

SEP 19 2022

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IN THE UNITED STATES SUPREME COURT OF APPEALS

No. 22-7189

AMOS G. HICKS

Petitioner

VS.

DONALD F. AMES, Superintendent
Mt. Olive Correctional Complex
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE FOURTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Filed By:

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

- (1) Was the Petitioner's Constitutional Right of Due Process and First Amendment Right to all Records violated when the Courts destroyed Petitioner's transcripts and thereby refused to furnish the Petitioner with his transcripts to file a proper and fully developed Direct Appeal?**
- (2) Was the Petitioner's Constitutional Right of Effective Counsel and Due Process violated when trial counsel was ineffective by not requesting the complete case file in order to research any Court errs including but not limited to Jury Instructions; Court decisions; *Voir Dire*; and any other pertinent rulings within the trial proceedings?**
- (3) Was the Petitioner's Constitutional Right of Due Process violated when the Official Court Reporter took Petitioner's case file to her home and did not transcribe and file with the Circuit Court the complete case file when she had the file, which was subsequently destroyed?**

LIST OF PARTIES

Amos G. Hicks, Petitioner

**Donald F. Ames, Superintendent
State of West Virginia, Respondent
West Virginia Attorney General**

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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 judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

- reported at 229 W. Va. 44, 725 S.E.2d 569 (2011); or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the Intermediary court appears at Appendix ____ to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 23, 2022.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 23, 2022, and a copy of the order denying rehearing appears at Appendix D.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was June 3, 2020.

A copy of that decision appears at Appendix E.

A timely petition for rehearing was thereafter denied on the following date: _____ and a copy of the order denying rehearing appears at Appendix ____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to *petition the Government for a redress of grievances.*

United States Constitutional Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, *without due process of law;* nor shall private property be taken for public use, without just compensation.

United States Constitutional Amendment 6:

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the *Assistance of Counsel for his defense.*

United States Constitutional Amendment 14:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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 laws.

STATEMENT OF THE CASE

This complete case deals with destroyed trial transcripts which ultimately violated the Petitioners Constitutional Right to a meaningful Direct Appeal and any collateral attacks in the Courts.

On October 21, 2008, the Petitioner was indicted in the Circuit Court of McDowell County, West Virginia for first degree murder, malicious assault, and conspiracy. The State alleged that the Petitioner hired thirty-five-year-old Mose Douglas Mullins, Jr., (hereinafter, "Mr. Mullins") to kill several people because they had stolen property from him. Jamie Chantel Webb (hereinafter "Ms. Webb") was killed. The malicious assault and conspiracy offenses were on Mr. Jeffrey Mullins (hereinafter "Mr. J. Mullins") which survived the attack.

The Petitioner's trial began on July 20, 2009. In the State's opening statement, they alleged that the Petitioner had provided a gun and offered to pay \$10,000 to Mr. Mullins to kill Ms. Webb and Mr. J. Mullins. The State put forward that the Petitioner was motivated by his belief that Ms. Webb and Mr. J. Mullins had broken into his home and stolen some guns a year previous to the shooting. The State further contended that Mr. Mullins owed the Petitioner thousands of dollars and felt he had no option other than to do what the Petitioner told him. It came out in trial that the alleged shooter Mr. Mullins was robbed of "220 oxycontin" the night before by the alleged victims Mr. J. Mullins and Mr. Webb which was a greater motive than what the State proffered.

On May 13, 2001, Mr. Mullins carried out the alleged Petitioner's request, with the assistance of James Blaine Waldron (hereinafter "Mr. Waldron"), using a Ruger 9mm semiautomatic pistol allegedly provided by the Petitioner. Ms. Webb was killed, but Mr. J.

Mullins survived although he was paralyzed as a result of the shooting. Mr. Mullins also shot Don Ball (hereinafter “Mr. Ball”), who happened to be with Ms. Webb and Mr. J. Mullins at the time of the shooting. Mr. Ball also survived his injuries. During the trial, Mr. Mullins testified that he was selling drugs for the Petitioner and had fallen in debt to the Petitioner. Mr. Mullins then testified that the Petitioner offered him \$5,000 to kill Ms. Webb and Mr. J. Mullins, which was inconsistent with previous statements.

Following a four-day trial, the jury found the Petitioner guilty on all counts. On October 7, 2009, the Petitioner was sentenced to life imprisonment without the possibility of parole for his conviction of first-degree murder; not less than two nor more than ten years of imprisonment for his conviction of malicious assault; and not less than one nor more than five years imprisonment for his conviction of conspiracy. Those sentences were to be served consecutively. Sid Bell, the Prosecutor, stated at the Evidentiary hearing of December 5, 2016, that he would have offered a voluntary manslaughter plea had the Petitioner’s counsel asked for a plea.

Counsel Michael F. Gibson filed a direct appeal of Petitioner’s conviction with the Supreme Court of Appeals of West Virginia (hereinafter “SCAWV”), claiming that (1) the circuit court erred in admitting certain Rule 404(b) evidence; (2) the evidence presented at trial was insufficient to sustain his convictions; and (3) the circuit court “erred in granting [sic - not] petitioner a new trial.” On April 14, 2011, the SCAWV affirmed the lower court’s conviction and sentence. See State v. Hicks, 229 W. Va. 44, 54 (2011).

Prior to filing the Direct Appeal, the Petitioner paid \$5,000 to Counsel Michael F. Gibson (hereinafter “Mr. Gibson”) to obtain the complete case file although the Petitioner was entitled

to one (1) free copy of the complete case file. The Petitioner and the family of the Petitioner requested the Street Law Firm, second trial Counsel, to obtain the complete case file. They wrote Mr. Gibson about some concerns of the family. See **Appendix F**. There were other issues not in the letter but was concerning to the Petitioner and his family. There was evidence specifically in the jury instructions that the jury was instructed wrongly, specifically the lesser included instructions. Mr. Gibson, however, paid \$3,800 and only ordered certain portions of the case file on October 30, 2009. See **APPENDIX G**. He did order the Jury Instructions, however, they were never sent to him and he did not follow up on why he did not receive them.

After discovering Mr. Gibson had not ordered the complete case file to compile a complete Direct Appeal, the Petitioner asked why the complete case file was not requested since the Petitioner paid \$5,000 to obtain the complete case file but Mr. Gibson only used \$3,800 and ordered portions of the transcripts. The Petitioner also inquired as to why the Jury Instruction transcripts were not present. There was no justifiable reason given. Thereby, the Petitioner filed a Civil Rights Complaint under 42 U.S.C. § 1983 in the Circuit Court of Mercer County. The Petitioner was AWARDED monetary relief from Mr. Gibson as he admitted not ordering the complete case file and not following up on why he did not receive the Jury Instructions. As a result, the Petitioner's Direct Appeal was incomplete due to not having the complete case file. Although this argument was dismissed on the Habeas, in the Tort action (2:13-cv-27830), District Judge Johnston was concerned that there was a "due process" violation. It showed the diversity in judgment in the Court system as Petitioner won the civil

case showing the deficiency in a Direct Appeal and inability to file a proper Writ of Habeas Corpus.

On November 28, 2011, the Petitioner began a *pro se* attempt to obtain the complete case file. See **APPENDIX H**. On December 7, 2011, Judge Booker T. Stephens appointed Counsel after receiving an Appellate Transcript Request Form with an explanation why he needed the transcripts. Judge Stephens stated the case had merit. See **APPENDIX I**. On December 16, 2011, Judge Stephens appointed different Counsel due to a Conflict of Interest with the first appointed Counsel. See **APPENDIX J**.

After a period of attempts to obtain the complete case file, Petitioner received a letter dated November 9, 2012 from "Carolyn R. DiLorenzo" (hereinafter "Ms. DiLorenzo"), that she wrote to Attorney Phillip A. LaCaria. Ms. DiLorenzo was the Official Reporter for Honorable Judge Booker T. Stephens. See **APPENDIX K**. The letter stated that the "trial transcript was prepared by Janet Murphy (hereinafter "Mrs. Murphy"), [prior] Official Reporter for Judge Stephens, when the Appellate Transcript Request Form was initially received." It continues to state that Mrs. Murphy had passed away and that her husband "disposed of materials that were located in her home office." Ms. DiLorenzo testified in the Petitioner's Omnibus Hearing held on December 5, 2016 that it was all true about the destruction of the case file. See **APPENDIX L**. In a tort action filed in the Southern District of West Virginia (Southern District of West Virginia No. 2:13-cv-27830) Judge Thomas E. Johnston stated "If the transcripts of Plaintiff's trial has indeed been lost, that is a troubling development for due process. While Plaintiff may have an opportunity to bring claims relating to the alleged loss of the transcripts

to this Court to seek redress at some future point, the state court should have the first opportunity to address those claims."

Although a Direct Appeal was filed on March 10, 2010, it was not complete due to not having the complete case file, specifically the jury instructions. The Petitioner paid \$5,000 to Attorney Michael F. Gibson to obtain the complete case file. Although he ordered the jury instructions, they were not given to him. He did not order, however, the complete case file. He obtained some portions of the case file only after the Direct Appeal was filed. The West Virginia Supreme Court of Appeals affirmed the lower Court's conviction and sentence on April 14, 2011.

Subsequently, the Petitioner filed an Appellate Request Form *pro se* to order the complete set of case files on November 28, 2011 only after attempting to contact the attorney multiple times for almost a year to no avail. The Petitioner filed FOIA requests, mailed letters, made phone calls, etc. to obtain his case file. On December 7, 2011, Judge Stephens appointed Petitioner Counsel stating "Hicks case has merit." He stated that any correspondence with the Court would be through Counsel. On November 9, 2012, the Petitioner learned that his case file had been destroyed. Thereby, not only was there an incomplete Direct Appeal but a complete collateral attack was impossible. Therefore, he lost his Constitutional Right to a meaningful Direct Appeal and to a meaningful Writ of Habeas Corpus.

In conclusion, the trial counsel was paid \$5,000 to obtain the complete case file to do a meaningful and complete Direct Appeal. The trial counsel, however, filed a partial Direct Appeal without reviewing the record for any other errors, specifically jury instruction and *voir dire* errors, which there were errors that Petitioner and his family brought to Counsel's attention. Subsequently, due to not obtaining the complete case file, the official Court

Reporter passed away and her husband destroyed all of his wife's records, including several inmate case records. Thereby, the Petitioner could not compile a sufficient and complete Direct Appeal and collateral attack either. The Petitioner was served an egregious miscarriage of justice because of the present errors, specifically with the jury instructions.

On October 31, 2018, the Honorable Booker T. Stephens denied the Petitioner's Writ of Habeas Corpus. On June 30, 2020, the WVSCA affirmed the lower Court's denial of the Petitioner's Writ of Habeas Corpus. Subsequently, the Petitioner filed in the Southern District Court of West Virginia. On September 29, 2021, a Memorandum Opinion and Order was issued by the Honorable David A. Faber.

Thereafter, Petitioner filed an appeal with the Fourth District Court in Richmond, Virginia. On May 23, 2022, the Fourth District Court denied Petitioner's appeal. On June 23, 2022, the Fourth District Court denied an *en banc* hearing. The Petitioner received that Order on June 27, 2022.

This Certiorari ensues.

REASONS FOR GRANTING THE PETITION

The main reason for granting this certiorari is that the Petitioner has been served a flagrant and egregious abuse of justice in the lower Courts. Had he been able to obtain a full and complete set of transcripts, which would include the complete case file (jury instructions), he would have had a case that would have been overturned on erroneous jury instructions.

Coppedge v. United States, 369 U.S. 438, 445-446, 8 L.Ed.2d 21, 82 S. Ct. 917 (1962) held “[t]he administration of justice in the federal courts would be more evenhanded if the indigent's right to a transcript were not dependent either upon the advice he receives from

counsel at the time when he may still file a direct appeal, or upon his later ability to persuade a trial judge that if the transcript were available, it would show that counsel's advise was actually unsound. The indigent is at least entitled to a transcript of sufficient completeness to permit a determination of frivolousness." From the facts above, the Petitioner NEVER was able to obtain a full set of transcripts prior to a Direct Appeal. United States v. Brown, 202 F.3d 691, 696 (4th Cir. 2000) held "omissions from a trial transcript only warrant a new trial if the missing portion of the transcript specifically prejudices [a defendant's] appeal." Although there were other errors, the main one was found in the jury instructions. There were none on the lesser included offenses.

The Fourth Circuit opined "Hicks seeks a reversal of his convictions and a new trial based on a missing portion of this trial transcript, yet he requested the transcripts only after his unsuccessful direct appeal." This is absolutely not accurate. The Petitioner paid Mr. Gibson \$5,000 to obtain the complete set of transcripts prior to the direct appeal. Mr. Gibson, however, paid \$3,800 for only portions of the transcripts. The Petitioner was under the assumption that Mr. Gibson had ordered the complete case file and did not discover that it wasn't a complete set until after the decision of the WVSCA. It was then that the Petitioner discovered that his Direct Appeal was not complete especially with the errors in the jury instructions. Within the jury instructions, Petitioner swears that the Court did not give instructions to the lesser included offenses or define the offense of first degree murder.

The Southern District of West Virginia Court Judge Thomas E. Johnston (No. 2:13-cv-27830) stated, "If the transcripts of Plaintiff's trial has indeed been lost, that is a troubling development for due process. While Plaintiff may have an opportunity to bring claims relating

to the alleged loss of the transcripts to this Court to seek redress at some future point, the state court should have the first opportunity to address those claims.” The State contended that the transcripts were not needed since a Direct Appeal was filed and affirmed. This is the problem, however. The Direct Appeal was filed before Trial Counsel ordered and received all the transcripts, at least the ones he did order. The Direct Appeal was insufficient and lean of all the errors – including but not limited to the jury instruction errors.

West Virginia Code § 51-7-7 states emphatically that failure to furnish transcripts when ordered renders the sentence void. The State is thus violating their own statute by not providing the complete case file in order to properly compile a Direct Appeal and/or a collateral attack of the conviction.

The Judge provided the Petitioner with a copy of his standard instructions but could not state emphatically which instructions he gave and which ones he did not give. The Petitioner stands on the fact that the jury instructions were wrongly given. The Petitioner also is of the belief that there were errors that affected the trial in closing arguments.

While there is no constitutional right to transcripts on a collateral attack of the conviction, there is a constitutional right to a collateral attack. Also, while there is a constitutional right to transcripts for a direct appeal, there is no constitutional right to transcripts in a collateral proceeding. *U. S. v. MacCollom*, 426 U.S. 317, 96 S. Ct. 2086, 48 L.Ed.2d 666 (1976) held “providing an inmate with a copy of his transcript on direct appeal satisfies the Constitutional right of equal access to the courts.” The Petitioner needed the transcripts in the Direct Appeal. It is obvious he did not have equal access to the courts. See also *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L.Ed.891 (1956).

Hardy v. United States, 375 U.S. 277, 11 L.Ed.2d 331, 84 S. Ct. 424 (1964) held "a transcript is available for appeal purposes, Congress having provided in the Court Reporter Act, 28 USC § 753(b), that a transcript "by shorthand or by mechanical means" of "all proceedings in criminal cases had in open court" shall be made. The Petitioner has a First Amendment Right to any Court records, including but not limited to his transcripts, records, files, and etc. The Official Reporting Clerk not only violated the law by taking criminal cases to her home, but she violated the law by not transcribing and filing the complete case. To further hurt the sore, her husband destroyed all the records.

Other districts have held that if the Petitioner "demonstrates that his suit is not frivolous and the transcript is needed to decide the issue presented by the suit," he is entitled to a copy of the transcripts. See Sistrunk v. United States, 992 F.2d 258, 259 (10th Cir. 1993).

While most Courts deal with the right of a free copy of the transcripts, the Petitioner actually paid for the production of the complete set of transcripts. Without notice, Mr. Gibson only paid \$3,800 for portions of the transcripts. One portion that he requested was the jury instructions, but they were not produced, thus violating the due process of showing the jury instruction errors by the Judge.

If the Court would have instructed the jury correctly, there is no doubt that the Petitioner would have been found guilty of a lesser included offense such as second degree murder, however, the jury was not instructed on such. Also, the Judge did not instruct the jury on the elements of the crime. At the Omnibus hearing held on December 5, 2016, no one could swear to the fact that he did instruct properly.

Besides the jury instructions, Petitioner did not receive the *voir dire* (he could not determine if the jury makeup was constitutional or not for the Direct Appeal); the remaining portions of trial transcripts; opening and closing comments; and certain Court rulings.

CONCLUSION

It cannot be disputed that the Petitioner has been served with an egregious miscarriage of justice in the lower Courts. For the Petitioner's transcripts to be destroyed, an incomplete Direct Appeal filed, a partial Writ of Habeas Corpus filed is definitely a miscarriage of justice. There is a Constitutional Right to a complete set of transcripts of a criminal trial. There is no doubt there were jury instruction errors that the Court tried to cover up by providing a "standard copy of jury instructions," however, there were emphatically no instructions on the elements or instructions given of the lesser included offenses. There were other errors remembered however, cannot be stated emphatically without the transcripts. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Amos G. Hicks
Amos G. Hicks

Date: 19 Sept. 2022