IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 24-234

MICHAEL LANE PINKERMAN,

Petitioner,

v.

Appeal from a final order of the Circuit Court of Cabell County (Case No. 20-F-226)

STATE OF WEST VIRGINIA,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF APPEAL

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I. ASSIGNMENTS OF ERROR

1. The Petitioner contends the circuit court erred in denying the Petitioner's motion to suppress based upon a warrantless search of a pistol while at the Petitioner's home.

2. The Petitioner contends the circuit court erred in denying the Petitioner's motion to suppress based on the provision of false information to the magistrate in the application for the search warrant.

3. The Petitioner contends the circuit court erred in denying his request for an evidentiary hearing regarding misrepresentations made to the grand jury by the State.

4. The Petitioner contends the circuit court erred in denying Petitioner's two challenges for cause based upon close relationships between the prospective jurors and law enforcement officers intimately connected with the case.

II. STATEMENT OF THE CASE

The State charged the Petitioner with a six-count indictment entered October 15, 2020. The indictment charges the Petitioner with two counts of “attempted first degree murder”, two counts of “malicious assault on a law enforcement officer,” one count of “wanton endangerment” and one count of “obstructing an officer.” The grand jury returned a true bill based on testimony presented to it on October 14, 2020, by the Cabell County Prosecuting Attorney as well as First Sergeant Trooper Gregory N. Losh and Cabell County Sheriff’s Deputy Nate Rogers. The events giving rise to the charges occurred on October 30, 2019. Appx. at 13 and Grand Jury Transcript.

On October 30, 2019, members of the Cabell County Sheriff’s Department Detective Unit arrived at a home owned by the Petitioner. The purpose of the officers’ visit to the Petitioner’s home was to speak with Michael Lane Pinkerman, II, the Petitioner’s 26-year-old son who lived at the residence (“noon visit”). Feb. 21, 2023 Hearing Transcript at 20. The officers travelled to the home for the dual purpose of an alleged welfare check on Mr. Pinkerman, II and to speak about a gun being fired into the Ona Volunteer Fire Department on October 28 or 29, 2019. This was a warrantless “knock and talk” type of visit. Upon the officers’ arrival and after knocking on various doors to the home, Mr. Pinkerman, II, exited the rear door of the home and was allegedly holding a pistol. *Id.* at 22. One of the officers directed Mr. Pinkerman, II to put the firearm to the side. Mr. Pinkerman, II complied with the directives by making the gun safe and placing it on a stack of wood. An officer then escorted Mr. Pinkerman, II to converse with him privately. Subsequently, another officer seized the firearm, moved the firearm to a different location, manipulated the firearm and took various photographs of the firearm in different positions for the purpose of identifying the specific firearm for investigative purposes. The subject firearm was lawfully owned by the Petitioner.

The officers exited the Petitioner's home and curtilage. The officers then used the identifying information gathered from the firearm while it was being manipulated and photographed to conduct a rudimentary investigation. The investigation included contacting a government official with "dispatch" or "911" to run the firearm through National Crime Information Center (NCIC) using numbers on the firearm found and preserved by the officer's search of the firearm.[1] The "dispatch" operator informed the officer that the NCIC database indicated the firearm was stolen. However, this status was not verified by the investigating officers. The officers knew the subject firearm's location at the Petitioner's residence, but did not confirm it was a stolen firearm through NCIC or otherwise.

A law enforcement officer then executed an affidavit application seeking a search and seizure warrant. The purpose of the warrant was to search the Petitioner's home and to seize the following:

1. A Berretta, 9mm Pistol Identified by Serial Number 934648765490
2. Any Magazines, paperwork, receipts or any items related to the Beretta 9mm pistol listed above.

Appx. at 63.

The affidavit expressly states it was being submitted "for the limited purpose of obtaining a search warrant for a stolen gun at Mr. Pinkerman's residence[.]" In reliance upon the officer's

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[1] "Criminal justice agencies enter records into NCIC. Those records are available to other law enforcement agencies nationwide. For example, an officer can search NCIC during a traffic stop. The system responds instantly and tells the officer if the vehicle is stolen or the driver is wanted. A positive response from NCIC is not probable cause for an officer to take action. Agencies must verify the information is accurate and up to date before taking action." See https://le.fbi.gov/informational-tools/ncic

affidavit, a magistrate signed a search warrant authorizing the search of the Petitioner's home for the purpose of seizing the items listed hereinabove. The search warrant was based on materially false information provided by the officers seeking the warrant.

The Cabell County Sheriff's Department uses the warrant as a means to return to the Pinkerman home to address the Petitioner's son. The Petitioner did not have a firearm in his possession and did not discharge a firearm during law enforcement's attempt to execute the search warrant. As law enforcement attempted to forcefully enter the Petitioner's home, the Petitioner's adult son walked from his bedroom into view of law enforcement officers who were positioned outside of the Petitioner's home. The Petitioner's son was wearing nothing more than his boxer style underpants. The State alleges the Petitioner's son brandished a pistol. The moment law enforcement saw the pistol in the son's hand, shooting occurred which resulted in the almost immediate death of the Petitioner's son. Further, two law enforcement officers sustained nonlethal gunshot wounds which were allegedly fired from the pistol held by the Petitioner's son. Petitioner was also grazed by a bullet as he attempted to open the door as shooting commenced. Prior to arriving at the door to Petitioner's home, law enforcement did not attempt to contact the Petitioner in any manner about the stolen firearm or otherwise. The law enforcement officers arrived heavily armed, with a battering ram, a sniper and "S.W.A.T." gear.

The grand jury presentation was more than 11 months after the search warrant was executed. Nevertheless, the State misrepresented to the grand jurors that the firearm was stolen. On multiple occasions during grand jury testimony the State misrepresents the pistol was stolen. West Virginia State Trooper Losh testified as follows:

> [T]hey come to find out that it was reported **stolen**. It was in the national database, and it was **stolen** out of Gilbert, Arizona. So you wonder how guns get from one place to the other – **stolen** stuff. It's crazy. I don't know.

* * * * *

But that was the reason that they were going to go back to the house that night, the **stolen** gun that he was in possession of and the warrant that was probably going to be – you know, the warrant issued for him receiving or – you know, being in possession of that **stolen** gun.

* * * * *

That's the only reason they're there. They end up finding out the gun is **stolen**.

* * * * *

So they – so that was the noon meeting. They run – pistol **stolen**. We get the search warrant for the pistol and him and all that, going back at 6:00 that evening.

* * * * *

Prosecuting Attorney: So did they come back and discover that the weapon that he has was **stolen**?

Trooper Losh: Yes. They knew that shortly after leaving the house because they took a picture – I'm just – I'm giving – around about noon. They take a picture of that gun that they had him sit down that he come out with. And they run it. It comes back **stolen**.

Prosecuting Attorney: So as a result of that, when they go back a second time, they go in – was it pursuant to a search warrant?

* * * * *

A grand juror also questioned Sheriff's Deputy Nate Rogers about the warrant as follows:

Grand Juror: The warrant for – the warrant was issued for what to return at 6:00 p.m.?

Deputy Rogers: It was to go – so they find out – they go at noon. They find out that gun is **stolen**. Later, after they leave – they take a picture of it. He says, "Get out." They leave. They take that picture and they look at it, run the serial numbers. Well, it's **stolen**. So now they go back for a search warrant to get – to find that gun in the house.

Contrary to the above representations, the Petitioner and his son were not in violation of any law related to the subject firearm. The officers only reason for being at the Petitioner's home was the pistol, which was lawfully owned by the Petitioner for almost two decades.

The jury trial in this matter commenced with voir dire on January 23, 2024. During voir dire prospective jurors were asked whether they knew any of the listed witnesses. Prospective Juror Tucker raised her hand indicating she knows Brady Hinchman. The following exchange takes place:

Prosecuting Attorney:	How do you know him?
Prospective Juror:	I'm friends with his mom and he grew up with my son. They went to high school together. But we don't discuss cases or anything like that.
Prosecuting Attorney:	Okay. Any reason why that would prevent from you being fair and impartial?
Prospective Juror:	(Nonverbal response; negative nod.)
Prosecuting Attorney:	Have to answer.
Prospective Juror:	No.

* * * * *

Mr. Thomas Peyton:	Ms. Tucker. Yes, ma'am. You were friends – did you say with one of the witness's mothers?
Prospective Juror:	Yes.
Mr. Thomas Peyton:	Which witness was that?
Prospective Juror:	Brady Hinchman.
Mr. Thomas Peyton:	Were you acquainted with any of the other witnesses that the judge read off?
Prospective Juror:	(Non verbal response; negative nod.)
Mr. Thomas Peyton:	How close friends are you with his mother?

Prospective Juror: (Inaudible.)

The Court Reporter: I can't – she's going to have to stand up or speak louder. I can't hear her.

Mr. Thomas Peyton: The court reporter is sitting down. She has to type everything we say.

Prospective Juror: Our sons went all through school together.

Mr. Thomas Peyton: So you have a son that's the same age as –

Prospective Juror: Yeah. As Brady.

* * * * *

Mr. Thomas Peyton: And were they friends growing up?

Prospective Juror: Yes. She would babysit or I would babysit, one or the other.

Mr. Thomas Peyton: Have you had any discussions with her about this case?

Prospective Juror: No.

The Petitioner timely moved to strike Prospective Juror Tucker for cause. The state did not object. The Court ruled as follows:

Trial Court: Okay. So we just have the one that you moved to strike for cause and then the State didn't necessarily object to. I still have an issue with striking her for cause because she – I think she qualified herself by saying that she could be fair and impartial. I don't think she rises to the level of giving anywhere near the type of answer that I would normally strike for cause where they say I would lean to believe him more. She said she wouldn't believe him more or believe him less. So I think she qualified herself. I certainly understand if the defense wants to keep her on the radar for a strike, but I don't think she's for cause at this point.

January 23, 2024 Trial Transcript at 43-47 and 57-58.

Prospective Juror Tucker babysat the State's witness, Brady Hinchman, as a child; her son of the same age attended school with Officer Hinchman; her son was friends with Officer

Hinchman during their childhood; and she is friends with Officer Hinchman's mother, who also babysat for Prospective Juror Tucker's son. Further, the State did not object to the motion to strike for cause. The Petitioner was forced to utilize one of his statutorily entitled preemptory strikes on Prospective Juror Tucker. The Petitioner was left with no choice but to use a strike on Prospective Juror Tucker because Officer Hinchman was a key witness for the State. In particular, the State called Brady Hinchman as a witness on the second day of trial. He was the third in line of officers attempting to enter the Petitioner's home under the authority of the search warrant.

Hinchman provides detailed testimony claiming the Petitioner was holding the door shut despite instructions to open the same. He also claims the door opened during the interaction and the Petitioner "slammed the door back." When the gunfire begins, Hinchman indicates he had "auditory exclusion. That's when you're in high-stress situation, you don't hear -- everything kind of goes into slow motion." January 24, 2024, Trial Transcript of Hinchman testimony at 11. Hinchman continues by describing for the jury an exchange of gunfire in which his fellow officers were shot. Hinchman testified as follows: "So I turn and I look at Nate and I said, Look, if I get shot in the face, please drag me out of this house; I don't want to die in here, but I'm going to go. He said, All right. I've got you." *Id*. at 17. This type of testimony was anticipated by defense counsel and, certainly, the prosecuting attorney. This is likely why the State did not object to the motion to strike Prospective Juror Tucker for cause. It is difficult to imagine Prospective Juror Tucker being unbiased when hearing this type of emotionally charged testimony from her son's friend, her friend's son and someone she has known most of his life.

The Petitioner also moved to strike Prospective Juror Freeman for cause. January 23, 2024 Trial Transcript at 15-16. Prospective Juror Freeman was friends with another officer on the scene, Detective Preston Stephens. Ms. Freeman attended public school as his classmate from elementary school through high school. They also attended church together. They lived a couple houses from each other when they were growing up as children. *Id*. at 44. Prospective Juror Freeman has preconceived notions about the facts of the case from media reports and her nephew is a local law enforcement officer whom she thinks was called to the scene of the incident. *Id.* at 13 She also confirmed she has family members that live close to the scene of the shooting. *Id.* at 14. The challenge for cause was denied by the trial court.

The jury trial progressed over the trial week with the jury deliberating over two separate weekdays. Ultimately, the jury returned a verdict of guilty to count 6: obstructing an officer; not guilty to counts 3 through 5: wanton endangerment and malicious assault x 2; and the jury was deadlocked as to counts 1 and 2: attempted murder x 2. When the verdict was rendered, the trial court revoked Petitioner's bond and remanded him to custody. On March 11, 2024, the trial court denied post-trial motions and sentenced Mr. Pinkerman to the maximum term of incarceration: 12 months. Additionally, the State moved to dismiss the two attempted murder charges with prejudice. The Petitioner did not object and the trial court granted said motion. Appx. at 92. Therefore, this appeal seeks reversal of Petitioner's conviction of obstructing an officer.

III. SUMMARY OF ARGUMENT

The Petitioner contends the circuit court erred in denying the Petitioner's motion to suppress based upon a warrantless search of a pistol while at the Petitioner's home. The officers manipulated the firearm after it was rendered safe by the occupant of the home. As a result of manipulating and taking photographs of the pistol, the officers contacted dispatch to convey identifiers from the pistol. The information conveyed to dispatch resulted in the application for and issuance of a search warrant that led to the shooting at Petitioner's home.

The Petitioner contends the circuit court erred in denying the Petitioner's motion to suppress based on the provision of false information to the magistrate in the application for the search warrant. In particular, the officers involved operated with a reckless disregard for the truth when they informed the magistrate the pistol was a stolen firearm, when, in fact, it was lawfully owned and possessed by the Petitioner and his son.

The Petitioner contends the circuit court erred in denying his request for an evidentiary hearing regarding misrepresentations made to the grand jury by the State when the prosecuting attorney and the grand jury witnesses tell the jurors the pistol was stolen when they knew the pistol was rightfully owned by the Petitioner and lawfully possessed by his son.

The Petitioner contends the circuit court erred in denying Petitioner's two challenges for cause based upon close relationships between the prospective jurors and law enforcement officers intimately connected with the case. The proper remedy for an appellant or criminal defendant at trial should be revisited by the Court.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner asserts that oral argument is necessary because the case involves a multitude of facts that may be more thoroughly addressed at oral argument. Further, Petitioner is requesting clarification of existing precedent as applied to the facts of this case in relation to denied challenges for cause of prospective jurors.

V. ARGUMENT

ASSIGNMENTS OF ERROR

1. The Petitioner contends the circuit court erred in denying the Petitioner's motion to suppress based upon the warrantless search of a pistol while at the Petitioner's home.

The trial court erred in upholding the search warrant used by law enforcement as justification for raiding the Petitioner's home with a S.W.A.T. style tactical team. The issue involves the government's search and seizure of a pistol at the Petitioner's residence without a warrant or exigent circumstances. The information gleaned from that search and seizure was used to obtain the subject search warrant. The handling, manipulating and photographing of Petitioner's pistol while visiting his home constitutes an unlawful search and seizure.

The object of the search warrant was a stolen firearm which was in the possession of the Petitioner's adult son at the Petitioner's home earlier the same day as the shooting. Neither the Petitioner or his spouse were home during the noon visit by law enforcement when the search of Petitioner's pistol occurred. Further, neither Petitioner or his spouse had any knowledge law enforcement had any interaction with their son or his activities in the 2-3 days leading to the time he was killed in the shooting. On the day of the shooting, Petitioner and his wife were at a monastery in Wayne, West Virginia, where they volunteer their time. By all accounts, the Petitioner was in the restroom while his wife finished making dinner when the Cabell County Sheriff's deputies begin a raid of the home that evening with a battering ram, positioned sniper, multiple firearms directed at both Petitioner and his wife and wearing tactical S.W.A.T. gear. This was far different from the "knock and talk" method used by law enforcement earlier the same day when Petitioner's son made the pistol safe and placed it to the side as directed by law enforcement.[2] The Petitioner had no idea this was coming because he was living lawfully inside his home. The

[2] If the object was to acquire a stolen firearm, it is unclear why law enforcement did not attempt some further communication with the Petitioner as owner and occupant of the home. Even a rudimentary review of readily available public records would disclose the Petitioner owned the home and vehicles despite the presence of his 26-year-old son during the noon visit. If they desired possession of the firearm, the tactics used during the noon visit were successful and there is no explanation for why that tactic was not utilized in some form prior to raiding a home with an innocent family and their pets inside.

Petitioner did not have a firearm in his possession and did not discharge a firearm during law enforcement's attempt to execute the search warrant.

Prior to arriving at the door to Petitioner's home, law enforcement did not attempt to contact the Petitioner in any manner about the "stolen" firearm or otherwise. As the United States Supreme Court of Appeals noted, one of the interests in notifying the homeowner of the search warrant in anticipation of voluntary compliance "is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. *See, e.g., McDonald v. United States*, 335 U.S. 451, 460-461, 69 S. Ct. 191, 93 L. Ed. 153 (1948) (Jackson, J., concurring). *See also Sabbath*, 391 U.S., at 589, 88 S. Ct. 1755, 20 L. Ed. 2d 828; *Miller*, 357 U.S., at 313, n. 12, 78 S. Ct. 1190, 2 L. Ed. 2d 1332." *Hudson v. Michigan*, 547 U.S. 586, 126 S. Ct. 2159, 165 L.Ed.2d 56 (2006).

Ordering the Petitioner's son to put down the pistol in addition to seizing and manipulating the pistol for the purpose of investigating and photographing the firearm was an unconsented to search. The United State Supreme Court of Appeals held as follows in *Arizona v. Hicks*, "The policeman's actions come within the purview of the Fourth Amendment. The mere recording of the serial numbers did not constitute a "seizure" since it did not meaningfully interfere with respondent's possessory interest in either the numbers or the [firearm]. However, the moving of the equipment was a "search" separate and apart from the search that was the lawful objective of entering the apartment. The fact that the search uncovered nothing of great personal value to respondent is irrelevant." Syl. Pt. 1, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).

In *Hicks*, the Supreme Court noted the "distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches is much more than trivial for purposes of the Fourth Amendment." 480 U.S. at 325. A search is a search, even if it happens to disclose nothing but the [additional identifiers on a pistol.] *Id.* The analysis is fact based. In the case at hand, law enforcement approached the rear door of the Pinkerman home without a warrant. The Petitioner's 26-year-old son exited the door with a pistol in hand. He was lawfully permitted to possess that firearm at the time. Law enforcement ordered the son to put the pistol down. He follows commands emptying the gun of bullets, including the bullet in the chamber, and placing the pistol to the side with the clip extruded and bullet to the side. The gun also had a safety switch that was engaged when Petitioner's son placed the pistol on the wood pile. February 21, 2023 Hearing Transcript at 48-49, 151-152 and Exhibit Photographs. One officer then escorts the son to a different area of the property likely around 10-15 feet from the initial interaction and beyond the stacked firewood. *Id.* at 37 and 49-50. Officer Vincent was also standing between the pistol and the officer meeting with meeting with the son. The gun was clearly safe at that point and is not immediately incriminating. Without consent and the with the owner separated from the pistol by order of law enforcement, other members of law enforcement seized the firearm and maneuvered it in order to take photographs for investigative purposes. These photographs were utilized in securing the search warrant. According to the deputies on scene for the noon visit, Petitioner's son's emptying the chamber and removing the clip rendered it safe. *Id.* at 34, 112 and 118.

The United States District Court for the Southern District of Ohio recently addressed a synonymous issue. In *United States v. Thompson*, 553 F.Supp.3d 429 (N.D. Ohio 2021), the Court addressed a situation where law enforcement obtained an arrest warrant for the defendant on charges of robbery and burglary. The defendant "came out the front door [of his residence.] On seeing the officers, he retreated back inside and shut the door. On gaining entry, the officers encounter the defendant and another individual. They conducted a protective sweep, finding neither other occupants or contraband." *Id.* at 431-432. An officer noticed a shotgun under the couch. Law enforcement suspected it was stolen, took the gun from under the couch, determined its serial number, called the Detective Bureau and only then learned the gun was stolen. *Id.* The defendant moved to suppress arguing the legality of the firearm search and seizure.

The dispositive question is whether the shotgun's "incriminating nature [was] immediately apparent." *Id.* at 432. The *Thompson* court noted law enforcement picked up the gun to view the serial number. "This seizure and inspection preceded his ultimate determination that the defendant . . . could not lawfully possess a shotgun." Id at 433. Firearms, by their mere appearance, are not automatically incriminating. *Id.* The officers in the case at hand clearly understood they needed additional information from the firearm in order to investigate. Therefore, they picked up the gun, moved it and turned it over to view all sides for the purpose of investigative photography. The firearm was already unloaded, safe and separated significantly from the Petitioner's son. The search was a violation of Petitioner's constitutional rights. The United States District Court for the Southern District of West Virginia recently stated, it is "unaware of any precedent that holds the mere presence of a firearm, without any other fact, is sufficient to justify its full seizure as 'contraband' under the plain view doctrine." *United States v. Bumgarner*, No. 2:21-cr-00086 (S.D.W.Va. Dec. 20, 2021, Berger, D.J.) Continuing, "[o]fficers cannot simply seize a firearm in plain view, during a warrantless search, for the sole purpose of determining whether it is contraband." *Id.* at 14.

Under the exclusionary rule, all the evidence obtained as a result of the initial search must be suppressed. *United States v. Calandra*, 414 U.S. 338, 347 (1974). Additionally, any evidence obtained because of the subsequent search warrants must also be suppressed, as it would not have been possible to obtain it absent the initial illegality, and it derives directly from that improper search. See *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963).

2. The Petitioner contends the circuit court erred in denying the Petitioner's motion to suppress based on the provision of false information to the magistrate in the application for the search warrant.

The law enforcement officers who applied for the search warrant represented to the magistrate that the pistol for which they sought a search warrant was stolen, when, in fact, it was lawfully owned by the Petitioner. The Court erred in denying Petitioner's motion to suppress on this issue.

The law enforcement officer who applied for the search warrant informed the magistrate Petitioner's son was in possession of a stolen pistol. This was false. The subject firearm was lawfully owned by the Petitioner and lawfully possessed by his son at their home on October 30, 2019. The stolen firearm allegation was the only basis for the issuance of a search warrant authorizing seizure of the firearm.

Regarding misrepresentations in warrant applications, the Court held as follows:

> To successfully challenge the validly of a search warrant on the basis of false information in the warrant affidavit, the Petitioner must establish by a preponderance of the evidence that the affiant, either knowingly and intentionally or with reckless disregard for the truth, included a false statement therein. The same analysis applies to omissions of fact. The Petitioner must show that the facts were intentionally omitted or were omitted in reckless disregard of whether their omission made the affidavit misleading.

Syl. Pt. 1, *State v. Lilly*, 461 S.E.2d 101, 194 W.Va. 595 (1995)

In the case at hand, the Petitioner asserts the affiant included a false statement with reckless disregard for the truth and omitted facts which made the application misleading. When the law enforcement officers call dispatch and get a report the pistol appeared stolen, they cannot communicate with the dispatcher clearly regarding detailed markings because "everybody's celebrating now instead of looking the fucking shit up[.]" February 21, 2023 Transcript at 140. They are celebrating the initial indication from dispatch that the pistol is stolen. The excitement by law enforcement in having a mechanism to return to the Pinkerman residence can likely be attributed to the officers unpleasant interaction with Petitioner's son during the noon visit when he directed them off of the property. From that point, the officers forwent any attempt to confirm the initial indication of a stolen firearm as they were giddy about using "S.W.A.T." tactics on Mr. Pinkerman's son.

When the dispatcher attempts to follow up with Officer Stephens during the telephone call, Officer Stephens instructs him "just would you send that hit confirmation . . . And if you call and verify and all that – well, there's no need to verify right now because we don't have it in our possession." *Id*. at 141. The "hit confirmation" that was faxed to law enforcement contains descriptions of two different firearms with the same serial number. *Id.* at 144. The firearm that did not have the same caliber as the firearm law enforcement wanted to seize was marked through with a handwritten "X". Neither law enforcement or dispatch made any effort to follow up with the originating agency to decipher the discrepancy. As noted by dispatcher Smith, this is the type of situation which called for follow up. *Id.* at 129-130. Further, the firearm noted by dispatch as stolen was from the state of Arizona and only entered as stolen a number of weeks prior. There was a telephone number of the originating agency on the confirmation sheet. No calls were made. The affiant and other law enforcement officers were willfully blind and in reckless disregard for the truth because they were preoccupied with executing a search warrant at the home of a person who met them with a firearm in hand and directed them to leave the property in a less than cordial manner.

The gravity of law enforcements' actions as a result of the issuance of the warrant should not be overlooked. As opposed to determining who actually owns the home via tax records, deeds or registered vehicles, law enforcement uses the search warrant to conduct a raid on the Pinkerman household. This is extreme conduct under the circumstances when the item sought for seizure is a “stolen” pistol likely located in a family dwelling. The photographs of the pistol from the noon visit clearly show additional markings, one of which is the actual serial number, but no effort is made to confirm any number other than a model number which was erroneously listed as a serial number for no less than two firearms in the NCIC database.

Various federal Circuit Courts of Appeal addressed recklessness under similar situations. In *Maresca v. Bernalillo Cnty.*, 804 F.3d 1301 (10th Cir. 2015), the Court found that an “unreasonable mistake” constitutes reckless disregard for the truth invalidating probable cause for an arrest. *Maresca* involved the stopping of a purported stolen vehicle and the arrest of its occupants at gunpoint. "The Maresca officers threatened deadly force against a family (wrongly) suspected of occupying a stolen car." *Hemry v. Ross*, 62 F.4th 1248, 1255 (10th Cir. 2023). The vehicle was not, in fact, stolen.

In that case, such readily available exculpatory evidence included the stolen-vehicle description already on the officer’s computer screen before the arrest, which did not match the Marescas' truck in style, make, model, year, color, license plate number, or registration status; and the corrective information that dispatch presumably would have provided had the officer waited for verification, in accordance with her training. These steps were not taken. *Maresca*, 804 F.3d at 1310-1311. The *Maresca* case involved the stop of a vehicle, much less sacred as to privacy concerns than a family home. The Court’s conclusion that it was unreasonable for the officer to arrest the Marescas was "based upon all the circumstances of the case and, in particular, [the officer’s] failure to use readily available information—already on the computer screen in front of her and from the dispatcher—to verify that the Marescas' vehicle was reported stolen before arresting them." *Id.*

In the case at hand, both the officer and dispatch had information readily available indicating verification was needed before applying for a search warrant of a home. See *Baptiste v. J.C. Penney Co.*, 147 F.3d ,1252, 1257 (10th Cir. 1998) ("A police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest.") (quoting *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir.1986)); see also *Phelan v. Village of Lyons*, 531 F.3d 484, 488 (7th Cir.2008); *United States v. Finley*, 612 F.3d 998, 1002 (8th Cir. 2010) ("[T]he applicable test is ... whether, viewing all of the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.") The same principle undergirds these cases: *Rainsberger v. Benner*, 913 F.3d 640, 651 (7th Cir. 2019); *Winfrey v. Rogers*, 901 F.3d 483, 494 (5th Cir. 2018); *Humbert v. Mayor & City Council of Balt. City*, 866 F.3d 546, 557 (4th Cir. 2017); *Williams v. City of Alexander*, 772 F.3d 1307, 1311 (8th Cir. 2014); *Chism v. Washington*, 661 F.3d 380, 388 (9th Cir. 2011); *Miller v. Prince George's County*, 475 F.3d 621, 629 (4th Cir. 2007); *Mattoon v. Sue del Papa*, 161 F. App'x 672, 673 (9th Cir. 2006); *Snell v. Tunnell*, 920 F.2d 673, 697–98 (10th Cir. 1990) ; see also *United States v. White*, 850 F.3d 667, 674 (4th Cir. 2017); *Maresca v. Bernalillo Cnty.*, 804 F.3d 1301 (10th Cir. 2015). The State was reckless under the circumstances of this case.

3. The Petitioner contends the circuit court erred in denying his request for an evidentiary hearing regarding misrepresentations made to the grand jury by the State.

The trial court erred in denying the Petitioner an evidentiary hearing regarding misrepresentations made during the grand jury. The issue arises from testimony and questions illicited during the grand jury presentation indicating the Petitioner and his son were in possession of a stolen firearm at a time when the State was fully aware the firearm was not stolen and was lawfully owned by the Petitioner. While grand jury is an ex parte proceeding, the State should not be permitted to prohibit an evidentiary hearing when the transcript clearly demonstrates the facts were misrepresented to the jurors.

Law enforcement officers were at the Petitioner's home at the time of the shooting for the purpose of serving a search warrant authorizing the seizure of "[a] Berretta, 9mm Pistol Identified by Serial Number 934648765490" and "[a]ny Magazines, paperwork, receipts or any items related to the Beretta 9mm pistol listed above." The Beretta pistol referenced above was not stolen. The pistol was rightfully purchased by the Petitioner. The Petitioner has owned the pistol from 1999 through present. Further, it was legal for the Petitioner's son to possess said firearm at the Petitioner's home. The alleged serial number referenced above was not, in fact, the serial number, but was a model number which does not identify a specific firearm.

Importantly, as to all counts except obstructing, the State was accusing the Petitioner of acting as a principal in the second degree. The State argued the Petitioner refused to open the door to his home while law enforcement was attempting to execute a search warrant at his home. More specifically, the State alleges the Petitioner was attempting to hold the door shut or otherwise prevent the door from opening with some portion of his body. Even assuming the arguments by the State were, for the most part, accurate, the evidence was thin as to the allegations that Petitioner acted as an aider and abettor to his son during this surprise deadly interaction with law enforcement.

The pertinent points of law regarding the potential dismissal of a grand jury indictment are as follows:

> 4. Once the Petitioner establishes a prima facie case of willful, intentional fraud in obtaining an indictment he is entitled to a hearing with compulsory process. *Barker v. Fox*, 160 W.Va. 749, 238 S.E.2d 235, 237 (1977).
>
> "[D]ismisal 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." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261-62, 108 S.Ct. 2369, 101 L.Ed.2d 228, 238 (1988) (citing *United States v. Mechanik*, 475 U.S. 66, 78, 106 S.Ct. 938, 945, 89 L.Ed.2d 50 (1986) (O'Connor, J., concurring)). "Most courts hold that as a general rule, a trial court should not grant a motion to dismiss criminal charges unless the dismissal is consonant with the public interest in the fair administration of justice." Syl. Pt. 12, in part, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782, 786 (1984).

7. In reviewing the evidence for sufficiency to support the indictment, the court must be certain that there was significant and material evidence presented to the grand jury to support all elements of the alleged criminal offense. Syl. Pt. 7, State ex rel. *Pinson v. Maynard*, 3838 S.E.2d 844, 181 W.Va. 662 (1989)

5. When perjured or misleading testimony presented to a grand jury is discovered before trial and there is no evidence of prosecutorial misconduct, the State may withdraw the indictment without prejudice, or request the court to hold an in camera hearing to inspect the grand jury transcripts and determine if other sufficient evidence exists to support the indictment. Syl. Pt. 5, State ex rel. *Pinson v. Maynard*, 3838 S.E.2d 844, 181 W.Va. 662 (1989)

The State secured the indictment by willful or intentional fraud. The State knew the firearm was not stolen when it used that claim to convince the grand jury to indict the Petitioner. The State willfully misrepresented to the grand jurors that the firearm was stolen. Petitioner requested a hearing and moved to dismiss the indictment based on the misrepresentations to the grand jury. The trial court denied the opportunity for a hearing by finding Petitioner did not present a prima facia claim of willful or intentional fraud.

Contrary to the above misrepresentations, the Petitioner and his son were not in violation of any law related to the subject firearm. The officers only reason for being at the Petitioner's home was the pistol, which was lawfully owned by the Petitioner. If the grand jury was informed the gun was lawfully owned and possessed by the Petitioner and law enforcement had no legal right to attempt a forceful entry of the Petitioner's home, there is serious doubt a grand jury would return a true bill. It is readily apparent the misrepresentations to the grand jurors substantially influenced the grand jury's decision to indict or there is grave doubt that the decision to indict was free from substantial influence of such misrepresentations.

In felony prosecutions, the grand jury's position is constitutional, not merely ministerial, as it is "the tribunal representing the people, for the purpose of charging crime and designating the criminal." *See State ex rel. Noll v. Dailey*, 72 W. Va. 520, 522, 79 S.E. 668, 669 (1913). Furthermore, the grand jury serves a "protective role" in the criminal justice system. *State ex rel. Swanigan v. Cline*, 177 W. Va. 107, 108, 350 S.E.2d 734, 736 (1986). Having "dual function," the grand jury behaves as "a sword" that investigates cases to bring accused individuals to trial on "just grounds" and as "a shield" to protect people against baseless prosecutions. *State ex rel. Miller v. Smith*, 168 W. Va. 745, 751, 285 S.E.2d 500, 504 (1981). While the grand jury presentment is normally ex parte with participation limited to the prosecuting attorney and its witnesses, the Court should not sanction blatant misrepresentations of fact to a grand jury in order to paint the accused as a law breaker harboring a stolen firearm when Mr. Pinkerman was the opposite. The State insinuated the Petitioner and his son were aware the police found a stolen firearm at the residence during the noon visit. Thereby, opening grand jurors to the potential conclusion that Mr. Pinkerman may be preparing to confront law enforcement when they return for the firearm. Of course, Petitioner had no knowledge of any police interaction with his son during the noon visit or otherwise. *See State v. Grimes*, 226 W.Va. 411, ___, 701 S.E.2d 449, 457 (2009)(Following an evidentiary hearing before the circuit court, the Court notes concern with witness' failure to disclose Petitioner's complete statement to grand jury and concern with state witness' associating Petitioner's statement with "suppression hearing.")

The trial court denied Petitioner's motion to dismiss the indictment, but did so via the denial of an evidentiary hearing. The finding of insufficient evidence to conduct a hearing on the subject was error.

4. The Petitioner contends the circuit court erred in denying Petitioner's two challenges for cause based upon close relationships between the prospective jurors and law enforcement officers intimately connected with the case.

The trial court erred in denying the Petitioner's challenge of a juror for cause who had a relationship with a relative of one of the law enforcement officers on the scene during the shooting incident. The Petitioner asserts the witness' relationship created an insurmountable implied bias which should disqualify the juror. Additionally, another prospective juror had preconceived notions about the facts and has ties to the scene and one of the officers. Both prospective jurors were challenged for cause.

In West Virginia, parties to a lawsuit are entitled to impartial jurors. Either party in any action or suit may, and the court shall on motion of such party, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection; and if it shall appear to the court that such person is not a qualified juror or does not stand indifferent in the cause, another shall be called and placed in his stead for the trial of that cause. W.Va. Code § 56-6-12 [1931].

Our Court has stated that "[a]ctual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed." Syllabus Point 5, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996). 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 or bias. Voir dire ferrets out biases and prejudices to create a jury panel, <u>before the exercise of preemptory strikes</u>, free of the taint of reasonably suspected prejudice or bias. (emphasis added) *O'Dell v. Miller*, 211 W.Va. 285, ____, 565 S.E.2d 407, 410 (2002).

In West Virginia, case law has long held that trial courts must resolve any doubt of possible bias or prejudice in favor of the party seeking to strike for cause. "Any doubt the court might have regarding the impartiality of a juror must be resolved in favor of the party seeking to strike the potential juror. *State v. West,* 157 W.Va. 209, 200 S.E.2d 859, 866 (1973)." *Davis v. Wang,* 184 W.Va. 222, 226, 400 S.E.2d 230, 234 (1990) *overruled on other grounds by Pleasants v. Alliance Corp.,* 209 W.Va. 39, 543 S.E.2d 320 (2000). This State's practice of resolving any doubt about a prospective juror in favor of the party moving to strike the prospective juror is supported by sound reasoning. "A fair and impartial trial by jury can only be ensured by removing, for cause, prospective jurors who have experiences or attitudes that indicate a significant potential for prejudice in the matter at trial. Accepting such jurors' statements, that they can set aside their biases and be fair, creates the great risk of seating biased jurors, and a clear appearance of prejudice to a party." Patterson, Arthur H. and Nancy L. Neufer, *Removing Juror Bias By Applying Psychology To Challenges For Cause,* 7 Cornell J.L. & Pub. Pol'y 97, 106 (1997); *See also,* Daniel J. Sheehan, Jr. and Jill C. Adler, *Voir Dire: Knowledge Is Power,* 61 Tex. B.J. 630 (1998).

Therefore, when considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror. When considering whether a prospective juror is prejudiced or biased, the trial court must consider all the circumstances surrounding the juror. The trial court must not only consider the prospective juror's promise to be fair but all of the circumstances at issue. As far as is practicable in the selection of jurors, trial courts should endeavor to secure those jurors who are not only free from but who are not even subject to any well-grounded suspicion of any bias or prejudice. *State v. Dephenbaugh,* 106 W.Va. 289, 145 S.E. 634 (1928); *State v. Siers,* 103 W.Va. 30, 136 S.E. 503 (1927). When in doubt, a trial court should exclude a prospective juror. Trial judges must resist the temptation to "rehabilitate" prospective jurors simply by asking the "magic question" to which jurors respond by promising to be fair when all the facts and circumstances show that the fairness of that juror could be reasonably questioned this Court reminds trial courts that "it cannot be overemphasized that no error is committed even when a qualified juror is struck as long as the remaining panel members are qualified. Rather, our cases demonstrate that a trial court risks error only when it refuses to strike jurors whose impartiality is questionable." *State v. Phillips,* 194 W.Va. 569, 589, 461 S.E.2d 75, 95 (1995).

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

> When [a] Petitioner can demonstrate even a tenuous relationship between a prospective juror and any prosecutorial or enforcement arm of State government, Petitioner's challenge for cause should be sustained by the court. A Petitioner is entitled to a panel of twenty jurors who are free from exception, and if proper objection is raised at the time of impaneling the jury, it is reversible error for the court to fail to discharge a juror who is obviously objectionable. In any case where the trial court is in doubt, the doubt must be resolved in favor of the Petitioner's challenge, as jurors who have no relation whatsoever to the State are readily available.

State v. Archer, 169 W.Va. 564, 566, 289 S.E.2d 178, _____ (1982).

Here, the two prospective jurors in question should have been excluded when the Petitioner challenged them for cause. In response to the trial court's erroneous rulings on the subject, Petitioner was essentially forced to use two of his statutorily entitled preemptory strikes on the two unqualified prospective jurors. Appx. at 91. In Syllabus Point 3, *State v. Sutherland*, 231 W.Va.

410, 745 S.E.2d 448 (2013), the Court held a trial court's failure to remove a biased juror from the panel does not violate a criminal defendant's right to a trial by an impartial jury if the defendant removes the juror with a preemptive strike. In order to obtain a new trial for having used a preemptory strike to remove a biased juror from the jury panel, a criminal defendant must show prejudice. *Id.*

The *Sutherland* holding renders the statute providing for preemptory strikes practically meaningless. How is a defendant to protect his rights to preemptory strikes? The choice of purposefully leaving a biased person on the jury is not realistic in practice. In the case at hand, two of the Petitioner's preemptory strikes were used to remove jurors which should have been removed for cause. Defendants in criminal cases are entitled to their the statutory number of preemptory strikes. The petitioner urges the Court to find the loss of two preemptory strikes sufficient prejudice to constitute reversible error. Alternatively, if there is some mechanism to preserve a criminal defendant's rights other than the choice to leave a biased juror on the jury, the Court should remand so the Petitioner can apprise himself of that process. The *Sutherland* ruling turns preemptory strikes, the purpose of which is to make strikes based on personal preference, into the new mechanism for handling unqualified jurors. This is patently unfair and should be revisited.

VI. CONCLUSION

The Petitioner requests the Court take this matter under consideration and reverse the Petitioner's conviction or, alternatively, remand for hearing regarding the grand jury presentation or a new trial.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 24-234

MICHAEL LANE PINKERMAN,

Petitioner,

v.	**Appeal from a final order of the Circuit Court of Cabell County (Case No. 20-F-226)**

STATE OF WEST VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

I, Thomas H. Peyton, counsel for Petitioner, do hereby certify that on the 8th day of July, 2024, I served a true and exact copy of the foregoing "PETITIONER'S BRIEF IN SUPPORT OF APPEAL" and "APPENDIX" upon all interested parties via Supreme Court of Appeals E-Filing – File & Servexpress, as follows:

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