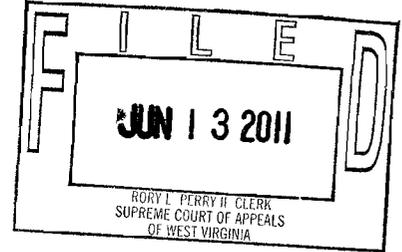

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0378

STATE ex rel. MICHAEL BROWN,

*Respondent,
Petitioner Below,*



v.

MICHAEL V. Coleman, Acting Warden,
Mount Olive Correctional Center,

*Petitioner,
Respondent Below.*

BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

	Page
ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE	2
The Underlying Case	2
The Instant Habeas Corpus Case	5
SUMMARY OF ARGUMENT	8
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	9
ARGUMENT	10
I. THE LOWER COURT WAS CLEARLY ERRONEOUS IN SEVERAL MATERIAL FACTUAL FINDINGS: THAT ASSISTANT PROSECUTING ATTORNEY JOE MARTORELLA, WHO WAS THE PROSECUTOR IN A CASE INVOLVING A JUROR’S SON, WAS ALSO A PROSECUTOR IN RESPONDENT’S CASE; THAT THE JUROR AT ISSUE WAS “QUITE LIKELY” TO HAVE BEEN STRUCK FOR CAUSE AT TRIAL, HAD SHE MADE CERTAIN DISCLOSURES; AND THAT DURING VOIR DIRE, MEMBERS OF THE JURY POOL “APPROACHED THE PRESIDING JUDGE IN A SIDEBAR.”	10
II. THE LOWER COURT ERRED IN CONCLUDING THAT <i>STATE v. DELLINGER</i> MANDATED A FINDING OF UNCONSTITUTIONAL BIAS IN RESPONDENT’S CASE	12
A. A Juror May Remain Constitutionally Impartial Despite a Connection to a Trial or a Nondisclosure Arising after a Trial Has Begun	13
B. Juror Wickline Meets the Test for Constitutional Impartiality	20
III. THE LOWER COURT ERRED IN CONCLUDING THAT <i>STATE v. DELLINGER</i> MANDATED A FINDING OF PREJUDICE AGAINST RESPONDENT	22
IV. ANY ERROR WITH RESPECT TO SEATING THE JUROR AT ISSUE WAS HARMLESS	23
CONCLUSION	27

TABLE OF AUTHORITIES

	Page
CASES	
<i>Chapman v. California</i> , 386 U.S. 18, 87 S. Ct. 824 (1967)	24
<i>Ladd v. State</i> , 3 S.W.3d 547 (Tex. Crim. App. 1999)	20
<i>Mathena v. Haines</i> , 219 W. Va. 417, 633 S.E.2d 771 (2006)	10
<i>O'Dell v. Miller</i> , 211 W. Va. 285, 565 S.E.2d 407 (2002)	16
<i>State ex rel. Farmer v. McBride</i> , 224 W. Va. 469, 686 S.E.2d 609 (2009)	15, 22, 24
<i>State ex rel. Grob v. Blair</i> , 158 W. Va. 647, 214 S.E.2d 330 (1975)	23-24
<i>State ex rel. Hatcher v. McBride</i> , 221 W. Va. 760, 656 S.E.2d 789 (2007)	10
<i>State v. Ashcraft</i> , 172 W. Va. 640, 309 S.E.2d 600 (1983)	20
<i>State v. Audia</i> , 171 W. Va. 568, 301 S.E.2d 199 (1983)	14
<i>State v. Brown</i> , 210 W. Va. 14, 552 S.E.2d 390 (2001)	5
<i>State v. Campbell</i> , 617 S.E.2d 1 (N.C. 2005)	14
<i>State v. Dellinger</i> , 225 W. Va. 736, 696 S.E.2d 38 (2010)	<i>passim</i>
<i>State v. Dennis</i> , 683 N.E.2d 1096 (Ohio 1997)	16
<i>State v. Finley</i> , 177 W. Va. 554, 355 S.E.2d 47 (1987)	16
<i>State v. Gilman</i> , 226 W. Va. 453, 702 S.E.2d 276 (2010)	14
<i>State v. Hatcher</i> , 211 W. Va. 738, 568 S.E.2d 45 (2002)	16, 17
<i>State v. Holland</i> , 178 W. Va. 744, 364 S.E.2d 535 (1987)	13
<i>State v. Hughes</i> , 225 W. Va. 218, 691 S.E.2d 813 (2010)	18, 20
<i>State v. Miller</i> , 197 W. Va. 588, 476 S.E.2d 535 (1996)	15-16, 21
<i>State v. Mills</i> , 221 W. Va. 283, 654 S.E.2d 603 (2007)	13, 14

TABLE OF AUTHORITY (Cont'd)

	Page
<i>State v. Olsen</i> , 508 N.W. 2d 616 (Wis. Ct. App. 1993)	16
<i>State v. Peacher</i> , 167 W. Va. 540, 280 S.E.2d 559 (1981)	13, 16
<i>State v. Rush</i> , 224 W. Va. 554, 687 S.E.2d 133 (2009)	13
<i>State v. White</i> , No. 35529, 2011 WL 50470 (W. Va., Feb. 10, 2011)	21
<i>State v. Wilson</i> , 157 W. Va. 1036, 207 S.E.2d 174 (1974)	14
 CONSTITUTIONAL PROVISIONS	
U.S. Const., amend. VI	13
U.S. Const., amend. XIV	13
W. Va. Const., art. II, § 14	13

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0378

STATE ex rel. MICHAEL E. BROWN,

*Respondent,
Petitioner Below,*

v.

MICHAEL V. COLEMAN, Acting Warden,
Mount Olive Correctional Center,

*Petitioner,
Respondent Below.*

BRIEF OF THE PETITIONER

Comes now Michael V. Coleman, Acting Warden, Mount Olive Correctional Center, Petitioner, by counsel, Barbara H. Allen, Managing Deputy Attorney General, and files this brief in support of his Petition for Appeal from the January 7, 2011, Order of the Circuit Court of Cabell County granting habeas corpus relief to Respondent, Michael E. Brown; and from the February 11, 2011, Order Denying the Petitioner's Motion for Reconsideration.

ASSIGNMENTS OF ERROR

1. The lower court was clearly erroneous in several material factual findings: that Assistant Prosecuting Attorney Joe Martorella, who was the prosecutor in a case involving a juror's son, was also a prosecutor in Respondent's case; that the juror at issue was "quite likely" to have been struck for cause at trial, had she made certain disclosures; and that during voir dire, members of the jury pool "approached the presiding judge in a sidebar."

2. The lower court erred in concluding that *State v. Dellinger*, 225 W. Va. 736, 696 S.E.2d 38 (2010), mandated a finding of juror bias in the Respondent's case.

3. The lower court erred in concluding that *State v. Dellinger*, 225 W. Va. 736, 696 S.E.2d 38 (2010), mandated a finding that the Respondent was prejudiced by the juror's participation.

4. Any error with respect to seating the juror at issue was harmless.

STATEMENT OF THE CASE

This is an appeal from the lower court's grant of habeas relief for Respondent. In reconsidering an order entered by the Honorable Judge Dan O'Hanlon, denying such relief, Judge John L. Cummings found that pursuant to the intervening case of *State v. Dellinger*, 225 W. Va. 736, 696 S.E.2d 38 (2010), the non-disclosure of certain information by juror Brenda Foster [now Wickline and hereinafter Juror Wickline] during *voir dire* raised a presumption of bias on the part of the juror and that prejudice resulted therefrom.

The Underlying Case

In the underlying criminal case, the Respondent was charged and convicted of the cold-blooded execution of two individuals who had accused him of shorting them in a drug deal and thereafter may have taken his car keys as a petty revenge.

On March 4, 1999, the Respondent was convicted of two counts of first degree murder arising from the shooting deaths of Ronald Davis and Greg Black in the early morning hours of August 15, 1997. (App. vol. II, 470.) At trial, the State was represented by Christopher D. Chiles, Cabell County Prosecuting Attorney, and Jara Divita, Assistant Prosecuting Attorney. (App. vol. II, 464, pp. 66-67.) During *voir dire*, the court directed Mr. Chiles to read the names of his staff to

potential jurors, and the court then asked whether the jurors “knew” anyone in that office. (*Id.*) Juror Wickline did not answer. (*Id.*)

The court then asked the potential jurors if they knew any witnesses or parties to the case, to which Juror Wickline responded that she did know a witness. (*Id.*, vol. II, 464, pp. 83.) Juror Wickline, questioned further, stated that she could be fair despite knowing the witness. (*Id.*)

The court then asked the potential jurors if anyone had family members who “had ever been defendants,” to which Juror Wickline did not respond. (*Id.*, vol. II, 464, pp. 93.)

Thereafter, twelve jurors, including Juror Wickline, as well as two alternate jurors, were empaneled.

At trial, the State put on evidence showing that a few weeks before the murders, Respondent sold drugs to the victims, but the victims soon discovered they had been “shorted” in the deal. (App. vol. II, 464, pp. 179-82; App. vol. II, 464, pp. 124-28.) Ronald Davis, one of the victims, found Respondent to confront him about the “shorted” amount. (App. vol. II, 464, pp. 182-83; App. vol. II, 465, pp. 127-28.) The victim and Respondent resolved the drug deal issue peacefully, but later that evening, Respondent could not find his car keys. (*Id.*, vol. II, 465, pp.65-66, 127-29.) Respondent became angry about the missing keys and blamed the victims, Ronald Davis and Greg Black. (App. vol. II, 464, pp. 184-85; App. vol II, 465, pp. 128-30; App. vol. II, 467, p. 23.) According to several witnesses, Respondent threatened to kill Davis and Black or to “get them.” (App. vol. II, 464, p. 185; App. vol. II, 465, p. 9.) According to two witnesses, Respondent wielded a shotgun while demonstrating anger about the missing keys and threatening to kill Davis and Black or get his keys back. (App. vol II, 464, p.185; App. vol. II, 465, 129-30.)

On the evening of August 14, 1997, Jason Pinkerton overheard Respondent, Matthew Fortner, and Joey France planning a robbery of the victims' house. (App. vol. II, 465, pp. 131-34.) When Pinkerton told them that the victims had guns, Respondent responded, "We'll shoot back if we have to." (*Id.*, vol. II, 465, pp. 134-36.) Fortner testified that Respondent killed the two men. (App. vol. II, 467, p. 10.) Fortner further testified that Respondent planned the robbery of the victims' house, and around 3:00 a.m. on August 15, 1997, Fortner, France, and Respondent executed that plan. (*Id.*, vol. II, 467, pp. 25-26, 28.) Fortner owned a tech nine handgun, and Respondent used France's Glock 9 handgun. (*Id.*, vol. II, 467, p. 29.) The State's ballistics expert, Clarence Lane, testified that all of the bullets recovered from the crime scene were fired from the Glock 9 handgun. (App. vol. II, 468, p. 12.)

According to Fortner, he and Respondent approached the victims' house, and Respondent knocked on the door; France remained in the car. (App. vol. II, 467, p. 29.) A man answered, and Respondent stated, "This is Mike Brown. I've got the money that I owe you." (*Id.*, vol. II, 467, p. 29.) When the man opened the door, Respondent shot him in the face. (*Id.*, vol. II, 467, pp. 29, 182-83.) Respondent and Fortner entered the house and another man asked what the noise had been, whereupon Respondent shot him seven or eight times. (*Id.*, vol. II, 467, p. 30.) According to the medical examiner, victim Davis was shot once with the bullet entering through the mouth and striking the spinal cord, causing death soon thereafter, and victim Black was shot seven times, five of which were in the chest and back, causing death. (*Id.*, vol. II, 467, pp. 182-88.)

Later on in the morning of August 15, 1997, Respondent, Fortner and France returned to the Pinkerton residence. (*Id.*, vol. II, 467, p. 30.) Michael Mount testified that Respondent and Fortner left Pinkerton's around 3 a.m. and were gone for about 45 minutes. (App. vol. II, 465, p.192.)

Upon their return to Pinkerton's, Respondent acted differently. (*Id.*, vol. II, 465, p. 202.) Respondent later told Mount that he and Fortner had murdered the two people who took Respondent's keys. (*Id.*, vol. II, 465, p. 194.)

Respondent was found guilty on two counts of first-degree murder. (App. vol. II, 470, p. 4.) Following a bifurcated penalty phase, wherein the jury recommended mercy on both counts, Respondent was sentenced to two consecutive terms of life with mercy. (App. vol. II, 471, pp. 139-43.)

On appeal, this Court affirmed the Respondent's conviction, although the case was remanded for the preparation of a presentence report and resentencing. *State v. Brown*, 210 W. Va. 14, 552 S.E.2d 390 (2001).

The Instant Habeas Corpus Case

Respondent initially filed a Petition for Writ of Habeas Corpus in or about 2002 and thereafter amended his petition on July 25, 2005. (App. vol. I, 0006; Order, 4, Jan. 7, 2011.) Respondent again amended his petition on May 14, 2009, alleging for the first time, *inter alia*, that the actions of a juror created a presumption of bias on the part of that juror and a presumption of prejudice to the Respondent.¹ During the course of the habeas proceedings, the court (then Judge O'Hanlon) granted leave for the parties to take the deposition of Juror Wickline. (*Id.*, vol. I, 6; Order, 4-5.) The deposition was taken on December 30, 2009, and made part of the record in the habeas proceedings. (*Id.*, vol. I, 7; Order, 5; *see* App. vol. I, 161, Depo. of Wickline.)

¹Respondent's other habeas issues, which were left undecided by lower court, involved a co-defendant, Matthew Fortner: Fortner's mental health; a polygraph issue; the alleged withholding of Fortner Brady materials; and the Fortner issue as newly discovered evidence. (App. vol. I, 7; Order, 5.)

Juror Wickline stated in her affidavit and deposition that she failed to disclose three connections to the Cabell County legal system while she acted as juror in Respondent's trial, all three connections involving her son's criminal indictment. Juror Wickline testified in her deposition that she did not tell the court during Respondent's trial that: 1) her son, Michael Foster, had been indicted in Cabell County and was scheduled to appear for trial in front of the same trial judge and in the same term of court as Respondent's case; 2) though she did not know him personally, she knew of Assistant Prosecutor Joe Martorella, whose name was read as a member of the Cabell County Prosecutor's Office during *voir dire*, because Mr. Martorella was the prosecutor assigned to Juror Wickline's son's criminal case; and 3) four days into Respondent's trial, Juror Wickline noticed that her son's attorney, Lee Booten, appeared in the back of the courtroom and seemed to be the attorney for one of the State's primary witnesses, Matthey Fortner, a fact Juror Wickline apparently never brought to anyone's attention. (App. vol. I, 228, ¶¶ 4-6, 10, Affidavit of Brenda Wickline (Aug. 14, 2009); *see generally* App. vol. I, 161, Depo. of Wickline.)

Juror Wickline explained each of these nondisclosures in her deposition testimony. She did not disclose the fact of her son's case to the court because the judge asked whether any family members "had been defendants." Juror Wickline testified that first, she did not think her son was yet a defendant, having only been charged with a crime, and second, the question was framed in the past tense. (*Id.*, vol. I, 161, 191-93, 200-01, 203, 214-15; Depo. of Wickline, pp. 30-32, 39-40, 42, 53-54.) She also admitted, however, that she was afraid, stressed, intimidated, ashamed, and embarrassed by her son's criminal conduct and being in a courtroom. (App. vol. I, 161, 192-94; Depo. of Brenda Gayle Wickline, pp. 31-33.) With respect to Mr. Martorella, Juror Wickline stated in her deposition that did not disclose knowing him because she did not "know" him personally, only

as “a person who is a name, you know, nobody I really knew,” unlike the witness she knew personally and admitted knowing during voir dire. (*Id.*, vol. I, 161, 189, 208, Depo. of Wickline, pp. 28, 47.) With respect to Lee Booten, Juror Wickline explained in her deposition that she did not disclose her connection to Mr. Booten, who was apparently an attorney for one of the State’s witnesses in Respondent’s trial, because she “thought being a small town that, you know, it didn’t dawn on [her] that would be a problem.” (App. vol. I, 161, 184, Depo. of Wickline, p. 23.) She also admitted she was frightened and intimidated by Judge O’Hanlon and the process generally and ashamed of her son’s criminal trouble. (*Id.*, vol. I, 161, 92-94, 95-96, 207, 219-20, Depo. of Wickline, pp. 31-33, 34-35, 46, 58-59.)

Juror Wickline maintained that she was fair, unbiased, and impartial as a juror at Respondent’s trial, even stating that she “was more apt to show mercy toward Michael Brown, if anything.” (*Id.*, vol. I, 161, 94, 204-05, 215-16, Depo. of Wickline, pp. 33, 43-44, 54-55.) She stated in her deposition that she “didn’t fully understand,” (*id.*, vol. I, 161, 195, 200, Depo. of Wickline, pp. 34, 39), but when she thought a *voir dire* question applied to her, she answered it. (*Id.*, vol. I, 161, 212, Depo. of Wickline, p. 51.) It was only after the passage of ten years, when she was contacted by the Respondent’s counsel, that Juror Wickline began to have doubts about not disclosing the fact of her son’s case during Respondent’s trial. (*Id.*, vol. I, 161, 205-06, Depo. of Wickline, pp. 44-45.)

Judge O’Hanlon held a habeas hearing to consider arguments on the issue of Juror Wickline’s non-disclosures. (App. vol. I, 150.) On April 12, 2010, Judge O’Hanlon entered an Amended Order denying relief on the juror issue, but granting Respondent’s request to raise other issues. (*Id.*)

Respondent filed a Motion for Reconsideration, which was assigned to Judge Cummings due to Judge O’Hanlon’s retirement. (App. vol. I, 3.) On January 7, 2011, Judge Cummings issued an Order Granting Habeas Corpus Relief, concluding that the intervening case of *State v. Dellinger*, *supra*, required a different result than that reached by Judge O’Hanlon. *Id.* Judge Cummings ordered a new trial. *Id.*

Thereafter, Petitioner filed a Motion for Reconsideration, which was denied by Judge Cummings. (See Order Denying Motion for Reconsideration [Feb. 11, 2011]; App. vol. I, 1.) This appeal followed.

SUMMARY OF ARGUMENT

The legal conclusions of the court below were based on three material factual findings that were clearly erroneous.

First, the prosecutor in the juror’s son’s case was not a prosecutor in the Respondent’s case; the record clearly and completely refutes this. Second, the court’s finding that the trial judge would “quite likely” have stricken the juror for cause, had the juror made certain disclosures, is wholly refuted by the the trial judge himself, who stated that he would simply have asked follow-up questions of the juror and that no evidence existed to question her impartiality. Third, there were no juror sidebars during the Respondent’s trial, giving credence to the juror’s claim that one reason she failed to make disclosures was her concern about the embarrassment of making them in open court.

The case of *State v. Dellinger*, was not “new law” mandating a new result in the Respondent’s case; rather, it was a *per curiam* opinion that applied established law to a set of facts easily distinguishable from the facts at bar. In *Dellinger*, a juror deliberately failed to disclose the

existence of substantial personal connections with the defendant (and two witnesses), apparently for the purpose of remaining on his jury. This Court found that “[t]he individual who lies *in order to improve his chances of service* has too much of a stake in the matter to be considered indifferent.” *Id.* at 742, 696 S.E.2d at 44 (citations omitted and emphasis supplied). Here, in contrast, the juror’s non-disclosures did not rise to a constitutional level, and her reasons for failing to disclose do not suggest any improper motive on her part.

The case of *State v. Dellinger, supra*, does not mandate a presumption of prejudice in the instant case, where the juror’s non-disclosures during voir dire do not demonstrate bias or prejudice on her part. Respondent failed to establish, either directly or circumstantially, that he was prejudiced by the presence of Juror Wickline on his jury.

Assuming arguendo that the presence of Juror Wickline was constitutional error, such error was harmless beyond a reasonable doubt. The case against the Respondent was strong; the State had direct testimony from accomplice witnesses, corroborating forensic evidence, and evidence of the Respondent’s after-the-fact admission that he had killed the victims. A review of the record leads to the conclusion that if anything, the Respondent caught a break: the jury granted mercy in a case involving two execution-style murders.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that this case is appropriate for consideration under Rule 20 of the Revised Rules of Appellate Procedure, and that oral argument is necessary to aid the Court in its resolution of the issues, despite the fact that the case involves assignments of error in the application of settled law, to-wit, *State v. Dellinger*. The breadth and scope of *Dellinger* – a per curiam opinion that established no new law, contrary to the apparent belief of the court below – is an important issue

both going forward, in future trials, and going backwards, in the flood of habeas corpus petitions sure to follow in the event of a ruling in the Respondent's favor.

ARGUMENT

Standard of review: "In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a de novo review." Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006). See *State ex rel. Hatcher v. McBride*, 221 W. Va. 760, 763 656 S.E.2d 789, 792 (2007).

I. THE LOWER COURT WAS CLEARLY ERRONEOUS IN SEVERAL MATERIAL FACTUAL FINDINGS: THAT ASSISTANT PROSECUTING ATTORNEY JOE MARTORELLA, WHO WAS THE PROSECUTOR IN A CASE INVOLVING A JUROR'S SON, WAS ALSO A PROSECUTOR IN RESPONDENT'S CASE; THAT THE JUROR AT ISSUE WAS "QUITE LIKELY" TO HAVE BEEN STRUCK FOR CAUSE AT TRIAL, HAD SHE MADE CERTAIN DISCLOSURES; AND THAT DURING VOIR DIRE, MEMBERS OF THE JURY POOL "APPROACHED THE PRESIDING JUDGE IN A SIDEBAR."

In the instant case, several of the main factual findings upon which the lower court based its legal conclusions were clearly and indisputably wrong.

First, the court found that Juror Wickline "had significant relationships with the Court" because, inter alia, "Mr. Martorella, assistant prosecutor in [Respondent's] case, was also prosecutor for Ms. Wickline's son's case" and that "the assistant prosecutor in the case was prosecuting her son." (App. vol. I, 3, 9, 14, Order, 7, 12, Jan. 7, 2011.) The record is crystal clear that these statements are incorrect. The prosecutors in the Respondent's case were Christopher Chiles and

Jara Divita. Joseph Martorella, who was prosecuting Juror Wickline's son, did not appear in Respondent's trial. (App. vol. II, 464, pp. 66-67; *see also generally* App. vol. II, 464-71.)

During *voir dire*, Judge O'Hanlon directed Mr. Chiles to read the names of his staff to the jury pool for the purposes of determining whether any of the prospective jurors "knew" any of the prosecutors in the Cabell County office. (App. vol. II, 464, pp. 67-73.) Mr. Martorella's name was read along with that of every other member of Mr. Chiles' office. (*Id.*) That was the full extent of Mr. Martorella's alleged presence at Respondent's trial; his name was read. Therefore, the lower court was clearly erroneous in finding that Mr. Martorella was a prosecutor in both the Respondent's case and Juror Wickline's son's case.

Second, the court below also concluded that if Juror Wickline had disclosed her son's legal situation at trial, the trial court was "quite likely" to have struck her for cause. (App. vol. I, 3, 14, Order, 12, Jan. 7, 2011.) However, the trial court, Judge O'Hanlon, specifically stated in his initial order denying Respondent habeas relief that whether Juror Wickline would have been struck for cause was "uncertain." (App. vol. I, 150, 158, Amended Order, 9, Apr. 12, 2010.) Judge O'Hanlon further stated that "prejudice cannot automatically be concluded from the presence of a juror" such as Juror Wickline, (*id.*), and concluded that if the juror had disclosed her son's situation during *voir dire*, she would not have been automatically struck; rather, she would have been questioned further. (*Id.*, vol. I, 150, 159, Amended Order, 10, April 12, 2010.) Upon further questioning, Judge O'Hanlon concluded, no evidence existed that Juror Wickline would have answered any differently than in her deposition, in which she maintained her impartiality. (*Id.*) In light of the trial judge's clear statements to the contrary, the habeas court was clearly erroneous in concluding that had Juror Wickline made her disclosures during *voir dire*, the trial court was "quite likely" to have struck her.

Third, the lower court stated that during *voir dire* other members of the jury pool “approached the presiding judge in sidebar to privately state their relationships and issues.” (App. vol. I, 3, 14, Order, 12, Jan. 7, 2011.) However, a review of the *voir dire* transcript reveals that no such sidebars were ever conducted.² This is material because Juror Wickline testified that part of her reluctance to disclose her son’s situation was the embarrassment of having to discuss it in open court, which she apparently believed would be the procedure in the event she spoke up. (The trial judge did state in his introductory remarks to the venire that personal matters could be discussed at sidebar; however, it is unknown whether Juror Wickline heard that statement and/or understood it, given her anxiety and apprehension about being in court.)

The three factual findings discussed above are all material, and all clearly erroneous. Further, they were central to the lower’s court’s conclusion, which followed immediately thereafter, that “[f]rom the totality of the circumstances, prejudice must be presumed” *Id.* The factual record upon which the court’s totality-of-the-circumstances decision relies is inaccurate.

II. THE LOWER COURT ERRED IN CONCLUDING THAT *STATE v. DELLINGER* MANDATED A FINDING OF UNCONSTITUTIONAL BIAS IN RESPONDENT’S CASE.

As a threshold matter, the court below (and the Respondent in his motion for reconsideration of Judge O’Hanlon’s original decision denying habeas relief) both treated *State v. Dellinger, supra*, as though it articulated some new– and explosive –principle of law. To the contrary, *Dellinger* was a *per curiam* opinion with no new syllabus points; this Court simply analyzed the fairly extraordinary facts of the case under the same law that Judge O’Hanlon utilized in his order denying the Respondent’s juror-based claim.

²Sidebars were taken between counsel and the judge, but none occurred during *voir dire* between members of the jury pool and the court.

Both before and after this Court decided *State v. Dellinger*, the law in this jurisdiction is that jurors with connections to the court, parties, or issues at trial may still be deemed to be constitutionally impartial, even in situations where the connections are not disclosed during *voir dire*. Short of actual bias or prejudice, the question is whether the juror can remain impartial and render a verdict on the evidence presented. However, a juror with actual bias, whether by fact or presumption, is considered partial. At the time of Respondent's trial, Juror Wickline's son was under indictment in the same court and by the same county prosecutor's office as Respondent, a fact not disclosed during *voir dire*. However, the lower court erred in concluding that this connection to the court and the county prosecuting attorney's office mandated a finding of unconstitutional, presumed-actual bias.

A. A Juror May Remain Constitutionally Impartial Despite a Connection to a Trial or a Nondisclosure Arising After a Trial Has Begun.

Criminal defendants have a right to trial by impartial jury. United States Constitution, amends. VI, XIV; West Virginia Constitution, art. III, § 14; Syl. Pt. 1, *State v. Peacher*, 167 W. Va. 540, 280 S.E.2d 559 (1981); Syl. Pt. 2, *State v. Dellinger, supra*. The right to an impartial jury may be violated due to a juror's connection to a trial if that connection is such that impartiality is defeated. For example, this Court has held that if a juror and a primary witness socialize during a trial or have "socialized" generally, then the juror's connection to the trial might become a constitutional violation. Compare *State v. Holland*, 178 W. Va. 744, 364 S.E.2d 535 (1987) (law enforcement witness talked with jurors, no constitutional violation found) with *State v. Rush*, 224 W. Va. 554, 687 S.E.2d 133 (2009) (law enforcement witness talked with jurors, constitutional violation found) and *State v. Mills*, 221 W. Va. 283, 654 S.E.2d 603 (2007) (if juror and law enforcement witness have "socialized," constitutional violation found).

However, this Court has held that jurors can have connections to a trial without violating a defendant's constitutional rights. For example, in *State v. Mills*, the Court upheld a verdict where a juror worked with one of the State's law enforcement witnesses. Quoting a Louisiana appellate court decision, the *Mills* Court stated that "[d]isclosure during trial that a juror knows . . . a witness . . . is not sufficient to disqualify a juror unless it is shown that the relationship is sufficient to preclude the juror from arriving at a fair verdict." *Id.* at 288, 654 S.E.2d at 610. The Court also cited a North Carolina appellate decision for the proposition that "[m]ere acquaintance with a witness is not enough to require excusal for cause." *Id.*, citing *State v. Campbell*, 617 S.E.2d 1, 36 (N.C. 2005).

Similarly, a juror with connections to a victim may remain constitutionally impartial. In *State v. Gilman*, 226 W. Va. 453, 702 S.E.2d 276 (2010), this Court held that a preacher who gave the funeral service for the victim in a murder trial was not biased or prejudiced. Although the *Gilman* juror had been struck and did not deliberate on the defendant's guilt or innocence, the Court noted that the juror never "really even knew the victim . . . let alone [] harbored any prejudice or bias from performing the funeral." *Id.* at 462, 702 S.E.2d at 285.

This Court even upheld a verdict where a juror had an attorney-client relationship with the prosecuting attorney. In *State v. Audia*, 171 W. Va. 568, 573, 301 S.E.2d 199, 205 (1983), the prosecuting attorney alerted the court during *voir dire* that he represented a prospective juror in a class partition suit. The prosecutor stated that he had no actual contact with the juror in that suit, and there was no evidence that the juror was biased or prejudiced. *Id.* at 573-74, 301 S.E.2d at 205-06. The Court held, citing Syl. pt. 1, *State v. Wilson*, 157 W. Va. 1036, 207 S.E.2d 174 (1974), that "[t]he true test as to whether a juror is qualified to serve on the panel is whether without bias

or prejudice he can render a verdict solely on the evidence under the instructions of the court.” *Id.*; *see also* discussion at Part I.B. *infra*. A juror is not automatically disqualified because she discloses after *voir dire* that she knows a witness or has a relationship with a prosecutor. The jurors in both *Mills* and *Audia* could render an unbiased verdict, so they were allowed to sit on the jury panel.

Moreover, not all bias is unconstitutional bias. This Court has held that the presence of a biased juror on a jury panel does not *per se* violate a defendant’s constitutional rights. In *State ex rel. Farmer v. McBride*, 224 W. Va. 469, 482, 686 S.E.2d 609, 622 (2009), a juror disclosed after *voir dire* that she worked at a bank that handled the victim’s estate. The trial judge decided that she could nonetheless remain on the jury panel, and on subsequent habeas review, this Court upheld the lower court’s determination:

A trial court’s failure to remove a biased juror from a jury panel does not violate a defendant’s right to a trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Section 14 of Article III of the West Virginia Constitution. In order to succeed in a claim that his or her constitutional right to an impartial jury was violated, a defendant must affirmatively show prejudice. Syl. Pt. 7, *State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75 (1995). Syllabus Point 6, *State ex rel. Quinones v. Rubenstein*, 218 W.Va. 388, 624 S.E.2d 825 (2005).

Id., Syl. Pt. 6.³ Neither the *Farmer* juror’s connection to the trial nor her disclosure of that information after *voir dire* demanded habeas relief. The juror’s connection and the timing of her disclosure did not rise to the level of a constitutional violation.

Unlike lesser connections discussed above that might be considered bias without prejudice, actual juror bias apparently demands removal of the juror or reversal of the conviction. A court may find actual bias “by the 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.” Syllabus Pt. 5,

³The prejudice element is discussed at Part III, *infra*.

State v. Miller, 197 W. Va. 588, 476 S.E.2d 535 (1996); Syl. Pt. 1, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002); Syl. Pt. 4, *State v. Dellinger*, *supra*.

Other jurisdictions have also held that constitutional error does not occur *per se* where juror nondisclosure is due to a reasonable misinterpretation of *voir dire* questions or where the victims of violent crime were ashamed to admit their experiences in open court. In *State v. Olsen*, 508 N.W.2d 616 (Wis. Ct. App. 1993), a juror failed to disclose she was the victim of an assault because she felt ashamed to discuss it in open court. Seven months after trial, she disclosed the fact to the trial attorney, whom she knew, stating that she thought the defendant deserved another trial. *Id.* at 617-18. The Wisconsin appellate court, noting that the juror did not have “actual bias,” held that the nondisclosure was not constitutional error because the assault took place 30 years before, the juror was ashamed to admit it, and the juror volunteered her remorse to defense counsel. *Id.* In *State v. Dennis*, 683 N.E.2d 1096, 1103 (Ohio 1997), a juror failed to disclose that she had been the victim of sexual abuse when the jury pool was asked whether anyone had been the victim of “violent crime.” The Ohio court held that the trial court’s decision not to strike the juror was not error. *Id.*

Inherent in the right to an impartial jury is a meaningful and effective *voir dire*. Syl. Pt. 4, *State v. Peacher*, *supra*; Syl. Pt. 2, *State v. Dellinger*, *supra*. The purpose behind *voir dire* is to allow parties to intelligently gauge the impartiality of the jury and exercise challenges. Syl. Pt. 3, *Dellinger*. This Court has stated, “[t]he purpose of *voir dire* is to obtain a panel of jurors free from bias or prejudice.” *State v. Finley*, 177 W. Va. 554, 556, 355 S.E.2d 47, 49 (1987).

Grave nondisclosures can defeat the purpose of *voir dire*. In *State v. Hatcher*, 211 W. Va. 738, 740-41, 568 S.E.2d 45, 47-48 (2002), for example, this Court held that a juror’s nondisclosure during *voir dire* violated the defendant’s right to an impartial jury because the juror failed to

disclosure a very close connection to both the subject matter of the trial and a witness. The *Hatcher* juror was empaneled on a murder trial, but he intentionally failed to disclose that his mother had been violently murdered and that the state's testifying officer investigated his mother's murder. *Id.* The Court determined that the juror "failed to disclose highly important and potentially disqualifying information despite direct inquiry." *Id.*

In *State v. Dellinger*, 225 W. Va. at 742, 696 S.E.2d at 45, a juror intentionally failed to disclose substantial personal connections to the defendant and two witnesses during *voir dire*, including direct contact with the defendant one week prior to trial, arguably for the purpose of sitting on that defendant's trial. The *Dellinger* juror remained silent during *voir dire*. *Id.* at 738, 696 S.E.2d at 40. She failed to disclose that she was "friends" with the defendant on a social networking website, sent the defendant a message one week prior to trial giving him spiritual advice, ending the message with "talk soon," lived in the same apartment complex as the defendant at one time, was related to one of the witnesses, and that another witness employed the juror's brother-in-law. *Id.* at 738-39, 696 S.E.2d at 40-41. Moreover, in her deposition after these significant connections were discovered, the juror stated that she should have disclosed her connections, but she "disobeyed" her own spiritual direction to reveal the information. *Id.* at 742, 696 S.E.2d at 45. The Court stated the rule for presumption of actual bias, then decided that "the totality of Juror Hyre's responses during the June 11, 2008 [hearing], coupled with her repeated silence during *voir dire*, leads this Court to conclude that she had such connection with [the defendant] that bias must be presumed." *Id.* The Court held that "there is a fine line between being willing to serve and being anxious . . . [t]he individual who lies in order to improve his chances of service has too much of a stake in the matter to be considered indifferent." *Id.* at 742, 696 S.E.2d at 44 (citations omitted). The *Dellinger*

decision turned on the juror's intentional withholding of significant information during *voir dire*, necessary to form an opinion about that juror's relationship with the defendant and witnesses due to that juror's repeated failure to be forthcoming. *Id.*

In the instant case, the question is whether Respondent's constitutional right to an impartial jury was violated by Juror Wickline's participation on the jury despite her nondisclosures. As with the jurors in *Mills* and *Audia*, wherein the Court decided the jurors were impartial, Juror Wickline did have a connection to the court. However, she continues to this day to maintain her impartiality. As with the juror in *Farmer*, any presumed bias from Juror Wickline's connection to the court is not of constitutional proportion. Her connection did not constitutionally bar her from sitting on Respondent's jury as an impartial juror. As this Court stated in evaluating the juror in *State v. Hughes*, 225 W. Va. 218, 229, 691 S.E.2d 813, 824 (2010), discussed below, Juror Wickline "did not articulate a bias or prejudice against" respondent.

The lower court incorrectly relied on *Dellinger* to conclude that Juror Wickline's connections to the trial violated Respondent's rights. The facts in *Dellinger* are clearly distinguishable from the facts of this case. The *Dellinger* juror directly communicated with the defendant whose guilt or innocence she would be deciding; she lived in the same apartment building as the defendant at some time prior to trial; she had strong, non-disclosed connections to two witnesses, including a familial relationship with one; and the Court found that she *intentionally* remained silent during *voir dire* arguably for the purpose of sitting on the defendant's jury. The *Dellinger* juror was the very definition of an unconstitutional juror.

Juror Wickline, on the other hand, was not an unconstitutional juror. She did not have any direct connections to, communications with, or knowledge about Respondent; she disclosed her connections with a witness during *voir dire* when she thought she should; she did not remain silent during *voir dire* (stating that she did know a witness); and she *did not* intentionally remain silent concerning her son's case for the purpose of sitting on Respondent's jury. During *voir dire*, Juror Wickline answered affirmatively that she "knew" one of the witnesses because she knew that witness personally. Although Juror Wickline failed to disclose during *voir dire* that her son was currently under indictment and scheduled to be tried before Judge O'Hanlon, who was also the trial judge in Respondent's case, a fair reading of the *voir dire* together with the juror's deposition testimony shows that: 1) She failed to disclose the information because she misinterpreted the judge's question asking whether any family members "had ever been a defendant," e.g., she believed that because her son had not yet been tried and convicted, he was not yet a "defendant"; 2) she failed to disclose the information because she literally construed the judge's question, which was framed in the past tense, to be inapplicable to her son's situation that was currently pending; 3) she failed to disclose the information because she was intimidated by the judicial process and embarrassed about her son's situation; 4) she failed to disclose that she "knew" Assistant Prosecuting Attorney Martorella, whose name was read during *voir dire*, because she did not know him—she just knew him, as she described in her deposition, "as a person who is a name"; and 5) unlike the juror in *Dellinger*, the last thing on earth she wanted was to be on the Respondent's jury (or any jury). She maintains her impartiality, and the record does not otherwise reflect bias. Juror Wickline herself stated that if any bias existed, which it did not, she would have been more likely to show mercy to Respondent.

Therefore, Juror Wickline's connections were not such that constitutional error occurred. The established law both before and after *Dellinger* demands a finding that Respondent was not unconstitutionally deprived of his right to an impartial jury.

B. Juror Wickline Meets the Test for Constitutional Impartiality.

An impartial jury is one “‘composed of persons who have no interest in the case, have neither formed nor expressed any opinion, who are free from bias or prejudice, and stand indifferent in the case.’” *State v. Dellinger*, 225 W. Va. at 741, 696 S.E.2d at 43, citing *State v. Ashcroft*, 172 W. Va. 640, 647, 309 S.E.2d 600, 607 (1983). As this Court has stated many times, “‘the relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant.’ Syllabus point 4, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).” Syl. Pt. 3, *State v. Hughes, supra*. A protestation of impartiality can be discredited if the record clearly shows otherwise. *Id.*

In Syl. Pt. 5, *State v. Hughes*, this Court held that a juror can remain on a jury if she remains impartial, despite an ambiguous statement concerning the likelihood of guilt of a defendant at the time of indictment. In *Hughes*, the juror stated in *voir dire* that the State needed probable cause of guilt to charge a person with a crime, and this Court held that the juror was not subject to removal. *Id.* at Syl. Pt. 5. The Court concluded that a juror stating a fact does not establish whether the juror is biased. *Id.* at 228, 691 S.E.2d at 823, quoting *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999) (jurors who give an equivocal statement can remain on a jury if they “‘follow the law and afford [the accused] the presumption of innocence”). The Court concluded that the juror in *Hughes* “‘did not articulate a bias or prejudice against Mr. Hughes.’” 225 W. Va. at 229, 691 S.E.2d at 824.

As recently as this year, this Court has decided that where a juror knows a witness, the test to determine whether that juror may sit is whether she has formed an opinion as to the case. In *State v. White*, No. 35529, 2011 WL 50470 (W. Va., Feb. 10, 2011), two jurors were held to be constitutionally impartial despite their connections to the trial and/or their opinions as to the validity of certain types of evidence. The first juror knew the name of a witness through his relationship with the witness' mother. *Id.* The Court held that the juror did not have a personal relationship with the witness, did not have a "fixed opinion" about the case, and could "judge impartially the guilt of the defendant." *Id.*, quoting Syl. Pt. 4, *State v. Miller*, *supra*. The second juror allegedly equivocated about how she would consider psychological testimony. *Id.* The Court determined that the party challenging the juror did not carry its burden to show that she was partial. *Id.* In conclusion, the Court found that there was no indication that either juror would have been "unable faithfully and impartially to apply the law." *Id.*

In the instant case, Juror Wickline maintained her impartiality throughout her *voir dire* and deposition, both before and after this information came to light, and her connection to the Cabell County legal community at the time of Respondent's trial does not discredit her testimony that she was in fact impartial. Juror Wickline stated during *voir dire* that she could "listen to the law and the evidence in this case and base [her] verdict solely and exclusively on that." (App. vol. II, 464, p. 83.) She was able faithfully and impartially to apply the law in Respondent's case. Juror Wickline's connection at issue involves her son's criminal case, not Respondent's. The overlap between her son's case and Respondent's did not fix Juror Wickline's opinion as to the merits of Respondent's case, and thus there is no basis on which to conclude that Juror Wickline had such a fixed opinion of Respondent's case that she could not judge the matter impartially.

Juror Wickline had no interest in the outcome of Respondent's case. She neither formed nor expressed any opinion as to the case prior to hearing the evidence. She was indifferent to Respondent. Therefore, Juror Wickline was impartial, and Respondent was properly tried by an impartial jury.

The lower court incorrectly relied upon *Dellinger* to grant Respondent's habeas petition. *Dellinger* involved a situation where there was clear, actual, and unambiguous bias, prejudice, and intentional nondisclosure by a juror who wanted to sit on the jury and for that purpose remained completely silent during *voir dire*, despite having direct communication with the defendant concerning spiritual advice during a crisis, living in the defendant's apartment complex, being related to one witness, and knowing another witness.

III. THE LOWER COURT ERRED IN CONCLUDING THAT *STATE v. DELLINGER* MANDATED A FINDING OF PREJUDICE AGAINST RESPONDENT.

As stated above, not all bias is constitutionally impermissible per se, disqualifying a juror on grounds of partiality. See Syl. Pt. 6, *State ex rel. Farmer v. McBride, supra*. Short of actual bias, which is not present in the instant case, a showing of juror bias will only rise to a constitutional level if that bias results in prejudice to the defendant. In *Farmer*, this Court upheld the lower court's determination that:

A trial court's failure to remove a biased juror from a jury panel does not violate a defendant's right to a trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Section 14 of Article III of the West Virginia Constitution. *In order to succeed in a claim that his or her constitutional right to an impartial jury was violated, a defendant must affirmatively show prejudice.* Syl. Pt. 7, *State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75 (1995). Syllabus Point 6, *State ex rel. Quinones v. Rubenstein*, 218 W.Va. 388, 624 S.E.2d 825 (2005).

Id., Syl. Pt. 6 (emphasis added).

In the instant case, Respondent showed that Juror Wickline had not disclosed that her son was indicted by the same county prosecutor's office, that the same judge was to preside over her son's trial, that her son's prosecutor was named during *voir dire* as one of many staff members in Mr. Chiles' office, and (later on during the trial) that her son's attorney also represented a witness. If, *arguendo*, Juror Wickline's connection to the Cabell County legal community at the time of Respondent's trial constituted bias, which the Petitioner contests, Respondent did not affirmatively show any prejudice resulting from that bias. In fact, in her deposition Juror Wickline stated that if she had been biased, she would have been more likely to have been sympathetic to the Respondent.

The lower court wrongly concluded, based on its erroneous factual findings, that prejudice to the Respondent resulted "[f]rom the totality of the circumstances." Juror Wickline's situation is not actual bias, as discussed above; and absent a showing of prejudice, Juror Wickline's service did not deprive the Respondent of his constitutional rights. To the contrary, the evidence demonstrates that Juror Wickline, although she did have a connection to the Cabell County legal community at the time of Respondent's trial, remained constitutionally impartial in his case. Respondent was properly tried and convicted for the murder of Ron Davis and Greg Black.

IV. ANY ERROR WITH RESPECT TO SEATING THE JUROR AT ISSUE WAS HARMLESS.

Constitutional error may be deemed harmless. In *State ex rel. Grob*, this Court adopted the United States Supreme Court's general rule that constitutional error can be harmless: "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. Pt. 5, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214

S.E.2d 330 (1975); Syl. Pt. 5, *State ex rel. Farmer v. McBride, supra*.⁴ Under this rule, even if, *arguendo*, a juror is found to be partial, that error might be harmless if the partiality is very slight and the weight of the evidence against a defendant is great.

The evidence presented at trial of Respondent's guilt was great. In the early morning hours of August 15, 1997, Ronald Davis and Greg Black were murdered in their home. At trial, the State provided evidence that, a few weeks before the murders, Respondent sold drugs to the victims, but the victims soon discovered they had been "shorted" in the deal. (App. vol. II, 464, pp. 179-82; App. vol. II, 465, pp. 124-28.) Ronald Davis, one of the victims, found Respondent to confront him about the "shorted" amount. (App. vol. II, 464, pp.182-83; App. vol. II, 464, pp. 127-28.) The victim and Respondent resolved the drug deal issue peacefully, but later that evening, Respondent could not find his car keys. (App. vol. II, 464, pp.65-66, 127-29.) Respondent became angry about the missing keys and blamed the victims, Ronald Davis and Greg Black. (App. vol. II, 464, pp. 184-85; App. vol. II, 465, pp. 128-30; App. vol. II, 467, pp.1, 23.) According to several witnesses, Respondent threatened to kill Davis and Black or "get them." (App. vol. II, 464, p. 185; App. vol. II, 465, p. 9.) According to two witnesses, Respondent wielded a shotgun while angry about the missing keys and threatening to either kill Davis and Black or get his keys back. (App. vol. II, p. 185; App. vol. II, 465, pp. 129-30.)

On the evening of August 14, 1997, Jason Pinkerton overheard Respondent, Matthew Fortner, and Joey France planning a robbery of the victims' house. (App. vol. II, 465, pp. 131-34.)

⁴The United States Supreme Court also stated that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). However, the Court did not state that any and all juror error falls within this harmless exception. Juror error might not rise to the level of a constitutional violation, and even if constitutional error arises, it might be deemed harmless.

When Pinkerton told them that the victims had guns, Respondent responded, "We'll shoot back if we have to." (App. vol. II, 465, pp.135:24-136:9.) Fortner testified that Respondent killed the two men. (App. vol. II, 467, p. 10.) Fortner stated that Respondent planned the robbery of the victims' house, and around 3 a.m. on August 15, 1997, Fortner, France, and Respondent executed that plan. (*Id.*, vol. II, 467, pp. 25-26, 28.) Fortner owned a tech nine handgun, and Respondent used France's Glock nine handgun. (*Id.*, vol. II, 467, p. 29.) The State's ballistics expert, Clarence Lane, testified that all of the bullets recovered from crime scene were fired from the Glock nine handgun. (App. vol. II, 468, p. 12.)

According to Fortner, he and Respondent approached the victims' house, and Respondent knocked on the door. (App. vol. II, 467, p. 29.) France remained in the car. *Id.* A man answered, and Respondent stated, "This is Mike Brown. I've got the money that I owe you." (*Id.*, vol. II, 467, pp. 29:19-20.) When the man opened the door, Respondent shot him in the face. (App. vol. II, 467, pp. 29, 182-83. The two entered the house, and another man asked what the noise had been, and Respondent shot the second man seven or eight times. (*Id.*, vol. II, 467, p. 30.) According to the medical examiner, victim Davis was shot once with the bullet entering through the mouth and striking the spinal cord, causing death soon thereafter, and victim Black was shot seven times, five of which were in the chest and back, causing death. (*Id.*, vol. II, 467, pp.182-88.)

Later on the morning of August 15, 1997, Respondent, Fortner, and France returned to the Pinkerton residence. (*Id.*, vol. II, 467, p. 30.) Michael Mount testified that Respondent and Fortner left Pinkerton's around 3 a.m. for about 45 minutes. (App. vol. II, 465, p.192.) Upon their return to Pinkerton's, Respondent acted differently. (App. vol. II, 465, p. 202.) Respondent told Mount

later that he and Fortner had murdered the two people who took Respondent's keys. (App. vol. II, 465, p. 194.)

An array of witnesses testified as to Respondent's motive and plan. Several witnesses even testified as to Respondent killing the two victims, including people Respondent told and an eye witness to the murders. Furthermore, according to the ballistics expert, the gun used to kill both victims was the gun other witnesses testified that Respondent carried during the break-in of the victims' home; the defense alleged that Fortner killed the victims, but the bullets recovered were not fired from a Tech nine Fortner owned and carried on the night of murders. Therefore, significant evidence weighed against Respondent at trial. Any error found in the seating of Juror Wickline, which would be presumed bias and not actual bias, was slight. Therefore, any error found would be harmless given the great weight of the evidence and the slight suggestion of jury bias. Respondent was properly convicted of murder. Moreover, Respondent actually fared better than he might have anticipated when the jury added recommendations of mercy to its guilty verdict.

CONCLUSION

For all of the reasons set forth in this brief and apparent on the face of the record, the decision of the Circuit Court of Cabell County, West Virginia, should be reversed. Thereafter, this case should be remanded to the habeas court to hear and decide the Respondent's remaining issues and claims, which have not yet been addressed by the court.

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CERTIFICATE OF SERVICE

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