

20-6522

IN THE
SUPREME COURT OF THE UNITED STATES

RICKY VINCENT PENDLETON--PETITIONER

VS.

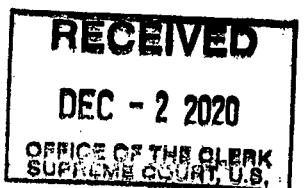
TERRY C. HAMRICK and TRACY P. RICE--RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

**Ricky Pendleton
c/o: #3572914-One Mountside Way
Mount Olive Correctional Complex
Mount Olive, WV 25185**



QUESTION(S) PRESENTED

- 1. WHETHER INDIGENT PRISONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY COURT REPORTER'S DENYING HIM ACCESS TO THE GRAND JURY TRANSCRIPTS REQUESTED TO PREPARE FOR APPEAL?**

- 2. WHETHER A PARTICULARIZED NEED FOR ANY DOCUMENTS OR ANY OTHER REQUEST IS THE ONLY SHOWING?**

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINION BELOW

For cases from **state court**:

The opinion of the West Virginia Supreme Court of Appeals to review the merits appears @ Appendix A to the petition and is reported @ **Pendleton v. Hamrick, 2020 W. Va. LEXIS 345.**

The opinion of the West Virginia Supreme Court of Appeals to review the merits in the Petition for rehearing appears @ Appendix B to the petition and is unpublished.

The opinion in the Circuit Court of Berkeley County, West Virginia Order Denying Petition for Writ of Mandamus appears @ Appendix C and is reported @ E-Filing Notice; www.betty.hustler@courtswv.gov including signature of Circuit Court Judge, Ref. Code: 19D2NNST. Reported @ E-Filing Notice 1/22/2019 4:00PM CC-02-2018-C-281 Berkeley County Circuit Clerk Virginia Sine

JURISDICTION

For cases from state court:

The date on which the West Virginia Supreme Court of Appeals decided my case was June 3rd 2020. A copy of that decision appears @ [Appendix A](#).

The date on which the West Virginia Supreme Court of Appeals decided my Petition for rehearing case was September 3rd 2020. A copy of that order refusing said Petition for rehearing appears @ [Appendix B](#).

The date on which in the Circuit Court of Berkeley County, West Virginia Order Denying Petition for Writ of Mandamus appears @ [Appendix C](#) which is also reported @ E-Filing Notice 1/22/2019 4:00PM CC-02-2018-C-281 Berkeley County Circuit Clerk Virginia Sine; www.betty.hustler@courtswv.gov including signature of Circuit Court Judge, Ref. Code: 19D2NNST.

The jurisdiction of this Court is invoked under **28 U.S.C. §1257(a)**.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 1. Fourteenth Amendment of the Constitution of the United States**
- 2. W. Va. Const., art. III, § 10.**
- 3. W. Va. Const., art. III, § 17.**
- 4. The requirement of this section that the indigent person file a written request, setting forth the grounds upon which the appeal or writ of error will be sought, is directory and not mandatory in character. A convicted indigent defendant is entitled to a free transcript of the record of transcript of the testimony, upon complying with this section, for use in seeking an appeal. Pursuant to § 51-7-7 which states:**

"In any case wherein an indigent person has filed a notice of intent to seek an appeal or writ of error as specified in section four [§ 58-4-4], article four, or section four [§ 58-5-4], article five, chapter fifty-eight of this code, the court, or judge thereof in vacation, upon written request of such convicted person or his counsel, presented within sixty days after the entry of such judgment, shall, by order entered of record, authorize and direct the court reporter to furnish a transcript of the testimony and proceedings of the trial, or such part or parts thereof as such convicted person or his counsel shall have indicated in his request to be necessary, to the convicted person, without charge to him, for use in seeking his appeal or writ of error, and the cost of such transcript whether the case be one of misdemeanor or felony, shall be certified by the judge of the court to the auditor of the State and shall be paid out of the treasury of the State from the appropriation for criminal charges."

STATEMENT OF THE CASE

Petitioner had filed a Petition for Writ of Mandamus Case No. CC-02-2018-C-281, and on January 22, 2019, an Order of the Circuit Court of Berkeley County denying his Petition for a Writ of Mandamus, Appendix C. Petitioner had appealed this decision to the West Virginia Supreme Court of Appeals, which was Affirmed on June 3, 2020, @ Appendix A. Petitioner then filed a Petition for rehearing and this was also refused by the West Virginia Supreme Court of Appeals, @ Appendix B. Petitioner now files in the U.S. Supreme Court for it to review:

1. if Petitioner's constitutional rights were violated as an indigent prisoner who request for transcripts of the grand jury to prepare for an appeal at the higher state court level;
2. if Petitioner can only show a Particularized Need for such document requested is all.

The rights guaranteed by the Fourteenth Amendment to the Constitution of the United States and W. Va. Const., art. III, §§ 10, 17, in that it provides for the furnishing of a transcript at public expense to indigent defendants, whether they stand convicted of a felony or misdemeanor. This Supreme Court of the United States has consistently held it to be a violation of the Fourteenth Amendment to deprive a person, because of his indigency, of any right of appeal afforded to other convicted defendants. A state which grants appellate review cannot do so in a way that discriminates against some convicted defendants on account of their poverty. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

Here are the reasons for granting this Petition showing Petitioner's constitutional rights are violated as follows herein.

REASONS FOR GRANTING THE PETITION

QUESTION PRESENTED:

1. WHETHER INDIGENT PRISONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY COURT REPORTER'S DENYING HIM ACCESS TO THE GRAND JURY TRANSCRIPTS REQUESTED TO PREPARE FOR APPEAL?

Petitioner, Ricky Vincent Pendleton, self-represented, appealed the January 22, 2019, order of the Circuit Court of Berkeley County denying his petition for a writ of mandamus, @ Appendix C. He later filed in the West Virginia Supreme Court of Appeals in which it ultimately affirmed the lower court's Order @ Appendix A. Petitioner then filed a Petition for rehearing based on the higher court's overlooking of the facts by law, @ Appendix B. According to the provisions of this section and § 51-7-2, all proceedings in the criminal trial are required to be reported. See State v. Bolling, 162 W. Va. 103, 246 S.E.2d 631, 1978 W. Va. LEXIS 330 (W. Va. 1978). Petitioner by trial counsel, Keith L. Wheaton, had filed by way of Motion to Compel discovery @ Appendix D. for a true copy of the May term, 1996 state proceedings, state grand jury transcripts. Mr. Wheaton did also file a Motion to Transcribe Testimony, @ Appendix E. In both motions, which was an indication for the May term, 1996 state proceedings, state grand jury transcripts. These motions were ignored by the State and misinterpreted by the Circuit Court. Petitioner was given the federal transcripts instead. Petitioner reasonably believes that the state and the circuit court knew or should have known that the request was for the May term, 1996 state proceedings, state grand jury transcripts, evidenced by two motions and purposefully given the wrong transcripts.

A. WHAT THE STATE SUPREME COURT HAD OVERLOOKED:

Petitioner had filed numerous petitions in regards to requests for the May term, 1996 state proceedings, State grand jury transcripts in different courts to no avail. The West Virginia Supreme Court of Appeals, did rearugued its same point such as:

*"Upon a careful reading of the victim's statement, we determine that the statement did support probable cause that petitioner took part in the beating because the victim indicates that petitioner "must have been" present given that the victim was "bombardeed" during the attack. 2015 W. Va. LEXIS 1095, [WL] at *3. Our decision in Pendleton II notwithstanding, petitioner filed a petition for a writ of mandamus in the circuit court on August 21, 2018, to compel respondents, who are Berkeley County court reporters, to produce the May 22, 1996, grand jury transcript. The circuit court denied the mandamus petition by order entered on January 22, 2019. Petitioner now appeals the circuit court's January 22, 2019, order." Pendleton v. Ballard, No. 14-1307 ("Pendleton II"), 2015 W. Va. LEXIS 1095, 2015 WL 6955134 (W. Va. Nov. 6, 2015) (memorandum decision).*

The fact that according to the victim's written statement didn't see Petitioner in anyway committing any crimes against him. He only mentions [he] "*must have been close by,*" but mere presence at a scene of the crime doesn't make you part of the crime. See the victim's written statement @ Appendix F. Now, a convicted indigent defendant is entitled to a free transcript of the record of his trial, upon complying with this section, for use in seeking an appeal. State ex rel. Legg v. Boles, 148 W. Va. 354, 135 S.E.2d 257, 1964 W. Va. LEXIS 66 (W. Va. 1964). An indigent person who substantially complies with the requirements of this section is entitled to a free transcript which he seeks for the purpose of applying for an appeal from a judgment upon an indictment for a criminal offense for which he has been tried and found guilty and sentence has been imposed. State ex rel. Kennedy v. Boles, 150 W. Va. 504, 147 S.E.2d 391, 1966 W. Va. LEXIS 172 (W. Va. 1966); State ex rel. Hamrick v. Coiner, 156 W. Va. 17, 189 S.E.2d 846, (W. Va. 1971). Petitioner was in fact indigent at the time of applying an appeal from a judgment.

B. DUTY OF THE COURT REPORTER CONCERNING THIS CASE:

Pursuant to §51-7-7 which in part states:

"In any case wherein an indigent person has filed a notice of intent to seek an appeal or writ of error as specified in section four [§ 58-4-4], article four, or section four [§ 58-5-4], article five, chapter fifty-eight of this code, the court, or judge thereof in vacation, upon written request of such convicted person or his counsel, presented within sixty days after the entry of such judgment, shall, by order entered of record, authorize and direct the court reporter to furnish a transcript of the testimony and proceedings of the trial, or such part or parts thereof as such convicted person or his counsel shall have indicated in his request to be necessary, to the convicted person, without charge to him, for use in seeking his appeal or writ of error, and the cost of such transcript whether the case be one of misdemeanor or felony..."

This section [§51-7-7] supplements, and perhaps exceeds, the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States and W. Va. Const., art. III, §§ 10, 17, in that it provides for the furnishing of a transcript at public expense to indigent defendants, whether they stand convicted of a felony or misdemeanor. *State ex rel. Banach v. Boles*, 147 W. Va. 850, 131 S.E.2d 722, 1963 W. Va. LEXIS 36 (W. Va. 1963). Petitioner had made a written request for such request for the May term, 1996 state proceedings, State grand jury transcripts for an appeal in the next level. The requirement of this §51-7-7 section that the indigent person file a written request, setting forth the grounds upon which the appeal or writ of error will be sought, is directory and not mandatory in character. Hence, *"elimination or disregard of such provision would not defeat the purpose of the legislature in the enactment of this section."* *State ex rel. Kennedy v. Boles*, 150 W. Va. 504, 147 S.E.2d 391, 1966 W. Va. LEXIS 172 (W. Va. 1966).

"The language of this section and its inclusion in the chapter designated "Courts and Their Officers" clearly shows that the court reporter is an officer of the court and acts in its behalf." *State ex rel. Legg v. Boles*, 148 W. Va. 354, 135 S.E.2d 257, 1964 W. Va. LEXIS 66

(W. Va. 1964); Burger v. Burger, 176 W. Va. 416, 345 S.E.2d 18, 1986 W. Va. LEXIS 483 (W. Va. 1986). Failure to provide free transcript violates constitutional rights of indigent defendant. The court reporter, being an officer of the court, acts for the court, and consequently for the State, and his refusal to furnish an indigent defendant free a transcript of the testimony in accordance with § 51-7-7, constitutes a violation of defendant's constitutional rights under the Fourteenth Amendment. In the decisions by the Supreme Court of the United States, beginning with Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, the refusal to furnish an indigent defendant a free a transcript of the testimony to enable him to apply for an appeal is a violation of the Fourteenth Amendment. Petitioner had never received the May term, 1996 state proceeding, state grand jury transcripts to fight for his appeal in the next level.

QUESTION PRESENTED:

2. WHETHER A PARTICULARIZED NEED FOR ANY DOCUMENTS OR ANYTHING OTHER REQUEST IS THE ONLY SHOWING?

Petitioner had made a Particularized Need for the May term, 1996 state proceeding, state grand jury transcripts. According to Woodruff v. Thornsby, 2014 U.S. Dist. LEXIS 151399, which shows, in United States v. Moussaoui, 483 F.3d 220, 235 (4th Cir. 2007), it additionally observed in part as follows:

... "The Supreme Court has explained that a party seeking disclosure of grand jury materials must make a showing of a "particularized need" by demonstrating that (1) the materials are needed to avoid an injustice in another proceeding; (2) the need for disclosure is greater than the need for continued secrecy; and (3) the request is structured to cover only needed materials. *Id.* at 235 (citing *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979)). "

Petitioner's purpose was for the preparation of trial in the lower court but was denied this.

*"And this "particularized need" becomes "strong" both for purposes of trial preparation and for trial itself, when there has been prior unlimited release to one party in the litigation of the grand jury transcript and materials. In that case, disclosure is in order not merely to assure the accuracy of the testimony but also "to equalize the access to relevant facts which each side possesses" and to eliminate the obvious unfair advantage, arising from affording only one side "exclusive access to a storehouse of relevant fact." **In re Grand Jury, 800 F.2d at 1302.***

Citing **Douglas**, Petitioner will show the Particularized Need for the May term, 1996 state grand jury transcript, by demonstrating that of the following:

(1). the materials are needed to avoid an injustice in another proceeding:

- (a). to determine if African-American, and Hispanics were proportionally represented during the grand jury selection, names and who were in continuation of constantly being selected to serve on the grand jury master jury wheel at the area of Berkeley County, West Virginia.
- (b). to determine if African-American, and Hispanics were proportionally represented during the grand jury mastery jury wheel for young adults since Petitioner was twenty years of age during the May term, 1996 state grand jury proceeding had occurred.
- (c). to review, the May term, 1996 state grand jury proceeding, the testimony of WV State trooper Eric D. Burnett, who was not the investigating officer in this case. However, WV State trooper D.E. Boober and WV State trooper Jeffrey Phillips both had testified at the state trial.

Now, Petitioner wanted to inspect if either of these officers had testified to the report of the other officer, which is unlawful.

(2). the need for disclosure is greater than the need for continued secrecy:

The need for the May term, 1996 state grand jury proceeding, the testimony of WV State

trooper Eric D. Burnett which is greater than the need for continued secrecy based the fact that Petitioner during the pre-trial proceedings by trial counsel Keith L. Wheaton, had filed two Motions: Motion to Compel Discovery, see @ Appendix D; and Motion to Transcribe Testimony, see @ Appendix E. These motions were an indication requesting for need for the May term, 1996 state grand jury proceeding, the testimony of WV State trooper Eric D. Burnett for preparation of trial. Mr. Wheaton would have investigate this case more thoroughly upon such disclosure, but was instead, forwarded the Federal grand jury transcripts, which didn't have anything to do with the upcoming state trial. The circuit court and the state knew or should have known per request. This was a sabotage against Petitioner's fairness to face trial as following:

(a). Whether Petitioner was wrongfully indicted as the Principal in the first degree based on the testimony of WV State trooper Eric D. Burnett who may have misled the grand jury?

According to the victim's Ryan Frankenberg's written statement see @ Appendix F, who he had only implicates David Wayne Gibson as attacking, and beating him throughout, in which stating in part:

"The one boy got out then "D" [David Gibson] put my car in park and grabbed me around the head. I tried to push him off of me but "D" [David Gibson] had a good hold of me and he pulled me out from the passenger side."

""D" [David Gibson] started hittig me while I was in the car but really did land a hard on me until he had me out of the car. The only thing "D" [David Gibson] said was get out of the car and used foul language throughout.

"I don't remember anything right after being dragged out of the car, but the other boy must have been close by because it seemed like I was bombarded after being out of the car."

"...No, just that I told "D" [David Gibson] when he first grabbed me and throughout the time that he was beating me to just take my car and my money."

Mr. Frankenberry's written statement did not in fact implicate Petitioner as to my overt act in particular. However, there were "*overwhelming*" evidence against David "D" Gibson upon eyewitness account by Mr. Frankenberry's statement. So why was Petitioner indicted as the "Principal" in the first degree? In all four counts in the indictment, Petitioner was the sole perpetrator, see indictment, @ Appendix G. Eventhough Mr. Frankenberry did mention: "*...but the other boy must have been close by because it seemed like I was bombarded after being out of the car.*" Mere presence doesn't make one part of a crime, in fact even having knowledge of a crime being committed doesn't make one part of the crime. This does show a possibility that WV State trooper Eric D. Burnett may have misled the grand jury that he had 'influenced the grand jury's decision to indict' or there is 'grave doubt that the decision to indict was free from the substantial influence of such violations. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 101 L. Ed. 2d 228, 108 S. Ct. 2369 (1988) 101 L. Ed. 2d at 238 (citing *Mechanik*, 475 U.S. 66, 78, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986) (O'Connor, J., concurring)).

(b). Whether claims were incomplete due to such that Non-disclosure of May term, 1996 state grand jury transcript?

Petitioner was denied access to the May term, 1996 state grand jury transcripts in his numerous attempt to acquire them. However, his claim in which he was prevented from filing is incomplete based on the fact that it is not ADJUDICATED, pursuant to *Smith v. Mirandy*, 2016 U.S. Dist. LEXIS 43714. The Fourth Circuit has indicated that "[a] claim is not adjudicated on the merits when the state court makes its decision on a materially incomplete record. A record may be materially incomplete when a state court unreasonably refuses to permit further development of the facts of a claim." *Gordon v. Braxton*, 780 F.3d 196, 204 (4th Cir. 2015).

The Fourth Circuit has found that a "state court unreasonably refused to permit further factual development where the state court denied a petitioner's request for an evidentiary hearing on a claim that the Fourth {2016 U.S. Dist. LEXIS 49} Circuit characterized as a "credibility contest." Id. at 203-04. Similarly, in Winston I, the Court held that "the state court did not adjudicate the petitioner's claim on the merits where petitioner's request for discovery and an evidentiary hearing were denied by the state court, and the state court "passed on the opportunity to adjudicate [his] claim on a complete record.'" 592 F.3d at 557. It further states: "Finally, it bears mentioning that, while a state court's summary denial of a claim may be presumed to be an adjudication on the merits, where the thoroughness of the state court's development of the record underlying the summary denial is challenged by a federal habeas petitioner, a federal court may still find that the state court did not adjudicate the claim on the merits due to the materially incomplete record before the state court. See Winston II, 683 F.3d at 502 (discussing *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)).

Petitioner was inexplicably denied an opportunity to develop his claims due to Non-disclosure of May term, 1996 state grand jury transcripts as following:

(1) **the existence of a clear right in the petitioner to the relief sought:** Petitioner was an indigent person who substantially complies with the requirements of § 51-7-7 is entitled to a free transcript which he seeks for applying for an appeal from a judgment of conviction upon an indictment.

(2) **the existence of a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel:** the legal duty of the Respondent pursuant to § 51-7-7, which shows in part as following:

"upon written request of such convicted person or his counsel, presented within sixty days after the entry of such judgment, shall, by order entered of record, authorize and direct the court reporter to furnish a transcript of the testimony..."

"...such part or parts thereof as such convicted person or his counsel shall have indicated in his request to be necessary, to the convicted person, without charge to him, for use in seeking his appeal or writ of error..."

(3) **the absence of another remedy at law:** Petitioner has no other remedy at law to request for the May term 1996 state grand jury transcripts, he has been acquiring for them by way of numerous Petitions to no avail.

CONCLUSION

Based on the foregoing, Petitioner reasonably believes that this Petition for a writ of Certiorari should be granted.

Respectfully submitted,

Ricky Pendleton
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November 4, 2020