

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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STATE OF WEST VIRGINIA,  
Respondent,

v.

TINA M. FRYMYER,  
Petitioner.

Appeal from Final Order  
Gilmer County Circuit Court  
Case Number 22-F-8

## PETITIONER'S BRIEF

Respectfully Submitted,

Petitioner,  
By Counsel

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### IV. Issues Presented and Standard of Review

1. Whether the Petitioner, Tina Frymyer, was deprived of a fair trial due to juror misconduct, as prohibited by Sixth and Fourteenth the United States Constitution and established in Remmer v. United States, 347 U.S. 227 (1954) and United States v. Resko, 3 F.3d 684 (3d Cir. 1993).
2. Whether the role of the prosecutor and clerk in the alleged juror misconduct violated the ethical standards of legal practice and subsequently impacted the fairness of the trial, as discussed in Smith v. Phillips, 455 U.S. 209 (1982)
3. Whether the judge erred by refusing to order an investigation into the allegations of juror prosecutor and clerk misconduct and whether he erred in forbidding Petitioner's

counsel to question specific jurors about recently discovered inconsistencies in their answers during voir dire and alleged behavior during trial.

4. Whether the cumulative impact of these irregularities warrants a reversal of the Circuit Court's denial to set aside the verdict and dismiss all charges against the Defendant-Petitioner, Tina Frymyer.

#### Standard of Review

'In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.'

Syllabus Point 3, State v. Vance, 207 W. Va. 640, 535 S.E.2d 4

Syl. Pt. 1, Phares v. Brooks, 214 W. Va. 442, 590 S.E.2d 370, 371 (2003). See Syl. Pt. 3, Human Rights Coram, v. Tenpin Lounge, Inc., 158 W. Va. 349, 350, 211 S.E.2d 349, 350 (1975) ("If it be determined that a juror falsely answered a question on *voir dire* examination, whether or not a new trial should be awarded is within the sound discretion of the trial court.") With this standard of review to guide us, we proceed to address the allegations raised in this appeal. See State v. Hutchinson, 215 W. Va. 313, 319, 599 S.E.2d 736, 742(2004) ("In determining whether there has been an abuse of discretion, we must evaluate each case on its own facts." (citations omitted)).

## **VI. Statement of the Case**

### ***A. Factual Background***

Tina Frymyer, the Defendant-Petitioner, was charged with fraudulent schemes in the Circuit Court of Gilmer County by way of indictment. She was alleged to have taken a foster child from DHHR and then placed the child in the care of another individual, Brandy Sims, for approximately 5-6 months. The allegation is that Ms. Frymyer did not forward the funds she was receiving for the care of the child to Ms. Sims but used them for her own living expenses. The trial commenced on February 17, 2023, and concluded on the same day, with a guilty verdict. The Defendant-Petitioner was sentenced to prison for 1 to 10 years then the sentence was suspended for six years probation and ordered to pay restitution. This appeal comes from conduct that was observed during the trial and evidenced gathered post trial that indicate at least one juror, circuit clerk and prosecutorial engaged in misconduct that resulted in an unfair jury trial. Additionally, Petitioner is alleging the trial judge refused to investigate when asked and made unfair judicial rulings post trial in an apparent attempt to limit Petitioner's ability to discover the depth of misconduct involved amongst the parties.

### ***B. Procedural History***

The Defendant-Petitioner filed a timely motion for to set aside the verdict and dismiss the indictment based on misconduct by at least one juror, the circuit clerk and prosecutor which was discovered post-trial. The Circuit Court denied the post trial motion on July 6, 2023, prompting the Defendant-Petitioner to appeal to this Court and contest the validity of the trial and its resulting verdict.

The issues in this appeal center on allegations of juror misconduct including the prosecutor's and clerk's role in the misconduct. These allegations, if substantiated, not only question the integrity of the criminal justice system in Gilmer County but also put the fairness of the Defendant-Petitioner's trial in serious doubt as well as the justification for making her go through a second trial.

## ***VII. Summary of Argument***

This appeal seeks to address and rectify significant concerns related to the trial process that resulted in the guilty verdict against Defendant-Petitioner, Tina Frymyer. Petitioner contends that the Circuit Court erred in denying the motion to set aside the verdict and dismiss the

indictment given the compelling evidence of juror misconduct and the prosecutor's and Clerk's involvement in this misconduct. Each of these elements individually and collectively compromised the fairness of the trial, and therefore, necessitated its review and likely reversal including outright dismissal of the indictment due to its egregious nature as the mistrial was brought on not only by juror misconduct, but prosecutorial and clerk misconduct as well. Petitioner is asserting that the rulings promulgated by the Court were biased in order to shield further discovery and protect the alleged wrongdoers.

Firstly, the role of jurors is to be impartial arbiters. In this case, there is substantial evidence to indicate that at least one juror was compromised, thereby putting the entire verdict into question. Legal precedents such as United States v. Resko clearly delineate how juror misconduct can be grounds for a new trial.

Secondly, the involvement of the prosecutor and clerk in the alleged juror misconduct further clouds the integrity of the trial and provides grounds to have the verdict set aside and the indictment dismissed with prejudice due to double jeopardy. Established case law provides a methodology for evaluating a case when a prosecutor is implicated in misconduct.

Lastly, the circuit clerk's involvement in the juror misconduct has the potential to have biased the proceedings significantly since her sister ended up being a juror in the trial and she allowed her to lie during voir dire to escape the scrutiny that would have come with full disclosure.

Considering these serious concerns, this appeal aims to scrutinize the validity of the original trial and argues for the verdict to be set aside and the indictment dismissed to uphold the sanctity and fairness of the criminal justice system, and buttress or establish case law in the State of West Virginia when dismissal of an indictment is appropriate due to juror, prosecutor or clerk misconduct.

## **VIII. Argument**

### ***A. Juror Misconduct Invalidates the Verdict***

The integrity of the jury is a cornerstone of the American judicial system. In this case, substantial evidence suggests that at least one juror was compromised, thereby putting the validity of the entire verdict into question. Juror misconduct violates a defendant's right to a fair trial and should not be taken lightly. The Supreme Court ruling in Remmer v. United States emphasizes that any extraneous influence on the jury should be presumed prejudicial. The case

dictates that it is the prosecution's burden to prove that such misconduct did not impact the verdict, which in this case they have failed to do. Remmer v. United States, 347 U.S. 227 (1954)

Juror Carrie Collins, the sister of Gilmer County Circuit Clerk Pam Starsick, failed to disclose close relationships she had to almost every witness in the case. The list of witnesses to be called by the parties included the arresting officer, WV Trooper R.P. Smith, DHHR Worker Jennifer Godfrey, and Brandy Sims, the caregiver for the infant placed in Petitioner's care. It was Brandy Sims who didn't receive the money provided by the DHHR to Petitioner for the infant's care and thus a quasi victim in the matter.

Juror Carrie Collins did not acknowledge being close personal friends with any of the witnesses listed above when questioned by the Court and counsel in voir dire. (App Pg 10 Line 21- Pg 11 Line 17) Counsel for Petitioner noticed that Juror Collins was acting out during the trial by communicating non verbally with both the Gilmer County Prosecuting Attorney, Gerry Hough, and Gilmer County Circuit Clerk, Pam Starsick, as evidenced by a letter counsel sent to Judge Alsop post trial on 2/18/23. Additionally, Counsel was able to piece together these relationships from Facebook searches conducted post trial and discovered they were not disclosed during voir dire by Juror Carrie Collins. That information was included in the letter to the judge as well. (App Pg 24-27)

Juror Carrie Collins apparently was close enough friends with arresting officer R.P. Smith that she shared photos of their children together at sporting events on Facebook. (App Pg 60-61) Arresting officer R.P. Smith testified post trial that their children most likely participated in sports over the years and he may have been their coach but wasn't sure because "I've coached a lot of kids in this county." Trooper Smith acknowledged that he knew Carrie Collins and worked with her brother in law Trooper Starsick, the husband to her sister, Pam Starsick, even though Trooper Starsick was stationed out of the Wood County detachment at the time these events occurred. (App Pg 128 Ln 11 - Pg 134 Ln 24)

Juror Carrie Collins knew witness Jennifer Godfrey the DHHR worker involved in the case because Juror Carrie Collins used to work at the DHHR with Jennifer Godfrey but failed to disclose any of this on voir dire. (App Pg 58-59, Pg 125 Ln 22 – Pg 126 Ln 18, Pg 160 Ln 20 – Pg 164 Ln 22)

Juror Carrie Collins was personal friends with witness Brandy Sims as well but failed to disclose it. Brandy Sims is the quasi victim who cared for the foster child but didn't receive any of the funds sent to Petitioner. Its apparent that Juror Carrie Collins and Brandy Sims' friendship goes back to childhood as Brandy Sims indicated that Juror Carrie Collins taught her in school between the ages of 5 and 6, and their families were friends only living miles apart. Additionally, Juror Carrie Collins and Brandy Sims are friends on Facebook with each of them

"liking" and "loving" photos posted by each other periodically over the years with the most recent one being less than 10 days before the trial. (App Pg 41-57, 72) (App pg 138 Ln 3 – pg 154 Ln 4)

It is axiomatic that a criminal defendant has a fundamental and constitutional right to trial by an impartial and objective jury. U.S. Constitution Amend VI

The right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14, of the West Virginia Constitution. A meaningful and effective voir dire of the jury panel is necessary to effectuate that fundamental right.

Indeed, "a criminal defendant is entitled to insist upon a jury `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. Ashcraft, 172 W. Va. 640, 647, 309 S.E.2d 600, 607 (1983) ( quoting State v. McMillion, 104 W. Va. 1, 8, 138 S.E. 732, 735 (1927) *overruled on other grounds* State v. Harden, 223 W. Va. 796, 679 S.E.2d 628 (2009)). To that end, this Court has long recognized the process of *voir dire*, meaning "to speak the truth," Michael v. Sabado, 192 W. Va. 585, 592, 453 S.E.2d 419, 426 (1994) as the parties "opportunity to discover[] whether there are any `relevant and material matters that might bear on possible disqualification of a juror.'" *Id.* (quoting Tenpin Lounge, 158 W. Va. at 355, 211 S.E.2d at 353. As we stated in State v. Derr, 192 W. Va. 165, 174, 451 S.E.2d 731, 740 (1994), "[o]ne of the ways this fundamental right [to a fair trial] is achieved is by *voir dire* which allows both the litigants and the trial court to discover any bias or prejudice a juror may harbor." Thus, we have held that

'[t]he official purpose[] of *voir dire* is to elicit information which will establish a basis for challenges for cause and to acquire information that will afford the parties an intelligent exercise of peremptory challenges.' Syl. Pt. 2, in part, Michael, 192 W. Va. 585, 453 S.E.2d 419 (1994).

Syl. Pt. 3, State ex rel. Nationwide Mut. Ins. Co. v. Karl, 222 W. Va. 326, 328, 664 S.E.2d 667, 669(2008). See Ashcraft, 172 W. Va. at 648, 309 S.E.2d at 608. "Clearly, then, a fair trial requires a meaningful and effective [v]oir dire examination." Tenpin Lounge, 158 W. Va. at 355, 211 S.E.2d at 353. State v. Dillinger, 225 W.Va. 736, 740-741 (2010)

In case State v. Miller, the Court stated 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." Syllabus Point 5, State v. Miller, 197 W. Va. 588, 476 S.E.2d 535 (1996)." Syl. Pt. 1, O'Dell v. Miller, 211 W. Va. 285, 286, 565 S.E.2d 407, 408 (2002). We are particularly mindful that "[t]he process of identifying bias or prejudice, except in clear cases, can be a delicate one where the conclusion is finally drawn from the

totality of the responses." 211 W. Va. at 289, 565 S.E.2d at 411 ( quoting Daniel J. Sheehan, Jr. and Jill C. Adler, *Voir Dire: Knowledge is Power*, 61 Tex. B.J. 630, 634 (1998)). Dillinger at 741.

Juror Collins lied to get on the jury panel which is atypical as a significant percentage of jurors look for ways to get off the panel which really calls into question her motives. As quoted in *Dyer v. Calderon*, "[j]ury service is a civic duty that citizens are expected to perform willingly when called upon to do so. But there is a fine line between being willing to serve and being anxious. . . . The individual who lies in order to improve his chances of service has too much of a stake in the matter to be considered indifferent." *Dyer v. Calderon*, 151 F.3d 970, 982 (9th Cir.) cert. denied, *Calderon v. Dyer*, 525 U.S. 1033, 119 S.Ct. 575, 142 L.Ed.2d 479 (1998). Indeed, "the quality of indifference . . . along with impartiality, is the hallmark of an unbiased juror." *Id.* 151 F.3d 970, 982 (9<sup>th</sup> Cir.) It is clear from the record that Juror Collins had a stake in the outcome of the trial with the web of relationships that existed but were not disclosed on voir dire.

### ***B. Prosecutor's Role in the Misconduct***

The prosecutor's involvement in the alleged misconduct adds an additional layer of complexity and concern. Prosecutors hold a unique position of trust and must adhere to high ethical standards to ensure a fair trial. When a prosecutor is implicated in influencing juror conduct, it undermines the entire trial process. In this case, the prosecutor's role in the misconduct is significant enough to warrant a new trial.

First, Petitioner asserts there is enough evidence to find that the Gilmer County Prosecuting Attorney knew who Juror Carrie Collins was contrary to his written statement to the Court. (App Pg. 29-30) The evidence before the Court is that counsel for Petitioner witnessed a lot of non verbal communication between Juror Carrie Collins and Prosecuting Attorney Gerry Hough as the trial was ongoing, so much communication that it alarmed counsel and he questioned the prosecutor about it as the jury was deliberating and reported it to the judge. (App pg. 24-27)

Juror Carrie Collins worked inside the Gilmer County Courthouse in the tax department for approximately 2 years only five or six years prior to this trial according to Deputy Jones. Additionally, it is known in the county that the Prosecuting Attorney owned a lot of rental real estate for which Juror Carrie Collins handled said property taxes and is the sister of the elected Gilmer County Circuit Clerk Pam Starsick who also worked inside the Courthouse. (App Pg 119 Ln 11 - Pg 121 Ln 5)

Lastly, Juror Carrie Collins was in an extended romantic relationship with long time Gilmer County Sheriff Deputy Casey Jones which was shared on the internet and widely known in

Gilmer County as they resided together for approximately 2 years. (App Pg 52-53, 64-67) Some of the likes on the post from June 10, 2019 were from Jasmin Morton Mohr, an ex clerk for Judge Alsop, Joyce Morton a long time attorney from Webster County and mother to Jasmin, long time CPS worker Robin Meadows and Gilmer County Magistrate Carol Wolfe. (App Pg 64-67) When asked about the likelihood that Prosecutor Gerry Hough did not know Juror Carrie Collins as stated by Prosecutor Hough, Sheriff Deputy Jones stated that “....everybody pretty much knows everybody. It’s a small town.” (App Pg 125 Ln 1-17)

It is very apparent from the non verbal communication between Juror Collins and Prosecutor Hough during trial that they did know each other which is what prompted counsel’s inquiry as contained in the letter written to the judge. (App Pg 24-27) When you combine that with these other family, work and romantic ties with a well known sheriff deputy in Gilmer County, its almost impossible that Prosecutor Hough did not know the identity of Juror Carrie Collins contrary to his written statement to the court. In addition, Prosecutor Hough stated in his response that Petitioner’s counsel received the jury questionnaires and with due diligence would have known the background of Juror Carrie Collins but he received the same list, worked with her in the same building in Gilmer County but claims he did not know who she was in fact which is hard to believe. (App Pg 29-30)

### ***C. Clerk's Inappropriate Behavior and Non-disclosure***

The role of the court clerk is often overlooked but is critical for ensuring a fair trial. In this instance, the court clerk had participated in the misconduct alleged that was witnessed during the trial that significantly impact the proceedings. The clerk's failure to disclose her close family relationship with Juror Carrie Collins is contrary to the purpose of voir dire and allowing her sister, Juror Carrie Collins, to continue to conceal relationships with each witness compounds the misconduct.

This concealment prevented Petitioner from adequately weighing her impartiality or bias in the matter. The concealed of this close personal relationship and resulting behavior did impact the jury trial as alleged by Petitioner’s counsel in the letter to Judge Alsop. (App Pg. 24-27) The Clerk failed to perform her sworn duties as an officer of the Court as she not only participated in her sister’s attempt to make a mockery of the trial but allowed her sister to mislead Petitioner and Petitioner’s counsel by not correcting the record when she was aware of her sister’s failure to answer questions truthfully during voir dire.

Obviously, the Clerk knew that her sister, Juror Carrie Collins, had an immediate family member involved in law enforcement since Clerk Starsick is married to a WV State Trooper and all parties reside in Gilmer County. Additionally, Clerk Starsick knew that her sister had been employed with DHHR and worked with Jennifer Godfrey, and that her sister was friendly with

the investigating officer WV Trooper R.P. Smith who works for same agency as her husband. Evidence obtained from Facebook show that Brandy Sims and Clerk Starsick were also friendly on Facebook even conversing on a post made by Brandy Sims so its fair to infer that Clerk Starsick knew that her sister, Juror Carrie Collins, was friends with Brandy Sims. (App Pg 68-74) The Facebook exhibit involving the choosing of the baby name Madeline was commented on by Clerk Starsick as Madeline was the name of the Brandy Sims' grandmother. (App Pg. 73-74, Pg 150 Ln 12 - Pg. 151 Ln 23) Brandy Sims freely admitted that she knows their family as she grew up not too far down the road from Pam Starsick and Carrie Collins, "...I grew up not too far down the road from them. I don't know her personally but I do know her. I know the family. This is a small county." (App Pg 150 Ln 12 – 21)

The inappropriate behavior witnessed by counsel for Petitioner involved Juror Carrie Collins, two male jurors one on each side of her, the prosecutor and the Clerk as it was evident there were non verbal communication ongoing between Jurors Collins and Stewart towards the Clerk periodically throughout the trial even though the Clerk was not visible from Petitioner's table. Juror Jason Stewart who was seated to the left of Juror Carrie Collins only one chair from the end where the Prosecutor and Clerk's table were located appeared to be overly friendly towards the Clerk during trial as well as emitting laughter during parts of the proceeding as Juror Carrie Collins was acting up in the front row. It appears from a Facebook search that the Clerk is friendly with Juror Stewart or his wife as she "loves" a photo of Juror Stewart and his wife. (App Pg 75-76) Counsel for Petitioner was precluded from call Juror Stewart as a witness by Judge Alsop so the extent of the relationship between Jason Stewart, Carrie Collins and Clerk Pam Starsick is unknown at this time.

#### ***D. Judicial Rulings Biased Petitioner***

Petitioner's counsel wrote a detailed letter on February 18, 2023 to Judge Alsop following the conclusion of the trial asking for an investigation into alleged Juror, Clerk and Prosecutorial misconduct. Counsel filed the necessary post trial motions within the time frame established by the Court and filed a witness and exhibit list ahead of the first post trial hearing held on 4/17/23. In that hearing held on 4/17/23, Judge Alsop made it clear that he was going to be an impediment to Petitioner and Petitioner's counsel quest for the truth. Counsel asked the Court to call the first witness and Judge Alsop stated, "I'm not going to let you call witnesses today or any other day because your not going behind the jury verdict or the jury qualification." (App Pg 80 Ln 1 – Pg 86 Ln 12)

After said hearing and the reaction from Judge Alsop it was decided to file a motion to have him disqualified as judge because we felt he was biased against Petitioner and in favor of the alleged wrongdoers in the matter. (App Pg. 89 – 91) Judge Alsop immediately defended Juror Collins when he stated that he disagreed that she lied even though we hadn't produced any witnesses at that point. It was apparent the he had already made up his mind to defend Juror Collins for obvious lies during voir dire. (App Pg 97 Ln 17-23) Judge Alsop filed a reply refusing to be removed. The WV Supreme Court did not remove him. In his response, Judge Alsop denies being biased but admits that Clerk Pam Starsick's husband has appeared before the Court "...on a few occasions, appeared as a witness before this Court, but not regularly, and not in this case." (App Pg. 104-105).

Judge Alsop refused to allow Petitioner to call any jurors including Jurors Carrie Collins and Jason Stewart. Counsel wanted to call Prosecutor Hough and Clerk Starsick, but knew that the Court would never allow it. In refusing to allow Petitioner to call the two jurors, Judge Alsop cited Rules of Evidence 606 claiming it prohibits the calling of a juror to testify with regards to a verdict, but counsel was only requesting to examine her with regards to her failure to answer truthfully on voir dire not the events that occurred during deliberation. (App Pg. 164 Ln 24 – Pg. 171 Ln 10)

Precedent exists in the 14<sup>th</sup> Judicial Circuit where Judge Alsop sits to conduct a through investigation into the claims of juror misconduct made by Petitioner. Judge Alsop could have ordered an investigation allowing Petitioner and her counsel to call and cross examine the prospective jurors but chose not to. In 2010 a case of alleged juror misconduct, State v. Dillinger, arose out of Braxton County with Judge Richard Facemire presiding. The facts of the case are different from the case at hand as Dillinger involved alleged misconduct by a juror only. The allegations centered around alleged contact between a juror and the defendant via MySpace social media network that was not disclosed on voir dire. In Dillinger, Judge Facemire ordered an investigation into the allegations and allowed testimony on the matter to be brought before the Court. State v. Dillinger, 225 W.Va. 736(W. Va. 2010)

Additionally, federal case law exists that mandates a more a more searching inquiry into the potential prejudice to the Petitioner from the jury's misconduct than what was conducted by Judge Alsop. The Court in U.S. v. Resko reversed a lower court's ruling restricting trial counsel's right to question jurors mid trial when it was revealed that the jurors had been discussing the case amongst themselves in violation of Court Order. The trial judge decided to do a two part questionnaire which the U.S. Supreme Court found to be inadequate. United States v. Resko, 3 F.3d 684 (3d Cir. 1993) We believe that Judge Alsop's refusal to allow Petitioner's counsel to question the jurors is even more restrictive than found in Resko therefore inadequate and grounds for reversal.

Judge Alsop further found that a brother in law is not an immediate family member for purposes of voir dire when prospective jurors are asked if they have an immediate family member working in law enforcement. Juror Carrie Collins has a brother in law working in law enforcement that resides in Gilmer County but failed to answer in the affirmative during voir dire. The court found that she did not mislead during voir dire when answering that question because according to Judge Alsop a brother in law isn't an immediate family member. Judge Alsop did admit with Petitioner's counsel that the definition of immediate family member under WV law is varied with some classifying a brother in law as immediate family and others not. (App Pg 110 Ln 6 – Pg 114 Ln 21, Pg. 173 Ln 19 – Pg. 176 Ln 22) What is the purpose of voir dire if a prospective juror can conceal that their brother in law works for local law enforcement? Judge Alsop's holding that a brother in law is not an immediate family member was disagreed with both WV State Trooper R.P. Smith and Gilmer County Sheriff Deputy Casey Jones who both testified that they consider a brother in law an immediate family member. Counsel asserts that is the common sense view off a brother in law for purposes of voir dire. (App Pg 121 Ln 6 - Pg122 Ln 2, Pg 132 Ln 3 – Pg 134 Ln 24)

The record is replete with examples where Judge Alsop refused to allow Petitioner and Petitioner's counsel to prosecute the case the way they desired. From the initial hearing in April 2023 where Judge Alsop said he wasn't going to allow Petitioner or Petitioner's counsel to call any witnesses or "undermine" the jury, it was apparent the Court was not receptive to Petitioner's inquiry into misconduct by the parties. Refusing to allow anyone to question these jurors is an abuse of his power when contrasted with the approach in the 14<sup>th</sup> judicial circuit in Dillinger which constitutes reversible error.

### ***E. Request for Dismissal***

Considering the above points, it is evident that the original trial was compromised on multiple levels. Each issue individually raises concerns about the integrity of the process, and collectively they render the verdict invalid. As such, the Petitioner respectfully requests that the guilty verdict be set aside and that her indictment be dismissed. There is support for Petitioner's position in that the alleged mistrial is not only attributable to juror misconduct but also Clerk and Prosecutorial misconduct. That's the nexus that allows for the dismissal of the indictment on double jeopardy grounds. Prosecutorial misconduct is now widely accepted as grounds for the more serious remedy of dismissal versus the customary remedy which is a new trial be ordered. The Court in Dillinger ordered a new trial be conducted reversing the lower court's

ruling. In Dillinger, the misconduct of the juror was the sole impetus for the new trial which is much different than this matter which involves officers of the Court.

This WV Supreme Court in State v. Elswick cited syllabus point eight of State v. Pennington, 179 W.Va. 139, 365 S.E.2d 803 (1987): "When a mistrial is granted on motion of the defendant, unless the defendant was provoked into moving for the mistrial because of prosecutorial or judicial conduct, a retrial may not be barred on the basis of jeopardy principles. Oregon v. Kennedy, 456 U.S. 667, 679, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416,427 (1982)." This Court has further explained that an inquiry is required into the intent of the prosecutor in making the reference to failure to testify. Specifically, in syllabus point two of State ex rel. Bass v. Abbot, 180 W.Va. 119, 375 S.E.2d 590 (1988), this Court observed: "The determination of 'intention' in the test for the application of double jeopardy when a defendant successfully moves for a mistrial is a question of fact, and the trial court's finding on this factual issue will not be set aside unless it is clearly wrong."

The United States Supreme Court, in Kennedy, explained that "[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." 456 U.S. at 675-76. State v. Elswick, No. 35014 WV (2010)

The established standard in Kennedy and carried on in Pennington is that the mistrial had to be caused by prosecutorial misconduct in order for double jeopardy to apply. This case isn't a mistrial but it is to be treated as one if the Court finds error and orders a new trial therefore a similar analysis should apply. Is the mistrial the result of prosecutorial misconduct? Petitioner argues it is as the prosecutor and clerk had the ability to point out the family relationship to Petitioner and Petitioner's counsel including relationship to WV State Trooper Strasick who is her brother in law. These were things the Prosecutor and Clerk failed to do. To make this even more egregious, the prosecutor misled the Court in writing claiming that he didn't know Juror Carrie Collins when it's apparent from the facts and observations of Petitioner's counsel that he did in fact know her.

The Courts surrounding West Virginia namely North Carolina and Pennsylvania have widened the circumstances where they will dismiss an indictment due to misconduct on behalf of a prosecutor. They have slowly moved towards dismissal of the indictment when the Prosecutor or Court is the cause of the mistrial and their actions weren't the result of an accident or honest mistake.

Taken from Commonwealth v. Byrd No. 468 WDA 2017 (PA 2019),

"Our standard of review is well settled. An appeal based on double jeopardy grounds presents a question of constitutional law. Commonwealth v. Vargas, 947 A.2d 777, 780 (Pa. Super. 2008) (citations omitted). As with all questions of pure law, our standard of

review is *de novo* and our scope of review is plenary. *Id.* We must also consider the following:

The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article 1, § 10 of the Pennsylvania Constitution protect a defendant from repeated criminal prosecutions for the same offense. Ordinarily, the law permits retrial when the defendant successfully moves for mistrial. If, however, the prosecution engages in certain forms of intentional misconduct, the Double Jeopardy Clause bars retrial. Article I, § 10, which our Supreme Court has construed more broadly than its federal counterpart, bars retrial not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial. An error by a prosecutor does not deprive the defendant of a fair trial. However, where the prosecutor's conduct changes from mere error to intentionally subverting the court process, then a fair trial is denied.

*Commonwealth v. Adams*, 177 A.3d 359, 371 (Pa. Super. 2017). "[D]ismissal is an appropriate remedy in such a case because a mistrial would be an inadequate remedy for systematic intentional prosecutorial misconduct[.]" *Id.*

By and large, most forms of undue prejudice caused by inadvertent prosecutorial error or misconduct can be remedied in individual cases by retrial. Intentional prosecutorial misconduct, on the other hand, raises systematic concerns beyond a specific individual's right to a fair trial that are left unaddressed by retrial. As this Court has often repeated, "a fair trial is not simply a lofty goal, it is a constitutional mandate, ... and where that constitutional mandate is ignored by the Commonwealth, we cannot simply turn a blind eye and give the Commonwealth another opportunity."

*Id.* (quoting *Commonwealth v. Graham*, 109 A.3d 733, 736 (Pa. Super. 2015) (additional citations omitted). In sum, conduct that constitutes mere prosecutorial error does not implicate double jeopardy; it is prosecutorial overreaching that cannot be condoned. *Commonwealth v. Martorano*, 559 Pa. 533, 741 A.2d 1221, 1222 (1999)." *Commonwealth v. Byrd* No. 468 WDA at 353-354 2017 (PA 2019)

The Court should apply the same standard in West Virginia as is applied in Pennsylvania. Prosecutorial misconduct that ignores the constitutional mandates provided for by the United States and West Virginia Constitution should be punished by application of the double jeopardy doctrine and all charges dismissed. To reward this type of behavior with a mistrial and new trial is only turning a blind eye by giving the State of West Virginia another chance to convict Petitioner.

## **IX. Conclusion**

For the reasons stated herein, Petitioner requests that this Honorable Court reverse the lower court's rulings and dismiss the indictment against Petitioner with prejudice.

Respectfully Submitted,

Petitioner,  
By Counsel

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## **Certificate of Compliance**

I certify that this brief complies with the type-volume limitation of the West Virginia Rules of Appellate Procedure and the appendix contains true representations of the exhibits.

/s/ Timothy V. Gentilozzi

## **Certificate of Service**

I hereby certify that a true and accurate copy of the foregoing brief was electronically filed with the Clerk of the Court for the Court of Appeals of the State of West Virginia on 12/8/23. I also certify that a copy was served electronically on all counsel of record on 12/8/23 in compliance with Rules.

/s/ Timothy V. Gentilozzi