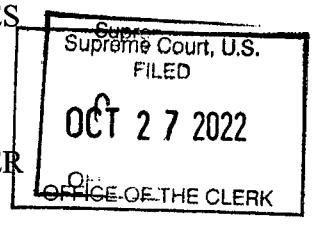
No. 22-5976

IN THE

SUPREME COURT OF THE UNITED STATES



RICKY VINCENT PENDLETON, PETITIONER

VS.

DONNIE AMES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI OF RICKY VINCENT PENDLETON

Ricky Pendleton
c/o: #3572914-One Mountainside Way
Mount Olive Correctional Complex and Jail
Mount Olive, WV 25185
Pro se

QUESTIONS PRESENTED

1. Under the Constructive Amendment, any substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury. Pendleton newly discovered ineffectiveness by trial counsel's failure to object that the lower court's instructions to the petit jury on three substantial elements such as Couceal, Enticement, and Entice Away, which were not alleged in the indictment for Kidnapping. Does this violate Fifth and Sixth Amendments of the U.S. Constitution?

2. Under the Malicious Assault statute, W.Va. Code §61-2-9(a) states, in part: any person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury with intent to maim, disfigure, disable or kill. Pendleton newly discovered ineffectiveness by trial counsel's failure to object that the indictment had wrongfully alleged ["with the intent to cause bodily injury"]. Does this violate Sixth and Fourteenth Amendments of the U.S. Constitution?

3. Under West Virginia Common law definition of robbery is: the unlawful taking and carrying away, of money or goods, from the person of another or in his presence, by force or putting him in fear, with intent to steal the money or goods. Pendleton's indictment alleged the surplusage: "did violently steal" pursuant to West Virginia Code §62-9-6. Does this violate clearly established federal law in U.S. v. Russell, 369 U.S. 749?

4. Under Blockburger v. United States, 284 U.S. 299 (1932), to determine there are two offenses or only one, each provision requires proof of a fact the other does not. Charges of robbery and larceny, Pendleton's indictment failed to allege two additional elements: that the taking has been from the person of another or in his presence; and that the taking is by force or putting the person in fear; separating robbery from larceny. Does this violates the Blockburger test?

LIST OF PARTIES

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

TABLE OF CONTENTS

OPIONION BELOW 1

JURISDICTION 1-2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2-3

STATEMENT OF THE CASE 4-12

REASONS FOR GRANTING THE WRIT 12-20

CONCLUSION 19-20

INDEX TO APPENDICES

APPENDIX A: West Virginia Supreme Court of Appeals memorandum decision March 26, 2022

APPENDIX B: West Virginia Supreme Court of Appeals refusal of Motion For Rehearing

APPENDIX C: West Virginia Supreme Court of Appeals September 26, 2022 Mandate issue

APPENDIX D: Verdict Sheet for trial Case No. 96-F-103

APPENDIX E: Motion to Compel Discovery

APPENDIX F: Motion For Transcribed Testimony

APPENDIX G: Prosecution's Opening Statement for trial Case No. 96-F-103

APPENDIX H: State Indictment for trial Case No. 96-F-103

APPENDIX I: (victim) Ryan Frankenberry's written statement

APPENDIX J: Motion To Dismiss Indictment

TABLE OF AUTHORITIES CITED

Russell v United States, 369 US 749, 754, n. 7, 8 L Ed 2d 240, 82 S Ct 1038 (1962).....i,2,13
Blockburger v. United States, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932).....i,2,13
Lawyer Disciplinary Bd. v. Wheaton, 216 W. Va. 673, 610 S.E.2d 8, 2004 W. Va. LEXIS 146 (2004).....4
Townsend v. Sain, 372 U.S. 293, 313, 83 S. Ct. 745, 757, 9 L. Ed. 2d 770 (1963).....11
Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992)..... 11
Dennis v United States, 384 US 855, 16 L Ed 2d 973, 86 S Ct 1840 (1966).....12,15
State v. Meadows, 18 W. Va. 658, 1881 W. Va. LEXIS 69 (W. Va. 1881).....13
State v. Harless, 168 W. Va. 707, 285 S.E.2d 461, 1981 W. Va. LEXIS 795 (W. Va. 1981).....13
State v. Neider, 170 W. Va. 662, 295 S.E.2d 902, 1982 W. Va. LEXIS 878 (W. Va. 1982).....13
Government of Virgin Islands v Berry, 604 F.2d 221; 1979 US App LEXIS 12624; 16 VI 614..14
Douglas Oil Co. of California v Petrol Stops Northwest, 441 US 211, 60 L Ed 2d 156, 99 S Ct 1667 (1979).....15
In re Grand Jury, 800 F.2d at 1302.....16
State v. Legg, 218 W. Va. 519, 625 S.E.2d 281 (2005).....17
Pendleton v. Ballard, 2013 W. Va. LEXIS 596 (W. Va., May 24, 2013).....17
Pendleton v. Ballard, 2015 W. Va. LEXIS 1095, 2015 WL 6955134 (W. Va., Nov. 6, 2015).....17
Williamson v. Mirandy, 2016 W.Va. LEXIS 110 (February 19, 2016).....18
Losh v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606, 608 (1981).....18

State/Federal Statutes and Rules:

W.Va. R. Crim. P. Rule 6(e)(3)(C)(i)(ii).....15,16
W.Va. Code § 61-2-9(a).....i,3,12
28 U.S.C. §1257(e).....2
W.Va. Code § 61-2-14a (1965).....2
W.Va. Code § 62-9-6.....3,7
W.Va. Code § 61-2-12 (1961).....3
W.Va. R. Crim. P. Rule 12(b)(2).....3,11

W.Va. R. Crim. P. Rule 52(b).....3
W.Va. Post-Conviction HabeasCorpus Procedures 9.....3,10,11
W.Va. Code § 53-4A-7.....3,10,11
W.Va. R. Civ. P. Rule 60(b)(1)(4)(6).....9
Fifth Amendment.....i,2,12
Sixth Amendment.....i,2, 12,13,17,18
Fourteenth Amendment.....i,2, 12,13,17,18

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RICKY VINCENT PENDLETON, PETITIONER

VS.

DONNIE AMES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI OF RICKY VINCENT PENDLETON

The Petitioner respectfully prays that a writ of certiorari is issued to review the judgment below.

OPINION BELOW

The memorandum decision for the post-conviction habeas corpus relief of the West Virginia Supreme Court of Appeals is designated for publication but is not yet reported. A copy of the decision appears at Appendix A. The refusal of the Motion For Rehearing of the West Virginia Supreme Court of Appeals is unpublished. A copy of refusal appears at Appendix B.

JURISDICTION

The memorandum decisions for the post-conviction habeas corpus relief; and on the

date May 26, 2022. A timely petition for rehearing was thereafter refused on the following date: September 19, 2022, a copy of the order refusing the Petition for rehearing appears at Appendix B. The Mandate of the West Virginia Supreme Court of Appeals was issued on September 26, 2022, which the Mandate appears at Appendix C. The jurisdiction of this Court is invoked under U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

"No person shall...be deprived of life, liberty, or property, without due process of law[.]"

The Sixth Amendment to the United States Constitution provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...and to be informed of the nature and cause of the accusation[.]"

The fourteenth Amenment to the United States Constitution provides in relevant part:

"No State shall make or enforce any law... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law[.]"

A violation of a Clearly Established Federal Law, in Russell v. United States, 369 US 749, 8 L. Ed. 240, 82 S. Ct. 1038 (1962).

A violation of a Clearly Established Federal Law, in Blockburger v. United States, 248 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

W.Va. Code, § 61-2 14a (1965) for Kidnapping states, in relevant part:

"If any person, by force, threat, duress, fraud or enticement take, confine, conceal, or decoy, inveigle or entice away, or transport into or out of this State or within this State, or otherwise kidnap any other person, for the purpose or with the intent of taking, receiving, demanding or extorting[.]"

W. Va. Code §61-2-9 (1978) defines malicious assault as follows: "(a) If any person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury with intent to maim, disfigure, disable or kill[.]"

The Common-law definition for robbery W. Va. Code §61-2-12 (1961) is defined as follows: "(1) the unlawful taking and carrying away, (2) of money or goods, (3) from the person of another or in his presence, (4) by force or putting him in fear, (5) with intent to steal the money or goods[.]"

W. Va. Code §62-9-6 Indictment form for robbery.

Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure requires "that a defendant must raise any objection to an indictment prior to trial. Although a challenge to a defective indictment is never waived...Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted."

Rule 52(b) of the West Virginia Rules of Criminal Procedure there must be: (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

W. Va. Post-Conviction Habeas Corpus Proc. R. 9

W. Va. Code § 53-4A-7

STATEMENT OF THE CASE

This case involves the strong suspicion of a possibility of the withholding of crucial evidence during the State grand jury proceeding in the May term, 1996. Where the victim of the case, Ryan Bealman Frankenberry hereafter ("the victim") had written a statement in great detail of eye-witnessing only co-defendant David Wayne Gibson ("D"), attacking and beating him throughout, while the victim had yelled at Mr. Gibson, to "take my money and car!" This part may have been withheld from the testimony by W.Va. State trooper Eric D. Burnett, who is the testifying witness before the grand jury. However, Petitioner had be indicted solely as "Principal in the first degree" for kidnapping, malicious assault, grand larceny, and aggravated robbery.

This story show how incompetent Petitioner's attorney, Mr. Keith L. Wheaton, who was newly appointed and also inexperienced in the practice of law as well. *See* Lawyer Disciplinary Bd. v. Wheaton, 216 W. Va. 673, 610 S.E.2d 8, 2004 W. Va. LEXIS 146 (2004).

He files a motion to compel discovery *See* (Appendix E) and in it one of the documents requested was the May Term 1996 state grand jury proceedings, in which it had been ignored and then Mr. Wheaton files a Motion for Transcribed Testimony *See* (Appendix F) in which in request specifically the May Term 1996 state grand jury proceedings. Where the state and the court had purposefully forwarded the federal grand jury transcripts instead. Mr. Wheaton had inadvertently mentioned State trooper Jeffrey Phillips who did testify in the federal grand jury proceeding instead of the state grand jury proceedings, this matter was never corrected for the record. Mr. Wheaton failures to object to seriously substatial trial errors was by his failure to investigate the case was prejudicial to Petitioner.

For these reasons, the petition for writ of certiorari should be granted.

A. Background and Trial Proceedings.

a. "The attack and beating" On or about November 28, 1995, Ryan Frankenberry, ("victicm") was attacked and beaten on Fish Hatchery Road. Then taken to an abandoned building where his vehicle, money, and credit cards were taken from him.

b. "The Suspect" Mr. Frankenberry had written a statement of that day to W.Va. State trooper D.E. Boober on December of 1995. Having time to think, Mr. Frankenberry had given his description of what occurred in great detail. Mr. Frankenberry had only mentioned eyewitnessing David Gibson attacking and beating him throughout. He had written yelling at Mr. Gibson, *"take my car and money!"* Mr. Frankenberry didn't know who the Petitioner was nor could he describe him, and he mentions another person's name to be at that scene "carter". Mr. Frankenberry didn't implicate the Petitioner, but only as conjecture, writing the other boy must have been close by after being bombarded with punches. In which, mere presence at a crime scene doesn't make one part of a crime. *See (victim) Ryan Frankenberry's written statement at Appendix I.*

c. "Theory of the Case" The Prosecuting Attorney's version was a fantasy. They claim that Mr. Gibson and the Petitioner could have just taken the vehicle at the Fish Hatchery Road by leaving Mr. Frankenberry there. During the grand jury proceedings the Prosecuting Attorney withheld the exculpatory evidence the Mr. Frankenberry had only witnessed Mr. Gibson attacking and beating him throughout, while yelling at Mr. Gibson, *"take my car and money!"* There is a possibility that this was in fact withheld, however, the Petitioner was indicted as the sole perpetrator for all four crimes being the "Principal" in the first degree of kidnapping, malicious assault, grand larceny and robbery. Thus, the Prosecuting Attorney failed to provide an actual notice of its intention to pursue an alternative theory and conviction for the Petitioner *"aiding, abetting,"* "Principal" in the second degree, which was unfairly prejudicial.

The prosecuting attorney failed to provide an *actual notice* during its opening statements in the case against the Petitioner. *See Opening Statement Appendix G.* In addition, the Berkeley County Circuit Court hereafter ("circuit court") instructs the petit jury with a Mandatory Presumption instructions that shifted the burden of proof to the defense, at that time which stated: "[Pendleton] *while aiding, abetting and otherwise participated with David Gibson."* Mr. Wheaton requested for a continuance, but was denied by the circuit court by stating: "You're Ready!"

d. "Unfair Surprise" based on the circuit court's Mandatory Presumption instructions, which Mr. Wheaton failed to object was prejudicial that intent to cause the defense to suffer actual prejudice due to the prosecuting attorney's belated injection of an alternative theory upon which a conviction may be based for aiding and abetting as following:

e. "Suffered Actual Prejudice" The Petitioner did suffer actual prejudice ad following: (1) By Mr. Wheaton's failure to object and properly investigate the caise, he couldn't show the he might have framed his defense differently in light of the alternative *"aiding abetting"* theory due to the unfair surprise; (2) By Mr. Wheaton's failure to object and properly investigate the case his defense was not sufficient to defend against both alternative theories of the Petitioner being "Principal" in the first degree, according to the indictment, *see Indictment at Appendix H*, and the Mandatory Presumption instuctions for *"aiding and abetting."* (3) By Mr. Wheaton's failure to object and properly investigate the case who didn't take steps to remedy this prejudice due for a continuance for preparation of trial, which was orally denied by circuit court, and there was the request for the May 1996 term state grand jury transcripts, which was granted, however, the federal grand jury transcripts was purposefully given instead.

f. **"The Witness"** The Prosecuting attorney called W.Va. State troopers D.E. Boober and Jeffrey Phillps during trial, but didn't calll W.Va. State trooper Eric D. Burnett, who did testify before the state grand jury proceedings. The victim in the case, Ryan Frankenberry did testify at trial to his written statement as to being the eyewitness to only David Gibson ("D") attacking and beating him throughout, and yelling at Mr Gibson to *"take his car and money!"* Mr. Frankenberry didn't testify to any new detail to implicating the Petitioner. He didn't know who the Petitioner was or looked like at the time, and only seeing him obviously at the defense table sitting with defense attorney Keith L. Wheaton.

g. **"Ineffective Assistance of Trial Counsel"** By Mr. Wheaton's failure to object and properly investigate the case where his defense was prejudiced as following:

1. **Count One - Kidnapping:** According to the instructions to the petit jury the circuit instructs on three new substantial elements such as *"Conceal"; "Enticement"; and Entice Away,"* which were not alleged in the indictment, and never convened a grand jury for an obvious Constructive Amendment issue, that the Petitioner was not aware of this trial error at the time.

2. **Count Two - Malicious Assault:** According to the indictment which had wrongfully alleged *"with intent to cause bodily injury"* Which should have properly alleged *"With intent maim, disfigure, disable or kill"* according to the statutory language W.Va. Code § 61-2-9a, which was unaware of by the Petitioner during trial.

3. **Count Four - Aggravated Robbery:** According to the indictment the robbery charge didn't allege common-law definition such as (1) the unlawful taking and carrying away, (2) of money or goods, (3) from the person of another or in his presence, (4) by force or putting him in fear, (5) with intent to steal the money or goods. Instead, alleged surplusage "did violently steal" under W.Va. Code § 62-9-6 for robbery, unaware by the Petitioner during trial.

4. **"The Violation of the Blockburger Test"** The Petitioner was charged and covicted for the greater and lesser-included offense of robbery and larceny. While larceny failed to alleged the "value" of the property alleged stolen, robbery failed to alleged the two additional elements that would have separated robbery from larceny as following: (1) *that the taking has been from the person of another or in his presence;* and (2) *that the taking is by force or putting the person in fear."* Which was not alleged in the indictment. *See Indictment at Appendix H.*

5. **"Withholding Exculpatory Evidence"** There is a great possibility that there was evidence in which was withheld. The victim, Ryan Frankenberry had written a statement to W.Va. State trooper D.E. Boober, in great detail as to witnessing only David Gibson attacking and beating him throughout, and that Mr. Frankenberry yelling at Mr. Gibson to take his car and money. The possibility that the grand jury was not presented with this probable cause evidence.

h. **"The Conviction"** The Petitioner was a 19 years old, African-American citizen, who was convicted of all four charges as the Sole Perpetrator after the jury trial July - August 1998. He was sentence subsequently to life with a recommendation of mercy, 1-to-10; 2-to10; and 60 years. Where the indictment never alleges David Gibson's involvement.

B. **Direct Appeal** Mr. Wheaton had inadequately filed for an appeal with issues that the Petitioner wanted to present. Mr. Wheaton refused to visit the Petitioner to go over possible claims. The appeal was refused on June 16, 1999.

a. **"Post-Conviction Remedy"** The Petitioner, by habeas counsel Mr. Nicholas Forrest Colvin, inadequately appeals the April 26, 2012 order of the circuit court's *Summarily Denying* the petition for writ of habeas corpus. The West Virginia Supreme Court of Appeals affirmed the decision of the circuit court on May 24, 2013.

b. **"Second Post-Conviction Remedy"** On November 26, 2014, the Petitioner now *pro se* appeals the order of the circuit court's *Summarily dismissing* his habeas petition. Affirmed on November 6, 2015.

c. **"Third Post-Conviction Remedy"** The Petitioner filed an appeal in 2019, which was denied on August 18th 2020. January 14, 2021, Petitioner filed Rule 60(b) motion which was denied and the Petitioner filed an appeal to the state supreme court who affirmed the circuit court's decision on May 26, 2022.

C. **"Discovery of res judicata Abuse, Procudure Abuse and Motion for Rehearing"** According to each of the Petitioner's Habeas petitions and Motions both of which the circuit court had wrongfully utilized the doctrine of res judicata, including the West Virginia Supreme Court of Appeals had overlooked this fact. Where each of the Petitioner's habeas petitions were denied *Summarily*, meaning that the Petitioner can pursue a successive habeas corpus petitions without being barred by reason of res judicata. According to Williamson v. Mirandy, 2016 W.Va. LEXIS 110 (February 19, 2016), the West Virginina Supreme Court of Appeals states in part: *Because the circuit court summarily denied petitioner's petition without holding a hearing or appointing counsel, the doctrine of res judicata will not bar petitioner from filing successive habeas petitions. See* Syl. Pt. 2, Losh v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606, 608 (1981).

Therefore, the doctrine of res judicata was in fact *NULL AND VOID*, after misapplying it in this case against the Petitioner. The doctrine of res judicata shouldn't of been utilized as a factor for each of the Petitioner's habeas petitions that the circuit court denied and the West Virginina Supreme Court of Appeals affirming that decision, shows that it had overlooked or misapprehended with particularity the points of law or fact regarding the doctrine of res judicata.

a. **"Abuse of Procedure and Process"** In all of the circuit court's decisions of each of the Petitioner's habeas petitions, which does violates the procedures at failing to comply with the expressed requirement of the W.Va. Post-Conviction Habeas Corpus Proc. R. 9 and W.Va. Code §53-4A-7.

b. **"Process"** That the circuit court did not clearly state the grounds upon which the matter was determined, state whether a federal and/or state right was presented and decided, or make specific findings as to whether the petitioner was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding. Thus, each Orders did not sufficiently set forth factual findings and conclusions of law as to each contention raised in the habeas petition.

c. **"Motion For Rehearing"** The Petitioner filed a Motion for Rehearing No. 21-0432 (Berkeley County No. 19-C-181) with the West Virginia Supreme Court of Appeals on May 3rd 2021, but was affirmed on May 26, 2022.

D. **"Points of law or facts" and "Overlooked or Misapprehended"**

a. **"Points of law or facts"** The circuit court denied the Petitioner's habeas Petitions and the West Virginia Supreme Court of Appeals didn't comply with the express requirements of W. Va. Post-Conviction Habeas Corpus Proc. R. 9 and W. Va. Code § 53-4A-7, it did not clearly state the grounds upon which the matter was determined, state whether a federal and/or state right was presented and decided, or make specific findings as to whether the petitioner was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding. Thus, the order did not sufficiently set forth factual findings and conclusions of law as to each contention raised in the habeas petition. This was prejudicial and unreasonable under clearly established federal law under the Sixth, and Fourteenth Amendment of the U.S. Constitution.

b. "Overlooked or Misapprehended" By the West Virginia Supreme Court of Appeals in which had in fact overlooked or misapprehended points of law or fact in this matter. According to requirements of W. Va. Post-Conviction Habeas Corpus Proc. R. 9 and W. Va. Code §53-4A-7 which was not complied which would have shown the lower court's abuse of discretion. The West Virginia Supreme Court of Appeals never considered the plain error doctrine asserted by the Petitioner, according to Rules of Appellate Procedures, Rule 10(c)(3). The Petitioner's assignment of error was phrased in such a fashion as to alert the Court to the fact that plain error is asserted. The Court was overlooking or misapprehended within its jurisdiction to decide. It also had overlooked or misapprehended Townsend v. Sain, 372 U.S. 293, 313, 83 S. Ct. 745, 757, 9 L. Ed. 2d 770 (1963)[, overruled on other grounds by Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992) with all of its six factors:

(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Lastly, The West Virginia Supreme Court of Appeals had overlooked or misapprehended points of law or fact according to the Petitioner's defective indictment claims which was denied this claim, based on Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure that, *"Although a challenge to a defective indictment is never waived, the Court literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by*

any reasonable construction charge an offense under West Virginia law or for which the defendant was convicted."

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to provide a very narrow but definitive ruling which defines ineffective assistance of trial and state habeas counsels' duty to conduct a reasonable investigation into the entire case based on the defects in the indictment, which make an appropriate objection based on unfair surprises, a proper request for production of grand jury transcripts which had been made aware specifically the state's version, instead the federal version was given without correction for the record. According to the *Dennis v United States*, 384 US 855, 16 L Ed 2d 973, 86 S Ct 1840 (1966); it was unanimously held *that "the failure of the trial court to permit the defendants to examine the witnesses' grand jury testimony constituted reversible error."* This opinion directly implicates the Sixth Amendment, counsel's performance, the Fifth and Fourteenth Amendments to the U.S. Constitution, which is in conflict with rulings from this Court.

The Constructive Amendment of the charge for count one of kidnapping and the lower court's instructions to the jury by substantially amending directly three substantial elements such as *"conceal"*; *"enticement"*; and *"entice away."* Which was not alleged according to the indictment. Would also show direct violations at implications of the Fifth and Sixth Amendments to the U.S. Constitution. Now, under the count two for malicious assault which wrongfully alleges according to the indictment *"with intent to cause bodily injury."* However, according to the statutory language for malicious assault under W. Va. Code § 61-2-9(a) (1978) which states in part: *"If any person maliciously shoot, stab, cut or wound any person, or by any*

means cause him bodily injury with intent to maim, disfigure, disable or kill..." And the intent must be "to maim, disfigure, disable or kill," not any other intent. *State v. Meadows*, 18 W. Va. 658, 1881 W. Va. LEXIS 69 (W. Va. 1881). Which implicates directly the Sixth and Fourteenth Amendments to the U.S. Constitution.

In addition to the misapplication of the state law in count four for robbery, which failed to allege its precedence of the West Virginina common law definition according to *State v. Harless*, 168 W. Va. 707, 285 S.E.2d 461, 1981 W. Va. LEXIS 795 (W. Va. 1981), which states:

(1) the unlawful taking and carrying away, (2) of money or goods, (3) from the person of another or in his presence, (4) by force or putting him in fear, (5) with intent to steal the money or goods. According to the indictment which only allege in part: *"did violently steal"* which implicating the clearly established federal law in *Russell v. United States* (1962) 369 US 749, 82 S Ct 1038, 8 L Ed 2d 240, 1962 U.S. LEXIS 2206, which involved an ``identical" indictment. Thus, showing the substantial seriousness of this robbery inept charge against the Petitioner for (1) failing of the indictment to contain the elements of the offense intended to be charged, and sufficiently apprises the Petitioner of what he must be prepared to meet; and (2) in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Moreover, an implication of the clearly established federal law in the *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932), by count three grand larceny and count four robbery having been in conflict with this ruling from this Court. According to the *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902, 1982 W. Va. LEXIS 878 (W. Va. 1982), Larceny is a lesser included offense in robbery. Now, in *Neider,* Id. the additional elements

which separate robbery from larceny are (1) that the taking has been from the person of another or in his presence and (2) that the taking is by force or putting the person in fear. In which this fact was never alleged in the accordance to the indictment against the Petitioner, at implicating conflict with the Blockburger test.

In furtherance, by the victim of the case, Mr. Frankenberry who only identified David Gibson attacking and beating him throughout with great detail; He didn't identified the Petitioner until trial when it was obvious he was sitting with his attorney. Mr. Frankenberry had identified another person instead, but to the point that he only mentions that the "other boy must been close by" after being bombarded with punches. The Petitioner would say mere presence doesn't make a person part of a crime, even knowledge of a crime being committed doesn't either. Mr. Frankenberry think he was bombarded with punches as he explains in detail that Mr. Gibson was attacking and beating him throughout, and that Mr. Gibson did land a hard hit when he had Mr. Frankenberry out of the vehicle.

Mr. Frankenberry never implicates the Petitioner had kidnapped him by placing him back in the vehicle, nor implicates him at holding or restraining him while in the vehicle. Which he asserts that he think that he was held down or tied up. Mr. Frankenberry didn't know, it was only conjecture of being kidnapped. There were no evidence that would suggest that the Petitioner was involved in a kidnapping among the other charges of being involved. According to *Government of the Virgin Islands v. Berry.* 604 F.2d 221, 16 V.I. 614 (3rd Cir. 1979), which held in part: *" kidnapping does not occur merely because the supposed victim thinks that he is being kidnapped. "* There is a reasonable suspicion that this fact had been withheld from the grand jury. However, the Petitioner, *the defense at that time,* had filed two motions: Motion to Compel

discovery, *see* (*Appendix E*); and also Motion to Transcribed Testimony. (*Appendix F*). Which was a request for the May term 1996 state proceedings, transcripts of the state grand jury. These motions were clearly blatant for this request of this particular document. It had been purposely staged that the federal grand jury transcripts had been given instead, when the lower court knew or should have known based on the two motions; never was corrected for the record. This act had kept the Petitioner from being disclosed that requested material after according to the West Virginia Rules of Criminal Procedure, Rule 6(e)(3)(C)(i)(ii), it was so directed by a court preliminarily to or in connection with a judicial proceeding to grant the Petitioner, *the defense at that time,* with that request of the May term 1996 state proceedings, transcripts of the state grand jury, and/or based also was permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. The Petitioner did file a Motion to dismiss indictment, *see* (*Appendix J*).

In all of this which does show a conflict according to *Dennis v United States*, 384 US 855, 16 L Ed 2d 973, 86 S Ct 1840 (1966), which this Court held unanimously that the failure of the trial court to permit the defendants to examine the witnesses' grand jury testimony constituted reversible error. Thus, there was a showing of the particularized need for this May term 1996 state proceedings, transcripts of the state grand jury for preparation of trial, set out by the United States Supreme Court in *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979), (1) the May term 1996, transcripts of the state grand jury proceedings was sought needed to avoid a possible injustice in another judicial proceeding, on appeal; (2) that the need for disclosure is greater than the need for continued secrecy, because the Petitioner's two motions were granted during the pre-trial pursuant to West Virginia Rules of

Criminal Procedure, Rule 6(e)(3)(C)(i)(ii). However, the federal transcripts were wrongfully given instead without correction. Therefore, the disclosure is greater than the need for continued secrecy, and "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." See In re Grand Jury, 800 F.2d at 1302 (footnote and citation omitted). And (3) the request is structured to cover only needed materials, which would be the testimony of West Virginia State trooper Eric D. Burnett, as to what had he testified to, and that would he be obligated to testify to the facts that the victim Mr. Frankenberry had only identify Mr. Gibson attacking and beating him throughout, and in great detail had stated that he only yelled at Mr. Gibson to "take his car and money." Thus, never identifying specifically the Petitioner as to committing any crimes against Mr. Frankenberry.

Moreover, According to the indictment, *See* (*Appendix H*), which had charged the Petitioner as the "Principal" in the first degree of all four charges with no mention of Mr. David Gibson. The trial counsel Keith Wheaton was ineffective when he had failed to object to the fact and also the lower court's Mandatory Presumption instructions, where in alleges that "[Ricky Pendleton] *'while aiding and abetting and otherwise participated with David Gibson."* At shifting the burden of proof to the defense at that time. Due to the fact that the prosecuting attorney didn't provide any actual notice that it would be trying the Petitioner with "aiding and abetting." Making it an unfair surprise, the lower court didn't even consider any of the factors may be considered for the purpose of determining whether or not the Petitioner had suffered actual prejudice due to the prosecution's belated injection of an alternative theory of the Petitioner "aiding and abetting" upon which a conviction may be based.

According to State v. Legg, 218 W.Va. 519 (2005), due from this unfair surprise the trial counsel was inadequately incompetent at addressing this matter let alone (1) framing a defense differently in light of the alternative "aiding and abetting" theory as far as being ineffective for failing to investigate the entire case; (2) There was no defense presented by Mr. Wheaton which would have been sufficient to defend against both alternative theories, due to being unaware of that fact; and (3) Mr. Wheaton didn't take steps to remedy the prejudice by, requesting for a continuance or asking that a witness be recalled, from his failure to investigate this case. But for these factors the outcome would have been different by which the defense would have had access as ordered by the lower court to disclose the May term 1996, transcripts of the state grand jury proceedings, and the charges would have been dismissed due to the defects in the indictment, the Petitioner was prejudiced by Mr. Wheaton's incompetency. This directly implicates conflict with the Sixth and Fourteenth Amendments of the U.S. Constitution.

Lastly, the Petitioner was represented by counsel, and the circuit court *summarily* denied the April 26, 2012 petition for writ of habeas corpus, see Pendleton v. Ballard, No. 12-0653 ("Pendleton I"), 2013 W. Va. LEXIS 596, 2013 WL 2477245, at *7 (W. Va. May 24, 2013) (memorandum decision). On September 15, 2014, the Petitioner filed a second habeas petition in the circuit court, alleging ineffective assistance of counsel in the first habeas proceeding. The circuit court *summarily* denied that petition by order entered on November 26, 2014. Pendleton v. Ballard, No. 14-1307 ("Pendleton II"), 2015 W. Va. LEXIS 1095, 2015 WL 6955134 (W. Va. Nov. 6, 2015) (memorandum decision). On August 18th 2020, the circuit court had once again had *summarily* denied the habeas petition Case No. CC-02-2019-C-181 and 19-C-181 the Petitioner appealed the West Virginia Supreme Court of Appeals affirmed it on March 26, 2022.

The West Virginia Supreme Court of Appeals supports what the lower court's utilizing of the *doctrine of res judicata,* asserting that *"[E]very ground for relief identified by the circuit court was adjudicated and/or waived in prior proceedings."* In further stating: *"we agree with respondent that the doctrine of res judicata bars petitioner from raising any issue..."* Based on all of the habeas corpus petitions filed by the Petitioner.

Moreover, granting this Petitioner will provide guidance to the West Virginia Supreme Court of Appeals, the lower courts and prosecuting concerning of overlooking state laws already set in precedence for application. According to Williamson v. Mirandy, 2016 W. Va. LEXIS 110 (2016), the petitioner in that case (Steven A. Williamson), on appeal to the West Virginia Supreme Court of Appeals, had asks that the West Virginia Supreme Court of Appeals address his issue under the plain error doctrine or remand the case so that the lower circuit court can address it.

Well, the West Virginia Supreme Court of Appeals had declined to do either, *"Because the circuit court summarily denied petitioner's petition without holding a hearing or appointing counsel, the doctrine of res judicata will not bar petitioner from filing successive habeas petitions."* See Syl. Pt. 2, Losh v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606, 608 (1981). So, by the circuit court in the case at hand, had in fact *summarily denied* the Petitioner's habeas corpus petitions without holding a hearing or appointing counsel, but did appoint counsel in the first habeas petition and not the last two habeas corpus petitions. In which the *doctrine of res judicata* were misused against the Petitioner to justify for the court to not address his newly discovered evidence claims, which also would directly implicates conflict with the Sixth and Fourteenth Amendments of the U.S. Constitution.

Defect in the Verdict Form:

According to State v. Legg, 218 W. Va. 519, 625 S.E.2d 281 (2005). Where there was similar issue in this case at hand. The defects in the Verdict Form which shows the unfairness with the belated alternative theory that the Petitioner "*aiding, abetting,*" "Principal" in the second degree. The Prosecuting Attorney's failed attempt to provide an Actual Notice of this was an unfair surprise. The jury verdict form used in this case provided only two options for the jury to choose among: (1) Guilty of Kidnapping with a recommendation of mercy; or Guilty of Kidnapping; (2) Guilty of Malicious Assault, or Not Guilty; (3) Guilty of Grand Larceny; or Not Guilty; (4) Guilty of Robbery; or Not Guilty. From the verdict form, it is impossible to tell whether or not the jury concluded that the Petitioner was a principal in the first degree or second degree. The Prosecuting Attorney did proceeded against the Petitioner in this case which constitute reversible error in the instant case. *See Verdict Sheet Form at Appendix D.*

CONCLUSION

As evidence above, Petitioner was deprived of a fair trial, so much so that both the trial and State habeas counsel were incompetent and ineffective in their assistance. They failed to object, or investigate the entire case, enough to raise actual issues proving that of a prejudicial practice that the Petitioner was unaware of the obvious substantial trial errors. And the Petitioner was granted access to the May 1996 term state grand jury transcripts, but instead receives the federal transcripts without corrections by both counsels. Lastly, the West Virginia Supreme Court of Appeals had misapplied, overlooked or by a misapprehension of its own precedence and procedural laws which were not applied on behalf of Petitioner, which involved an *unreasonable or unrational* application of clearly established federal law when it denied his Fifth, Sixth and Fourteenth Amendments claims and affirmed his 1998 conviction and sentence.

The Petitioner, at the time as the defense was not apprised as to the Prosecutor's belated alternative theory that the Petitioner was the *"aider, abettor" otherwise "Principal in the second degree,* that conviction on the basis of the jury verdict form in the instant case was one sided and not alleged upon which the jury could have relied. All in all, this state prisoner who challenged the matters in the State courts had shown that the state court's decision "was contrary to, involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" and/or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Each of the state court's rulings were so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

The Petition for writ of certiorari should be granted.

Respectfully submitted,

Ricky Pendleton

Ricky Pendleton
c/o: #3572914-One Mountainside Way
Mount Olive Correctional Complex and Jail
Mount Olive, WV 25185
Pro se

Date: **October 24, 2022**