

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

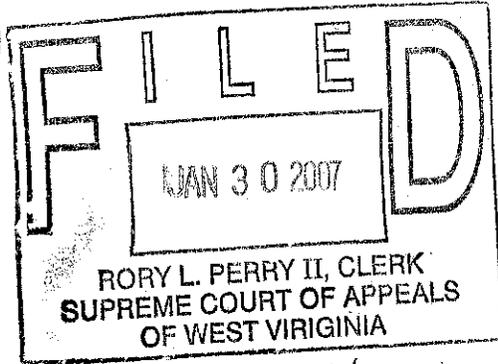
STATE OF WEST VIRGINIA, EX REL.
AARON MICHAEL PANKEY,

Petitioner,

vs.

ALFRED E. FERGUSON, JUDGE
CABELL COUNTY, WEST VIRGINIA
6th JUDICIAL CIRCUIT.

Respondent.



Supreme Court No. 33384
Underlying Civil Action No. 05-C-750
Underlying Indictment No. 97-F-155
(Judge Alfred E. Ferguson)

APPLICATION FOR A WRIT OF MANDAMUS

INTRODUCTION

Now comes into this Honorable Court, Aaron Michael Pankey, (hereafter "Petitioner"), moving this Court to grant his Application for a Writ of Mandamus and order Judge Alfred E. Ferguson to hold an omnibus/evidentiary hearing in reference to his writ of habeas corpus *ad subjiciendum*.

JURISDICTION

This Court has been vested with the plenary authority to entertain a writ of mandamus pursuant to Article VIII, Section 3 of the West Virginia Constitution, "The supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, *mandamus*, prohibition and

certiorari. Also, Rule 14 of the West Virginia Rules Of Appellate Procedure, Original Jurisdiction.

PROCEDURAL HISTORY

Criminal proceedings.

1) On or about 15 October 1997, the Petitioner, was convicted of First Degree Murder With Mercy in the Circuit Court of Cabell County, West Virginia, by virtue of a guilty plea. The Honorable Alfred E. Ferguson presided over both the plea hearing and sentencing.

Habeas corpus proceedings.

1) On or about 14 August 2001, the Petitioner filed a Motion requesting that the circuit court appoint counsel in order to perfect a Post-Conviction Habeas Corpus Petition pursuant to W.Va. Code § 53-4A1 *et seq.*, and the standards enunciated *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981). Furthermore, the Petitioner's request for appointment of habeas counsel to help prepare a correct filing of a habeas corpus petition was predicated upon the viewpoint that the Petitioner was unlearned in law and, was in disadvantageous position of being unable to properly perfect and file a habeas corpus petition.

2) On or about 1 October 2001, the Petitioner was notified by Kerry Kessel, Esq., (hereafter "habeas counsel"), that he had been appointed to represent him in regard to the filing of a writ of habeas corpus.

3) On or about 31 March 2005, habeas counsel filed a writ of habeas corpus with the Court alleging the following: (1) Coerced Confession; (2) Ineffective Assistance of counsel; and (3) Excessive Sentence. Thereafter, habeas counsel notified the Petitioner that a omnibus/evidentiary hearing had been set to take place on 18 May 2005.

AUTHORITIES IN SUPPORT

1) *Adams v. Circuit Court of Randolph County*, 317 S.E.2d 808 (1984), this Court syllabus

point 3 stated: "[g]iven 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, required to render a decision on the merits of the writ.

2) *State ex rel. Patterson v. Aldridge*, 173 W.Va. 446, 317 S.E.2d 805 (1984) this Court stated: "Under Article III, § 17 of the West Virginia Constitution, which provides that '...justice shall be administered without sale, denial or delay.'"

3) *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981): "[i]n general, the post-conviction habeas statute, *W.Va. Code, 53-4A-1 et seq.* [1967] contemplates that every person convicted of a crime shall have a fair trial in the circuit court, an opportunity to apply for an appeal to this Court, and one omnibus post-conviction habeas corpus hearing at which he may raise any collateral issues which have not previously been fully and fairly litigated during the trial and a record of the proceedings are available."

4) *State ex rel. Cackowska v. Knapp*, 147 W.Va. 699, 130 S.E.2d 204 (1963), this Court stated: "Mandamus will not lie to direct the manner in which a trial court should exercise its discretion with regard to an act either judicial or quas-judicial, but a trial court, or other inferior tribunal, may be compelled to act in a case if it unreasonably neglects or refuses to do so."

5) Canon 3(B)(8) of the Code of Judicial Conduct states; "A judge shall dispose of all judicial matters, promptly, efficiently, and fairly.

6) Rule 1 of the West Virginia Rules of Civil Procedure states in pertinent part: "...[t]hese rules govern the procedure ... judicial proceedings of a civil nature ... and administered to secure the just, speedy and inexpensive determination of every action." (Amended by order adopted November 6, 1967; and by order adopted February 19, 1998, effective April 6, 1998)

STANDARD FOR ISSUANCE OF WRIT OF MANDAMUS

To invoke mandamus the relator must show (1) a clear right to the relief sought; (2) a legal duty on the part of the respondent to do the thing relator seeks; and (3) the absence of another

adequate remedy. Syllabus Point 2, *Myers v. Barte*, 167 W.Va. 194, 279 S.E.2d 406 (1981).

GROUND FOR ISSUING APPLICATION FOR A WRIT OF MANDAMUS

Petitioner avers that he is entitled to an omnibus habeas corpus hearing as require by *Losh, supra*, to be held in the Cabell County Circuit Court upon his writ of habeas corpus, the circuit court previously granted Petitioner's *pro se* petition on or about 1 October 2001, and appointed counsel to amend the *pro se* petition. Habeas counsel did in fact file a petition styled: AMENDED OMNIBUS PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM, on 31 March 2005, with the circuit court setting a date for his omnibus hearing on 18 May 2005. Approximately, a year and half, has elapsed without this omnibus habeas corpus hearing coming to fruition since the date of the original hearing. Accordingly, pursuant to the authorities listed *supra* and the following, Petitioner avers that he is entitled to an omnibus hearing.

1) W.Va. Code § 53-4A-3 contains the provisions that allow courts to grant or deny the writ as the case may be. Absent a ruling in the final Order to the contrary, once the court determined, pursuant to W.Va. Code 53-4A-4(a) that the facts alleged in Petitioner's writ of habeas corpus and motion to appoint counsel were true and that the petition was filed in good faith and had merit or was not frivolous thereafter grants the writ, and appointed counsel files an amended petition, a petitioner is entitled to a omnibus hearing where both counsel and the petitioner ". . . must raise all issues which are known to them, or which, with reasonable diligence, would become known to them. *Losh* at 166 W.Va. 766-767, 277 S.E.2d 610-611. Subsequently, in order to determine whether counsel and petitioner have raised every potential legal issue, the court is to provide whatever facilities and procedures as are necessary including hold an *omnibus habeas corpus hearing* and inquire upon the record whether the petitioner and/or his counsel have raised all issues known to them or, with reasonable diligence, would become known.;

2) An omnibus habeas corpus hearing as contemplated in this article [53-4A-1] occurs when: (1) an applicant for habeas corpus is represented by counsel or appears *pro se* having knowingly and intelligently waived his right to counsel; (2) the trial court inquires into all the standard grounds for

habeas corpus relief; (3) a knowing and intelligent waiver of those grounds not asserted is made by the applicant upon the advice of counsel unless he knowingly and intelligently waived his right to counsel; and (4) the trial court drafts a comprehensive order including the findings on the issues addressed and a notation that the defendant was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding. *Losh supra*.

3) This Court in *Gill v. Hill*, 210 W.Va. 99, 554 S.E.2d 879 (2003) stated, in a case from Wood County wherein the Petitioner had gone forth throughout in a *pro se* manner and who was asserting a right to a hearing on several *pro se* motions he had previously filed; "[W]e agree that a circuit court has an obligation to ensure—with or without hearings, as the court (including the timely consideration of and ruling upon all motions filed by a party), and generally has a duty to schedule the petitioner's case only for a final omnibus habeas corpus hearing." *Id.* at 210 W.Va. at 101, 554 S.E.2d 881 (emphasis added). This Court cited *Losh v. McKenzie, supra*, as the authority, explicating that statement.

Therefore, the Petitioner is entitled to an omnibus habeas corpus hearing, and has satisfied the elements that must coexist in order to require, the issuance of a writ of mandamus compelling the Respondent to provide Petitioner with said hearing forthright: (1) Petitioner has a clear right to an omnibus habeas corpus hearing; (2) The existence of a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) The absence of adequate remedy at law.

PRAYER FOR THE WRIT

Petitioner, forevermore prays that this Honorable Court grant his writ as moulded, by compelling Alfred E. Ferguson, Judge of the Circuit Court of Cabell County, West Virginia (6th Judicial Circuit), to set a date for the effectuation of a omnibus habeas corpus hearing in accordance with the appropriate statutes and decisional law, at which time Petitioner and his counsel can argue there issues as contained in Petitioner's amended writ of habeas corpus *ad subjiciendum* in order to demonstrate Petitioner's entitlement to relief, thereby, being in the fair dispensation of justice.

VERIFICATION

I, Aaron Michael Pankey, Petitioner named in the foregoing APPLICATION FOR A WRIT OF MANDAMUS, having first duly sworn, says that he has read the said Writ, and further says that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information, and insofar as they are stated to be upon information, he believes them to be true.

Aaron Michael Pankey, *pro se*

Taken, subscribed and sworn to before me this ____ day of _____ 2006.

My commission expires: _____

(Seal)

Notary Public

CERTIFICATE OF SERVICE

I, Aaron Michael Pankey, do hereby certify that service of the APPLICATION FOR A WRIT OF MANDAMUS has been made upon Respondent Judge Alfred E. Ferguson, and counsel of record, Prosecuting Attorney of Cabell County, has been made by depositing a true copy thereof in the United States Mail, this 29 day of JANUARY, 200⁷ postage prepaid and properly addressed to:

Judge Alfred E. Ferguson

6th Judicial Circuit
Cabell County Courthouse
750 Fifth Avenue
Huntington WV, 25701

Prosecuting Attorney Of Cabell County, WV

750 5th Ave
Cabell County Court
Huntington WV, 25701

Aaron Michael Pankey, Petitioner *pro se*
Mount Olive Correctional Complex
1 Mountainside Way
Mt. Olive, West Virginia 25185
MOCC Telephone: (304) 442-7213

Dear Clerk of the Supreme Court of West Virginia

Please find enclosed pursuant to Rule 14, Original Jurisdiction, of the West Virginia Rules of Appellate Procedure, the original and nine (9) copies of my Application For A Writ Of Mandamus for filing in your office. Please pass the same to the Honorable Court for its consideration. Thank you in advance for your time in this matter.



Aaron Michael Pankey



