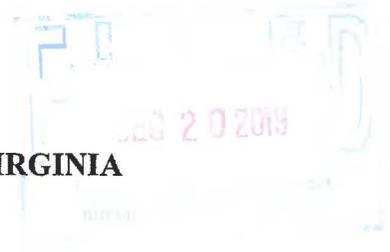


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 18-0882



**STATE OF WEST VIRGINIA ex rel.
DAVID TACKETT,**

Petitioner,

v.

**HONORABLE DARL W. POLING,
Judge of Circuit Court,
Raleigh County, West Virginia,**

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONDENT'S SUPPLEMENTAL RESPONSE BRIEF

Respondent State of West Virginia, by counsel, Karen Villanueva-Matkovich, Deputy Attorney General, respectfully responds to Petitioner's Supplemental Brief on behalf of the Respondent Judge, the Honorable Darl W. Poling. For the reasons discussed below, the above-styled Petition should be refused.

I. ISSUES

Whether an inmate is entitled to discovery prior to the filing of a habeas corpus petition and whether the West Virginia Freedom of Information Act can be used to obtain court records for the purpose of filing a habeas corpus petition?

II. STATEMENT OF THE CASE

This original jurisdiction proceeding concerning when an inmate can assert the right to access court records in anticipation of filing a habeas corpus petition arises from Raleigh County, Case No. 17-F-238. Here, Petitioner seeks a writ of mandamus requesting the Respondent Judge be compelled to produce documents from Case No. 17-F-238 "to perfect his Habeas Corpus claim in regards to not entering his guilty plea voluntarily and intelligently." (Petitioner's Brief (hereinafter Pet'r Br.) at 1-2).

On August 7, 2018, Petitioner entered guilty pleas to one count of Nighttime Burglary, two counts of First Degree Sexual Assault, and one count of Mandatory Sentence for Certain Sex Offenses Against Children. The circuit court accepted the pleas and sentenced Petitioner to life imprisonment pursuant to W.Va. Code §61-11-18(c) based upon Petitioner's admission regarding three prior felony convictions involving felonies of violence. (Supplemental Brief Appendix,

hereinafter, S.A.R.) at 18). The Guilty Plea and Order Sentencing Defendant to Life Imprisonment was entered on August 28, 2018. *Id.*

Petitioner, pro se, filed a document entitled “Petition for the production of documents” with the Raleigh County Circuit Clerk on August 27, 2018. Petitioner requested the motion be forwarded to the circuit court judge and the prosecutor. The motion requested several documents, essentially the entire record. (Reply of John A. Hutchison, Circuit Judge to Petition of David E Tackett Praying for Writ of Mandamus, at 2).

On October 11, 2018, Petitioner filed a Petition for Writ of Mandamus for the Production of Documents (hereinafter, Writ). The Writ requests the production of documents relating to Case No. 17-F-238 for the purpose of perfecting Petitioner’s habeas corpus claim. (Pet’r Br. at 2).

A reply to Petitioner’s Writ, Reply of John A. Hutchison, Circuit Judge to Petition of David E. Tackett Praying for a Writ of Mandamus (hereinafter, Reply), was filed on November 13, 2018, by the Honorable John A. Hutchison, Judge of the Circuit Court of Raleigh County.¹ Within the Reply, the Petitioner’s request was granted in part and denied in part. The circuit court determined that Petitioner had not filed a petition for a Writ of Habeas Corpus; therefore, without a pending petition, Petitioner’s request equates to a motion for discovery and as such was denied because Petitioner is “not entitled to discovery prior to filing a petition for Writ of Habeas Corpus.” *Id.* The circuit court granted Petitioner’s request regarding certain documents: the docket sheet, the indictment, the information and final order. *Id.*

By Order entered September 23, 2019, this Court appointed Dana Eddy, Executive Director of West Virginia Public Defender Services, as counsel for Petitioner and Kristen Keller,

¹ On May 2, 2019, the Honorable John A. Hutchison voluntarily disqualified himself as he is currently a Justice of this Court.

Prosecuting Attorney for Raleigh County, as counsel for the Respondent. This Court set the matter for oral argument and ordered supplemental briefing regarding whether an inmate is entitled to discovery prior to the filing of a habeas corpus petition and whether the West Virginia Freedom of Information Act can be used to obtain court records for the purpose of filing a habeas corpus petition. On November 26, 2019, Kristen Keller filed a motion requesting amendment to this Court's September 23, 2019, Order for substitution of counsel. By Order entered December 5, 2019, this Court substituted the WV Attorney General's office.

This supplemental brief will not rehash the arguments contained in Respondent's initial Reply brief. Respondent continues to stand behind the initial arguments contained in the Reply brief. This response addresses the issues as directed by this Court's September 23rd Order.

III. SUMMARY OF THE ARGUMENT

This petition concerns the extent of the Petitioner's right to obtain court documents in preparation of a habeas petition. The question before the Court is whether a Petitioner can compel the production of records prior to filing a habeas petition. In the absence of filing a habeas petition, document requests for preparing a habeas cannot be reviewed by the circuit court under W.Va. Code §53-4A-1, et seq and the Rules Governing Post-Conviction Habeas Corpus. Petitioner's motion was filed prior to filing a habeas petition and falls outside the scope of the statute and rules, and is, therefore, an inappropriate discovery request.

Furthermore, the suggestion of utilizing the West Virginia Freedom of Information Act (FOIA) to obtain court documents in preparation of a habeas petition is meritless. This Court addressed that issue directly in *State ex rel. Wyant v. Brotherton* and found that inmates may not use FOIA to circumvent the Rules Governing Post-Conviction Habeas Corpus.

For these reasons, the writ of mandamus should be denied.

IV. STATEMENT REGARDING ORAL ARGUMENT

This matter is scheduled for oral argument under Rule 20 of the Rules of Appellate Procedure on January 14, 2020.

V. ARGUMENT

As an initial matter, because of an ambiguity between Petitioner's motion filed on August 27, 2018 and subsequent motion filed on October 28, 2019, it is possible this request falls within the holding in *Call v. McKensie*, thus entitling Petitioner to a copy of the record as requested. (S.A.R. at 12). Respondent notes that the Docket sheet for Case No. 17-F-238 indicates on October 28, 2019 Petitioner sent a letter to the Raleigh County Circuit Clerk inquiring as to the status of his Motion to Produce Documents, with said motion attached. *Id.* The attached motion, entitled "Petition for Production of Documents" requests copies of orders, hearing transcripts, and plea agreements.

Petitioner's inquiry is tantamount to the pending motion before the circuit court and profoundly impacts the posture of the instant petition. Respondent recognizes Petitioner's October 28 request appears to fall squarely within the holding of *Call v. McKensie*, 159 W.Va. 191, 220 S.E.2d 665 (1975). In *Call*, this Court issued a Writ of Habeas Corpus to review whether an indigent criminal defendant convicted on a plea of guilty is entitled *on appeal or in a habeas corpus proceeding* to a free transcript of all relevant material of record in his case. (emphasis added). (*Id.* at 193). This Court held that indigent criminal defendants are entitled to a free transcript of the record upon request.

Absent from the Petitioner's motion filed on October 28th is any basis or justification for the request. (S.A.R. at 12). There is no mention of preparing for a habeas petition or an appeal. This motion was filed after the plea and sentencing order had been entered. Petitioner is currently

incarcerated, serving his sentence. Petitioner has not filed an appeal, nor has a petition for habeas corpus been filed. (Pet'r Br. at 2). However, it should be noted that Petitioner filed an appellate transcript request form on May 23, 2019, with the Raleigh County Circuit Clerk. (S.A.R. at 22).

Respondent respectfully requests the matter be remanded to the circuit court with specific direction to determine if Petitioner's request, as filed, should be granted in accordance with *Call* and the documents provided to Petitioner. If the circuit court should grant the pending motion and provide the documents to Petitioner, the instant petition would be rendered moot, academic and without purpose; and, therefore, should be dismissed from this Honorable Court's docket.

Notwithstanding Petitioner's pending motion before the circuit court and, in the alternative, assuming this Court determines that consideration of the issues pursuant to its Order dated September 23, 2019, is necessary, Respondent will address each of the issues in turn.

A. Pursuant to W.Va. Code §53-4A-4(a) and the W.Va. Rules of Post-Conviction Habeas Corpus, an inmate is not entitled to discovery prior to the filing of a habeas corpus petition.

A habeas petitioner "is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904, (1997). In proceedings under the West Virginia Post-Conviction Habeas Corpus Act, W.Va. Code §§53-4A-1 to -11, discovery is available only where a court in the exercise of its discretion determines that such process would assist in resolving a factual dispute, that, if resolved in the petitioner's favor, would entitle him or her to relief. Syl. Pt. 3, *State ex rel. Parsons v. Zakaib*, 207 W.Va. 385, 532 S.E.2d 654 (2000). This Court reiterated this point in Syllabus Point 2 of *State ex rel. Wyant v. Brotherton*, 214 W.Va. 434, 589 S.E.2d 812 (2003), upon which the circuit court correctly relied in its reply to Petitioner's Writ.

Petitioner argues in his supplemental brief that *Brotherton* can be distinguished and fails to address the complexity of filing a habeas petition. In fact, Petitioner stresses that context is

important when analyzing the *Brotherton* syllabus points.

Upon review of *Brotherton*, unlike Petitioner, Roger Wyant had pursued an appeal and had received documents pertaining to his criminal trial. *Id.* at 814. Years later, Wyant again requested the documents for purposes of a habeas petition. *Id.* Wyant's subsequent request was made pursuant to the West Virginia Freedom of Information Act (hereinafter, FOIA). *Id.* Wyant filed a writ of mandamus after the denial of his document request. *Id.* Lorenzo Valentine, the other *Brotherton* petitioner, was similarly situated in that he submitted a FOIA request to obtain the records of a co-defendant. *Id.* at 437. Petitioner's request, in the instant petition, did not utilize FOIA. However, the *Brotherton* petitioners and Petitioner made their document requests prior to filing or intending to file a habeas petition which requires appropriate analysis under W.Va. Code §53-4A-1 et seq., the post-conviction habeas corpus statute and the relevant rules. As explained in *Brotherton*, "[A]n inmate is bound to follow the procedures set out in the Rules Governing Post-Conviction Habeas Corpus Proceeding in West Virginia for filing a petition for writ of habeas corpus and to obtain documentation in support thereof." *Brotherton*, 214 W.Va. at 440. This Court further provided guidance relative to complexity of the process: "Under the foregoing rules, an inmate may initiate a post-conviction habeas corpus proceeding with a relatively simple petition that requires only minimal information. Once a petition is filed, the circuit court has numerous means at its disposal to assure that petitioners asserting claims that appear meritorious have available the means necessary to create an adequate record to support those claims." *Id.* See W.Va. Code §53-4A-4.

Petitioner maintains that the *Brotherton* analysis does not address his request for documents because the different types of documents require different analysis. In support of this contention, Petitioner points out that the *Brotherton* opinion fails to discuss the types of documents

requested and the implications of FOIA.

Petitioner fails to appreciate that the types of documents speak to the status of the requester, which is the crux of the issue. A petitioner's request for documents, who has not been convicted or entered a plea, should be scrutinized under certain provisions under the state and federal constitutions and more specifically, Rule 16 of the W.Va. Rules of Criminal Procedure. A petitioner's request for documents, who has been convicted or entered a plea, should be reviewed based upon whether a petitioner is seeking an appeal or filing a habeas petition and the relevant statutes and rules. It is the status of the petitioner that establishes the contours of the request and the examination of the request.

Here, in the instant petition, Petitioner's request for documents is premised upon his need to prepare a habeas petition. There is no requirement for supporting documentation when filing a habeas petition. (Rule 4(c) provides that, once a petition is filed, the circuit court will conduct a preliminary review of the grounds raised and whether an answer is required. It is this determination of whether an answer is required that gives rise to production of documents for review by the court, the state and the petitioner.) *See* W.Va. Rules Governing Post-Conviction Habeas Corpus Proceedings (hereinafter, Rules). As of the filing of the reply to the writ, no habeas petition had been filed by Petitioner. Without a filed habeas petition, there is no legal duty to produce the documents as requested. (Reply at 3). If Petitioner had filed a habeas petition, the court may have reviewed the request under Rule 7 of the Rules as Rule 7 provides for discovery in post-conviction habeas proceedings. The circuit court's denial of Petitioner's request was a reasonable application of the Rules and W.Va. Code §53-4A-1, et seq.

B. Recognizing that the West Virginia Freedom of Information Act (FOIA) conflicts with W.Va. Code §53-4A-1 et seq., the provisions of FOIA are general and function subordinate to W.Va. Code §53-4A-1, et seq. which is specific due to statutory construction for the purposes of obtaining court records to prepare a habeas corpus

petition.

“Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails.” *Harrison County Commission v. the Harrison County Assessor*, 222 W.Va. 25, 31, 658 S.E.2d 555, 561 (2008)(citing *Bowers v. Wurzburg*, 205 W.Va. 450, 462, 519 S.E.2d 148, 160 (1999). See also *Tillis v. Wright*, 217 W. Va. 722, 728, 619 S.E.2d 235, 241 (2005) (“[S]pecific statutory language generally takes precedence over more general statutory provisions.”); Syl. Pt. 6, *Carvey v. West Virginia State Bd. of Educ.*, 206 W. Va. 720, 527 S.E.2d 831 (1999) (“The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” (internal quotations and citations omitted))).

Both the West Virginia Freedom of Information Act, W.Va. Code § 29B-1-1, et seq., and W.Va. Code §53-4A-1, et seq. require, among other things, an examination of the requester, the type of request, and the type of document. The provisions of FOIA protect the public’s access to court records and proceedings while W.Va. Code §53-4A-1 to 11, provide for a “balanced system that contemplates the rights of the inmate petitioners as well as the interests of the court system.” *Brotherton*, 214 W.Va. at 440. In the instant petition, the application of FOIA has been definitively decided by this Court in the *Brotherton* case which held that an inmate may not use FOIA to obtain court records for the purpose of filing a petition for writ of habeas corpus. To do so would circumvent the carefully set procedures under W.Va. Code §53-4A-1, et seq. and the Rules Governing Post-Conviction Habeas Corpus. *Id.* Therefore, FOIA is an inappropriate mechanism to utilize for the purposes of obtaining documents for a habeas.

VII. CONCLUSION

The Petitioner's contention that he is entitled to the issuance of a writ of mandamus to compel the production of the requested is erroneous. Petitioner is not entitled to a writ of mandamus as a matter of law. Wherefore, the Respondents respectfully request that this Honorable Court DENY the petition for writ of mandamus. Alternatively, this Court may choose to remand this matter to the Circuit Court of Raleigh County to address the subsequent motion for production of documents and direct the court to enter an appropriate order reflecting its related findings and conclusions.

Respectfully submitted,

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