

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CARL FOY,

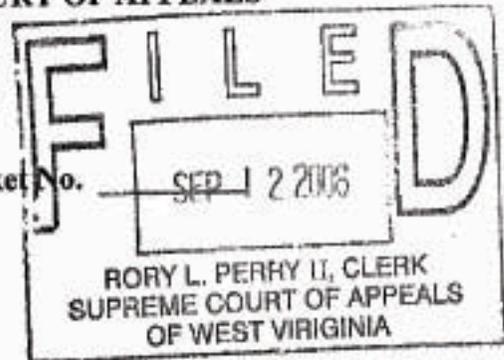
Petitioner,

vs.

THE HONORABLE ROBERT L. HOLLAND, JR.

Respondent.

Docket No.



PETITION FOR WRIT OF MANDAMUS

Pursuant to the provisions of West Virginia Code § 53-1-1, et seq. the Petitioner moves the Court for a Writ of Mandamus compelling the Honorable Robert L. Holland, Jr. to rule on the attached Petition for Writ of Habeas Corpus filed on May 18, 2005, pursuant to the provisions of West Virginia Code § 53-4A-1 and shows the Court as follows:

1. The Petitioner was tried by a jury and convicted of first-degree murder without mercy and sentenced to life imprisonment without parole by Judgment Order dated November 22, 2002, signed by the Respondent.
2. The Petitioner appealed his conviction to the West Virginia Supreme Court of Appeals and by Order dated May 27, 2004 the Court refused to hear the Appeal by a 3 to 2 vote.
3. On May 18, 2005, the Petitioner filed his Petition for Writ of Habeas Corpus in the Circuit Court of Pleasants County, West Virginia. (Exhibit A). (Without Attachments).
4. On June 30, 2005, the Respondent issued an Order which neither granted or refused the Petition but directed the State to file a responsive pleading on or before August 31, 2005. (Exhibit B).
5. On November 4, 2005, Counsel for the Petitioner sent the Respondent a letter requesting him to issue the Writ of Habeas Corpus and schedule a hearing on said Petition. (Exhibit C).

6. On November 7, 2005, the State filed a responsive pleading requesting the Respondent to deny the Writ of Habeas Corpus. (Exhibit D). (Without Attachments).

7. On December 23, 2005, the Petitioner again wrote the Respondent and again requested a hearing on said Petition. (Exhibit E).

8. On January 30, 2006, the Petitioner obtained a time for a status conference from the Circuit Clerk and sent a notice for status conference on March 8, 2006. (Exhibit F).

9. On March 8, 2006, a status conference was held in the case and the Respondent indicated that he believed the record was fully developed¹ and he would rule on the petition based on the existing record.

10. Six months have passed since the March 8, 2006 hearing without the Respondent issuing a ruling on the Petition for a Writ of Habeas Corpus, which has been before the Respondent for more than a year.

Wherefore, Petitioner requests this Honorable Court to issue a Rule To Show Cause why the Writ of Mandamus should not be granted as prayed for herein.

CARL WAYNE FOY
By Counsel


George L. Partain (WV State Bar No. 2827)
Attorney at Law
305 Stratton Street
Post Office Box 808
Logan, WV 25601
(304) 752-3638

¹ The Petitioner had filed a Motion for a New Trial citing the various grounds set forth in the subject Petition for Habeas Corpus and the Respondent held a hearing on the Motion on May 5, 2003, but he never ruled on the Motion for New Trial.

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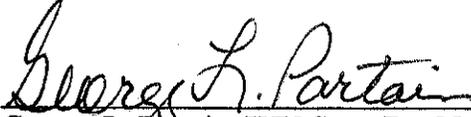
Respondent.

CERTIFICATE OF SERVICE

I, George L. Partain, do hereby certify that I have served the foregoing Petition for Writ of Mandamus on behalf of Carl Wayne Foy by mailing a copy by the United States Mail postage pre-paid, on this 11th day of September 2006, to the following:

The Honorable Robert L. Holland, Jr.
Circuit Court Judge
Pleasants County Courthouse
301 Court Lane
St. Mary's, WV 26170

The Honorable Tim Sweeney
Prosecuting Attorney of Pleasants County
Post Office Box 340
St. Mary's, WV 26170


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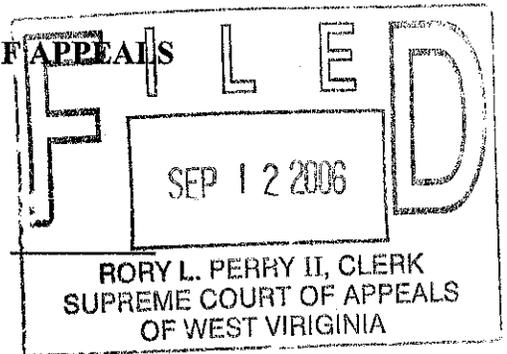
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MEMORANDUM OF LAW
IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

FACTS

The Petitioner filed a Petition for Writ of Habeas Corpus with the Circuit Court of Pleasants County, essentially maintaining that his court appointed attorneys were ineffective, resulting in him being convicted of first-degree murder without mercy. The Petitioner discharged his court appointed attorneys following his conviction and the undersigned attorney filed a Motion for New Trial. An evidentiary hearing was held concerning the Motion for New Trial wherein Petitioner contended his court appointed attorneys were ineffective. The testimonies of both court-appointed attorneys were taken at a hearing before the Honorable Robert L. Holland, Jr. who is the Respondent herein. The hearing was held on May 5, 2003. Judge Holland never ruled on the Motion for New Trial related to Petitioner's claim that his conviction resulted from ineffective assistance of counsel. An appeal was prosecuted to the West Virginia Supreme Court of Appeals, which was refused by a 3-2 vote. Subsequently, the Petitioner filed the subject Petition for Writ of Habeas Corpus on May 18, 2005. In response to the filing of the Petition for Writ of Habeas Corpus, the Respondent issued an Order on June 30, 2005, directing the prosecuting attorney to file a responsive pleading on or before August 31, 2005. On November 4, 2005, Petitioner requested the Respondent to respond to the Writ of

Habeas Corpus and schedule a hearing. Thereafter, the State filed a responsive pleading requesting the Respondent to deny the Writ of Habeas Corpus. On December 23, 2005, the Petitioner again requested the Respondent to hold a hearing on the Petition for Writ of Habeas Corpus. On January 30, 2006, the Petitioner obtained a time for a status conference, which was held on March 8, 2006, at which time the Court stated that based on the hearing held in connection with the Motion for New Trial that the record was fully developed on the issues set forth in the Petition for Writ of Habeas Corpus. The Respondent indicated he would rule on the Petition based on the existing record.

Six months have passed and Respondent has failed to issue a ruling on the Petition for Writ of Habeas Corpus. In view of the fact it has been a year and 3 months since the Petition was filed without a ruling on the Petition, the Petitioner deemed it necessary to file the subject Petition for Writ of Mandamus.

ARGUMENT

The West Virginia Supreme Court of Appeals has recognized that Writs of Mandamus are issued only in the most extraordinary of situations and three factors must be met before relief will be granted. In Syllabus Pt. 2 of State, ex rel. Kucera v. City of Wheeling, 153 W.Va. 538, 170 S.E.2d 369 (1969) the Court stated “a Writ of Mandamus will not issue unless 3 elements coexists – (1) A clear legal right in the petition for the relief sought; (2) A legal duty on the part of the respondent to do the things which the petitioner seeks to compel; and (3) The absence of another adequate remedy.” In the present case there obviously is a clear legal right for the Petitioner to have the Respondent to rule on his Petition for Writ of Habeas Corpus. There is likewise a legal duty on the part of the Respondent to issue a ruling. Thirdly, there is no other adequate remedy for the Petitioner to compel the Respondent to issue a ruling. It has been more

than 6 months since the Court stated it would issue a ruling and more than 15 months since the Petition was filed and therefore, the Petitioner submits the Supreme Court of Appeals should issue a Rule To Show Cause as prayed for in Petitioner's Petition.

CARL WAYNE FOY
By Counsel



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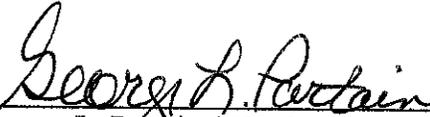
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