

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 24-234

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STATE OF WEST VIRGINIA,

Respondent,

v.

MICHAEL LANE PINKERMAN,

Petitioner.

BRIEF OF RESPONDENT

**Appeal from the March 8, 2024, Order
Circuit Court of Cabell County
Case No. 20-F-226**

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Introduction.....	1
Assignments of Error	1
Statement of the Case.....	2
A. The events of October 30, 2019.....	4
B. The motion to suppress	5
C. The motion to dismiss the indictment and for an evidentiary hearing on testimony presented to the grand jury	6
D. The motion to strike two jurors for cause	7
Summary of the Argument.....	8
Statement Regarding Oral Argument and Decision.....	9
Standard of Review.....	10
Argument	11
I. A photograph of a pistol in plain view is not a search; thus, the circuit court correctly denied the motion to suppress. Even assuming <i>arguendo</i> that error existed, any such error was harmless	11
II. The circuit court did not err in denying Petitioner’s motion to suppress because the affidavit submitted in support of the search warrant application did not contain information that was false or misleading or that showed a reckless disregard for the truth.....	15
III. Regardless of the status of the motion to suppress, there is no reasonable probability that either the photographs of the pistol or the validity of the search warrant led to Petitioner’s conviction of obstruction.....	21
IV. The circuit court soundly exercised its discretion in denying Petitioner’s request to go behind the indictment because there was no showing of willful, intentional fraud.....	22

V.	The circuit court correctly denied Petitioner’s motion to strike two potential jurors for cause after conducting appropriate individual voir dire, because both jurors unequivocally stated they could be fair and impartial. Moreover, Petitioner’s failure to argue, let alone demonstrate, prejudice caused by using peremptory strikes wholly defeats this assignment of error	23
Conclusion		26

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Baptiste v. J.C. Penney Co.</i> , 147 F.3d 1252 (10th Cir. 1998)	20
<i>Barker v. Fox</i> , 160 W. Va. 749, 238 S.E.2d 235 (1977).....	23
<i>Hudson v. Michigan</i> , 547 U.S. 586 (2006).....	18, 19
<i>Maresca v. Bernalillo Cnty.</i> , 804 F.3d 1301 (10th Cir. 2015)	19, 20
<i>McDonald v. United States</i> , 335 U.S. 451 (1948).....	18
<i>O’Bryan v. State</i> , 464 S.W.3d 875 (Tex. App. 2015).....	18
<i>State ex rel. Pinson v. Maryland</i> , 181 W. Va. 662, 383 S.E.2d 844 (1989).....	7, 10
<i>Sabbath v. United States</i> , 391 U.S. 585 (1968).....	18
<i>State v. Beckett</i> , 172 W. Va. 817, 310 S.E.2d 883 (1983).....	24
<i>State v. Benny W.</i> , 242 W. Va. 618, 837 S.E.2d 679 (2019).....	11, 25
<i>State v. Charlot</i> , 157 W. Va. 994, 206 S.E.2d 908 (1974).....	24
<i>State v. Deaner</i> , 175 W. Va. 489, 334 S.E.2d 627 (1985).....	24
<i>State v. Green</i> , No. 22-895 (W. Va. Supreme Court, July 21, 2024) (memorandum decision)	11
<i>State v. Harshbarger</i> , 170 W. Va. 401, 294 S.E.2d 254 (1982).....	24, 25

<i>State v. Jenkins</i> , 195 W. Va. 620, 466 S.E.2d 471 (1995).....	14
<i>State v. Lacy</i> , 196 W. Va. 104, 468 S.E.2d 719 (1996).....	10, 12
<i>State v. Lilly</i> , 194 W. Va. 595, 461 S.E.2d 101 (1995).....	16
<i>State v. Miller</i> , 197 W. Va. 588, 476 S.E.2d 535 (1996).....	11, 24
<i>State v. Omechinski</i> , 196 W. Va. 41, 468 S.E.2d 173 (1996).....	22
<i>State v. Rhymer</i> , 915 S.W.2d 465 (Tenn. Crim. App. 1995).....	18
<i>State v. Rollins</i> , 233 W. Va. 715, 760 S.E.2d 529 (2014).....	25
<i>State v. Spinks</i> , 239 W. Va. 588, 803 S.E.2d 558 (2017).....	10, 23
<i>State v. Sutherland</i> , 231 W. Va. 410, 745 S.E.2d 448 (2013).....	25
<i>State v. Thomas</i> , 157 W. Va. 640, 203 S. E.2d 445 (1974).....	14
<i>State v. Walls</i> , 170 W. Va. 419, 294 S.E.2d 272 (1982).....	21
<i>State v. Ward</i> , 249 W. Va. 347, 895 S.E.2d 202 (2023).....	12
<i>State v. White</i> , 228 W. Va. 530, 722 S.E.2d 566 (2011).....	12
<i>State v. Wood</i> , 177 W. Va. 352, 352 S.E.2d 103 (1986).....	21
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....	22
<i>United States v. Finley</i> , 612 F.3d 998 (8th Cir. 2010)	20, 21

<i>United States v. Leon</i> , 468 U.S. 897 (1984).....	17
--	----

Statutes

42 U.S.C. § 1983.....	19, 20
-----------------------	--------

Other Authorities

United States Constitution Fourth Amendment.....	12
MERIAM-WEBSTER, https://www.merriam-webster.com/	16
West Virginia Constitution Amendment and Article III Section 6.....	10
West Virginia Rules of Appellate Procedure Rule 10	7, 11, 12, 15, 22
West Virginia Rules of Appellate Procedure 18.....	9

INTRODUCTION

Petitioner, Michael Pinkerman, Sr. (“Petitioner”), was convicted of one count of obstruction after he hindered law enforcement from executing a valid search warrant and a valid arrest warrant for his son, Michael Pinkerman, Jr. (“Michael”). This tragic set of events began when law enforcement spoke with Michael regarding a shooting that occurred at the Ona Volunteer Fire Department, from which he had been “fired” the day before. The first time officers went to the home, Michael approached law enforcement in a tactical position with a loaded gun in hand. Following a short discussion with Michael, law enforcement ran a standard firearm check through National Crime Information Center (“NCIC”), and the gun was flagged as stolen. Law enforcement then returned to the home a second time with a valid search warrant and a valid arrest warrant for Michael. Petitioner, however, refused to open the door and blocked their entry. By the time law enforcement made it into the home, Michael was armed and opened fire, injuring two officers. Tragically, Michael did not survive the return fire. Although Petitioner was only convicted for the single count of obstruction, he now challenges matters that have no little to no bearing on his conviction and points the finger of blame at law enforcement. For the reasons set forth below, this Court should affirm his conviction.

ASSIGNMENTS OF ERROR

Petitioner advances four 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."

Pet'r's Br. 1.

STATEMENT OF THE CASE

Petitioner was charged 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. App. Vol. 1, 13-14. The charges against Petitioner arose from a series of events beginning with an encounter between his son and law enforcement at Petitioner's home. When law enforcement later returned to the home to execute a search warrant for a stolen pistol and an arrest warrant for Michael, Petitioner obstructed law enforcement's entry into the home. By the time law enforcement made it through the door, Michael opened fire. Law enforcement returned fire and Michael unfortunately did not survive. The jury convicted Petitioner of obstruction, acquitted him of wanton endangerment and malicious assault, and hung on the two attempted murder charges. App. Vol. 4, 81-84. Following the hung jury, the State dismissed the attempted murder charges, with prejudice. *Id.* at 94. The circuit court sentenced Petitioner to twelve months in jail on the conviction of obstruction. *Id.* at 93. Petitioner appealed.

A. The events of October 30, 2019.

On October 29, 2019, law enforcement responded to an incident at the Ona Volunteer Fire Department involving someone peppering the building with 9mm shells. Feb. 21, 2023, Motions Hearing, 18, 19.¹ Michael was identified as a possible suspect because he had been "fired" from the fire department the day before the shooting. *Id.* Four investigating officers went to speak with Michael about the shooting. App. Vol. 3, 69.

¹ Petitioner separated the transcripts from the remainder of the Appendix.

The encounter with Michael began in a volatile manner. When police arrived at the Pinkerman home, Michael responded to their knock on the door in a tactical stance with a loaded .9mm semiautomatic pistol in hand and ready for action. Feb. 21, 2023, Motions Hearing, 22-23. The officers advised Michael they were just there to talk and convinced him to set the gun down. *Id.* at 23-24, 29. Michael removed the magazine, cleared the chamber, and set the gun down. *Id.* at 23-24. As Sgt. McQuaid² spoke with Michael, he led Michael a short distance away from the gun so it was not within his easy reach. *Id.* at 37. Another officer, Lt. Steve Vincent, then picked up the gun, made sure it was clear, and set it back down. *Id.* at 24, 34. A third officer, Cpl. Jared Cremeans, snapped a photograph of the gun in place. *Id.* at 66-67. He then picked up the gun and photographed the other side. *Id.* at 66-67. Notably, the serial numbers/identifying information were located on both sides of the pistol. *Id.* at 65.

Initially, Michael was agitated that law enforcement was at the home and made some “choice comments” as to what they could do, but he did speak with them. *Id.* at 26. The conversation deteriorated as soon as it turned to the shooting at the fire department, however. *Id.* Michael became verbally and physically aggressive, and he ordered the officers to leave. *Id.* The officers complied with the directive to leave, and, to ensure their continued safety while leaving the property, Sgt. McQuaid placed Michael’s pistol on a trailer by the driveway so they could monitor it. *Id.* at 26-27; App. Vol. 3, 70. The officers backed up to their vehicles and instructed Michael to leave the gun disassembled where it was until they left the property. Feb. 21, 2023, Motions Hearing, 27. Michael disregarded the instructions and had the gun reassembled and in-hand with a bullet chambered before the officers reached the end of the driveway. *Id.* at 27-28.

² Respondent was unable to locate Sgt. McQuaid’s first name in the Appendix.

Officer Preston Stephens called 911 dispatch to run the gun's serial number through the NCIC database. Feb. 21, 2023, Motions Hearing, 105. It came back as stolen. *Id.* at 108-09. Cpl. Cremeans then obtained a search warrant for the pistol, App. Vol. 3, 69-74, and an arrest warrant for Michael, Feb. 21, 2023, Motions Hearing, 110. Given Michael's aggressive, threatening behavior earlier that day, law enforcement assembled a team to execute the warrants. Oct. 14, 2020, Hearing, 26-27.

When the officers arrived at Petitioner's home, Petitioner would not let them in despite law enforcement repeatedly identifying themselves and alerting him of the search warrant. *Id.* at 20, 26-30. Petitioner physically barricaded the door and blocked the officers' path. *Id.* at 34. The officers were forced to break down the door. *Id.* at 28-29. Michael then entered the room and immediately opened fire, shooting two officers. *Id.* at 29-30, 35. Law enforcement returned fire and killed Michael. *Id.* at 35-36. Petitioner was taken to the hospital for treatment after being grazed by a bullet. *Id.* at 20. After his release from the hospital, he was arrested. *Id.* at 39.

Shortly after the events unfolded on October 30, 2019, law enforcement learned that the .9mm pistol was not stolen. Feb. 21, 2023, Motions Hearing, 71-72. The officer who gave the serial number to dispatch to run through NCIC mistakenly gave the model number. *Id.* at 72.

B. The motion to suppress.

Petitioner filed a motion to suppress. App. Vol. 1, 15-17. Petitioner argued that law enforcement's handling, manipulating and photographing of the pistol constituted an unlawful search and seizure. App. Vol. 1, 16-17. He argued alternatively that law enforcement's intentional or reckless inclusion of false information in the search warrant affidavit rendered the search warrant unlawful. App. Vol. 1, 16-17. The State opposed the motion, arguing the photographs did not constitute a seizure and regardless, the gun was in plain view. App. Vol. 1, 27-28.

Additionally, the pistol's serial numbers/identifying information were located on both sides. Feb. 21, 2023, Motions Hearing, 65.

During a hearing on the motion, Officers Vincent, Cremeans, and Stephens from the Cabell County Sheriff's Department and the 911 dispatch operator, Shawn Smith, testified. Feb. 21, 2023, Motions Hearing, 16-149. Law enforcement's practice is to run NCIC checks through 911 no matter the type of check and 911 communicates with other law enforcement agencies. *Id.* at 93. Petitioner played the recording of Officer Stephens's call with 911 following law enforcement's departure from the Pinkerman property. *Id.* at 135.

In the call, Officer Stephens asked 911 to run a gun's serial number, gave the make as Beretta, the caliber as 9mm and the number they believed to be the serial number. Feb. 21, 2023, Motions Hearing, 136. Dispatch ran the number and told him it was reported stolen out of Arizona. *Id.* at 110. Officer Stephens specifically asked, "Are you positive that's a hit?" *Id.* at 138. Dispatch confirmed the hit was, in fact, a Beretta 9mm pistol with the exact same identifying numbers. *Id.* at 139. Officer Stephens and dispatch again compared the numbers to verify accuracy. *Id.* at 139-40. Dispatch again confirmed that that number, make, and caliber gun was a "hit" for a stolen gun from Arizona. *Id.* at 140. Dispatch read the model number listed on the NCIC report, but the officers stated they did not have anything showing the model number for comparison. *Id.* at 140-41. Officer Stephens began to ask Dispatch to call and verify the "hit" but backtracked because "there's no need to verify it right now because we don't have it in our possession." *Id.* at 140. Dispatch's response of "[y]eah," indicated their practice was to have a stolen item in hand before further verifying. *Id.* at 141. Before ending the call, Dispatch again assured Officer Stephens that "everything matches." *Id.* at 141. Cpl. Cremeans then applied for and received a search warrant based on this information. App. Vol. 3, 55-72.

Following the testimony, the circuit court found that when law enforcement initially went to Petitioner's home to speak with Michael about the shooting at the fire department, Michael exited the residence in a tactical position, armed with a loaded, 9mm Beretta handgun. App. Vol. 4, 74. It noted that Lt. Vincent testified that in his 24 years of service, he never witnessed someone exit a house in the manner Petitioner's son did. Feb. 21, 2023, Motions Hearing, 161. The lower court stated "[i]t was certainly an excited, aggressive situation." *Id.* The circuit court found that once Michael complied with law enforcement's request to lower the weapon and disassemble it, the weapon was placed on a pile of wood, in plain view, and Lt. Vincent checked the weapon for officer safety then placed it back on the pile of wood. *Id.* "The fact that he came out with a loaded pistol, ultimately ended up with the pistol being laid in plain view, . . . the officer was within his right to check it for safety purposes, lay it back down, and then it's in plain view when those photographs are taken." *Id.*

With regard to the search warrant, the circuit court expressly found that Petitioner did not establish by a preponderance of the evidence that law enforcement presented any false information. *Id.* at 162. The circuit court further found that law enforcement acted in good faith both when they got the information from 911 and when they applied for a search warrant. *Id.*; App. Vol. 4, 74-75.

A. The motion to dismiss the indictment and for an evidentiary hearing on testimony presented to the grand jury.

Prior to trial, Petitioner moved to dismiss the indictment, claiming it was obtained by willful intentional fraud. App. Vol. 1, 20-24. The fraud, according to Petitioner, occurred when law enforcement testified that the gun was stolen as reported by the state of Arizona when, in fact, law enforcement later learned the gun was not stolen. *Id.* This "false" reason was the basis for the officers' return to Petitioner's house that night. *Id.* The State opposed the motion, emphasizing that the officers' testimony relayed the series of events on October 30, 2019 (and law

enforcement's actions that same day), based on the information they possessed at the time they obtained, and then attempted to execute, the search warrant. App. Vol. 1, 29-32.

After hearing arguments on the motion, the circuit court disagreed with Petitioner. Apr. 6, 2023, Motions Hearing, 18-29; App. Vol. 4, 77-78. In denying the motion to dismiss and the request for an evidentiary hearing, the circuit court explained that neither of the officers who testified were asked when or if they knew the pistol was not actually stolen; that whether the pistol was stolen was not relevant to the grand jury proceedings, because it was not an element of any offense charged in the indictment; and that there was no fraud because the officers were testifying to what they knew at the time they obtained the arrest warrant for Michael Pinkerman and the search warrant for Petitioner's home. App. Vol. 4, 77-78. The circuit court thus concluded that pursuant to *State ex rel. Pinson v. Maryland*, 181 W. Va. 662, 383 S.E.2d 844 (1989), Petitioner failed to make a *prima facie* case that the indictment was obtained by willful, intentional fraud. App. Vol. 4, 78.

D. The motion to strike two jurors for cause.

During the individual voir dire portion of jury selection, two potential jurors were independently questioned about their relationships with witnesses in the case. Jan. 23, 2024, Trial Tr., 12-17, 38-41, 43-47.³ According to Petitioner, one prospective juror had a relationship with a relative of one of the officers on scene during the shooting and another prospective juror had preconceived notions about the facts and had ties to the scene and one of the officers. Pet'r's Br. 22. Each of these two potential jurors stated they could be fair and impartial even though they

³ Petitioner fails to cite the record as to when and how this matter arose and how it was addressed, making it exceedingly difficult for Respondent to locate the relevant passages. Despite this Court's requirement that parties adhere to Rule 10 of the West Virginia Rules of Appellate Procedure, Petitioner's entire brief is woefully lacking in citations, and the Court should refuse to consider it.

each knew a witness. Jan. 23, 2024, Trial Tr., 16-17, 38-41, 58. Petitioner moved to strike them both for cause. The circuit court addressed their respective responses and found them qualified based on their statements of impartiality. Jan. 23, 2024, Trial Tr., 16-17, 57-58.

SUMMARY OF ARGUMENT

1. Law enforcement did not conduct an illegal search or seizure warranting the suppression of photographs. Because Michael Pinkerman, Jr. exited the home with a loaded pistol in hand and approached law enforcement in a tactical stance, Lt. Vincent was permitted to handle the pistol to ensure it was disassembled for officer safety. As to Cpl. Cremeans photographing the pistol where it lay after Lt. Vincent set it down following the safety check, that, too, was within the bounds of the law. Recording visible numbers is neither a search nor a seizure under *Arizona v. Hicks*. Moreover, because the serial numbers/identifying information were located on both sides of the pistol, assuming *arguendo* that photographs of the nonvisible side of the pistol should have been suppressed, the error is harmless.

2. The search warrant was not obtained with false or misleading evidence or evidence that showed a reckless disregard for the truth. Officer Stephens followed protocol by having 911 dispatch submit the pistol's identifying information to NCIC; confirmed the make, the caliber, and the identifying numbers on the pistol multiple times; and the dispatch operator repeatedly assured Officer Stephens that the gun was a "match" for the stolen pistol. The circuit court heard the evidence, assessed witness credibility, and found law enforcement acted in good faith in relying on the NCIC hit and there was no evidence of a reckless disregard for the truth.

3. Regardless of whether the motion to suppress was granted or denied, there is no probability whatsoever that either the photographs of the pistol or the validity of the search warrant led to Petitioner's conviction of obstruction. The result of a successful motion to suppress is to suppress

evidence; it would not negate the fact that law enforcement arrived on Petitioner's doorstep to execute a search warrant, and it certainly would not negate the fact that Petitioner blocked their ability to do so. Hence, even if the evidence was suppressed and this case was retried, it would assuredly yield the same result.

4. The State did not obtain the indictment by fraud.⁴ The circuit court correctly found that the testimony regarding the pistol being stolen explained the information law enforcement possessed and the series of events that led to the criminal charges against Petitioner. Had the officers informed the grand jury they later learned Petitioner owned the pistol, the charges against Petitioner for attempted murder, malicious wounding, wanton endangerment, and obstruction would have remained unaffected. Each of the offenses of which Petitioner was charged stands independent of whether the pistol was stolen.

5. The circuit court correctly denied Petitioner's motion to strike two potential jurors for cause after conducting appropriate individual voir dire. Both jurors unequivocally stated they could be fair and impartial, and Petitioner neither alleges nor argues that a biased juror served on the panel.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

⁴ Respondent's fourth argument corresponds with Petitioner's third assignment of error. Respondent's fifth argument corresponds with Petitioner's fourth assignment of error.

STANDARD OF REVIEW

The first two assignments of error challenge the circuit court's denial of a motion to suppress. When reviewing a ruling on a motion to suppress, all facts are construed in the light most favorable to the State, as it was the prevailing party below. Syl. pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996). "Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error." *Id.* In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment and Article III Section 6 of the West Virginia Constitution is a question of law that is reviewed *de novo*. *Id.*, syl. pt. 2. This Court, therefore, will affirm a circuit court's denial of a motion to suppress evidence "unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or based on the entire record, it is clear that a mistake has been made." *Id.*

Petitioner's third assignment of error challenges the circuit court's denial of his motion to dismiss the indictment. A motion to dismiss an indictment is reviewed *de novo*. *State v. Spinks*, 239 W. Va. 588, 602, 803 S.E.2d 558, 572 (2017). The well-settled rule in West Virginia is that "[e]xcept 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. 2, *Pinson*, 181 W. Va. 662, 383 S.E.2d 844.

Petitioner's fourth assignment of error challenges the circuit court's denial of his motion to strike two potential jurors for cause. A trial court has broad discretion in determining whether to strike jurors for cause, and this Court will reverse only where actual prejudice is demonstrated.

State v. Miller, 197 W. Va. 588, 605, 476 S.E.2d 535, 552 (1996). In reviewing the qualifications of a jury to serve in a criminal case,

review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial court.

Syl. pt. 5, *State v. Benny W.*, 242 W Va. 618, 837 S.E.2d 679 (2019).

ARGUMENT

I. A photograph of a pistol in plain view is not a search; thus, the circuit court correctly denied the motion to suppress. Even assuming *arguendo* that error existed, any such error was harmless.

Boiling the search and seizure issue down to its essence,⁵ Petitioner contends law enforcement conducted an unlawful search of his pistol by picking it up and photographing it without consent. Pet'r's Br. 12, 13. Thus, argues Petitioner, under the exclusionary rule, all evidence obtained as a result of the unlawful search should have been suppressed.⁶ Pet'r's Br. 13-14. There is no error here.

First, Petitioner fails to meet the basic threshold for appellate review of this assignment of error.⁷ In *State v. Green*, No. 22-895 (W. Va. Supreme Court, July 21, 2024) (memorandum decision), this Court again reiterated that a Petitioner's failure to comply with Rule 10 of the West Virginia Rules of Appellate Procedure is fatal deficiency. Rule 10(c)(7) requires the argument

⁵ Petitioner identifies the first assignment of error as a challenge to law enforcement's warrantless search of his pistol. Pet'r's Br. 10. The first portion of his argument, however, relates to the search warrant. Pet'r's Br. 10-12. Because Petitioner's second assignment of error addresses the search warrant, Respondent will address the search and seizure issue here and reserve its discussion of the search warrant for the second assignment of error.

⁶ The only evidence that would have been seized under this search warrant is Petitioner's 9mm Beretta pistol, its magazines, paperwork, receipts and accoutrements. App. Vol. 3, 66.

⁷ This Rule 10 argument applies to each of Petitioner's four assignments of error.

section of a Petitioner's Brief contain "an argument clearly exhibiting the points of fact and law presented . . . the argument must 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." Petitioner did not do this. Not in his statement of the case, Pet'r's Br. 2-4, and not in his argument, Pet'r's Br. 10-14. As a result, not only does Ground 1 violate Rule 10, but the lack of citations also hinders meaningful review of the circuit court's findings of fact, application of law, and legal conclusions. Consistent with this Court's typical procedure to "not address issues that have not been properly briefed[.]" *State v. White*, 228 W. Va. 530, 541 n.9, 722 S.E.2d 566, 577 n.9 (2011), this Court should not address this Ground. Should it nonetheless consider its merits, this assignment of error fails.

Just as the circuit court concluded, Lt. Vincent's handling and manipulating the weapon to ensure it was disassembled was "certainly for officer safety," and, therefore, justified. App. Vol. 4, 75. The Fourth Amendment applies only to unreasonable searches and seizures. *Lacy*, 196 W. Va. at 112, 468 S.E.2d at 727. Indeed, the touchstone of the Fourth Amendment's promise is "reasonableness," which generally, though not always, translates into a warrant requirement. *Id.* "The circumstances that justify warrantless searches include those in which officers reasonably fear for their safety, [and] where firearms are present." *Id.* at 113, 468 S.E.2d at 728. "[O]fficers should be permitted to search for a suspected weapon and secure it if the officers have a reasonable belief that failure to secure the weapon will endanger themselves or private citizens." *State v. Ward*, 249 W. Va. 347, ___ n.19, 895 S.E.2d 202, 212 n.19 (2023) (citing *Lacy*, 196 W. Va. at 114 n.14, 468 S.E.2d at 729 n.14).

In the present case, law enforcement did not need to search for a weapon; Michael "greeted" them with a loaded gun. App. 74. Given his needless aggression, the officers had every

reason to believe that failing to secure then weapon endangered those present. Luckily, Michael cleared the pistol and set it down on a stack of wood, at law enforcement's request. Feb. 21, 2023, Motions Hearing, 35-36. One officer then walked Michael a short distance away from the pistol so it was not within easy reach while they spoke, and Lt. Vincent "walked over and picked the gun up, ensured its safety, put it back down." *Id.* at 36. Under the circumstances, it was entirely reasonable for Lt. Vincent to confirm the weapon was disarmed. The circuit court heard law enforcement's testimony and rejected Petitioner's arguments that it was unreasonable for Officer Vincent to double check the safety of the gun simply because he observed Michael removed the clip and appear to make the pistol safe. App. Vol. 4, 74- 75. The circuit court did not err in so ruling, and it should be affirmed.

As to Cpl. Cremeans' actions once Lt. Vincent laid the pistol back down, the crux of the issue turns on whether Cpl. Cremeans conducted a search or a seizure by photographing the pistol. Photographing the pistol in place where Lt. Vincent set it down was not an unlawful search or seizure. In *Arizona v. Hicks*, the United States Supreme Court addressed a similar issue. 480 U.S. 321 (1987). In that case, law enforcement lawfully entered Hicks' apartment to search for a shooter, additional victims, and weapons. *Id.* at 323. One officer noticed stereo equipment he believed was stolen. *Id.* He moved some of the components to find and record the serial numbers, then called and reported them to his headquarters. *Id.* On being advised that one of the components had been taken in an armed robbery, the officer seized it immediately. *Id.* The lower court granted the motion to suppress the seized evidence. *Id.* at 324.

The question of whether the officer's actions constituted an illegal search and seizure moved through the appellate courts. The Supreme Court's ruling on the matter established three particular principles that apply to the present case. First, law enforcement's inspection of the stereo

components that were already in view did not constitute a search. *Hicks*, 480 U.S. at 324-25. Second, “the mere recording of the [visible] serial numbers d[id] not constitute a seizure.” *Id.* And, third, “[i]f the computer had identified as stolen property a component with a visible serial number, the evidence would have been admissible.” *Id.* at 332 (Powell, J., dissenting).

Here, the record reflects that law enforcement went to Petitioner’s home to speak with Petitioner’s son about the shooting at the Ona Volunteer Fire Department, which involved a 9mm gun. App. Vol. 3, 69. The record establishes that after Lt. Vincent’s safety check, Cpl. Cremeans photographed the 9mm gun where it lay, capturing its identifying numbers. Feb. 21, 2023, Motions Hearing, 66-67. *Hicks* indisputably establishes that the serial numbers/identifying information, which were visible on the pistol and recorded via photograph before Cpl. Cremeans flipped the pistol over, was not a search. Nor was recording the visible serial numbers/identifying numbers a seizure. *Hicks*, 480 U.S. at 324. Also pursuant to *Hicks*, because NCIC identified as stolen property a 9mm Beretta with a visible serial number, that evidence is admissible. *Hicks*, 480 U.S. at 332 (Powell, J., dissenting). That evidence, therefore, was properly used to obtain a search warrant.

Even if this Court disagrees with the circuit court and finds that that Cpl. Cremeans engaged in a “search” per *Hicks*, this error would be harmless. Suppressing the photograph of the nonvisible side of the gun would not yield a different outcome at trial. “Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction.” *State v. Jenkins*, 195 W. Va. 620, 629, 466 S.E.2d 471, 480 (1995) (quoting syl. pt. 20, *State v. Thomas*, 157 W. Va. 640, 203 S. E.2d 445 (1974)). The serial numbers/identifying information that law enforcement ran through NCIC *were located on both sides of the pistol*. Feb. 21, 2023, Motions Hearing, 65. Hence, unlike *Hicks*, where the

officer moved components to read the identifying number, the firearm's serial numbers were in plain view regardless of whether Cpl. Cremeans moved the pistol. *Id.* at 65-66. Consequently, even if the circuit court had suppressed the photographs of the nonvisible side of the pistol, the initial photograph and the serial numbers/identifying information thereon remained admissible. Any error in the circuit court's ruling on the motion to suppress, therefore, was harmless.

II. The circuit court did not err in denying Petitioner's motion to suppress because the affidavit submitted in support of the search warrant application did not contain information that was false or misleading or that showed a reckless disregard for the truth.

Petitioner argues that because the 9mm Beretta pistol law enforcement used as the basis for a search warrant was not stolen—a fact law enforcement learned days later—the search warrant authorizing seizure of the pistol was based on false information. Pet'r's Br. 15. He further argues that even though the officers provided 911 dispatch the identifying numbers they believed to be the serial numbers, the officers' failure to take additional steps to verify the accuracy of the NCIC information constituted a reckless disregard for the truth.⁸ Pet'r's Br. 15- 16. Petitioner thus claims that Officer Cremeans obtained a search warrant with information he knew was false or would have known was false if not for a reckless disregard of the truth. Pet'r's Br. 15.⁹ The circuit court heard this same argument, Feb. 21, 2023, Motions Hearing, 154-59, found that law enforcement acted in good faith when they obtained the information from 911, did not knowingly use false information to obtain the search warrant, and thus failed to satisfy the requisite burden of

⁸ Petitioner hypothesizes that instead of taking additional steps to verify the accuracy of the NCIC information, the officers were “celebrating” the gun being stolen because of ill will toward Michael. Pet'r's Br. 15. Not only does the record fail to support such an inference, but Officer Stephens also expressly testified there was no celebration about the gun being stolen. Feb. 21, 2023, Motions Hearing, 122-23.

⁹ Petitioner again fails to pinpoint when and how he presented this issue to the lower court in violation of Rule 10, evidence at trial. *See* Pet'r's Br. 15-18.

proof to suppress the search warrant. *Id.* at 160-62. There is no error in the circuit court’s findings and conclusions.

“To successfully challenge the validity of a search warrant on the basis of false information in the warrant affidavit, the defendant 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.” Syl. pt. 1, *State v. Lilly*, 194 W. Va. 595, 461 S.E.2d 101 (1995). In determining whether a statement is false, this Court said that “a statement in a warrant is not false . . . merely because it summarizes facts in a particular way; if a statement can be read as true, it is not a misrepresentation.” *Id.* at 601, 461 S.E.2d at 107.

To begin, there is a distinct difference between incorrect information and knowingly false information. “Incorrect” information is “inaccurate” or “faulty,” whereas “false” information is “intentionally untrue,” or “adjusted or made so as to deceive.”¹⁰ The identifying information on the pistol that law enforcement believed to be the serial number was an accurate number; it just was not the pistol’s serial number, which law enforcement did not learn until a week or more later. *See App. Vol. 4*, 75; Feb. 21, 2023, Motions Hearing, 120-21. Thus, the serial number/identifying information for the 9mm Beretta pistol that Officers Stephens and Cremeans provided to dispatch was *incorrect* information, not *false* information. Moreover, the fact that a 9mm Beretta pistol with a serial number matching the number Officer Stephens provided to dispatch undermines any legitimate argument that law enforcement should have known the number was not the serial number for *this* 9mm Beretta. Officer Stephens took particular care to match the identifying numbers on the pistol with dispatch, repeating and confirming the information before acting. Feb.

¹⁰ *Incorrect*, MERIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/incorrect> (last visited Aug. 20, 2024); *False*, MERIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/false> (last visited Aug. 20, 2024).

21, 2023, Motions Hearing, 136-42. Even if the incorrect number could be viewed as “false,” the circuit court expressly found that Petitioner’s evidence did not demonstrate by a preponderance of the evidence that law enforcement knowingly provided false information. *Id.* at 162; App. Vol. 4, 75. The circuit court unreservedly held that “[t]he officers acted in good faith when they got the information that they did from 911.” Feb. 21, 2023, Motions Hearing, 162. No part of this finding is clearly erroneous.

Petitioner also posits that the officers made an unreasonable mistake or acted with a reckless disregard for the truth by relying on the accuracy of the NCIC information received by 911 dispatch instead taking steps to confirm its validity. Pet’r’s Br. 15-16. Instead of demonstrating recklessness, however, the record reinforces the reasonableness of law enforcement’s belief that the pistol in question was stolen. Officer Stephens followed protocol by having 911 dispatch submit the pistol’s identifying information to NCIC. Feb. 21, 2023, Motions Hearing, 82-83, 93. His ensuing conversation with 911 demonstrates the care he took to confirm the pistol’s identifying numbers with the NCIC hit. He confirmed the make, the caliber, and the identifying numbers on the pistol multiple times, *id.* at 136-141, and dispatch operator repeatedly assured Officer Stephens that the gun was a “match” for the stolen pistol, *id.* at 140, 141. No matter how Petitioner cherry-picks portions of Officer Stephens’s testimony to paint an unfavorable picture, *see, e.g.*, Pet’r’s Br. 15-16, law enforcement followed protocol and had reason to believe the information from NCIC was correct. *See United States v. Leon*, 468 U.S. 897 (1984) (articulating that a good faith exception to the exclusionary rule exists when an officer acting with objective good faith obtains a search warrant and acts within its scope). Thus, while Petitioner opines that the officers essentially targeted Michael because of his aggressive behavior, the fact remains that Officer Stephens accurately relayed numbers on the pistol to dispatch, properly relied

on dispatch's report that it was stolen, and acted appropriately in applying for a search warrant with that information.

Petitioner argues that it was reckless or unreasonable for law enforcement to rely on the information from NCIC¹¹ and that law enforcement should have attempted to contact him and determined who owned the home by searching tax records, deeds, and vehicle registrations before obtaining the search warrant. Pet'r's Br. 12, 16. The cases Petitioner relies on are wholly inapposite to the present case. In *McDonald v. United States*, 335 U.S. 451 (1948), law enforcement officers broke into a rooming house after being repeatedly denied a search warrant, rather than simply asking the landlady for permission to enter to observe the tenant they believed was engaged in an illegal lottery venture. In *Hudson v. Michigan*, 547 U.S. 586 (2006), the question involved the appropriate remedy for a violation of a knock-and-announce rule. The Supreme Court affirmed the denial of a motion to suppress, noting the exclusionary rule is limited “where its remedial objectives are thought most efficaciously served,” and that the “knock and announce” is not necessary when “circumstances presen[t] a threat of physical violence,” *id.* at 589 (citation omitted). In *Sabbath v. United States*, 391 U.S. 585 (1968), law enforcement violated a statute requiring prior notice of authority and purpose before officers could “break open” a door to execute a search warrant.

¹¹ NCIC is regarded as a trustworthy source of information. *See, e.g., O'Bryan v. State*, 464 S.W.3d 875, 880 (Tex. App. 2015) (“Whether as a repository for collective knowledge or as an historically trustworthy source of information, NCIC—and its records—has received widespread acceptance as providing a sufficient basis for both probable cause and reasonable suspicion.”); *State v. Rhymmer*, 915 S.W.2d 465, 468 (Tenn. Crim. App. 1995) (explaining officer did not in act in bad faith where he “acted in reliance upon [NCIC] information he believed to be accurate; information from other officers or record keepers widely used by police in our computerized age.”).

Contrary to Petitioner’s implication, these cases do not impose an affirmative duty on law enforcement to attempt to contact a person before executing a search warrant and instead recognize that no “knock and announce” is even required in situations presenting a threat of physical violence—situations like the one face in the instant case. Perhaps the most informative point made by the Supreme Court is that the personal and property interests protected by the “knock and announce” rule has never protected one’s interest in preventing the government from seeing or taking evidence described in a warrant. Petitioner, then, certainly had no protected interest in preventing law enforcement from executing the search, and the exclusionary rule is inapplicable. *Hudson*, 547 U.S. at 586-87.

Petitioner also analogizes the instant case with *Maresca v. Bernalillo Cnty.*, 804 F.3d 1301, 1304 (10th Cir. 2015). The parallels between the present case and *Maresca* are nonexistent. *Maresca* was a 42 U.S.C. § 1983 civil rights suit involving a situation where an officer made an “unreasonable mistake.” Specifically, the officer was randomly following a vehicle and mistyped its license plate number into the NCIC database. NCIC returned an entry for a stolen maroon 2009 four-door Chevrolet sedan with expired plates. *Id.* The Maresca vehicle was a red 2004 Ford pickup truck with current plates, so the stolen vehicle did not match the Marescas’ truck in color, type of vehicle, make, model, year, license plate number, or license plate registration status. *Id.* The NCIC screen also stated: “Warning—the following stolen vehicle record contains expired license plate data. Use caution, contact entering agency to confirm status.” *Id.* Additionally, Bernalillo County officers were trained to double-check stolen vehicle reports and told to have dispatch verify the information in the NCIC reports before approaching a potentially stolen vehicle. *Id.* The officer ignored the warning, the distinguishing information, and protocol. *Id.* She conducted a “felony stop” that involved drawing guns on the family of five (including the small

children), making them lay face down on the highway, holding a gun over the fourteen-year-old, causing the child to believe they were going to be shot in the head, pointing a gun with finger-on-trigger at the wife, handcuffing all of them and locking them all in different squad cars. *Id.*

Unlike *Maresca*, the officers in this case followed protocol. Feb. 21, 2023, Motions Hearing, 82-83. Unlike the officer in *Maresca*, Officer Stephens confirmed the make, the caliber, and identifying information with dispatch multiple times, was repeatedly assured by dispatch that the pistol was a match with the stolen pistol, and applied for a search warrant based on that same information. *Id.* at 136-141; App. Vol. 3, 63-72. Also unlike *Maresca*, where law enforcement's threat of deadly force was wholly unjustified, here, given the aggressive, armed reception they received from Michael for a mere "knock-and-talk" earlier that day, *see* Pet'r's Br. 2, they realistically anticipated that executing a search warrant would receive a much nastier reception. As a result, they took the necessary precautionary measures of bringing extra officers and a SWAT team. Regardless, the manner in which law enforcement arrived to execute the search warrant has no bearing on the validity of the search warrant itself. The extra precautions further proved justified in hindsight given how the events unfolded.

The other cases Petitioner references are equally unavailing. For example, *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252 (10th Cir. 1998), is another civil rights action and dealt with the propriety of an arrest, not a search warrant. *United States v. Finley*, 612 F.3d 998 (8th Cir. 2010), is on point but undercuts Petitioner's argument. There, the court rejected the attempt to invalidate a search warrant obtained with an affidavit identifying a "false" date. *Id.* at 1003. The Eighth Circuit Court noted that "materiality of a falsehood is not determinative of an affiant's state of mind." *Id.* at 1002. The lower court heard the testimony of the officer and concluded there was no

evidence of reckless disregard for the truth. *Id.* at 1002-03. The Eighth Circuit Court thus had no “firm conviction that a mistake ha[d] been made” and affirmed.

The same principles hold true here. The circuit court heard the evidence directly from the officers, assessed their credibility, and found that the officers did not knowingly present false information in obtaining the search warrant. Feb. 21, 2023, Motions Hearing, 162. As this Court has recognized, the credibility of witnesses and the weight to be given their testimony are matters for the trier of fact, whose findings are entitled to great weight and will not be disturbed on appeal unless clearly contrary to the evidence. *State v. Wood*, 177 W. Va. 352, 355, 352 S.E.2d 103, 105 (1986). The circuit court’s findings are fully supported by the testimony and the record. Therefore, it did not err in rejecting Petitioner’s arguments about false evidence and reckless disregard of the truth.

III. Regardless of the status of the motion to suppress, there is no reasonable probability that either the photographs of the pistol or the validity of the search warrant led to Petitioner’s conviction of obstruction.

Even if the circuit court had granted Petitioner’s motion to suppress, Petitioner’s conviction for obstruction would remain unaffected. There is no reasonable probability in this case that either the photographs of the pistol or the validity of the search warrant led to Petitioner’s conviction for obstruction. He was charged with and convicted of the misdemeanor offense of obstruction based on his interference with law enforcements’ attempt to execute a valid search warrant and valid arrest warrant. *See* App. Vol. 1, 14; App. Vol. 4, 81-82. Thus, whether the photographs were part of a lawful search and whether the search warrant was valid have no bearing whatsoever on whether Petitioner obstructed law enforcement.

Added to that, if an attack on a search warrant is successful, “this will result in voiding the search warrant and rendering the property seized under such warrant inadmissible.” *Wood*, 177 W. Va. at 354, 352 S.E.2d at 105 (citing syl. pt. 1, *State v. Walls*, 170 W. Va. 419, 294 S.E.2d 272

(1982)). The only property that would have been seized under this search warrant is the 9mm Beretta pistol, its magazines, paperwork, receipts and accoutrements. App. Vol. 3, 66. Again, that evidence has no bearing whatsoever on Petitioner's conviction of obstruction.

The scenario in this case epitomizes the meaning of the statement that “[m]ost errors, including constitutional ones are subject to harmless error analysis . . . simply because it makes no sense to retry a case if the result assuredly will be the same.” *See State v. Omechinski*, 196 W. Va. 41, 48 n.11, 468 S.E.2d 173, 180 n.11 (1996) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993)). Even if the evidence was suppressed and this case was retried, it would assuredly yield the same result.¹²

IV. The circuit court soundly exercised its discretion in denying Petitioner's request to go behind the indictment because there was no showing of willful, intentional fraud.

Petitioner's third assignment of error asserts the circuit court erred in denying his request for an evidentiary hearing on his motion to dismiss the indictment, which was predicated on testimony that the firearm was stolen. Pet'r's Br. 18-22; *see* App. Vol. 1, 20-24. The circuit court heard argument on Petitioner's motion and ultimately denied it because Petitioner failed to make a *prima facie* showing of willful and intentional fraud. App. Vol. 4, 77-78. In addition to this contention being meritless, Petitioner's abject lack of citations to the record violates the minimum requirements for appellate review, and this Court should decline to consider this assignment of error. W. Va. R. App. P. 10. If the Court nonetheless considers this third assignment of error, it fails.

¹² It is not clear from the Appendix whether the photographs or the pistol were introduced into evidence at trial.

The well-settled rule in West Virginia is that “[e]xcept 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.” *Spinks*, 239 W. Va. at 602, 803 S.E.2d at 572. As Petitioner notes, it is only once a defendant establishes a *prima facie* case of willful, intentional fraud that he is entitled to a full hearing with compulsory process. Pet’r’s Br. 19; *Barker v. Fox*, 160 W. Va. 749, 753, 238 S.E.2d 235, 237 (1977). The circuit court correctly refused to hold an evidentiary hearing—*another* evidentiary, given it already held an evidentiary hearing on the motion to suppress—because Petitioner failed to meet the *prima facie* threshold.

Just as the circuit court found, the officer’s testimony regarding the pistol being stolen was not fraudulent because it explained the information law enforcement possessed at that time and the series of events that led to the criminal charges against Petitioner. App. Vol. 4, 78. It also was not relevant because Petitioner was neither charged with nor indicted for any offense relating to or incumbent on whether the pistol was lawfully possessed. *Id.* Each of the offenses of which Petitioner was charged stands independent of whether the pistol was stolen. The circuit court did not err in denying Petitioner’s request for a hearing, and its ruling should be affirmed.

V. The circuit court correctly denied Petitioner’s motion to strike two potential jurors for cause after conducting appropriate individual voir dire, because both jurors unequivocally stated they could be fair and impartial. Moreover, Petitioner’s failure to argue, let alone demonstrate, prejudice caused by using peremptory strikes wholly defeats this assignment of error.

Petitioner lastly complains that the circuit court erred by refusing to strike for cause two potential jurors and, as a result, he was “forced” to use two peremptory strikes to remove them from the panel. Pet’r’s Br. 24. According to Petitioner, one prospective juror had a relationship with a relative of one of the officers on scene during the shooting and another prospective juror

had preconceived notions about the facts and had ties to the scene and one of the officers. Pet'r's Br. 22.

It is well established that the “true test to be applied with regard to qualifications of a juror is whether a juror can, without bias or prejudice, return a verdict based on the evidence and the court’s instructions and disregard any prior opinions he may have had.” Syl. pt. 1, *State v. Harshbarger*, 170 W. Va. 401, 294 S.E.2d 254 (1982) (quoting *State v. Charlot*, 157 W. Va. 994, 1000, 206 S.E.2d 908, 912 (1974)). “Jurors who on voir dire of the panel indicate possible prejudice should be excused or should be questioned individually either by the court or by counsel to precisely determine whether they entertain bias or prejudice for or against either party, requiring their excuse.” Syl., *State v. Deaner*, 175 W. Va. 489, 334 S.E.2d 627 (1985); *Accord* syl. pt. 5, *State v. Beckett*, 172 W. Va. 817, 310 S.E.2d 883 (1983). “Actual 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.” Syl. pt. 5, *Miller*, 197 W. Va. 588, 476 S.E.2d 535. Petitioner cannot show any actual bias here, as the jurors in question unequivocally indicated they could return a verdict despite a distant social relationship with a witness.

Aligning with these governing authorities, the circuit court conducted individual voir dire of every potential juror whose answers indicated additional questioning was needed, including both jurors at issue here. Jan. 23, 2024, Trial Tr., 12-17, 38-41, 43-47, 1-133. Despite Petitioner essentially arguing that bias should be presumed, each juror unequivocally stated they could be fair and impartial even though they each knew a witness, and nothing in their responses in their individual voir dire led the circuit court to believe otherwise. *Id.* at 16-17, 58. This Court has long held that a criminal defendant is not entitled to a jury comprised of individuals who have never

met any of the participants in the case; she is entitled to a jury that is free from bias or partiality. *Harshbarger*, 170 W. Va. at 403, 294 S.E.2d at 256 (“The purpose of voir dire is to obtain a panel of jurors free from bias or prejudice.”). That is precisely what Petitioner received. The circuit court heard the prospective jurors’ responses to question, judged their demeanors and veracity, and found no grounds to strike them for cause.

What is more, this Court has repeatedly rejected the very argument Petitioner makes: that fatal error occurred because he was “forced” to use peremptory strikes to remove two jurors he deemed biased. Pet’r’s Br. 24. In *State v. Sutherland*, this Court held that “[a] trial court’s failure to remove a biased juror from a jury panel, . . . does not violate a criminal defendant’s right to a trial by an impartial jury if the defendant removes the juror with a peremptory strike.” Syl. pt. 3, *State v. Sutherland*, 231 W. Va. 410, 745 S.E.2d 448 (2013) (citations omitted). When a defendant uses a peremptory strike to remove a biased juror, he “must show that [he] was forced to accept a juror who should have been excused for cause. That is, appellate courts will not find reversible error based on the trial court’s refusal to remove that juror for cause unless the resulting jury was not fair and impartial.” *Benny W.*, 242 W Va. at 628, 837 S.E.2d at 689 (citing *State v. Rollins*, 233 W. Va. 715, 729, 760 S.E.2d 529, 543 (2014)).

Despite this Court’s clear and unequivocal precedent, the same issue regarding peremptory strikes has been raised time and again. Presumably to underscore its unwavering adherence to *Sutherland*, this Court used syllabus point 6 of *Benny W.* to reiterate its *Sutherland* syllabus, and then provided in its discussion a laundry list of decisions rejecting this same argument. See *Benny W.*, 242 W Va. at 628-29, 837 S.E.2d at 689-90. Truly, this Court could not have made it any clearer: to meet the level of prejudice that would require a new trial, a petitioner must demonstrate that at least one juror who actually sat on his petit jury should have been removed for cause.

Though faced with this Court's unflinching precedent, Petitioner nonetheless takes the same approach as the masses. He urges this Court to "find the loss of two p[er]emptory strikes sufficient prejudice to constitute reversible error," because it is "unfair." Pet'r's Br. 25. Aside from the absence of any legal authority to support this plea, he also has not and cannot demonstrate prejudice. Petitioner faced multiple counts of attempted first-degree murder, multiple counts of malicious wounding, and wanton endangerment, yet the jury convicted him *only* of the misdemeanor offense of obstruction. It cannot realistically be argued, let alone demonstrated, that a biased or prejudiced juror served on the panel. Petitioner has not and cannot satisfy his burden on appeal.

CONCLUSION

This Court should affirm Petitioner's convictions and the Circuit Court of Cabell County's March 8, 2024, Order.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 24-234

STATE OF WEST VIRGINIA,

Respondent,

v.

MICHAEL LANE PINKERMAN,

Petitioner.

CERTIFICATE OF SERVICE

I, Holly M. Mestemacher, do hereby certify that the foregoing Brief of Respondent is being served on counsel of record by File & Serve Xpress this 20th day of August, 2024.

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