IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-513

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TINA M. FRYMYER,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

BRIEF OF RESPONDENT

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ASSIGNMENTS OF ERROR

1. Should the Court order the indictment dismissed based on allegations that Juror Carrie Collins engaged in juror misconduct, when the juror accurately answered voir dire questions but did not volunteer more information about other potential relationships with persons connected to the case?
2. Should the Court order the indictment dismissed based on allegations that the prosecutor or circuit court clerk engaged in misconduct by failing to disclose "non-verbal communication" and various familial or casual relationships?
3. Did the circuit court err in declining to order a fuller post-trial "investigation" into the jurors' answers during voir dire and behavior during trial, including post-verdict examination of the jurors themselves?
4. Do the "cumulative impact of these irregularities" justify dismissing the indictment?

INTRODUCTION

Petitioner Tina Frymyer accuses the circuit court, the clerk of the circuit court, the prosecutor, and a juror of effectively conspiring to sit a biased juror in a criminal prosecution. At bottom, Petitioner maintains that Juror Carrie Collins had undisclosed relationships with law enforcement, the clerk, the prosecution, multiple witnesses, and perhaps even other jurors. But neither the facts nor the law ultimately supports the allegations. The juror honestly answered the questions that were asked during voir dire. The prosecutor disclosed all the information about the juror that he knew. The circuit-court clerk had no role in what happened below. And in the end, long-ago relationships, social-media contacts, and "facial expressions" or "body language" involving a juror, App. 24, are not a reason to order a new trial—let alone dismiss the indictment, as Petitioner now requests. The Court should instead affirm.

STATEMENT OF THE CASE

A. The Department of Health and Human Resources (DHHR) placed a foster child with Petitioner and gave her funds to take care of the child. App. 9. But rather than taking care of the child, Petitioner gave the child to another individual, Brandy Sims, for about eight months. *Id.* Petitioner still kept the funds. *Id.*

A Gilmer County grand jury eventually indicted Petitioner for obtaining money under false pretenses. App. 9. The trial started on February 17, 2023. *Id.* During voir dire, the circuit court asked jurors several questions about their qualifications to serve. Initial questions focused on whether the juror fit the requirements to sit—whether they were citizens of Gilmer County, had previously been convicted of a felony, and if they had served on a jury within the last two years. App. 9-10.

The court then asked questions about potential juror bias concerning the facts of the case. The court asked if anyone knew about the case other than what the court had explained. The jurors stated they hadn't. App. 10. The court then asked the jury if any of them had any close relationships with Petitioner, any of the witnesses, or any of the attorneys involved in the case. App. 10-12. As for the witnesses, the court asked if anyone was "related by blood or connected by marriage to any of those witnesses?" The court then followed up by asking if any of the jurors were "[c]lose personal friends with any of those witnesses." App. 10-11. All the jurors said no. App. 11. The same held true for the witnesses Petitioner intended to call. *Id.* The court then asked if any of the juror were "employed as any law enforcement officer, or any members of your immediate family, or have you been in the past." App. 12-13. The jurors said no. App. 13. And all the jurors confirmed that they did not know of "any reason why [they] could not sit upon this jury and render a true verdict based on upon the law and the evidence in this case." *Id.* Likewise,

they all agreed that they would require the prosecution to "put forth the evidence" before convicting. App. 20.

The trial then began and ultimately ended that day with the jury finding Petitioner guilty. App. 24; Pet'r's Br. 5.

B. Following the trial, Petitioner's counsel sent a letter to the circuit court concerning potential juror misconduct. App. 24-27. Counsel suggested that a juror engaged in misconduct during the trial with the prosecutor and the circuit clerk mainly based on "her facial expressions and body language." App. 24-25. Counsel was also concerned that the same juror was "overly chummy" with two other jurors. App. 25. Petitioner's attorney said that he later discovered that the juror, Carrie Collins, was the sister of the circuit clerk Pam Starsick, and that Collins had dated a sheriff's deputy. *Id.* Based on these facts, Petitioner's attorney said that Collins engaged in juror misconduct by hiding relationships with witnesses and planned to file a motion soon. App. 26-27. He sought "swift punishment for everyone" and asked for "an outside agency" to investigate. App. 27.

The Gilmer County Prosecuting Attorney responded to the complaint. App. 29-30. He said that he did not know that Collins was the sister of the circuit clerk Starsick until he asked the juror, who confirmed it. App. 29.

Petitioner then moved to vacate the jury verdict and dismiss the indictment based on the juror misconduct described in the letter her attorney sent to the court. App. 32-40.

C. The court held a sentencing hearing on April 10, 2023, during which it heard Petitioner's motion. App. 80. Petitioner's attorney said that Juror Collins lied throughout voir dire. App. 81. He specifically took issue that the juror "knew every witness in the case or had worked with every witness in the case." App. 83. The court said that the attorney needed to have the transcript to

show that the juror lied and continued the hearing to allow Petitioner to present evidence. App. 85-86. Petitioner's counsel assured the court that his "proof [wa]s throughout the Internet." App. 85.

Before the evidentiary hearing, Petitioner moved to disqualify the circuit court judge because the judge's "obvious bias prohibits from be[ing] an impartial judge." App. 90. This Court denied Petitioner's request. Pet'r's Br. 12.

The Court then held a hearing on Petitioner's motion for a new trial on June 7, 2023. App. 110. The circuit court noted that Collins was the sister of the circuit clerk, but that relationship alone did not per se disqualify her from participating as a juror in the case. *Id.* Petitioner's attorney argued that Collins lied during voir dire because she said she didn't have any immediate families who engaged in law enforcement—even though her brother-in-law was a law-enforcement officer. App. 110-11. The court and Petitioner's attorney then had an extended colloquy about whether a brother-in-law is considered immediate family. App. 114. The court concluded that a brother-in-law was not immediate family. *Id.*

Petitioner's attorney first called Cason Jones, a Gilmer County Deputy who dated Collins, to testify as to his relationship with her. App. 119. Jones testified that he knew that Collins was a tax deputy in Gilmer County back in 2014. App. 120. He added that Collins's brother-in-law is a state trooper, and he would consider a brother-in-law to be immediate family. App. 121. Petitioner's attorney then asked Jones if it would be "shocking" that the prosecutor would not know the clerk's sister. App. 125. Jones said that he "wouldn't know what he was thinking or about not knowing her," but it is a small town where "everybody pretty much knows everybody." *Id.* Jones also testified that Collins later went to work for the DHHR doing secretarial work. App.

126. And Jones reported that Brandy Sims was his neighbor, but he was unsure if Collins knew Sims. App. 126-27.

Petitioner's attorney next tried to call Collins to testify. App. 127. But the circuit court said that he could not call her because "[w]e're not going behind the jury verdict." *Id.*

Petitioner's attorney then called the investigating officer, Trooper R.P. Smith. App. 128. He testified that he knew Collins's brother-in-law since he worked for the state police but didn't work with him. *Id.* Smith testified that he didn't think Trooper Starsick ever worked in Glenville, either. App. 129. Petitioner's attorney asked Smith if he knew Collins. App. 129. Smith said yes. Her attorney then asked Smith if he had ever coached any of Collins's kids in youth sports. *Id.* Smith said he didn't think he did, but it was possible he could have. *Id.* Further questioning revealed that Smith's daughter and Collins's daughter were on the same basketball team back in 2019. App. 131. Finally, Smith testified that he would consider a brother-in-law to be an immediate family member. App. 134.

Petitioner's attorney tried to call another juror to testify. App. 135. The circuit court again said that a juror could not testify because they were "not going behind the jury verdict." *Id.*

Petitioner's attorney thus called Brandy Sims to testify. App. 137. Sims testified that she knew who Collins was because Collins was her summer school teacher when Sims was five years old—over twenty-five years ago. App. 138, 151. Sims testified that she did not "know her on a personal level, and [Collins] doesn't know [Sims] on a personal level." App. 138. Sims also testified that she had not maintained contact with Collins apart from being friends on Facebook. App. 139. Petitioner's attorney then showed Sims several posts where either her or Collins liked each other posts on Facebook. App. 140-150. Sims testified again that she did not "know [Collins] on a personal level," but did know her and her family. App. 150.

The circuit court then heard further proceedings to allow Jennifer Godfrey from Child Protective Services to testify. App. 160. Godfrey testified about the conversation she had with Petitioner's attorney following the trial about whether Godfrey knew Collins. App. 161-62. Godfrey said that she and Collins worked together about three years ago for DHHR in the Grantsville office—which is not in Gilmer County. App. 163. Godfrey said she recognized Collins but did not know her outside the professional setting. *Id.* Godfrey also said it was a big office, and that they "didn't go to lunch together." App. 164.

Petitioner's attorney again said he would like to call jurors to testify. App. 165. The court and Petitioner's attorney proceeded to have a lengthy exchange on whether any case law supported disqualifying a juror because she knew individuals involved in the case. App. 167. Petitioner's counsel said he did not have "time to do research on that issue" despite the hearing being two months after the court first heard the motion. *Id.* Instead, he insisted it was "commonsense" that Collins should have told the court about her connections with the witnesses. App. 168.

The circuit court then rendered its decision. It first found that jurors should not testify under West Viriginia Rule of Evidence 606 because this wasn't a case of outside influence. App. 174. The court then noted that the "definition of 'immediate family' … is all over the board," and so Collins did not lie when she said she did not have any immediate family members who were law-enforcement officers. *Id.* The court further found no authority that said a juror was *per se* disqualified because of a previous relationship with law enforcement, her previous work, or related to the clerk of the court. App. 175. In sum, the court found that none of Petitioner's arguments were a basis for a new trial and denied Petitioner's motion. App. 176.

After the circuit court denied Petitioner's motion for a new trial, the circuit court sentenced her to six years' probation and required restitution. App. 186.

Petitioner now appeals.

SUMMARY OF THE ARGUMENT

I. Juror Collins did not engage in misconduct. She accurately answered a question probing whether she had immediate family in law enforcement. Her brother-in-law was not immediate family. Petitioner could have asked questions about more distant family connections during voir dire, but she did not. In any event, nothing in the record suggests that the answer was given dishonestly, even if a brother-in-law could constitute immediate family. And even if the answer were problematic, Petitioner has not established that the correct answer would have given her a basis to challenge Juror Collins for cause.

Juror Collins had no improper or undisclosed relationships with other persons involved in the case. Minimal social media contacts do not evince a close relationship. A passing acquaintance with the investigating officer is not enough to justify a new trial. Similarly, working years ago with a witness did not create a relationship that needed to be disclosed. And teaching a witness in summer school when the witness was five years old did not cement a close relationship that needed to be disclosed in voir dire.

It also was not error to allow Juror Collins to sit on the jury when her sister was the circuit clerk. Given the nature of the circuit clerk's role, relationship would be unlikely to affect the result in any way. And again, Petitioner could have asked about such relationships in voir dire. She did not.

II. No prosecutorial misconduct occurred here. The facts in the record support the notion that no misbehavior was happening between jurors in the box and the prosecutor's team. Petitioner invites this Court to speculate that the prosecutor must have been lying about who he knew at the trial and on the jury, but speculation is not sufficient to warrant a new trial.

III. The circuit court clerk also acted appropriately. The circuit clerk had no duty to volunteer the information about which the Petitioner now complains. She did not conceal anything at any time. And the evidence suggests she behaved professionally—and certainly not so *un*professionally that her behavior would have swayed the jurors' decision.

IV. The circuit court was not biased. Petitioner often complains about rightful decisions that the circuit court made. He also suggests that the circuit court should have allowed him to conduct a more sweeping "investigation," including the examination of some of the jurors. But the circumstances here didn't compel the circuit court to probe further, as Petitioner largely offered spurious allegations with little support in either the facts or the law.

V. Cumulative error does not justify dismissing the indictment. No errors happened here, let alone multiple errors. And even if the Court were to disagree, then the correct remedy would be a new trial—not dismissal of the indictment outright.

STATEMENT REGARDING ORAL ARGUMENT

Under West Virginia Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record.

STANDARD OF REVIEW

This Court "review[s] the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard." *State v. Dellinger*, 225 W. Va. 736, 740, 696 S.E.2d 38, 42 (2010). This Court "review[s] the circuit court's underlying factual findings under a clearly erroneous standard." *Id.* Questions of law are reviewed de novo. *Id.* If a circuit court determines that a juror falsely answered a question during voir dire, "whether or not a new trial should be awarded is within the sound discretion of the trial

court." Syl. pt. 3, *W. Va. Hum. Rts. Comm'n v. Tenpin Lounge, Inc.*, 158 W. Va. 349, 211 S.E.2d 349 (1975).

ARGUMENT

I. Juror Collins Did Not Engage In Misconduct.

Petitioner maintains that Juror Collins engaged in misconduct because she purportedly lied about relationships she had with various people having some connection with the case. Although Petitioner believes these supposed relationships implicate the sort of juror misconduct seen in *Remmer v. United States*, 347 U.S. 227 (1954), they do not. *Remmer* addresses "private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury." *Id.* at 229. But Petitioner's allegations do not involve these kinds of "extraneous influences." *Remmer v. United States*, 350 U.S. 377, 382 (1956). Instead, Petitioner really asserts classic juror-bias claims. *See, e.g.*, *Fields v. Brown*, 503 F.3d 755, 775 & n.14 (9th Cir. 2007) (explaining how relationships giving rise to bias and contacts during trial creating extraneous influences on the jury are "analytically distinct"); *see also, e.g.*, *Commonwealth v. Guisti*, 747 N.E.2d 673, 681 (Mass. 2001) ("[J]uror bias is not an extraneous matter."); *United States v. Barnett*, No. 97-3091, 1998 WL 203122 (D.C. Cir. Apr. 8, 1998) ("Mere juror bias and opinions expressing such bias do not amount to extraneous evidence that casts the legitimacy of the verdict into doubt.").

This Court gives "special deference to the trial court's decision of juror bias because of its broad discretion in this area." *State v. Miller*, 197 W. Va. 588, 605, 476 S.E.2d 535, 552 (1996). The challenging party bears the burden of showing that a juror was partial. Syl. pt. 5, *State v. White*, 228 W. Va. 530, 722 S.E.2d 566 (2011). "An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and

impartially to apply the law." *Id.* And relatedly, "[i]n a criminal case, the inquiry made of a jury on its *voir dire* is within the sound discretion of the trial court and not subject to review, except when the discretion is clearly abused." Syl. pt. 3, *State ex rel. Parker v. Keadle*, 235 W. Va. 631, 776 S.E.2d 133 (2015). Likewise, the circuit court has "discretion on the question of whether a new trial should be granted because of false answers given by a prospective juror on such examination." *Tenpin Lounge, Inc.*, 158 W. Va. at 358, 211 S.E.2d at 354.

Especially considering these deferential standards, the circuit court did not err in concluding that Juror Collins was not biased and did not engage in misconduct.

A. Juror Collins did not lie about having immediate family that were law-enforcement officers.

Throughout her brief, Petitioner notes that Juror Collins's sister was married to a West Virginia State Police trooper, Oakey Starsick, who was not directly involved in the case. Merely being related to a law-enforcement officer is not a *per se* ground to disqualify a juror in West Virginia. *See* syl. pt. 6, *State v. Beckett*, 172 W. Va. 81 310 S.E.2d 883 (1983); *see also, e.g.*, *State v. Hardway*, 182 W. Va. 1, 385 S.E.2d 62 (1989). Indeed, the Court has said that jurors with all kinds of relationships with law enforcement needn't be stricken—including relationships by marriage. *See State v. Mills*, 221 W. Va. 283, 287–88, 654 S.E.2d 605, 609-10 (2007) (collecting authorities). So Petitioner tries to establish that Juror Collins should have been disqualified because she *lied* about the relationship. But the record shows otherwise.

Remember that the court asked only whether any juror had a "member[] of [his or her] immediate family" who was "employed as a law enforcement officer." App. 12. Thus, the first question is whether Juror Collins truthfully answered that question.

Juror Collins truthfully and correctly answered "no" to the circuit court's question during voir dire because a brother-in-law is not commonly understood to constitute immediate family.

Take the West Virginia Code, for example. Over and over, statutes define "immediate family" and "immediate family members" in ways that exclude brothers-in-law. *See, e.g.*, W. Va. Code §§ 3-12-3, 61-10-32. Federal laws say much the same. *See, e.g.*, 26 U.S.C. § 9035(b). Ordinary dictionary definitions do, too. *See, e.g.*, *Black's Law Dictionary* (11th ed. 2019) (defining "immediate family" as "[a] person's parents, spouse, children, and siblings, as well as those of the person's spouse"); *Merriam-Webster Dictionary*, https://bit.ly/48ItdXg (lasted visited Jan. 22, 2024) ("[A] person's parents, brothers and sisters, husband or wife, and children"). Likewise, no West Virginia court has extended the tort of intentional infliction of emotional distress—which arises from witnessing outrageous conduct committed on a member of a person's "immediate family," *Courtney v. Courtney*, 186 W. Va. 597, 601, 413 S.E.2d 418, 422 (1991)—to an in-law relationship like this one. And other courts have also understood that "immediate family" addresses the "most restrictive" form of family—a form that does not include brothers-in-law. *In re Marriage of Gerleman*, 430 P.3d 467, 473 (Kan. Ct. App. 2018); *see also, e.g.*, *Thompson v. Dhaiti*, 959 N.Y.S.2d 522, 523 (N.Y. App. Div. 2013) (holding that a stepdaughter was not "immediate family" for purposes of tort action). In short, because the question was "expressly limited" to immediate family, Juror Collins correctly answered it. *Pleasants v. All. Corp.*, 209 W. Va. 39, 43, 543 S.E.2d 320, 324 (2000).

If Petitioner thought that even the most tenuous familial connections to law enforcement justified a juror's removal for cause (or the use of a peremptory strike), then her counsel could have explored those relationships in his own voir dire. But Petitioner's counsel instead chose to ask only four generic questions about the jurors' understandings of their responsibilities. App. 17. None of them concerned relationships or connections to anyone, let alone law enforcement. Having failed to probe the issue, Petitioner cannot now be heard to complain that Juror Collins

correctly answered the questions that *were* asked. *See Billings v. Polk*, 441 F.3d 238, 245 (4th Cir. 2006) (finding that no basis to grant a new trial "where a juror innocently fails to disclose information that might have been elicited by questions counsel did not ask"); *cf. State v. Bongalis*, 180 W. Va. 584, 591, 378 S.E.2d 449, 456 (1989) ("[T]he failure to ask voir dire questions relative to statutory or common law grounds for disqualification of jurors constitutes lack of diligence, and forecloses utilizing such disqualification to attack the jury verdict.").

Even if it could be said that a brother-in-law is "immediate family," Juror Collins's answer otherwise would not establish that she acted dishonestly. And that element of dishonesty is key. "To invalidate the result of … trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 555 (1984). After all, jurors "cannot be expected invariably to express themselves carefully or even consistently." *Skilling v. United States*, 561 U.S. 358, 397 (2010). Petitioner needs to find some evidence that the juror *intentionally* lied or misled before she can assume bias from the failure to disclose. *See State v. Dennis*, 216 W. Va. 331, 349, 607 S.E.2d 437, 455 (2004) ("[M]otives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."). Here, Petitioner has not given the Court any reason to believe that Juror Collins's answer was anything more than an honest mistake about what constitutes "family." (Again, the better reading of the record is that it was not even mistaken.)

Lastly, even if Petitioner had shown that Juror Collins failed to honestly answer a material question during voir dire, she would still need to "show that a correct response would have provided a valid basis for a challenge for cause." *Dennis*, 216 W. Va. at 349, 607 S.E.2d at 455; *see also Belcher v. Dynamic Energy, Inc.*, 240 W. Va. 391, 400, 813 S.E.2d 44, 53 (2018). She

has not even tried to do so—nor could she. Nothing suggests that the distant in-law relationship here affected the jury's deliberations. Juror Collins confirmed that she would reach her decisions fairly and based on the evidence. *See, e.g.*, *State v. Gillispie*, No. 11-0478, 2012 WL 3030862, at *4 (W. Va. June 13, 2012) (memorandum decision) (finding that juror could not be presumed to be biased where she answered general question about fairness affirmatively). And given that Trooper Starsick was not even involved in the case, her assurances seem especially reasonable.

B. Juror Collins did not have a close relationship with any of the witnesses.

Petitioner also argues that Juror Collins "failed to disclose close relationships she had to almost every witness in the case." Pet'r's Br. 7. Here again, Petitioner seems to suggest at times that the mere existence of relationships is enough to establish juror bias and the need for relief. If that were the right rule, then trials in small, tightknit communities might become next to impossible. But thankfully, that has never been the rule in West Virginia. In *State v. Satterfield*, 193 W. Va. 503, 514, 457 S.E.2d 440, 451 (1995), for example, a prospective juror was a "good friend of four key State witnesses, a friend of the victim and the victim's daughter, … knew some of the facts of the case from two people who discovered the body of the victim[,] … [and] knew the appellant's family." Despite those many connections, the Court concluded that the juror was qualified to serve. *Id.*; *see also, e.g.*, *State v. Wade*, 174 W. Va. 381, 385, 327 S.E.2d 142, 147 (1985) (finding no error in the court's refusal to strike jurors with multiple relationships with witnesses and prosecutor).

Generally speaking, rather than disqualifying any juror with a relationship, the Court has asked whether evidence in the record establishes actual bias or a close social relationship that is "sufficient to preclude the juror from arriving at a fair verdict." *State v. Foster*, 221 W. Va. 629, 643, 656 S.E.2d 74, 88 (2007). And other than vague allegations of courtroom behavior, Petitioner

never even tries to allege actual bias arising from Juror Collins's supposed relationships with these witnesses.

So the question becomes whether Juror Collins was so close with any of these witnesses that bias must be presumed. Or, as the circuit court put it, the Court must ask whether Juror Collins was actually "related by blood or connected by marriage" or "[c]lose personal friends" with the witnesses. App. 11. (Neither the Court nor Petitioner's counsel ever asked if any of the jurors merely *knew* any of the witnesses.) Parsing each relationship individually shows that Juror Collins correctly answered that she had no such relationship with any of the witnesses.

To begin with, Petitioner likely places too much weight on social media contacts across the board. Petitioner's counsel did not ask about social media during voir dire. Yet now, Petitioner repeatedly suggests that even the most minimal of contacts through social media equates to a close friendship. Petitioner is wrong. "It is now common knowledge that merely being friends on Facebook does not, *per se*, establish a close relationship from which bias or partiality on the part of a juror may reasonably be presumed." *McGaha v. Commonwealth*, 414 S.W.3d 1, 6 (Ky. 2013); *see also Sluss v. Commonwealth*, 381 S.W.3d 215, 217 (Ky. 2012). Many other courts have said much the same. *See, e.g.*, *Slaybaugh v. State*, 44 N.E.3d 111, 111 (Ind. Ct. App. 2015), *aff'd*, 47 N.E.3d 607 (Ind. 2016); *State v. Webster*, 865 N.W.2d 223, 226 (Iowa 2015); *State v. Madden*, No. M2012-02473-CCA-R3-CD, 2014 WL 931031, at *1 (Tenn. Crim. App. Mar. 11, 2014); *W.G.M. v. State*, 140 So. 3d 491, 493 (Ala. Crim. App. 2013). This Court, too, has declined to find juror bias when jurors had social media contact with other persons involved in the case. *See State v. Miller*, No. 21-0378, 2022 WL 856614, at *5 (W. Va. Mar. 23, 2022) (memorandum decision) (Facebook "friends"); *Evans v. Bluefield Hosp. Co.,* No. 17-1090, 2018 WL 6016028, at *4 (W. Va. Nov. 16, 2018) (memorandum decision) (Facebook "like" and birthday wish). In an

age when many people have hundreds of these connections, and when even a fleeting real-world interaction can give rise to a "friendship" on social media, courts cannot assume that linking or liking is enough to constitutionally disqualify a juror.

Social media aside, Petitioner has established no kind of problematic relationship with any of the persons involved here.

For instance, Petitioner overstates what the record shows when she suggests that Juror Collins was "close" friends with arresting officer R.P. Smith. *See* Pet'r's Br. 7. At most, the evidence showed that the juror and the officer had encountered one another in their relatively small community. Officer Smith acknowledged that he knew the juror and had talked with her before, App. 132, and he agreed that he had met her brother-in-law, App. 128-29—but that was about all he could say. As Petitioner notes, the officer could not even recall whether he had coached her children. App. 131-32. And all in all, Officer Smith struggled to recall much of anything about this juror. Yet Petitioner speculates that they must have had something like a deep friendship based only on these minimal connections. Petitioner has not shown that, based on the ties the record shows, Juror Collins was unable to "return a verdict based on the evidence and the court's instructions and disregard any prior opinions [s]he may have had." *State v. Finley*, 177 W. Va. 554, 556, 355 S.E.2d 47, 49 (1987); *see also, e.g.*, *White*, 228 W. Va. at 538, 722 S.E.2d at 574 (finding that a juror's occasional interactions with the investigating officer did not justify disqualifying her).

Petitioner also says that Juror Collins knew witness Godfrey. Pet'r's Br. 7. Here again, that alleged connection aligns with what Juror Collins said during voir dire, as no one (including Petitioner's counsel) asked the jurors whether they merely knew any of the witnesses. And the record does not suggest that the juror and the witnesses were close. They had only worked in the

same office three years before. App. 163. They maintained a solely professional relationship; for instance, they did not have lunch together. App. 164. This Court has often found that these sorts of shallow working relationships don't raise any inference of bias. *See, e.g.*, *State v. Messer*, No. 14-1180, 2015 WL 7628699, at *5 (W. Va. Nov. 20, 2015) (memorandum decision) (finding that no error in circuit court's refusal to strike a juror who had a "working relationship" with the prosecutor years before); *State v. Ritchie*, No. 11-0780, 2012 WL 3079171, at *4 (W. Va. Apr. 13, 2012) (finding that no error in circuit court's refusal to strike to jurors who had worked with witness for the prosecution).

Petitioner lastly insists that Juror Collins was "personal friends with witness Brandy Sims." Pet'r's Br. 7. Beyond a few scattered social media "likes" spanning several years, Petitioner cites only two connections between these two women: Juror Collins had taught Sims in summer school when she was around five, App. 138, and Juror Collins grew up "not too far down the road" from Sims. App. 150. But Sims also stressed that the two did not know each other on a "personal level." App. 139; *see also* App. 150 (same). Even on social media, the two did not communicate with one another. App. 139. Again, contacts like these do not give rise to a presumption of bias that would require the circuit court to retry a case after a criminal conviction. *See, e.g., State v. Jeremy S.*, 243 W. Va. 523, 535–36, 847 S.E.2d 125, 137–38 (2020) (finding that the circuit court did not err in strike juror with a "remote" relationship with the prosecutor, who had taught at same school that prosecutor attended when prosecutor was in fifth grade); *see White*, 228 W. Va. at 538, 722 S.E.2d at 574 (affirming decision not to strike juror even though juror said testifying witness's family lived at the "end of [her] road"). That's especially so when Juror Collins "represented unequivocally that [s]he would decide the merits of the case based upon the evidence presented." *State v. Worley*, 179 W. Va. 403, 416, 369 S.E.2d 706, 719 (1988).

In short, none of these relationships presented the kind of actual or presumed bias that would require Juror Collins to be stricken. And even if they had, Petitioner still has not established how Collins's presence on the jury ultimately prejudiced her at trial. Given that failure, no relief would be warranted. *See Dennis*, 216 W. Va. at 349, 607 S.E.2d at 455.

C. Juror Collins's familial relationship with the court clerk is not per se disqualifying.

Petitioner also attacks Juror Collins for being related to the circuit court clerk. Everyone agrees that Juror Collins was related to the clerk. But Petitioner cites no authority suggesting that a familial relationship with court administrative staff is enough to disqualify a juror. The State has been unable to locate any authority in any jurisdiction—federal or state—that would support such an argument, either. The few bits of authority that do exist in fact reject Petitioner's argument. *See State v. Stanhope*, 476 S.W.3d 382, 404 (Tenn. Crim. App. 2013) (affirming refusal to grant new trial because juror was sister-in-law of court clerk); *United States v. Guess*, Nos. 96-3193 & 96-3198, 1997 WL 561338, at *2 (6th Cir. Sept. 9, 1997) ("The facts concerning the relationship between the juror and the court clerk do not even raise an inference of prejudice, much less demonstrate any actual prejudice."). Lacking any authority in her favor, it is hard to see how it could be said that the circuit court abused its discretion in refusing to strike Juror Collins.

Logic supports the same result. Circuit court clerks perform important but largely administrative tasks. *See Rutledge v. Workman*, 175 W. Va. 375, 380-81, 332 S.E.2d 831, 835-37 (1985) (explaining that, although "circuit court clerks are more than our minions," they perform administrative work at the direction of the circuit court). In the ordinary case, they would not engage with the jury to any real degree. They would not be *directly* involved in the trial. They also are not "partial" players in the way that a witness for one side or a prosecutor might be. So a witness's favorable opinion of the court clerk wouldn't be likely to sway her toward any particular

result—just as a close relationship with the stenographer would not render a witness more likely to side with the prosecutor or the defense. Especially given Petitioner's failure to point out some particular disadvantage, then, this Court cannot presume one. *Cf. Beckett*, 172 W. Va. at 821, 310 S.E.2d at 888 (describing how West Virginia courts have generally policed close relationships with prosecuting attorneys, defense attorneys, and law enforcement personnel—but not mentioning clerks).

If Petitioner had a genuine sense that a relationship with the court clerk was so destructive as to justify striking a juror, then her counsel should have asked about those relationships during voir dire. But once more, having failed to do so, she cannot be heard to complain about the juror's failure to volunteer this immaterial information. *Bongalis*, 180 W. Va. at 591, 378 S.E.2d at 456.

II. The Prosecutor Did Not Act Inappropriately.

Citing no legal authority, Petitioner also accuses the prosecuting attorney of engaging in misconduct. To be sure, "a prosecuting attorney is in a quasi-judicial role and is required to avoid the role of a partisan, eager to convict, and must set a tone of fairness and impartiality." *State v. Leadingham*, 190 W. Va. 482, 492, 438 S.E.2d 825, 835 (1993) (cleaned up). But nothing in the record suggests that the prosecuting attorney here did anything inappropriate. In essence, Petitioner maintains that the prosecuting attorney lied when he represented that he did not know Juror Collins. App. 29-30. The prosecuting attorney stressed that he had "no business, social, or legal relationship" with the juror, had never heard her talked about by the circuit clerk, and knew nothing about any of Juror Collins's relationships. App. 29. Petitioner has not carried his burden of showing those statements were untrue and somehow prejudiced her.

Petitioner first insists that the prosecutor and the juror must have had a relationship because they were engaged in "non verbal communication" with one another. Pet'r's Br. 9. It's sometimes not clear what type of communication was occurring; some of Petitioner's counsel's accounts

make it sound as though Petitioner's counsel simply lost favor with the jury. *See, e.g.*, App. 172 ("[T]hey [the jurors] had a party going on over there, and I wasn't invited and I wanted to know why."). In any event, Petitioner never objected to (or even mentioned) that supposed communication before the jury began deliberating. Had she done so, the matter could have been dealt with, and the juror could have been excused if appropriate. Yet even now, she summons no evidence that anyone other than her counsel saw any giggling, mouthing, or other communication. And the trial court could observe the jurors' conduct, both verbal and non-verbal, throughout the trial. *See Lister v. Ballard*, 237 W. Va. 34, 40, 784 S.E.2d 733, 739 (2016) (explaining that "[t]he circuit court was in the best position to make th[e] credibility assessment" in a juror bias cases because it could base its conclusions on its observations of juror behavior.). The circuit court had no concerns, either. Indeed, other than her counsel's unsworn allegations, Petitioner offers no reason to believe communication occurred. That is not enough. *See, e.g., United States v. Rosario-Camacho*, 697 F. Supp. 2d 244, 247-53 (D.P.R. 2010) (rejecting allegations of jury tampering based on purported "non-verbal communications" between prosecutors and the jurors, calling them "utterly frivolous"). So the circuit court was entitled to favor the prosecuting attorney's denials over Petitioner's after-the-fact story.

The rest of Petitioner's misconduct allegations largely amount to speculation piled on speculation. Petitioner maintains that the prosecuting attorney must have secretly known the juror because (1) Juror Collins worked in a different part of the courthouse years ago; (2) the prosecuting attorney owned property at a time when Juror Collins worked in the tax office; (3) Juror Collins was (unbeknownst to the prosecutor) related to the circuit court clerk; and (4) Juror Collins once dated a Sheriff's Deputy. Pet'r's Br. 9-10. To describe these allegations is almost enough to rebut them. It is entirely plausible that the prosecutor might work in the same building as someone and

not know them. It is entirely plausible that the prosecutor might not remember dealing with a particular tax-office staffer, assuming he dealt with her at all. It is entirely plausible that the prosecutor might not know all the relatives of courthouse staff. And it is entirely plausible that the prosecutor might not have kept apprised of all the romantic goings-on in the county. In sum, "[t]he only thing that can flow from such evidence is pure speculation." *Barbina v. Curry*, 221 W. Va. 41, 49, 650 S.E.2d 140, 148 (2007). And truth be told, these supposed smoking-gun facts prove little more than the fact that the prosecutor and the juror happen to live in the same county (a fact known to everyone already). The prosecuting attorney therefore did not engage in any misconduct in denying that he was engaged in some plot or the like with Juror Collins.

And ultimately, Petitioner makes no genuine effort to explain how any of this "misconduct" could have influenced the outcome of the trial here. In deciding whether prosecutorial misconduct warrants a new trial, the Court considers whether the behavior "rendered the trial unfair." *State v. Guthrie*, 194 W. Va. 657, 677 n.25, 461 S.E.2d 163, 183 n.25 (1995). Ill-defined "non-verbal" behavior by one juror in the jury box, and an after-the-fact denial of association from the prosecutor, would not rise to such a level as to poison the entire trial. And as the prosecuting attorney noted below, all the information found in Petitioner's post-trial motion for a new trial concerning the prosecutor's supposed ties to the juror could have been discerned from a little research with the juror questionnaire. So Petitioner is too late in trying to raise these issues now. *Cf. State v. Scotchel*, 168 W. Va. 545, 552 n.6, 285 S.E.2d 384, 389 n.6 (1981) (assertion of prejudice from juror's involvement "is not well taken since the defendant did not exercise due diligence"). Lastly, especially considering the weight of the evidence against Petitioner, no prosecutorial misconduct would have moved the needle on this verdict.

But at bottom, no prosecutorial misconduct occurred here that would warrant any relief.

III. The Court Clerk Did Not Act Inappropriately.

Petitioner accuses the circuit court clerk, Pamela Starsick, of misconduct of her own. In particular, she argues that the clerk violated the "spirit" of voir dire by not identifying Juror Collins as her sister and by "allowing [Juror Collins] to conceal relationships with each witness." Pet'r's Br. 10-11. Petitioner also says that the clerk was somehow participating in the "inappropriate behavior" during trial. *Id.* at 11. Petitioner is wrong on all counts.

First, Petitioner provides no authority suggesting that a circuit clerk has a duty to volunteer information on a potential relationship with one of the jurors. As noted above, the clerk of the circuit court plays an important but somewhat peripheral role in the conduct of criminal trials, so it's not even clear how these relationships could influence a result. Thus, the circuit court clerk did not violate any legal duty in failing to interject at trial and note her either relationship with her sister or with another juror, Jason Stewart (even assuming that relationship existed). Further, had Petitioner asked the jurors questions about their relationships with court staff, she could have received all the information she supposedly needed, including information about relationships with the court clerk. Her failure to ask about those connections during voir dire suggests that they are not as material as she now suggests.

Second, the circuit court clerk did not conceal anything. As already explained, Juror Collins answered none of the questions during voir dire inappropriately. Thus, even if the clerk would have had some obligation to intervene, the record does not establish that Juror Collins was engaged in misconduct that should have been called out by the clerk. And here again, Petitioner engages in a healthy dose of speculation, insisting—without any record citation or other evidence—that the clerk possessed actual knowledge of the many distant relationships that Petitioner insists were so problematic. But Petitioner has once again failed to provide legal authority for the notion that the clerk would have a duty to disclose all this information even if she

did know it. The circuit court clerk is an officer of the court who in turn bears certain obligations. *See State v. Nixon*, 178 W. Va. 338, 341, 359 S.E.2d 566, 569 (1987). But to carry her burden of showing that the circuit court abused its discretion in denying her a new trial, Petitioner must do more than just hand-wave at those obligations; she must directly explain why they were violated here. She has not.

Third, no "misbehavior" by the clerk during trial warrants a new trial. On this point, Petitioner appears to be challenging the purported non-verbal communication again. This time, the clerk is cast as the supposed communicator with Juror Collins. Whatever the narrative, the answers remain the same. The circuit court was in the best position to observe what occurred and respond to any actions that required intervention. It never saw fit to do so. All relevant parties—save Petitioner's counsel—have either denied that "communications" or "misbehavior" occurred or simply never mentioned it at all. And Petitioner's counsel never raised the issue before deliberations, suggesting that the supposed communications have been overstated. And this last fact proves particularly decisive. In *Darab v. United States*, 623 A.2d 127, 143 (D.C. 1993), for example, all parties conceded that the clerk had done what Petitioner now alleges here: she was laughing, gesturing, and communicating with jurors—despite multiple instructions not to. But the court denied relief because, among other reasons, the defendant's counsel had not asked for "additional remedies." "[T]he extent to which the defense did not pursue additional remedies at trial," the court explained, "is some indication that the defense did not view the courtroom clerk's conduct as prejudicing the jury." *Id.* Add on that Petitioner has never shown prejudice from this supposed conduct, and the same result follows here. *See also, e.g.*, *Tibbets v. State*, 582 So. 2d 74, 75-76 (Fla. Dist. Ct. App. 1991) (finding that new trial was unwarranted even though the jury

foreperson sent a letter noting that clerk of court had been "distracting" by "making faces at defense counsel during the trial").

The clerk did not engage in any kind of misconduct.

IV. The Circuit Court Did Not Show Judicial Bias.

After an unsuccessful earlier attempt to ask this Court to remove the circuit court judge from her case, Petitioner revives the argument again that the circuit court was biased and "an impediment to Petitioner and Petitioner's counsel [sic] quest for the truth." Pet'r's Br. 10-11.

"It is axiomatic that a judge should disqualify himself or herself from any proceeding in which his or her impartiality might reasonably be questioned." *Johnson v. Case*, 243 W. Va. 382, 393, 844 S.E.2d 153, 164 (2020) (cleaned up). But a defendant cannot establish actionable bias merely by expressing disagreement with the court's rulings. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). "Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.*; *see also Belue v. Leventhal*, 640 F.3d 567, 573 (4th Cir. 2011) (describing why orders and in-court statements generally don't give rise to valid bias claims, and explaining that the few cases finding bias based on "in-trial conduct tend to involve singular and startling facts"). Indeed, even getting reversed on appeal does not "cast[] into doubt the trial judge's impartiality." *State v. Whitt*, 183 W. Va. 286, 290, 395 S.E.2d 530, 534 (1990).

In large part, Petitioner's argument reduces to simple disagreement with the circuit court's decisions on the points already discussed. She disagrees with the court's judgment that a brother-

in-law is an immediate family member. Pet'r's Br. 13. She disagrees with statements the court made during these hearings. Yet Petitioner has not established why these decisions and statements were so out of bounds that they must be regarded as evidence of impartiality. Indeed, as should be clear to this point, all the judge's decisions were correct ones. And to the extent that Petitioner's counsel felt the court was asking him for too much, he was not. The court repeatedly asked Petitioner's counsel to point to the record or authority to support his claims, which at times could seem outlandish. And he continuously failed to do that. *See* App. 80, 81, 83, 111, 167. That demand for support is not biased decisionmaking—it is wise decisionmaking.

Only one part of Petitioner's argument—concerning the adequacy of the court's "investigation"—is not just repackaged complaints from her other claims. Pet'r's Br. 12. But to be clear: the circuit court permitted substantial investigation. Despite misleading quotations from Petitioner suggesting otherwise, the record shows that Petitioner was permitted to "investigate" over two days of hearings. App. 107-81. She called and examined four witnesses. *Id.* She made substantial legal arguments, including additional arguments at the initial sentencing hearing. App. 80-86. The court then based its findings on the facts and evidence before it, while rejecting Petitioner's attempts to inject extraneous matters into the case. *See, e.g.*, App. 170 (rejecting Petitioner's counsel's accounts of how clerk-related juror issues were handled in Tucker County because "[t]he clerk in Tucker County is not here and, quite frankly, that evidence is not in the record").

Yet Petitioner now objects that she could not call the prosecutor and the clerk to testify, even though she concedes she never tried to call them. Counsel evidently assumed that "the [c]ourt would never allow it." Pet'r's Br. 12. But having failed to even preserve an objection, Petitioner cannot build reversible error on the back of her hypothetical witnesses. *See, e.g.*, *McGhee v. Smith*,

No. 15-0765, 2016 WL 3369563, at *5 (W. Va. June 17, 2016) (memorandum decision) (holding that parties could not complain about inability to call witness when they "did not attempt to call [the person] as a witness"); *Shamblin v. Nationwide Mut. Ins.,* 183 W. Va. 585, 598, 396 S.E.2d 766, 779 (1990) ("Nationwide never attempted to call a witness … Consequently, the trial court never made a ruling which denied Nationwide's presentation of further evidence.").

Petitioner also objects that she could not call jurors. Relying on *State v. Dellinger*, 225 W. Va. 736, 696 S.E.2d 38 (2010), Petitioner maintains that she had a right to probe several jurors about their purported biases and relationships. *Dellinger* suggests that jurors may be questioned, but it nowhere holds that they must be. And here, the circuit court was justifiably concerned about what Petitioner proposed, as West Virginia Rule of Evidence 606 (a rule with which Petitioner's counsel was not familiar, App. 165) precludes hearing post-verdict testimony from jurors much of the time. (That distinguishes this case from *United States v. Resko*, 3 F.3d 684, 692 (3d Cir. 1993), on which Petitioner relies, which involved questioning jurors *during* trial, *pre*-verdict.) Likewise, this Court has "emphasize[d] that not every allegation of juror misconduct requires that the challenged juror be called to testify." *State v. Jenner*, 236 W. Va. 406, 419 n.11, 780 S.E.2d 762, 775 n.11 (2015). Rather, "[t]he decision on whether to hear juror testimony depends on the facts and the accusations, and how well the accusations are supported by the moving party." *Id.*

Here, the circuit court did not abuse its discretion in finding that juror testimony was neither necessary nor appropriate. For one thing, the facts and accusations did not involve some extraneous contact during trial (like the kind seen in *Jenner*) or undeniable lying during voir dire (as seen in *Dellinger*). Rather, the accusations here involved supposed preexisting bias that could have been ferreted out during an effective voir dire. *See* App. 174 (The Court: "This is not an outside influence in regards to this case."). "[W]hile due process may require some sort of hearing

to determine whether extraneous contacts may have affected a jury's ability to be fair, the standard applies only to prejudicial extraneous contacts, and *not* to preexisting juror bias." *Arreola v. Choudry*, 533 F.3d 601, 606 (7th Cir. 2008); *see also Porter v. Zook*, 898 F.3d 408, 447 (4th Cir. 2018) (collecting authorities explaining that the preference for hearings with juror testimony "applies only to prejudicial extraneous contacts, not to preexisting juror bias"). For another, Petitioner had little support for his rather extreme allegations of court-wide malfeasance. Unlike *Dellinger*, where the petitioner had specific evidence that a juror had contacted the defendant only days before trial, 225 W. Va. at 738, 696 S.E.2d at 40, Petitioner here relied mostly on distant connections, innuendo, rumor, and speculation. When pressed for more, her counsel cited "proof … throughout the Internet." App. 85. It was reasonable for the circuit court to assume that further testimony would have been a fishing expedition premised on Facebook activity and little else. App. 118 (The Court addressing Petitioner's counsel: "[Y]ou've made some pretty spurious allegations … throughout this case. … [A]nd I think they're not supported."). Especially considering the circuit court's "duty to supervise the direct and cross-examination of each party's witnesses" and its "ability to manage the courtroom," *State v. Delorenzo*, 247 W. Va. 707, 719, 885 S.E.2d 645, 657 (2022), the circuit court did not abuse its discretion in declining to permit Petitioner to poke behind the verdict.

The circuit court thoughtfully and appropriately conducted these proceedings. It was not biased in the least.

V. No Cumulative Error Exists Here To Warrant Relief.

In a last argument, Petitioner seems to argue that the illusory problems she has described constitute cumulative error. "[T]he cumulative error doctrine is applicable only when 'numerous' errors have been found." *State v. Tyler G.*, 236 W. Va. 152, 165, 778 S.E.2d 601, 614 (2015).

Petitioner has not identified *one* error, let alone three. *Id.* (explaining cumulative error refers to more than two errors). "[B]ecause … there is no error in this case, the cumulative error doctrine has no application." *State v. Knuckles*, 196 W. Va. 416, 426, 473 S.E.2d 131, 141 (1996).

Lastly, if the Court were to disagree, then the remedy Petitioner seeks—dismissal of the indictment outright—has no basis in West Virginia law. In juror-bias cases, the remedy for a biased juror is a new trial. Petitioner tries to avoid that rule by recasting this as a prosecutorial-misconduct case. But that does her no good, either. Prosecutorial misconduct will not bar a subsequent prosecution unless the prosecution intentionally induces the need for a new trial. *State v. Elswick*, 225 W. Va. 285, 291, 693 S.E.2d 38, 44 (2010). Petitioner never meaningfully addresses, let alone tries to meet, that standard.

Remedy proves to be beside the point, anyway. Petitioner has not established juror bias, prosecutorial misconduct, judicial bias, or any other violation of law that warrants any form of relief at all.

CONCLUSION

For all these reasons, this Court should affirm the circuit court.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-513

TINA M. FRYMYER,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

I, Spencer J. Davenport, do hereby certify that the above Response Brief is being served on counsel of record by File & Serve Xpress on January 22, 2024.

/s/ Spencer J. Davenport
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