No. 22-7189

IN THE SUPREME COURT OF THE UNITED STATES

AMOS GABRIEL HICKS, PETITIONER,

v.

DONNIE AMES, SUPERINTENDENT,
MOUNT OLIVE CORRECTIONAL COMPLEX, RESPONDENT.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The state courts concluded Petitioner had not shown any prejudice from his failure to receive one part of his trial transcripts on direct appeal -- was that decision unreasonable?
2. The state courts concluded Petitioner had not shown that his appellate counsel was constitutionally ineffective merely because that counsel did not obtain certain additional transcripts beyond the hundreds of pages he did receive -- was that decision unreasonable?
3. The state courts concluded Petitioner had not shown any constitutional error when he was unable, after a court reporter's death, to obtain transcripts of all proceedings in connection with his state post-conviction motions -- was that decision unreasonable?

RELATED PROCEEDINGS

Circuit Court for McDowell County, West Virginia:

State v. Amos Gabriel Hicks, No. 08-F-154-S (Oct. 5, 2009)

Amos Gabriel Hicks v. David Ballard, Warden, Mt. Olive Corr. Complex, No. 12-C-100-S (Oct. 31, 2018)

Supreme Court of Appeals of West Virginia:

State v. Amos Gabriel Hicks, No. 35670 (Apr. 14, 2011)

Amos Gabriel Hicks v. Donald Ames, Superintendent, Mt. Olive Corr. Complex, No. 18-1025 (June 3, 2020)

United States District Court for the Southern District of West Virginia:

Amos Gabriel Hicks v. Steven Canterbury, No. 2:13-cv-27830 (Oct. 28, 2015)

Amos Gabriel Hicks v. Donald F. Ames, Superintendent, Mt. Olive Corr. Complex, No. 1:20-00665 (Sept. 29, 2021)

United States Court of Appeals for the Fourth Circuit:

Amos Gabriel Hicks v. Donald F. Ames, Superintendent, Mt. Olive Corr. Complex, No. 21-7526 (May 23, 2022)

United States Supreme Court:

Amos Gabriel Hicks v. Booker T. Stephens, Judge Circuit Court of W. Va., McDowell Cnty., 12-9986 (Oct. 7, 2013)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet.App.A1-A3) is unreported but available at 2022 WL 1619847. The opinion of the United States District Court for the Southern District of West Virginia (Pet.App.B1-B16) is unreported but available at 2021 WL 4480993; the related report and recommendation from the magistrate judge is found at 2021 WL 4485002. The opinion of the Supreme Court of Appeals of West Virginia on Petitioner's petition for a writ of habeas corpus (Pet.App.E1-2) is unreported but found at 2020 WL 2904845. That Court's opinion on Petitioner's direct appeal (Pet.App.C1-C14) is published as State v. Hicks, 725 S.E.2d 569 (W. Va. 2011) (per curiam).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on May 23, 2022 and denied rehearing on June 23, 2022. Petitioner petitioned for certiorari on September 19, 2022. This Court has subject-matter jurisdiction under 28 U.S.C. § 1254(a).

INTRODUCTION

In his petition for a writ of certiorari, Petitioner Amos Hicks tries to turn a court reporter's death into a constitutional claim justifying federal habeas-corpus relief. Petitioner could not obtain certain transcripts from his initial criminal trial when he sought habeas relief in state court. The transcripts were unavailable because the reporter had passed away, and her records from trial had not been preserved. Yet years earlier, Petitioner had pursued a direct appeal from his conviction with all the records that he needed. And even today, Petitioner has never identified any colorable claims that more transcript pages might have allowed him to make. Twelve judges have now rejected Petitioner's argument otherwise. Lacking any suggestion of prejudice, this fact-bound case is a poor candidate for review from this Court -- especially when viewed through the highly deferential lens of federal habeas review of a state-court judgment.

The Court should deny the Petition.

STATEMENT

In 2009, a McDowell County, West Virginia jury convicted Petitioner of first-degree murder, malicious assault, and conspiracy. Pet.App.C5. The circuit court sentenced Petitioner to life without possibility of parole, and the Supreme Court of Appeals of West Virginia affirmed. Id. Petitioner then petitioned for habeas corpus in state circuit court, challenging his conviction on multiple grounds. The circuit court denied that petition, see Ex. 17, Hicks v. Ames, No. 1:20-cv-00665 (S.D.W. Va. Fed. 10, 2021), ECF No. 14-18 ("State.Habeas.Op."), and the Supreme Court of Appeals of West Virginia again affirmed, Pet.App.E1. Petitioner next turned to the federal courts, filing a habeas action under 28 U.S.C. § 2254 in the U.S. District Court for the Southern District of West Virginia. That court likewise denied Petitioner relief, Pet.App.B1, and the Fourth Circuit denied a certificate of appealability and dismissed the appeal, Pet.App.A2.

1. Petitioner was a drug dealer in the rural area of McDowell County. Pet.App.C5. He supplied Mose Mullins -- among others -- with drugs to sell and use. Id. Unfortunately, driven by his OxyContin addiction, Mr. Mullins soon became indebted to Petitioner. Id. So to address the drug debt, the two men struck an agreement: Mr. Mullins would kill several people Petitioner thought had stolen things from him, and Petitioner would pay Mr. Mullins $5,000 a killing in return. Id. at 5-6. Petitioner gave

Mr. Mullins a gun and a promise of more drugs if he succeeded. Id. at 6.

Petitioner's plan became a reality in May 2001. Mr. Mullins lured three people to a secluded area on the pretense of a drug buy. Pet.App.C7. Once there, Mr. Mullins shot all three. Id. One victim died at the scene, another survived but was paralyzed, and the third survived after fleeing with five gunshot wounds. Id. Testimony at trial showed that Petitioner had threatened and brutally beaten at least one other person who he thought had wronged him. Id. Thankfully, authorities arrested and charged Petitioner before he could send Mr. Mullins after her.

After a four-day trial laying out Petitioner's role in launching this murder-for-hire scheme, a jury convicted Petitioner on all counts. Pet.App.C5. The state circuit court sentenced him 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 of imprisonment for his conviction of conspiracy, with those sentences to be served consecutively. Id. Petitioner appealed.

2. On direct appeal, Petitioner raised two challenges. First, he maintained that the circuit court erred in admitting certain evidence of Petitioner's drug dealing under West Virginia Rule of Criminal Procedure 404(b). See Pet.App.C1. And second,

he insisted that the evidence presented at trial could not sustain his convictions, chiefly because he believed Mr. Mullins was not a credible witness. Id.

The Supreme Court of Appeals of West Virginia rejected both arguments in a per curiam opinion. First, "the State [had] presented specific and detailed purposes establishing credible explanations and rationales for the admission of [the Rule 404(b)] evidence." Pet.App.C10. At the same time, the circuit court gave repeated limiting instructions on that evidence, including "during the charge to the jury at the conclusion of trial." Id. Second, it was "abundantly clear" that the State had produced sufficient evidence of guilt. Pet.App.C11. Indeed, it was "undeniable" that the evidence supported Petitioner's guilt beyond a reasonable doubt. Pet.App.C12.

3. Beginning in May 2012, Petitioner began filing multiple pro se petitions for habeas corpus in state court even though the state court had appointed counsel. In total, he raised thirty-seven grounds for habeas relief. State.Habeas.Op.5.

As relevant here, Petitioner raised four claims related to the transcripts from his initial trial: (1) an unconstitutional failure to provide "proof of a Valid Jury Trial Verdict" because certain transcripts had not been obtained; (2) a denial of "Due Process and Equal Protection of Law" where the State purportedly "fail[ed] to produce the transcripts of all proceedings and the

trial of the matter"; (3) a denial of "full 'Appellate Review'" because transcripts were purportedly "missing"; and (4) ineffective assistance of counsel because counsel "failed to request[] all of the Transcripts to be transcribed." See Ex. 18, First Amend. To Pet. For Writ of Habeas Corpus at 49, 95, 110, 112, Hicks, No. 1:20-cv-00665 (S.D.W. Va. Fed. 10, 2021), ECF No. 14-19.

In each of these four claims, Petitioner argued that he needed transcripts from every part of his trial and did not receive them. Petitioner had requested transcripts twice: before his direct appeal and before his state habeas petition.

Back in October 2009, before filing his direct appeal, Petitioner's counsel had ordered transcripts of all witness testimony, the State's opening statement and closing arguments, discussions on the Rule 404(b) issues, discussions on Petitioner's motions for acquittal and new trial, the sentencing hearing, and the jury instructions. State.Habeas.Op.34; see also Pet.App.G1-2. The court reporter in turn prepared and provided all the requested transcripts to Petitioner -- amounting to several hundred pages -- except for the transcription of the circuit court's instructions to the jury. See Ex. 26, Habeas Hearing Tr. 154:11-155:2, Hicks, No. 1:20-cv-00665 (S.D.W. Va. Fed. 10, 2021), ECF No. 14-27. A written copy of the jury instructions and charge was provided to the Supreme Court of Appeals in the direct appeal.

State.Habeas.Op.41. The Supreme Court of Appeals even referenced these instructions in its final decision. Pet.App.C10.

Just before filing his state habeas petition in 2012, Petitioner's appointed counsel requested more transcripts. These transcripts encompassed voir dire, Petitioner's opening statement and closing arguments, certain "unknown proceedings" lasting 39 minutes during one day of trial, and the jury instructions. State.Habeas.Op.35; see also Pet.App.H1. Unfortunately, by that time, the original court reporter had passed away. State.Habeas.Op.35; see also Pet.App.K1-2. When the new reporter could not locate materials from Petitioner's trial in the former reporter's office, she contacted the former reporter's husband to ask whether he might know of any materials that the reporter might have stored at home. State.Habeas.Op.35-36. The husband confirmed that the now-deceased reporter had kept materials at home, but he had disposed of all of them -- without notice to anyone -- soon after the reporter's death. State.Habeas.Op.36-37. Thus, the other transcripts could not be prepared.

The state post-conviction court determined that these missing transcripts did not entitle Petitioner to habeas relief. West Virginia rules would have permitted Petitioner to submit statements in place of transcripts during the habeas proceedings, but Petitioner never invoked those rules. State.Habeas.Op.37-38 (citing W. Va. R. Civ. P. 80(e)). During his direct appeal,

Petitioner had "a majority of his trial transcript," and any gaps in the transcript did not preclude effective review. State.Habeas.Op.38-40. In the end, it was the witnesses' testimony that drove the case -- and thus the appeal -- and Petitioner had all that testimony transcribed. State.Habeas.Op.41. The Supreme Court also had "paper copies of the jury charge, jury instructions, and jury verdict forms" before it. Id. In short, "Petitioner ha[d] to show that the missing portions of the transcript [we]re prejudicial and impact[ed] his case," and "[h]e ha[d] failed to do so." State.Habeas.Op.43.

The state post-conviction court held that neither Petitioner's transcript-related claims nor any of his many other claims had merit. State.Habeas.Op.45-46. It thus denied him any relief. Id. Petitioner appealed again.

4. In a memorandum decision in 2020, the Supreme Court of Appeals again affirmed unanimously. Pet.App.E1. Petitioner had once more argued that "the loss of certain portions of the trial transcript denied petitioner a meaningful appeal in [his direct appeal]." Pet.App.E2. The Supreme Court of Appeals reviewed the record and agreed with the circuit court. Pet.App.E2. It therefore "adopt[ed] and incorporate[d] the circuit court's well-reasoned findings and conclusions." Pet.App.E2. The court also denied Petitioner's petition for rehearing.

5. While pressing his state habeas petitions, Petitioner also sought transcript-related relief in separate civil actions. He first filed a lawsuit under 42 U.S.C. § 1983 "alleging constitutional deprivations at the hands of various McDowell County, West Virginia court administrators on the basis of Plaintiff's inability to procure portions of his criminal trial transcript." Hicks v. Canterbury, No. 2:13-CV-27830, 2015 WL 6509133, at *1 (S.D.W. Va. Oct. 28, 2015). A federal district court dismissed that action because it would have "undermine[d] the state exhaustion requirement and require[d] [the federal court] to impugn the validity of Plaintiff's conviction and continued confinement." Id. at 9. The "constitutional foundation for [Petitioner]'s claim" was also "murky." Id. Unhappy with that result, Petitioner filed for a writ of assumpsit against his appellate attorney in state circuit court. That suit settled for a nominal sum. See Order, Hicks v. Gibson, No. 17-C-408-WS (Taylor Cnty. (W. Va.) Cir. Ct. Aug. 29, 2018) (reflecting a settlement of $2,104). Petitioner also filed disciplinary complaints against some of his lawyers and the trial judge.

6. Hicks then pursued federal habeas relief in the U.S. District Court for the Southern District of West Virginia, filing a petition under 28 U.S.C. § 2254 in October 2020. Here again, Hicks argued that "the lack of transcriptions of certain trial

proceedings denied him due process and equal protection of the law." Hicks, 2021 WL 4485002, at *3.

The magistrate judge found it "was not unreasonable for the [state] circuit court to determine that lack of access to a complete transcript was not prejudicial." Id. at 12. None of the missing pieces were particularly critical, none of them pertained to the arguments he raised on appeal, and Petitioner had not requested most of the transcripts until after his appeal, anyway. Id. Further, a First Amendment claim was a non-starter because Petitioner had not raised it in state court and the State had not refused to hand anything over. Id. In the end, Petitioner had "provided no evidence that the alleged omissions from his trial transcript specifically prejudiced him on appeal," and "there is no constitutional right to a trial transcript on collateral review." Id.

The district court agreed with the magistrate judge's conclusions in full. Pet.App.B4. It too concluded that Petitioner had not made the substantial showing of prejudice that he needed to make to obtain relief under Section 2254. Id. at 12-13. Nor could Petitioner "convert the missing transcripts into an ineffective assistance of counsel claim" without showing how the transcripts were relevant to issues on appeal. Id. at 13. And a gap in some transcripts did not offend his First Amendment rights.

That gap was not the State's fault and the transcripts were equally unavailable to all. Id. at 13-14. Petitioner appealed.

7. In a brief, unpublished, per curiam opinion, the Fourth Circuit "den[ied] a certificate of appealability and dismiss[ed] the appeal." Pet.App.A1. The court's independent review did not reveal any basis for an appeal. Id. The court later denied Petitioner's petition for rehearing. Pet.App.D1.

ARGUMENT

This petition for certiorari does not warrant the Court's review. Courts have repeatedly explained that Petitioner must identify how any lack of transcripts prejudiced him. Petitioner still has not done so. Especially given the intensely fact-bound nature of the questions presented and the highly deferential nature of habeas review of state-court judgments, this case should come to its end now.

1. This Court reviews cases only when compelling circumstances require the Court's involvement to settle an important federal question. Sup. Ct. R. 10. A petition might meet this standard if it presents an important but as-yet-unaddressed federal question. Id. Or a petition might concern important federal questions that courts have decided differently or in ways that conflict with this Court's precedent. Id.

Petitioner does not claim any of those circumstances apply here. The Petition does not implicate any split among the circuits

or the state courts of last resort. Nor does Petitioner suggest any direct conflict with this Court's precedents; indeed, he only cites a handful of those precedents, and they don't even apply. Instead, Petitioner asks for simple error correction of the unpublished, per curiam opinion below. But "error correction ... is outside the mainstream of the Court's functions and ... not among the 'compelling reasons' ... that govern the grant of certiorari." Stephen M. Shapiro, et al., Supreme Court Practice § 5.12(c)(3) (10th ed. 2013).

It would be especially wrong to engage in unvarnished error correction in a splitless case when the questions presented concern factual matters addressed and resolved many times over by other courts. At bottom, Petitioner disagrees with the notion that he had what he needed to make the arguments that he wanted to raise on direct appeal. He wants this Court to revisit what transcript pages he had and when. See, e.g., Pet.11. But this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."). Nor does the Court take on cases just to decide what "inferences [should be] drawn" from the evidence. Gen. Talking Pictures Corp. v. W. Elec. Co., 304 U.S. 175, 178 (1938). So when a petition "present[s] primarily ... a question of fact, [it] does

not merit Court review." NLRB v. Hendricks Cnty. Rural Elec. Membership Corp., 454 U.S. 170, 176 n.8 (1981).

Remember that not one single judge has agreed with Petitioner's position. "[U]nder what [the Court] ha[s] called the 'two-court rule,' th[is] policy has been applied with particular rigor when [the trial] court and court of appeals are in agreement as to what conclusion the record requires." Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)). Here, though, it's not just two courts -- four courts have disagreed with Petitioner's read of the facts and inferences one might find in this record.

2. The petition also does not warrant review because it never engages with the mandatory standards of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). "The writ of habeas corpus is an extraordinary remedy that guards only against extreme malfunctions in the state criminal justice systems." Shinn v. Ramirez, 142 S. Ct. 1718, 1731 (2022) (cleaned up). For that reason, "AEDPA imposes several limits on habeas relief, and [this Court] ha[s] prescribed several more." Id. These standards and limits are "intentionally difficult to meet." Woods v. Donald, 575 U.S. 312, 316 (2015) (cleaned up).

One of those limits proves to be important here: Petitioner must show not just that "the state court's determination was

incorrect, but [also] that [the state court's] determination was unreasonable -- a substantially higher threshold for a prisoner to meet." Shoop v. Twyford, 142 S. Ct. 2037, 2043 (2022) (cleaned up). To show that, Petitioner would need to explain how the state court "(1) contradicted or unreasonably applied this Court's precedents, or (2) handed down a decision 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" Id. (quoting 28 U.S.C. § 2254(d)). "This means that a state court's ruling must be so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Shoop v. Hill, 139 S. Ct. 504, 506 (2019) (cleaned up); see also Brown v. Davenport, 142 S. Ct. 1510, 1525 (2022) (stressing lofty standards that a petitioner must meet to obtain relief under Section 2254(d)). And factual determinations made by state courts are "presumed to be correct." 28 U.S.C. § 2254(e)(1); see also Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

Petitioner never engages with any of those standards. In fact, the Petition never mentions AEDPA -- so Petitioner "all but ignore[s] the only question that matters." Harrington v. Richter, 562 U.S. 86, 102 (2011) (cleaned up). Petitioner treats deference as beside the point. The statutorily imposed presumptions are nowhere to be found. Rather than rely on this Court's precedents, Petitioner inappropriately seeks shelter in state law. See Pet.12

(referring to W. Va. Code § 51-7-7); but see Engle v. Isaac, 456 U.S. 107, 121 n.21 (1982) ("[A] mere error of state law ... is not a denial of due process." (cleaned up)). He also invokes unrelated federal statutes. Id. at 13 (referring to the Court Reporter Act); but see, e.g., Madera v. Risley, 885 F.2d 646, 648 n.1 (9th Cir. 1989) (explaining that the Court Reporter Act "does not apply to state court proceedings").

And when he does refer to this Court's holdings -- as AEDPA requires him to, White v. Woodall, 572 U.S. 415, 419 (2014) -- he misquotes words from inapplicable opinions. He quotes a dissent from United States v. MacCollom, 426 U.S. 317, 338 (1976), but cites it as Coppedge v. United States, 369 U.S. 438 (1962). See Pet.11. He quotes from Howard v. Cain, No. 11-CV-1365, 2015 WL 5436918, at *2 (W.D. La. Aug. 6, 2015), a case rejecting a habeas petitioner's claim premised on a lack of transcripts, but he cites it as MacCollom. See Pet.12. And he cites the plurality opinion in Griffin v. Illinois, 351 U.S. 12 (1956), for the idea that a transcript is necessary for equal access to the courts, Pet.12, even though Griffin expressly "d[id] not hold ... that [the State] must purchase a stenographer's transcript in every case," 351 U.S. at 20. These authorities hardly show a conflict with or an unreasonable application of clearly established law. Petitioner has failed to meet his threshold responsibility to show that no

reasonable jurist would agree with the State courts' views. The Court can thus reject the Petition for that reason alone.

3. These problems aside, Petitioner's claims lack merit -- further confirming that the Court has no reason to intervene.

a. This Court has said that criminal defendants deserve a "record of sufficient completeness" on appeal. Draper v. Washington, 372 U.S. 487, 499 (1963). But lower courts have uniformly declined to hold "that due process requires a verbatim transcript of the entire proceedings or that an incomplete record confers automatic entitlement to relief." United States v. Savage, 970 F.3d 217, 237 (3d Cir. 2020); see also, e.g., Mitchell v. Wyrick, 698 F.2d 940, 941 (8th Cir. 1983) ("Mere absence of a perfect transcript does not necessarily deny one due process of law."). "[T]he record is adequate for full appellate review so long as it contains the portions necessary to address the alleged errors below." Higginbotham v. Louisiana, 817 F.3d 217, 222 (5th Cir. 2016) (cleaned up). And "a record of sufficient completeness does not necessarily mean a verbatim transcript," either. Menzies v. Powell, 52 F.4th 1178, 1233 (10th Cir. 2022). Other ways of recording the proceedings can work, too. Particularly "when, through no fault of the State, transcripts of criminal trials are no longer available because of the death of the court reporter, some practical accommodation must be made." Norvell v. Illinois, 373 U.S. 420, 424 (1963). For all these reasons, then, "the

absence of the jury instruction transcripts is not a per se denial of his due process right to a fair appeal." Bransford v. Brown, 806 F.2d 83, 86 (6th Cir. 1986).

So "when part of a transcript is missing, habeas relief is warranted only if the petitioner shows prejudice." Menzies, 52 F.4th at 1234 (collecting authorities); see also, e.g., Kheireddine v. Gonzales, 427 F.3d 80, 85 (1st Cir. 2005) ("[T]he claimant must show specific prejudice to his ability to perfect an appeal sufficient to rise to the level of a due process violation." (cleaned up)); United States v. Hoey, 71 F. App'x 962, 965 (4th Cir. 2003) (same); United States v. Charles, 313 F.3d 1278, 1283 (11th Cir. 2002) (same); Mullen v. Blackburn, 808 F.2d 1143, 1146 (5th Cir. 1987) (same). Indeed, even outside the habeas context, a "prejudice requirement has now been adopted by almost every circuit to consider the issue in the context of missing or inaccurate trial transcripts." United States v. Weisser, 417 F.3d 336, 342 (2d Cir. 2005); see also United States v. Carrazana, 70 F.3d 1339, 1343 (D.C. Cir. 1995) ("Many courts have emphasized the importance of the defendant's alleging some specific error in the missing portions of the record.").

A defendant shows prejudice by establishing at least a "colorable need" for the missing part of the transcript. Fahy v. Horn, 516 F.3d 169, 190-91 (3d Cir. 2008). Put another way, Petitioner must show how the omitted parts of the transcript left

the appellate court unable to "determine whether the [trial] court committed reversible error." United States v. Malady, 960 F.2d 57, 59 (8th Cir. 1992). Mere speculation that the missing portions might have contained some evidence of reversible error is not enough. See, e.g., Winkler v. Parris, 927 F.3d 462, 466-67 (6th Cir. 2019); Santiago v. Coughlin, No. 96-2229, 1997 WL 32924, at *2 (2d Cir. Jan. 8, 1997).

Here, the state courts reasonably concluded that Petitioner had failed to establish any prejudice from the "missing" transcripts on direct appeal. To be clear, Petitioner received all the transcripts that his counsel requested on direct appeal except for the judge's reading of the jury instructions. So beyond those instructions, the lower courts reasonably held Petitioner responsible for his own failure to request any other transcripts before appealing. After all, "[p]utting to one side the exceptional cases in which counsel is ineffective," and ignoring the few instances (not relevant here) in which defendants must personally make certain key decisions, "the client must accept the consequences of the lawyer's decision[s]." Taylor v. Illinois, 484 U.S. 400, 418 (1988).

Petitioner has identified no specific reversible error that might arise from the non-provided jury instructions. He does not suggest that his counsel objected to any of the instructions when the trial court gave them. Cf. United States v. Cadarette, No.

86-1230, 1987 WL 37200, at *1 (6th Cir. Apr. 23, 1987) (finding no prejudice from missing jury-instruction transcripts where "defendant ... made no suggestion of how he might have been prejudiced" and "trial counsel indicate[d] that he made no objections on defendant's behalf"). The Supreme Court of Appeals had a written copy of the instructions that they consulted; recall how the court referred to the charge given at the end of Petitioner's trial in its decision on Petitioner's direct appeal. See Pet.App.C10. The transcript for the jury instructions did not pertain to the grounds that Petitioner raised in his appeal. And Petitioner's counsel -- who was also one of Petitioner's two lawyers at trial -- also did not see any grounds for appealing from those instructions. In sum, "there is not even a modicum of evidence here that the incomplete transcript resulted in actual prejudice." Moore v. Carlton, 74 F.3d 689, 693 (6th Cir. 1996).

The closest Petitioner comes to alleging specific prejudice is a reference to potential "lesser included instructions" that Petitioner thinks the trial court should have given but didn't. See Pet.7, 11, 13, 14. Petitioner never raised that specific point in the state proceedings, so the Court could not consider it here.* See Sexton v. Beaudreaux, 138 S. Ct. 2555, 2560 (2018) (explaining

* Petitioner also suggests -- without further elaboration -- that "the Judge did not instruct the jury on the elements of the crime." Pet.13. But he does not offer anything to support that rather outrageous assertion, and he never raised that point below, either.

that it was a "fundamental error" for a federal court to "consider[] arguments against the state court's decision that [the petitioner] never even made in his state habeas petition"). But even if the Court were to consider it, that issue would supply no prejudice for at least two reasons.

First, Petitioner never explains why missing transcripts were necessary to make whatever claim he wanted to make. "All that would be necessary would be a concession that no such instruction was given, together with a description of the nature of the evidence against petitioner, not claimed to be absent here." Green v. Scully, 840 F. Supp. 254, 256 (S.D.N.Y. 1993) (rejecting habeas claim based on omission of transcript that would have purportedly supported lesser-included argument). Even without the concession, Petitioner could have looked to the written copies of the instructions or some alternative record, just as the state post-conviction court recognized. He did not.

Second, Petitioner never describes why the failure to provide instructions on some unidentified lesser included offense -- "such as second degree murder," Pet.13 -- would amount to legal error. See Jackson v. Renico, 179 F. App'x 249, 252 (6th Cir. 2006) (rejecting habeas claim based on missing transcripts because "[t]he petitioner made no specific allegation of error"). "[D]ue process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction." Hopper

v. Evans, 456 U.S. 605, 611 (1982). And though second-degree murder can constitute a lesser included offense of first-degree murder under West Virginia law, there still must be "evidence which would tend to prove such lesser included offense." State v. Richardson, 811 S.E.2d 260, 272 (W. Va. 2018). Petitioner has identified no evidence like that, even though he concededly has transcripts of all the evidence presented at trial. Nor could he. This case involved a premeditated, well-planned, and cold-blooded scheme to kill multiple individuals. It was not an act of passion or the like that might justify a lesser included offense. So "[t]here was no evidence 'which would tend to prove' the lesser included offense, i.e. that the killing was spontaneous and of a non-reflective nature." Id. Thus, no prejudice could arise.

And the Petition's fleeting reference to Petitioner's unpreserved First Amendment argument does not change that. Pet.13. The First Amendment protects access to criminal trials. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576-78 (1980) (plurality). But here, no one denied Petitioner access to his trial. Petitioner does not have copies of certain transcripts of certain parts of his trial because they simply do not exist; the State did not refuse him anything. That situation does not implicate the First Amendment, particularly when no prejudice results. See, e.g., Saunders v. Phila. Dist. Att'y's Off., 546 F. App'x 68, 72 (3d Cir. 2013) (finding that First Amendment claim

failed where the defendant could not "establish that any lost or rejected claims were non-frivolous or arguable").

b. Probably seeing that his claim for lack of transcripts on appeal does not work on its own, Petitioner sometimes seems to argue that he received ineffective assistance because his lawyer did not seek out more transcripts. Pet.10. But that effort cannot succeed.

Petitioner does not mention the relevant standards for an ineffective-assistance-of-counsel claim. A defendant does not have "a right to an attorney who performs his duties mistake-free." Weaver v. Massachusetts, 582 U.S. 286, 300 (2017) (cleaned up). "[C]ounsel should be strongly presumed to have rendered adequate assistance." Cullen v. Pinholster, 563 U.S. 170, 189 (2011). To defeat that presumption, a defendant "must show that counsel failed to act reasonabl[y] considering all the circumstances." Id. (cleaned up); see also Maryland v. Kulbicki, 577 U.S. 1, 2 (2015) (explaining that counsel's error must be "so serious that he no longer functions as counsel" (cleaned up)). If defendant can establish this deficient performance, then he still must show prejudice, too. In particular, he must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cullen, 563 U.S. at 189. And a "reasonable probability" is a "substantial," not just a "conceivable, likelihood of a different

result." Shinn v. Kayer, 141 S. Ct. 517, 523 (2020). These standards and Section 2254(d) "are both highly deferential, and when the two apply in tandem, review is doubly so." Harrington, 562 U.S. at 105 (cleaned up). Given that extreme deference, "federal courts are to afford both the state court and the defense attorney the benefit of the doubt." Woods v. Etherton, 578 U.S. 113, 117 (2016) (cleaned up).

The state courts reasonably rejected Petitioner's ineffective assistance claim. Other than insisting that he asked for a complete transcript and didn't get one, Petitioner never explains with any specificity why his counsel's choice not to order certain specific pages fell below reasonable professional norms. That could have well been enough to reject the ineffective-assistance argument. Cf. Draper, 372 U.S. at 495 (recognizing how "part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal" such that a defendant may not need them).

But worse, as the state courts recognized, the arguments about prejudice are even vaguer. Again, Petitioner did not suffer prejudice from the absence of any transcripts on jury instructions. And as for the rest of it, Petitioner can suggest only that other unspecified but meritorious claims might be hiding within. See Pet.12 (referring to "all the errors[,] including but not limited to the jury instruction errors"); Pet.14 (alluding to "other errors

remembered"). "Conclusory" arguments like these ones are not enough to show prejudice. Nguyen v. Archuleta, 369 F. App'x 889, 894 (10th Cir. 2010); see also, e.g., Dugger v. White, No. 96-16473, 1998 WL 10396, at *1 (9th Cir. Jan. 12, 1998); Gruszie v. United States, No. 16369, 1991 WL 127709, at *1 (9th Cir. July 15, 1991); cf. Santiago, 1997 WL 32924, at *2 ("[A] perfunctory assertion that there might possibly be an appealable issue concerning the denial of his competency motion in the missing transcripts is insufficient to satisfy the requisite showing of prejudice."). They do not even meet the "heightened pleading requirements" that apply to habeas petitions. McFarland v. Scott, 512 U.S. 849, 856 (1994).

When it comes to prejudice on his ineffective-assistance claim, the most that Petitioner can muster is a reference to a letter that one of his trial lawyers sent to his other trial counsel recounting "thoughts" from Petitioner's family about certain things the trial court supposedly said to the jury. Pet.App.F1. Here again, this fourth-hand account is too sparse to establish prejudice from the missing transcripts, especially when Petitioner offers no legal argument to go with them. And in the end, obtaining the transcripts of these comments would not have made any difference. Counsel was obviously aware of the comments -- having received the letter -- and made a strategic decision not to raise them on appeal. Counsel was right.

The statements paraphrased in the letter are not the sort that warrant reversal under West Virginia law. One was just a statement that the court expected trial to finish by a certain day. See, e.g., State v. R.T., No. 11-0468, 2012 WL 2915020, at *3 (W. Va. Feb. 14, 2020) (holding that the circuit court's "numerous references to time" did not impermissibly coerce the jury); State v. Mayle, No. 11-0562, 2012 WL 2914271, at *3 (W. Va. Feb. 13, 2012) (holding that the circuit court did not influence or rush the jury by expressing belief that trial would end by a certain day). Another was a statement that no one would disturb the jury unless they summoned the bailiff by knocking on the door. See, e.g., State v. Pannell, 225 W. Va. 743, 750 (W. Va. 2010) (holding that the court's comments that jurors would stay as long as necessary was not coercive). So any failure on counsel's part in not asking to transcribe those comments was immaterial and non-prejudicial.

Petitioner's claim for ineffective assistance of counsel thus fails.

c. Petitioner also says -- without further development -- that a lack of certain transcripts caused him to lose "his Constitutional Right ... to a meaningful Writ of Habeas Corpus." Pet.9; see also Pet.10 ("Petitioner could not compile a sufficient and complete ... collateral attack either."). This last argument fails, too.

Petitioner maintains that his "constitutional right to a collateral attack" was undermined because he did not have all the transcripts he wanted. Pet.12. If he means to refer to state proceedings, he is mistaken: no right to collaterally attack a conviction in state courts exists. "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings." Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality op.); see also Lackawanna Cnty. Dist. Att'y v. Coss, 532 U.S. 394, 402 (2001) (noting that there is "no constitutional mandate" for States to afford post-conviction relief); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) ("States have no obligation to provide this avenue of relief."). Thus, as to the state proceedings, the fundamental premise of Petitioner's argument is wrong.

Nor did the lack of transcripts offend any of Petitioner's rights as to his federal post-conviction challenge. Petitioner "has no constitutional right to a transcript to prepare for a post-conviction proceeding." Hays v. Newsom, 3 F. App'x 270, 271 (6th Cir. 2001); see also Bush v. Sec'y, Fla. Dep't of Corr., 888 F.3d 1188, 1197 (11th Cir. 2018) (same); Randolph v. Taylor, 69 F. App'x 824, 825 (9th Cir. 2003) (same); Ruark v. Gunter, 958 F.2d 318, 319 (10th Cir. 1992) (same). Indeed, as best the State can tell, no court anywhere has ever held that a criminal defendant has a right to obtain the transcript of his criminal trial to support

his federal post-conviction challenge. It would be particularly odd to recognize such a right in this case, given that no "violation of the Due Process or Equal Protection Clause" occurs where, as here, a transcript is missing "due to the death of the court reporter" and the defendant had counsel at trial and on appeal. Norvell, 373 U.S. at 423; Rickard v. Burton, 2 F. App'x 469, 470 (6th Cir. 2001) ("[N]o constitutional violation occurs when a transcript does not exist due to the death of the court reporter and, consequently, the transcript is unavailable to both sides.").

And even if some right to transcripts during post-conviction proceedings did exist, Petitioner would still have to meet the challenge of establishing prejudice. As should be clear by this point, Petitioner can't do so. The transcripts did not contain evidence of potentially colorable claims. Petitioner brought the only potential claims he had during his direct appeal, and those claims failed. He cannot use the unfortunate death of a court reporter to transform immaterial transcript pages into a meritorious post-conviction challenge.

* * * *

In total, none of Petitioner's claims had any merit. So even if the Court could look past the many threshold reasons to refuse this prejudice, the merits would not warrant granting the petition for certiorari.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted.

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JUNE 2023