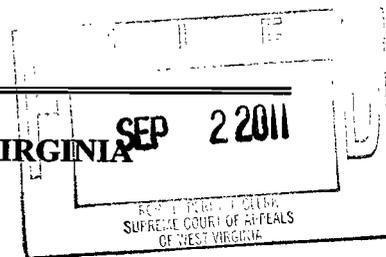

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0378



STATE ex rel. MICHAEL BROWN,

Respondent,

v.

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

Petitioner,

REPLY BRIEF OF THE PETITIONER
AND RESPONSE TO CROSS-ASSIGNMENTS OF ERROR

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Respondent,

v.

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

Petitioner.

**REPLY BRIEF OF THE PETITIONER
AND RESPONSE TO CROSS-ASSIGNMENTS OF ERROR**

Comes now the State of West Virginia on behalf of the Petitioner, Michael V. Coleman, Acting Warden, Mt. Olive Correctional Center, by counsel, Barbara H. Allen, Managing Deputy Attorney General, and files the within Reply Brief and Response to Cross-Assignments of Error in support of the State's appeal from a judgment of the Circuit Court of Cabell County, West Virginia, granting a writ of habeas corpus to the Respondent.

At the outset, it should be noted that the Respondent's brief adds an issue, one not designated as a cross-assignment, to the issues presented by the State. The State will therefore address this issue in its reply brief, and then separately address the issues raised in the cross-assignments of error.

I.

REPLY BRIEF

A. RESPONDENT'S CLAIM THAT THE APPEAL WAS NOT TIMELY FILED HAS ALREADY BEEN RESOLVED BY THIS COURT.

The Respondent devotes three pages of his brief to his argument that the State's Notice of Appeal was filed on March 1, 2011, more than thirty days after entry of the underlying order granting habeas corpus relief, and that the appeal should therefore be dismissed as untimely. The State is puzzled by this argument, as the timeliness issue has already been resolved by this Court.

On March 1, 2011, contemporaneously with the filing of its Notice of Appeal, the State filed a Motion for Leave to File Petition for Appeal Out of Time, conceding that the appeal was late with respect to the underlying order, but setting forth the circumstances in detail and making a case for excusable neglect. On March 11, 2011, the Respondent filed a response in opposition. On March 31, 2011, this Court granted the State's motion, and the timeliness issue has therefore been resolved.

The State notes that this Court has exercised its discretion to grant leave for filing an appeal out of time in a number of cases, particularly during the first months following the effective date of the Revised Rules of Appellate Procedure. Although the Court could indeed take a hard line and send a "clear message," as the Respondent puts it, to potential appellants "that their notice to appeal must be filed on time . . .," the fact is that the Court has the authority under Rules 2 and 39(b) of the Revised Rules of Appellate Procedure to suspend any rules, and/or permit an act to be done after the expiration of a time period, for good cause shown. In the instant case, the Court found good cause, granted the State's motion, and exercised its authority to permit the State to file its appeal out of time.

B. THE LOWER COURT WAS CLEARLY ERRONEOUS IN SEVERAL MATERIAL FACTUAL FINDINGS.

1. The court below found that Juror Wickline “had significant relationships with the Court” because, inter alia, “Mr. Martorella, assistant prosecutor in [Respondent’s] case, was also prosecutor for Ms. Wickline’s son’s case” and that “the assistant prosecutor in the case was prosecuting her son.” (App. Vol. I, 3, 9, 14; Order of January 7, 2011, 7, 12.) This finding was clearly erroneous, as detailed in the State’s initial brief, and was also material.

The Respondent seeks to prop up the court’s finding by supplementing the Appendix with the first page of a pre-trial motion transcript in the underlying case. The only fair reading of the transcript is that the two prosecutors handling the case, Mr. Chiles and Ms. Divita, were late getting to court for the hearing and that Mr. Martorella happened to be in the courtroom on another case¹ when the Michael Brown case was called.

THE COURT:

Hello Mr. Rosinsky, Mr. Spurlock.

Mr. Martorella, we have a plethora of orders here in this case and motions. Are there any of these motions – and I assume you’ve seen them all, as I have.

MR. MARTORELLA:

No, Your Honor, *this is Chris Chiles’ case and Jara – and I just called Jara.* She’s right here. Here she is.

MS. [JARA] DIVITA:

Chris is on his way down here.

(Supp. App. 1, emphasis supplied.)

¹He referred to it as “the Margie Mitchell motion.” (Supp. App., 1.)

Almost immediately thereafter, the court called a recess to await Mr. Chiles' arrival. The transcript does not disclose whether Mr. Martorella stayed or left at that point; however, it may reasonably be inferred that he stayed, solely for the purpose of waiting for the hearing in his own case since he had been unsuccessful in his quest to have the court hear his motion before the Brown case commenced.

The Respondent concedes that "Mr. Martorella also appears to be in Court on another matter at the same time as the Brown case," but argues that his one minute appearance in a transcript would have led the court below, "who is conducting a careful review of the record," to conclude that he was a prosecutor in the instant case. (Respondent's Brief, 5.) Perhaps the Respondent is right that this is what led the court to make his finding of fact – although that is pure speculation – but it doesn't change the fact that the court was flatly wrong. The transcript completely, absolutely belies any claim that Mr. Martorella was a prosecutor in the Brown case ("No, Your Honor, this is Chris Chiles' case and Jara – and I just called Jara.").

This is material because the court's conclusion rested on its recitation of Juror Wickline's "significant relationships with the Court," one of which, according to the court, was the supposed participation of Mr. Martorella in both the instant case and the juror's son's case. The inference drawn by the court, tacit but unmistakable, was that the juror would want to curry favor with her son's prosecutor by finding in his favor in Brown. With Mr. Martorella out of the picture, the inference would be far more tenuous: that the juror would want to curry favor with her son's prosecutor by finding in some other prosecutor's favor in Brown.

Additionally, all clearly erroneous findings of fact – and there were three – are material in this case, where the court below analyzed the issues under a totality of the circumstances test.

2. The court below found that if Juror Wickline had disclosed her son's legal situation during voir dire, the trial court was "quite likely" to have struck her for cause. (App. Vol. I, 3, 14; Order of January 7, 2011, 11, 12.)

The trial court would have found this quite surprising, as it stated in its Amended Order of April 12, 2010, that whether Juror Wickline would have been struck for cause was "uncertain"; that "prejudice cannot automatically be concluded from the presence of a juror" such as Juror Wickline; that if the juror had disclosed her son's situation during voir dire she would not have been automatically struck, but rather would have been questioned further; and that no evidence existed that the juror would have answered any differently than she did in her deposition, in which she maintained her impartiality. (App. Vol. I, 150, 158, 159; Amended Order, 9, 10.)

The Respondent seeks to prop up the habeas court's finding by ignoring the clear language of the original habeas court's order, while focusing on statements made by the original habeas court from the bench during the give-and-take of oral argument

It is hornbook law that a court speaks through its orders (both oral and written), not through its statements made prior to the entry of a decision. The Respondent offers no authority for the novel proposition that a court's final written order can be somehow amended – and here, amended to mean something entirely different from what it says! – with parol evidence. If the Respondent truly believed that Judge O'Hanlon's Amended Order was inconsistent with his oral findings, the Respondent should have made a motion pursuant to West Virginia Rules of Civil Procedure 59(e) to alter or amend the order, not waited until Judge O'Hanlon retired and then filed a motion for reconsideration before Judge Cummings.

In short, the second habeas judge was clearly erroneous in finding as a fact that the trial court *would* have granted a new trial had he been made aware of Juror Wickline’s situation, when the trial court, sitting as the initial habeas judge, had already held that he *wouldn’t* have done so.

There is no question that this erroneous finding was material as another factor in the totality of the circumstances analysis.

3. The court below found that during voir dire, members of the jury pool “approached the presiding judge in sidebar to privately state their relationships and issues.” (App. Vol. I, 3, 14; Order of January 7, 2011, 12.) The transcript of voir dire proceedings in the underlying case reveals that no such sidebars ever occurred.

The Respondent argues that the court’s finding was not clearly erroneous because the trial court had told the jury pool that sidebars were a possibility,² because there was an attorney sidebar, and because there was a juror sidebar on the fifth day of the trial, not during voir dire. However, what *could have* happened during voir dire doesn’t alter what *did not* happen – there were no juror sidebars – and the Petitioner is at a loss to respond further to the Respondent’s illogical argument.

Again, this is material because the court’s clearly erroneous finding casts suspicion on Juror Wickline’s testimony that she remained silent for a number of reasons (she was embarrassed, she didn’t consider her son to be a “defendant” because he had not been convicted, and the like), none of them nefarious. And again, there is no question that this erroneous finding was material as another factor in the totality of the circumstances analysis.

²Juror Wickline testified in her deposition that she did not remember hearing this (App., 179-80), an inconvenient fact for the Respondent.

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

As set forth in the Petitioner’s initial brief, *State v. Dellinger*, 225 W. Va. 736, 696 S.E.2d 38 (2010), was a per curiam opinion that did not announce any new law; rather, it applied this Court’s precedents – the same precedents applied by the initial habeas judge in this case – to an egregious set of facts. The Respondent claims that although *Dellinger* may not have been “new” law, it signaled a new “trend” in the law. This is a curious assertion, for several reasons. First, as a broad (but logically unassailable) proposition, one per curiam case does not establish a trend. Second, what new trend are we talking about here? This Court has never hesitated to reverse a conviction where the facts established actual juror bias, *see, e.g. State v. Hatcher*, 211 W. Va. 738, 568 S.E.2d 45 (2002); *O’Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002). Therefore, *Dellinger* didn’t change anything, as its per curiam status illustrates.

Additionally, the facts in this case simply do not rise to the level of the facts in *Dellinger*, where the juror lived in the defendant’s apartment complex, was friends with him on a social network, directly contacted him, advised him with respect to his future, had connections to other witnesses, and, most critically, failed to disclose this information for the specific purpose of remaining on the jury, knowing that what she was doing was wrong. *State v. Dellinger, supra*, 225 W. Va. at 742, 696 S.E.2d at 45 (juror testified that she disobeyed her own spiritual direction to reveal the information). On these facts, this Court noted that “there is a fine line between being willing to serve and being anxious . . . [t]he individual who lies in order to improve his chances of service has too much of a stake in the matter to be considered indifferent.” *Id.* at 742, 696 S.E.2d at 44 (citations omitted).

Here, in contrast, the only rational inference to be drawn from the evidence is that Juror Wickline, who had no connection to the Respondent whatsoever, wanted to be anywhere else on earth other than in the courthouse, serving on a jury.

The Respondent relies not only on *Dellinger*, but also on this Court's precedents cited *infra*, as well as *State v. Dean*, 134 W. Va. 257, 58 S.E.2d 114 (1950), *W. Va. Human Rights Comm'n v. Tenpin Lounge, Inc.*, 158 W. Va. 349, 211 S.E.2d 349 (1975), and *State v. Mills*, 221 W. Va. 283, 654 S.E.2d 603 (2007). These cases are all factually inapposite to the case at bar and do not compel a conclusion that Juror Wickline was biased or that the Respondent was prejudiced. The Petitioner will discuss the cases in turn.

In *State v. Hatcher*, 211 W. Va. 738, 568 S.E.2d 45 (2002), a juror in a murder case intentionally failed to disclose that his mother had been violently murdered and that the State's testifying officer had investigated the mother's murder. *Id.* at 740-41, 568 S.E.2d at 47-48. On these facts, the Court reversed the conviction, finding that the juror had "failed to disclose highly important and potentially disqualifying information despite direct inquiry." *Id.* The logic of this result is apparent, as there can be no question that the victim of a violent crime – and the juror was indeed a victim, having lost his mother in the worst way imaginable – might not be an unbiased juror in a case involving a similar violent crime. Further, there can be no question that the victim would probably view the investigating officer, a witness for the State, as an unimpeachable witness, given the history between the victim and the officer.

Nothing remotely akin to these facts is present in the instant case, where Juror Wickline had no actual bias against the Respondent and no implied bias based on psychological identification with

the victim and/or with the investigatory/prosecutory team, or abhorrence born of tragic experience for the particular crime alleged.

In *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002), a medical malpractice case, the potential juror was a former patient of the defendant doctor and a current client of the doctor's law firm. Faced with these exceptional circumstances, the trial court had engaged in the then-common practice of "rehabilitating" the juror by asking the classic 'will you be fair and follow the instructions of the court' question.³ This Court reversed, holding that when considering whether to disqualify a juror for cause, a trial court must resolve any doubts in favor of excusing the juror and may not "rehabilitate" a juror by follow-up questioning after the juror has made a clear statement reflecting or indicating the existence of a disqualifying prejudice or bias. *Id.*, Syl. Pts. 3, 4 & 5.

O'Dell is clearly inapposite to the case at bar, where the issue is whether the non-disclosure of information by a juror rises to the level of a constitutional violation, requiring collateral relief. Cf. Syl. Pt. 4, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996) (relevant test for determining bias is "whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant"); *State v. White*, No. 35529, 2011 WL 50470 (W. Va., Feb. 10, 2011) (test is whether juror would have been "unable faithfully and impartially to apply the law").

In both *State v. Dean*, 134 W. Va. 257, 58 S.E.2d 114 (1950), and *W. Va. Human Rights Comm'n v. Tenpin Lounge, Inc.*, 158 W. Va. 349, 211 S.E.2d 349 (1975), the issue was actual racial discrimination on the part of a juror, in cases involving an African American defendant in a criminal case and an African American plaintiff in a civil rights case, respectively. Here, in contrast, there

³As any trial lawyer can attest, only an individual desperate to get out of jury service will answer "no" to this question.

is no suggestion that Juror Wickline knew or had any connection to the Respondent, or any bias or prejudice against him. To the contrary, the juror's alleged "connection to the courthouse" was purely theoretical and would require this Court to apply a presumption: that any juror would expect to curry favorable treatment for a relative facing criminal charges by voting to convict a defendant in a wholly unrelated case, and would therefore do so without regard to the evidence or the instructions of the court.⁴

And in *State v. Mills*, 221 W. Va. 283, 654 S.E.2d 603 (2007), although this Court reaffirmed its prior holding that "[e]ven though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary . . .," *id.* at Syl. Pt. 2, the Court went on to find that a prospective juror's work ties with certain State witnesses did not establish bias on the juror's part. "Disclosure during the trial that a juror knows . . . a witness . . . is not sufficient to disqualify a juror unless it is shown that the relationship is sufficient to preclude the juror from arriving at a fair verdict." *Id.*, 221 W. Va. at 288, 654 S.E.2d at 608, citing *State v. Worley*, 179 W. Va. 403, 416, 369 S.E.2d 706, 719 (1988).

The Respondent argues that Juror Wickline could not determine her own impartiality, which is true in the broadest sense; her testimony with respect to her subject belief is not dispositive. However, the testimony is certainly relevant, and may be credited unless "the other facts in the record indicate to the contrary." Syl. Pt. 2, *State v. Mills*, *supra*.

⁴In that regard, it is interesting to note that the original habeas judge seemed to think that Juror Wickline's bias, if any, would be a bias against the State, which was prosecuting her son in an unrelated case, not against the Respondent. During oral argument, the judge speculated that "if she had answered the questions, there would have been a motion to strike her for cause *probably by the prosecutor*." (App., 21-22, emphasis supplied.)

In the instant case, the “other facts” are mere inferences and presumptions which are manifestly insufficient to overcome Juror Wickline’s testimony and the complete lack of any evidence of bias or prejudice on the juror’s part.

Further, the Respondent argues that Juror Wickline could not determine her own qualification to serve as a juror, which again is true in the broadest sense; that’s up to the trial court in the first instance, and then this Court and/or a habeas court on review. This argument is a red herring, as no one is suggesting that Juror Wickline is the arbiter of her qualification to serve. What the Petitioner is suggesting, and indeed arguing, is that (a) the Respondent has failed to prove that Juror Wickline’s service on the jury constituted a violation of the Respondent’s constitutional rights, and (b) the juror whose integrity is being attacked has a right to give evidence and tell her side of the story, which is what Juror Wickline did in this case.

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

As argued in the Petitioner’s original brief, there is not a shred of evidence in the record from which it could be inferred that Juror Wickline had any actual bias against the Respondent; in fact, the only evidence is Juror Wickline’s under-oath assertion that she did *not* have any bias.

In this latter regard, the Respondent argues that Juror Wickline was precluded from testifying as to her lack of bias by West Virginia Rules of Evidence 606(b), which provides:

Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror.

Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Clearly, Rule 606(b) is completely inapposite, as it deals with impeachment of a jury's verdict by inquiry into its deliberative process, not the qualification of a juror to serve. *See, e.g., State v. Daugherty*, 221 W. Va. 15, 650 S.E.2d 114 (2006), cert. denied, 552 U.S. 829 (2007).⁵

Short of actual bias, which is not present in this case, this Court has held that “[i]n order to succeed in a claim that his or her constitutional right to an impartial jury was violated, a defendant must affirmatively show prejudice.” Syl. Pt. 6, *State ex rel. Farmer v. McBride*, 224 W. Va. 469, 686 S.E.2d 609 (2009). The Respondent completely, utterly failed to make such a showing, and the court below erred in making a vague reference to “the totality of the evidence” when in fact there was *no* evidence.

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

The Respondent claims that any error with respect to seating Juror Wickline could not be deemed harmless because “[a]fter all, she would naturally hope for lenience for her son.” (Respondent's Brief, 24.) In short, there's that presumption again: that any juror would expect to curry favorable treatment for a relative facing criminal charges by voting to convict a defendant in a wholly unrelated case, and would therefore do so regardless of the evidence and the instructions of the court.

⁵The Respondent's reference to Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, vol. I, §6-6(B), pg. 6-55 (2000), is puzzling, since Professor Cleckley makes this exact point: testimony barred by Rule 606(b) is testimony concerning the jury's *deliberations*.

The presumption is supported neither by logic nor law, and in fact to even voice it – albeit in the careful language crafted by the Respondent’s skillful counsel – demonstrates a sad cynicism about our system of justice.

A harmless error analysis requires not a presumption made up out of whole cloth, but rather a review and analysis of the trial record to determine whether the evidence was sufficient to permit this Court to say that the error was harmless beyond a reasonable doubt. *See, e.g.*, Syl. Pt. 5, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975). The Petitioner made such an analysis in his initial brief, and stands on that analysis. To the extent that the Respondent attempts to rebut the analysis by arguing about whether the testimony of witness Fortner was tainted, that issue is not ripe for review in that it has not been ruled upon by the habeas court.⁶

II.

RESPONSE TO RESPONDENT’S CROSS-ASSIGNMENTS OF ERROR

Respondent asserts two cross-assignments of error: first, that the habeas court erred in finding that Juror Wickline was not subject to West Virginia Code § 56-6-14 (barring a “person” with “any matter of fact to be tried by a jury” the right to sit on any jury during the same term of court); and second, that the circuit court erred in refusing discovery of Matthew Fortner’s mental health records. Both of these claims are without merit. Respondent’s first issue is not a

⁶All issues involving Fortner were raised by the Respondent in the habeas proceeding, but not resolved by either the initial habeas judge, Judge O’Hanlon, or the second habeas judge, Judge Cummings. Judge Cummings granted relief solely on the juror disqualification issue. Thus, in the event this Court reverses Judge Cummings’ order, the matter will be remanded to the circuit court for consideration of the Respondent’s other issues, including the Fortner issue; and in the event this Court sustains Judge Cummings’ order, the matter will be remanded to the circuit court for a new trial, at which time the Fortner issues can be argued before the trial judge.

constitutional claim subject to review on habeas corpus, and Respondent's second issue is not properly before this Court as the matter has not yet been ruled on by the habeas court.

A. RESPONDENT'S FIRST CROSS-ASSIGNMENT OF ERROR IS NOT SUBJECT TO HABEAS REVIEW BECAUSE IT FAILS TO RISE TO A CONSTITUTIONAL LEVEL.

Respondent's first cross-assignment of error is not subject to habeas review. This Court has often held that "[a] habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. Pt. 4, *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979); Syl. Pt. 9, *State ex rel. Kitchen v. Painter*, 226 W. Va. 278, 700 S.E.2d 489 (2010).

Not all error is subject to habeas review. For example, in *State v. Legursky*, 187 W. Va. 607, 607-608, 420 S.E.2d 743, 743-744 (1992), a habeas petitioner argued that the circuit court had erred in denying him the transcript of an *in camera* hearing that could have been used as cross-examination material. The court reporter assigned to transcribe the hearing was no longer employed at the time of the request, and no transcript of the hearing was ever produced. *Id.* This Court echoed the general rule that "[t]raditionally, we have held that habeas corpus is not a substitute for an appeal and that a showing of error of *a constitutional dimension* is required in order to set aside a criminal conviction in a collateral attack by writ of habeas corpus." *Id.* at 608, 420 S.E.2d at 744 (emphasis added). The *Legursky* Court concluded that the *in camera* hearing was too minimal to be of "constitutional dimension." *Id.* Instead, any error from the denial of the transcript for cross-examination purposes was mere trial error. *Id.*

In this case, Respondent first argues that the circuit court erred in failing to find a violation of West Virginia Code § 56-6-14. (Brief of Cross-Pet., 28.) Chapter 56, Article 6 of the West

Virginia Code deals with trial practice. Any violation of that section, assuming *arguendo* that there was such a violation in this case, which is denied, is statutory, not constitutional. As explained in *Legursky*, a statutory violation not involving a constitutional violation is inappropriate for habeas review.⁷

Therefore, Respondent's first cross-assignment of error is not subject to review. Habeas relief is appropriate only to remedy errors of constitutional dimension.

B. ASSUMING ARGUENDO THAT HABEAS REVIEW OF THIS ISSUE IS APPROPRIATE, THE CIRCUIT COURT DID NOT ERR IN FINDING THAT JUROR WICKLINE'S SERVICE DID NOT VIOLATE WEST VIRGINIA CODE § 56-6-14.

Assuming *arguendo* that the Court deems this issue appropriate for review in a habeas corpus action, the circuit court did not err because West Virginia Code § 56-6-14 clearly indicates that the "person" referred to must be the potential juror himself or herself, who is a party in a matter to be tried by a jury in that term of court. The "person" to be excluded from jury service must be a party to the other matter being tried.

West Virginia Code § 56-6-14 provides in its entirety:

No *person* shall serve as a juror at any term of a court during which *he* has any matter of fact to be tried by a jury, which shall have been, or is expected to be, tried during the same term." (Emphasis added.)

Under this unambiguous language, a violation of the statute occurs when: 1) a person serves as a juror, and 2) that service takes place during the same term of court when he or she has a matter to be tried by a jury. The clear language of the statute expressly applies only to the juror, not to members of his or her family, close friends, or acquaintances.

⁷Respondent also successfully challenged the juror's qualification to serve on constitutional grounds, an issue argued extensively in the Petitioner's initial and reply briefs.

In this case, Juror Wickline's son was on trial in the same term of court as her jury service. Juror Wickline was not on trial, and although she had a son who had a matter to be tried by a jury, she did not. The statute does not encompass family and friends of jurors. It only applies to jurors who themselves have issues to be tried by a jury during the same term of court.

Respondent argues that this statute would apply to members of a firm or corporation. (Brief of Cross-Assignments, 29-31.) This argument must fail for two reasons: First, firms and corporations are different than families and friends. Firms and corporations are composed of people, and those people who compose a firm or corporation are, in essence, the firm or corporation itself. An employee is the company. A family member of a defendant is not the defendant on trial.

Second, this Court has held that employment by a company involved in an underlying action does not *per se* disqualify a juror. Respondent cites *State v. Dushman*, 79 W. Va. 747, 91 S.E.2d 809 (1917), for the common-law proposition that a juror employed by a company cannot serve on a jury where that company is involved in the underlying action. Eighty years later, however, this Court called *Dushman* into question in *State v. Sampson*. 200 W. Va. 53, 57-58, 488 S.E.2d 53, 57-58 (1997). In *Sampson*, a juror worked eight hours per week at the hospital that was involved in the underlying action. *Id.* The defendant moved to strike her for cause, arguing that she was not "free from exception." *Id.* This Court upheld the verdict, stating that the juror as a part-time employee, had no interest in the outcome of the case. *Id.* The Court distinguished *Dushman* without overruling it, but stated that "*Dushman*'s prima facie exclusion of employees may have outlived its value." *Id.* Employment by an employer does not *per se* disqualify a juror from serving in a case involving that employer.

In summary, the circuit court did not err in its interpretation of West Virginia Code § 56-6-14. Juror Wickline was not the “person” on trial during the same term of court as her jury service took place.

C. THE CIRCUIT COURT FAILED TO REACH THE ISSUE CONCERNING MATTHEW FORTNER’S MENTAL HEALTH RECORDS, AND THEREFORE THE ISSUE IS NOT BEFORE THIS COURT ON APPEAL.

As to Respondent’s second cross-assignment of error, the issues regarding Matthew Fortner’s records were not resolved by the circuit court, which granted the writ solely on the juror issue. As this Court noted recently in *State ex rel. Farmer v. McBride*, 224 W. Va. 469, 479 n. 9, 686 S.E.2d 609, 619 n.9 (2009), citing Syl. pt. 1, *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 267 S.E.2d 721 (1980), “As a general rule ‘(t)his Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court.’”

In this case, the underlying orders fail to address the Fortner issues. The current action stems from the reconsideration of an order dated April 12, 2011, denying habeas relief “on the sole issue of whether [Respondent was] entitled to habeas relief because of the actions of a juror.” (App., 150, 154; Amended Order of Apr. 12, 2010.)⁸ Respondent moved the circuit court to reconsider its denial, and on January 7, 2011, the new presiding judge did so and granted Respondent relief, finding that “[h]aving determined Issue (1) in favor of the Petitioner, this Court need not address Petitioner’s other assignments of error.” (App., 3, 15; Order of Jan. 7, 2011.) Neither order addressed the issues involving production of Matthew Fortner’s mental health records.

⁸“All of Petitioner’s other issues will be heard at a single omnibus hearing to be held in the future.” *Id.*

Because the circuit court did not address the issues regarding Matthew Fortner's mental health records, those issues "have not been acted upon" for the purposes of this appeal. *State ex rel. Farmer v. McBride, supra*. Therefore, the issues regarding Matthew Fortner's mental health records are not subject to appellate review and this Cross-Assignment of Error should be dismissed.

III.

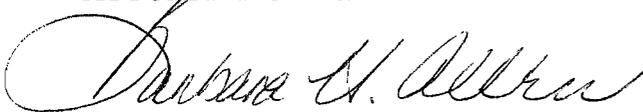
CONCLUSION

For all of the reasons set forth in the Petitioner's initial brief, its Reply Brief and its Response to Cross-Assignments of Error, and all of the reasons apparent on the face of the record, this Honorable Court should reverse the judgment of the Circuit Court of Cabell County, West Virginia; and thereafter remand this case for the court below to consider the Respondent's remaining issues which have not yet been ruled upon.

MICHAEL V. COLEMAN, Acting Warden,
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By Counsel

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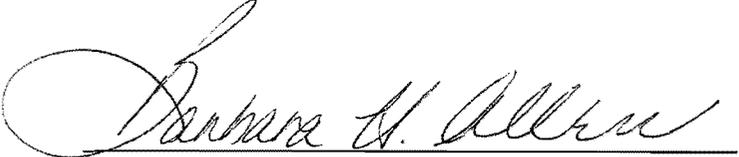
CERTIFICATE OF SERVICE

I, Barbara H. Allen, counsel for Petitioner, do hereby certify that I have served true copies of the foregoing Reply Brief of the Petitioner and Response to Cross-Assignments of Error upon all parties by depositing said copies in the United States mail, with first-class postage prepaid, on this 2nd day of September, 2011, addressed as follows:

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