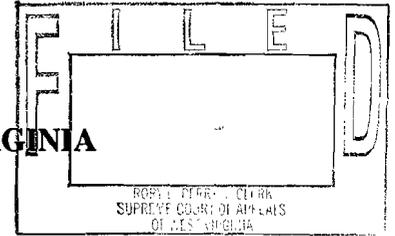


NO.11-0378  
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**STATE ex rel. MICHAEL BROWN,**  
*Respondent, Petitioner Below,*

v.

**MICHAEL V. COLEMAN, ACTING WARDEN,**  
**MOUNT OLIVE CORRECTIONAL CENTER,**  
*Petitioner, Respondent Below.*

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**BRIEF OF THE RESPONDENT AND  
CROSS-ASSIGNMENTS OF ERROR**

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## **Statement of The Case**

### **The Habeas Corpus Case**

The Petitioner's recitation of proceedings and Court rulings is accurate. What the Petitioner omitted was Judge O'Hanlon's denial of a motion seeking discovery of witness Matthew Fortner's mental health records, App. 417-450. This followed Fortner's successful habeas corpus on the grounds that his attorney was ineffective when he did not review those records for a possible defense before Fortner pled guilty. Fortner's petition is attached to Mr. Brown's Amended Petition, App. 350.

### **The Underlying Case**

Mr. Brown was convicted of a double homicide as stated. He has denied any involvement, App. 468 p. 77. The case against Mr. Brown was based on testimony which was totally unsupported by any physical or scientific evidence which would connect him to these murders, App. 468 pp. 18-181, testimony of Robert White, former West Virginia State Police chemist and laboratory director. Moreover, the murder weapon had no connection to Mr. Brown but was seized from his co-defendants following a robbery which they committed in Florida.

### **Statement Regarding Oral Argument and Decision**

The Respondent/Cross-Petitioner believes that this is a case which is appropriate for oral argument as it appears suitable under the criteria expressed in Rule 20. The Respondent/Cross-Petitioner rejects the suggestion of the Petitioner, brief p.10, that a "flood of habeas corpus petitions," are "sure to follow" if Mr. Brown is successful as a scare tactic by the Petitioner. It is doubtful that there are many inmates who have jurors known to have been dishonest during voir dire or cases in which the State has filed notice of appeal out of time. However, if there are then they deserve the Court's attention

## Argument

### Respondent's Threshold Challenge To Appeal

#### **1. The State failed to timely file its notice of appeal.**

Rule 5(b) of the Revised Rules of Appellate Procedure requires that the appealing party must file the notice of appeal within thirty (30) days of entry of the judgment which is being appealed. In the instant case the order which granted habeas corpus relief was entered on January 7, 2011, App. 3. The State's Notice of Appeal is dated March 1, 2011, clearly outside of the thirty (30) day window prescribed.

The State sought reconsideration of the January 7 ruling by motion to reconsider filed on February 10, 2011 which was itself not filed within the time for the Notice of Appeal, App. 463, dkt.sheet entry 2-10-11. The State now argues that it timely proceeds on its appeal measured from the order which denied the motion to reconsider and not based on the order which granted the writ, App. 1.

The issues presented follow. Whether the State's motion to reconsider as filed on February 10 is to be treated by analogy as a motion under Rule 59(e) or Rule 60(b) of the Rules of Civil Procedure? Further, since the Rules of Civil Procedure do not appear to apply to habeas corpus proceedings what procedural rules do govern this question? see Pozzie v. Prather, 157 S.E. 2d 625, 628 (1967); State ex rel. Walker v. Jenkins, 203 S.E. 2d 354, 355 (1974). Finally, is the timely filing of a notice of appeal considered to be a jurisdictional requirement under the Revised Rules of Appellate Procedure?

There exists a kind of split personality in habeas corpus proceedings. As such, the only way to determine some procedural questions must be by way of analogy. W.Va. Code, Chap. 53, Art. 4A, Sec. 1(a) states that all such proceedings shall be "civil in character." The Court precedent as above noted holds that the Rules of Civil Procedure do not apply. The procedure

for habeas corpus proceedings is spelled out with specificity as to the pleadings in the habeas statutes but not as to other matters. Rule 1 of the Rules of Civil Procedure states that the rules apply to all actions and other judicial proceedings of a civil nature whether in law or equity. Rule 81 does not mention habeas corpus proceedings as being proceedings in which the rules do not apply. Questions thus remain.

In the event that the Rules of Procedure were to be used by analogy to determine this issue, the result would be that the appeal is untimely. The Rules of Civil Procedure do not contain any rule or procedure which addresses a motion to reconsider. Therefore, when such a motion is filed in a civil action it will be treated either as a motion to alter or amend judgment under Rule 59(e) or as a motion for relief from a judgment or order under Rule 60(b). In the instant case since the State's motion to reconsider was filed more than thirty (30) days after the final appealable order was entered then by analogy this Court's review, if any, would have to be limited to whether the Circuit Court erred when it denied the motion to reconsider. More to the point, the recent authority from this Court clearly states that such a motion to reconsider such as the State has filed below, if filed in a civil action, does not extend the period for appeal. Burton v. Burton, 672 S.E. 2d 327 (2008). The contrary is true only if the motion is treated as one filed under Rule 59(e) which would be untimely in the case sub judice in that more than ten(10) days had passed.

The statute which governs judicial review of post-conviction habeas corpus states that an appeal must be filed in the manner and within the time provided for civil appeals, W.Va. Code, Chapter 53, Art. 4A, Sec. 9(a). The State's appeal of course also fails to conform to these requirements.

The current Appellate Rules as revised require that

“Within thirty days of entry of the judgment being appealed, the party appealing *shall file*

*the notice of appeal and attachments required...*  
Rule 5(b) (emphasis added)

The word “shall” absent some contrary intent expressed in the language contained in the applicable rule or statute is interpreted as being mandatory, In re Petition to Remove John G. Sims, 523 S.E. 2d 273 (1999); Nelson v. Public Employees Insur. Bd, 300 S.E. 2d 86 (1982) syl.pt. 1.

Regardless of whether the timeliness of the State’s appeal is judged by rules of procedure or by the rules of this Court the State appears to have failed to timely proceed with this appeal. Accordingly, the State’s appeal should be denied on procedural grounds. The State of course would remain free to retry the case against Mr. Brown. The message of such a decision would be clear to those who want to appeal that their notice to appeal must be filed on time.

### **The Errors Alleged By The State**

#### **2. The Lower Court Was Clearly Erroneous In Several Material Factual Findings**

*Response: The Circuit Court was correct in all findings of fact which are material to the issues decided. The facts are overwhelming in support of the decision below.*

The State argues that the lower Court was clearly erroneous in several of its material findings of fact. On the contrary, not only did the Court conduct a careful review of the record, any mistake in fact findings is not such as would be material to the outcome. The mostly uncontested facts which are found in the record fully support the decision reached below.

In that the State has identified three such alleged erroneous findings in its brief, Brief of Petitioner p.10, those will be first addressed hereinafter. The remaining factual findings will also be considered in that collectively the facts overwhelmingly support the award of habeas corpus relief to Mr. Brown.

**Assistant Prosecutor Joe Martorella did appear in the Brown case and was the Prosecutor in Juror Wickline son’s case**

The State argues (Brief p. 10) that the record is crystal clear that the following statements are incorrect:

- that Juror Wickline “had significant relationships with the Court” because
- Joe Martorella was prosecuting Juror Wickline’s son, and
- was an assistant in Mr. Brown’s case.

The State has apparently failed to conduct a complete review of the record in Mr. Brown’s case. Mr. Martorella appeared early on as prosecutor in Mr. Brown’s case, although he did not prosecute the trial. Judge Cummings obviously did conduct a thorough review of the record. *The record reflects that assistant Prosecutor Joe Martorella appeared at a hearing on pre-trial motions in the Brown case on January 11, 1999, Supp. App.p.1.* The State has overlooked this appearance. In fairness, Mr. Martorella also appears to be in Court on another matter at the same time as the Brown case and does refer to the other attorneys who later tried Mr. Brown’s case. But, to the Defendant and to a judge who is conducting a careful review of the record Mr. Martorella appears for the State in the Brown matter quite contrary to the State’s argument.

In contrast to what the State argues this finding is not so significant as the fact that Mr. Martorella was a member of the staff of Mr. Brown’s prosecutor, was introduced as such in voir dire, and he was simultaneously prosecuting Juror Foster Wickline’s son Mike. Thus, even if Judge Cummings were deemed to be mistaken, the materiality of such a mistake is dubious given the narrow view being advanced by the State. The real vice is that Mrs. Wickline did not provide important truthful information in response to proper garden-variety voir dire questioning. It requires no citation of authority to understand why prospective jurors are provided the names of the prosecutor’s staff. Such information acts as a trigger which can lead to other information. Not only do lawyers find out directly who a juror knows, but they find out indirectly other things

e.g. a juror's connection to the legal system or contact with that system. As Mrs. Wickline's testimony indicates, many people are embarrassed, ashamed or outright reluctant to share personal information with others particularly when it is something like a family member under indictment for a sex crime and kidnaping. However as lawyers and judges well know, knowledge of such information as she withheld is important to informed jury selection. Providing truthful information is, and must always be, the rule. The State's position if adopted would trivialize the absence of truth in the jury selection process and inform readers of the opinion that it is o.k. for a juror to lie under oath.

**The "likelihood" that Juror  
Brenda Foster Wickline Would  
Have Been Struck For Cause**

The State also argues that the lower Court was clearly erroneous in finding as fact that juror Wickline was "quite likely" to have been struck for cause, Brief p. 14. Once again the State has been careless in its review of the record. That is particularly so in that the State relies on comments which were made by trial judge O'Hanlon during the earlier habeas proceedings in an attempt to bolster its argument. On March 17, 2010 when the issue of untruthful responses by juror Wickline was being discussed, Judge O'Hanlon stated:

"THE COURT:

. . . .

Now, I think that there is no question in my mind that if she had answered the questions, there would have been a motion to strike her for cause probably by the prosecutor.

. . . .

I would have just said appreciate it.

. . . .

So, I think she was a disqualification for cause.  
I think she would becoming (sic) a disqualification for

cause under Hatcher. It's plum up that she has to go and that the trial is infirm if she is one of the people who deliberates." App. 21-22.  
(Emphasis Added)

The grounds cited for excusing potential jurors as stated by the judge at trial further support the lower Court's finding. What follows are the grounds actually stated when excusing prospective jurors at Mr. Brown's trial:

- Juror stated that he knew some family members of "boy that was killed" and added that he had a medical condition (no follow up questions asked or answered) App. 464 p. 27.
- Juror stated that a deceased victim was previously married to her cousin, App. 464 pp. 32-33.
- Juror says he thinks "my thoughts have been muddled" because [his] son-in-law and daughter live in a trailer park owned by a co-defendant's father, App. 464 pp. 36-37.
- Juror states that he "knows" a co-defendant/witness' father pretty well, App 464 pp. 37-38.
- Juror at first excused on grounds that he was a Marshall University police officer although he, like others before him who knew witnesses, stated that he could be fair and impartial, App. 464 p. 43, then the juror was told that he could stay. p. 44.
- Juror stated that he had a ruptured disk which bothered him if he sat for a long time, App. 464 pp. 55-56.
- Juror said he was friends with parents of a deceased victim, App. 464 p. 57.
- Juror said she was a friend of Mr. Brown's family, App. 464 p. 58.
- Juror indicated that he got muscle cramps and his legs got numb "if he sits too long." No follow up inquiry was made, App. 464 pp. 62-63.
- Juror indicated that he knew possible witnesses one of whom, a State trooper, he had a poor opinion of, App. 464 pp. 78-79.
- Juror was prosecutor's cousin, App. 464 p. 91.

- Juror knew Defendant and his family from their neighborhood, App. 464 p. 91.
- Juror excused to accommodate prior anniversary plans, App. 464 pp. 96-97.

The Court on its initiative excused the above jurors for cause. The record reflects that counsel made no motion to strike for cause, pp. 99-100, and the clerk selected at random jurors from which the alternates would be chosen, p. 101. No record of a dispute about jurors or their qualifications appears in the record.

The unknown facts which Mrs. Foster Wickline withheld should be compared to the reasons above given for excusing jurors. Mrs. Foster Wickline gave no response to the very specific question of whether anyone in her family had ever been a Defendant in a criminal case, App. 464 p. 83. She gave no response to the specific question of whether she knew Joe Martorella, p. 67. Mr. Martorella's name came up again during voir dire when a juror recognized his son's connection, p. 20. Still no response from Mrs. Foster Wickline. Later, she said nothing when she saw her son's attorney Lee Booten whom she had hired, in the courtroom when another of his clients Mr. Fortner, a former co-defendant to Brown, testified as a State's witness that Mr. Brown committed the murder, App. 176, 183-184. Of course, no mention was ever made that her son Michael Foster's trial was scheduled before Judge O'Hanlon on March 9, 1999- apparently the next trial after the Brown case, App. 198-199. The Court record reflects that attorneys Martorella and Booten or at least one of them appeared to enter an order continuing Mike Foster's trial which was presented to and signed by Judge O'Hanlon during Mike Brown's trial. Id. It is no stretch of legal logic to conclude that Mrs. Wickline was a good candidate for a for cause challenge. Indeed, given the record of the grounds on which the trial Judge excused jurors it is a reasonable inference to conclude as Judge Cummings did. Judge O'Hanlon said as much if he been made aware that her son's case was then scheduled before him as being

prosecuted by Mr. Chiles' office. Further, Judge Cummings was surely offering his considerable experience and learned opinion on the subject as he was entitled to do. Indeed as he was expected, to do. In no way is that clearly erroneous. On the contrary, it is dead right.

The standard for granting a for cause challenge has been stated to be whether the prospective juror possesses a mind which is "wholly free from bias or prejudice." Further, the object of jury selection is to select jurors "who are also free from the suspicion of prejudice," State v. West 200 S.E. 2d 859, 865-866 (1973). More recently, this Court has held that proof of specific facts can show a presumption of bias, State v. Miller, 476 S.E. 2d 535 (1996); O'Dell v. Miller, 565 S.E. 2d 407 (2002); State v. Dellinger, 696 S.E. 2d 38 (2010). Stated another way, a juror's statement that he or she is not biased should not be taken at face value. Rather, follow-up inquiry is appropriate. This rule assumes that the juror honestly provides the requested information in the first place.

Undersigned counsel submits that the State has framed the issue and their argument too narrowly. Not only would juror Wickline have been the subject of a for cause challenge, she must be considered to have been a reasonably certain candidate for peremptory challenge if a for cause challenge were denied. The total absence of critical information from this juror provided in response to specific questions also denied to counsel the ability to make an informed decision about exercising their peremptory challenges. In this sense, even if this Court agrees that Judge Cummings was wrong to conclude that Mrs. Wickline would have been stricken for cause, the result would be the same. After all, it is the false response and/or absence of a response which is the basic infirmity that results in prejudice. Any challenge whether peremptory or for cause was likely to follow this disclosure. False responses result in allowing a juror to sit on the jury when it is patently obvious, as is the case here, that the juror would not have been sitting in the trial. It bears repeating that the system relies upon honesty. Jurors certainly must be included when

requiring honesty among trial participants.

### The Sidebar Conferences

The State argues that the Court’s findings that jurors participated in sidebars is clearly erroneous and material, Brief p. 12. The Court’s finding is neither clearly erroneous nor material to the decision reached below. Further, Mrs. Wickline’s testimony that she did not hear the Court mention sidebar conferences is contrary to the record, see Wickline deposition testimony App. 179-181. In no event should her explanation excuse her failing to truthfully respond during voir dire. Moreover, a juror was questioned away from other jurors during day five(5) of the trial, App. 468 pp. 126-127.

The trial record contains the following specific references to sidebar or bench conferences occurring during voir dire and other references which are germane to Mrs. Wickline’s testimony about why she did not truthfully answer:

- “Although none of us like to be nosy and get into your personal or private business obviously we’re going to ask you some questions, the answers to some of which may be embarrassing to you. And, so, if you feel that the answers to a question is something you would rather not be talking about out here in front of God and County, say, Judge, I wonder if I could come over to the sidebar and talk to you about that. Everybody that’s watched television probably knows what a sidebar conference is by now

. . . . .

So, we’ll be happy to come over here and take it up in private with you at a sidebar conference so you don’t have to tell some personal thing about yourself or your family....”

App. 464 pp. 20-21.

“The Court:

- There we go, another sidebar conference.” App. 464 p. 24.
- “Mr. Chiles:. . . may we approach the bench?

Where upon the following proceedings were had out of the Hearing of the jury. . . . .

. . . . .

The Court: Mr. Brown, you can choose to come up here or you can choose not to. . .  
App. 464 pp. 59-60.

“The Court:

Any jurors that you [speaking to counsel in front of jury] would like to bring over to sidebar and question individually. . . or is there any further inquiry you would like. . . that we could discuss up here.” p. 99.

- Further, there is this reference from the Court to a potential juror  
“Anything that you would have felt the need to come forth and disclose to the Court and counsel. . . “ p. 57.
- Mrs. Foster Wickline did speak up during voir dire about an acquaintance who was named as a possible witness, p. 83.
- During the fifth (5<sup>th</sup>) day of trial juror Wilma Fonda spoke privately out of the presence of other jurors about two witnesses she recognized, App. 468 pp. 126-127.

In the face of the foregoing record which clearly shows both explanations of and references to sidebar conferences the State in essence argues that because the record reveals no such conferences with jurors Judge Cummings committed reversible error the significance of which overrides Mrs. Wickline’s obvious lack of candor during voir dire, Brief of State p. 12. The record will not support the State’s assertion.

What follows is Judge Cummings’ order in this regard:

- “Mrs. Wickline also observed other jurors presenting their backgrounds to the Court and to counsel and stating their relationships to the accused, the prosecution team, and witnesses. The transcript of *voir dire* also indicates that individuals approached the presiding judge in sidebar to privately state their relationships and issues”, App. 14.

When the two sentences above are read and the second sentence is then ignored the award of habeas corpus is still fully supported when viewed along with the other uncontested facts. Moreover, if the words “in sidebar to privately state” are removed from the second sentence the result must be the same. What is important to the Court’s finding in this case is that the juror did not truthfully respond. Her feelings of embarrassment, intimidation (noting that she did speak out once), and prior experience before Judge O’Hanlon will never justify an untruth, see App. 193-194, 220. If the Judge misread the record of proceedings in this connection such misreading is immaterial to the conclusion which he reached. However, the conference with juror Fonda indicates that he properly considered the record and that the State has again been careless in its reading of the record.

**3. The Lower Court Erred In Its  
Interpretation of State v. Dellinger**

***Response: The lower Court correctly interpreted Dellinger and properly applied that decision to the facts. The State’s arguments distort this Court’s precedent and, if adopted as law, would undermine the purpose of the Voir Dire process.***

The State in its brief, pp: 12-13, argues that the opinion in State v. Dellinger, supra announced nothing new, therefore their argument goes that it must follow that Judge Cummings was wrong in the conclusion which he reached. This argument ignores both the record in the case below and the applicable law.

**The Record as Developed Reflects that the Lower  
Court was Initially Struggling to Anticipate  
This Court’s Ruling on this Issue**

Mrs. Wickline’s deposition was taken on December 30, 2009, App. 161. The issue of her false (non)responses during voir dire was argued at a hearing conducted on March 17, 2010, App. 17. This Court’s precedent concerning juror misconduct was discussed at length, App. 22-23, 25-28, 31, 33-34, 37-40. The Court asked counsel “What do you think the Supreme Court would

do with this same case (referring to a case which was decided “a long time ago”), App. 22. This dialogue was between counsel and Judge O’Hanlon and occurred some 2 ½ months before this Court handed down State v. Dellinger. All present were arguing about trends in the decisions. When Dellinger was published counsel promptly brought it to the Court’s attention in a motion as the amended petition for habeas corpus relief was still pending. A short time later, Judge O’Hanlon retired from the bench. It appeared to counsel then, as it does now, that Dellinger constitutes an important decision about juror voir dire, particularly when the trend of decisions is considered. Critical to the case sub judice is the holding in Dellinger that when proof of specific facts which show prejudice or connection with the parties exists bias is presumed, 696 S.E. 2d 38, syl. point 4. The State was arguing below that State v. Hughes, 691 S.E. 2d 813 (2010) represented the trend, App. 27-28, 31.

It was with this record and background in place that Judge Cummings entered the Brown case. What Judge Cummings wrote on this subject in his opinion was

“Since the time of that ruling [Judge O’Hanlon’s earlier decision], the West Virginia Supreme Court of Appeals determined State v. Dellinger. . . which case warrants this Court revisiting the issue of a juror’s actions at Petitioner’s trial,” App. 3.

The judge had before him a record indicating that a juror had failed to provide important information which was asked of her, that she had a son who was scheduled for the next trial in the Court where she was sitting as juror, that she had been to all or most of her son’s court hearings before the same judge, that she and her son had previously been before the same judge on another case, that a principal State’s witness was being represented by the attorney she had hired for her son, that she became aware of that fact during trial, that she was on her son’s bond and that she had failed to respond when her son’s prosecutor was identified as a member of the Brown prosecutor’s staff, see Wickline deposition and affidavit, App. 161, 227.

It is submitted contrary to the State's argument that what Judge Cummings did was to undertake a very careful review of the record, consider this Court's most recent ruling on the applicable law, and then correctly apply the law to the known, uncontested and very specific facts. Those facts show Mrs. Foster Wickline's connection with the prosecution, the trial judge and the criminal trial process at that very term of Court. This is information which should have been revealed during voir dire and information which would have no doubt resulted in Mrs. Wickline's removal as a juror.

**Voir Dire Examination Anticipates That  
The Person Examined Shall Be Truthful**

The very term *voir dire* means "to speak the truth," Black's Law Dictionary (5<sup>th</sup> ed 1979).

As this Court has stated:

"The process called *voir dire*, meaning "to speak the truth," is the litigants' opportunity to discover whether there are any "relevant and material matters that might bear on possible disqualification of a juror." *Human Rights Comm. v. Tenpin Lounge, Inc.*, 158 W.Va. 349, 355, 211 S.E. 2d 349, 353 (1975). In some cases, "a fair trial requires a meaningful and effective *voir dire* examination." *Human Rights Comm. v. Tenpin Lounge, Inc.*, 158 W.Va. At 355, 211 S.E. 2d at 353. Because preconceived notions about the case at issue threaten impartiality, each juror must be free of bias.

The cases in this jurisdiction have long recognized that the official purpose of *voir dire* is to elicit information which will establish a basis for a challenges for cause and to acquire information that will afford the parties an intelligent exercise of peremptory challenges. *See also* Syllabus Point 3, *Torrence v. Kusminsky*, 185 W.Va. 734, 408 S.E. 2d 684 (1991) (jurors may be questioned not only for purposes of for cause challenges, but so that a party may intelligently use peremptory challenges)." Michael v. Sabado, 453 S.E. 2d 419, 426 (1994).

This Court expounded on the importance of voir dire in the case of State v. Ashcraft, 309 S.E. 2d 600 (1983), a decision in which a first degree murder conviction was reversed.

"It is fundamental tenet of due process, guaranteed by the sixth and fourteenth amendments to the United States constitution and by article III, section 14 of the West Virginia Constitution, that a criminal Defendant is entitled to trial by an impartial and objective jury. Thus, we have long held that a criminal Defendant is entitled to insist upon a jury "composed of persons who have no interest in the case, have neither formed nor expressed any opinion, who are free from bias or

prejudice, and stand indifferent in the case.” *State v. McMillion*, 104 W. Va. 1, 8, 138 S.E. 732, 735 (1927).

The traditional means for vindicating this right is examination of prospective jurors on their voir dire, i.e. on their oath “to speak the truth.” 47 Am.Jur.2d, *Jury*, §196 (1969). See also *Black’s Law Dictionary* at 1412 (5<sup>th</sup> ed. 1979). Voir dire examination is recognized both in our statutory law, see W.Va. Code §56-6-12 (1966),<sup>5</sup> and in our rules of criminal procedure, see W.Va.R.Crim.P. 24(a).<sup>6</sup> It “is designed to allow litigants to be informed of all relevant and material matters that might bear on possible disqualification of a juror and is essential to a fair and intelligent exercise of the right to challenge either for cause or peremptorily.” *West Virginia Human Rights Comm’n v. Tenpin Lounge, Inc.*, W.Va., 211 S.E. 2d 349, 353 (1975).” 309 S.E. 2d at 607-608. (Emphasis Added).

The Ashcraft conviction was reversed because the trial judge would not allow follow up questioning of individual jurors about relationships which they revealed that presented the potential for bias and prejudice. The Court held as follows:

“This Court has consistently held that a meaningful and effective voir dire of the jury panel is necessary to effectuate the fundamental right to a fair trial by an impartial and objective jury. See, e.g., *State v. Schrader*, W.Va., 302 S.E. 2d 70 (1982); *State v. Helmick*, W.Va., 286 S.E. 2d 245 (1982); *State v. Peacher*, W.Va., 280 S.E. 2d 559 (1981); *State v. Payne*, W.Va., 280 S.E. 2d 72 (1981); *State v. Pratt*, *supra*; *State v. Pendry*, *supra*; *West Virginia Human Rights comm’n v. Tenpin Lounge*, *supra*; *State v. Wilson*, *supra*; *State v. West*, 157 W.Va. 209, 200 S.E. 2d 859 (1973); *State v. McMillion*, *supra*, Given the gravity of the offense charged in this case, and the demonstrated possibilities for prejudice or bias revealed by counsel’s preliminary questions, we believe it was an abuse of discretion and reversible error for the trial court to preclude individual voir dire of the jury panel. Accordingly, the Appellant’s conviction must be reversed.” p. 609 (Emphasis Added).

It is an abuse of discretion and reversible constitutional error when the trial judge disallows meaningful follow-up inquiry. The same result should be reached when a prospective juror prevents meaningful follow-up inquiry by his or her deception. Indeed, such dishonesty prevents any inquiry. Both situations result in an infringement of a right which is guaranteed by our State and U.S. Constitutions. It is only reasonable to conclude that when a juror, whether by

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dishonesty or because of intimidation or embarrassment, fails to participate in voir dire thereby withholding information which would likely lead to disqualification the right to a fair trial is implicated. Voir dire is regarded as being a critical stage of the proceedings which is secured by Article III Section 14 of the West Virginia Constitution, State v. Hamilton, 403 S.E. 2d 739, 742 (1991); State v. Martin, 197 S.E. 727 (1938); and see Gomez v. U.S., 490 U.S. 858 (1989). The proceedings are so important that our rules and statutes require that the accused shall be present, Rule 43(a) Rules of Criminal Procedure, W.Va. Code, Chapter 62, Article 3, Section 2. In conclusion, since our law imposes requirements on judges during voir dire, imposes the requirement that the accused “participate” at least by his presence, then it follows that the juror must also be subject to the most basic requirement of all-to speak the truth when asked. Or, if the Court adopts the more benign view which is suggested by the State that Mrs. Foster Wickline did not correctly hear the questions or somehow that she misinterpreted them, Brief p. 19, or even that she did not hear anything said about a sidebar conference, App. 179, then the juror must be expected to listen to the questions which are asked and presumed to have heard and understood them. After all, Courts presume that the juror heard and understood jury instructions as to the law.

**West Virginia Law Concerning Juror Bias and Nondisclosure  
Falls Into 2 Categories. Those in Which Jurors Speak  
and Those In Which Jurors Remain Silent.**

Our cases fall into two(2) categories. Those in which jurors speak and those in which jurors remain silent. The State correctly identifies much of this Court’s precedent on the subject of juror bias and nondisclosure, Brief pp. 13-18. What is significant about the cases which the State cites is that most address situations in which the jurors at issue actually answered questions during voir dire. Therefore, on appeal the issues therein addressed were the trial court’s denial of follow-up inquiry or the denial of a for cause challenge. These cases are can be distinguished on

their facts since the juror in this case provided none of the critical information in response to voir dire questioning. The cases cited do otherwise provide guidance in the instant appeal and of course include principles which do apply. However, it is the cases which address nondisclosure which provide clearer guidance for deciding Mr. Brown's case.

The following cases involve nondisclosure: State v. Dean, 58 S.E. 2d 860 (1950); W.Va. Human Rights Comm'n v. Tenpin Lounge, Inc., 211 S.E. 2d 349 (1975); State v. Hatcher, 568 S.E. 2d 45 (2002); and State v. Dellinger, *supra*.

In the Dean case a murder conviction and death penalty was reversed due to racial prejudice on the part of one juror. The juror's prejudice was not indicated during voir dire. Rather it was revealed by witnesses who came forward and testified after the trial about post trial comments made by the juror. Those comments included "all the g\_\_ damn n\_\_\_\_\_ ought to be dead" and "if I had my way about it, I would kill all of the g\_\_ damn n\_\_\_\_\_," 58 S.E. 2d at 869. Of course, Mr. Burns had denied any prejudice against the Negro race during the voir dire proceedings. In its opinion the Court stated the following which provides an apt comparison to Mr. Brown's case:

"Though this case involves no dereliction of duty on the part of the able Judge...it does, however, concern the very life of a twenty-three year old woman, in which the evidence in question...conflicts greatly. It is typically the kind of case where a Defendant should have a jury whose integrity and freedom from bias are beyond reproach," p. 871.

The Court concluded that Miss Dean's case must be reversed whether the juror had been truthful or whether the witnesses who came forward about the juror's comments had been truthful. The Court reasoned that:

"we cannot fathom the workings of the human mind. But because this young Defendant was convicted of a capital offense...in which her constitutional rights are involved, we dare not hazard a guess, pp. 872-873.

As set forth in this Brief, supra p.1, there was no physical evidence linking Mr. Brown to these murders. The co-defendants owned and possessed the murder weapon and had used it in a Florida robbery after which they were arrested. Mr. Brown was convicted on words alone including the alleged eye witness testimony from co-defendant Fortner whose mental history resulted in his successful habeas corpus. Mr. Brown received a sentence of consecutive life terms of imprisonment. The Judge asked appropriate questions in voir dire which this juror by her silence answered dishonestly. Mr. Brown, like Miss Dean, stands convicted of a capital offense in which his constitutional rights have been infringed. The outcome should not turn upon whether or not we believe that Mrs. Foster Wickline failed to hear and/or to understand questions and statements made by the Judge during voir dire.

In the Tenpin Lounge case this Court cited the Dean decision when reversing a judgment which was adverse to the Human Rights Commission by exonerating the Defendant club of racial discrimination. After the verdict, the Commission moved the trial court to examine certain jurors in order to determine whether they had sworn falsely during voir dire. The trial court denied the motion, but this Court reversed perceiving.

“...no valid reason for a trial court to refuse ... to determine the truth or falsity of the jurors’ voir dire answers when such answers are brought into question,” 211 S.E. 2d at 353.

And, citing Arm.Jur. 2d Jury §209 the Court quoted:

“There is authority that if a juror falsely represents his interest or situation on voir dire examination, or conceals a material fact relevant to the controversy, he is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge, and it may be grounds for a new trial,” p. 354.

The Court stated that “ *This being a case pertaining to racial prejudice, a strong presumption exists that an injustice resulted if a prospective juror did not answer a relevant and material question truthfully,*” Id.

In the Tenpin Lounge decision the concept of presumed bias and prejudice appears. Counsel acknowledges that race may be considered an important factor in Tenpin Lounge as it was in Dean. But the idea that the reviewing Court's decision must turn on proof of actual prejudice when no answer or a false answer has been provided appeared to be secondary to common sense. Interestingly, this Court granted a new trial to the Commission rather than directing that a hearing be conducted on the motion to examine the jurors in questions, the denial of which led to the appeal.

State v. Hathcher is another decision in which a juror failed to disclose important information. Hatcher involved a murder conviction which was reversed. The particular information which was not disclosed was that the juror's mother had been murdered and that a police officer who was a State's witness had also investigated the juror's mother's murder. The juror had mentioned in voir dire that he knew the officer who was his "life-long neighbor."

This Court noted the following:

"It may be conceivable that the juror in question did not understand the direct question about family members being the victims of violence, even after other jurors spoke up with answers. It may also be conceivable that the juror simply forgot to mention the police officer's role in investigating his mother's murder. But the weight of the evidence in the record strongly suggests that the juror failed to honestly disclose circumstances that might cause the juror to be disqualified; or at the least that would give rise to further inquiry by defense counsel, and perhaps a peremptory strike from the jury panel," 568 S.E. 2d at 47.

In reaching its decision this Court stated:

". . . we conclude that in the instant case the jury of a juror who for whatever reason failed to disclose highly important and potentially disqualifying information despite a direct inquiry about the information denied the Defendant a fair trial." pp. 47-48.

There is much about Hatcher which is similar to Mr. Brown's case in addition to involving a murder conviction. The juror denied understanding the questions asked of him and the others, even when others on the panel answered those questions in his presence. Like

Brown's case, the weight of the evidence suggests otherwise than the explanation given by the juror. Had the question been answered truthfully further questions would have been asked and he may well have been struck for cause (an obvious likelihood) or been the subject of a peremptory strike. In reversing the conviction the Court did not address presumption of prejudice stating simply that the juror's dishonesty denied Hatcher a fair trial.

Finally, there is the Dellinger opinion the interpretation of which is the source of most of what the State now complains of in this appeal. Unlike Hatcher, Dellinger refers to the presumption of prejudice concept when a juror lacks candor about a material subject syl. pt. 4. However, as in Hatcher the dishonesty on the juror's part was found to have denied the accused a fundamental right, syl. pt. 2. Moreover, as in the case sub judice the Dellinger juror professed her impartiality when she testified post trial and she judged herself to be impartial by explaining her interpretation of the questions which were asked of her. As in Brown's case the juror was completely uncommunicative concerning answers to important questions. The Court concluded:

"Whatever her reasons for doing so [not answering], she cannot be considered to have been indifferent or unbiased," 696 S.E. 2d at p.44.

**When Made 11 years After Trial A Statement By a Juror  
Professing Her Previous Impartiality is Not Proof Of Impartiality**

The State places considerable weight upon juror Foster Wickline's deposition testimony stating that she believed that she was impartial, even more likely to show mercy to Mr. Brown, Brief 19-22. The State argues that these statements establish her as a constitutionally impartial juror. The State's argument flies in the face of the fact that this testimony was given approximately 11 years after the case was tried. The reference to this juror's having indicated that she could listen to the law and evidence and base her verdict on "that," App. 464 p. 83, Brief p. 21, was made in direct response to the appearance of a possible witness named Cheryl

Seplocha who had been identified by counsel, App. 464 p. 76. This lady did not actually appear as a witness however. Moreover, the State's argument flies in the face of the law. The test for impartiality does not stop at the bold, even self-serving statements made by jurors to the effect that "I can be impartial." Instead the test includes an evaluation of specific facts which show either a connection to the parties or actual prejudice, Dellinger, syl.pt. 4 citing Miller and O'Dell supra.

The State's reliance upon Mrs. Foster Wickline's testimony about her impartiality is misplaced. This view that more than a decade later a juror can say she was impartial and it is therefore accepted to be so is the equivalent of a Defendant, after a verdict of guilt, calling upon a former trial juror to testify that he/she did not agree to the verdict. Such is what is sometimes referred to as "jury remorse," State v. Wery, 737 N.W. 2d 66 (WI 2007); People v. Canady, (C.A. Cal. 6-15-11 No. B220620); The accepted rule is that such statements by jurors will not be received to impeach their verdict after it is final. Jurors can be polled to avoid such later circumstances. This concept also forms the very foundation of Rule 606(b) of our Rules and Evidence.

Former trial jurors can testify concerning matters which were extrinsic to the deliberative process, but not "that or any other juror's state of mind or emotions," Rule 606(b); and see State v. Scotchel, 285 S.E. 2d 384(1981). This Court has relied upon Professor Cleckley in applying this rule:

"Professor Cleckley has pointed out that:

Rule 606(b) bars juror testimony regarding four topics:

- (1) the method or arguments of the jury's deliberation;
- (2) the effect of any particular thing upon an outcome in the deliberation;
- (3) the mindset or emotions of the juror during deliberation; and
- (4) the testifying juror's own mental process during the deliberations.

Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* (Vol. 1), §6-6(B), pg. 6-55 (2000)," State v. Daugherty,

650 S.E. 2d 114, 117 (2006).

What the State relies upon in its brief is in essence juror Wickline's claimed mindset, emotions and mental process during deliberations as provided a decade later. As such, the argument must fail.

The State also relies on this Court's decision in State v. White, 2011 WL 50470 (2-10-11), Brief p. 21. In White two jurors spoke out in voir dire, one knowing the mother of the investigator and the other was equivocal about potential psychological testimony. As with the prior cases upon which the State relies, White contrasts with Mr. Brown's trial in that the jurors spoke out and a record was made of their responses to voir dire follow-up questions, *at the time* the responses were made. The issue of whether juror Wickline had an opinion about the case or a potential relation to the parties at the time of trial was lost. As resurrected 11 years later, her comments about impartiality are irrelevant and must be taken to prove nothing.

#### **4. The Lower Court Erred In Concluding That Dellinger Mandated a Finding of Prejudice**

***Response: State v. Dellinger mandates a finding of presumed prejudice.***

***The claim of impartiality which is made almost 11 years after the fact cannot be taken to establish otherwise.***

State v. Dellinger is quite plain in its instruction that actual bias can be shown by circumstances which result in a presumption of bias. The circumstances surrounding Mrs. Foster Wickline at the time of Mr. Brown's trial certainly do rise to a level which would support that presumption. The essence of Dellinger is that facts when taken in their totality may be such that one must presume that this juror is a strike for cause. No one who is experienced in the trial of lawsuits, especially capital criminal cases, would look at these facts and conclude that had this juror provided true answers during voir dire she would be sitting as a trial juror. Why? Because she had too many ongoing "connections" to the criminal law process, the trial court and the

prosecutor. The true answers if they had been supplied by her would have disqualified her due to the principle in our law that “the object of jury selection is to secure jurors who are not only free from improper prejudice and bias, but who are also free from the suspicion of improper prejudice and bias,” State v. Hatley, 679 S.E. 2d 579 (2009) and O’Dell v. Miller, 565 S.E. 2d 407 (2002). In the end, Mrs. Foster Wickline’s failure to respond deprived counsel of the opportunity to have a constitutionally proper trial. The right of the accused is to have a meaningful voir dire examination. It cannot be gainsaid but that such an examination did not take place, see Moon v. Michael Koslow Construction, Inc., 458 S.E. 2d 610 (1995).

The State’s reliance on State ex rel. Farmer v. McBride, Brief p. 22 is once again misplaced in that the juror in that case was questioned on the record during the trial proceedings. Mrs. Foster Wickline’s testimony about impartiality came more than a decade later and cannot be considered in that it is contrary to Rule of Evidence 606(b) as testimony about a juror’s mind, emotions or mental process.

#### **5. Any Error Was Harmless.**

***Response: Mr. Brown’s case does not present a proper case in which to apply the harmless error doctrine. In any event, Mrs. Foster Wickline’s silence at trial deprived both Court and counsel of the ability to judge the harmless vs. prejudicial effects at the temporally appropriate time.***

In arguing that any error below involving juror Foster Wickline was harmless, Brief 23-26, the State cites two cases. These cases are State ex rel. Grob v. Blair, 214 S.E. 2d 330 (1975) and Chapman v. California, 386 U.S. 18 (1967).

In Blair, this Court held that:

“Henceforth, before an accused will be entitled to Court his absence at a critical stage of the trial proceedings as reversible error, he must demonstrate a possibility of prejudice in the occurrence.” S.E. 2d at 337. (Emphasis added).

In the case of Mr. Brown it is the “possibility of prejudice” which cannot be discounted. The *juror in question said nothing*. Her son’s case was next up both on the Court’s docket and the prosecutor’s calendar of cases in that Court. While the State and even the trial judge have stated that it was more likely that she would have been challenged or struck by the State, a good argument can be made for the converse. After all, she would naturally hope for lenience for her son. The fact remains that Mrs. Foster Wickline was a juror who should not have served in Mr. Brown’s case. When the “possibility of prejudice” by her is taken into account in considering whether to apply harmless error, the doctrine must be rejected.

In Chapman, the Supreme Court determined that there could be harmless constitutional error. The Court also found that the State application of the State harmless error rule is a state question, 386 U.S. at 20. If this Court focuses its analysis on the State rule, then under Blair the argument that this is harmless error must fail. Further, the concept of presumed prejudice applies to defeat the State’s harmless error argument.

Under Chapman the party which advocates that the error is harmless must establish its harmlessness beyond a reasonable doubt. When one considers that Mrs. Foster Wickline should have been struck for cause Mr. Brown is left with a jury comprised of an unconstitutional make up. Thus, the error can never be considered as harmless.

In the case of Rushden v. Spain, 464 U.S. 114 (1963), the Supreme Court ruled upon a criminal conviction in which a juror made a number of comments during voir dire which might be considered prejudicial to the Defendant. The Court sustained the conviction citing the harmless error doctrine. However, Justice Marshall dissented pointing out differences in the injury to a Defendant in this context, p. 141. First, there is the injury which results from bias of one or more jurors. Second, there is the *injury from the Defendants loss of opportunity to correct, mitigate or adjust to an alternation of the juror’s perspective*. It is the second kind of

injury that applies in Mr. Brown's case. It results from the juror's total silence causing the loss of important information. That flaw in the most fundamental aspect of the proceedings cannot be corrected by hindsight analysis which takes place after the passage of more than a decade. For this reason also, a harmless error analysis is inappropriate to this violation of a most fundamental and basic right. The error in this case should be deemed to be inherently prejudicial.

The State pins much of its argument about the evidence against Mr. Brown upon the testimony of Matthew Fortner, brief 25-26. It merits remembering that *no physical evidence matches Mr. Brown or connects him in any way to these crimes. Moreover, it was Mr. Fortner and Mr. France who had the murder weapon with them in Florida where they were apprehended for robbery.*

The other witnesses who testified for the State were impeached, intoxicated on the night about which they testified and/or testified under an immunity agreement or plea bargain such as Mr. Fortner did, see App. 465 pp. 220-227; App. 464. p. 173-178.

Mr. Robert White, a former State Police chemist and former head of police lab in South Charleston testified concerning the absence of any finding of gunshot residue associating Mr. Brown to this shooting, App. 468 pp. 133-155, 177-180.

For his part Mr. Brown denied any involvement in the shooting of these victims, App. 468 pp. 77-125. His mother and sister provided testimony about Mr. Brown's plans to enter college, App. 468 pp. 49, 57. His mother saw him when he came home on the night in question, indicating that Mike appeared normal and that night and at the ensuing family reunion which she was working on, App. 468 pp. 54-57.

In conclusion, the error under consideration in this case involves the basic constitutional right to a fair trial before a jury which is free from bias and also free from the suspicion of bias. This error, caused by dishonesty, infringes a substantial right and is not such a technical defect as

should be disregarded by this Court under the rubric of harmless error.

**6. Mrs. Foster Wickline Determined her  
Qualifications to Serve As Juror.**

In the final analysis this juror acted as judge and counsel to decide that she was qualified to serve as a juror in Mr. Brown's trial, App. 195. In her deposition Mrs. Wickline testified as follows:

A. I felt I could be, I felt I could be impartial.

....

Q. ... you felt yourself, in other words, you were judging yourself as a potential juror in that respect; am I right?

A. I was.

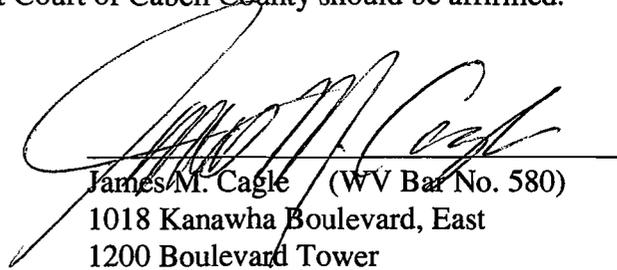
This Court's precedent as previously cited in this brief stands firmly against a prospective juror making her own decision about his or her own qualifications to serve. Cases from other jurisdictions agree, Beggs v. Univeral C.I. T. Credit Corp. 387 S.W. 2d 499, 503 (Mo. 1975); Hawkins v. Glenn 848 S.W. 2d 622 (1993).

The harm lies in the falsity of the information which destroys the right of rejection. At least one jurisdiction has held such concealment by a juror results in a miscarriage of justice, Ben Skiles v. Ryder Truck Lines, 267 So. 2d 379 (D.C. of App. FL. 1972). Counsel submits that is the result in Mr. Brown's case when this juror essentially selected herself to serve.

**Conclusion**

For the foregoing reasons the appeal should be dismissed, however if the Court allows the

appeal to continue the judgment of the Circuit Court of Cabell County should be affirmed.

A large, stylized handwritten signature in black ink, appearing to read 'James M. Cagle', is written over a horizontal line.

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**STATE EX REL. MICHAEL E. BROWN,  
Respondent and Cross-Petitioner,**

**v.**

**MICHAEL V. COLEMAN, ACTING WARDEN,  
MOUNT OLIVE CORRECTIONAL CENTER  
Petitioner and Cross-Respondent.**

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**BRIEF OF CROSS-PETITIONER**

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**STATE EX REL. MICHAEL E. BROWN,  
Respondent and Cross-Petitioner,**

v.

**MICHAEL V. COLEMAN, ACTING WARDEN,  
MOUNT OLIVE CORRECTIONAL CENTER  
Petitioner and Cross-Respondent.**

**BRIEF OF THE CROSS-PETITIONER**

Under the provisions of Rule 10(f) of the Rules of Appellate Procedure the Respondent submits that errors prejudicial to this Respondent appear in the record of proceedings below.

**Assignments of Error**

1. The lower Court committed prejudicial error when it misinterpreted the meaning of “person” in West Virginia Code 56-6-14 which addresses juror disqualification.
2. The lower Court further committed prejudicial error when it denied the Respondent any right of review and discovery of exculpatory material in the form of mental health records of his chief accuser co-defendant Matthew Fortner.

**Statement of The Case**

This cross appeal address two rulings. The first was a decision by Judge Cummings contained in the final order of January 7, 2011. There Judge Cummings ruled that W.Va. Code, Chap. 56, Art. 6, Sec. 14 means that the only “person” who can have a matter of fact to be tried during the same term of Court must be the person actually named and specifically not a family member, App. 9. The second was a ruling by Judge O’Hanlon which denied Mr. Brown’s counsel discovery of Matthew Fortner’s mental health records, Supp. Appendix p. 14. This material is exculpatory as defined by the U.S. Supreme Court and it has been denied to Mr. Brown throughout both trial and habeas corpus proceedings.

### **Summary of Argument**

The conclusions concerning the lower Court's interpretation of the statutory law and legal precedent is subject to this Court de novo review.

W.Va. Code Chap. 56, Art. 6, Sec 14 disqualifies jurors who have a matter to be tried by a jury in the term of court of service. This statute applies to family members of parties and to members of firms or partnerships with matters to be tried that term. The statute must be interpreted with its purpose in mind and consideration given to the common law of juror disqualifications.

Impeachment information and material regarding a State's witness constitutes exculpatory material which must be provided to the accused. In this case, such material has been denied when requested.

### **Statement Regarding Oral Argument and Decision**

The Respondent/Cross-Petitioner believes that this is a case which is appropriate for oral argument as it appears suitable under the criteria expressed in Rule 20. The Respondent/Cross-Petitioner rejects the suggestion of the Petitioner, brief p.10, that a "flood of habeas corpus petitions," are "sure to follow" if Mr. Brown is successful as a scare tactic by the Petitioner. It is doubtful that there are many inmates who have jurors known to have been dishonest during voir dire or cases in which the State has filed notice of appeal out of time.

### **Argument**

#### **1. The Lower Court Erred in its Interpretation of W.Va. Code §56-6-14.**

W.Va. Code Chapter 56, Art. 6 Sec. 14 reads as follows:

"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."

Mr. Brown argued that this statute disqualified Mrs. Foster Wickline. The Circuit Court

disagreed ruling that:

“Petitioner argues that the relevant “person” stated in the statute could be Ms. Wickline. This argument does not have merit.”  
App. 9.

The Court below reasoned that “while she may have an interest in the matter, she is not the “person” identified in the statute,” App. 10.

The Court’s decision is contrary to the purpose of the statute and contrary to a fair reading of this Court’s precedent. This Court has held;

“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 2, *State v. Kilpatrick*, 158 W.Va. 289, 210 S.E. 2d 480 (1974); *State v. Beckett*, 310 S.E. 2d 883 (1983), Syl. point 2. (Emphasis Added).

The rationale for this rule is expressed by the Court in reference to the common law concern that jurors be free from the suspicion of prejudice, 310 S.E. 2d at 887-888. That suspicion logically extends to persons who have matters pending for trial in the same term of Court.

In the case of *State v. Dushman*, 91 S.E. 809 (1917) a conviction was reversed because a juror participated when the victim of larceny was his employer C&O Railway Company. The Court noted that the common law grounds for disqualification included the existence of an action pending between the juror and a party or that the juror is a party’s master or servant. The Court noted that they were disposed to hold that employees of a party would be “presumptively subject to some bias or prejudice,” p. 810, see also *State v. West*, 200 S.E. 2d 859 (1973).

When considering the common law and the purpose of 56-6-14 together with the idea that corporations are persons the only common sense interpretation of this statute is that the disqualification extends to persons other than the one who is actually named in the case which is pending for trial in the term of Court. There is little doubt that a member of a firm with a matter

pending for trial would be disqualified even though he is not a named party. A mother of one who is scheduled for trial would likewise be disqualified. In the instant case Mrs. Foster Wickline had pledged her home as collateral on her son's bond. She did indeed have a "matter of fact to be tried" during the term in which she served as a juror.

**2. The Lower Court Erred in its Refusal to Permit Discovery  
of Matthew Fortner's Psychiatric Counseling  
and Hospitalization Records.**

As alleged in the Amended Petition for Habeas Corpus Matthew Fortner entered into a plea agreement under which he testified that he witnessed Mr. Brown kill the victims, App. 247 paragraph 7. Later, Fortner successfully secured habeas relief on the grounds that his counsel Mr. Booten had failed to get copies of records of his "long history of sexual, physical, and emotional abuse by family members" and "drug treatment facilities several times prior to the murders." The Court (Judge O'Hanlon) ruled that counsel had provided ineffective assistance by failing to properly investigate Fortner's past mental condition.

The Respondent moved the lower Court to order the discovery of Fortner's mental health records on the basis of this Court's decision in Myers v. Painter, 576 S.E. 2d 277 (2002) and the U.S. Supreme Court's decision in Kyles v. Whitley, 514 U.S. 419 (1995). Specifically, Myers v. Painter spoke to the importance of accessing psychiatric or psychological records of adverse witnesses and Kyles v. Whitley addressed the government's duties to produce evidence which is exculpatory. The Respondent's position is that evidence which casts doubt upon a witness' credibility or ability to recall events constitutes exculpatory evidence. Records of mental illness fall into that category, although whether or not they are ultimately admissible at trial is another issue. However, the records should at least be reviewed by the Court so that an informed threshold decision can then be made as to their relevance and materiality.

A hearing was conducted on November 9, 2007 on the request for discovery, App. 417-

451. The Court denied the request stating that:

“I don’t believe that we are at a point here where you have made sufficiently proper proceeding (sic) for me to grant you your motion. And I’m going to deny at this time.” App. 450.

What follows makes the foregoing statement is troubling at the very least. On the last day of Fortner’s habeas corpus proceeding at which Judge O’Hanlon set aside Fortner’s plea agreement on the basis of ineffective assistance of counsel, the Judge stated on the record that:

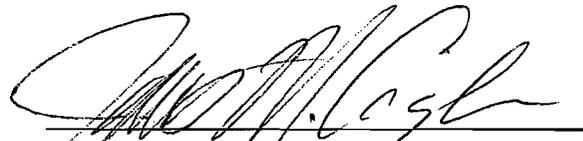
“And I believe that Mr. Booten in good faith thought he was protecting the guy at the time by not getting some damaging information that might have hurt him, might have required the Court to allow that information in as impeachment, which I did keep out of the trial at the State’s request. So for whatever reason, I think Mr. Booten felt he was acting in his best interest,” Supp. App. p. 14.

Although the Court said it was denying the request “at this time” it bears mention that *the time the request was heard was approximately one year after the last hearing on Fortner’s habeas corpus petition.* It is impossible to reconcile the Court’s treatment of the motion seeking at least a review of the records with the Court’s statement that the Court had previously noted such records may have been used to impeach Fortner. Counsel submits that impeachment material is considered to be exculpatory material, U.S. v. Bagley, 473 U.S. 667 (1985). Bad faith on the part of the prosecution is not required, Arizona v. Youngblood, 488 U.S. 51 (1988). Thus, when the matter of Fortner’s mental history was indicated the duty applied. It is clear that the duty has been ignored both by the State and by the Circuit Court.

### **Conclusion**

For the foregoing reasons the Court’s order of January 7, 2011 must be affirmed. Alternatively, if the Court remands this case the Circuit Court should be directed to order the

production of all of Mr. Fortner's psychiatric or psychological counseling records produced for review by the Court and as proper discovery for Mr. Brown's counsel to review.



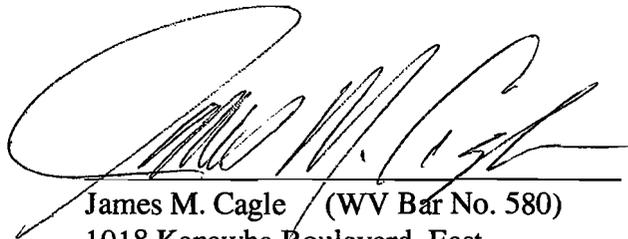
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**CERTIFICATE OF SERVICE**

***Hand Delivered***

TO: Barbara H. Allen, Managing Deputy Attorney General  
State Capitol, Rm 26-E  
Charleston, WV 25305

The undersigned, James M. Cagle, Counsel for the Petitioner, Michael E. Brown, does hereby certify that a true and correct copy of the **Brief of the Respondent and Cross-Assignments of Error** was served hand delivered to Barbara H. Allen, Managing Deputy Attorney General at the State Capitol, Room 26-E, Charleston, WV 25305, on this the 8<sup>th</sup> day of August, 2011.



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