IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-107

WILLIAM BALLENGER,
Petitioner,

v.

ROBIN MILLER, Superintendent,
Huttonsville Correctional Center
Respondent.

RESPONDENT'S BRIEF

Appeal from the
Circuit Court of Cabell County
Case No. 19-C-92

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INTRODUCTION

Respondent Robin Miller, Superintendent, files this response to Petitioner's self-represented brief; Respondent filed a separate response to the brief filed by Petitioner's attorney. In his self-represented brief, Petitioner assigns three additional errors. Petitioner's self-represented brief does not comply with the Rules of Appellate Procedure because it contains no citations to the appendix record. The alleged *Brady* violation and grand jury issues lack merit and should have been raised on direct appeal, thus there is a presumption they are waived. Further, Petitioner's ineffective assistance of counsel argument does not warrant relief because he does not show that he was prejudiced.

ASSIGNMENTS OF ERROR

1. The court committed error by finding no *Brady* violation occurred.

2. The court committed error by not dismissing the indictment due to fraud and irregularities before the grand jury.

3. Ineffective assistance of counsel for not challenging the victim's identification of Petitioner.

Pet'r's Br. 5.

STATEMENT OF THE CASE[1]

A. Criminal trial.

In January 2015, Petitioner was indicted by a Cabell County grand jury for Second Degree Robbery, Malicious Wounding, First Degree Robbery, and Obstructing an Officer. App. 213, 1426-27. At the conclusion of the trial, the jury convicted Petitioner of Second Degree Robbery,

[1] The Statement of the Case in this brief is identical to the Statement of the Case in Respondent's Brief which responds to Petitioner's counseled brief.

Battery (a lesser-included offense for Malicious Wounding), and Obstructing an Officer; Petitioner was found not guilty of First Degree Robbery. App. 213, 1489-94.

The Robbery charges relate to the same victim, but charge two different acts. The Second Degree Robbery charge alleged that Petitioner took $20 from the victim under threat of bodily injury. App. 1149-50. The First Degree Robbery charge alleged that Petitioner struck the victim and took his cell phone. App. 1156-58. Petitioner's trial lasted four days, included the testimony of eleven State witnesses and Petitioner, and 51 exhibits were admitted into evidence. App. 548, 711-713, 1016.

The victim testified at trial and identified Petitioner as the person who approached him and asked for money. App. 744-747. The victim denied having any money, but eventually he threw $20 on the ground and Petitioner said "[a]w, I am going to beat your ass because you ain't got nothing but $20." App. 747. The victim said he tried to walk away from Petitioner, but the next thing he knew, he was on the ground. App. 747. The victim remembered Petitioner going in his pocket and stomping him with big brown boots while he was on the ground. App. 747. The next thing the victim remembered was waking up from a coma in the hospital. App. 751.

Rebecca Noble testified for the State as an eyewitness to the robbery who was familiar with both Petitioner and the victim. App. 565-624. Noble stated that Petitioner approached the victim, asked him for $20, and said, "you better give me the f'n money." App. 575, 583, 602. The victim did not give Petitioner $20, and Petitioner began "hitting and stomping" the victim. App. 612. When the victim did not produce any money, Petitioner hit the victim and kicked him after he fell to the ground, and told the victim he would kill him. App. 575. After the victim was struck and lying on the ground, Noble testified that Petitioner took the victim's phone out of his pocket. App. 577, 612. But Petitioner's counsel pointed out that a phone matching the description of the victim's

phone was found at the scene of the crime. App. 615-16. The victim bled profusely after the incident and Noble had to hold a towel on the victim's catheter. App. 611-12. Noble was concerned about the victim's health after the robbery and she called 911; the State played this call for the jury. App. 581.

Another eyewitness to the robbery, Vincent Cheeks, testified at Petitioner's trial. App. 656-90. Cheeks stated he was with his friends Rebecca Noble and the victim on the night in question when Petitioner approached them and asked if they "were looking for anything." App. 663. Cheeks believed this "refers to were we looking for drugs or anything that he could assist us with." App. 663. Cheeks responded they were not looking or interested in anything; and they only had $20, which Cheeks had given to his friend, the victim. App. 664. Cheeks testified he had not actually given the victim $20, but he did not want to be involved in the situation. App. 664. Petitioner insisted on getting the $20 from the victim, and the victim said, "no, we don't want anything and I am not handing you the 20." App. 665. Then Petitioner stated "you are going to give up the 20, or else." App. 665. The victim again refused and asked Petitioner to leave them alone. App. 665. Petitioner then hit the victim with a closed fist, and started beating him and stomping him after he fell to the ground. App.666. Petitioner eventually stopped beating the victim, and Cheeks did not see Petitioner take anything from the victim. App. 666-67. The victim was beaten badly and required medical attention. App. 667-68.

Several other witnesses testified about the State's investigation of the case. App. 714-1083. In addition to the evidence of Robbery and Battery, the State presented evidence that Petitioner committed the offense of Obstructing an Officer when he gave a false name to a police officer who was investigating the crimes. App. 927, 1579.

B. Recidivist trial.

After Petitioner's trial, the State filed a recidivist information based upon Petitioner's prior felony conviction for First Degree Possession of Controlled Substances in Boyd County, Kentucky. App. 213, 1503-04, 1530-40. In September 2004, Petitioner was arrested in Ashland, Kentucky after he was found in possession of "rock" cocaine. App. 1556. According to the police report and citation, an Ashland police officer was investigating a possible drug transaction in progress when he observed Petitioner in a parking lot walking toward a vehicle occupied by a man who was smoking marijuana. App. 213, 1554-59. When Petitioner noticed the officer, Petitioner dropped a plastic package containing rock cocaine. App. 213-14, 1554. Upon contact with the officer, Petitioner initially denied possession of the package but later admitted that he had purchased the cocaine for the man occupying the vehicle. App. 214, 216, 1554. Both the police report and the citation to which Petitioner pleaded guilty indicate that, factually, Petitioner possessed rock cocaine with the intent to deliver. App. 216, 1554.

In October 2004, Petitioner pleaded guilty by information to First Degree Possession of Controlled Substances in Boyd County, Kentucky Circuit Court. App. 1530-44. The information charged as follows –

> On or about the 14th of September, 2004, in Boyd County, Kentucky, the above-named Defendant unlawfully committed the offense of First Degree Possession in Controlled Substances, KRS 218A.1415, UOR 42203, a class D felony, when he unlawfully possessed a quantity of cocaine, against the peace and dignity of the Commonwealth of Kentucky.

App. 1543. After Petitioner pleaded guilty to this felony, the Boyd County, Kentucky Circuit Court sentenced Petitioner to one year in the Kentucky State Penitentiary, suspended in favor of three years of probation. App. 1503, 1530-40. In 2005, Petitioner admitted to violating his probation in

Kentucky and the Boyd County court sentenced him to one year in the custody of the Kentucky Department of Corrections. App. 1503-04, 1506-09.

The State introduced the evidence described above at Petitioner's recidivist trial, and the jury found Petitioner to be the same person convicted in Kentucky of the above-described felony offense. App. 214, 1495. Consequently, the court found Petitioner to be a habitual offender and enhanced the minimum sentence for his Second Degree Robbery conviction by five years. App. 214, 1497-98. The court also sentenced Petitioner to jail for 12 months for Battery, and 5 days for Obstructing an Officer, concurrent with each other and consecutive to his sentence for Second Degree Robbery. App. 1497-98.

C. Omnibus habeas hearing.

In July 2021, Petitioner filed an Amended Petition for Writ of Habeas Corpus and *Losh* list; and in October 2021, Petitioner filed a Supplemental Amended Petition for Writ of Habeas Corpus. App. 32-152. In relevant part, Petitioner argued that his trial attorney, Kerry Nessel, provided ineffective assistance because: 1) he did not challenge whether the State could use Petitioner's prior felony conviction from Kentucky to enhance Petitioner's sentence in a habitual offender proceeding, and 2) he did not argue that the First Degree and Second Degree Robbery charges violated double jeopardy. App. 37-43. Petitioner further argued that the cumulative effect of multiple errors violated Petitioner's right to a fair trial. App. 45-49.

The habeas court found that Petitioner's prior conviction in Kentucky for possession of cocaine is a felony, and court documents from the Kentucky case reflect that Petitioner told the arresting officer that he intended to deliver the cocaine to another person. App. 214-18. Thus, the habeas court held that the most appropriate analogue for this offense under West Virginia law is also a felony, i.e., Possession with Intent to Deliver a Controlled Substance. App. 216. Petitioner

did not raise this issue on direct appeal. *State v. Ballenger*, No. 16-0986, 2017 WL 5632824 (W. Va. Supreme Court, Nov. 22, 2017) (memorandum decision).

With regard to Petitioner's double jeopardy argument, the habeas court held that the First Degree Robbery and Second Degree Robbery charges are separate and distinct offenses because they are supported by separate acts committed by Petitioner. App. 219. The factual basis for the First Degree Robbery charge is an act of violence, in which Petitioner struck the victim several times and took his cell phone. *Id.* In contrast, the factual basis for the Second Degree Robbery charge is a threat of violence, where Petitioner threatened the victim and demanded money prior to striking him and taking his cell phone. *Id.* Further, Petitioner did not suffer multiple punishments because he was acquitted for First Degree Robbery. App. 1489-94. Thus, the State properly prosecuted Petitioner for both offenses, and Nessel was not ineffective as alleged. App. 218-20.

The habeas court also rejected Petitioner's cumulative error claim, finding no errors to support this claim. App. 221-224. The court held Nessel made an objectively reasonable strategic decision not to object during the State's opening and closing statements. App. 222. And Nessel was not ineffective when he failed to object to the admission of Noble's and Cheeks' statements at trial, because the court would have overruled any hearsay objection that Nessel may have offered. *Id.* The court further held Nessel's impeachment and cross-examination of the victim was reasonable, even though he would approach them differently now because "[h]indsight … is 20/20." App. 223. Petitioner presented no evidence that Nessel's failure to object to a photo array was unreasonable. App. 223-24. Rejecting the cumulative error claim, the court reasoned that even if "any of these objections or arguments should have been made, Petitioner nevertheless received a fair trial when considering the evidence" presented and the trial as a whole. App. 224.

SUMMARY OF ARGUMENT

First, the self-represented Petition in this case should be disregarded because it does not contain any citations to the appendix record and, thus, does not comply with the Rules of Appellate Procedure. Second, the trial errors presented in this self-represented Petition are waived because they could have been raised on direct appeal, but were not. Third, if the State did not disclose impeachment evidence relating to witness Vincent Cheeks, this error did not change the outcome of the trial. Fourth, Petitioner presents no evidence of willful, intentional fraud before the grand jury, and he did not challenge his indictment before trial. Fifth, Petitioner's counsel was not ineffective for failing to challenge the victim's out-of-court identification of Petitioner.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule 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. Accordingly, this case is appropriate for resolution by memorandum decision.

ARGUMENT

A. The self-represented Petition does not comply with the Rules of Appellate Procedure, and this Court should reject the arguments presented therein.

Petitioner assigns three errors in his self-represented Petition, but he does not cite the appendix record in support of his arguments. The self-represented Petition incorporates the Statement of the Case from the Petition filed by Petitioner's attorney, but this does not contain appendix citations that support the additional arguments asserted in the self-represented Petition.

Petitioner's self-represented brief does not comply with the Rules of Appellate Procedure and this Court should reject the arguments therein on this basis because self-represented litigants must comply with the rules. *See State v. Bays*, No. 21-0491, 2022 WL 1694067 at *4 (May 26, 2022) (memorandum decision). Rule 10 of the West Virginia Rules of Appellate Procedure

requires that all briefs contain a Statement of the Case "[s]upported by appropriate and specific references to the appendix or designated record." W. Va. R. App. P. 10(c)(4). Moreover, the Petitioner's brief "must contain an argument clearly exhibiting the points of fact and law presented, . . . citing the authorities relied on," and must also "contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal." W. Va. R. App. P. 10(c)(7). Although this Court will "liberally construe briefs in determining issues presented for review, issues ... mentioned only in passing but [that] are not supported with pertinent authority, are not considered on appeal.'" *State v. Larry A.H.*, 230 W. Va. 709, 716, 742 S.E.2d 125, 132 (2013) (quoting *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996)). "[A] skeletal argument, really nothing more than an assertion, does not preserve a claim. . . Judges are not like pigs, hunting for truffles buried in briefs." *State v. Surber*, 228 W. Va. 621, 633, 723 S.E.2d 851, 863 (2012) (internal quotations and citation omitted). Moreover, "[a]n appellant must carry the burden of showing error in judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment. Syl. Pt. 4, *State v. Myers*, 229 W. Va. 238, 728 S.E.2d 122 (2012) (internal quotations and citations omitted). In this Court's December 10, 2012 Administrative Order, it noted that the Rules of Appellate Procedure "are not mere procedural niceties; they set forth a structured method to permit litigants and this Court to carefully review each case." Administrative Order, *Filings That Do Not Comply with the Rules of Appellate Procedure* (Dec. 10, 2012). In maintaining this exacting approach, this Court has routinely refused to address inadequately supported claims. *See Porter v. Logan Co. Fire Dep't*,, No. 15-0520, 2016 WL 1735243, at *2 n.2 (W. Va. Supreme Court Apr. 29, 2016) (memorandum decision)

(disregarding a portion of the petitioner's argument because he failed to cite to the 1,400-page appendix record); *Jones ex rel. Estate of Jones v. Underwriters at Lloyd's, London*, No. 12-0293, 2013 WL 3185081, at *2 (W. Va. Supreme Court, June 24, 2013) (memorandum decision) ("[W]e require that arguments before this Court be supported by 'appropriate and specific citations to the record on appeal.'" (quoting W. Va. R. App. P. 10(c)(7)).

In support of his *Brady* claim, Petitioner claims "the police knew that [witness] Cheeks had a warrant for failure to appear" when he gave his statement to police, but Petitioner does not cite to the appendix to establish this fact. Pet'r's Br. 5. Similarly, Petitioner does not cite the appendix to support his argument that the indictment was procured through false testimony. Pet'r's Br. 7-8. Further, Petitioner does not support his arguments regarding misconduct before the grand jury or ineffective assistance with any citations to the appendix record. Pet'r's Br. 9-12. Because the self-represented Petition in this case contains no citations to the appendix record, this Court should dismiss these arguments because the brief does not comply with the Rules of Appellate Procedure.

B. This Court should find the trial errors presented in the self-represented Petition are waived because they could have been raised in Petitioner's direct appeal.

Petitioner argues that the following alleged errors occurred that justify reversal of his convictions: 1) the State failed to disclose evidence that could have been used to impeach witness Vincent Cheeks (Pet'r's Br. 5-6); 2) the superseding indictment was obtained through false testimony from Officer Bentley (Pet'r's Br. 7-8); 3) the State knowingly presented incomplete and misleading testimony to the grand jury (Pet'r's Br. 9-10); 4) failure to impeach the victim with his out-of-court statement (Pet'r's Br. 12). Petitioner could have raised these issues on direct appeal, but did not. *State v. Ballenger*, No. 16-0986, 2017 WL 5632824 (W. Va. Supreme Court, Nov. 22, 2017)(memorandum decision).

Any ground that a habeas petitioner could have raised on direct appeal, but did not, is presumed waived. Syl. Pt. 1, *Ford v. Coiner*, 156 W. Va. 362, 196 S.E.2d 91 (1972). "[T]he burden of proof rests on petitioner to rebut the presumption" that he waived this ground for habeas relief. Syl. Pt. 2, *Id.* Because Petitioner did not present these issues in his direct appeal, there is a rebuttable presumption they are waived and should not be considered by this Court. Syl. Pt. 2, *Ford v. Coiner*, 156 W. Va. 362, 196 S.E.2d 91 (1972). The Petitioner has not rebutted the presumption of waiver, and this Court should deny relief on these grounds.

C. If the State did not disclose impeachment evidence relating to witness Vincent Cheeks, this error did not change the outcome of the trial.

Petitioner claims, without citation, that "the police knew" witness Vincent Cheeks had a warrant for his arrest when he gave his statement to police, but they did not arrest him. Pet'r's Br. 5. Citing *Brady v. Maryland*, Petitioner claims that this is an "inducement" that the State should have been disclosed prior to trial. 373 U.S. 83 (1963); Pet'r's Br. 6.

> There are three components of a constitutional due process violation under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield,* 169 W.Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.

Syl. Pt. 2, *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007). Evidence is material "if there is a reasonabl[e] probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Morris*, 227 W. Va. 76, 85, 705 S.E.2d 583, 592 (2010) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Even if Petitioner is correct that Cheeks had a warrant for failing to appear in court and the State did not provide it in discovery, he was not prejudiced. Cheeks was not the only eyewitness to testify about Petitioner's involvement in the crimes in question. Both Petitioner and Rebecca

Noble testified and provided an account of events that was largely consistent with Cheeks' testimony. App. 565-624, 740-81. Many other witnesses testified about the State's investigation and 51 exhibits were admitted into evidence. App. 548, 711-713, 1016. Even without Cheeks' testimony, there is sufficient evidence to sustain Petitioner's conviction. Thus, Petitioner cannot prove that the result of his trial would have been different if he had known that Cheeks had a bench warrant when he gave his statement to police, but the police did not arrest him. The court should deny relief on this issue.

D. Petitioner presents no evidence of misconduct or willful, intentional fraud before the grand jury, and he did not challenge his indictment before trial.

Without citation to the appendix record, Petitioner claims that Officer Bentley changed his testimony before the grand jury when the State sought a superseding indictment. Pet'r's Br. 7-8. In essence, Petitioner complains that Officer Bentley provided two different versions of the Robbery, one that involved Petitioner taking the victim's cell phone, and the other involving Petitioner taking $20. Petitioner claims that this "shift" in Bentley's testimony is evidence of willful, intentional fraud. Pet'r's Br. 8. Petitioner further claims that Bentley did not "present accurate and complete testimony" regarding the robbery. Pet'r's Br. 9-10.

"Challenges to an indictment based on irregularities during grand jury deliberations must be raised under Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure prior to trial." Syl. Pt. 4, *State v. Bongalis*, 180 W. Va. 584, 378 S.E.2d 449 (1989).

> Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure requires that a defendant must raise any objection to an indictment prior to trial. Although a challenge to a defective indictment is never waived, this Court literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted.

Syl. Pt. 1, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996). Except for willful, intentional fraud, "the law of this State does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury, either to determine its legality or its sufficiency." Syl. Pt., *Barker v. Fox*, 160 W. Va. 749, 238 S.E.2d 235 (1977). "Dismissal of an indictment is appropriate only if it is established that the violation substantially influenced the grand jury's decision to indict or if there is grave doubt that the decision to indict was free from substantial influence of such violations." Syl. Pt. 6, *State ex rel. Pinson v. Maynard*, 181 W. Va. 662, 383 S.E.2d 844 (1989) (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261-62 (1988) (internal quotations omitted).

In this case, Petitioner did not challenge his indictment prior to trial, and consequently, this Court should decline to review this issue. Syl. Pt. 4, *State v. Bongalis*, 180 W. Va. 584, 378 S.E.2d 449 (1989). Even if this Court reviews this issue, Petitioner's arguments fail.

To the extent that Petitioner complains Bentley provided different versions of what happened during the robbery, this fit the State's varying theories of how the robbery occurred. The State "has . . . broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case." *Ball v. United States*, 470 U.S. 856, 859 (1985) (holding that a simultaneous prosecution of overlapping crimes is permissible, but the defendant can only be convicted and sentenced for one of the crimes). This discretion includes the authority to charge Petitioner with two types of Robbery. In this case, the State pursued two alternate theories of Robbery. For the First Degree Robbery charge, the State attempted to prove that Petitioner struck the victim and took his cell phone. App. 973-74, 1157-59. And the Second Degree Robbery charge alleged that the victim gave Petitioner $20 under threat of bodily injury. App. 973-74, 1149-50. The jury was properly instructed on both charges. App. 1149-50, 1157-59. Because the State has

discretion to prosecute criminal cases, pursuing two alternate Robbery charges was permissible, even though Petitioner could not in the end stand convicted of both offenses. *Ball v. United States*, 470 U.S. at 861-64 (1985). Given the State's alternate theories of robbery, there is no evidence of willful, intentional fraud in procurement of the indictment in this case, and this Court should deny relief.

Petitioner further complains that Bentley did not give a "full accounting of the incident" to the grand jury regarding whether Petitioner received $20 because of the robbery. Pet'r's Br. 9-10. But the sufficiency of proof given during grand jury proceedings "cannot be inquired into to invalidate an indictment found by a lawfully constituted grand jury. The presumption is that every indictment is found upon proper evidence. If anything improper is given in evidence before a grand jury, it can be corrected on the trial before the petit jury." *State ex rel. State v. Hummel*, 247 W. Va. 225, __, 878 S.E.2d 720, 728 (2021) (quoting *Noll v. Dailey*, 72 W. Va. 520, 522, 79 S.E. 668, 669 (1913)). Even perjured testimony before a grand jury can "easily be corrected during a trial with its incumbent procedural and evidentiary safeguards." *State ex rel. Pinson v. Maynard*, 181 W. Va. 662, 667, 383 S.E.2d 844, 849 (1989). Petitioner has not shown any misconduct before the grand jury, and this Court should deny relief.

E. Petitioner's counsel was not ineffective for failing to challenge the victim's out-of-court identification of Petitioner.

Without citation to the appendix record, Petitioner complains that his attorney was ineffective because he did not object to the victim's in-court identification of Petitioner or a photo array that supposedly tainted his out-of-court identification of Petitioner. Pet'r's Br. 10-12.

> In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the

> crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Syl. Pt. 1, *State v. Taylor*, 200 W. Va. 661, 490 S.E.2d 748 (1997). Petitioner has not shown that the photo array in question was suggestive, nor does he address the victim's opportunity to view Petitioner at the time of the crime, the victim's degree of attention, the accuracy of the victim's description, the level of the victim's certainty, or the length of time between the crime and confrontation. *See id.* Petitioner fails to show that there was an error, or that his attorney's inaction was objectively unreasonable. Likewise, Petitioner cannot show prejudice because Petitioner's account of events at trial was largely consistent with the evidence presented at trial, including the testimony of eyewitnesses Cheeks and Noble. App. 565-624, 656-90.

Petitioner has not proven that the existence of error or that his attorney's inactions were objectively unreasonable. Thus, this Court may dismiss these claims without analyzing for prejudice. *See* Syl. Pt. 5, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995) (holding that this Court may dispose of an ineffective assistance of counsel claim "based solely on a petitioner's failure to meet either prong of the test."). Since there was no error, Petitioner should obtain no relief on this issue.

CONCLUSION

For the reasons stated, this Court should deny the relief requested by Petitioner.

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ROBIN MILLER, Superintendent,
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CERTIFICATE OF SERVICE

I, Jason David Parmer, do hereby certify that on the 10th day of July, 2023, I served a true and accurate copy of the foregoing ***Respondent's Brief*** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure, and further, a courtesy copy was mailed to said individuals at the addresses below:

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