IN THE SUPREME COURT OF THE UNITED STATES

No. 22-7189

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

REPLY BRIEF
IN
OPPOSITION
TO
RESPONDENT'S BRIEF

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APPENDIX LIST

The Petitioner received the Respondent's Brief on Friday afternoon June 16th. The Law Library is closed on the weekends and the 19th (Juneteenth) and 20th (West Virginia day) were holidays. On Wednesday, June 21st, Petitioner began this Brief pursuant to Rule 15 of the United States Rules of the Supreme Court. Due to an institutional lockdown, Petitioner is only able to access the Law Library two (2) hours a day. Due to the restrictions, Petitioner is only addressing certain parts of the Respondent's Brief although there are many errors and misstatements. Thereby, the Petitioner requests the appointment of Counsel to amend and perfect a reply to this Court showing all errors and misstatements of the Respondent.

As a reminder to the Respondent and to this Honorable Court, the Petitioner is a *pro se* litigant and cannot be held to the standard of an attorney's petition. See *Chestnut v. Bureau of Prisons*, LEXIS 167188; Case No. 1:22-2386-RBH-SVH (4th Cir. Ct. 2022) "Pro se complaints are held to a less stringent standard than those drafted by attorneys. *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). A federal court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case. *Erickson V. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L.Ed.2d 1081 (2007). In evaluating a pro se complaint, the plaintiff's allegations are assumed to be true. *Fine v. City of N.Y.*, 529 F.2d 70, 74 (2nd Cir. 1975)."

The Respondent skirts the real questions at issue. The questions were:

(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?

The Respondent did not really answer any of the questions. They also did not state the facts of the case correctly. Thereby, the Petitioner replies with an appendix of additional evidence. The Respondent states, "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." This is completely untrue. Four (4) days after the *trial* Petitioner told Appellate Counsel Michael Gibson that there were problems with the Voir Dire and Jury Instructions. (See APP. M - Letter from Carla Faletti (Law Clerk to Thomas R. Scott Jr.) to Michael Gibson (Petitioner's Trial Counsel). The letter indicated that the voir dire and jury instructions were needed. Not only did the Petitioner have a problem with the jury instructions but also some of the statements made by the Judge.

Attorney Gibson was paid $5,000 to order a full set of transcripts. He did not order a complete set but rather portions. He only used $3,800 out of the $5,000. He did not relay to the Petitioner that only portions were ordered. Years later, Petitioner sued the estate of Attorney Gibson and won. It was revealed during the Habeas hearing that he did not order a complete set of transcripts. (See APP R - December 2016 Evidentiary Hearing transcripts).

The Respondent stated "Thankfully, authorities arrested and charged Petitioner before he

could send Mr. Mullins after her." (Pg. 4 of Resp.Brief). This is completely untrue! The Respondent is making up stories to make the Petitioner appear incompetent. The shooting happened in May 2001. Petitioner was not arrested until 2008. No one was threatened or harmed between 2001 and 2008. Therefore, what the Respondent declares is false. This is all found within the case file, especially the portions that cannot be reproduced.

At the Petitioner's trial in 2009, it was discovered that the victims of the 2001 shooting by Mose Mullins was because they had stolen 220 Oxycontin from him the day before the shooting.

As this Court can see, the Respondent is pulling falsehoods out of the air in order for this Court to deny the Petitioner's Due Process. The facts and errors of the case is largely found in the portions of transcripts the Petitioner cannot obtain. The Petitioner needs an appointed attorney to amend and perfect this brief.

The Respondent again speaks on page 5 of their brief about the Rule 404(b) instructions. They quote some from what the West Virginia Supreme Court (WVSCA) said in the 2011 Direct Appeal case (App. C). However, they misquote what was said. There were NO JURY INSTRUCTION transcripts provided, thereby, the Respondent is grasping at straws. The WVSCA wrote "the State presented specific and detailed purposes establishing credible explanations and rationales for the admission of such evidence..." At no time does the WVSCA or Respondent show the jury instructions from the transcripts because they were never provided. The Respondent gives what the WVSCA writes which is "during the charge to the jury at the conclusion of the trial." This again is what the Respondent stated, however, with no proof. The WVSCA took at face value what the Respondent said in their brief. There were no jury

instructions produced and the Respondent is only stating what they think was done. How can the Respondent state such statements without proof? There are no jury instructions along with other portions of the transcripts.

The Respondent states on page 6 "A written copy of the jury instructions and charge was provided to the Supreme Court of Appeals in the direct appeal." Again, this is completely untrue. The Petitioner has NEVER had a copy of the jury instructions or the 404(b) instructions from anyone. If there is a copy of these instructions, why did the Respondent not produce a copy of them for this court? Neither the Respondent or the WVSCA can produce the jury instructions and/or the 404(b) instructions.

Again, the Respondent stated "and any gaps in the transcript did not preclude effective review." Judge Stephens, the Habeas Judge, told the Petitioner's Habeas Counsel that they should work out a plea to second degree murder and to drop the Habeas due to the lost portions of the transcripts. (See APP. N - letter from Counsel LaCaria). Judge Stephens was concerned "because of the court reporter's actions, as well as her husband's, at throwing away part of [the] files." They all knew there were probable errors within those portions of transcripts.

Again, the Respondent misleads this Court when they stated on page 9, "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." They quoted from a lawsuit against several defendants in an attempt to obtain all transcripts available. Judge Johnston stated in his conclusion, "If the transcript 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 transcript to

this Court to seek redress at some future point, the state court should have the first opportunity to address those claims." See *Hicks v. Canterbury*, No. 2:13-cv-27830 (2015). The Respondent tried to mislead this Court by quoting only portions of Judge Johnston's opinion. He in fact declared that the State should have the opportunity to answer the charge of the transcripts, but if the State cannot, then it can be brought back to the Federal Court.

Again, the Respondent misleads this Court when they stated on page 10, "and Petitioner had not requested most of the transcripts until after his appeal, anyway. 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." This is completely untrue. This Court can see on the original Habeas (McDowell County - 12-C-100) in the Circuit Court, and up, that it was discussed and offered as an error. The First Amendment error was number 32 which stated:

> Was the Petitioner denied Due Process and Equal Protection of Law where he is disabled by the State's failure to produce the transcripts of all proceedings and the trial of matter in direct violation of West Virginia Constitution, Article III, § 10 and 17 and United States Constitution, Amendments 1, 5 and 14 which effectively and constructively denies the right to effective appellate review mandating reversal of conviction, vacation of sentence and a new trial or release?
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> In the petition, it was argued:
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> In *United States v. Hardy*, 375 U.S. 277, n. 3 (1964): "Boskey, *The Right to Counsel in Appellate Proceedings*, 45 Minn. L. Rev. 783, 792-793 (1961), in speaking of the task of counsel who is appointed to represent the appellant and who did not serve as trial counsel, says "...the new counsel is operating under serious handicaps. Normally he had no prior acquaintance with the trial proceedings and no personal knowledge of the case which would form a basis for sound judgement. Normally, with no transcript, he cannot make his own independent analysis of the trial proceedings.

Further, the Petition argued:

> In, *Hardy v. United States*, was determined on a case that the Defendant was an

> indigent, who was provided only part of the transcripts of his trial proceedings. The Defendant had counsel in the appellate proceeding that was not the same counsel that represented him at trial. The Court granted transcripts for the portions of the trial which related to conclusory allegations formulated by the indigent defendant, pro se, but denied transcripts for the remainder of the proceedings.
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> On certiorari, the United States Supreme Court of Appeals held by vote of 7-2 that: the duties of the attorney appointed by the Court of Appeals could not be discharged unless he obtained the entire transcript." It was also held, "that a complete transcript should be equally available to one whose appointed lawyer on appeal was also his lawyer at trial and that the availability of a transcript should not be made to depend on the facts of each case." The case was reversed.

Further, it states:

> The Government is required to provide transcripts of the entire trial proceedings upon request for appellate review, if not release is proper remedy. *Lane v. Brown*, 372 U.S. 477, 483, 83 S.Ct. 768, 9 L.Ed.2d (1963); *Coppedge v. United States*, 369 U.S. 438, 82 S. Ct. 917, 8 L.Ed.2d (1962); *Griffin v. Illinois*, 351 U.S. 12, 17-18, 76 S. Ct. 585, 100 L.Ed. 891 (1956); *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963).

This was backed up also by Ground 14 of the same Habeas Petition which stated:

> Did the Circuit Court 'abuse its discretion' where it gave incomplete instructions to the jury as to guide them in their decisions involving the elements of the offenses charged in direct violation of the West Virginia Constitution, Article III, § 10 and 17 and the United States Constitution, Amendments, 5 and 14 which permitted the jury to infer its own unfettered discretion and conclusion of law denying a fair trial with reliable results mandating reversal?

Further, it stated within this ground:

> "Significantly, "an instruction setting forth the elements of the offense is "Mandatory and indispensable," and the mere reading of a statute does not suffice." *United States v. Head*, 641 F.2d 174, 180 (4th Cir. 1981)."
> "Further, both the Fourth Circuit and West Virginia Court of Appeals require that the trial court give basic instructions to the jury whether or not requested. *State v. Dozier*, 163 W. Va. 192, 255 S.E.2d 552 (1979); *United States v. Hutchinson*, 338 F.2d 991 (4th Cir. 1964); *United States v. Head*, 641 F.2d 174 (4th Cir. 1981); *State v. Lambert*, 173 W. Va. 30, 312 S.E.2d 31 (1984); *State v. Romine*, 166 W. Va. 135. 272 S.E.2d 680, 681-82 (1980); *State v. Brown*, 107 W. Va. 60, 146 S.E.2d

887 (1929)."
"It is obligatory upon the judge to give instructions which are "clear, concise, accurate and impartial statements of the law written in understandable language and delivered in a conversational tone which will be helpful guidance to the jurors." Devitt, The Practical Suggestions about *Federal Jury Instructions*, 38 F.R.D. 75 (1966)."
It has been estimated that, of cases reversed on appeal, at least one-third (1/3) contain prejudicial error in instructions. *Skidmore v. B & O Railroad, Co.*, 167 F.2d 54 (2nd Cir 1948). This is why, "Jury instructions are reviewed to determine if they are supported by the evidence and a correct statement of law." *United States v. Schallom*, 998 F.wd. 196, 199 (4th Cir. 1993)."
"The Fourth Circuit has applied the 'instructions as a whole' doctrine in *United States v. Love*, 767 F.2d 1052 (4th Cir. 1985); *United States v. Fleming*, 739 F.2d 945, 949 (4th Cir. 1984); *United States v. Park*, 421 U.S. 658, 674, 95 S.Ct. 1903, 1912, 44 L.Ed.2d 489 (1975); *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 400, 38 L.Ed.2d 368 (1973)."
"Further, when reviewing for Constitutional Infirmity, the Court is required to look at the charge "in its entirety," not just the challenged parts. *Smith v. Bordenkircher*, 718 F.2d 1273 (4th Cir. 1983); *Gore v. Leeke*, 605 F.2d 741 (4th Cir. 1973); *Reeves v. Reed*, 596 F.2d 628, 629 (4th Cir. 1979)."

All of the above statements were quoted from the Habeas Corpus in McDowell County, West Virginia (12-C-100). Petitioner did not discover that any of the transcripts were missing until after the Direct Appeal was decided and when Mr. Gibson sent the portion of the requested transcripts he ordered. Petitioner was always under the assumption that Mr. Gibson ordered the entire trial due to the request of Petitioner and his family and also paying Mr. Gibson $5,000 for the transcripts. He also paid Mr. Gibson $20,000 for the Direct Appeal itself.

Attorney Gibson only paid $3,800 for portions of the transcripts. This was all revealed later and the Petitioner was paid by the estate of Attorney Gibson. After the Direct Appeal was decided is when Petitioner discovered that Attorney Gibson did not review the jury transcripts for errors because he did not order all the transcripts.

Again, the Respondent stated "That gap was not the State's fault and the transcripts were

equally unavailable to all." Again, this is completely untrue. The State of West Virginia Supreme Court has developed a **Manual for Official Court Reporters of the West Virginia Judiciary** and a **Record Retention Schedule**[1] which guides and instructs Court Reporters what to do. This means that the Court Reporters are a subordinate of the State of West Virginia which makes them the State of West Virginia. (See APP. O and APP. P)

On page 13 of the Respondent's Brief, they state "Remember that not one single judge has agreed with Petitioner's position." While the Petitioner has never had any relief, Judge Stephens told the Petitioner's Attorney: (See APP. N).

> "that Judge Stephens was concerned very much about [the Petitioner's] case mainly because of the court reporter's actions, as well as her husbands's, at throwing away part of [Petitioner's] file. [LaCaria] submitted to Mr. Kornish that there was a possibility, if the State agreed, that the Court might accept a plea of second degree murder or a lesser included offense such as voluntary manslaughter, in consideration for the fact that the habeas corpus case would be dismissed and that there would be no forther litigation involving the history of Gabe Hicks' case and the actions of certain individuals during the course of the litigation, mainly the court reporters actions. I think that the Court does not want this information to go forth knowing that the next stage of Gabe's case would be in the Supreme Court, as I understand it."

Also, Judge Johnston (4th District Court Judge) stated in his conclusion, "If the transcript 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 transcript to this Court to seek redress at some future point, the state court should have the first opportunity to address those claims." (See *Hicks v. Canterbury*, No. 2:13-cv-27830 (2015)). Thereby, not every Judge agreed with the Respondent.

The Respondent keeps "clean[ing] up cases." They do so in order to "trick" this Court.

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[1] See CR 4 and CR 8.

For example, they try to quote *Harrington v. Richter*, 562 U.S. 86, 102 (2011) and stated "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 actually was talking about "the Court of Appeals all but ignored..." While the Petitioner may not have commented on the AEDPA, he reminds this Court that he is *pro se* litigant and cannot be held to the standard of an attorney's petition. As far as ignoring the question, it is very apparent that the Respondent is ignoring the questions and is focused on the procedures of the Petitioner's Brief.

Further, the Respondent stated "(explaining that the Court Reporter Act "does not apply to state court proceedings"). This cannot be further from the truth. West Virginia has a **Manual for Official Court Reporters of the West Virginia Judiciary**[2] (See APP. O) which the Court Reporter testified to in the habeas hearing (pg. 32). She stated "This is the Manual For Court - - official Court Reporters of the West Virginia Judiciary." She continues talking about the official Court Reporters manual. There are rules that a Court Reporter has to go by in West Virginia.

The Respondent stated that the "mere absence of a perfect transcript does not necessarily deny one due process of law." This case was speaking of the transcription of the records with errors within. The Petitioner does not have any of the Jury Instructions or the Voir Dire among other portions. The Petitioner contends there are errors found in the Jury Instructions. Besides, the Petitioner is not asking for a "perfect" trial transcription but just a complete one. Also, remember what Judge Johnston said, "If the transcript of Plaintiff's trial has indeed been lost, that is a troubling development for **due process**. While Plaintiff may have an opportunity to

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[2] See Record Retention Schedule CR. 4 and CR 8 (APP. P). See Manual for Offical Court Reporters of the West Virginia Judiciary Section XV - pg. 22 (Untranscribed Notes).

bring claims relating to the alleged loss of the transcript to this Court to seek redress at some future point, the state court should have the first opportunity to address those claims." (See *Hicks v. Canterbury*, No. 2:13-cv-27830 (2015)).

Again, the Respondent states "A defendant shows prejudice by establishing at least a "colorable need" for the missing part of the transcript." Time and time again, the Petitioner asserted there were errors in the Jury Instructions and Voir Dire. The Petitioner relayed to the Court his thoughts. Direct Appeal Attorney Michael Gibson was paid $5,000 for a full set of transcripts. He did not order a complete set and did not inform the Petitioner of this fact although he and Petitioner, and Petitioner's family, discussed errors in the Jury Instructions and Voir dire before the filing of the Direct Appeal. See APP. M

The Respondent stated "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." This cannot be further from the truth. The Petitioner spoke with Michael Gibson, Direct Appeal Attorney, prior to filing any brief. The Petitioner paid $5,000 for a complete set of transcripts. The Petitioner and his family talked about the errors found within the Jury instructions and the Voir dire. The Petitioner did not discover that Mr. Gibson did not order the complete set of transcripts until after the Direct Appeal Decision.

The Petitioner requests this Court to read the Petitioner's case from the Trial through to the Federal Court. The Respondent keeps making claims "Petitioner never raised that specific point in the state proceedings," however, every ground listed was asserted and presented to the

State Court all the way through to the Federal Court. The Respondent keeps making absurd allegations that are just not true.

The Respondent states, "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." This is untrue. The Petitioner requested discovery, and these records, from the Court but was denied. (See APP. Q - Motions Hearing of August 8, 2013).

The Respondent says "[t]here was no evidence 'which would tend to prove' the lesser included offense..." Prosecutor Sidney Bell, however, testified at the December 2016 Evidentiary Hearing that he would have offered Petitioner Voluntary Manslaughter if his trial attorney had asked for a plea deal because he doubted he could get a conviction. (See APP. R - Omnibus Hearing of December 5, 2016 at pages 131-132). The Respondent keeps skipping over the most pertinent facts of the Petitioner's case.

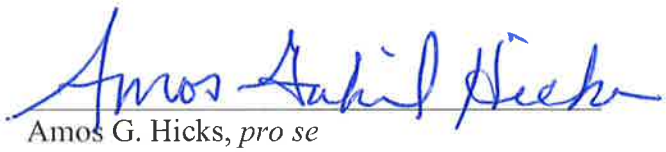
In summary, Appellate Counsel Michael Gibson was asked by the Petitioner and by his family to order a complete set of transcripts. The Petitioner and his family spoke to Mr. Gibson regarding the Jury instruction errors. The Petitioner and his family gave Mr. Gibson $20,000 to perfect a Direct Appeal. The Petitioner and his family gave Mr. Gibson $5,000 to order a complete set of transcripts. Later, after the Direct Appeal Supreme Court decision, it was revealed that Mr. Gibson did not order a complete set of transcripts, especially the Voir dire and the Jury instructions, which is known to have errors. Since that time, from the first Habeas Corpus to now, the Petitioner has fought to obtain a set of his transcripts to show all the errors. In retrospect, it is the State's fault as the Court Reporter is an officer of the Court and she took home materials that are to be left in the Courthouse. Consequently, her husband destroyed all

transcripts thus violating the West Virginia Judiciary Official Manual for Court Reporters and the Record Retention Schedule. Therefore, the State was in gross dereliction of their duties according to their own Rules set forth by the West Virginia Supreme Court.

CONCLUSION

THEREFORE, the Petitioner humbly requests this Court to appoint an Attorney to amend andperfect any part of the briefs submitted to this Court and to reverse the lower Court's decision and to permit the Petitioner to return to Court for a new trial, release, or a plea deal of voluntary manslaughter which the Prosecutor testified that he would have offered. As stated above, the Respondent misstates many things within their Petition. The Petitioner, due to limited time, cannot address all the issues but rather only address a portion of them.

Respectfully submitted



Amos G. Hicks, *pro se*

VERIFICATION

I, Amos G. Hicks, Petitioner, do swear and attest the Facts and Statements contained herein are True and Correct to the best of my knowledge and belief. As to those statements based upon information of others, of facts represented by others or founded upon their testimonies, I believe same to be true and correct and do so represent to this Court the same as true and correct and true in representation as believed by me under penalty of perjury. All information in this Petition is set forth thereby as truth. All documents represented and set forth are true and accurate so presented. The document has been sent to the parties listed on the Certification of Service by placing the documents in the institutional mail system on the 27th day of June, 2023. It is so Sworn.

Respectfully Sworn and Attested

Amos Gabriel Hicks

Amos G. Hicks, *pro se.*

STATE OF WEST VIRGINIA:

COUNT OF FAYETTE, TO WIT:

Taken, subscribed and sworn before me, a notary public in and for the County of Fayette and the State of West Virginia on the **27th** day of **June, 2023.**

Affix Seal Below:

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Richard H. Coleman
State of West Virginia
1 Mountainside Way
Mount Olive, WV 25185
My Commission Expires July 31, 2024

Richard H. Coleman

Notary Signature

Notary Seal