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## Gaining Access to the Jury: A Critical Guide to the Law of Jury Selection in West Virginia

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# GAINING ACCESS TO THE JURY: A CRITICAL GUIDE TO THE LAW OF JURY SELECTION IN WEST VIRGINIA

CHARLES R. DiSALVO\*

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\*\* Part Two of this article is scheduled for publication in a future issue.

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“Another requisite of a fair trial is a fair jury.”

—The West Virginia Supreme Court of Appeals, *State v. Lohm*<sup>1</sup>

## I. INTRODUCTION—THE NET

My research for this article was initially designed to simply collect the entire body of jury selection law in West Virginia. No one else had catalogued it before. I believed producing such a catalogue would be a valuable enterprise because our courts and practitioners would then have before them a compendium of our jury selection law. This compendium, I hoped, would in turn lead to more rational jury selection practices and, in the end, to the effectuation of the overarching theoretical purpose of jury selection—the empanelling of a reasonably unprejudiced and unbiased jury.<sup>2</sup>

When I began putting together this collection of the law and sharing my concerns with others, however, I realized that a larger picture was beginning to emerge. The picture was of jury selection and *voir dire* as a large net, spread out in the water to collect those members of the population whom we do not want swimming through—the prejudiced, the biased, and anyone else unqualified to serve as a juror in a criminal trial or civil lawsuit.

The net, I have learned, is an unsatisfactory one. The law of jury selection and *voir dire* is uninformed and antiquated. As far as the law in this area is concerned, the teachings of the social sciences—psychology in particular—do not exist.

In this article I survey the condition of the current net. In the second part of my discussion, which will appear in a future issue of this journal, I will demonstrate that many prejudiced and biased jurors swim through the net, discuss the reasons for their ability to

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1. *State v. Lohm*, 97 W. Va. 652, 125 S.E. 758 (1924), *overruled*, *State v. Dolin*, 347 S.E.2d 208 (W. Va. 1986).

2. For purposes of distinguishing two different types of *a priori* postures of jurors, I will refer in this article to an *a priori* judgment against a person, idea, or cause as “prejudice” and an *a priori* judgment in favor of a person, idea, or cause as “bias.”

do so, and suggest what can be done to make the net a better tool for creating more impartial jury panels.

Let me admit the obvious at the beginning. I do not pretend to believe that all prejudice and bias can be removed or even neutralized by use of the measures to be recommended here. Our profession, like all professions, is limited in its capacity to reverse the imperfections with which human beings are born. I do believe, however, that we can not only substantially reduce the prejudice and bias that would otherwise exist on panels, but we can also greatly neutralize the prejudice and bias that remain.

## II. A SURVEY OF THE LAW OF CHALLENGES

My description of the net is organized around the now common notion that jury selection is actually a process of “unselection.”<sup>3</sup> The court and lawyers, of course, are not free to select members of the community at large for jury service.<sup>4</sup> They are limited to those whose names are randomly drawn from the jury list, a list itself composed of names selected at random from fixed-source lists by jury commissioners.<sup>5</sup> From this group, all the lawyers and judges can do is *remove* persons. Those remaining constitute the jury.

Thus, the only way to describe the net is to describe the mechanisms for removing jurors. Let us begin with the four grounds available to attorneys for challenging jurors: challenges to the array, challenges for cause, challenges to the favor, and peremptory challenges.

3. To the best of my knowledge, it was Irving Younger who coined the term “jury unselection.” Younger, *Jury Selection* (video-taped lectures) Tape 1 (1986).

4. This is not to say that there have not been those who desired to hand-pick jurors whom they believed to be specially qualified to hear cases. The notion of such “blue ribbon” juries has been a matter of some controversy in the past. *See, e.g., Baker, In Defense of the “Blue Ribbon” Jury*, 35 IOWA L. REV. 409 (1950).

In *Fay v. New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043 (1947), the United States Supreme Court upheld the use of state court “blue ribbon” juries.

5. West Virginia Code § 52-1-5 (1988) requires that commissioners select names from at least two of three source lists: 1) state personal income tax payers; 2) licensed drivers; and 3) registered voters.

### A. Challenges to the Array

A challenge to the array is predicated upon some fundamental defect in the *process* which brought forth the panel and the jury list from which it was drawn, such that the process, the panel, and the list must all be invalidated<sup>6</sup>. Such challenges are commonly grounded on deviations from the statutory scheme for composing jury lists and selecting panelists<sup>7</sup> or on constitutional defects.<sup>8</sup>

The principal constitutional ground on which challenges to the array have been based is the fair trial requirement of the sixth amendment to the United States Constitution.<sup>9</sup> Despite recent reforms in

6. See *State v. Cartwright*, 20 W. Va. 32, 36 (1882) (a challenge to the array must be based on an irregularity affecting the whole panel of jurors).

7. W. JORDAN, *JURY SELECTION* 45-46 (1980). Such attacks in West Virginia have been uniformly unsuccessful. An example of such a challenge in West Virginia is *State v. Nuckolls*, 152 W. Va. 736, 166 S.E.2d 3 (1969). In *Nuckolls*, the court re-affirmed an historical distinction in the administrative provisions of the law that governed jury list composition, calling some mandatory and some directory. The failure to abide by mandatory provisions would normally result in the invalidation of the list. Failure to meet the technical requirements of directory terms, however, would not result in invalidation, assuming substantial compliance with the law and the absence of prejudice to the appellant. In *Nuckolls*, the jury commissioners allowed the clerk to perform some of their duties. The court found these statutorily-mandated duties to be directory and the compliance to be substantial.

Other challenges based on non-compliance with procedural requirements include *State v. Mills*, 33 W. Va. 453, 10 S.E. 808 (1890) (unsuccessful attack upon method of selecting jurors from bystanders); *State v. Huff*, 80 W. Va. 468, 92 S.E. 681 (1917) (unsuccessful attack upon a jury list prepared by a jury commissioner whose term had expired); *State v. Price*, 96 W. Va. 498, 123 S.E. 283 (1924) (unsuccessful attack upon a jury that had been summoned to appear on a day other than the first term of court without the required written court order); *State v. Carduff*, 142 W. Va. 18, 93 S.E.2d 502 (1956) (unsuccessful attack upon list with an insufficient number of jurors drawn out of term); and *State v. Hankish*, 147 W. Va. 123, 126 S.E.2d 42 (1962) (unsuccessful attack upon jurors whose names had been drawn improperly).

In a case decided under the 1986 reforms to jury law (see text accompanying footnotes 10-14), *Bennett v. Warner*, 372 S.E.2d 920 (W. Va. 1988), the West Virginia Supreme Court held that the requirement that juror qualification forms be used, W. VA. CODE § 52-1-1 (1986), was mandatory in nature, that failure to comply with the requirement was sufficient to cause reversal, and that a demonstration of prejudice to the appellant was unnecessary for the appellant to prevail on appeal. (In the course of its decision the court volunteered the opinion that the use of juror qualification forms was discontinued by virtue of amendments to West Virginia Code chapter 52 enacted in 1988, citing § 52-1-5a of the statute. This is an error. The use of such forms remains a requirement. See § 52-1-7(b).

8. For an extensive review of methods for challenging the array on constitutional grounds, see *JURYWORK* (D. Kairas & B. Bonora, 2d ed. 1987).

9. Several such attacks on the constitutionality of panels have been made in West Virginia in recent years, all without success. See, e.g., *State v. Johnson*, 157 W. Va. 341, 201 S.E. 2d 309 (1973) (attacking the exclusion of poor persons); *State ex rel. Whitman v. Fox*, 236 S.E.2d 565 (W. Va. 1977) (attacking the exclusion of non-voting non-landowners from a grand jury); *State v. Williams*, 249 S.E.2d

the West Virginia statutory procedure for composing jury lists, the sixth amendment remains an important ground on which to mount a challenge to the array. To understand the contours of such an attack, a quick review of the reforms is in order.

Until 1986, West Virginia jury lists (the lists from which panelists' names are drawn) were composed using the "key-man" system. Under this scheme, jury commissioners were essentially free to select persons of their own liking. Jury lists were, as a result, dominated by older, white males and excluded important groups, such as women.<sup>10</sup> This system was reformed in 1986 when the Legislature required that jury commissioners randomly select names from voter registration lists.<sup>11</sup> This reform improved the original system by replacing favoritism and caprice with mandatory randomness and objective, fixed-source lists. Unfortunately, this reform was itself flawed, for voter registration rolls are widely recognized as underrepresenting significant portions of the population, such as racial minorities.<sup>12</sup>

In 1988, the West Virginia Legislature changed the sources from which names may be drawn for jury lists, requiring that commissioners use at least two of three lists: voter registration rolls, drivers license lists, and lists of state income tax payers.<sup>13</sup> This system took effect on July 1, 1988. As a result, for the next year or two we will be dealing with jury verdicts from both systems.<sup>14</sup>

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752 (W. Va. 1978) (attacking the exclusion of non-voters); and *State v. Hobbs*, 282 S.E.2d 258 (W. Va. 1981) (attacking the exclusion of persons who do not own personal property). These cases have been described and analyzed by the author in an earlier volume of this journal. See, DiSalvo, *The Key-Man System for Composing Jury Lists in West Virginia—The Story of Abuse, Case for Reform*, 87 W. VA. L. REV. 219, 240-42 (1984).

10. For a detailed description of this system and the abuses which resulted, see DiSalvo, *supra* note 9, at 219. See also M. Arbogast, D. Bumgardner, & S. Knox, *Prospective Jurors in West Virginia: A Comparison* (1984) (unpublished manuscript); and LEAGUE OF WOMEN VOTERS OF WEST VIRGINIA, INC., *AN ASSESSMENT OF THE JURY SERVICE SELECTION SYSTEM IN WEST VIRGINIA* (1984).

11. See W. VA. CODE chapter 52, article 1 (1986). Note that although the statutory scheme enacted in 1986 allowed jury commissions with access to computers to use a combined master list consisting of the voter registration list and the driver's license list, no county chose to employ both lists.

12. See DiSalvo, *supra* note 9, Appendix A.

13. W. VA. CODE § 52-1-5 (1988).

14. Juries will be empanelled by courts under the 1986 system at least up to July 1, 1988, and probably up to December 31, 1988. Appeals from the verdicts of such juries will occupy the West Virginia Supreme Court for the ensuing year or more.

Yet, whether we are dealing with verdicts handed down by jurors drawn from the three lists or verdicts delivered by juries created solely from voter registration lists, these juries, to varying degrees, will be biased.

What is the source of this bias? As I have just mentioned, voter registration lists underrepresent cognizable groups<sup>15</sup> in the population. Consequently, it is impossible to get a fair cross-section of the community from a voter registration list. This underrepresentation is significant because of what might be called the representative-prejudices theory underpinning the sixth amendment's fair cross-section requirement.

The theory holds that no juror is without prejudice or bias and that the only way to deal with such imperfections in humankind is to get a fair cross-section of the population.<sup>16</sup> Thus, using a rough example, in a criminal case with a black defendant, a juror who has a racial prejudice with regard to black people will be neutralized in the jury deliberation room by the presence of black jurors in terms of how the prejudiced juror talks, reasons, and votes.

Because voter registration lists clearly underrepresent cognizable groups in the population, sole reliance on these lists results in underrepresentative juries, that is, juries that do not balance prejudice and bias well. Thus, it makes good sense to allow challenges to these arrays on the basis of the impartial-trial requirement of the sixth amendment, which requires that the jury list represent a fair cross-section of the community. Moreover, there is sound precedent for such a challenge. The supreme court of a leading sister state, California, recently found such juries unconstitutional.<sup>17</sup>

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15. See JURYWORK, *supra* note 8, at § 5.04[1].

16. "[T]he failure to include a fair cross-section of the community on jury panels increases the chance that intolerant viewpoints will remain unrepudiated . . ." Note, *Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1558 (1988).

See Professor Jon Van Dyke's limited defense of the theory in Van Dyke, *Voir Dire: How Should It Be Conducted To Ensure That Our Juries Are Representative and Impartial?*, 3 HASTINGS CON. L. QUARTERLY 65 (1976). See also, Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STANFORD L. REV. 544, 551-52 (1975).

17. See *People v. Harris*, 36 Cal. 3d 36, 201 Cal. Rptr. 782, 679 P.2d 433, *cert. denied*, 469 U.S. 965 (1984).

Thus, as long as we continue to select potential jurors from voter registration lists, we will have juries that underrepresent cognizable groups and do not neutralize prejudice by balancing it. Litigants are entitled to consider using the challenge to the array to challenge such juries.

What of juries composed by drawing names from the new source lists? Commissioners are now required to draw names from at least two of three lists:<sup>18</sup> a modified type of drivers license list,<sup>19</sup> the voter registration list, and the list of state income tax payers. While drivers license lists are the most representative and inclusive lists available,<sup>20</sup> each of the remaining two lists is problematic. We know that voter registration lists are clearly underrepresentative of cognizable groups. As for the list of state income tax payers, it is an untested list. Some reports already have indicated that the names of women filing jointly with their husbands cannot be picked up by the computer systems in use at the State Tax Department.<sup>21</sup> The exclusion of substantial numbers of women would create serious constitutional difficulties.<sup>22</sup> Therefore, it is quite possible that many jury commissioners will employ underrepresentative taxpayer and voter registration lists to form underrepresentative master lists under the new jury list law.

One remedy for this imbalance of prejudices is for the West Virginia Supreme Court to respond to a challenge to an array by overturning criminal convictions obtained using juries drawn from such jury lists. In the past, however, the court has refused to do this in an even more egregious situation.<sup>23</sup> Furthermore, even if, in light of the California precedent, the court listens more eagerly to a future challenge to an array, overturns a conviction, and effectively requires

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18. W. VA. CODE § 52-1-5(a) (1986).

19. Only the names of persons who have renewed or applied for licenses within the previous two years will appear on the drivers license list. W. VA. CODE § 52-1-3(5) (1988). This definition is carried over from the 1986 legislation.

20. See VAN DYKE, JURY SELECTION PROCEDURES 99, 102 (1977) and DiSalvo, *supra* note 9, at 260-61.

21. Telephone interview with Ted Philyaw, West Virginia Supreme Court Administrator (June 1, 1988).

22. See Taylor v. Louisiana, 419 U.S. 522 (1975).

23. See cases collected at DiSalvo, *supra* note 9, at 240-42.



a fairer cross-section on jury lists, the resulting system still will place total reliance on the balance-of-prejudices theory.

There are good reasons to be concerned about the balance-of-prejudices theory, however. In the civil jury context, the theory is weakened by the size of the civil jury, now six in West Virginia. Does the theory work as well in a jury of this size? Even if it does, are we content to live in a world in which we fail to attempt to achieve fair trials by employing every possible method for removing prejudice? Finally, will balancing prejudices alone be a sufficient way of getting at the subtle and sophisticated prejudices and biases also described below?

In considering these questions, it is worth noting that the history of the challenge to the array teaches us that it is useful only for attacking large and tangible prejudices, such as those against racial and ethnic minorities<sup>24</sup> and women.<sup>25</sup> The utility of the challenge to the array for attacking subtle prejudices and biases is, by contrast, quite limited.

Therefore, if we choose not to balance prejudice and bias—that is to say, if the court refuses to invalidate West Virginia's sole reliance on voter registration lists and state tax payer lists—then the difficult job of removing and neutralizing prejudice and bias becomes all the more important.<sup>26</sup>

## B. Challenges for Cause

### 1. Challenges for Cause and Challenges to the Favor Distinguished

A useful distinction, latent in the relevant West Virginia statute,<sup>27</sup> is that between challenges for cause and challenges to the favor. An

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24. See, e.g., *State v. Strauder*, 11 W. Va. 745 (1877), *rev'd sub nom. Strauder v. West Virginia*, 100 U.S. 303 (1879); *Norris v. Alabama*, 294 U.S. 587 (1935); *Smith v. Texas*, 311 U.S. 128 (1940); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Turner v. Fouche*, 396 U.S. 346 (1970); *Castaneda v. Partida*, 430 U.S. 482 (1970).

25. See *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979).

26. It is evident that when the size of the jury is halved, the potential that juror prejudices and biases will be balanced is greatly reduced.

27. West Virginia Code § 56-6-12 calls for the examination of jurors to determine whether they

understanding of the distinction by judges and lawyers will be helpful to them in appreciating their appropriate roles in jury selection and, if accepted by the profession, will bring clarity to now ambiguous areas of voir dire law.<sup>28</sup>

Challenges for cause are based on objective, clearly articulated, statutory or decisional disqualification criteria. With respect to the statutory disqualification criteria, they are so clear that the trial court has no choice but to excuse a prospective juror whose characteristics match one or more of the disqualification criteria. With respect to the common law grounds, the trial court similarly must excuse a disqualified juror.<sup>29</sup> (Of course, the court does exercise discretion in deciding whether a prospective juror's characteristics do in fact place the juror in a disqualifying category.) Of these challenges, those stemming from the common law are based on an *a priori* theoretical assumption that jurors in particular factual categories lack the capacity to be impartial, a judgment made quite apart from the individual juror's actual ability to be impartial. Thus, the juror is said to be tainted with "implied bias."<sup>30</sup>

An example of a ground supporting a challenge for cause is kinship. What the West Virginia Supreme Court has said about the rationale for kinship challenges applies with equal force to the other "implied bias" common law disqualification grounds:

[I]t is utterly impossible for any person to determine how far the judgment or action of a person affected by [the relationship] may be swayed or controlled. It operates upon the mind and heart of the individual secretly and silently. Its operation is not disclosed by any outward manifestation other than the result.<sup>31</sup>

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are "qualified," "related to either party," have "any interest in the cause," or are "sensible to any bias or prejudice . . ." As the ensuing discussion in the text will point out, the challenge for cause takes in the first three categories, while the challenge to the favor encompasses the last.

The federal Jury Selection and Service Act, 28 U.S.C. §§1861-77 (1982), uses language that distinguishes between the two terms: "All challenges for cause or favor . . . shall be determined by the court." 28 U.S.C. § 1870 (1982).

28. See, e.g., the discussion of the exclusion of those employed by law enforcement agencies and the exclusion of those with relationships with such persons, *infra*.

29. W. JORDAN, *supra* note 7.

30. One state, Washington, explicitly distinguishes in its statutory jury law between implied bias and actual bias. WASH. REV. CODE RCW 4.44.180. See *Washington v. Parnell*, 77 Wash. 2d 503, 463 P.2d 134 (1969), for an application of the distinction.

31. *State v. Harris*, 69 W. Va. 244, 71 S.E. 609 (1911).

A challenge to the favor, by contrast, calls for the court to make a prudential judgment about the individual juror's actual capacity to be impartial.<sup>32</sup> In the words of our statute, the court must decide whether a juror "is sensible of any bias or prejudice."<sup>33</sup> An example of a prospective juror who ought to be removed for favor is one whose opinion has been influenced by what the juror has read so that the juror cannot give the courtroom evidence an impartial hearing.

It is, of course, reversible error to deny a valid challenge for either cause or favor.<sup>34</sup>

The disqualification grounds on which challenges for cause can be predicated are found in the West Virginia Code and in West Virginia decisional law.<sup>35</sup> In this section I will identify each of the disqualifying grounds found in these two sources and describe the treatment the ground has received from the West Virginia Supreme Court.

## 2. Statutory Grounds for Cause Disqualification

The 1986 reforms, among other things, gave a clear shape to the process and criteria by which jurors are disqualified from service. The process begins with the presumption that the juror is qualified.<sup>36</sup> Chapter 52, Article 1, Section 8(b) of the West Virginia Code (hereinafter W. Va. Code) then sets out a detailed list of disqualifying statutory criteria:

A prospective juror is disqualified to serve on a jury if the prospective juror:

- (1) Is not a citizen of the United States, at least eighteen years old<sup>37</sup> and a

32. The determination of the qualifications of a juror is a problem often difficult to solve. The fact sought to be established, whether the juror may be biased or prejudiced, rests alone with the proposed juror, and often he may be unable to honestly determine whether he would be unduly influenced by certain facts or situations in consideration of evidence to be offered. Usually the answer is left to the sound discretion of the trial judge.

State v. Gargiliana, 138 W. Va. 376, 379, 76 S.E.2d 265, 267 (1953).

33. W. VA. CODE § 56-6-12 (1966).

34. State v. Wilcox, 286 S.E.2d 257, 258 (W. Va. 1982).

35. The statutory disqualification criteria do not exhaust the grounds for cause removals. The vitality of common law grounds continues. See *Watkins v. Baltimore and O.R. Co.*, 130 W. Va. 268, 43 S.E.2d 219 (1947).

36. W. VA. CODE § 52-1-8 (1988).

37. Jurors who are sixty-five years of age or older are not disqualified from service, but will be excused upon request. W. VA. CODE § 52-1-8(c) (1988).

resident of the county;<sup>38</sup>

(2) Is unable to read, speak and understand the English language;

(3) Is incapable, by reason of substantial physical or mental disability, of rendering satisfactory jury service;<sup>39</sup> but a person claiming this disqualification may be required to submit a physician's certificate as to the disability and the certifying physician is subject to inquiry by the court at its discretion;<sup>40</sup>

(4) Has, within the preceding two years, been summoned to serve as a petit juror, grand juror or magistrate court juror, and has actually attended sessions of the magistrate or circuit court and been compensated as a juror pursuant to the provisions of section twenty-one of this article, section thirteen, article two of this chapter, or pursuant to an applicable rule or regulation of the supreme court of appeals promulgated pursuant to the provisions of section eight, article five, chapter fifty of this code;

(5) Has lost the right to vote because of a criminal conviction; or

(6) Has been convicted of perjury, false swearing or other infamous offense.<sup>41</sup>

38. There appears to be only one reported West Virginia case on this ground, *Zickefoose v. Kuykendall*, 12 W. Va. 23 (1877). *Zickefoose* stands for the rule that the West Virginia Supreme Court will not reverse the verdict of a trial court jury on which a non-resident has sat (unbeknownst to the unsuccessful party) unless the party "has suffered injustice from the fact that such juror served upon the case." *Id.* at 34. See also, *State v. McDonald*, 9 W. Va. 456 (1876), and *State v. Greer*, 22 W. Va. 800 (1883). Later, in *Watkins v. Baltimore and O.R. Co.*, 130 W. Va. 268, 43 S.E.2d 219 (1947), the court articulates the harmless error rule as a three-part test:

[When] the motion to set aside the verdict and grant a new trial is based upon the disqualification or incompetency of a juror, the burden is upon the party attacking the verdict to show: (1) that the juror was, in fact, disqualified or incompetent to serve as a juror in the trial of the case; (2) that the party so moving to set aside the verdict exercised due diligence in an effort to ascertain the disqualification or incompetency of the juror prior to empanelling of the jury or the return of its verdict; and (3) that he was prejudiced or suffered an injustice by the fact that the disqualified or incompetent juror served on the jury.

*Id.* at 272, 43 S.E.2d at 222.

One would think that simply losing a verdict is prejudice enough to meet the third prong of the *Watkins* test, especially in cases in which the juror could have been challenged for cause (as defined below). After all, the very notion of cause *presumes* conscious or unconscious bias or prejudice in the juror. If a juror serves on a jury and, as we must assume, contributes to the verdict at least by his vote, if not also by his discussion in deliberations, then is not a litigant deprived of an impartial jury? *Watkins'* facts illustrate the situation nicely. There the challenged juror was an employee of the defendant, a clear ground for cause challenge (see below). This juror contributed to the verdict against the plaintiff, in favor of his employer.

The *Watkins* court closed its eyes to this political reality and rejected the argument that "the mere fact that the verdict was in favor of the defendants constitutes a showing of . . . prejudice." *Id.* at 223. This decision vitiates the wisdom of cause challenges. (See *Watkins v. Baltimore & O.R. Co.*, 130 W. Va. 268, 274, 43 S.E.2d 219, 224 (1947)).

39. If the mental disqualification of a juror is raised after the verdict, the court will weigh the evidence of mental competence, but in the event of a conflict in the proof, will give great deference to the trial court. See *State v. Camp*, 110 W. Va. 444, 158 S.E. 664 (1931).

40. For materials dealing with jurors who become incapacitated after being sworn, see W. VA. CODE § 62-3-7 (1984); and *State v. Oldaker*, 304 S.E.2d 843 (W. Va. 1983) and the cases collected there.

41. An infamous offense is a felony or offense punishable by death or imprisonment in the state penitentiary. *State v. Maynard*, 289 S.E.2d 714, 718 (W. Va. 1982).

In addition to establishing these criteria, the 1986 reforms maintained the previously existing disqualifications for the following: jurors having cases to be heard during the term of their service;<sup>42</sup> certain jurors hearing criminal prosecutions for lynching;<sup>43</sup> city residents hearing certain cases in which their municipality is interested;<sup>44</sup> and persons who have been convicted of suborning perjury.<sup>45</sup>

Only jurors whose characteristics match one or more of these disqualifying criteria are actually disqualified under the statute.<sup>46</sup> The primary aim of these criteria is to guarantee that jurors are equipped with the minimal intellectual, social, civic, and physical abilities for service. There is no attempt here to screen for either gross or subtle forms of bias and prejudice (with one possible exception<sup>47</sup>). Hence, the contribution these criteria make to the net is minimal.

### 3. Common Law Grounds for Cause Disqualification

The common law grounds for cause disqualification were established, for the most part, in the decisional law of this jurisdiction

42. W. VA. CODE § 56-6-14 (1966). In *Beck v. Thompson*, 31 W. Va. 459, 7 S.E. 447 (1888), a case in which a juror who had a matter to be tried during the same term of court sat on the appellant's trial jury, the *Zickefoose* harmless error rule was applied and explicitly said to govern in civil as well as criminal cases. *Beck*, 31 W. Va. at 467, 7 S.E. at 449 (1888). See also, W. VA. CODE § 56-6-16 (1966). Compare *Beck* with *Roberts v. Stevens Clinic Hospital, Inc.*, 345 S.E.2d 791 (W. Va. 1986) (not improper for jurors, who earlier in the term served with plaintiff's decedent's grandmother, to hear plaintiff's case when parties were aware during *voir dire* of grandmother's service and no objections were made and extensive individual *voir dire* was allowed, showing no friendship with plaintiff's family).

*Garrett v. Patton*, 81 W. Va. 771, 95 S.E. 437 (1918), provides an interesting application of the same-term disqualification ground. In *Garrett*, there were no jurors on the panel who were to have their own cases tried that term. But the plaintiff was, in fact, a person who had served with these same jurors, hearing cases earlier that same term. The court conducted a thorough analysis of the purpose of the same-term disqualification ground and found that the purposes for establishing the ground applied with equal weight when applied to the question of whether jurors sitting in judgment on another juror's case, in the same term, should be disqualified. The *Garrett* court found that they should "[w]hen a litigant serves on the petit jury in the circuit court, at a term at which he has a case to be tried by a jury, all of the other jurors with whom he has been serving are incompetent to sit in the trial of his case," *Id.* at 779, 95 S.E.2d at 440, but applied the *Zickefoose* harmless rule to find no error on this point.

43. W. VA. CODE § 61-6-12 (1984).

44. W. VA. CODE § 52-1-18 (1981).

45. W. VA. CODE § 61-5-3 (1984).

46. The jury selection law of West Virginia is premised on the notion that all citizens are presumptively qualified. One is removed from consideration for service only upon a showing of *disqualification*. Note in a similar vein that the statute permits no categorical occupational or other exemptions from service on the petit jury, as does the federal Jury Selection and Service Act, 28 U.S.C. § 1863(b)(5), (6) (1982).

47. The exception concerns the disqualification for those who have served within the previous two years. See Part Two for a description of the prejudices created by prior jury service.

decades ago in the seminal case of *State v. Dushman*.<sup>48</sup> These grounds supplement the statutory grounds described above.<sup>49</sup>

In *Dushman*, the appellant, convicted of receiving stolen goods, complained that the trial court would not let him question jurors whom he believed were in the employ of the corporation from which the goods had been stolen. Although the corporation was not a party, the West Virginia Supreme Court considered the relationship close enough to raise reasonable suspicions about the ability of the jurors to be impartial. Accordingly, the court reversed the conviction and awarded a new trial. In doing so, the court articulated seven “principal causes of challenges, *prima facie* disqualifying jurors. . . .”<sup>50</sup> Later, the West Virginia Supreme Court would add an eighth cause.<sup>51</sup> As will be apparent in Part II of this article, although these eight criteria certainly have a great deal more to do with screening for bias and prejudice than the statutory criteria described above, the net remains plagued with gaping holes.

#### a. Kinship to Either Party Within the Ninth Degree.

When a juror is related to one of the parties within the prescribed degree, there is no discretion to be exercised by the court. The court must excuse the juror.<sup>52</sup> In criminal cases the Court has said that it will interpret “party” to include the victim in a criminal case because that person is a real party in interest.<sup>53</sup>

When a relationship does not fall squarely within the prohibited categories, the court often turns to other authority to resolve the

48. *State v. Dushman*, 79 W. Va. 747, 91 S.E. 809 (1917).

49. *Id.* at 749, 91 S.E. at 810.

50. *Id.* The *Dushman* court appears to have adopted the common law challenges for cause directly from Blackstone. See 3 BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 363 (W. Lewis 1902).

51. It is possible to categorize the eighth cause, employment by, or relationship to a person employed by, a prosecutorial arm of government in a criminal case, as simply a variation of the traditional master-servant exclusion found in *Dushman*. This author chooses to treat the exclusion as a separate one because the exclusion extends in certain circumstances beyond those who are themselves employees to those who are connected in various ways to such employees. See discussion of this disqualification below.

52. See, e.g., *State v. Hatfield*, 48 W. Va. 561, 37 S.E. 626 (1900) (supreme court upheld the exclusion of persons who were the defendant’s cousins and in-laws).

53. *State v. Beckett*, 310 S.E.2d 883, 888 (W. Va. 1983) (citing *State v. Kilpatrick*, 158 W. Va. 289, 210 S.E.2d 480 (1974)). See the discussion of *Kilpatrick* and *Beckett*, *infra*, in relation to challenges to the favor.

challenge. For example, when a juror is related to a member of a party's family through marriage, the court treats these and similar cases not like challenges for cause under kinship (technically there is no relationship to a party) but as challenges to the favor, affirming in the reported cases the trial court's exercise of discretion in excluding the juror.<sup>54</sup> Similarly, when a juror is employed by a member of a party's family, the court turns not to the kinship disqualification but to the disqualification for having an interest in the cause.<sup>55</sup> Lastly, the supreme court has refused to create a *blanket* kinship disqualification ground governing a juror's consanguineal relationship to a witness.<sup>56</sup> Here again, the standard is interest in the cause.<sup>57</sup>

#### b. An Arbitrator for Either Party.

The purpose of the exclusion of an arbitrator for either party is to prevent a person who has acted as an arbitrator in a dispute from sitting again as a fact finder in the trial court. This exclusion certainly makes good sense, for arbitrators often employ different evidentiary standards than those employed in a jury trial, thus exposing the arbitrator to evidence not admissible in a trial court.<sup>58</sup> Moreover, an arbitrator would probably have a clear opinion at the start of trial regarding liability.

The reference to "either party" is unclear. It may be taken to mean either that the juror who has served as an arbitrator in an *ex parte* hearing in the same dispute is disqualified or that an arbitrator who has served one party in other, and perhaps similar, contexts is disqualified. There are no reported West Virginia cases elaborating upon this exclusion.

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54. See, e.g., *Pardee v. Johnson*, 70 W. Va. 387, 74 S.E. 721 (1912) (excluding a juror related to the grantor of plaintiff's land in an ejectment action); *State v. McCauseland*, 82 W. Va. 525, 96 S.E. 938 (1918) (excluding juror who was a brother-in-law of the accused's brother); *State v. Ginanni*, 328 S.E.2d 187 (1985) (excluding a juror whose former spouse's sister was married to the defendant).

55. *Wilcox*, 286 S.E.2d 257, 258-59. See discussion of interest in the cause below.

56. See discussion above, however.

57. See *State v. Wilson*, 157 W. Va. 1036, 207 S.E. 2d 174, 180 (1974) (court upheld the trial court's refusal to ask whether any jurors were related to any witnesses subpoenaed by the state). It is doubtful that *Wilson* and *State v. Harris*, 69 W. Va. 244, 71 S.E. 609 (1911) (holding that it was not improper to retain a juror who was related to the spouse of the prosecuting witness), survive *Kilpatrick*.

58. M. HILL & A. SINICROPI, *EVIDENCE IN ARBITRATION* 3-5 (2d ed. 1987).

c. Interest in the Cause.

There is no clear definition in the case law of what it means for a juror to have "an interest in the cause."<sup>59</sup> If this category is to have a meaning that is independent from the challenge to the favor, however, it must be taken to contemplate situations in which the juror would be *assumed*, rather than proven, to be partial. Thus, a classic case in the commentaries of "interest in the cause" involves pecuniary interest, such as the interest of a stockholding juror who is asked to sit as a fact finder in a case in which his company is a party. Such jurors are "ordinarily incompetent to sit as jurors in the action."<sup>60</sup>

The real issue in this area, however, is what *degree* of interest should cause the court to move the challenge from the favor category, in which bias or prejudice actually must be proven, to the cause category, in which bias or prejudice are assumed, *de jure*, to exist.<sup>61</sup> The difficulty of this problem, especially in sparsely populated areas, is illustrated by *West Virginia Department of Highways v. Fisher*. In *Fisher*, the West Virginia Supreme Court reversed the trial court's decision not to grant cause disqualifications for thirteen prospective jurors, all of whom had various relationships with a well-known country doctor and his witnesses in a condemnation case and some of whom were actually patients of the doctor. The court held:

[W]here a physician-patient relationship exists between a party to the litigation and a prospective juror, although such prospective juror is not disqualified *per se*, special care should be taken to ascertain, pursuant to W. Va. Code § 56-6-12 [1931], that such prospective juror is free from bias or prejudice.<sup>62</sup>

Thus, while the court did not squarely put juror-patients in the interest-for-cause category, it came close to doing so. As a result, it

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59. The West Virginia Supreme Court itself has noted this lack of clarity in *State v. Beckett*, 310 S.E.2d 883, 887 (W. Va. 1983).

The reader should note that this ground is contained not only in the decisional law, *see Dushman*, above, but is also contained in the statutory law. *See* W. VA. CODE § 56-6-12 (1966).

60. *See* W. JORDAN, *supra* note 7, at 92.

61. "While interest in a case to such an extent as naturally to lead to an inference of bias disqualifies one as juror in that case, it is nevertheless difficult to rule generally as to just when, under particular circumstances, one has such an interest." 47 AM. JUR. 2D *Jury* § 272 (1969).

62. *West Virginia Department of Highways v. Fisher*, 289 S.E.2d 213, 220 (W. Va. 1982), *cert. denied*, 459 U.S. 944 (1982); *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986).



appears that such jurors will be presumed partial unless otherwise demonstrated.

However, *Fisher* remains unique. The supreme court has resisted appeals to insert other categories of jurors in the interest-for-cause category or even to give them the special treatment the *Fisher* court did. For example, the supreme court has refused to approve removal of labor union members for interest in a criminal case brought in the context of a dispute among various union forces for control of the workforce.<sup>63</sup> Likewise, it has refused to find juror-depositors disqualified for interest in a case involving the banking institutions in which they were depositors.<sup>64</sup>

The West Virginia Supreme Court's resistance to expanding the interest-in-the-cause disqualification category is understandable but nonetheless disappointing. It is costly to pay a juror not to serve.<sup>65</sup> Courts undoubtedly prefer to have fewer rather than more *a priori* disqualifications simply because it is less expensive and less time-consuming. Courts must surely know, however, that the appearance of impropriety is often as damaging as actual impropriety.<sup>66</sup> When a juror who may have an ax to grind against a rival union or who may expect favored treatment at a bank is allowed to serve, the appearance of impropriety is created and public trust is threatened. In such circumstances, there should be no hesitation in choosing public confidence in the justice system over the efficient use of state tax dollars on utilitarian grounds alone.<sup>67</sup> The supply of the latter

63. *State v. Woolridge*, 129 W. Va. 448, 464, 40 S.E.2d 899, 908 (1946).

64. *Community Bank & Trust v. Keyser*, 285 S.E.2d 424, 432 (W. Va. 1981).

65. West Virginia Code § 52-2-17(a) (1986) requires that jurors be paid between fifteen and forty dollars for each day of required attendance, plus their travel costs.

66. To maintain [the jury] system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not comply such relation to either side as to lead on that account to any doubt on that subject.

*Crawford v. United States*, 212 U.S. 183, 195 (1908).

67. The object of the law is to secure jurors whose minds are wholly free from bias or prejudice for or against the accused. *State v. Hatfield*, 48 W. Va. 561, 37 S.E. 626 (1900). This is the very basis for the great weight and sanctity given to their verdicts. Those who administer the law must respect its wise and salutary rules of procedure, in order that like respect for law and order may be inspired in others . . . .

*State v. Messer*, 99 W. Va. 241, 245, 128 S.E. 373, 374, 40 A.L.R. 608 (1925).

depends in considerable part on the health of the former. More importantly, expediency, as the West Virginia Supreme Court itself has said, is not the true measure of justice.

d. An Action is Pending Between the Juror and a Party.

Because the implication of prejudice is so strong where an action is pending between a juror and a party, the wisdom of this rule is completely self-evident. No reported cases elaborating on this point exist in West Virginia.<sup>68</sup>

e. The Juror has Taken Money for His or Her Verdict.

Without doubt, this was the *Dushman* court's attempt at humor. However, every lawyer knows the value of authority. If one wants to remove a prospective juror whom the other side has bribed, here is all the authority one needs.

f. The Juror was Formerly a Juror in the Same Case.

The historical origins of this rule in West Virginia are rooted in the peculiar situation in which a person who is called for petit jury service has already served in the grand jury for the very same case. *State v. McDonald* sets forth the traditional rule that governs in such circumstances:

If it appears that a man (sic) summoned as a juror, for the trial of a prisoner has been upon the grand jury that found the indictment, he must be rejected.<sup>69</sup>

The unmistakable motivation for the general rule proscribing repeated same-case service is to allow the parties to a lawsuit, whether

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68. The West Virginia Supreme Court, in *Wagoner v. Jaeger*, 49 W. Va. 61, 38 S.E. 528 (1901), did not squarely rule on this disqualification but seemed, with quite good and evident reason, to assume that the rule obtained. (The appellant, who had objected after the verdict to the juror's service, was not heard to complain in the supreme court because "by the exercise of ordinary diligence [he] could certainly have ascertained [prior to trial] that the juror was a defendant in a . . . suit brought by himself . . ." *Id.* at 63, 38 S.E. at 529.) The obviousness of the reason for the rule did not prevent Justice Musmanno of the Pennsylvania Supreme Court from waxing elegant on it. *See Darlington Brick and Mining Co. v. Commonwealth of Pennsylvania*, 407 Pa. 660, 182 A.2d 524 (1962).

69. *State v. McDonald*, 9 W. Va. 456, 465 (1876). *See also State v. Cooper*, 74 W. Va. 472, 474-75, 83 S.E. 358, 359 (1914). *Cf. State v. Jones*, 128 W. Va. 496, 501, 37 S.E.2d 103, 106 (1946).

criminal or civil, the opportunity to write on a clean slate. The desire to achieve this effect is a recurring theme in jury selection law. It is not surprising, therefore, to find that the rule against repeated same-case service comes into play in other important contexts as well.

For example, especially in sparsely populated rural counties there is a real possibility that a juror who once sat on a particular case may be called to sit on a retrial of the same case occurring as the result of a mistrial or a successful appeal. Surely it would be extremely difficult, if not impossible, for such a juror to enter the second trial with the required impartiality.<sup>70</sup> While there are no reported West Virginia cases on this point, the majority rule with respect to service on both a trial and a retrial is understandably quite clear: repeated service is forbidden whether the case is criminal or civil in nature.<sup>71</sup>

There have been attempts to extend this exclusion to circumstances in which the prospective juror is asked to hear not the same case but the same or similar *evidence* in a later proceeding. Until recently, the West Virginia Supreme Court has been firm in its unwillingness to recognize the exclusion in such circumstances. For example, in *State v. Carduff*<sup>72</sup> the court refused to find that a juror who would have heard evidence for the second time when a defen-

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70. Denial of a challenge based on this ground would probably be a deprivation of the constitutional right to jury trial. There is not much doubt that a juror who has sat on former trial of the same case, either to verdict or to a point at which a mistrial was declared, would not have a virgin mind with respect to the issues in the second trial of that case.

W. JORDAN, *supra* note 7, at 84. See Annotation, *Juror's Presence At or Participation in Trial of Criminal Case (or Related Hearing) as Ground of Disqualification in Subsequent Criminal Case Involving Same Defendant*, 6 A.L.R.3d 519, 542 (1966).

71. W. JORDAN, *supra* note 7, at 84-85. See also Annotation, *supra* note 70 at 541 (stating that "in most instances particular jurors or prospective jurors have been held disqualified").

Prior to *State v. Van Metre*, 343 S.E.2d 450 (W. Va. 1986) (see text associated with footnotes 81-84, *infra*), *State v. Dephenbaugh*, 106 W. Va. 289, 145 S.E. 634 (1928) made it less than clear that West Virginia would follow the majority rule. In *Dephenbaugh*, a prospective juror had heard some testimony in the first trial of the case, apparently as a spectator. The same juror even admitted to having partially made up his mind. Because the trial court, with the assistance of a leading question, was able to coax the juror into saying his decision would be governed by the evidence, the Supreme Court of Appeals upheld the trial court's refusal to dismiss the juror. (This example of the court's refusal to excuse a clearly prejudiced juror when the trial court puts the proper words in his mouth is astonishing, but typical. For other examples of the court closing its eyes to bias and prejudice in similar situations, see Part C(4), below.)

72. *Carduff*, 142 W. Va. 18, 93 S.E.2d 502.

dant different than the defendant in the first trial was in the dock should have been removed on that basis alone.<sup>73</sup> The *Carduff* court believed that some showing of actual partiality must be made in order to sustain a challenge to such a juror.<sup>74</sup> Likewise, in *State v. Riley*<sup>75</sup> the court would not infer bias or prejudice when grand jurors who participated in the indictment of a defendant on one charge were later available to serve as petit jurors in a case against the same defendant on a different but similar charge.<sup>76</sup> The *Riley* court, too, said that actual prejudice must be demonstrated.<sup>77</sup>

Even when the juror whose service is in issue falls squarely in the traditional category of same-case service, there has been no assurance that the failure to exclude such a person would be ruled reversible error. This is so because the *Riley* court narrowed this ground for challenge for cause by creating a harmless error rule:

[E]ven if a member of the petit jury was a member of the grand jury which returned the indictment, and the entire record shows that the defendant had a fair and impartial trial, such disqualification would not warrant setting aside the verdict of the jury.<sup>78</sup>

Such a position, of course, begs the question. Nearly every juror, when asked whether he or she could be fair and impartial in the second proceeding, is going to answer affirmatively out of a desire to follow the constitutional rules that require a presumption of in-

73. *Id.* at 41, 93 S.E.2d at 516. See also *State v. Koski*, 101 W. Va. 477, 133 S.E. 79 (1926).

74. *Carduff*, 142 W. Va. at 41, 93 S.E.2d at 516.

75. *State v. Riley*, 151 W. Va. 764, 151 S.E.2d 308 (1967).

76. *Id.* at 380-83, 151 S.E.2d at 320-22.

77. *Id.* In a third case, *State v. Taft*, 183 W. Va. 332, 102 S.E.2d 152 (1958), *aff'd.*, 144 W. Va. 704, 110 S.E.2d 727 (1959), the West Virginia Supreme Court refused to invalidate the trial court's refusal to strike prospective jurors who had been in the courtroom to hear some evidence against the same defendant stemming from the same facts.

In *State v. Charlot*, 157 W. Va. 994, 206 S.E.2d 908 (1974), the court refused to find those jurors disqualified who had served on a number of similar trials in the same term in which the prosecution employed the same key witnesses as those it intended to employ against the defendant. The court relied upon *Carduff* and *Riley* for authority.

The reader should note that even though prior service is not always an adequate ground for a challenge for cause, a party is entitled to individual *voir dire* to determine the existence of actual bias or prejudice. *State v. Toney*, 302 S.E.2d 815, 818 (W. Va. 1983).

78. *Riley*, 151 W. Va. at 381, 151 S.E.2d at 321.

nocence.<sup>79</sup> Anyone who has spent five minutes in a courtroom, however, knows that most *first-time* jurors believe that the defendant would not be in court unless he or she has done something wrong. They credit the state. How heightened is this feeling when a person whom the jurors have *already convicted once for another crime or indicted for the offense they are now trying* appears before them? What fallible human being would extend to such a defendant his or her complete and unsullied right to the presumption of innocence? The *Riley* court's position is disingenuous because the question to be decided here is not whether such a juror will admit to actual bias—he or she likely will not—but whether our common experience teaches us that such jurors are in fact tainted and, thus, should be excluded on grounds of implied prejudice.

It is quite clear that the supreme court has had an interest in refusing to exclude such jurors on the basis of implied prejudice, not because the court has a genuine belief that the jurors are actually impartial but because empanelling different jurors would inconvenience the court.<sup>80</sup> In *State v. Van Metre*<sup>81</sup> such pedestrian considerations gave way to what Justice Harlan Calhoun, in his stirring dissent in *Riley*, called our “basic and fundamental . . . requirements of fair trials of criminal cases by impartial juries . . . .”<sup>82</sup>

In *Van Metre*, several defendants were charged with the same crime. They were to be tried separately. In order to serve judicial economy, jurors for the three trials were all selected from the same panel of twenty, resulting in a panel for *Van Metre*'s case that held nine jurors who had already heard the case against a co-indictee.

79. A number of modern commentators on juries have made this point. See generally S. HAMLIN, WHAT MAKES JURIES LISTEN? 36-41 (1985); Note, *Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1583-84 (1988); and Gold, *Voir Dire: Questioning Jurors on Their Willingness to Follow the Law*, 60 IND. L. J. 164, 178 (1984) (“The assumption that jurors will follow the law appears to be based primarily on wishful thinking.”).

80. The court's bias in this direction was revealed in *Carduff*, 142 W. Va. at 39, 93 S.E.2d at 515, when it quoted this passage of *Haussener v. United States*, 4 F.2d 884 (8th Cir. 1925) with approval: If, when one case has been tried, the entire panel of jurors sitting therein is disqualified from sitting as jurors in every other case of a similar sort, trial courts will be so far impeded in the transaction of their business as to make enforcement of [the Volstead Act] difficult, if not impossible.

81. *State v. Van Metre*, 342 S.E.2d 450 (W. Va. 1986).

82. *Riley*, 151 W. Va. at 392, 151 S.E.2d at 329.

The West Virginia Supreme Court perceived the situation as one involving “a compelling case of possible juror bias”<sup>83</sup> and declared the practice a violation of the constitutional “right to a fair and impartial trial.”<sup>84</sup> More important for future challenges than *Van Metre’s* holding, however, are the sentiments expressed by Mr. Justice Neely at the conclusion of his opinion, for they attack the political underpinning of so many of the court’s earlier rulings in this area: “When the demands for fair procedure conflict with the desirable public policy of economy of effort and money, fair procedure prevails.”<sup>85</sup>

g. The Juror is a Party’s Master, Servant, Counsellor, Steward, Attorney or “of the Same Corporation or Society.”

i) The Juror Who is a Master or Servant of a Party.

It is undisputed that a juror who is the employer or employee of a party is absolutely disqualified.<sup>86</sup> This application of the rule nicely illustrates the wisdom of the common law in creating disqualifications on the basis of implied-in-law bias and prejudice. Justice Rufus Peckham of the United States Supreme Court explains the employment disqualification:

[T]he general tendency among men, recognized by the common law, [is] to look more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side. Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and *it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question*

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83. *Van Metre*, 342 S.E.2d at 451.

84. *Id.* at 452.

85. Some might argue that *State v. Gargiliana*, 138 W. Va. 376, 76 S.E.2d 265 (1953), rather than *Van Metre* is the case that sets a new tone in this area. In *Gargiliana* the state supreme court held that a juror who had been in the courtroom as a spectator during the same term and had heard some evidence in a prosecution of the defendant for another violation of the same statute should have been disqualified by the trial court. But this juror had also discussed the evidence with another and answered *voir dire* questions about bias equivocally. *Gargiliana*, 135 W. Va. at 379, 76 S.E.2d at 267-68. This additional and independent basis for the *Gargiliana* ruling distinguishes it from *Van Metre*.

86. *Crawford v. United States*, 212 U.S. 183, 195 (1909). See also 47 AM. JUR. 2D *Jury* § 326 (1969).

*wholly uninfluenced by anything but the evidence.* The law therefore most wisely says that with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.<sup>87</sup>

When the employer-juror relationship is particularly relevant to the type of case being tried, the West Virginia Supreme Court has occasionally been willing to extend the disqualification to situations in which the employer was not actually a party. In *State v. Dushman*<sup>88</sup> the court was faced with having to decide whether jurors who were in the employ of a corporation should have bias implied to them in a criminal prosecution of defendants accused of having received stolen goods belonging to the corporation. Because the court surmised that the corporation had an interest in the result and that the employees would be under the corporation's influence, the court decided to view the jurors as "presumptively subject to some bias or prejudice" and, therefore, challengeable for cause.<sup>89</sup>

A number of other cases in which the court has refused to find implied-in-law bias or prejudice can only be explained by the relative weakness the court found in the employer-juror relationship of the particular case. These cases include *White v. Lock*,<sup>90</sup> in which the court ruled that a juror who shared an employer in common with a party was not to be disqualified on the grounds of implied-in-law bias;<sup>91</sup> *State v. Wilcox*,<sup>92</sup> in which the court refused to find that jurors who were employed by the brother of a breaking-and-entering victim fell into the cause category;<sup>93</sup> and *State v. West*, in which the court refused to rule that all State and local government employees are *prima facie* disqualified to sit as jurors in criminal cases.<sup>94</sup>

87. *Crawford v. United States*, 212 U.S. 183, 196 (1909) (emphasis supplied).

88. *Dushman*, 79 W. Va. 747, 91 S.E. 809.

89. *Id.* The court reached the same result five years later in *State v. Davis*, 91 W. Va. 241, 112 S.E. 414 (1922). In *Davis*, the court referred to the juror-employees as "*prima facie* . . . disqualified."

90. *White v. Lock*, 332 S.E.2d 240, 243 (W. Va. 1985).

91. *Id.* (citing *Woolridge*, 129 W. Va. 448, 40 S.E.2d 899 (1946)). See also *supra* note 63 and accompanying text for discussion of *Woolridge*.

92. *Wilcox*, 169 W. Va. 142, 286 S.E.2d 257.

93. Contrasting this case with *Dushman* and *Davis*, the court said "Here the challenged jurors are farther removed from the parties to the proceeding and had no interest in the outcome." *Wilcox*, 169 W. Va. at 144, 286 S.E.2d at 259. The court says that the attorneys should have made an effort to demonstrate favor but failed to do so. *Id.* at 145, 286 S.E.2d at 259.

94. *State v. West*, 157 W. Va. 209, 219, 200 S.E.2d 859, 865 (1982). See *infra* note 124 for discussion concerning disqualification of persons associated with law enforcement employees in criminal cases.

ii) The Juror Who has an Attorney-Client Relationship With a Party.

It is clear from the language used in the common law<sup>95</sup> that a juror who is an attorney for a party must be considered “absolutely” disqualified.<sup>96</sup> But what of the situation in which the juror is a *client* of an attorney for a party? Is that, too, grounds for absolute disqualification?

There is no clear answer in West Virginia on this point. As a result of the West Virginia Supreme Court’s decision in *State v. Audia*,<sup>97</sup> however, it appears that West Virginia is in accord with the majority rule that “in the absence of a controlling statute, a juror is not disqualified in either a criminal or civil case for past or present professional or business relations with an attorney in the case.”<sup>98</sup>

The ambiguity in West Virginia has been created because *Audia* did not squarely present the issue to the court. In *Audia* a prospective juror in a criminal action was being represented by the prosecuting attorney in a partition suit in which the attorney was also representing thirty to forty other family members. The prospective juror had never met the prosecutor and did not even know that the prosecutor was the family’s lawyer.

The court rejected the appellant-defendant’s argument that bias should be implied as a matter of law, saying:

We find no prejudice, *per se*, in the attorney-client relationship between the prosecutor and [the juror], *particularly where, as here, the representation is of a class*

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95. A principal cause of challenge, *prima facie* disqualifying a juror, is “that he is the party’s counselor . . . or attorney . . .” *Dushman*, 79 W. Va. 749, 91 S.E. at 810.

96. *Crawford v. United States*, 212 U.S. 183, 195 (1908).

97. *State v. Audia*, 301 S.E.2d 199 (W. Va. 1983), *cert. denied*, 464 U.S. 934 (1983).

98. W. JORDAN *supra* note 7 (citing, *inter alia*, *People v. Wilkes*, 44 Cal.2d 679, 284 P.2d 481 (1955); *State v. Ekis*, 2 Kan. App. 2d 658, 586 P.2d 288 (Kan. 1978); *Bailey v. McLeod*, 143 Kan. 638, 56 P.2d 460 (1936); *Whitney v. Louisville & N.R. Co.*, 292 Ky. 381, 177 S.W.2d 139 (1944); *Eikenberry v. McFall*, 33 Ohio Abs. 525, 36 N.E.2d 27 (1941); *Border v. Carrabine*, 30 Okla. 740, 120 P. 1087 (1912); *State v. Glover*, 41 S.D. 465, 113 N.W. 625 (1907); *Lumberman’s Ins. Co. v. Goodman*, 304 S.W.2d 139 (Tex. Civ. App. 1957); and *Harrison v. Missouri-Kansas & TR Co.*, 89 S.W.2d 455 (Tex. Civ. App. 1935) (error dismissed); *Kagele v. Frederick*, 43 Wash.2d 410, 261 P.2d 699 (1953); *State v. Lewis*, 31 Wash. 75, 71 P. 778 (1903); and *Redwine v. Fitzhugh*, 78 Wyo. 407, 329 P.2d 257 (1958)). See also Annotation, *Professional or Business Relations Between Proposed Juror and Attorney as Ground for Challenge for Cause*, 52 A.L.R.4th 964 (1987).



*of people and he has little, if any, contact with the particular individual who is the juror.*<sup>99</sup>

The court went on to hold that:

[W]here a prospective juror is one of a class of persons represented by the prosecuting attorney at the time of trial, but there has been no actual contact between that juror and the prosecutor, the existence of the attorney-client relationship alone is not *prima facie* grounds for disqualification of that juror.<sup>100</sup>

Can we conclude from *Audia* that the supreme court will not find the attorney-client relationship grounds for absolute cause disqualification in the more typical context in which the prospective juror is being represented by an attorney for a party and has a typically close relationship with the attorney? Or should we conclude that the court will simply articulate a sliding scale rule, under the terms of which the level of scrutiny of the relationship is proportionate to the closeness of the relationship? The reasoning and holding in *Audia* appear to have been drawn with great care so that this issue could be decided another day.

However the court decides, it will be well-advised to reject the premise of the majority rule.<sup>101</sup> It appears to be contrary to common human experience. It asks us to believe that a juror who has entrusted a legal matter to an attorney can suspend for the duration of the juror's service the special confidence that juror has demonstrated in the attorney. Moreover, the premise asks us to believe that the juror will not be influenced in his or her decision-making by thoughts of the consequences on the well-being of the juror's own case of a vote against the interests of his or her attorney. As Judge Walter Jordan has said, because the juror who can put aside such considerations is rare, such a juror should be disqualified.<sup>102</sup>

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99. *Audia*, 301 S.E.2d at 205-06 (emphasis supplied).

100. *Id.*

101. The majority rule appears to be losing some support as the trend of authority is to exclude from juries all persons who by reason of their business or social relations, past or present with either of the parties, could be suspected of possible bias, even though the particular status or relation is not enumerated in the statutes declaring the qualifications of jurors and the grounds of challenge.

47 AM. JUR. 2D, *Jury* § 321 (1969).

102. W. JORDAN, *supra* note 7, at 98. It appears from the context of Judge Jordan's remarks that he means for such jurors to be absolutely disqualified for cause.

Unfortunately, the West Virginia Supreme Court's latest decision in this area appears to continue West Virginia's embrace of the unrealistic appraisal of human nature that supports the majority rule. The appellant in *State v Nixon*<sup>103</sup> argued that a juror who was a litigant in an ongoing domestic relations dispute in which the defendant's attorney was representing the juror's former spouse<sup>104</sup> should be disqualified for cause. The *Nixon* court rejected this position, clearly implying that such a juror will be dismissed only on a showing of actual prejudice or bias.<sup>105</sup> The distressing levels of animosity that often accompany involvement in domestic relations litigation are too well known. Also well known are the lengths to which jurors will go to establish themselves in the eyes of the court and their colleagues as fair persons. Given these realities, the supreme court would be well-advised to give some reconsideration to the basis of its decision in *Nixon*.

iii) The Juror Who is "of the Same Corporation or Society".

This disqualifying ground, like all the others grounds described in *Dushman*, was apparently taken directly from Mr. Justice Blackstone's Commentaries by the *Dushman* Court.<sup>106</sup> Unfortunately, neither Blackstone, the *Dushman* court, nor any West Virginia Court

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The Alabama Supreme Court has taken the minority position, finding that a juror ought to have bias implied to him when his attorney, in a contingency fee case, is representing a party in a case the juror would hear if chosen to serve. Alabama explicitly rejects the position that such a juror should be examined for actual bias. *Price v. State*, 383 So. 2d 884, 887 (Ala. 1980), *cert. denied*, 383 So. 2d 888 (Ala. 1980). *But cf.*, *Albright v. Wood, Inc. v. Wallace*, 274 Ala. 317, 148 So. 2d 240 (1962), and *Harris v. State*, 46 Ala. App. 497, 243 So. 2d 770 (1970). *See also Frank v. United States*, 59 F.2d 670 (9th Cir. 1932) (holding that the trial court did not err in excusing a prospective juror when the relation of attorney and client existed between defense counsel and the prospective juror), and *Christiancy v. State*, 106 Neb. 822, 184 N.W. 948 (1921) (holding that the sustaining of the State's challenge to a prospective juror was not error when the prospective juror had a case pending in which the defense counsel was his attorney).

103. *State v. Nixon*, 359 S.E.2d 566 (W. Va. 1987).

104. A conversation with the defendant's attorney adds some detail to the court's description of the situation. The defendant's attorney was representing the juror's ex-wife in an ongoing and long-standing dispute over child support and custody. The trial transcript indicates that there was at least one modification petition pending at the time of the *Nixon* trial. Telephone interview with Kevin Burgess (July 22, 1988).

105. *Id.* In response to questions from the trial judge, the juror said he could be fair.

106. *See* 3 W. BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 363 (W. Lewis 1902).

since has offered any suggestion as to the scope of this disqualification.

The majority rule that prospective jurors who are stockholders of corporations that are parties are disqualified from serving is clear.<sup>107</sup> There appears to be no reason to believe this rule would not be applied in West Virginia. The more difficult question associated with this disqualification ground concerns the situation in which a party and a prospective juror share membership in a common organization, such as a labor union or fraternal organization.

A simple application of the plain meaning of the text of *Dushman* would result in the disqualification of such persons, but the textual meaning has been implicitly rejected in West Virginia and elsewhere. In *State v. Woolridge*,<sup>108</sup> the West Virginia Supreme Court rejected the argument, without reference to the “same corporation or society” ground, that one labor union member could not sit on a jury hearing a riot charge involving members of a rival union when all were employees of the same corporation. The court appeared to take the position that because the employer, the Weirton Steel Company, had no real interest in the outcome of the prosecution for a riot that threatened the company’s property and because the workforce for whose loyalty the two unions were competing numbered 10,000 persons, the possibility of actual sympathy or prejudice on the part of the prospective jurors was negligible. Aside from being completely unrealistic in its assessment of the interest businesses have in the integrity of their property and union control of the workforce, this reasoning is wholly inconsistent with that employed by the court in *Dushman*<sup>109</sup> and *Davis*.<sup>110</sup> In any event, the important point is that the “same corporation or society” ground was ignored.

If membership in the same corporation does not always disqualify, then what of membership in the same society? West Virginia

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107. W. JORDAN, *supra* note 7, at 92. The rule is typically treated as stemming from the interest-in-the-cause disqualification rather than the “same corporation” ground.

108. *Woolridge*, 129 W. Va. 448, 40 S.E.2d 889 (1946), discussed above in text associated with footnote 63.

109. *State v. Dushman*, 79 W. Va. 747, 91 S.E. 809 (1917).

110. *State v. Davis*, 91 W. Va. 241, 112 S.E. 414 (1922).

has not ruled on this question, but for years other courts have ignored the language of the ground. One of the earliest cases to do so, *Purple v. Horton*,<sup>111</sup> is prototypical. In *Purple* the defendant claimed that, because the plaintiff and some of the prospective jurors were Masons, the “same society” grounds should serve to disqualify the prospective jury members.

The court conducted a purposive analysis of the grounds in these terms:

[T]he reason assigned for excluding as jurors all persons [who fall into cause categories] is because the challenge for cause carries with it *prima facie* evident marks of suspicion, either of malice or favor. Is it true that persons belonging to the same society or corporation are *ipso facto* prejudiced in favor of every person belonging to the same society or corporation, so that they can not decide a question of fact between them and other persons? Whatever may have been the state of society in the days of Finch and Blackstone, it is not so now. This rule would exclude every stockholder in the same bank, every member of the same church, and every associate of the same benevolent society. We have many societies in which the members are extremely numerous, who have never heard of each other, and can have no inducements to favor persons who may belong to the same society, in preference to other individuals.<sup>112</sup>

If this approach to social and benevolent organizations resonated with common sense in 1834, it still holds true for today’s larger population, with its proliferation of large voluntary associations and the resulting rise in anonymity. The courts are right to treat challenges on this ground as if they were challenges to the favor, which require a showing of actual bias or prejudice.<sup>113</sup>

h. The Juror Who, in a Criminal Case, is a Member of the Law Enforcement Community.

In 1973, the West Virginia Supreme Court added an eighth disqualification ground to the traditional grounds articulated some sixty-

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111. *Purple v. Horton*, 27 Am. Dec. 167, 13 Wend. 9 (N.Y. 1834).

112. *Id.*

113. For cases from other jurisdictions, see those collected at 47 AM. JUR. 2D *Jury* §§ 323, 324 (1969).

six years earlier in *Dushman*.<sup>114</sup> In *State v. West*,<sup>115</sup> an appeal by a defendant convicted of larceny, the court held that “it is reversible error to permit a challenged juror who is an employee of the Department of Public Safety [the State Police], a law enforcement arm of the state, to be a member of the panel of twenty.”<sup>116</sup> The relevant syllabus point broadened this exclusion to say that “in a criminal case it is reversible error for a trial court to overrule a challenge for cause of a juror who is an employee of a prosecutorial or enforcement agency of the State of West Virginia.”<sup>117</sup>

The *West* decision is commendable for its insightful and realistic view of human nature. The court frankly admits that subtle forces work on human nature to result in our viewing, often unconsciously, certain sides of a dispute more favorably than others.<sup>118</sup> Simply by virtue of his or her association with law enforcement, for example, a prospective juror is “subject to potential prejudice” and ought to be disqualified without the use of a peremptory challenge.<sup>119</sup> This is precisely the reason the common law initially established cause challenges—because under some circumstances, in which human frailty is clearly brought into play, our common experience tells us that conscious, but more often unconscious, prejudice and bias take up residence in prospective jurors.

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114. *Dushman*, 79 W. Va. 747, 915 S.E. 809. The text of the opinion might give some grounds to argue that the *State v. West* court was simply elaborating upon *Dushman's* disqualification of those prospective jurors with a master-servant relationship with a party. The court does, in fact, cite *Dushman* for this fact and quotes *Crawford v. United States*, 212 U.S. 183 (1909), for authority for the proposition that a prospective juror employed by the government is a servant of one of the parties. If this were all the court had said on cause disqualifications, one might conclude that the master-servant ground was the basis of the *West* decision. But the court goes on not only to speak of kinship, interest, and same-society or corporation grounds, but it also seemingly disqualifies not only employees but those persons *connected*, not necessarily by kinship alone, to employees. See discussion of *West* and its progeny at notes 125 and 126.

115. *State v. West*, 157 W. Va. 209, 200 S.E.2d 859 (1973).

116. *Id.* at 219, 200 S.E.2d at 865. The panel of twenty, referred to here by the court, refers to those jurors who remain after all but peremptory challenges are exercised.

117. *Id.* at 216, 200 S.E.2d 861 (1973). Syllabus points of opinions published by the West Virginia Supreme Court are part of the court's constitutional duty. See W. VA. CONST. art. XIII, §4. As for the force they carry, see Note, *Courts - The Syllabus In West Virginia - Law or Official Headnote?* 58 W. VA. L. REV. 274 (1956).

118. *West*, 157 W. Va. at 219, 200 S.E.2d at 865 (quoting *Crawford v. U.S.*, 212 U.S. 183 (1909)).

119. *Id.*

The supreme court easily could have ended its opinion with the disqualification of employees of the prosecutorial and law enforcement arms of state government. Instead, however, it continued:

[W]hen the defendant can demonstrate *even a tenuous relationship* between a prospective juror and any prosecutorial or enforcement arm of State government, defendant's challenge for cause should be sustained by the court . . . . [D]oubt must be resolved in favor of the defendant's challenge, as jurors who have *no relation* to the State are readily available.<sup>120</sup>

Over the next fifteen years, this language was to cause serious definitional problems for the court in two areas: One, who is an employee of a law enforcement arm of the state? Two, what are the contours of the "tenuous" relationships that will disqualify prospective jurors having them?

The supreme court has begun to address the first question in a series of cases in which it has held that magistrates,<sup>121</sup> secretaries to circuit judges,<sup>122</sup> employees of the Department of Human Services,<sup>123</sup> and arson investigators<sup>124</sup> are not part of the enforcement system for the purposes of the exclusion, but city police<sup>125</sup> and K-9 correctional officers who assist law enforcement personnel are.<sup>126</sup>

The court has followed a more tortuous path in resolving the second, and more difficult, question. Here, the court's troubles were

120. *Id.* at 220, 200 S.E.2d at 866 (emphasis supplied).

121. *State v. Maynard*, 289 S.E.2d 714, 719 (W. Va. 1982). The court reasoned that a magistrate, unlike an individual in law enforcement, is concerned with the "disinterested resolution of disputes," and therefore the reasoning which causes enforcement personnel to be treated as presumptively disqualified does not apply to magistrates.

122. *State v. Brown*, 355 S.E.2d 614, 620 (W. Va. 1987).

123. *State v. Bailey*, 365 S.E.2d 46, 51 n.7 (W. Va. 1987). In *Bailey*, the employee was a social worker whose job brought her into contact with the office of the prosecutor in child placements and home investigations. While the juror's division investigated the defendant, the juror disclaimed any knowledge of the case. *Bailey*, 365 S.E.2d at 50.

124. *State v. Worley*, 369 S.E.2d 706 (W. Va. 1988) (petition for certiorari filed August 11, 1988). How can a part-time arson investigator, employed by the fire department, *not* be a member of a law enforcement agency? Arson is a crime. Fire officials investigate arson *because* it is a crime. Perhaps the court in *Worley* was reluctant to find that the arson investigator's job fit within the category of "law enforcement" because there was no other substantive error in *Worley's* trial to disturb the conviction. Perhaps, too, the court is uncomfortable with the cause exclusion of law enforcement personnel but is not comfortable in overturning *West* entirely.

125. *State v. Dye*, 167 W. Va. 652, 653, 280 S.E.2d 323, 324 (1981). Apparently the State had argued that *West* applied only to state enforcement officials. *Dye* makes it clear that all enforcement officials are to be included in the ambit of the exclusion.

126. *State v. Simmons*, 301 S.E.2d 812, 813 (W. Va. 1983).

caused, at least in part, by the impression it gave in *West*, perhaps inadvertently, that one who had “even a tenuous relationship” with law enforcement was presumptively disqualified, just as a juror who was personally employed by a law enforcement agency was presumptively, automatically, and absolutely disqualified.<sup>127</sup>

The nature of the relationship disqualification first appeared as an issue in *State v. Pratt*.<sup>128</sup> In *Pratt*, a number of prospective jurors indicated that they had relationships with enforcement personnel. The defendant’s attorney sought to question these jurors about their relationships, but the trial court refused the request. In finding the court’s refusal an abuse of discretion, the West Virginia Supreme Court ruled that the trial court should have *either* allowed the questioning (which is what the defendant’s counsel sought) *or simply excused the jurors*. The clear implication of the *Pratt* court’s providing this second option seems to be that one who is related to enforcement personnel can be treated as removable for *cause*, without resort to the challenge for favor or the peremptory strike.<sup>129</sup>

In a pair of cases following *Pratt*, the court held, without extensive discussion, that a juror who was a close friend of the prosecutor and his spouse and whose own spouse was a candidate for sheriff<sup>130</sup> and a juror whose son was in law enforcement work<sup>131</sup> were each disqualified by reasons of the *West* relationship test.

Then in a pair of 1983 cases, the West Virginia Supreme Court began to trim the definition of “tenuous relationship.” In *State v. White*<sup>132</sup> it refused to classify two jurors as coming within the re-

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127. It may be helpful here to keep in mind the distinction made earlier in this paper between challenges for cause and challenges for favor. Had the *West* court denominated employees themselves as challengeable for cause and those with relationships to employees as challengeable for favor, much of the ensuing confusion about the status of those with relationships would have been easily prevented.

128. *State v. Pratt*, 161 W. Va. 530, 538, 244 S.E.2d 227, 233-34 (1978).

129. Indeed, the implication is that there was no need for the defendant’s counsel or the court to continue questioning the prospective jurors after they had identified themselves as related to law enforcement personnel.

130. *State v. Payne*, 167 W. Va. 252, 257, 280 S.E.2d 72, 76 (1981).

131. *State v. Archer*, 169 W. Va. 564, 564, 289 S.E.2d 178, 180 (1982). Later, in *State v. Maynard*, 289 S.E.2d 714, 719 (W. Va. 1982), the court reinforced the relationship disqualification it had created when it read *Archer* as holding that “the near relatives of law enforcement officers should not serve on panels for criminal trials.”

132. *State v. White*, 301 S.E.2d 617, 618 (W. Va. 1983).

relationship test. One juror “knew” a state trooper involved in the case “socially.” Another juror, who was a former deputy sheriff, knew two of the enforcement officers involved in the case through his former employment. In *State v. Meadows*<sup>133</sup> the court ruled that a prospective juror who ten years earlier had been sporadically employed as a prison guard also did not meet the relationship test.

At this point, the court must have sensed that an expansive reading of its “even a tenuous relationship” test was making it difficult to select criminal juries, for in *State v. Beckett*<sup>134</sup> the court dramatically changed direction. While persons in the actual employ of a law enforcement agency were to remain absolutely disqualified, *Beckett* announced a new rule for persons related to such employees:

[A] prospective juror’s consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a *per se* disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case.<sup>135</sup>

Thus, the court has now made it crystal clear that a challenge on the basis of the relationship test is a challenge to the favor, requiring a demonstration of actual bias or prejudice, and not a challenge for cause, requiring automatic removal. The only exception to this rule is in the case of a prospective juror whose relationship is with someone *directly involved* with the case at hand.<sup>136</sup> Such a person, apparently, is challengeable for cause.<sup>137</sup>

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133. *State v. Meadows*, 304 S.E.2d 831, 841 (W. Va. 1983).

134. *State v. Beckett*, 310 S.E.2d 883 (W. Va. 1983).

135. *Id.* at 889. The court claims in its opinion to have “consistently” treated the relationship disqualification as one that requires a showing of actual bias or prejudice. *Id.* But the court’s decision in *Archer*, which the court does not mention in *Beckett*, shows otherwise.

136. Syllabus points 2 and 4 of *Beckett*, read as follows:

2. “When a prospective juror is closely related by consanguinity to a prosecuting witness or to a witness for the prosecution, who has taken an active part in the prosecution or is particularly interested in the result, he should be excluded upon the motion of the adverse party.” Syllabus Point 1, *State v. Kilpatrick*, W. Va., 210 S.E.2d 480 (1974).

4. A potential juror closely related by blood or marriage to either the prosecuting or defense attorneys involved in the case or to any members of their respective staffs or firms should automatically be disqualified.

*Beckett*, 310 S.E.2d at 883.

137. Again, this rule is not obvious from the *West* decision, as the *Beckett* opinion might have one believe. In *West* the court referred to jurors having “even a tenuous relationship” with “any prosecutorial or enforcement arm of State government . . . .” *State v. West*, 157 W. Va. 209, 219, 200 S.E.2d 859, 866 (1973) (emphasis supplied).



In keeping with this clarified approach, the supreme court has emphasized that those parties challenging jurors who might be excused on favor grounds are entitled to individual *voir dire*<sup>138</sup> to determine the existence or nonexistence of actual bias or prejudice.<sup>139</sup> Recently, however, the court has held that this right is somewhat limited. Although the court may exercise its discretion to ask a broader range of questions, it is *required* only to ask "each juror who . . . is related to a law enforcement official whether that relationship would bias him against the accused in any way."<sup>140</sup>

In the decisions following *Beckett*, the court has adhered to the principles articulated there.<sup>141</sup>

### C. Challenges to the Favor.

To this point, we have discussed two types of challenges: challenges for cause and challenges to the array. Our system also allows a third type of challenge, known in the elegant language of our older cases as the "challenge to the favor."<sup>142</sup> This challenge permits parties to seek the removal of unlimited numbers of jurors by motion when,

138. See discussion of the meaning of individual *voir dire* at part two.

139. *State v. Ashcraft*, 309 S.E.2d 600, 609 (W. Va. 1983); *State v. Beckett*, 310 S.E.2d 883, 889 (W. Va. 1983), *State v. Worley*, 369 S.E.2d 706, 719 (W. Va. 1988).

140. *State v. Lassiter*, 354 S.E.2d 595, 600 (W. Va. 1987), *overruling recognized* by *State v. Haselton*, 371 S.E.2d 366 (W. Va. 1988). One might reasonably ask whether such a limited inquiry can probe the juror's mind sufficiently to determine the actual presence or absence of prejudice or bias. See discussion of questioning in Part Two.

141. See *Jordan v. Holland*, 324 S.E.2d 372, 378 (W. Va. 1984); *State v. Wade*, 327 S.E. 2d 142, 147 (W. Va. 1985); *State v. Brown*, 355 S.E.2d 614, 620 (W. Va. 1987); *State v. Perdue*, 372 S.E.2d 636 (W. Va. 1988). In *State v. Bailey*, 365 S.E.2d 46 (W. Va. 1987), this rule is announced: [w]here a prospective juror, who is not an employee of a prosecutorial agency, indicates during voir dire that her employment involves work with the prosecutor's office, there is no error in the trial court's refusal to strike the prospective juror for cause absent a showing on the record of bias or prejudice or a [refused] request by counsel for individual voir dire to determine whether such bias or prejudice actually exists.

*Id.* at 51. See also *State v. Lassiter*, 354 S.E.2d 595 (W. Va. 1987).

142. *Thompson v. Douglass and Co.*, 35 W. Va. 337, 338, 13 S.E. 1015, 1016 (1891). *Thompson* offers this distinction between cause and favor challenges:

Challenges for cause are divided by the common law into challenges for principal cause and challenges to the favor,—the former being where the cause assigned positively disqualified; the latter being causes which, though not conclusively disqualifying, yet threw suspicion of bias upon the juror.

*Id.* at 338, 13 S.E.2d 1016.

in the words of our statute, the juror “is sensible of any bias or prejudice.”<sup>143</sup>

The grounds for disqualification for favor and the answer to the question “Who questions?” (addressed later in this paper) constitute the most rigorous tests of the net. The breadth of favor grounds and the control of juror questioning determine whether the mesh of the net is fine enough to catch subtle and deeply ingrained prejudice and bias of every sort imaginable or whether the net is flawed by large and quite serious holes.

I divide the discussion of challenges to the favor into two parts: 1) general rules concerning such challenges and 2) the most common favor grounds found in the case law.

### 1. General Rules Governing Favor Challenges

The West Virginia Supreme Court has frequently articulated the standard by which the merits of favor challenges are to be evaluated:

The true test as to whether a juror is qualified to sit on a panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court.<sup>144</sup>

In the event the prospective juror has preconceived notions about the case, the test proceeds thusly:

In order that one who has formed or expressed an opinion as to the guilt or innocence of an accused may be accepted as a competent juror on such panel, his mind must be in such condition to enable him to say on his *voir dire*, unequivocally and without hesitation, that such opinion will not affect his judgment in arriving at a just verdict from the evidence alone submitted to the jury on the trial of the case.<sup>145</sup>

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143. Either party in any action or suit may, and the court shall on motion of such party, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice therein . . . .

W. VA. CODE § 56-6-12 (1966).

144. *State v. Finley*, 355 S.E.2d 47, 49 (W. Va. 1987) (quoting *State v. Harshbarger*, 294 S.E.2d 254, 256 (W. Va. 1982)), and *State v. Peacher*, 280 S.E.2d 559, 569 (W. Va. 1981). *See also* *State v. Matney*, 346 S.E.2d 818, 821 (W. Va. 1986) (quoting *State v. Neider*, 295 S.E.2d 902 (W. Va. 1982)) and *State v. Deaner*, 334 S.E.2d 627, 628 (W. Va. 1985) and cases collected there.

145. *State v. Matney*, 346 S.E.2d 818, 821-22 (W. Va. 1986) (quoting *State v. Johnson*, 49 W. Va. 684, 39 S.E.2d 665 (1901)).

One of the purposes of *voir dire*, and of favor challenges in particular, is to clear the way for the use of the parties' peremptory challenges.<sup>146</sup> Accordingly, the West Virginia Supreme Court has repeatedly said that a party to a lawsuit is "entitled to a panel of . . . jurors, each impartial and free from bias or prejudice, before being required to exercise his rights as to peremptory challenges."<sup>147</sup>

The pivotal role of the trial judge in dealing with favor challenges also has been clearly set out by the Court:

So much depends upon the manner of the juror and his tone of voice and the opportunity of the trial judge to see and know the juror that it is the settled practice to not interfere with his findings, unless clearly against the evidence.<sup>148</sup>

This deference to the prudential judgments of the trial court is not unlimited, however. When the examination of jurors on *voir dire* reveals the possibility of prejudice or bias the court has the duty to excuse the jurors or, at least, to question the prospective jurors or to allow the attorneys to question them "to precisely determine whether they entertain bias or prejudice for or against either party, requiring their excuse."<sup>149</sup>

These general rules then are the parameters of the law governing challenges to the favor in West Virginia.

## 2. Grounds for Favor Challenges

As the West Virginia Supreme Court has said, quoting Lord Coke, "The causes of favor are infinite."<sup>150</sup> Nonetheless, in an effort to explain and give some shape to the West Virginia favor cases, I group them here into categories that reflect those situations in which parties and courts can most often expect to see favor challenges arise.

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146. Discussed *infra*.

147. *State v. Flint*, 42 W. Va. 509, 514, 96 S.E.2d 677, 681 (1957), *cert. denied*, 356 U.S. 903 (1958).

148. *Id.*

149. *State v. Deaner*, 334 S.E.2d 627, 628 (W. Va. 1985) (citing numerous cases).

150. *Thompson v. Douglass and Co.*, 35 W. Va. 337, 339, 13 S.E. 1015, 1016 (1891). "No enumeration was ever attempted of what causes might be alleged as grounds of challenges to the favor. It would be impossible to specify all that should be allowed in advance by a statute, for they depend upon each particular case, and the circumstances and parties to it." *Id.*

a. Bias or Prejudice Resulting from Relationship with a Party, Attorney or Witness.<sup>151</sup>

i) Bias or Prejudice Resulting from Knowledge of the Decedent in a Criminal Prosecution

The West Virginia Supreme Court has gone in opposite directions in situations in which a prospective juror admitted knowledge of the deceased victim in a criminal prosecution. In the first case, *State v. Flint*,<sup>152</sup> the juror, who had knowledge of the deceased and of how the crime occurred, stated on *voir dire* that it would take much evidence to erase his previous "impressions." The supreme court upheld the trial court's refusal to excuse this juror apparently because the juror later said that "he was not conscious of any bias or prejudice; that he could give the defendant and the State a fair and impartial trial; that he had no opinion as to the guilt or innocence of the defendant; and that he could make his decisions as a juror 'entirely from the evidence.'"<sup>153</sup>

Twenty-nine years later, in *State v. Matney*,<sup>154</sup> the court, in a *per curiam* opinion, took the opposite tack. In *Matney* the prospective juror said that he had been acquainted with the decedent and that although he could render a fair verdict, "it would be hard."<sup>155</sup> Later, the prospective juror, much like the prospective juror in *Flint*, was heard to say that he could return a verdict solely on the law and the evidence. The trial court then granted the State's challenge. The supreme court upheld the dismissal of the juror, stating that in cases where there is doubt as to whether the juror is impartial, "the doubt must be resolved in favor of the juror's challenge."<sup>156</sup> The *Matney* court neither discussed nor cited *Flint*.

Thus, the law on knowledge of decedents is in conflict. The difference in treatment of the two jurors can only be explained by

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151. Note that kinship relationships and attorney-client relationships are challenges for cause and are treated above.

152. *State v. Flint*, 142 W. Va. 509, 96 S.E.2d 677 (1957), *cert. denied*, 356 U.S. 903 (1958).

153. *Id.* at 514, 96 S.E.2d at 681.

154. *State v. Matney*, 346 S.E.2d 818 (W. Va. 1986).

155. *Id.* at 821.

156. *Id.* at 822.

hypothesizing that the *Matney* court believed the defendant there received a fair trial and that the removal of the contested juror was immaterial to the result. Undoubtedly, the treatment accorded the contested juror in *Flint* is more reflective than *Matney* of how the court treats many challenges to the favor. Generally, if the juror can be led to say that he will be guided solely by the evidence and the law, the trial court's refusal to allow a challenge to the favor will not be ruled reversible error regardless of prior statements of the juror that his opinion of the facts has been shaped by previous experiences.<sup>157</sup>

#### ii) Bias or Prejudice Resulting from Relationship With a Party

Judging from the reports of trial court activity contained in the appellate cases, West Virginia trial courts appear to excuse for favor prospective jurors who are acquainted with parties somewhat more often than not. This marginal predisposition to excuse jurors with social relationships with parties reflects mainstream *voir dire* thinking in the United States.<sup>158</sup> Thus, the West Virginia cases in this area deal not with the question of whether the trial courts erred for *refusing* to excuse prospective jurors but whether it was error to *excuse* them.<sup>159</sup> In such cases, the court applies a harmless error rule and uniformly finds that such excuses do not constitute reversible error when the remaining panelists constituted an impartial jury.

In that minority of cases in which the trial court has refused to excuse friends of a party, the trend appears to be toward overruling,

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157. Before leaving this area, it should be noted that it is reversible error for the trial court to refuse to allow questions as to whether the prospective jurors knew the decedent. *State v. Peacher*, 167 W. Va. 540, 554, 280 S.E.2d 559, 570 (1981).

158. See, e.g., *W. JORDAN*, *supra* note 7, at 88-89:

Generally, all persons who could be suspected of bias because of their past or present business or social relations with any of the parties should be excluded from the jury . . . . It stands to reason that a prospective juror who is a close personal friend of one of the parties . . . will have a hard time being completely fair and unprejudiced. It is very likely that, because of that relationship, such juror will tend to favor the friend's cause or version.

*Id.*

159. See, e.g., *Thompson v. Douglass*, 35 W. Va. 337, 13 S.E. 1015 (1891), *Ritz v. Kingdon*, 139 W. Va. 189, 79 S.E.2d 123 (1953), *overruled in part*, 140 W. Va. 585, 87 S.E.2d 689 (1955), and *State v. Curtin*, 332 S.E.2d 619 (W. Va. 1985).

rather than sustaining, the trial court's refusal to excuse. This trend is illustrated in a recent case, *West Virginia Department of Highways v. Fisher*,<sup>160</sup> in which the supreme court reversed the trial court for refusing to remove jurors who knew a party. This approach, too, is consistent with the national trend to remove acquaintances of parties from the panel of prospective jurors.<sup>161</sup>

### iii) Bias or Prejudice Resulting from Relationships with Witnesses

#### a) Consanguineal Relationships

When the court is faced with determining whether a consanguineal juror-witness relationship creates bias or prejudice in the prospective juror, it first takes a discriminating look at the nature of the relationship to determine whether the challenge should be treated as one for cause or for favor.

The leading case in this area is also the one in which the juror-witness relationship was the most pronounced. *State v. Kilpatrick*<sup>162</sup> was a prosecution of an individual accused of making abusive telephone calls. The prosecution, which intended to call a telephone company employee as a key witness, apparently remained silent when the witness's father was impaneled as a juror. When the juror volunteered, after being sworn, that he was the father of the prosecution witness, the defendant moved the trial court to remove him. The trial court refused, and the supreme court reversed this refusal as an abuse of discretion.

In the course of reaching this result, the court distinguished between prosecution witnesses and other witnesses. The court indicated that prospective jurors who have consanguineal relationships with prosecution witnesses ought to be promptly removed on the basis of

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160. *W. Va. Dept. of Highways v. Fisher*, 289 S.E.2d 213 (W. Va. 1982).

161. The *Flint* trial court's decision to refuse to exclude a juror who knew the defendant (adverted to above) was affirmed, *State v. Flint*, 42 W. Va. 509, 96 S.E.2d 677 (1957), *cert. denied*, 356 U.S. 903 (1958), placing *Flint* in the minority.

162. *State v. Kilpatrick*, 158 W. Va. 289, 210 S.E.2d 480 (1974).

cause,<sup>163</sup> whereas prospective jurors who have blood relationships with non-prosecution witnesses must be evaluated on a case-by-case basis to determine whether prejudice or the suspicion of prejudice exists.<sup>164</sup>

A rule governing consanguineal juror-witness relationships in civil cases has not been announced by the court.<sup>165</sup>

#### b) Non-consanguineal Relationships

When the West Virginia Supreme Court confronts a non-consanguineal juror-witness relationship in a civil case, it appears that it treats the challenge as one for favor, requiring the trial court to evaluate the prospective juror for actual bias or prejudice.<sup>166</sup> In criminal cases, however, one who has a non-consanguineal relationship with a law enforcement official testifying in the case apparently is challengeable for cause.<sup>167</sup>

163. "The law is settled that, if a juror is within a prohibited degree of relationship to a prosecuting witness, he should be excluded on motion of the adverse party." *Id.* at 293, 210 S.E.2d at 482.

164. "In judging possible prejudice on the part of a juror related to the witness other than the prosecuting witness, each case must be decided on its own facts." *Id.* at 295, 210 S.E.2d at 484.

In *Kilpatrick*, the court found that allowing the witness's father to remain as a juror created at least the suspicion of prejudice and was therefore an abuse of discretion.

The *Kilpatrick* approach is still good law. In *State v. Wade*, 327 S.E.2d 142 (W. Va. 1985), the court was faced with the question of whether the trial court's refusal to excuse two prospective jurors who knew witnesses other than prosecuting witnesses was reversible error. The court performed a factual analysis befitting a favor challenge and concluded that because the trial court's examination of the jurors showed no bias or prejudice, the court did not abuse its discretion in retaining the jurors. (The court did opine, however, that removal of the jurors would have been "a more prudent course." *Id.* at 148.)

For cases from other jurisdictions, see Annotation, *Social or Business Relationship Between Proposed Juror and Non-Party Witness as Affecting Former's Qualifications as Juror*, 11 A.L.R.3d 859 (1967).

165. Given the court's unequivocal rejection of jurors related to prosecuting witnesses, one would think that the court, in regard to leading civil witnesses, would hesitate before embracing the general rule which "appears to be . . . that an individual will not be disqualified from serving as a juror simply because he is related, either by affinity or consanguinity, to a witness in a civil action." Annotation, *Juror's Relationship to Witness, in a Civil Case, as Ground of Disqualification or For Reversal or New Trial*, 85 A.L.R.2d 851 (1962).

166. This approach was implicit in the court's decision in *Fisher*, 289 S.E.2d 213, 220, *cert. denied*, 459 U.S. 944 (1982). In *Fisher* a number of jurors knew the plaintiff's witnesses. The court found that the failure of the trial court to dismiss these (and other jurors) for favoring the plaintiff was reversible error.

In *State v. Collins*, 329 S.E.2d 839, 846 (W. Va. 1984), the court hints that it will take a similar approach in criminal cases when the relationship is to a witness other than a law enforcement official.

167. See text accompanying notes 114-141 and *cf.* *State v. Crouch*, 358 S.E.2d 782, 784-85 (W. Va. 1987).

## b. Specific Political and Social Biases or Prejudices

Because “opinions with respect to the subject matter of particular litigation may be held with such conviction as to prejudice one’s ability to render a verdict solely on the evidence under the instructions of the court,”<sup>168</sup> the West Virginia Supreme Court has taken pains to carefully scrutinize verdicts rendered by panels which the trial courts have allowed to include persons who may have harbored special biases or prejudices with particular impact on the case at hand. Thus, the court has reversed criminal convictions in cases involving juror opinions about welfare,<sup>169</sup> drug use,<sup>170</sup> psychiatrists,<sup>171</sup> the insanity defense,<sup>172</sup> the presumption of innocence,<sup>173</sup> and racial equality.<sup>174</sup>

168. *State v. Deaner*, 334 S.E.2d 627, 628 (W. Va. 1985).

169. *Id.* at 627.

170. *State v. Bennett*, 304 S.E.2d 35 (W. Va. 1983). *But see* *State v. Harshbarger*, 294 S.E.2d 254, 255-57 (W. Va. 1982) (court held that it was not reversible error for the trial court to inquire about the attitudes of the prospective jurors regarding the legalization of marijuana in a prosecution for the delivery of marijuana).

171. *State v. Sanders*, 242 S.E.2d 554 (W. Va. 1978), *overruled*, 168 W. Va. 211, 283 S.E.2d 914 (1981). *See infra*, note 173, for the question about psychiatrists that the trial court refused to ask. In *State v. Guthrie*, 315 S.E.2d 397 (W. Va. 1984), the court said this about its decision in *Sanders*: “[I]f a defendant requests, a court should have jurors questioned about their prejudices or biases against persons suspected of having mental diseases or defects, and against psychiatrists or psychologists.” *Id.* at 404.

172. *Sanders*, 161 W. Va. 399, 242 S.E.2d 554. In *Sanders*, a murder prosecution in which the defendant claimed insanity, the court held it was reversible error for the trial court to refuse to ask these two *voir dire* questions:

Are there any members of the jury who have a bias or prejudice against psychiatrists, that is doctors who study mental disease and disorders, to such an extent that you could not fairly consider their testimony and opinions and give them like weight with other evidence and testimony in the case?

Are there any persons on the jury who have a bias or prejudice either for or against persons suspected of having a mental illness or defect such that they would not be able to fairly sit as a juror in a case wherein the defendant was suspected of having such mental disease or defect?

*Id.* at 404 n.4, 242 S.E.2d at 557 n.4. A less enlightened view is represented by *State v. Harrison*, 36 W. Va. 729, 15 S.E. 982, 984 (1892).

173. *State v. Messer*, 99 W. Va. 241, 128 S.E. 373 (1925).

174. *State v. Dean*, 130 W. Va. 257, 58 S.E.2d 860 (1950). *Dean* illustrates what the evidentiary procedure permitted by W. Va. Code § 56-6-12 (1966) for proving the bias or prejudice of a juror would look like, although in *Dean* the testimony appears to have been taken after the verdict in the context of a new trial motion rather than prior to swearing of the jury in aid of *voir dire*.) *See also* *West Virginia Human Rights Commission v. Tenpin Lounge*, 158 W. Va. 349, 211 S.E.2d 349 (1975) (court held that the trial court’s refusal to allow the Commission to question jurors after the verdict in an effort to prove they had lied on *voir dire* concerning their membership in segregated voluntary



### c. Bias or Prejudice Stemming from a Previously-Formed Opinion<sup>175</sup>

Our trial system depends upon the jury for its success. The character, intelligence, and life experiences of the jurors contribute heavily to the quality of justice juries are capable of rendering. It is no coincidence, therefore, that we require of jurors certain minimal attributes—literacy, physical and mental ability, and majority age<sup>176</sup>—to promote proper decision-making. At the same time, our system also depends upon formal rules of evidence to maintain the strict control over information jurors receive that the system believes is necessary for fair results.<sup>177</sup>

These two goals collide when the prospective juror has educated him or herself about the case prior to trial by obtaining information about the case, by reflecting on the wisdom of the laws involved, or by reflecting on relevant policy issues. The collision takes place because obtaining knowledge and reflecting on issues almost inevitably lead to the formation of an opinion about the proper result

organizations was error).

*Tenpin* also held that mere membership in such an organization is not a ground on which a prospective juror can be dismissed for cause. *Tenpin*, 158 W. Va. at 356, 211 S.E.2d at 353.

The court's views on the racial attitudes of jurors has at times been less than progressive. One of the most shameful opinions issued by the court in this area (second only, perhaps to *State v. Strauder*, 11 W. Va. 745 (1877), *rev'd sub nom.*, *Strauder v. West Virginia*, 100 U.S. 303 (1879), in which the court upheld the exclusion of blacks from jury duty, (see DiSalvo, *supra* note 9, at 228) is *State v. Lohm*, 97 W. Va. 652, 125 S.E. 758 (1924), *overruled*, *State v. Dolin*, 347 S.E.2d 208 (W. Va. 1986). *Lohm* was accused of rape. The local Ku Klux Klan, in what was apparently a very emotionally-charged atmosphere, acted as an investigator for the prosecution, rounding up evidence to be used. Moreover, the Klan ran several sensational news stories about the case in its propaganda sheet. Despite all this and despite the Klan's well-known prejudices, the trial court refused to exclude two self-confessed Klan members from the jury. The Supreme Court of Appeals refused to reverse on this basis and then added insult to injury when it went out of its way to strongly imply that the Klan was no different than any other "class of good citizens." *Lohm* at 657, 125 S.E. at 760.

The court, just a little over two years later, thought a little differently of the issue saying that in the future "it would be well . . . for jurors belonging to the Klan to be excused." *State v. Siers*, 103 W. Va. 30, 33, 136 S.E. 503, 504 (1927).

But shortly after *Siers*, the court replicated the approach it took in *Lohm* in *State v. McMillion*, 104 W. Va. 1, 138 S.E. 732 (1927).

175. Because the scope of this article is restricted to *voir dire*, this section does not treat the question of prejudice and bias created by trial publicity.

176. W. VA. CODE § 52-1-8(b) (1988).

177. For a description of the purposes of the rules of evidence, see F. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS 4 (2d ed. 1986).

in a case. The danger, of course, is that the juror's mind will not operate solely on the basis of the information provided to the juror in the confines of the courtroom.

This conflict between intelligent reflection on the world about oneself and the open-mindedness required for fairness was squarely faced by the West Virginia Supreme Court more than a hundred years ago in *State v. Schnelle*.<sup>178</sup> The court spoke then of the juror with a prior opinion in these terms:

Why should he be excluded from the jury? Merely because from what he had heard about the case [and] from what he had read he had formed and expressed an opinion of the guilt or innocence of the accused? Such a rule would put a discount on intelligence and a premium on ignorance. The human mind is so constituted, that when it receives information on any subject, it will at once form a hypothetical opinion upon such information.<sup>179</sup>

The court then took this view of the ideal juror:

The well balanced mind will not be prejudiced by such an opinion, if afterwards the information on which it was based is found to be incorrect or only partially correct. The mind that can thus discriminate and not suffer itself to be prejudiced by impressions formed on partial knowledge of the facts is the kind of mind that ought to be possessed by every juror who tries an issue where the life or liberty of a citizen is involved.<sup>180</sup>

The court then prescribed the test which trial courts should employ when faced with a juror possessing an opinion gained from previously acquired knowledge:

The prisoner has no right to object to any juror, who, although he has formed and expressed an opinion as to his guilt or innocence, yet can truthfully say that his mind is free from prejudice, and that the opinion previously formed will not influence him in his verdict; but unless the proposed juror understands his own mind on the question, and can promptly say, that it is at that time free from prejudice, and that his mind is entirely free to pass upon the guilt or innocence of the accused upon the evidence submitted to him as such juror, he is not a competent juror and should be ordered to stand aside.<sup>181</sup>

The wisdom of the *Schnelle* court has withstood the test of time. Over the past century and more, the West Virginia Supreme Court

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178. *State v. Schnelle*, 24 W. Va. 767 (1884).

179. *Id.* at 780-81.

180. *Id.* at 781. The court is, of course, also interested in the fairness of civil juries. See, e.g., *Malone v. Monongahela Valley Traction Co.*, 105 W. Va. 60, 141 S.E. 440 (1928).

181. *Schnelle*, 24 W. Va. at 782.

has used the *Schnelle* opinion as the basis for its evolving test for discriminating between knowledgeable jurors who should and should not serve.<sup>182</sup>

The test, as it has evolved to the present, consists of three steps<sup>183</sup>:

- (1) Does the juror have prior information of any sort about the facts of the case or issues involved in the case?<sup>184</sup>
- (2) If so, has that information led the juror to form an opinion about the merits of the case?<sup>185</sup>
- (3) Whether or not the juror believes he or she has formed an opinion, can the juror
  - (a) unequivocally and without hesitation say that
  - (b) he or she can set aside any opinion he or she might have and
  - (c) reach a verdict based solely on the evidence presented in the courtroom?<sup>186</sup>

Clearly, a court will not disqualify a juror simply because the juror has read about the case or obtained information in other ways.<sup>187</sup> Similarly, it is not enough to disqualify a juror on the sole ground

182. See *State v. Gargiliana*, 138 W. Va. 376, 76 S.E.2d 265 (1953); *State v. Richards*, 101 W. Va. 136, 132 S.E. 375 (1926); *State v. Messer*, 99 W. Va. 241, 128 S.E. 373 (1925); *State v. Toney*, 98 W. Va. 236, 127 S.E. 35 (1925); *State v. Johnson*, 49 W. Va. 684, 39 S.E. 665 (1901); *State v. Harrison*, 36 W. Va. 729, 15 S.E. 982 (1892); *State v. Baker*, 33 W. Va. 319, 10 S.E. 639 (1889).

183. As the court indicates in *State v. Beck*, 167 W. Va. 830, 837 n.7, 286 S.E.2d 234, 239 n.7, this test is predicated on the United States Supreme Court's decision in *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975). *Murphy* relies on another important United States Supreme Court case in the pre-trial publicity area, *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). For commentary on *Dowd*, see W. JORDAN, *supra* note 7, at 74-76.

184. Common sources include newspaper, television, and radio reports, conversations with persons involved, and conversations with persons having knowledge. See generally W. JORDAN, *supra* note 7, at 73-74.

185. This is an objective, not a subjective, test. It is not necessary that the juror acknowledge that he or she has actually formed an opinion. It is up to the trial court to decide whether an opinion has been formed. "The significant aspect of the voir dire dialogue . . . is not the juror's uncertainty as to whether he has formed an opinion . . ." *State v. Beck*, 167 W. Va. 830, 837-38, 286 S.E.2d 234, 240 (1981). The judgment of the juror on this question, while "entitled to some consideration, [is not to] be taken as conclusive." *State v. Williams*, 160 W. Va. 19, 26, 230 S.E.2d 742, 747 (1976). See also *State v. Pendry*, 159 W. Va. 738, 747, 227 S.E.2d 210, 217 (1976) ("The existence of bias or prejudice or other lack of qualification is addressed in the first instance to the trial court."), *overruled in part on other grounds*, 161 W. Va. 168, 241 S.E.2d 914 (1978).

186. *State v. Beck*, 167 W. Va. 830, 837, 286 S.E.2d 234, 240 (1981). Some of the older cases indicate that to support disqualification, the juror's opinion must be deliberate and decided. See, e.g., *State v. Toney*, 127 S.E. 35, 37 (1925). This gauge seems to have been discarded in favor of the strict "hesitation and equivocation" test of *Beck* and other modern cases.

187. The court has made it clear on more than one occasion that simply "[h]aving some knowledge of the case does not automatically disqualify a juror." See *State v. Beck*, 167 W. Va. 830, 835, 286 S.E.2d 234, 238 (1981); *State v. Neider*, 295 S.E.2d 902, 909 (W. Va. 1982).

that the juror does, in fact, have a bias or prejudice without also showing that the bias or prejudice will interfere with the juror's good judgment.<sup>188</sup> However, once it is determined that the juror has, at the least, been exposed to prior extra-courtroom information, then the trial court is required to determine by thorough individual questioning whether an opinion has been formed and, if so, to what extent that opinion would affect the juror's judgment in the case.<sup>189</sup> (When the jury has been exposed to prejudicial information in the courtroom, not only is individual questioning necessary, but it also must be conducted *in camera*.<sup>190</sup>) Should the questioning reveal that this bias or prejudice will interfere with the jurors's good judgment, then the juror is disqualified.

The key part of the test is the joint notion of *promptness* and *clarity*. Can the juror say without qualification and without pausing that he or she can put aside previously formed opinions and make a decision on the evidence alone? Our supreme court's decisions have been fairly uniform in enforcing this standard over a long period of time.<sup>191</sup> Thus, the court has deemed jurors disqualified who "supposed" they could be fair,<sup>192</sup> who "couldn't say" whether an opinion based on newspaper accounts could be set aside,<sup>193</sup> who required

188. *State v. Guthrie*, 315 S.E.2d 397, 404-05 (W. Va. 1984).

189. *State v. Neider*, 295 S.E.2d 902, 908-09 (W. Va. 1982). *See also State v. Williams*, 160 W. Va. 19, 24, 230 S.E.2d 742, 746 (1976). *State v. Guthrie*, *supra* note 188, illustrates the court's rejection of a juror challenge in the light of incomplete questioning.

190. *State v. Finley*, 355 S.E.2d 47, 51 (W. Va. 1987).

191. "Fairly" rather than consistently uniform because the court has occasionally allowed a verdict to stand even when some hesitation and equivocation occurred in the juror's responses on *voir dire*. For example, in *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981), when a juror was asked whether she had formed an opinion about the defendant's guilt or innocence, she said "yes and no." *Id.* at 838, 286 S.E.2d at 240. About *this* response the court was correct to point out that hesitation concerning whether one had formed an opinion is not dispositive of the prejudice question. The juror was *also* asked, however, whether she could render a true verdict based on the evidence, to which she responded, "outside of how I feel I guess not." *Id.* at 838, 286 S.E.2d at 240. There is little equivocation here: the juror is saying that she cannot render a verdict on the evidence. But the court excuses this frank admission because she was later asked the same question, to which she effectively answered this time "yes." What could be more equivocal than two opposite answers to the same question? Yet the court refused to find her disqualified. Perhaps without saying so, the court has resurrected the long-neglected *Watkins* harmless error rule. *Watkins v. Baltimore & O.R. Co.*, 130 W. Va. 268, 43 S.E.2d 219 (1947). *See supra* note 38.

192. *State v. Schnelle*, 24 W. Va. 767, 781 (1884).

193. *State v. Johnson*, 49 W. Va. 684, 691, 39 S.E. 665, 668 (1901). *Johnson* held that it was error to include on the panel a juror who expressed "any degree of doubt." *Id.* at 691, 39 S.E. at 668 (emphasis supplied).

evidence to set aside a judgment that the defendant was guilty,<sup>194</sup> who expressed doubt about being influenced by comments heard prior to trial,<sup>195</sup> and who “thought” they could set aside previous opinion and rule solely on the evidence.<sup>196</sup>

In this setting, as in other favor contexts, there is a clear danger that our system will permit prejudiced and biased persons to sit on juries. The danger arises here, as it does elsewhere, from two sources. The first source consists of the proclivity toward the use of leading questions which those judges and lawyers wishing to retain jurors on the panel have. These persons employ leading questions to induce the hesitant juror to say that he or she could render a verdict solely on the evidence. The principal characteristic of the leading question, of course, is that it gives the *cross-examiner*, not the witness, an opportunity to make statements. For this reason, some lawyers and judges employ leading questions on *voir dire*. Furthermore, they are unencumbered by the inconvenience of leading-question objections, which are not recognized on *voir dire*. This misuse of the leading question can distort the process of gathering accurate and reliable information on *voir dire*. The second source of the danger stems from the need each juror has to maintain an image of himself or herself as an upright and fair-minded citizen. After a juror has honestly admitted a preconceived opinion, the leading question tells the typical juror that something is amiss and that the juror has answered in an inappropriate manner. Because the juror wants to please the judge as authority figure and his or her colleagues on the panel and wants to conform to socially acceptable conduct, the juror too often will allow himself or herself to be led.<sup>197</sup>

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194. *State v. Messer*, 99 W. Va. 241, 244, 128 S.E. 373, 374 (1925) (*Messer* states that when the juror's opinion is “decided” the juror is to be disqualified. *Id.* at 241, 128 S.E. at 373); *State v. Johnson*, 49 W. Va. 684, 696, 39 S.E. 665, 667 (1901). *See also State v. Hatfield*, 48 W. Va. 561, 37 S.E. 626 (1900) (not error to exclude juror who required evidence to move him from his pre-conceived opinion).

195. *State v. Gargiliana*, 138 W. Va. 376, 380, 76 S.E.2d 265, 267-68 (1953).

196. *State v. Bennett*, 304 S.E.2d 35, 37-38 (W. Va. 1983).

197. The United States Supreme Court said this in *Irvin v. Dowd*, 366 U.S. 717, 728 (1961), about the reliability of such answers: “No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father . . . . As one of the jurors put it, ‘You can't forget what you hear and see.’” *Id.*

The danger is exacerbated in civil cases. Since 1985, the Legislature has allowed juries to consist of only six persons.<sup>198</sup> Previously, the damage a prejudiced or biased person could do was limited by virtue of that person being but one juror of twelve. Now, however, that juror plays a more prominent role in the jury's decision because of the jury's diminished size. The risk of unjust verdicts is enhanced.

To decrease the likelihood that persons who are truly prejudiced and biased will be empanelled as jurors, lawyers and judges ought to avoid the inappropriate use of the leading question. This is especially important for judges, for it is to their exercise of discretion that the supreme court often defers.<sup>199</sup> Even more important, the court should strictly enforce its rule that requires the prompt dismissal of any juror who hesitates and equivocates on the question of his or her ability to render a verdict solely on the evidence.

#### D. *Peremptory Challenges*

Arbitrariness and capriciousness are not welcome in the law. Yet, in the area of peremptory challenges, the exception is the rule.<sup>200</sup> In both civil and criminal jury trials, the litigants possess the right to remove limited numbers of jurors from the qualified panel for virtually any reason or no reason whatsoever.<sup>201</sup>

The purpose of allowing peremptory challenges, however, is not to encourage irrationality but to advance the goal of an impartial

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198. W. VA. CODE § 56-6-11 (Supp. 1988).

199. The determination of the qualification of a juror is a problem often difficult to solve. The fact sought to be established, whether the juror may be biased or prejudiced, rests alone with the proposed juror, and often he may be unable to honestly determine whether he would be unduly influenced by certain facts or situations in consideration of the evidence to be offered. Usually the answer is left to the sound discretion of the trial judge. *State v. Beacraft*, 126 W. Va. 895, 30 S.E.2d 541 [(1944), *overruled*, *State v. Dolin*, 347 S.E.2d 208 (W. Va. 1986)]; *State v. Camp*, 110 W. Va. 444, 158 S.E. 664 [1931]. His experience in such matters, often aided by some knowledge of the character, abilities and habits of the particular juror, coupled with the fact that he observes the demeanor and expression of the juror on *voir dire* examination, are justifiable reasons for vesting wide discretion in him.

*State v. Gargiliana*, 138 W. Va. 376, 379-80, 76 S.E.2d 265, 267 (1953).

200. "For [the peremptory challenge] is, as Blackstone says, an arbitrary and capricious right . . . ." *Lewis v. United States*, 146 U.S. 370, 378 (1882).

201. This privilege once was, but now no longer is, absolute. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

trial by permitting each side to remove jurors whom it believes, for whatever reason, are hostile to its cause or friendly to its opponent's cause.<sup>202</sup> To fulfill this purpose, the law of *voir dire* does not require a litigant to account to the court for his or her motives in removing a juror peremptorily.<sup>203</sup> An objection to a peremptory strike will simply not be heard.<sup>204</sup>

One important exception to the exception does exist, however. In *Batson v. Kentucky*,<sup>205</sup> the United States Supreme Court held that the equal protection clause forbids a criminal prosecutor from peremptorily removing jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."<sup>206</sup> At the same time, the Supreme Court relieved the defendant of the burden imposed by *Swain v. Alabama*<sup>207</sup> to prove discrimination by showing a *pattern* of racial discrimination by the prosecution in a number of cases over time. Instead, once the defendant shows that he or she is a member of a cognizable group,<sup>208</sup> that the prosecutor has used the peremptory challenge to remove jurors who are group members in the defendant's case, and that the facts infer a racial motivation, then the prosecutor must justify his or her action by demonstrating a neutral reason for the exclusion of the jurors in question.

*Batson* leaves in its wake a number of new questions: Will defendants of one cognizable group eventually be permitted to challenge

202. "[A] party . . . has a right to an impartial and unbiased jury; and, in order to insure that right, the party is entitled . . . to meaningful *voir dire* examination and peremptory challenges of the prospective jurors." *Barker v. Benefit Trust Life Ins. Co.*, 324 S.E.2d 148, 152 (W. Va. 1984). The United States Supreme Court has said the purpose of peremptory strikes is to "eliminate extremes of partiality on both sides" and "to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overruled*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

203. STARR & McCORMICK, *JURY SELECTION* 315 (1985).

204. 47 AM. JUR. 2D *Juries* § 235 (1969).

205. *Batson*, 476 U.S. at 79.

206. *Id.* at 89.

207. *Swain v. Alabama*, 380 U.S. 202 (1965).

208. It is widely recognized in the field of jury composition law that groups characterized by race, sex, religion, ethnicity, and political affiliation are cognizable. See DiSalvo, *supra* note 9, at 234-35.

the exclusion of jurors belonging to another cognizable group?<sup>209</sup> Will a defendant who belongs to no cognizable group be able to challenge the exclusion of those who do?<sup>210</sup> Does *Batson* apply to criminal defendants?<sup>211</sup> Could it be made to apply to parties to civil actions as well?<sup>212</sup> Does *Batson* signal the oncoming demise of the peremptory challenge generally?<sup>213</sup> We await the United States Supreme Court's resolution of these questions. In the meantime, it is clear that state court decisions refusing to find reversible error in race-based peremptory challenges in single cases by criminal prosecutors, such as West Virginia's *State v. Clements*,<sup>214</sup> no longer obtain.

However, for the foreseeable future, setting group-based challenges aside, the peremptory challenge is alive and well in West Virginia. In fact, the very institution of *voir dire* is often explained in many of our cases as the predicate for the exercise of peremptory challenges.<sup>215</sup> While the peremptory challenge is neither a state nor

209. *Batson* would seem to require same-class membership. See *Batson*, 476 U.S. at 95. In *Fields v. People*, 732 P.2d 1145 (Colo. 1987), the Colorado Supreme Court used an equal protection analysis to conclude that a black defendant may challenge the exclusion of Hispanics.

210. *Peters v. Kiff*, 407 U.S. 493 (1972), in which the Supreme Court allowed a white defendant to employ the wrongful exclusion of blacks from jury lists as a basis for relief in a federal habeas corpus action, suggests an affirmative answer. Since *Batson* some state courts have held that white defendants cannot use *Batson* to challenge the exclusion of blacks, *State v. Christenson*, 720 S.W.2d 738 (Mo. App. 1986), and that whites have no state constitutional right to challenge the exclusion of blacks, *Kibler v. State*, 501 So. 2d 76 (Fla. App. 1987), while others have employed their state constitutions' fair trial provisions to allow non-group members to challenge the exclusion of jurors belonging to cognizable groups. See *State v. Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 (1985), cert. granted, 101 N.J. 285, 501 A.2d 948, aff'd, 103 N.J. 508, 511 A.2d 1150 (1986); *Riley v. State*, 496 A.2d 997 (Del. Super. 1985), cert. denied, 478 U.S. 1022 (1986); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979), cert. denied, 444 U.S. 881 (1979); *People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978).

211. See Note, *Discrimination by the Defense: Peremptory Challenges after Batson v. Kentucky*, 88 COLUM. L. REV. 355 (1988) (arguing that equal protection requires extension of the rule).

212. See *Esposito v. Buonome*, 642 F. Supp. 760 (D. Conn. 1986) (holding that *Batson* applies only to criminal cases) and *Clark v. Bridgeport*, 645 F. Supp. 890 (D. Conn. 1986) (holding that *Batson* applies to civil actions when there is state action).

213. There is no constitutional right to peremptory challenges that would bar their abolition. See *Stilson v. United States*, 250 U.S. 583, 586 (1919). In his concurrence, Mr. Justice Marshall proposes that peremptory challenges in criminal cases be banned altogether. *Batson*, 476 U.S. 79, 102 (Marshall, J., concurring). For a review of the virtues of peremptory challenges, see Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STANFORD L. REV. 545 (1975).

214. *State v. Clements*, 334 S.E.2d 600, 609 (W. Va. 1985).

215. It is important for courts and litigants to recognize that the *voir dire* examination, if it is to serve its proper function, must of necessity be directed not only to establishing a



federal constitutional right, its exercise is assured by statute in civil cases (W. Va. Code § 56-6-12), by statute in felony cases (W. Va. Code § 62-3-3), and by rule in misdemeanor and felony cases (West Virginia Rules of Criminal Procedure § 24(b)).

Each civil litigant is entitled to four peremptory strikes.<sup>216</sup> In felony trials the defense is entitled to six strikes, while the prosecution is entitled to two.<sup>217</sup> In misdemeanor trials each side receives four peremptory strikes.<sup>218</sup> Certain circumstances may lead to an expansion by the court of the number of peremptory strikes allowed. For example, if a criminal defendant can demonstrate good cause for expansion, such as prejudicial pre-trial publicity, the court can exercise its discretion under § 24(b) to grant additional peremptory strikes.<sup>219</sup> A second situation calling for the expansion of the number of peremptory strikes permitted in civil *or* criminal cases occurs when there are multiple parties with conflicting interests on the same side of the case. The West Virginia Supreme Court has indicated that it is clear error to deny multiple civil parties on the same side with demonstrably hostile interests the full number of strikes each.<sup>220</sup> There is no reason to believe the court would treat multiple criminal defendants, for whom there are all-important liberty interests at stake, any differently.<sup>221</sup>

Although the scope of *voir dire* is "left largely to the discretion of the trial court,"<sup>222</sup> denial of the right to exercise peremptory chal-

basis of a challenge for cause, but also to enable a litigant and his counsel to exercise reasonable judgment in utilizing peremptory challenges.

State v. Pendry, 159 W. Va. 738, 746, 227 S.E.2d 210, 217 (1976) *overruled in part* on other grounds by Jones v. Warden, West Virginia Penitentiary, 161 W. Va. 168, 241 S.E.2d 914 (1978). See also Barker v. Benefit Trust Life Ins. Co., 324 S.E.2d 148 (W. Va. 1984); State v. Ashcraft, 309 S.E.2d 600 (W. Va. 1983); W. Va. Human Rights Commission v. Tenpin Lounge, 158 W. Va. 349, 211 S.E.2d 349 (1975). As for the scope of *voir dire* in aid of peremptory challenges, see Part Two of this article.

216. W. VA. CODE § 56-6-12a (1966 & Supp. 1988). If alternates are employed, the number of peremptory strikes available to a civil litigant rises in proportion to the number of alternates. See W. VA. R. CIV. P. 47(b).

217. W. VA. CODE § 62-3-3 (Repl. Vol. 1984); W. VA. R. CRIM. P. 24(b).

218. W. VA. R. CRIM. P. 24(b).

219. See W. VA. R. CRIM. P. 24(b); State v. Clements, 334 S.E.2d 600, 609 (W. Va. 1985), *cert. denied*, 474 U.S. 857 (1985).

220. Tawney v. Kirkhart, 130 W. Va. 550, 563, 44 S.E.2d 634, 641 (1947).

221. W. VA. R. CRIM. P. 24(b)(1)(B) (court authorized to grant additional peremptory strikes to multiple criminal defendants).

222. State v. Stonestreet, 112 W. Va. 668, 669, 166 S.E. 378, 379 (1932). See also, Henthorn v. Long, 146 W. Va. 636, 653, 122 S.E.2d 186, 196 (1961).

lenges altogether is clearly reversible error.<sup>223</sup> Moreover, our cases have made it clear that a litigant is entitled to exercise the right of peremptory challenges against a panel of prospective jurors who are wholly free from disqualifying characteristics,<sup>224</sup> saying in particular that the exercise of a peremptory challenge against a juror who should have been previously excused by the trial court for cause or favor does not cure the error.<sup>225</sup>

### III. CONCLUSION

We have reviewed and analyzed the four types of challenges—challenges to the array, challenges for cause, challenges to the favor, and peremptory challenges. In part two of this Article, which the reader will find in a future issue of the West Virginia Law Review, I will review and analyze *voir dire* procedure, examine the biases and prejudices left untouched by current *voir dire* law, and propose methods for using *voir dire* for its true purpose of securing fair juries and fair trials.

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223. *Barker v. Benefit Trust Life Ins. Co.*, 324 S.E.2d 148 (W. Va. 1984); *Tawney v. Kirkhart*, 130 W. Va. 550, 44 S.E.2d 634 (1947); *State v. Pearis*, 35 W. Va. 320, 13 S.E. 1006 (1891).

224. *State v. Bennett*, 304 S.E.2d 35, 37 (W. Va. 1983); *State v. Messer*, 99 W. Va. 241, 245-56, 128 S.E. 373, 374 (1925); *State v. Davis*, 91 W. Va. 241, 112 S.E. 414 (1922).

225. *State v. Messer*, 99 W. Va. 241, 246, 128 S.E. 373, 374 (1925).

