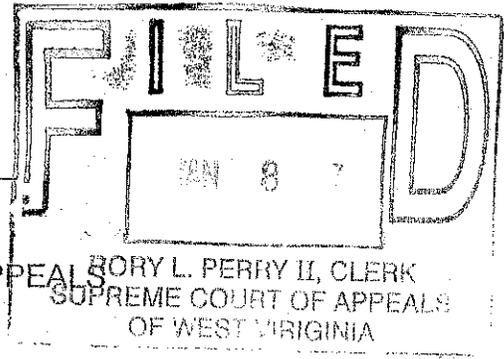


No. \_\_\_\_\_



IN THE SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA, EX REL.  
DAVID S. BRANHAM,

DO NOT REMOVE  
FILE COPY

Petitioner Below,

v.

Civil Action No. Misc-157  
Underlying Felony No. 90-F-285  
Honorable Irene C. Berger., Judge

Honorable IRENE C. BERGER, Judge  
13<sup>th</sup> Judicial Circuit for Kanawha County  
Kanawha County Judicial Annex  
111 Court Street  
Charleston, West Virginia 25301

Respondent Below

---

**PETITION FOR WRIT OF  
MANDAMUS**

---

THE UNREASONABLE DELAY OF NINE (9) MONTHS 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. THE SAID PETITION HAS BEEN PENDING BEFORE THE RESPONDENT SINCE APRIL 17, 2006. THE RESPONDENT IS REFUSING TO RENDER A DECISION.

**David S. Branham**  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, W.Va. 26273-0001

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<u>Adams v. Circuit Court of Randolph County</u> , 173 W.Va. 448, 317 S.E.2d 808 (1984) .....	5, 8
<u>Burrow v. Hoskin</u> , 742 F.Supp. 966, 968 (M.D. Tenn. 1990) .....	5
<u>Dean v. Young</u> , 777 F.2d 1239, 1240 (7 <sup>th</sup> Cir. 1985) .....	8
<u>Harris v. Nelson</u> , 394 U.S. 286, 290, 89 S.Ct. 1082 (1969) .....	6, 7
<u>In re Begerow</u> , 133 Cal. 349, 65 P. 828, 829 (Cal. 1901) .....	6
<u>In re Ford</u> , 160 Cal. 334, 116 P. 757, 759 (Cal. 1911) .....	6
<u>Jones v. Shell</u> , 572 F.2d 1278, 1280 (8 <sup>th</sup> Cir. 1978) .....	5
<u>Mugnano v. Painter</u> , 212 W.Va. 831, 835 n.2, 575 S.E.2d 590, 594 n.2 (2002) .....	6, 8
<u>Rheuark v. Shaw</u> , 628 F.2d 297, 304 (5 <sup>th</sup> Cir. 1980) .....	9
<u>Smith v. Kansas</u> , 356 F.2d 654, 656-57 (10 <sup>th</sup> Cir. 1966), <i>cert. denied</i> , 389 U.S. 871, 88 S.Ct. 154 (1967) .....	5
<u>State ex rel. Burgett v. Oakley</u> , 155 W.Va. 276, 184 S.E.2d 318 (1971) .....	9
<u>State ex rel. Buxton v. O'Brien</u> , 97 W.Va. 343, 125 S.E. 154 (1924) .....	9
<u>State ex rel. Cockowska v. Knapp</u> , 147 W.Va. 699, 130 S.E.2d 204 (1963) .....	9
<u>State ex rel. Dillon v. Egnor</u> , 188 W.Va. 221, 228, 423 S.E.2d 624, 631 (1992) .....	10
<u>State ex rel. Judy v. Kiger</u> , 153 W.Va. 764, 767-68, 172 S.E.2d 579, 581 (1970) .....	10
<u>State ex rel. Kucera v. City of Wheeling</u> , 153 W.Va. 524, 170 S.E.2d 362 (1969) .....	5
<u>State ex rel. McLaughlin v. Vickers</u> , 207 W.Va. 405, 410, 533 S.E.2d 38, 43 (2000) .....	7
<u>State ex rel. Patterson v. Aldredge</u> , 173 W.Va. 446, 317 S.E.2d 805 (1984) .....	7
<u>State ex rel. Valentine v. Watkins</u> , 208 W.Va. 26, 31, 537 S.E.2d 647, 652 (2000) .....	6
<u>United States v. Johnson</u> , 732 F.2d 379, 383 (4 <sup>th</sup> Cir. 1984) .....	9
<u>White v. Haines</u> , 215 W.Va. 698, 703, 601 S.E.2d 18, 23 (2004) .....	6
 <b>Statutes</b>	
<u>W.Va. Code</u> § 53-1-2 (1923) (2000 Repl. Vol.) .....	2
<u>W.Va. Code</u> § 53-4A-1(a) (1967) (2000 Repl. Vol.) .....	6
<u>W.Va. Code</u> § 61-11-18 & 61-11-19 .....	3
 <b>Other Authorities</b>	
S. Merrill, <i>Law of Mandamus</i> § 186 (1892) .....	10
 <b>Rules</b>	
Rules Governing Post-Conviction Habeas Corpus Proceedings, W.Va, Rule 3(c) .....	8
Rules Governing Post-Conviction Habeas Corpus Proceedings W.Va, Rule 4(b) .....	8, 9
Rule 14, Rules of Appellate Procedure .....	2
 <b>Constitutions</b>	
Article I, Section 9, Clause 2, U.S. Constitution .....	3
Article III, Section 17 & 10, W.Va. Constitution .....	2, 5
Article III, Section 4, W.Va. Constitution .....	4
Article III, Section 14, W.Va. Constitution .....	3
Article VIII, Section 3, W.Va Constitution .....	2
 <b>Regulations:</b>	
Canon 3B(8) of the W.Va. Code of Judicial Conduct .....	7

TABLE OF CONTENTS

	Page:
Table of Authorities.....	ii
I. INTRODUCTION.....	2
II. JURISDICTION.....	3
III. STATEMENT OF FACTS.....	3
IV. ASSIGNMENTS OF ERROR WITHIN ORIGINAL PETITION.....	5
V. MEMORANDUM OF LAW.....	6
1. THE UNREASONABLE DELAY OF NINE (9) MONTHS 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. THE PETITION HAS BEEN PENDING BEFORE THE RESPONDENT SINCE APRIL 17, 2006. THE RESPONDENT IS REFUSING TO RENDER A DECISION.	
STANDARD OF REVIEW.....	6
1. The Legal Right.....	7
2. The Respondent's Duty.....	9
3. No other Remedies.....	11
V. RELIEF REQUESTED.....	12
VI. MEMORANDUM.....	13
VII. CERTIFICATION OF SERVICE.....	14
VIII. VERIFICATION.....	15

IN THE SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

---

CHARLESTON, WEST VIRGINIA

---

STATE OF WEST VIRGINIA, EX REL.  
**DAVID S. BRANHAM,**

Petitioner Below,

v.

Civil Action No. Misc-157  
Underlying Felony No. 90-F-285  
Honorable Irene C. Berger., Judge

Honorable **IRENE C. BERGER**, Judge  
13<sup>th</sup> Judicial Circuit for Fayette County  
Kanawha County Judicial Annex  
111 Court Street  
Charleston, West Virginia 25301

Respondent Below

**I. INTRODUCTION**

Petitioner David Scott Branham (hereinafter Petitioner Branham) respectfully moves this Honorable Court for the issuance of a *Writ of Mandamus* against the Respondent Irene C. Berger, Judge, for the Circuit Court of Kanawha County, at Charleston, West Virginia. This Court should grant mandamus relief herein based upon the Respondent Judge's unreasonable delay in conducting an initial review of Branham's petition for the denial of his constitutional right. Said petition has been pending before the Respondent since April 17, 2006.

## 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 THE FACTS

On April 17, 2006, Petitioner Branham filed with the Circuit Court of Kanawha County his petition for writ of habeas corpus and an application to proceed *in forma pauperis*. More than nine (9) 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). 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.

The Post Conviction Habeas Corpus petition arises out of the September 1990 indictment, the 11<sup>th</sup> day of April, 1991 plea, and the 21<sup>st</sup> day of June, 1991 sentencing of Petitioner Branham one count of aggravated robbery (*W.Va. Code § 61-2-12*), one count of malicious wounding (*W.Va. Code § 61-2-9*), and one count of grand larceny (*W.Va. Code § 61-3-13*). Subsequent to the 11<sup>th</sup> day of April, 1991, Petitioner Branham's entered a plea of guilty to the three felony counts, and subsequent to the 7<sup>th</sup> day of June, 1991 sentencing hearing, Kanawha County Circuit Court Judge A. Andrew

MacQueen pronounced sentence on the 21<sup>st</sup> day of June, 1991. Judge MacQueen sentenced the Petitioner to the following term of imprisonment:

- I. Count One - Felony offense of Aggravated Robbery as contained in Felony Indictment No. 90-F-285, the Court sentenced Petitioner to be imprisoned for a period of (Count One) to a determinate term of One Hundred (100) years.
- II. Count Two - Malicious Wounding as contained in Felony Indictment No. 90-F-285, the Court sentenced Petitioner to be imprisoned for a period of an indeterminate term of not less than 2 nor more than 10 years. Said sentence was ordered to be served consecutively to sentence imposed in Count one.
- III. Count Three - Grand Larceny as contained in Felony Indictment No. 90-F-285, the Court sentenced Petitioner to a term of not less than 1 year and not more than 10 years. Said sentence is to be served consecutively to the sentences imposed on Counts One and Two of Felony Indictment No. 90-F-285.

Petitioner Branham petitioned the Respondent to allow him an opportunity to exercise his constitutional right, with the appointment of legal counsel to file an Amended Post-Conviction Habeas Corpus petition, in order to properly present the claims of proportionality principle. Without the appointment of legal counsel, Petitioner would be denied proper access to this Court.

IV.      ASSIGNMENTS OF ERROR  
WITHIN ORIGINAL PETITION

- 1) It Is The Claim Of Petitioner That His Sentence Of One Hundred Twenty (120) Years For The Offense Of Aggravated Robbery Is Disproportionate To The Character And Degree Of The Offense Committed.
- 2) It Is The Claim Of Petitioner That A Defendant Has A Constitutional Right To The Enforcement Of A Plea Agreement That Has Passed The Executory Threshold. Petitioner Was Denied Due Process Of Law When The Sentencing Judge Impermissibly Enlarged The Terms Of The Judicially Accepted Plea Agreement.
- 3) It Is The Claim Of Petitioner That There Is Nothing Contained In The Record By Way Of Pre-Sentence Reports, Or A Transcript Of The Sentencing Hearing, That Would Indicate On What Factual Basis The Particular Terms Of The Sentences Were Fixed.
- 4) It Is The Claim Of Petitioner That There Is Nothing Contained In The Record By Way Of Pre-Sentence Reports, Or A Transcript Of The Sentencing Hearing, That Would Indicate On What Factual Basis The Particular Terms Of The Sentences Were Fixed.
- 5) It Is The Argument Of Petitioner Branham That He Has Been Denied The Effective Assistance Of Counsel, Which Is In Violation Of Article III, Section 14, Of The W Va. Constitution and the 6th Amendment to the U. S. Constitution.

The above claims were set forth with sufficient facts and supported by the existing record with detailed legal arguments to allow the Respondent to make an informed decision on the merits of the claims.<sup>1</sup> The failure of the trial court to act under the circumstances of this case is unreasonable as set forth in sufficient detail below.

Petitioner believes that under W.Va. Code 53-4A-1, he is entitled to the appointment of Appellant Counsel to represent him on a direct appeal to this Court from his conviction.

---

<sup>1</sup>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.

Under W.Va. Code § 29-21-1, et seq., the Legislature finds and declared that in certain proceedings the State is required to provide high quality assistance to indigent persons who would otherwise be unable to afford adequate legal counsel; that providing legal representation to those who face an economic barrier to adequate legal counsel will server the ends of justice in accordance with the rights and privileges guaranteed to all citizens by the Constitution of the United States of America and the Constitution of the State of West Virginia; that the availability of equality legal assistance reaffirms the faith of our citizens in our government of laws.

#### **IV. MEMORANDUM OF LAW**

1. THE UNREASONABLE DELAY OF NINE (9) MONTHS 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. THE SAID PETITION HAS BEEN PENDING BEFORE THE RESPONDENT SINCE APRIL 17, 2006. THE RESPONDENT IS REFUSING TO RENDER A DECISION.<sup>2</sup>

#### **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).

---

<sup>2</sup> 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..." Branham also claims constitutional protection under the umbrella of Article I, Section 9, Clause 2 of the United States Constitution.

## 1. The Legal Right

Petitioner Branham has an absolute legal right to timely consideration of his habeas corpus petition which was based on the fact that he has been denied his constitutional right to file a direct appeal with this Court. See *e.g.*, Jones v. Shell, 572 F.2d 1278, 1280 (8<sup>th</sup> 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 (10<sup>th</sup> Cir. 1966), *cert. denied*, 389 U.S. 871, 88 S. Ct. 154 (1967) (one-year delay in the adjudication of a post-conviction remedy may work a denial of due process cognizable in habeas corpus).<sup>3</sup>

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 Branham has demonstrated his entitlement to habeas corpus relief as set forth within his Petition. The petition contains five (5) separate claims with sufficient

---

<sup>3</sup> 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."

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 Branham has a clear legal right to raise constitutional claims arising from his criminal conviction in a direct appeal to this Court. See W.Va. Code § 53-4A-1(a) (1967) (2000 Repl. Vol.).<sup>4</sup> Moreover, the 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)."<sup>5</sup>

---

<sup>4</sup> 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 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).

<sup>5</sup> 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

As illustrated above, Petitioner Branham has a clear constitutional right to challenge his unlawful conviction through a direct appeal to this Court.

## 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*. Canon 3B(8) provides: "A judge shall dispose of all judicial matters promptly, efficiently, and fairly." Petitioner Branham 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.<sup>6</sup> Petitioner Branham notified the Respondent Judge of the nature of the issues contained in the habeas corpus petition and he continues to ignore the matter. 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.<sup>7</sup> Here, the

---

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."

<sup>6</sup> 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."

<sup>7</sup> 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

Respondent Judge has failed to properly conduct an initial review of the petition and the same has resulted in the unlawful detention of Petitioner Branham 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 (7<sup>th</sup> 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 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).

---

relief but the petition, as filed, is not sufficient for the court to conduct a fair adjudication of the matters 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).

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.<sup>8</sup>

### 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 Branham asserts that this Mandamus is merely an auxiliary process in which to compel the Respondent Judge to act.<sup>9</sup>

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.

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 Branham at

---

<sup>8</sup> "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 (4<sup>th</sup> Cir. 1984) (quoting Rheuark v. Shaw, 628 F.2d 297, 304 (5<sup>th</sup> Cir. 1980)).

<sup>9</sup> 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).

this stage of the proceedings, to compel the Respondent Judge to act. Mandamus relief is, therefore, proper.

**V. RELIEF REQUESTED**

Petitioner, David S. Branham, 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 and all other relief as may be appropriate to dispose of the matter as law and justice requires.

Respectfully submitted



David S. Branham  
DOC#-17275 – Unit Dorm 5  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, W.Va. 26273-0001

Petitioner proceeding *pro se*

IN THE SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

---

CHARLESTON, WEST VIRGINIA

---

STATE OF WEST VIRGINIA, EX REL.  
**DAVID S. BRANHAM,**

Petitioner Below,

v.

Civil Action No. Misc-157  
Underlying Felony No. 90-F-285  
Honorable Irene C. Berger., Judge

Honorable **IRENE C. BERGER**, Judge  
13<sup>th</sup> Judicial Circuit for Fayette County  
Kanawha County Judicial Annex  
111 Court Street  
Charleston, West Virginia 25301

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:

Honorable **IRENE C. BERGER**, Judge  
13<sup>th</sup> Judicial Circuit for Fayette County  
Kanawha County Judicial Annex  
111 Court Street  
Charleston, West Virginia 25301

  
David S. Branham  
DOC#-17275 – Unit Dorm 5  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, W.Va. 26273-0001

Petitioner proceeding *pro se*

## CERTIFICATION OF SERVICE

---

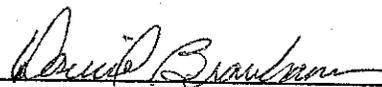
I, David S. Branham (DOC#-17275), Petitioner herein, do hereby certify that I have served a true copy of the foregoing "Petition for Writ of Mandamus," within the pending case Civil Action No. Misc-157; Underlying Felony No. 90-F-285; before the Supreme Court of Appeals upon the following persons by depositing said copy in the United States Mail with First Class Postage prepaid on this 8<sup>th</sup> day of January 2007, 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 Irene C. Berger, Judge  
13<sup>th</sup> Judicial Circuit Court for Kanawha County  
Kanawha County Judicial Annex  
111 Court Street  
Charleston, West Virginia 25301

TO: Honorable Cathy Gatson, Clerk  
Circuit Court Clerk for Kanawha County  
Kanawha County Judicial Building  
111 Court Street  
Charleston, West Virginia 25351



---

David S. Branham  
DOC#-17275 – Unit Dorm 5  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, W.Va. 26273-0001

VERIFICATION

STATE OF WEST VIRGINIA            )  
  )  
COUNTY OF RANDOLPH, To-Wit:    )

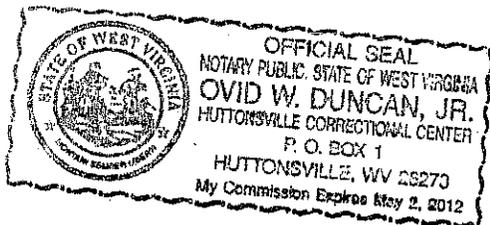
I, David S. Branham, DOC#-17275, the named Petitioner within the forgoing "Writ of Mandamus", which is being filed with the West Virginia State Supreme Court of Appeals, after being duly sworn, says that the facts and allegations contained therein are true, except insofar as they are stated to be upon information and belief, and that insofar as they are therein stated, the facts are believed to be true.

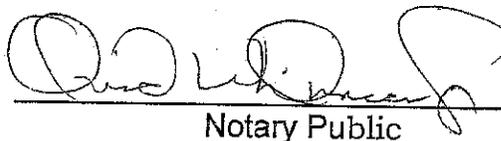


David S. Branham  
DOC#-17275 – Unit Dorm 5  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, W.Va. 26273-0001

Subscribed and sworn to before me this 5 day of January, 2007.

My Commission expires May 2, 2012



  
Notary Public