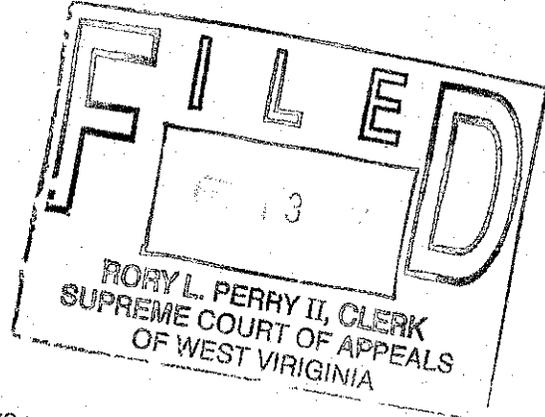


IN THE STATE SUPREME COURT OF APPEALS
WEST VIRGINIA

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STATE OF WEST VIRGINIA Ex Rel.
GREGORY WAYNE FRITZMAN

Petitioner

vs.

CASE NO:

THE HONORABLE MARK A. KARL, Judge
Circuit Court of Marshall County
ANTHONY S. BAYLISS, Attorney at Law
112 Roane Street
Charleston, WV. 25305

Respondent's

WRIT OF MANDAMUS/PROHIBITION

JURISDICTION

Comes now the Gregory Wayne Fritzman, (Petitioner hereinafter) by Propria Persona and pursuant to West Virginia Code § 53-3-1 and files his Writ Of Mandamus , and present the following:

STATEMENT OF FACTS

Petitioner filed a Writ of Habeas Corpus in accordance to West Virginia Code § 53-4A-1, and in accordance to Post-Conviction Habeas Corpus Rule 3 (a)(1), before the Circuit Court of Marshall County on June 17, 1999. The Honorable Clerk of Court in accordance to Post-Conviction Habeas Corpus Rule 3 (b) docketed the case; styled Fritzman v. Painter. The case was assigned to the Honorable Mark A. Karl. (Civil Action No. 99-C-130.)

Petitioner's Case sat before the Circuit Court of Marshall County's Judge, from 1999, until September 2003. (SEE APPENDIX 1)

Petitioner, because his Case sat before the Circuit Court of Marshall County over a span of four (4) years without any adjudication Proceeding, filed a Petition to the West Virginia State Supreme Court of Appeals, and on September 22, 2003, the Supreme Court entered an ORDER granting the Petition. (SEE APPENDIX 2).

Upon the ORDER FROM THE Supreme court, the Circuit Court of Marshall County appointed Attorney Anthony S. Bayliss of 112 Roane Street, Charleston West Virginia, 25305 to represent Petitioner and to file with-in sixty (60) days an Amended Habeas Petition, and to this date, this has never been done. (SEE APPEWNDIX 3)

Petitioner, in good faith effort, has written to Attorney Bayliss, and has tried to communicate to determine what the status of his case. Attorney Bayliss has had the case for about four (4) years, without a hearing, nor any assistance in filing an Amended Petition, as ordered. Anthony Bayliss, after four (4) years, has never written or answered any of the Petitioner's correspondence.

This is a clear violation of the Rules of Professional Conduct, Client Lawyer Relationship, Rule 1.3 Diligence, which reads:

"A lawyer shall act with reasonable diligence and promptness in representing a client", which the Supreme Court ruled it requires a lawyer to act with reasonable diligence and promptness in representing a client, when he failed to submit a writtensettlement, as a result of which his client's case was dismissed, and then failed to tell his client that the case had been dismissed, and then failed to file an Appeal. Lawyer Disciplinary Bd. v Scott, 213 W.Va. 209, 579 S.E. 2d 550, 2003 W.Va. LEXIS17 (2003).

Also Rule 1.4, Communication which reads: "(a) A Lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information. (b) A Lawyer shall explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation.

Attorney Bayliss also violated W.Va. Rule of Professional Conduct 1.4, by failing to return client's phone calls, failing to provide client with sufficient information to participate in decisions, failing to advise client that he had not filed a civil action, failed to advise client that the statute of limitations had run out on a claim, and failed to fulfill reasonable client expectations for information consistent with client's best interest. Lawyer Disciplinary Bd. V. Wheaton, 216 W.Va. 673, 610 S.E. 2d 8, 2004 W.Va. LEXIS 146 (Nov. 12. 2004).

The Petitioner's Habeas Corpus is civil in nature, and it should have been properly amended as the Court so Ordered, and neither the Court of Attorney Bayliss has taken corrective actions to protect the Petitioner's Constitutional Rights.

Petitioner has filed various letters to attorney Bayliss, and to the Court in an effort to have communication with his appointed Counsel. The Court or the Attorney will not communicate with the Petitioner in order to have his Habeas Corpus Petition adjudicated in a timely manner. Attorney Bayliss has failed to file proper motions. Nothing has been done as to this date to the best of the Petitioner's knowledge and beliefs.

It is with this, the Petitioner seeks Justice in an ORDER to the Circuit Court Judge, to file the Petitioner's case in a timely manner afforded, pursuant to Rule # 1, of the West Virginia Rules of Civil Procedure.

MEMORANDUM OF LAW

This Court has held in, State ex rel. Kucera v. City of Wheeling, 153 W.Va. 538, 170 S.E. 2d 367 (1969), "a writ of mandamus will not be issued, unless three elements co-exist:

- (1) "A clear legal right in the Petitioner 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."

The Court ruled "Obviously, persons who are imprisoned, do not lose their Constitutional Right to use the Courts to seek or obtain Justice." The Court further stated, "An implied Right of Action may arise from the language of this section providing that [t]he Courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy to due course of law." Hurley v. Allied Chem. Corp., 164 W. Va. 268, 262 S.E. 2d 757 (1980). West Virginia Constitution Article III, Section 17, further holds, "The Courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and Justice shall be administered without sale, denial or delay."

Petitioner had met the requirements set forth in State ex rel. Kucera v. City of Wheeling, supra, i.e., (1) a clear right;...Petitioner has a clear right to due process of law to Post Habeas Corpus relief in accordance to Rule 3 (a)(1) W.Va. Code 53-4A-1, as he is incarcerated at the Mount Olive Correctional Complex. The issues presented in the Petitioner's Habeas Corpus Petition before the Circuit Court of Marshall County, is supported by clearly established laws handed down by the West Virginia State Supreme Court, Statutory Law, i.e., West Virginia Code, and other decisions by various

Courts. Wolff v. McDonnell, 31 L. Ed. 2d 263 (1972); Russell v. Oliver, 552 F. 2d 115 (4th Cir. 1977); Gillespie v. Kendrick, 265 S.E. 2d 537 (W.Va. 1980); Cooper v. Gwinn, 298 S.E. 2d 781 (W. Va. 1981); Woodring v. Whyte, 245 S.E. 2d 238 (1978); Rhodes v. Chapman, 69 L. Ed. 2d 59 (1981)

(2) a legal duty on the part of Respondent; ...Applying the Post Habeas Corpus Rules, 4(b) initial review; appointment of counsel to file amended Petition.

There is a presumption of constitutionality with regard to legislation. However when a legislative enactment either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision of Article III, Section 17, of the West Virginia Constitution is implicated. W.Va. Constitution, Article III, § 17 ("The Courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.")

(3) The absence of another adequate remedy;..."Petitioner is incarcerated and has no other avenue for relief. Petitioner's Habeas Corpus was filed over Seven (7) years ago and Attorney Bayliss has not filed or corresponded with the Petitioner. The Circuit Court has not taken corrective measures to expedite the Judicial Proceeding in this case.

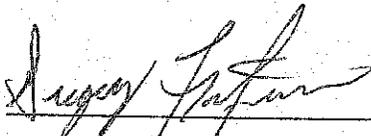
WHEREFORE: RELIEF SOUGHT:

- (1) Petitioner seeks an ORDER to have a new Attorney appointed to properly represent the Petitioner.
- (2) Petitioner seeks an ORDER to request the Honorable Judge Mark Karl, and Attorney Bayliss, to show cause, if any, why they have not procured, and or taken proper hearing on Petitioner's Habeas Corpus and to step down from the Petitioner's Case.
- (3) The Petitioner Moves this Honorable Court to issue an ORDER to the Circuit Court Judge of Marshall County, to show cause, if any, why the Petitioner's relief sought should not be granted.

(4) Petitioner moves this Honorable Court for an immediate Relief from incarceration for such egregious injustice in his Case.

(5) Petitioner seeks any and all Relief from this Honorable Court as it deems just and proper according to the Laws and Constitution of this State and the United States Constitution.

Respectfully Submitted on this 12 day of February, 2007.

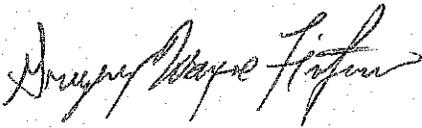


GREGORY FRITZMAN Doc # 25641
Mt. Olive Correctional Complex
One Mountainside Way
Mt. Olive, WV. 25185

VERIFICATION

Now comes the Petitioner, Gregory Wayne Fritzman by pro-se, and states that the facts and information contained in his Writ of Mandamus and Writ of Prohibition are true and correct, to the best of his knowledge and belief, and have offered by him in good faith, to the best of his ability.

Respectfully;



Gregory Wayne Fritzman
Mt. Olive Correctional Complex
One Mountainside Way
Mt. Olive, WV. 25185

25691

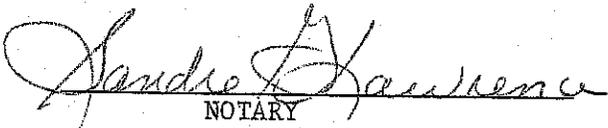
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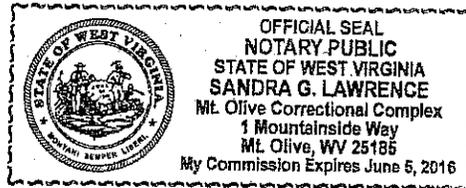
DATE

IN THE STATE OF WEST VIRGINIA
COUNTY OF FAYETTE, TO WIT:

Taken, sworn and subscribed to before the undersigned authority on this
12th day of February, 2007.



NOTARY



NOTARY SEAL

APPENDIX {1}

GREGORY FRITZMAN

vs. PAINTER, WARDEN, MT OLIVE

LINE	DATE	ACTION
1	06/23/99	PETITION FILED. SENT TO JUDGE.
2	06/14/02	MOTION TO COMPELL SENT TO JUDGE WITH FILE
3	09/22/03	PETITION FOR WRIT OF MANDAMUS
4	09/22/03	ORDER: SC ORDER AWARDING WRIT UNLESS COUNSEL APPT'D IN THE
5		INTERIM. 141/698
6	10/07/03	ORDER: HEARING 10-27-03 @ 1:15; MT OLIVE TO TRANSPORT
7		PETITIONER. COPIES TO ALL PARTIES.
8	11/10/03	ORDER: BAYLISS APPT'D COUNSEL; COPIES TO BAYLISS, SC, PET.,
9		PROS. 142/323
10	11/19/03	ORDER: SC ORDER DISMISSING WRIT OF MANDAMUS
11	11/28/05	MOTION FOR APPT OF COUNSEL; GAVE COPY TO JUDGE KARL
12	08/31/06	WRIT OF MANDAMUS - ASKING FOR COURT TO APP'T NEW COUNSEL,
13		COPY TO JUDGE KARL.
14	11/08/06	WRIT OF MANDAMUS FILED BY GREGORY W. FRITZMAN
15	12/11/06	ORDER: SUP CT ORDER - WRIT - NOT AWARDED.
16		155/413/685

APPENDIX {2}

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 11th of September, 2003, the following order was made and entered:

State of West Virginia ex rel. Gregory
W. Fritzman, Petitioner

vs.) No. 31558

Circuit Court of Marshall County,
Respondent

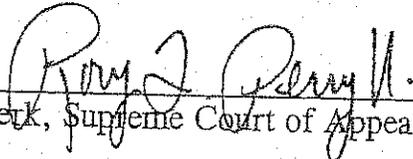
On a former day, to-wit, April 28, 2003, came the petitioner, Gregory W. Fritzman, pro se, and presented to the Court his petition praying for a writ of mandamus to be directed against the respondent, Circuit Court of Marshall County, as therein set forth.

Upon consideration whereof, the Court is of opinion that a rule should be awarded herein. It is therefore considered and ordered that a rule do issue directed against the respondent returnable before this Court at its courtroom in the City of Charleston, County of Kanawha, at ten o'clock, a. m., on Tuesday, the 18th day of November, 2003, commanding and directing the said respondent to show cause, if any it can, why a writ of mandamus should not be awarded against the Circuit Court of Marshall County, as prayed for by the petitioner in his said petition unless sooner mooted by the issuing of a ruling on the petitioner's motion for appointment of counsel. Justice McGraw would refuse.

Service of a copy of this order upon the respondents aforesaid shall have the same effect as the service of a formal writ.

A True Copy

Attest:


Clerk, Supreme Court of Appeals

APPENDIX {3}

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

GREGORY WAYNE FRITZMAN,

Petitioner,

vs.

//CASE NO. 99-C-130K

HOWARD PAINTER, WARDEN
OF MT. OLIVE CORRECTIONAL
CENTER,

Respondent.

ORDER

2003 NOV 10 AM 9
FILED
CIRCUIT CLERK

This 27th day of October, 2003, came the State of West Virginia by Eric M. Gordon, Assistant Prosecuting Attorney of Marshall County, and as well came the petitioner, Gregory Wayne Fritzman, in person, pro se.

This matter came on for a hearing to consider the Petitioner's Motion for Appointment of Counsel.

Upon inquiry of the Court, the petitioner represented that he has no funds, has no personal property, no automobile, works as a janitor at the Mt. Olive Correctional Center and has approximately forty dollars (\$40.00) on the books at said facility.

Whereupon, the Court advised the Petitioner and the State that Anthony S. Bayliss, Esquire, is hereby APPOINTED as counsel for the Petitioner. The Court further ORDERED that the Writ of Habeas Corpus and the Writ of Mandamus be transmitted to Mr. Bayliss and that said counsel has sixty (60) days to make any amendments to the documents. Should the writs be amended, the State shall file a return.

There being nothing further, the defendant is remanded to the authorities of the Mt. Olive Correctional Center to be returned to said facility.

The Clerk of this Court shall transmit a copy of this Order to Anthony S. Bayliss, Esquire, at PO Box 1054, Hurricane, West Virginia, 25526; a copy to the Clerk of the West Virginia Supreme Court of Appeals; a copy to the petitioner, Gregory Wayne Fritzman at the Mt. Olive Correctional Center; and a copy to the Marshall County Prosecuting Attorney's Office.

ENTERED this 5TH day of November, 2003.

Mark A. Karl

Mark A. Karl, Judge

A Copy Teste:

David R. Eaty, Clerk

By *Becky Taylor* Deputy