Case No. 33089

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA, EX REL.
WILBERT MAYLE,

Petitioner Below,

v.

Case No. 33089

DAVID M. PANCAKE, Judge
6th Judicial Circuit for Cabell County
Cabell County Courthouse
750 Fifth Avenue
Huntington, West Virginia 25701

Respondent Below

BRIEF OF APPELLANT

Wilbert Mayle
Huttonsville Correctional Center
Post Office Box No. 1
Huttonsville, W.Va. 26273-0001

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I. INTRODUCTION

Petitioner Wilbert Mayle, respectfully moves this Honorable Court for the issuance of a *Writ of Mandamus* against the Respondent David M. Pancake, Judge for the Circuit Court of Cabell County, at Huntington, West Virginia. This Court should grant mandamus relief herein based upon the Respondent Judge's unreasonable delay in conducting an initial review of Mayle's Petition for Post-Conviction Habeas Corpus relief. The petition has been pending before Judge Pancake since April 4, 2005.

II. JURISDICTION

This Court has original jurisdiction in Mandamus proceedings pursuant to Article VIII, Section 3 of the Constitution of West Virginia. Jurisdiction is recognized in Rule 14 of this Court's Rules of Appellate Procedure and under the statutory provision of W.Va. Code § 53-1-2 (1923) (2000 Repl. Vol.).

III. STATEMENT OF FACTS

On April 4, 2005, Petitioner Mayle filed with the Circuit Court of Cabell County his petition for writ of habeas corpus[1] and an application to proceed *in forma pauperis*.[2] More than ten (10) months has passed since the filing of the original Petition and the Respondent Judge has not made any preliminary assessment with regards to the original Habeas Petition (except to order it filed), Supplemental Petition[3] or Request for Appointment of Counsel.[4] The current habeas petition is the first opportunity the trial court has to correct the many constitutional violations committed at the trial of this case. Petitioner Mayle raised the following assignments of error for relief:

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[1] *See* (Ex. A).
[2] *See* (Ex. B).
[3] The Supplemental Petition was filed on August 22, 2005 (Ex. C).
[4] The Motion for Appointment of Counsel was filed April 4, 2005.

IV. ASSIGNMENTS OF ERROR

A. IT WAS CONSTITUTIONAL ERROR FOR THE TRIAL COURT TO INSTRUCT THE JURY ON FELONY-MURDER WITHOUT ALSO INSTRUCTING ON EACH ESSENTIAL ELEMENT OF THE UNDERLYING FELONY AND ON THE STATE'S BURDEN OF PROVING THE UNDERLYING FELONY BEYOND A RASONABLE DOUBT. THEREFORE, THE PETITIONER WAS DENIED A FAIR TRIAL AS GUARANTEED BY ARTICLE III, § 14 OF THE CONSTITUTION OF WEST VIRGINIA ANDF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION

B. PETITIONER MAYLE'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS DENIED BECAUSE OF AN OUT-OF-COURT PHOTOGRAPHIC ARRAY WHICH WAS SHOWN TO THE STATE'S ONLY EYE WITNESS, OFFICER LEROY CAMPBELL. THE ISSUE THAT IS BEING RAISED IS WHETHER THESE PHOTO ARRAYS WERE SO SUGGESTIVE AS TO IMPERMISSIBLY TAINT THE WITNESSES' IN-COURT IDENTIFICATION, WHEN SUCH WAS UNNECESSARILY AND IMPERMISSIBLY SUGGESTIVE AND DID CREATE A SUBSTANTIAL LIKELIHOOD OR ERROR IN THE IDENTIFICATION.

C. PETITIONER WAS DENIED A FAIR TRIAL AS GUARANTEED BY ARTICLE III, §§ 10 AND 14 OF THE CONSTITUTUION OF WEST VIRGINIA AND THE 14TH AMENDMENT TO THE U.S. CONSTITUTION BECAUSE THE STATE OF W.VA HAD NO LEGAL CONSTITUTIONAL AUTHORITY TO INDICT, TRY OR CONVICT PETITIONER OF A FELONY/MURDER, WHEN THE UNDERLYING FELONY HAD ALLEGEDLY TAKEN PLACE WITHIN THE STATE OF OHIO. ALSO, THE STATE OF WEST VIRGINIA VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS WHEN THEY TRIED AND CONVICTED PETITIONER OF A FELONY/MURDER CHARGE, WHEN IN FACT THE STATE OF OHIO HAS SINCE ACQUITTED THE PETITIONER OF THE UNDERLYING FELONY CHARGE. PETITIONER'S CONSTITUTIONAL RIGHT AGAINST MULTIPLE PUNISHMENTS WAS VIOLATED BY THE STATE OF WEST VIRGINIA.

D. PETITIONER WAS DENIED A FAIR TRIAL AS GUARANTEED BY ARTICLE III, §§ 10 AND 14 OF THE CONSTITUTUION OF WEST VIRGINIA AND THE 14TH AMENDMENT TO THE U.S. CONSTITUTION BECAUSE THE TRIAL JUDGE, AFTER A TIMELY OBJECTION BY DEFENSE COUNSEL, SHIFTED TO PETITIONER THE BURDERN OF PROVING EVERY ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT FROM THE STATE TO PETITIONER BY READING STATE INSTRUCTION NO. 3 AND NO. 9. THESE STATE INSTRUCTIONS WERE READ BACK-TO-BACK.

E. PETITIONER WAS DENIED A FAIR TRIAL AS GUARANTEED BY ARTICLE III, §§ 10 AND 14 OF THE CONSTITUTUION OF WEST VIRGINIA AND THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE OF PROSECUTOR'S MISCONDUCT AND WITH THE TRIAL COURT ALLOWING SUCH ADDITIONAL PROSECUTORIAL IMPROPRIETIES WITHOUT OFFERING APPROPRIATE CORRECTIVE INSTRUCTIONS TO THE JURY. THE TRIAL COURT OVERRULED A TIMELY OBJECTION BY DEFENSE COUNSEL TO THE PROSECUTOR'S MISCONDUCT.

F. PETITIONER WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BECAUSE AFTER A TIMELY OBJECTION. THE COURT ALLOWED THE OPINION TESTIMONY OF DR. FOSUDEA H. KOHINSAGER, THE MEDICAL EXAMINAR FOR THE STATE OF WEST VIRGINIA. THE OPINION OF DR. KOHINSAGER WAS A VIOLATION OF PETITIONER'S RIGHT TO A FAIR TRIAL BECAUSE, AS A GENERAL RULE, OPINION TESTIMONY OF A LAY WITNESS IS INCOMPETENT. MOREOVER, WHEN THE EVIDENCE, EXCLUSIVE OF EXPERT TESTIMONY, IS SUFFICIENT TO

ENABLE A JURY OF LAYMAN TO REACH ANI INTELLIGENT CONCLUSION, AN OPINION OFFERED BY AN EXPERT IS INADMISSIBLE.

G. PETITIONER WAS DENIED A FAIR TRIAL AS GUARANTEED BY ARTICLE III, §§ 10 AND 14 OF THE CONSTITUTUION OF WEST VIRGINIA AND THE 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE TRIAL JUDGE, AFTER A TIMELY OBJECTION BY DEFENSE COUNSEL, SHIFTED TO PETITIONER THE BURDEN OF PERSUASION BY CREATING A MANDATORY PRESUMPTION ON THE CRUCIAL ELEMENTSS OF INTENT AND HAVING INSTRCUTED THAT MALICE IS INFERRED OR PRESUMED FROM THE USE OF A DEADLY WEAPON, STATE INSTRUCTION NO. 9 DID VIOLA PETITIONER'S DUE PROCESS RIGHTS AND DENIED PETITIONER A FAIR TRIAL.

H. PETITIONER WAS DENIED A FAIR TRIAL AS GUARANTEED BY ARTICLE III, §§ 10 AND 14 OF THE CONSTITUTUION OF WEST VIRGINIA AND THE 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE OF PRE-TRIAL PUBLICITY.

I. PETITIONER WAS DENIED A FAIR TRIAL AS GUARANTEED BY ARTICLE III, §§ 10 AND 14 OF THE CONSTITUTUION OF WEST VIRGINIA AND THE 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE PETITIONER WAS PLACED WITHIN PHYSICAL RESTRAINTS AND PLACED IN A POLICE CAR IN FULL VIEW OF JURY. PETITIONER REMAINED IN THESE PHYSICAL RESTRAINTS DURING SEVERAL JURY VIEWS WITHIN THE STATE OF WEST VIRGINIA AND LATER IN THE STATE OF OHIO.

J. PETITIONER WAS DENIED A FAIR TRIAL AS GUARANTEED BY ARTICLE III, §§ 10 AND 14 OF THE CONSTITUTUION OF WEST VIRGINIA AND THE 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE PETITIONER WAS DENIED THE RIGHT TO BE PRESENT IN PERSON AT EACH CRITICAL STATGE OF HIS CRIMINAL TRIAL WHERE ANYTHING MAY BE DONE TO AFFECT HIM. FURTHER, DURING A JURY VIEW, A VAN JUMPED THE CURB AND NARROWLY MISSED SOME OF THE JURORS. THE TRIAL JUDGE, OUT OF THE PRESENT OF PETITIONER AND HIS DEFENSE COUNSEL, TOOL THE JURY TO A PRIVATE PLACE AND TALKED WITH EACH OF THEM IN PRIVATE. NO RECORD WAS EVER MADE OF THIS ACTION.

K. PETITIONER WAS DENIED A FAIR TRIAL AS GUARANTEED BY ARTICLE III, §§ 10 AND 14 OF THE CONSTITUTUION OF WEST VIRGINIA AND THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE STATE OF WEST VIRGINAI INTRODUCED EVIDENCE OF PETITIONER'S PRIOR FELONY CONVICTIONS, WHICH HAD TAKEN PLACE SOME 10 YEARS PRIOR. THE PRIOR CONVICTION THAT WAS INTRODUCED INTO THE TRIAL AGAINST PETITIONER HAD NOTHING TO DO WITH PREJURY OR FALSE SWEARING. FURTHER, PETITIONER DID NOT AT ANY TIME PLACE HIS CHARACTER OR REPUTATION IN ISSUE AT TRIAL.

L. PETITIONER WAS DENIED A FAIR TRIAL AS GUARANTEED BY ARTICLE III, §§ 10 AND 14 OF THE CONSTITUTUION OF WEST VIRGINIA AND THE 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE TRIAL JUDGE FAILED MANY TIMES OVER TO UPHOLD HIS OWN RULINGS.

M. PETITIONER WAS DENIED A FAIR TRIAL AS GUARANTEED BY ARTICLE III, §§ 10 AND 14 OF THE CONSTITUTUION OF WEST VIRGINIA AND THE 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE INTRODUCTION, OVER PETITIONER'S OBJECTIONS, OF PHOTOGRAPHS WHICH WERE REVOLTING AND GRUESOME AND WHICH WERE ONLY CALCULATED TO AROUSE THE PASSIONS AND PREJUDICES OF THE JURY AGAINST PETITIONER.

N. PETITIONER WAS DENIED A FAIR TRIAL AS GUARANTEED BY ARTICLE III, §§ 10 AND 14 OF THE CONSTITUTUION OF WEST VIRGINIA AND THE 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE COMPOSITION OF THE CABELL COUNTY GRAND JURY FOR THE JANUARY 18, 1982, TERM OF COURT AND ALL ITS PROCEDURES WERE UNCONSTITUTIONAL. FURTHER, PETITIONER WAS UNCONSTITUTIONALLY TRIED FOR A FELONY/MURDER WHEN PETITIONER WAS INDICTED ONLY FOR A MURDER

O. PETITIONER WILBERT MAYLE'S CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BY THE W.VA. PAROLE BOARD. IT IS PETITIONER'S ARGUMENT THAT IT IS A VIOLATION OF THE PRINCIPLE OF EX POST FACTO WHENTHE W.VA. PAROLE BOARD APPLIES RETROACTIVELY AN AMENDMENT WHICH OCCURRED AFTER HIS CONVICTION AND SENTENCE.

AMENDED ISSUE

P. IT IS THE ARGUMENT OF PETITIONER MAYLE THAT THE W.VA. PAROLE BOARD "ACTED IN AN ARBITRARY AND CAPRICIOUS FASHION IN DENYING HIM PAROLE BY FOCUSING PRIMARILY UPON HIS PREVIOUS CRIMINAL RECORD TO THE EXCLUSION OF OTHER RELEVANT FACTORS. FURTHER, IT WOULD BE THE ARGUMENT OF PETITIONER THAT HE IS NOT SEEKING RELEASE ON THIS SINGLE ISSUE, BUT A NEW HEARING UNDER THE ELIGIBILITY RULES THAT EXISTED AT THE TIME OF HIS CONVICTION.

Q. IT IS THE ARGUMENT OF PETITIONER MAYLE THAT W.VA. LAW REGARDING THE FREQUENCY OF PAROLE HEARINGS DOES VIOLATE THE EX POST FACTO CLAUSE BECAUSE W.VA. CODE § 62-12-13(A)(5) DOES NOT PROVIDE ANY GUIDANCE TO THE W.VA. PAROLE BOARD BY IDENTIFYING THE CLASS OF PRISONERS TO WHOM IT MAY DENY ANNUAL PAROLE REVIEW.

R. IT IS THE ARGUMENT OF PETITIONER MAYLE THAT HE HAS BEEN DENIED HIS CONSTITUTIONAL DUE PROCESS RIGHTS BY THE W.VA. PAROLE BOARD IN THEIR RELYING ON 'BUILT-IN' NEGATIVE REASONS (OR) 'BOILER PLATE' REASON TO DENY HIM PAROLE FOR THE PAST 14 YEARS. A STATEMENT OF SENTIMENT BY THE PROSECUTING ATTORNEY'S OFFICE AND THE FACTS SURROUNDING THE CRIME HE WAS ACCUSED OF BACK WITHIN THE YEAR OF DECEMBER 14, 1981, BASED UPON INSUFFICIENT DATE IS A VIOLATION. THE W.VA. PAROLE BOARD IS ACTING OUTSIDE THE SCOPE OF THEIR DISCRETION GRANTED TO THEM BY W.VA. STATUTE. THEREFORE, PETITIONER MAYLE MUST BE ENTITLED TO THE FULL PANOPLY OF PROCEDURAL DUE PROCESS PROTECTIONS WITH THE ASSISTANCE OF LEGAL COUNSEL IT IS A SUBSTANCE PREJUDICE TO THIS PETITIONER'S ABILITY TO ADEQUATELY PREPARE FOR A PAROLE HEARING UNDER THE PRESENT METHODS BEING USED BY THE W.VA. PAROLE BOARD.

The above claims are set forth with sufficient facts and supported by the existing record with detailed legal arguments to allow the court to make an informed decision on the merits of

the claims.[5] The failure of the trial court to act under the circumstances of this case is unreasonable as set forth in sufficient detail below.

V. MEMORANDUM OF LAW

1. THE UNREASONABLE DELAY OF ONE YEAR TO ACT UPON PETITIONER'S PETITION FOR POST-CONVICTION HABEAS CORPUS HAS CREATED A *DE FACTO* SUSPENSION OF THE WRIT AND MANDAMUS RELIEF SHOULD ISSUE.[6] THE PETITION HAS BEEN PENDING SINCE APRIL 4, 2005.

Standard of Review

The party seeking a Writ of Mandamus must demonstrate that: (1) a clear legal right to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy. *See* Syllabus Point 2, State ex rel. Kucera v. City of Wheeling, 153 W.Va. 524, 170 S.E.2d 362 (1969).

1. The Legal Right

Petitioner Mayle has an absolute legal right to timely consideration of his habeas corpus petition. *See e.g.*, Jones v. Shell, 572 F.2d 1278, 1280 (8th Cir. 1978) (The writ of habeas corpus, challenging illegality of detention, is reduced to a sham if the trial courts do not act within a reasonable time) (Footnote omitted)); Burrow v. Hoskin, 742 F.Supp. 966, 968 (M.D. Tenn. 1990) (delay of one year or more could be unreasonable); Smith v. Kansas, 356 F.2d 654, 656-57 (10th Cir. 1966), *cert. denied*, 389 U.S. 871, 88 S.Ct. 154 (1967) (one-year delay in the

[5] The habeas corpus claims, while admittedly prepared and submitted *pro se*, are strikingly well written, researched and tied to the underlying record. At the very least, the claims are deserving of a timely and adequate response from the Court.

[6] Article III, Section 4 of the Constitution of West Virginia provides, in part: "The privilege of the writ of habeas corpus shall not be suspended..." Mayle also claims constitutional protection under the umbrella of Article I, Section 9, Clause 2 of the United States Constitution.

adjudication of a post-conviction remedy may work a denial of due process cognizable in habeas corpus).[7]

The writ of habeas corpus is designed to give a speedy remedy to a citizen who is being unlawfully detained as explained by this Court in Adams v. Circuit Court of Randolph County, 173 W.Va. 448, 317 S.E.2d 808 (1984). In *Adams*, this Court entertained an original mandamus proceeding by an inmate to compel the Circuit Court of Randolph County to rule upon a petition for writ of habeas corpus. In Syllabus Point 3 of *Adams* this Court held:

> "Given the office and function of the writ of habeas corpus, a circuit court should act with dispatch. Accordingly, a circuit court must transfer habeas corpus applications promptly, if transfer is appropriate. If it does not make a prompt transfer, it is required to render a decision on the merits of the writ."

Petitioner Mayle has demonstrated his entitlement to habeas corpus relief as set forth within his Petition. The petition contains eighteen (18) separate claims with sufficient facts supported by the existing record and detailed legal arguments sufficient to allow the court to make an informed decision on the merits of the claims. Petitioner Mayle has a clear legal right to raise constitutional claims arising from his criminal conviction in a habeas corpus petition before the Circuit Court. *See* W.Va. Code § 53-4A-1(a) (1967) (2000 Repl. Vol.).[8] Moreover, the

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[7] Among the list of guarantees set forth in Article III, Section 17 of the West Virginia Constitution is the laudatory mandate that "justices shall be administered without...delay."

[8] State ex rel. Valentine v. Watkins, 208 W.Va. 26, 31, 537 S.E.2d 647, 652 (2000) (DAVIS, J.), explained to whom a post-conviction writ of habeas corpus is available to under W.Va. Code § 53-4A-1(a) (1967) (1994 Repl. Vol.): "Any person convicted of a crime and incarcerated under sentence of imprisonment thereof who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common-law or any statutory provision of this State, may, without paying a filing fee, file a petition for writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence...." *See also*, White v. Haines, 215

writ of habeas corpus "is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." Harris v. Nelson, 394 U.S. 286, 290, 89 S.Ct. 1082 (1969). Justice Albright, in a dissenting opinion, explained the fundamental instrument of the writ of habeas corpus in Mugnano v. Painter, 212 W.Va. 831, 835 n.2, 575 S.E.2d 590, 594 n.2 (2002):

> "The significance of the writ of habeas corpus as a legal remedy is illustrated by the fact that it has been aptly referenced as "the safeguard and the palladium of our liberties." In re Begerow, 133 Cal. 349, 65 P. 828, 829 (Cal. 1901). It has also been "regarded as the greatest remedy known to the law whereby one unlawfully restrained of his liberty can secure his release...." In re Ford, 160 Cal. 334, 116 P. 757, 759 (Cal. 1911)."[9]

As illustrated above, Petitioner Mayle has a clear constitutional right to challenge his unlawful conviction for aggravated robbery through a *Writ of Habeas Corpus*.

2. The Respondent's Duty

The Respondent Judge has a duty to handle all judicial matters promptly as stated under *Canon 3B(8) of the W.Va. Code of Judicial Conduct.* Cannon 3B(8) provides: "A judge shall dispose of all judicial matters promptly, efficiently, and fairly." Petitioner Mayle's continued incarceration is a direct result of the Respondent Judge's failure to exercise his judicial power to rule upon the habeas petition properly placed before him.[10] Petitioner Mayle notified the Respondent Judge of the nature of the issues contained in the habeas corpus petition and he

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W.Va. 698, 703, 601 S.E.2d 18, 23 (2004) (*Per Curiam*) (discussing *Valentine* standard for review of a circuit court's decision to grant or to deny a habeas corpus petition).

[9] In Harris v. Nelson, *supra*, 394 U.S. at 291-92, 89 S.Ct. at 1086-87, the Supreme Court stated: "The very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected. * * * * * There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writ of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law."

[10] In Syllabus Point 1 of State ex rel. Patterson v. Aldredge, 173 W.Va. 446, 317 S.E.2d 805 (1984), this Court held in part "judges have an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission."

continues to ignore the matter.[11] This Court adopted the Rules Governing Post-Conviction Habeas Corpus Proceedings In West Virginia (hereinafter "Habeas Corpus Rules"), in order to insure that post-conviction habeas corpus proceeding are processed expediently. *See* State ex rel. McLaughlin v. Vickers, 207 W.Va. 405, 410, 533 S.E.2d 38, 43 (2000) (MAYNARD, C.J.).

Under Habeas Corpus Rule 4(b) the Respondent Judge is required to make an initial review of the Petition and direct the course of the litigation.[12] Here, the Respondent Judge has failed to properly conduct an initial review of the petition and the same has resulted in the unlawful detention of Petitioner Mayle in violation of his constitutional rights.

The Respondent Judge herein has not acted with dispatch nor has he transferred the case, therefore, he is required to render a decision on the merits of the writ. *See e.g.,* Syllabus Point 3 Adams v. Circuit Court of Randolph County, *supra*. As Justice Easterbrook explained in Dean v. Young, 777 F.2d 1239, 1240 (7th Cir. 1985), speaking for the Court:

> "Expeditious review of criminal convictions should be the norm. Review must come quickly in order to relieve those in prison of the continuing effects of a wrongful conviction. A day in jail cannot be reclaimed. And if the error is one that can be repaired in a second trial, a prompt decision is essential so that this second trial will yield an accurate result. Memory and time pass together. This may harm the prosecutor in some cases the defendant in others. In either case delay is the enemy of truth."

In Mugnano v. Painter, *supra*, Justice Albright pointed out in his dissenting opinion the "broad discretion" that a circuit court has when considering whether a petition requesting post-conviction habeas corpus relief has expressed sufficient grounds:

> "...[I]n determining whether the petition and accompanying documents indicate that the petitioner is entitled to relief, the reviewing court must evaluate the

[11] (Exhibit E October 12, 2005 and November 8, 2005)

[12] Habeas Corpus Rule 4(b), states in part: "...If the petition is not transferred, *the circuit court shall promptly conduct an initial review of the petition.* If, upon initial review of the petition and any exhibits in support thereof, the court determines that the petitioner may have grounds for relief but the petition, as filed, is not sufficient for the court to conduct a fair adjudication of the maters raised in the petition, the court shall appoint an attorney to represent the petitioner's claims in the matter, provided that the petitioner qualifies for the appointment of counsel under Rule 3(c). The court may order appointed counsel to file an amended petition for post-conviction habeas corpus relief within the time period set by the court." (Emphasis added).

> request in a matter consistent with legislative design for post-conviction habeas relief. As this Court enunciated in syllabus point two of *State ex rel. Burgett v. Oakley*, 155 W.Va. 276, 184 S.E.2d 318 (1971), "[t]he intent of the Post-Conviction Habeas Corpus Act, Code, 53-4A-1, *et seq.*, as amended, was to liberalize, rather than restrict, the exercise of the writ of habeas corpus in criminal cases." (Citations omitted).

Id. 212 W.Va. at 835, 575 S.E.2d at 594. The Respondent Judge has not exercised this broad discretion outlined above because of his refusal to follow Habeas Corpus Rule 4(b) and conduct a prompt review of the petition.[13]

3. No other Remedies

In the ordinary procedural manner, an appeal process is available to a prisoner should an adverse ruling be entered in the Circuit Court. However, the ruling must be a final order before an appeal may be instituted to this Court. Here, there is no final order or judgment entered by the Respondent Judge. In either event, Petitioner Mayle asserts that this Mandamus is merely an auxiliary process in which to compel the Respondent Judge to act.[14]

In State ex rel. Judy v. Kiger, 153 W.Va. 764, 767-68, 172 S.E.2d 579, 581 (1970), this Court quoted approvingly, S. Merrill, *Law of Mandamus* § 186 (1892):

> "When a duty is imposed by law upon a court, a *mandamus* from a higher court is the proper means to compel the discharge of such duty. When such duty is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance such duty is ministerial, and a writ of *mandamus* to compel the performance of such duty will specify the exact mode of performance.

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[13] "The cancerous malady of delay, which haunts our judicial system by postponing the rectification of wrong and the vindication of those unjustly convicted, must be excised from the judicial process at every stage." United States v. Johnson, 732 F.2d 379, 383 (4th Cir. 1984) (*quoting* Rheuark v. Shaw, 628 F.2d 297, 304 (5th Cir. 1980)).

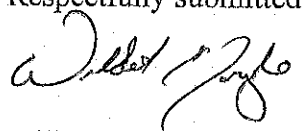
[14] *See* State ex rel. Buxton v. O'Brien, 97 W.Va. 343, 125 S.E. 154 (1924) (Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do in violation of their duty); State ex rel. Cockowska v. Knapp, 147 W.Va. 699, 130 S.E.2d 204 (1963) (A trial court or other inferior tribunal may be compelled to act in a case if it unreasonably neglects or refuses to do so).

Accord State ex rel. Dillon v. Egnor, 188 W.Va. 221, 228, 423 S.E.2d 624, 631 (1992) (MILLER, J.). There is no other adequate remedy available to Petitioner Mayle, at this stage of the proceedings, to compel the Respondent Judge to act. Mandamus relief is, therefore, proper.

VI. RELIEF REQUESTED

The Petitioner, Wilbert Mayle, respectfully moves this Honorable Court for the issuance of the *Writ of Mandamus* against the Respondent for the reasons set forth within this petition and any other relief as may be appropriate to dispose of the matter as law and justice requires.

Respectfully submitted



Wilbert Mayle
DOC#-13089 – Dorm No. 2
Huttonsville Correctional Center
Post Office Box No. 1
Huttonsville, W.Va. 26273-0001

Petitioner proceeding *pro se*

Case No. 33089

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA, EX REL.
WILBERT MAYLE,

Petitioner Below,

v.

Civil Action No. 05-C-315
Honorable David M. Pancake, Judge

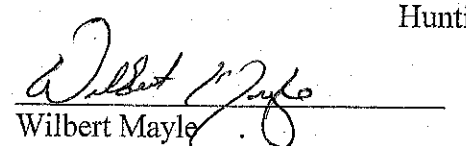
DAVID M. PANCAKE, Judge
6th Judicial Circuit for Cabell County
Cabell County Courthouse
750 Fifth Avenue
Huntington, West Virginia 25701

Respondent Below

MEMORANDUM

The following name and address is the person upon whom the rule to show cause is to be served upon, if granted:

The Honorable David M. Pancake, Judge
Judge, 6th Judicial Circuit
Cabell County Courthouse
750 Fifth Avenue
Huntington, WV 25701



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CERTIFICATION OF SERVICE

I, WILBERT MAYLE. (DOC#-13089), Petitioner herein, do hereby certify that I have served a true copy of the foregoing "Brief of Appellant," within the pending case (Civil Action No. 05-C-315) before the Supreme Court of Appeals upon the following persons by depositing said copy in the United States Mail with First Class Postage prepaid on this 10th of July 2006, addressed as follows;

TO:

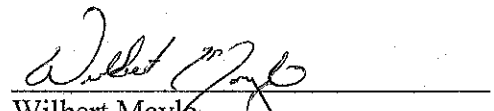
Mr. Rory L. Perry, II
Clerk of the Court
West Virginia State Supreme Court of Appeals
State Capitol Complex, Room E-317
1900 Kanawha Boulevard, East
Charleston, W.Va. 25305

TO:

Honorable David M. Pancake , Judge
6th Judicial Circuit for Cabell County
Cabell County Courthouse
750 Fifth Avenue
Huntington, W.Va. 25701

TO:

Honorable Adell Chandler, Clerk
Circuit Court Clerk for Cabell County
6th Judicial Circuit
Cabell County Courthouse
750 Fifth Avenue
Huntington, W.Va. 25701



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