Hyre and Lane evidences bias against the Defendant and no explanation for their omissions can rehabilitate their service as jurors.

B. The Case At Bar

There is nothing in the record to sufficiently rebut the presumption of bias by Jurors Hyre and Lane. Even if Ms. Hyre and Ms. Lane had purely personal motives for their omissions and or lies, that does not change the fact that they intentionally omitted information not only about themselves, but also failed to disclose such information after other members of the jury pool had identified themselves as having a relationship with the Defendant and or witnesses and as a result

were questioned by the trial court and or struck. Juror. Hyre and Juror Lane saw what happened to prospective jurors. Juror. Hyre and Juror Lane, for whatever reason, did not want to risk being stricken from the Appellant's jury, so they withheld vital information that deprived the Defendant of a constitutionally comprised jury. Juror Hyre even employed hyper technical definitions for the questions "Do you know the Defendant? Do you know these witnesses?" in order to avoid disclosure of her relationships with the same. Perhaps Juror Hyre may have felt that she was a part of "God's plan" for Shane Dellinger.¹⁰ Whatever Juror Hyre and Juror Lane's thought process was, it was offensive to the Court's holdings in Williams v. Taylor, is suspect, evidences an unwillingness to be forthcoming and cannot, under State v. Billie Dawn Hatley or State v. Miller, withstand this Court's scrutiny. Their duplicitous and selfish actions leave this Court with no other choice but to find that those jurors' evasions and omissions were evidence of bias warranting that the verdict as to the counts on which the Defendant was convicted be vacated and set aside.

III. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTIONS TO STRIKE JURORS FOR CAUSE WHERE VENIREPERSONS HAD SIGNIFICANT CONTACTS AND RELATIONSHIPS WITH LAW ENFORCEMENT WITNESSES, THEREBY CAUSING DEFENDANT TO USE HIS PEREMPTORY STRIKES.

In the case at bar, Defendant timely moved to strike Jurors Mace and Bender for cause because of their significant business and social ties¹¹ to law enforcement and corrections officers. RV2TT P. 61. L. 13. Motion to Strike Juror Mace; and RV2TT P. 61 LL. 1-10. Motion to Strike Juror Bender. The trial court then denied Defendant's motions because (1) the trial court didn't consider the juror's relationships to the witnesses and defendant significant; and (2) the prospective jurors had promised to be fair. RV2TT P. 62, LL. 1-16. Defendant then had to use his peremptory strikes to remove Jurors Mace and Bender. Under this Court's rulings in State of West Virginia v. Billie Dawn Hatley, 33919, W.Va., __W.Va. __, __S.E.2d __, (2009), it is reversible error for the trial court to compel the defendant to use his peremptory strikes to remove jurors who otherwise should have been removed for cause. Appellant incorporates by reference hereto all arguments raised *supra* relating to juror bias and remedies therefor as if

¹⁰ Juror Hyre stated in her My Space message of 7 February 2008 to the Defendant "... just remember that God is perfect and has the most perfect plan for your life." See Attachment A1.

¹¹ Juror Mace knew the Defendant and was a social friend of law enforcement witnesses. RV2TT P. 27, LL. 18-19; PP. 45-47; Juror Bender had the same problems, RV2TT P. 34 L 5-15; P. 40, L1-5

recited verbatim herein. Therefore, because Jurors Bender and Mace should have been removed for cause rather than the Defendant having to use his peremptory strikes, Appellant is entitled to reversal of his convictions and a new trial.

IV. BASED UPON THE FOREGOING, THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT A NEW TRIAL BECAUSE THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARDS TO THE FACTS.

The trial court erred and was clearly erroneous when it denied Defendant's motion for a new trial based upon juror misconduct when, in determining whether or not to grant a new trial, the court concluded that it must rely upon the juror's representations and promises that she had been fair. As discussed *supra*, that is not the applicable standard. This court has held that

“[a]lthough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.” Foster v. Sakhai, 210 W.Va. 716, 559 S.E.2d 53 (W.Va. 2001).

In the instant case, the trial court acted under a misapprehension of the law as well as the evidence. The rule which the trial court should have employed is: that in determining whether or not to grant a new trial based upon juror misconduct or bias, trial courts must look to the totality of the circumstances, not merely the juror's protestations and assertions that he or she had been fair and impartial. State v. Hatley, W.Va. 33919, ___ W.Va. ___, ___ S.E.2d ___, (W.Va. 2009). Indeed, “a juror's protestations of impartiality should not be credited if other facts in the record indicated to the contrary.” State v. Miller, Syl. Pt. 4, 197 W.Va. 588, 476 S.E.2d 535 (W.Va. 1996). *See* State v. Hatley, 33919 W.Va., ___ W.Va. ___, ___ S.E.2d ___, (W.Va. 2009) (*discussing* juror's assertions that previous representation by prosecuting attorney would not bias or prejudice him as insufficient to ally this concern warranting resolution in favor of juror's removal from the panel). West Virginia has held that “. . .any doubt the court might have regarding the impartiality of a juror must be resolved in favor of the party seeking to strike the potential juror [internal citations omitted]” State v. Varner, 575 S.E.2d 142, 148 (W.Va. 2002). This the trial court did not do.

In the instant case, Juror Hyre's insistence, upon being discovered as having withheld material information and questioned about it, that despite her myriad of connections to the Defendant and witnesses she was without bias or prejudice, was insufficient to allay anyone's legitimate suspicions let alone sustain a conviction. Nonetheless, the trial court found that,

"[I]n jury selection, [the court] must rely upon the juror and the juror's representation and their responses to the questions. The Court must give credence to a juror's opinion that they can be fair and impartial to both sides. And until such time as it is shown that a juror has a partiality and is not impartial, then the Court must, of course, presume that the juror is an impartial juror who has no knowledge of the case." EHT at P. 37 lines 8-15. Emphasis added.

Thus, in the case at bar, the trial court did not consider the totality of the circumstances and erroneously gave too much weight to the juror's protestations that she had been fair even after the juror had been shown to have provided dishonest answers to material questions. Indeed, even Juror Hyre conceded that she had exercised "bad judgement" in failing to disclose her relationships to the Defendant and witnesses. EHT P. 19, LL. 3-5. Therefore, the trial court used the wrong standard to evaluate the veracity of Juror Hyre's claims of non-bias and, respectfully, should be reversed.

The trial court further erred and was clearly erroneous when it concluded that a juror's mere acquaintance or distant relatives related to counsel or witnesses would not have been sufficient grounds to strike jurors Hyre and Lane for cause. This Court has held that

"[i]n many West Virginia communities, prospective jurors will often know the parties and their attorneys. Nevertheless, this familiarity does not remove the trial court's obligation to empanel a fair and impartial jury as required by West Virginia's Constitution, Article 3 §10. This obligation includes striking prospective jurors who have a significant past or current relationship with a party or a law firm." State v. Hatley, 33919, __W.Va. __, __S.E.2d __ (2009). [Emphasis added]

In the instant case, the trial court erred and was clearly erroneous when it stated:

"While I respect [counsel's] argument involving mere acquaintance, I don't know that Ms. Hyre's relationship with any of these parties or with the defendant even comes up to the definition of acquaintance. But if I applied the standard, mere acquaintance, in the matter, quite frankly, I would never get a jury in this county on any case because this county is so small that people come in contact everyday. . . . But the issue of mere acquaintance, I do not believe its sufficient and enough to show bias by a juror in the matter." EHT at P. 37 lines 21-25 and 38 lines 1 -2, 20-21. But see Davis v. McBride, 2007 WVSC 33199-

101207 (*finding*: mere acquaintance of juror with witnesses or defendant sufficient grounds to support peremptory strike).

In the totality of the circumstances, per O'Dell, the myriad of acquaintances of Juror Hyre and the witnesses, in cumulative effect, constitutes a significant current relationship with first the Defendant, second Terry Frame, and third Brenda Slaughter. Even allowing for the Juror Hyre's assertions regarding Sgt. Bonazzo, that her church was so large that she didn't know him, the total effect is damaging to the constitutional composition of the jury, and as such, Defendant's motion for a new trial based upon juror misconduct and bias should have been granted.

IV. EVIDENCE INSUFFICIENT TO SUSTAIN THE CONVICTION

Respectfully, the jury had to have gotten it wrong, been confused, or corrupted by the two biased jurors as discussed above in order for the jury to have come to the conclusion that Shane Dellinger was guilty of anything. Sgt Trader said the radio logs were crucial in establishing Deputy Dellinger's guilt. Brenda Slaughter, director of Braxton Co. 911 said that the radio logs were insufficient to establish whether someone worked or not and through questioning demonstrated that the logs, at times, were grossly incomplete. The State hammered on the issue that administrative time was prohibited under the Grants, yet at no time did the State produce a written statement to that effect, produce a portion of the Grant, or the Grant in its entirety, that stated that administrative time was prohibited. Indeed, such restriction does not exist in the Grant. Moreover, the State did not argue that the terms of the Grant contract needed to be construed because of a vague term or lack of completeness. It is axiomatic that where a contract is clear and unambiguous it is not to be construed. Instead the State called a witness who used parol evidence to explain the unwritten prohibition on billing for administrative time for which the State sought to convict Deputy Dellinger. Conversely, numerous credible witnesses for the Defense testified to working at night on patrol with Deputy Dellinger, who was a day shift deputy. Yet the jury drew the conclusion that Shane Dellinger was guilty. Only a confused or corrupted jury could have come to that conclusion and for this reason, the conviction of Shane Dellinger should be reversed, his sentence vacated and a new trial awarded to him.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

In the instant case, the Defendant was represented by two attorneys: Mike Clifford, Esq. and his associate, at that time, Barbara Harmon-Schamberger. On the morning of jury selection, however, Ms. Chamberger (appellate counsel herein), was before this Honorable Court arguing a civil matter. That left Mr. Clifford to choose the jury. As selection of the panel progressed, it became apparent that the majority of the jury had some significant connection to either the Defendant or the witnesses. In all, eight (8), of the panel of twenty (20) jurors called, disclosed significant or multiple ties to witnesses, particularly law enforcement and or the Defendant. RV2TT at PP 26-63. Of that eight, three disclosed more than once that they had relationships with the Defendant or the witnesses. Of those eight, Mr. Clifford attempted to remove for cause only two jurors, Pamela Bender and Joan Mace. Ms. Bender worked in law enforcement as did her husband and was friends with all of the subpoenaed officers' wives. Mr. Clifford also sought to remove Joan Mace on similar grounds. Given the totality of the circumstances in the matter as discussed more fully above, it was error for the trial court to deny the Defendant's challenge. *See State v. Hatley*, W.Va. No. 33919, __W.Va. __, __S.E.2d__ (2009) (holding in Syl. Pt. 3. "When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and *to resolve any doubts in favor of excusing the juror*). [Emphasis added]. At this point, Mr. Clifford made no effort to object to the seating of the jury panel, despite most of the panel's obvious connections to the Defendant or the witnesses.

This Court has held that "[a] finding by a trial court in a criminal case that a fair and impartial jury can not be obtained in the county wherein defendant stands charged, must be clearly supported by facts appearing in the record." *State v. Jenningsroscoe Bail*, 140 W.Va. 680, 88 S.E.2d 634 (1955). The trial court declared the panel qualified. RV2TT at P. 63. Mr. Clifford then had to use his peremptory challenges to remove the objectionable jurors, again in violation of *State v. Hatley* (citations omitted). More importantly, however, Mr. Clifford made little or no effort to argue and preserve the point for appeal that the panel should have been modified, that the objectionable jurors be stricken for cause or that the panel be enlarged. RV2TT at P. 62 lines 24-25. Knowing Mr. Dellinger was a fairly public figure with numerous public commendations and news write ups, and that Dellinger was a diligent volunteer in the community, an experienced criminal trial counsel such as Mr. Clifford should have anticipated the need for a

larger panel and made a motion in support thereof. Even if the trial court had denied said motions, the record would have established the arguable need for a larger panel and perhaps the necessity for a change of veniremen from outside of Braxton County. While it is axiomatic under State v. Bail that the trial court had to attempt to seat a jury in Braxton County, given the pre-trial publicity, the admitted ties of the jurors to various witnesses and the Defendant, it is inconceivable that Mr. Clifford made no effort to correct the circumstances that created the panel. Defendant argues that Mr. Clifford's performance, in light of all the circumstances, the identified acts or omissions, was outside the broad range of professionally competent assistance. State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Additionally, in regard to the records obtained by the State through the exercise of subpoena power with the records returnable to the prosecutor, and not a case or grand jury as required by law, Michael T. Clifford was a recognized expert for his Impeachment work in Mingo County on that exact same issue. Yet at no time, until he objected late in the trial, did Mr. Clifford ever set out to discover how the state had acquired its voluminous information on the Defendant. For that the trial court took Mr. Clifford to task:

THE COURT: No I'm talking now, Mr. Clifford. Did you not inquire as to how they got those records; wouldn't that come up?

MR. CLIFFORD: Well, may it would have, maybe it wouldn't.

THE COURT: Oh no; it should have. And attorney—if somebody showed up with my medical records I'd be wanting to know well, how did you get my medical record? RV2TT at P. 347 lines 14-21.

Thereafter the Court continued the matter in chambers, whereupon a civil but tense conference was held. The Court did not strike the State's evidence which was obtained by illegal subpoena.

Finally, the State's evidence regarding the alleged prohibition in the Grant on administrative billing was introduced by State's witness Chuck Zerckle of the W.Va. State Police. RV2TT, PP. 90-110. During Mr. Clifford's cross examination of Chuck Zerckle, Mr. Clifford *never* asked Mr. Zerckle to produce the portion of the Grant that prohibited administrative billing. Mr. Zerckle *only testified* that the Grant disallowed such billing. RV2TT, P. 106, Lines 1-7.

For these and other reasons apparent upon the record, the Defendant believes that in addition to the other assignments of error raised in this Petition this Honorable Court should

consider reversal of this conviction based upon ineffective assistance of counsel relating to the impaneling of the jury, failure of experienced trial counsel to discern the State's use of illegal subpoenas, and the failure of counsel to cross examine the State's witness regarding the alleged prohibition on administrative billing in the Grant, and used to assist in the conviction of the Defendant.

PRAYER FOR RELIEF:

For the foregoing reasons, the Petitioner, Christopher Shane Dellinger, prays that he be granted an appeal and superseadeas, and that his conviction and sentence on four counts, each running one to ten years consecutively, and suspended to 60 days in jail, two years home confinement, five years probation and two hundred (200) hours of community service be vacated and reversed. Petitioner further prays that his case be fully reviewed by this Honorable Court and that all other necessary and appropriate relief be granted.

**CHRISTOPHER SHANE DELLINGER, PETITIONER
BY COUNSEL,**


BARBARA HARMON-SCHAMBERGER, WWSBN 7296

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE