No. 20-5992

IN THE SUPREME COURT OF THE UNITED STATES

State of West Virginia,

Plaintiff Below, Respondent

vs.

Alan Lane Hicks,

Defendant Below, Petitioner,

ON PETITION FOR A WRIT OF CERTIORARI TO

THE WEST VIRGINIA SUPREME COURT OF APPEALS

Alan L. Hicks,
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III. QUESTION PRESENTED

Does subjecting petitioner's pro se Rule 35(a) argument styled, "Correction of an Illegal Sentence," to the 35(b) timeline, violate petitioner's Federal Constitutional Due Process and Equal Protection Rights? When that ruling, bars petitioner's federal filing rights under the Antiterrorism and Effective Death Penalty Act of 1996, by misquoting Rule 35 of the West Virginia Rules of Criminal Procedure.[1]

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1. Rule 35. Correction or reduction of sentence.

(a) Correction of Sentence. -- **The court may correct an illegal sentence at any time** and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence. Emphases added.

On February 23, 1989, petitioner filed a Rule 35 Motion. (Apx. pgs. 13-15). Thereafter, Frank Helvey was appointed to file, and did file the direct appeal. On January 10, 1990, the WVSC refused the appeal. (Apx. pg. 16). In November of 1997, petitioner filed a Petition for Writ of Habeas Corpus Ad-Subjiciendum. (Hereinafter Habeas). Petitioner filed a Motion for Appointment of CO Counsel with the Habeas. That motion went unanswered.

Petitioner received appointed counsel, on September 19, 2012, and on August 28, 2013, the Circuit Court granted his motion to withdraw. Thereafter, the Circuit Court appointed attorney Duane Rosenlieb to file an Amended Habeas. On March 23, 2017, after filing the Amended Habeas pro se, the petitioner filed a Motion to Remove Appointed Counsel and Proceed Pro se. That motion was heard by video conference on May 24, 2017. During the hearing Mr. Rosenlieb revealed that the Circuit Court had lost the entire file in petitioner's case.

On June 13, 2017, petitioner filed a Motion for Oral Argument and Hearing on Rule 35 Motion, (Apx. pgs. 26-27), and a Memorandum of Law in Support of Rule 35 Motion. (Apx. pgs. 28-34). When these filings went unanswered, petitioner filed a Mandamus. The WVSC ultimately issued a Rule to Show Cause in the mandamus case. Respondent filed a response to the Rule to Show Cause, which included an "Order Denying Rule 35 Motion," (Apx. pgs. 6-9), and an "Order" appointing counsel and setting a briefing schedule in petitioner's habeas. (Apx. pgs. 77-78). As a result of those two orders the WVSC dismissed petitioner's mandamus as moot.

On February 13, 2019, petitioner filed his Notice of Appeal from the order of the Circuit Court, denying the Rule 35. On February 15, 2019, the WVSC issued its Scheduling Order in regard to the appeal. (Apx. pgs. 35-36). In response to the scheduling order, on March 28, 2019, the petitioner filed a timely, Motion for Correction of Error, (Apx. pgs. 37-41), under Rule 6(e) of the Revised Rules of Appellate Procedure. (Hereinafter RAP).

On April 30, 2019, petitioner filed the Petition for Appeal, in the WVSC. (Apx. pgs. 42-52). And, on June 17, 2019, the Respondent, Assistant Attorney General Benjamin F. Yancey, filed a Summary Response. (Apx. pgs. 53-63). (Hereinafter Respondent Yancey). On July 1, 2019, petitioner filed his Reply to the summary response. (Apx. pgs. 64-71).

On January 13, 2020, the WVSC issued its Memorandum Decision, in which it affirmed the Circuit Court's ruling, and petitioner filed for rehearing. Rehearing was denied.

VII. ARGUMENT

Once in prison petitioner filed the Rule 35 motion. Thereafter, the trial judge, appointed Frank Helvey. He filed the appeal, and it was refused by the WVSC, without review. The refusal order stated it was, "an appeal from a judgment of the Circuit Court of Putnam County, rendered on the 28th day of October, 1988." (Apx. pg. 16). Petitioner felt that the day judgment was rendered would be governed by the amended commitment order, (Apx. pgs. 17-18), because that order set the effective sentence date, which had not yet been set.

One direct appeal issue, on the refusal to grant a self-defense instruction, was the gravamen of petitioner's Rule 35 issue on "correction of a sentence that was imposed in an illegal manner," while a mid trial acquittal was the basis for the issue on the "correction of an illegal sentence." (Apx. pgs. 19-21). In 1997, petitioner filed a pro se Habeas. Thereafter, petitioner filed a motion for a hearing on his Rule 35, (Apx. pgs. 26-27), and a Memorandum of Law. (Apx. pgs. 28-34). That motion went unanswered, so the petitioner filed a Mandamus.

The WVSC issued a Rule to Show Cause in the Mandamus case, which outlined two courses of action that, if taken, would moot the mandamus. In regard to the first course of action the Circuit Court denied petitioner's Rule 35 as being a Rule 35(b) and being untimely filed. (Apx. pgs. 6-9). In regard to the second course of action, the Circuit Court appointed petitioner an attorney and set a scheduling order for his Habeas. (Apx. pgs. 79-80). Based upon those two orders the WVSC dismissed the mandamus as moot.

Petitioner filed a notice of appeal, and the WVSC issued a scheduling order. The order stated, "the assignments of error in this appeal must relate only to the circuit court's decision not to reduce the petitioner's sentence[.]" (Apx. pgs. 35-36). The scheduling order was at odds with petitioner's actual issues presented before the Circuit Court. Thus, petitioner filed a Motion for Correction of Error under Rule 6(e). (Apx. pgs. 37-41). That motion went unanswered, and petitioner filed the Appeal. (Apx. pgs. 42-52).

In the Summary Response to the appeal, Respondent Yancey contends the "claims cannot be raised for the first time on appeal," and incorrectly states that petitioner's "line of argument is in direct conflict with the presumption under Rule 35 that petitioner's conviction for which he was sentenced is valid." (Apx. pg. 58). In support of his argument, Respondent Yancey cites State v. Head, 480 S.E.2d 507, 515 (1996), and State v. Marcum, 792 S.E.2d 37 (2016), both Rule 35(b) cases.

Respondent Yancey, citing Call v. McKenzie, 220 S.E.2d 665, 669 (1975), states, "[w]hile a defendant is entitled to due process of law, he is not entitled to appeal upon appeal, attack upon attack, and Habeas upon Habeas Corpus. There must be some end to litigation, and the proper way to effect this salutary result is to do everything right the first time." (Apx. pg. 59). Contrary to the Respondent's contention, petitioners habeas has been pending since 1997.

Respondent Yancey contends petitioner "was requesting a reduced sentence and did not assert that his sentence was illegal on statutory or constitutional grounds, [thus] petitioner's petition should be reviewed under the time requirements of Rule 35(b)." (Apx. pg. 61). The Reply addressed this exact quote by stating, Rule 35(a) states, **"[t]he court may correct an illegal sentence at any time, ... "** and on this point, **"petitioner's original Rule 35 had nine provisions, ... Provision [5] stated 'the jury acted illegally,' ..."** (Apx. pg. 67). Emphases added.

While the petitioner's original motion did not have an (a) or (b) designation, a motion filed pro se must be liberally construed and "held to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 30 L.Ed.2d 652 (1972). This Court has stated, we nonetheless review the pleading to ensure that it has "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 173 L.Ed.2d (2009). Also, "a claim presented by a pro se litigant should not be dismissed unless it appears that no relief can be granted under any set of facts that can be proved in support of the complaint's allegations." Hoghes v. Rowe, 66 L.Ed.2d 163 (1980).

In addressing petitioner's claim that his sentence was imposed in an illegal manner, the WVSC stated, "petitioner fails to cite any law in support of that contention," (Apx. pg. 4), and "he contends that if the jury would have been properly instructed on the heat of passion involved in self-defense, no judge would have instructed, that malice need not exist in the heart of the petitioner, against the victim." (Apx. pg. 4). However, petitioner's appeal cites United States v. Hicks, 748 F.2d 854 (1984), to support that the denial of the self-defense instruction allowed sentencing in an illegal manner. (Apx. pg. 51).

State v. Jenkins, 443 S.E.2d 244 (1994), was cited to support the claim that the Circuit Court's refusal to give the defenses self-defense instruction opened the door for the prosecutor to request, and receive, instructions on inferring malice. One state instruction stated, "to convict one of murder it is not necessary that malice should exist in the heart of the defendant ... against the deceased, Pedro Gaona." (Apx. pgs. 22-25). The wording in petitioner's case and the Jenkins case are identical. Jenkins resulted in a reversal.

The interpretation of petitioner's Rule 35 as a "plea for leniency," ignores the fact that the provisions in the original Rule 35, not intended for arguing leniency, are tied directly to the Rule 35(a) arguments presented in the memorandum of law. Under the Rule, a litigant is allowed to argue the Rule in three ways.

(1) A motion to reduce a sentence,
if filed within 120 days of sentencing.

(2) A motion to correct a sentence imposed in an illegal manner,
if filed within the time period provided herein for the reduction of sentence.

(3) **A motion to correct an illegal sentence,**
filed at any time. Emphases added.

In Wall v. Kholi, 179 L.Ed.2d 252 (2011), this court warned that separating motions for a reduced sentence into two categories was problematic. Id. at 265. West Virginia's Rule 35 is nearly identical to the one in Wall, and it also separates the motion to reduce into two categories: those that challenge a sentence on legal grounds and those that merely ask for leniency. West Virginia's Rule 35, like the one in Wall also requires that a challenge on the legal ground that the sentence was imposed in an illegal manner, be filed within 120 days

Unlike Wall, petitioner included provisions, in the original Rule 35, for arguments under the entire spectrum of the rule. The WVSC's decision, affirming the Circuit Court's ruling, did not account for the fact that West Virginia's Rule 35(a) allows a motion to correct an illegal sentence to be filed any time.

Under 28 U.S.C. §2244(d)(1), state prisoners have a 1-year limitation period for filing federal habeas corpus petitions. In this case the ruling, that petitioner's Rule 35 was untimely filed, bars petitioner under this Court's ruling in Wall, and the AEDPA. This is so because, petitioner did not file his Habeas within the one year limit, as the act required. Petitioner relied upon the Rule 35 to toll his time, because it was a collateral review.

The Rule 35(a) issue, "that the sentence is illegal," does not require a timely filed motion. The Rule 35(a) issue, "that the sentence was imposed in an illegal manner," is subject to a 120 day timeline. The lower courts have misquoted the rule, and in so doing have discounted the petitioner's rights as a pro se litigant. This action violates petitioner's due process and equal protection rights, and is contrary to this Court's ruling in Ashcroft, Haines and Hoghes, supra.

VIII. BASIS FOR WRIT OF CERTIORARI

The Circuit Court's branding, of petitioner's Rule 35 as a Rule 35(b) is only the latest in a continuing effort to delay, and deny petitioner the right to litigate his case. After filing a Habeas and a motion for the appointment of counsel, in November of 1997, petitioner was not appointed an attorney until September 21, 2012, when Shawn Bayliss was appointed to file an Amended Habeas. Attorney Bayliss' refusal to communicate resulted in a state bar complaint. In responding to the complaint Attorney Bayliss offered a letter, to the Public Defender's Office, as an exhibit. That letter stated, "[i]t is my great hope that a copy of the trial transcript remains in your possession, as the Court file is void of the same." (Apx. pg. 79).

Attorney Bayliss filed a motion to withdraw. On September 5, 2013, when Mr. Bayliss was relieved as counsel, Carl Dascoli, Jr., was appointed. (Apx. 106). Petitioner never knew of that appointment until he received Judge Reeder's summary response on June 19, 2018.

In the interim, being unaware that he was represented by counsel, petitioner filed a motion for a status conference on April 5, 2016. In response to the motion Judge Reeder appointed Duane Rosenlieb, the third attorney appointed. Attorney Rosenlieb was not responding to correspondence either. Finally, Duane Rosenlieb wrote a letter that was, and remains to this day, the only letter petitioner has ever received from an attorney appointed in regard to the Habeas. After the petitioner filed the amended petition, that attorney Rosenlieb was appointed to file, he filed a Motion to Remove Appointed Counsel and Proceed Pro se.

During that May 24, 2017, video hearing, petitioner requested a hearing on his Rule 35. Then, when attorney Rosenlieb stated that he had not been able to get a copy of the record, the petitioner stated that, "he would agree to copy the record he possessed with an Order from the Court which would waive the correctional facility's copying fees." Petitioner evidences this fact by order dated May 26, 2017. (Apx. pg. 83). Assistant Prosecutor, Jenifer Karr objected, and stated that the original court reporter's shorthand notes were available to be transcribed.

With no hearing scheduled, petitioner filed a motion for a hearing on the Rule 35. On July 13, 2017, petitioner filed a Motion To Prepare Transcripts which stated, "the transcripts would provide this Court with a nearly complete record in order to allow this case to move forward without relying upon the petitioner for the entire record, as the prosecution would understandingly be reluctant to do." (Apx. pg. 86). A year after the video conference hearing, with no movement on his case, petitioner filed a petition for Writ of Mandamus.

On May 21, 2018, the West Virginia Supreme Court of Appeals issued a scheduling order. On June 19, 2018, Judge Reeder filed a summary response. (Apx. pgs. 85-100). That document included a certificate of service which stated, "I hereby certify that on this 19th day of June, 2018, true and accurate copies of the foregoing Respondent's Summary Response were deposited in the U.S. Mail contained in postage-paid envelope addressed to all other parties to this appeal as follows: Alan L. Hicks ..." (Apx. pg. 100). (Emphases in original). However, petitioner never received the summary response, which is a violation of Rule 37 of the RAP.[2]

In his summary response, to the mandamus, the Judge Reeder relied upon a transcript of the May 24, 2017, video conference hearing, in a manner that violated Rule 7(d)(5). Judge Reeder cited the portion of the hearing in which the petitioner admitted possession of the record and expressed a willingness to provide them to the Court. What the respondent did not say was that the prosecutor objected to the petitioner providing the record and revealed that the court reporter's shorthand notes were still available to be transcribed. Rule 7(d)(5) states that, "If transcript excerpts are misleading or unintelligible by reason of incompleteness or lack of surrounding context, the entire transcript must be provided;" Furthermore, under Rule 80(c) of the West Virginia Rules of Civil Procedure, since the petitioner was proceeding pro se, Judge Reeder was required to give the petitioner notice when he caused the hearing to be transcribed. Petitioner has yet to be provided that transcript, and cites to it from memory.

Judge Reeder used that transcript to spur the WVSC into refusing the petitioner's request under question one for a docket sheet, and his request under question four for the transcription of the shorthand notes. (Apx. pg. 115).[3] Thereafter, in the Response that mooted the Mandamus, Judge Reeder included two orders, one denying the Rule 35, and one ordering petitioner to provide the record. (Apx. pg. 77).[4]

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2. Petitioner is in a maximum security prison where all incoming legal mail is retained by mail room staff, logged in on an incoming legal mail log sheet, then signed for by the inmate in the presence of staff in a secured area. Daily legal mail log sheets are retained via policy directives and procedures. A court order would be enough to prove that Joseph Reeder, Judge of the 29th Judicial Circuit Court, in West Virginia, failed to follow the Rules. Also, an appointed attorney notarized a document in which he claimed to have communicated in multiple ways.

3. Two things are very telling about Judge Reeder's use of the video hearing transcript; (1) the May 26, 2017, order removing Rosenlieb documented the fact that an order, waiving the prison's copying fees, (Apx. pg. 83), would have prevented petitioner from trying to get the shorthand notes transcribed in a May 15, 2018, Mandamus, (Apx. pg. 88), and (2) a single paragraph in that order states that petitioner "requested a hearing on his motion filed under Rule 35," and "that he believes the transcript will show his case should be dismissed." (Apx. pg. 82).

4. Judge Reeder, after failing to provide an order waiving prison copying fees, preventing petitioner from getting the transcripts ordered, and delaying the petitioner's case for at least one more year, orders the impossible. Now the petitioner "will make available any materials in his possession that he will rely upon in support of his Petition." (Apx. pg. 77). Approximately 3,000 pages at 15¢ a page, or $450.00. The end result is that the scheduling order used to get the mandamus mooted said the "Court will issue a final decision on the petition for Writ of Habeas Corpus Ad-Subjiciendum on or before September 6, 2019. (Apx. pg. 78). That date is nearly a year past due.

The end result of the video hearing was that Duane Rosenlieb, who was appointed to represent petitioner on May 3, 2016, (Apx. 106), was removed on May 26, 2017. (Apx. pgs. 83). On January 18, 2019, Judge Reeder appointed current counsel, Carl Hostler, when the WVSC's Rule to Show Cause basically said to allowed petitioner to continue pro se, would require "a ruling on the pending petition for writ of habeas corpus." (Apx. pg. 115).

On August 8, 2019, Carl Hostler, motioned for a continuance. The motion stated, "[t]he request is made in light of the lack of a trial transcript in the office of the Clerk of the Circuit Court of Putnam County. It is believed such transcript is in the possession of the WV Public Defenders' Service ..." (Apx. pgs. 80-81). Now, seven years after the first attorney failed, the fourth attorney is continuing the case in an attempt to get the record, from the exact place where the first one failed. (Apx. pg. 79). Also, the only document ever filed by any of the attorneys appointed to represent petitioner, is the motion for a continuance, filed a year ago, by Carl Hostler. (Apx. 80-81).

Petitioner filed a pro se document which contained nine provisions. Provision [1] stated that petitioner was indicted for murder and aggravated robbery, and [2] stated petitioner was acquitted of the aggravated robbery.

The State brought a Murder indictment, (Apx. pg. 117), and (16) months later, the state brought an Aggravated Robbery indictment, (Apx. pg. 118), which they joined for a single trial. The State's process of bringing separate indictments, then joining them, amended the indictment to a specific intent crime.

Other than the element of grand larceny, petitioner's indictment for aggravated robbery stated that the petitioner "did by presentment of a firearm ... an assault unlawfully and feloniously make ..." (Apx. pg. 118). The jury found petitioner guilty of grand larceny as a lesser included offense of the aggravated robbery charge. The presentment of the firearm was the only element left in play after the grand larceny. Petitioner's claim is that provisions one and two of his Rule 35 support an argument that the petitioner's rights were violated under the 5th amendments double jeopardy clause. The state was legally barred, by collateral estoppel from mentioning the firearm after the mid trial acquittal. In order to prove the murder, the state used evidence that, had it been proven, would have elevated the grand larceny to robbery. Therefore, the acquittal order is legally based upon a factual variance between the indictment and the proof at trial. Whether petitioner's Rule 35 was filed timely or not he is entitled to the protection of his federal rights that this collateral attack affords him under the AEDPA.

Petitioner contends that a rule should be issued and a writ of certiorari then ordered because the WVSC has abused the legitimate powers of that Court by failing to adhere to this Court's prior rulings on pro se litigation. Further, petitioner alleges that he has no adequate remedy at law because the state of West Virginia has barred all of his federal review, with the exception of the current filing.

By any one or more of the following tests, petitioner contends that the protection against double jeopardy applies to this case.

I. Single Act or Volition Test
II. Same Evidence Test
III. Collateral Estoppel
IV. Same Transaction Test

Petitioner includes with his petition, and incorporates herein by this reference, an appendix record of documents. Petitioner certifies that he reviewed the contents of this appendix, and they are true and accurate copies of items contained in the record of the lower tribunal.

IX. CONCLUSION

For the reasons discussed above and for matters as they appear in the record, petitioner contends that regardless of which aspect of the double jeopardy function is applied--same act or volition, same evidence, same transaction or collateral estoppel--petitioner's Rule 35(a) argument falls on all fours within the parameters of both the federal and state constitutional double jeopardy protections, and states a claim that is plausible on its face.

Whether this court applies Due Process, Equal Protection or Double Jeopardy, they are applied to state proceedings through the Fourteenth Amendment to the United States Constitution. Having presented what he believes to be a prima facie case, petitioner prays that this Court issue a rule against the WVSC to show cause why the Writ of Certiorari should not be awarded, and that a Writ of Certiorari be thereafter awarded.

Wherefore, the petitioner respectfully prays that the WVSC be directed to release the petitioner, based upon the Double Jeopardy violation contained within the argument under Rule 35(a), of the underlying case.

Respectfully submitted,

Alan Hicks

Alan Hicks, petitioner pro se