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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
ex rel. David E. Tackett,

Petitioner,

v.

Supreme Court No.: 18-0882
(Original Jurisdiction)

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

Respondent

PETITIONER'S SUPPLEMENTAL BRIEF

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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?

STATEMENT OF THE CASE

On August 7, 2018, the petitioner David E. Tackett entered his guilty plea before the Circuit Court of Raleigh County, West Virginia, in the case numbered 17-F-238. He pled guilty to all charges in the indictment issued against him, including burglary and first-degree sexual assault (the "Underlying Case"). Mr. Tackett's resulting sentence was life imprisonment. Mr. Tackett is presently incarcerated at the Northern Regional Correctional Center in Moundsville, West Virginia.

No direct appeal was filed on behalf of Mr. Tackett by his trial counsel. Nonetheless, only ten (10) days after entering his guilty plea, Mr. Tackett filed on his own behalf a "Petition for Production of Documents" with the Circuit Court of Raleigh County, West Virginia. The request was for documentation related to the Underlying Case. No reply was received.

On October 11, 2018, the petition in this matter was filed. Mr. Tackett demands that a writ issue mandating the Circuit Clerk of Raleigh County, West Virginia, to provide him with copies of:

i. Transcripts of the pretrial hearings in the Underlying Case;

ii. Orders entered in the Underlying Case;

iii. A transcript of the plea hearing in the Underlying Case;

iv. The plea agreement in the Underlying Case; and

v. The evidence in the Underlying Case, including discs provided by the West Virginia State Police's forensic laboratory.

Mr. Tackett's reason for requesting this information and documentation is: "to perfect his habeas corpus claim in regards to not entering his guilty plea voluntarily and intelligently." Again, no direct appeal has been filed on behalf of Mr. Tackett, but these actions were taken by Mr. Tackett within two (2) months of his conviction.

In response to Mr. Tackett's petition for the writ of mandamus, the Honorable John A. Hutchison, who was a Judge of the Circuit Court of Raleigh County, West Virginia, at the time of the response on November 13, 2018, stated that the Petitioner was entitled to the production of some of the documents requested.[1] Specifically,

> in short, the Defendant has no grounds to demand discovery prior to the initiation of a *Habeas Corpus* proceeding. The Defendant may be entitled to a copy of certain portions of his file which will be provided. These items include a copy of the docket sheet, the indictment, the information and the final order ... [T]he petitioner is not entitled to require the state to have transcripts of hearings and other proceedings prepared simply so he can engage in a fishing expedition. As of this time Petitioner has failed to state any grounds which might support his demands for the expensive and time-consuming production of documents.

Notwithstanding an acknowledgement that some material should be, and would be, provided to Mr. Tackett, the respondent circuit court requests that Mr. Tackett's petition be denied.

On the date of September 23, 2019, this Court entered its order appointing the undersigned counsel to represent the petitioner in this matter. In the order of appointment, this Court directed the undersigned to file a supplemental brief "addressing the issue of whether an inmate is entitled to discovery prior to the filing of a habeas corpus petition and whether the

[1] The Honorable John A. Hutchison is a Justice of this Court and, on May 2, 2019, His Honor voluntarily disqualified himself from presiding in this matter.

West Virginia Freedom of Information Act can be used to obtain court records for the purpose of filing a habeas corpus petition."

SUMMARY OF THE ARGUMENT

State ex rel. Wyant v. Brotherton[2], cited as the controlling authority in the response to Mr. Tackett's petition, does not resolve the issues presented on this appeal because the case is distinguishable and because the case does not fully consider the complexities in filing a petition for a writ of *habeas corpus* and does not fully consider the policies underlying the "West Virginia Freedom of Information Act." In summary, Mr. Tackett has not previously received transcripts or records related to the Underlying Case and is entitled, therefore, to such documents as a matter of constitutional right in order to review the process resulting in his conviction. The "form" petition for a writ of habeas corpus, if even known to the petitioner, requires detailed information and sophisticated conclusions and contains dire warnings regarding loss of rights and the possible penalty of perjury. A petitioner requires information from the record of the case in order to complete, without advice or assistance of counsel, the petition in a manner that the petitioner believes will heed the warnings and prevent a summary dismissal. Inmates are not an excluded class of persons under the provisions of the "West Virginia Freedom of Information Act" and the Act requires production of public records, which encompasses court records, without requirement of any purpose. Finally, the respondent has not identified any requested documents which are not in the possession of, or otherwise retained by, the clerk of the circuit court. For these reasons, a writ of mandate should issue as requested as Mr. Tackett is entitled to the requested documents.

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[2] *Id.*

STATEMENT REGARDING ORAL ARGUMENT

On September 23, 2019, this Court entered an order that "this matter shall be scheduled for consideration and oral argument under Rule 20 of the Rules of Appellate Procedure on January 14, 2020."

ARGUMENT

1. ***State ex rel. Wyant v. Brotherton* does not resolve the issues presented on this appeal because (i) it can be distinguished due to the context and circumstances in which the petitioner makes his request and (ii) it does not adequately consider the complexity of the petition for habeas corpus and the policies underlying the West Virginia Freedom of Information Act.**

Admittedly, the issues identified by this Court were addressed in *State ex rel. Wyant v. Brotherton* [3] to which the respondent cites. *Brotherton's* Syllabus Point numbered 2 was:

> In proceedings under the West Virginia Post-Conviction Habeas Corpus Act ... 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.[4]

Brotherton's Syllabus Point numbered 3 was:

> An inmate may not use the Freedom of Information Act ... to obtain court records for the purpose of filing a petition for writ of habeas corpus. Instead, an inmate is bound to follow the procedures set out in the Rules Governing Post-Conviction Habeas Court Proceedings in West Virginia for filing a petition for writ of habeas corpus and to obtain documentation in support thereof.[5]

As with most syllabi points of this Court, context is important.

In *Brotherton,* the Court considered requests by two incarcerated individuals for documents from a circuit clerk. The relator *Wyant* was serving a life sentence without the

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[3] 214 W. Va. 434, 589 S.E.2d 812.
[4] Syl. Pt. 2, *id.* Citations and quotations omitted.
[5] Syl. Pt. 3, *id.* Citations and quotations omitted.

possibility of parole in the Mount Olive Correctional Complex.[6] Initially, the relator requested and received transcripts and records in anticipation of an appeal.[7] Seven years later, the relator requested under the provisions of the West Virginia Freedom of Information Act[8] ("FOIA") "certain documents pertaining to the criminal trial that resulted in his incarceration."[9] The relator stated his intent at that time was to file a petition for a writ of *habeas corpus.*[10]

Eventually, the Circuit Court of Jackson County, West Virginia, ordered the circuit clerk not to produce the requested documents because the documents had already been produced seven years earlier.[11]

The petitioner *Valentine* was serving a sentence of fifteen years in the Mount Olive Correctional Complex.[12] The petitioner *Valentine* made a FOIA request to the Circuit Clerk of Mercer County, West Virginia, for documents relating to the sentencing of a co-defendant in the proceedings resulting in his conviction.[13] The Circuit Court of Mercer County, West Virginia, ordered the circuit clerk not to produce the documents finding that the FOIA request was a "Request for Discovery as found under Rule 7 of the W. Va. Rules of Post-Conviction Habeas Corpus Proceedings."[14]

The *Brotherton* Court reviewed the circuit courts' actions.

The majority of the *Brotherton* Court found that the FOIA requests were discovery requests, even though no habeas corpus petition had been filed. The *Brotherton* Court then held

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[6] *Id.* at 814.
[7] *Id.* at 814.
[8] W. Va. Code §§29B-1-1, *et seq.*
[9] *Brotherton, supra* at 814.
[10] *Id.*
[11] *Id.* at 815.
[12] *Id.*
[13] *Id.*
[14] *Id.*

that, because supporting documentation is not required when filing a petition for a writ of habeas corpus, the incarcerated individuals had no need for the documents. Specifically,

> because there is no requirement in the Habeas Corpus Rules that supporting documentation must be attached to the petition, there is no need for an inmate to utilize the FOIA to obtain court records prior to filing a petition.[15]

In short, the relator *Wyant* and the petitioner *Valentine* "may not utilize the FOIA to obtain documents for purposes of filing a writ of habeas corpus [and] the circuit courts did not exceed their jurisdiction in denying the requests."[16]

Upon reflection, the *Brotherton* analysis does not completely resolve Mr. Tackett's requests for documents and does not provide an analysis that can readily serve as precedent in resolving such requests. The respondent circuit court in this matter implicitly acknowledges this conclusion because, inconsistently with the *Brotherton* opinion, the respondent circuit court found that Mr. Tackett was entitled to certain documents on record with the circuit clerk.

Specifically, *Brotherton* did not discuss the different types of documentation that might be requested. Mr. Tackett's requested documents can be placed into three categories: (i) transcripts; (ii) court records; and (iii) documents or information not in the court's records. Each document type requires a different analysis. *Brotherton* also did not discuss the significance of context, i.e., the petitioner has not filed a direct appeal and as a result has never been provided transcripts or copies of the court record related to the Underlying Case. *Brotherton* also seemingly minimizes the complexity of filing a petition using the provided form, especially considering that the petition contains dire warnings about losing rights and about the possible penalty of perjury and further considering that a petition can be summarily dismissed without an

[15] *Id.* at 817.
[16] *Id.* at 818, 819.

ombudsman hearing in certain circumstances. Finally, *Brotherton* did not consider the policy underlying FOIA and did not analyze why its provisions are not unfettered as broadly to an inmate as it is to any other person.

The following discussion will focus on the different types of documents that might be requested; the context in which the requests are made; the reason why information might be needed to complete a petition for a writ of habeas corpus; and the application of FOIA to court records.

2. In the context of a petitioner who has not filed a direct appeal and who has not yet received copies of relevant transcripts and court records in his or her proceeding, transcripts and copies of the court records should be produced upon request at no cost to the petitioner.

This Court has routinely declared as follows:

> An indigent criminal defendant has a right to appeal his conviction. He is also constitutionally entitled to a copy of the trial court record, including the transcript of the testimony, without cost to him.[17]

The Legislature has acknowledged this fundament right by codification of the procedure for furnishing transcripts to indigent persons for purposes of an appeal.[18]

Admittedly, no appeal was taken by, or on behalf of, Mr. Tackett.[19] However, this Court has discouraged the presentment on appeal of issues that are better resolved in *habeas corpus* proceedings.[20] If an appeal is not taken because the constitutional flaws require analysis in an

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[17] *Rhodes v. Leverette,* Syl. Pt. 1, 160 W. Va. 781, 239 S.E.2d 136 (1977), citing West Virginia Constitution, Article III, Sections 10 and 17.

[18] See W. Va. Code §51-7-7.

[19] The following is outside the record in this matter and is made as a proffer. Mr. Tackett claims that he requested an appeal be taken by his counsel, which was not. Mr. Tackett further claims that he made requests for transcripts and other information which should be construed as an effective and timely notice of appeal. Undersigned counsel has seen correspondence from Mr. Tackett to a court reported dated August 13, 2018 (6 days after his plea), requesting forms to obtain transcripts from the Court. Mr. Tackett states he will present these claims to the circuit court.

[20] *See, generally, State v. Miller,* 194 W. Va. 3, 459 S.E.2d 114, 125 (1995).

evidentiary context, the resulting deprivation of the trial court record is inherently undue and unfair to a petitioner.

In *Call v. McKenzie*, the Court, without qualification as to context, timing, or purpose, stated:

> We hold today that henceforth an indigent criminal defendant shall always be entitled, upon request, to a free transcript of the entire record of his case.[21]

The resulting Syllabus Point is even more relevant to this matter:

> Upon request, an indigent defendant in a criminal case who enters a guilty plea is entitled to a transcript of all proceedings against him, including the indictment, pre-trial motions, pre-trial hearings, and any other matter of record.[22]

The straightforward point is that, without regard to context, a defendant convicted of a crime resulting in the loss of liberty is entitled to review the proceedings against him or her at no cost and without regard to the reasons why the review is being undertaken.[23]

Simply, the production of transcripts must be considered in the constitutional context of a person's right to have a "copy of the trial court record." A defendant is entitled to the court record OF HIS OR HER PROCEEDINGS[24] for review after conviction to decide what course, if any, should be taken.

The respondent circuit court states that the production of transcripts is expensive and time-consuming. However, the production of transcripts is not without compensation for the cost and time expended. If transcripts are prepared, the costs of the preparation can be assessed

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[21] 159 W. Va. 191, 193, 220 S.E.2d 665, 668 (1975)

[22] *Id.*, Syllabus Point 1.

[23] In *Brotherton,* the denial of the relator *Wyant's* request stated that the documents had been produced seven years earlier when the relator was contemplating an appeal and should not be produced again. But Mr. Tackett has not yet had a copy of the trial record provided to him. *Brotherton* is distinguishable for this reason.

[24] The capitalization is an emphasis to distinguish this from a request for transcripts or records in a proceeding other than the petitioning defendant's proceeding.

to the Supreme Court of Appeals of West Virginia as an administrative cost or, perhaps, to Public Defender Services pursuant to the provisions of W. Va. Code §§29-21-1, *et seq*.

3. FOIA extends to the production of court records and is afforded to any person without regard to the purpose for the request.

The declared policy embodied by FOIA is:

> Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of West Virginia that all persons are, *unless otherwise expressly provided by law,* entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.[25]

Notably, "person" is defined to include "any natural person, corporation, partnership, firm or association."[26] Inmates are not a class of "persons" who are expressly excluded from FOIA's declared policy of government transparency.

Moreover, "public body" means "*every* state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission."[27] Accordingly, the clerk's office is within the coverage of FOIA. Any doubt on this point is removed by the following provision of Rule 10.04 of the West Virginia Trial Court Rules:

> (a) *All persons* are … entitled to *full and complete information* regarding the operation and affairs of the judicial system.
> …
> (b) Writings and documents relating to the conduct of the public's business, and which are prepared, owned or

[25] W. Va. Code §29B-1-1 [italics added].
[26] W. Va. Code §29B-1-2(3).
[27] W. Va. Code §29B-1-2(4) [italics added].

> *retained* by a court, circuit clerk, or other court employee, are to be considered "public records."[28]

As a result, "any elected or appointed official or other court employee charged with administering the judicial system shall promptly respond to any request filed pursuant to the West Virginia Freedom of Information Act."[29] Essentially, the provisions of FOIA are available to Mr. Tackett to obtain matters of court record.

Brotherton denied the incarcerated individuals the right under FOIA to copies of the trial court record, even though they constituted public records, because the purpose for the request was to file a petition for habeas corpus. FOIA is devoid of any requirement that a "purpose" be stated for the requested production. FOIA's policy is unrestricted, providing for access without statement of need or otherwise, because the public is the master and its demands are not to be questioned by its public servants. Specifically, "every person[30] has a right to inspect or copy any public record of a public body in this state."[31] Indeed, "there is a presumption of public accessibility to all public records, subject only to the ... [expressly stated] categories of information which are specifically exempt from disclosure."[32] Finally, "any person[33] denied the right to inspect the pubic record of a public body may institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept."[34]

No purpose needs to be stated under the provisions of FOIA if Mr. Tackett exercises his rights to production of public records under FOIA.[35]

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[28] [emphasis added]. Information in the possession of "individuals other than court officers or employees, such as private or independent contractors" are not considered "public records." Trial Court Rule 10.04(c).
[29] Trial Court Rule 10.04(a).
[30] Again, no exclusion is made for an incarcerated individual as it refers to "any person."
[31] W. Va. Code §29B-1-3(a).
[32] W. Va. Code §29B-1-4(a).
[33] Again, no exclusion is made for an incarcerated individual as it refers to "any person."
[34] W. Va. Code §29-1-5(1).
[35] Notably, the circuit clerk is obligated to make the records available for inspection and copying which is problematic considering Mr. Tackett's confinement. A guardian could be appointed for this purpose. Or the circuit

Justice Albright's dissent in *Brotherton* regarding the majority's FOIA analysis compellingly establishes the inconsistency inherent in the decision. Mr. Tackett's cousin could make a FOIA request for the records desired by Mr. Tackett and not be denied[36], yet Mr. Tackett could be denied because of his status and his intent in using the documents.

4. The request for information and documents relevant to the completion of a petition for a writ of habeas corpus is not discovery, but, instead, is the compulsion of a layperson to be complete in response to questions for detailed information and grounds, especially when warnings are issued and such proceedings can be summarily dismissed.

The refusal to produce documents or information involved in the procurement of the conviction because it constitutes "discovery" for habeas corpus proceedings is not sustainable under closer scrutiny.

First, as previously discussed, the trial court record is personal to Mr. Tackett and embodies the process underlying the deprivation of his liberty for his lifetime. Mr. Tackett is inherently entitled to review that process to ensure that all his constitutional rights, including his right to the effective assistance of counsel, have been honored.[37] Mr. Tackett can only undertake this review by having a copy of the court record. In this regard, the information is his personal information and should not require formal procedures to obtain it.

Second, the *Brotherton* Court's assessment of the steps required to initiate a habeas corpus proceeding is overly simplistic. Petitioners are required to initiate the proceedings *pro se*. Petitioners are presumed, therefore, to know the provisions of the Rules Governing Post-Conviction Habeas Corpus Proceedings (the "Habeas Rules"), to understand the provisions of the Habeas Rules, and to adhere to the construct of the Habeas Rules. This is a challenge for

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clerk could reproduce the records and impose a reasonable fee, which, again, could be problematic and might require further constitutional analysis.

[36] Admittedly, the court record might be sealed and unavailable as a public record.

[37] *See, generally, Call v. McKenzie, supra.*

lawyers, let alone *pro se* petitioners. Indeed, many incarcerated individuals file handwritten letters for post-conviction relief without knowledge of the Habeas Rules' existence or content.

The *Brotherton* Court referred to Appendix A to the Rules Governing Post-Conviction Habeas Corpus Proceedings, stating:

> The form petition provided in the appendix to the rules is intended to assist a petitioner in stating simply and concisely the grounds upon which the petitioner claims he or she is being held unlawfully, and in providing a brief statement of the facts supporting such claims. To reach this end, the form even goes so far as to provide "a list of the most frequently raised grounds for relief in habeas corpus proceedings.[38]

Again, this unrealistically presupposes the petitioner knows about the Habeas Rules, has access to the Habeas Rules, and comprehends the provisions of the Habeas Rules. Secondly, the assessment of the Appendix A as user-friendly is not warranted. It requires attentiveness and provision of detail that a lay person should not be expected to possess as a matter of course.[39] Perhaps this is most starkly demonstrated by the instruction that "you must state grounds that have NOT been previously and finally adjudicated or waived." No lay person can begin to fathom what it means to be "finally adjudicated" or what it takes to be "waived."

Admittedly, the form provides a list of "grounds" for which habeas corpus may be granted, but, instead of being an aid, it stands as a challenge to the petitioner to try to find facts supporting every ground. The lay person is not going to engage in discriminating analysis, but, instead, is going to blanket themselves with every possible ground. Indeed, the form provides the following dire warning: "If you fail to set forth all grounds in this petition, you may be

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[38] *Brotherton, supra* at 817. Citations and quotations omitted.

[39] Dates are requested for various actions. Questions regarding petitions for appeal as granted or not granted are posed. References to an "evidentiary" hearing are made. Inquiries about requests for transcripts are made without explanation about how to make the requests. Legal strategies in other proceedings are requested. Grounds for relief are requested requiring summaries of supporting facts. Questions asking about appeals to the highest state court [sic] are asked.

barred from presenting additional grounds at a later date." This warning ensures that every ground will be preserved especially when the court record is not available for scrutiny.

Finally, it is not insignificant that the petition is to be signed "under penalty of perjury." The petitioner is aware that information must be accurate, so it is ironic that the information needed for accuracy is denied.

If this form is filled out by a lay person without an understanding of the underlying analysis in habeas corpus proceedings, the request for a trial record is not "discovery," but the source of the information needed to fill out the form. The denial of this information is particularly ironic when considered in the context of the syllabus point that:

> A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief.[40]

A petitioner would note with some irony that exhibits, affidavits and other documentary evidence are contained, potentially, in a court record to which the petitioner has no access under *Brotherton.*

Accordingly, the petitioner should not be required to complete the form petition without access to the information in the proceedings below. Contrary to *Brotherton's* analysis, much of the requested information is necessary to complete the form petition from the petitioner's perspective and to avoid the dire warnings of losing grounds for relief and to avoid the penalty of perjury and to avoid summary dismissal.[41]

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[40] *Perdue v. Coiner,* Syl. Pt. 1, 156 W. Va. 467, 194 S.E.2d 657 (1973).

[41] It should be noted that, after filing of the petition for a writ of mandamus, Mr. Tackett did file a petition for writ of mandamus with this Court that is identified as the case numbered 19-0753. Accordingly, the information could now be analyzed as to its relevance to the habeas corpus grounds asserted. The undersigned contends, however, that

5. **If information is requested that is not in the possession of, or otherwise retained by, the circuit court or its clerk, then a request for the documentation would be a request for discovery and would be subject to the circuit court's authorization, but it is the obligation of the respondent to identify this information.**

Finally, the undersigned concedes that if information is not retained by the court and is in the hands of third parties other than court officials, the obtaining of the documents is "discovery" and would only be permitted after the circuit court's review of the request for the documents. However, the response has not identified any document requested by petitioner that falls within this category. Indeed, it is often only the respondent who can identify such documents as the petitioner may presume that everything is within the circuit court's or clerk's reach.

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the information should not have been denied in the first instance. Ironically, opposition to the writ for habeas corpus is based in part on the absence of any transcripts to support the grounds.

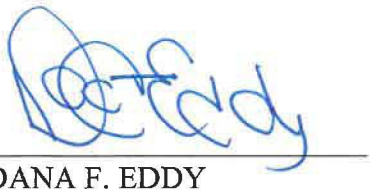
CONCLUSION

For these reasons, the Court is requested to issue its mandate requiring the production of the requested transcripts, the production of the information contained in the court record, and the identification of the information that is not within the court record or otherwise retained by the court or its circuit clerk.

Respectfully submitted,

DAVID E. TACKETT
Petitioner

By Counsel



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