

No. 33924

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**IN THE SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA**

**CHARLESTON, WEST VIRGINIA**

STATE OF WEST VIRGINIA, EX REL.  
**JACKIE D. TERRY,**

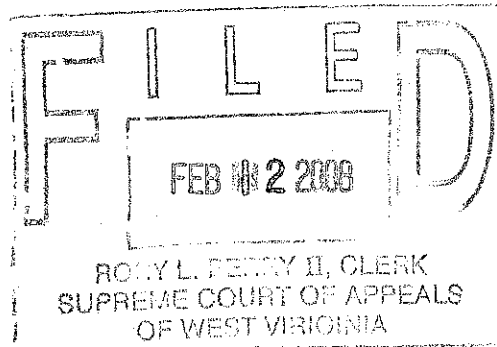
Petitioner Below,

v.

**Civil Action No. 07-C-132 (H)**  
Underling Felony No. 99-F-49 (H)  
Honorable Jay M. Hoke, Judge

**Honorable JAY M. HOKE, Judge**  
25<sup>th</sup> Circuit Court for Lincoln County  
Lincoln County Courthouse  
8000 Court Avenue  
Post Office Box No. 497  
Hamlin, West Virginia 25523

Respondent Below



**P E T I T I O N  
F O R W R I T O F M A N D A M U S**

**TO THE HONORABLE JUSTICE OF THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

Jackie D. Terry # *32360*  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, W.Va. 26273-0001

**IN THE SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA**

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**CHARLESTON, WEST VIRGINIA**

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STATE OF WEST VIRGINIA, EX REL.  
**JACKIE D. TERRY,**

Petitioner Below,

v.

**Civil Action No. 07-C-132 (H)**  
Underling Felony No. 99-F-49 (H)  
Honorable Jay M. Hoke, Judge

**JAY M. HOKE,** Judge  
25th Judicial Circuit for Lincoln County

Respondent Below

**I. INTRODUCTION**

Petitioner **Jackie D. Terry** respectfully moves this Honorable Court for the issuance of a *Writ of Mandamus* against the Respondent Jay M. Hoke, Judge for the Circuit Court of Lincoln County, at Hamlin, West Virginia. This Court should grant mandamus relief herein based upon the Respondent Judge's unreasonable delay in conducting an initial review of Terry's Petition for Post-Conviction Habeas Corpus relief. The petition has been pending before Judge Hoke since the 29<sup>th</sup> day of August, 2007. (See attached "Docketing of Petition by Circuit Court Clerk" Petitioner's Exhibit A).

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## **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 the 29<sup>th</sup> day of August, 2007, Petitioner Terry filed with the Circuit Court of Lincoln County his petition for writ of habeas corpus<sup>1</sup> and an application to proceed *in forma pauperis*.<sup>2</sup> More than six (6) months has passed since the filing of the original Petition and the Respondent has failed and refused to make any preliminary assessment with regards to the original Habeas Petition (except to order it filed), and Petitioner's Request for Appointment of Counsel.<sup>3</sup> The current petition is the first opportunity the Respondent has had to correct the constitutional violation committed at in this case. Within the pending petition, petitioner Terry raised the following grounds for relief:

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<sup>1</sup> See (Ex. B).

<sup>2</sup> See (Ex. C).

<sup>3</sup> The Motion for Appointment of Counsel was filed August 29, 2007.

**GROUNDNS PRESENTED TO LOWER COURT FOR  
POST-CONVICTION HABEAS CORPUS RELIEF**

**ISSUE - I**

1. **Petitioner Jackie D. Terry Is Entitled To His Custody Jail Credit For The Period Of Time That He was Incarcerated Within The Regional Jail. The Respondent Ordered That Petitioner Would Received This Jail Credit But As To This Date The Error Has Not Been Corrected. Petitioner Was Incarcerated Within The Regional Jail From June 8, 1999 Until June 8, 2000. But As To This Date, He Has Not Been Given The Custody Jail Credit As Was Ordered By The Court**

**ISSUE - II**

2. **Petitioner Jackie D. Terry Was Been Denied His Rights Under Both The United States And West Virginia Constitutional To Due Process And Equal Protection Because He Was Not Given Custody Jail Credit For the Time that He Was Incarcerated Within The Regional Jail. His Effective Sentencing Date Was Order To Be Listed As June 8, 1999. But As To This Date He Has Been Denied His Custody Jail Credit. His Effective Sentencing Date Should Be June 8, 1999, Not June 8, 2000. Petitioner Is Petitioning the Court To Correct The Error.**

The above claims are 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>4</sup> The failure of the Respondent to act under the circumstances of this case is unreasonable as set forth in sufficient detail below.

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<sup>4</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.

#### IV. MEMORANDUM OF LAW

##### 1. THE UNREASONABLE DELAY OF SIX (6) 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.

#### V. 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).

##### a) The Legal Right

Petitioner Terry has an absolute legal right to timely consideration of his habeas corpus petition. 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>5</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

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<sup>5</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."

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 Terry has demonstrated his entitlement to habeas corpus relief as set forth within his Petition. The petition contains two (2) 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 Terry 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.).<sup>6</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

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<sup>6</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).

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>7</sup>

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

#### **b) 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 Terry's continued incarceration is a direct result of the Respondent Judge's failure to exercise his judicial power to rule upon the petition properly placed before him.<sup>8</sup> Petitioner Terry notified the Respondent Judge of the nature of the issues contained in the petition and he continues to ignore the matter.<sup>9</sup> 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

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<sup>7</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 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>8</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>9</sup> (Exhibit E October 12, 2005 and November 8, 2005)

corpus proceeding are processed expeditiously. 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>10</sup> 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 Terry 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:

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<sup>10</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 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).

"...[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).

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>11</sup>

### **c) 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 Terry asserts that this Mandamus is merely an auxiliary process in which to compel the Respondent Judge to act.<sup>12</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.

<sup>11</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)).

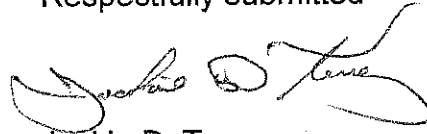
<sup>12</sup> See *State ex rel. Buxton v. O'Brien*, 97 W.Va. 343, 125 S.E. 154 (1924) (Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do in violation of their duty); *State ex rel. Cockowska v. Knapp*, 147 W.Va. 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).

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

**V. RELIEF REQUESTED**

The Petitioner, Jackie D. Terry, 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



Jackie D. Terry  
DOC#-32360 – Unit G-2  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, W.Va. 26273-0001

Petitioner proceeding *pro se*

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

IN THE SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

\_\_\_\_\_  
CHARLESTON, WEST VIRGINIA  
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STATE OF WEST VIRGINIA, EX REL.  
JACKIE D. TERRY,

Petitioner Below,

v.

**Civil Action No. 07-C-132 (H)**  
Underling Felony No. 99-F-49 (H)  
Honorable Jay M. Hoke, Judge


JAY M. HOKE, Judge  
25th Judicial Circuit for Lincoln County

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 Jay M. HOKE, Judge  
25<sup>th</sup> Circuit Court for Lincoln County  
Lincoln County Courthouse  
8000 Court Avenue  
Post Office Box No. 497  
Hamlin, West Virginia 25523

  
\_\_\_\_\_  
Jackie D. Terry  
DOC#-32360 – Unit G-2  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, W.Va. 26273-0001

Petitioner proceeding *pro se*

## **CERTIFICATION OF SERVICE**

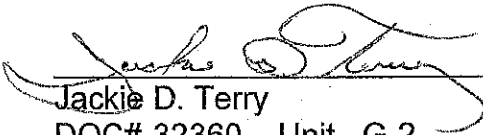
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I, Jackie D. Terry (DOC#-32360), Petitioner herein, do hereby certify that I have served a true copy of the foregoing "Petition for Writ of Mandamus," within the pending case (Civil Action No. 07-C-132 (H)) before the Supreme Court of Appeals upon the following persons by depositing said copy in the United States Mail with First Class Postage prepaid on this 11<sup>th</sup> of February 2008, addressed as follows;

TO: Honorable Jay M. Hoke, Judge  
25<sup>th</sup> Circuit Court for Lincoln County  
Lincoln County Courthouse  
8000 Court Avenue  
Post Office Box No. 497  
Hamlin, West Virginia 25523

TO: Honorable, Charles Brumfield, Clerk  
Circuit Court Clerk for Lincoln County  
Lincoln County Courthouse  
8000 Court Avenue  
Post Office Box No. 497  
Hamlin, West Virginia 25523

TO: Mr. Rory L. Perry, II, Esq.  
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

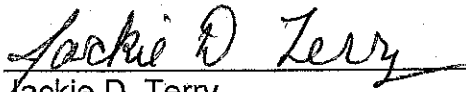
  
\_\_\_\_\_  
Jackie D. Terry  
DOC#-32360 – Unit –G-2  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, W.Va. 26273-0001

**VERIFICATION**

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

I, Jackie D. Terry, the Appellant within the forgoing "Petition for Writ of Mandamus" being filed with the West Virginia State Supreme Court of Appeals, from the Circuit Court of Lincoln County, within Civil Action No. 07-C-132 (H), 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.

  
\_\_\_\_\_  
Jackie D. Terry  
DOC#-32360 – Unit G-2  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, W.Va. 26273-0001

Subscribed and sworn to before me this 9th day of February, 2008.

My Commission expires March 15, 2010

  
\_\_\_\_\_  
Notary Public



# EXHIBIT

A

07.C.132

IN THE CIRCUIT COURT OF LINCOLN COUNTY  
HAMLIN, WEST VIRGINIA

STATE OF WEST VIRGINIA, EX REL.,  
JACKIE D. TERRY

Petitioner,

v.

Criminal Action No. 99-F-49  
25<sup>th</sup> Judicial Circuit for Lincoln County  
(Honorable Jay M. HOKE, Judge)

TERESA WAID, Warden  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, West Virginia 26273-0001

Respondent.

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LINCOLN CO., W.V.

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PETITION FOR WRIT  
OF  
MANDAMUS

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Petitioner Jackie D. Terry Is Entitled To His Custody Jail Credit For The Time He Served Within The Regional Jail As Was Ordered By This Court. Petitioner Was Incarcerated From June 8, 1999 Until June 8, 2000. As To This Date, Petitioner Has Not Been Given The Custody Jail Credit As Was Ordered By This Court

It Is The Claim Of Petitioner Terry That He Has Been Denied His Rights Under Both United States And West Virginia Constitutional Due Process And Equal Protection Because His Effective Sentencing Date Should Be Listed As June 8, 1999, And Not June 8, 2000.

Jackie D. Terry  
DOC#-32360 - Unit -G-2  
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IN THE CIRCUIT COURT OF LINCOLN COUNTY  
HAMLIN, WEST VIRGINIA

STATE OF WEST VIRGINIA, EX REL.,  
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(Honorable Jay M. HOKE, Judge)

TERESA WAID, Warden  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, West Virginia 26273-0001

Respondent.

**I. INTRODUCTION**

Come now, Petitioner **Jackie D. Terry** (hereinafter petitioner Terry (or) Mr. Terry) and respectfully moves this Honorable Court for the issuance of a *Writ of Mandamus* against the Respondent. This Court should grant mandamus relief herein based upon the Respondent's failure to grant him his custody jail credit. On June 8, 2000 this Court Ordered that Mr. Terry be given credited for all custody jail time that he served within the Regional Jail. (*See Petitioner's Exhibit A*).

Mr. Terry has been denied his custody jail credit as can more clearly be seen from (*Petitioner's Exhibit B*) which is an authorized time sheet from the West Virginia Division of Corrections). This exhibit clearly verifies the fact that Mr. Terry has not been given credit for his custody jail credit. The Effective Sentence

date is June 6, 2000. This Court Order the Effective Sentencing date to be June 8, 1999. As to this date, the Commitment Order has not been corrected.

On January 5, 2007 counsel (*H.C.Woods, Jr.*) for Mr. Terry represented unto this Court that the original sentencing Order and Commitment Order as entered on June 8, 2000 failed to Order that Mr. Terry be given custody jail credit for the time spent in confinement by him at the Regional Jail beginning on June 8, 1999. Mr. Terry claims that he is entitled to custody jail credit for all such time served as a mater of law. (*See Petitioner's Exhibit C.*)

On December 2, 2003, this Court clearly stated;

"This court finds that the original sentencing order was incorrect but that the order was modified by court order prepared by [petition's counsel, Richard Thompson, enter on the 24<sup>th</sup> day of September, 2002 and that the petitioner was given credit for time served."  
(*See Petitioner's Exhibit D.*)

This is an incorrect and inaccurate statement by the Court. As can be more clearly seen by (*Petitioner's Exhibit A*) Sentencing Court Commitment Order) and (*Petitioner's Exhibit B*) Authorized Time Sheet from the Division of Corrections) both of this documents clearly verify that Mr. Terry has been denied his custody jail credit beginning on June 8, 1999 until the present date.

Mr. Terry has been denied his custody jail credit from June 8, 1999 to June 8, 2000. Approximately one (1) years custody jail credit was taken from Mr. Terry. The West Virginia Division of Corrections still has the Effective Sentencing Date as June 8, 2000 and not June 8, 1999 as was ordered by this Court. (*See Petitioner's Exhibit B.*)

## **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**

The history of this case is as following. Within the Sentencing Court Commitment Order (*Petitioner's Exhibit A*) the following dates were listed;

Conviction date: June 8, 2000;  
Sentence Date: June 8, 2000 and  
**Effective Sentence Date:**

The Sentencing Court Commitment Order (*Petitioner's Exhibit A*) clearly fails to states the Effective Sentencing date in this case.

The basis of Mr. Terry's complaint is that his Effective Sentencing Date should be **June 8, 1999**. It is clear error to deny Petitioner his custody jail credit.

#### **IV. POINTS AND AUTHORITIES**

1. Article III, Section 5 of the West Virginia Constitution provides, in pertinent part, "Nor shall any person, in any criminal case . . . be twice put in jeopardy of life or liberty for the same offence."
2. Amendment V of the United States Constitution provides, in pertinent part: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb[.]"
3. The double jeopardy provision of the 5th Amendment is enforceable against the states by the 14th Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056 (1969) and *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072 (1969), protects a second prosecution for the same offense after conviction.
4. This Court held in computing the new sentence, the Constitution requires that custody jail credit must be given for time served under the original sentence. *Martin v. Leverette*, 161 W.Va. 547, 244 S.E.2d 39 (1978).

#### **V. 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).

## **VI. MEMORANDUM OF LAW**

- 1. Petitioner Jackie D. Terry Is Entitled To His Custody Jail Credit For The Time He Served Within The Regional Jail As Was Ordered By This Court. Petitioner Was Incarcerated From June 8, 1999 Until June 8, 2000. As To This Date, Petitioner Has Not Been Given The Custody Jail Credit As Was Ordered By This Court**
- 2. It Is The Claim Of Petitioner Terry That He Has Been Denied His Rights Under Both United States And West Virginia Constitutional Due Process And Equal Protection Because His Effective Sentencing Date Should Be Listed As June 8, 1999, And Not June 8, 2000.**

The Petitioner Terry asserts that he should have received credit for custody jail credit from June 8, 1999 until the present date. In support of his assertion, the Petitioner Terry relies upon this Court's holding in Syllabus Point 1 of Martin v. Leverette, 161 W. Va. 547, 244 S.E.2d 39 (1978) which states that,

The Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that credit for time spent in jail, either pre-trial or post-trial, shall be credited on an indeterminate sentence where the underlying offense is bailable.

In State ex rel. Roach v. Dietrick, 185 W. Va. 23, 25 n.5, 404 S.E.2d 415, 417 n.5 (1991), our State Supreme Court explained the reasoning for requiring that a defendant be given credit for time served while awaiting trial and/or sentencing:

Constitutional protections are implicated because a person who is unable to make bail will be incarcerated before trial. If such person is not given credit for the jail time, a longer period of incarceration will occur than for the person who commits the same offense but is released on pretrial bail.

The decision of this court squarely conflicts sharply with our State Supreme Court holding in Martin v. Leverette, 161 W.Va. 547, 244 S.E.2d 39 (1978), which held in computing the new sentence, the Constitution requires that custody jail credit must be given for time served under the original sentence. The double jeopardy and equal protection clauses of the W.Va. Constitution Article III, Section 10 and 17 clearly states that custody credit shall be credited on the sentence. In reaching this conclusion, the Court took guidance from federal courts. In Syllabus Point 1 of *Martin*, the Court held:

“[t]he Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution *require* that credit for the time spent in jail, either pre-trial or post-trial, *shall* be credited on an indeterminate sentence where the underlying offense is bailable.” (emphasis added).<sup>1</sup>

Defendant Martin argued that credit for time served must be mandatory in light of the principles stemming from *Pearce*, *Haynes*, and *Davis*. The Court agreed and stated:

“We recognize that while these cases are based on the United States Constitution, we are of the view to anchor the right to such credit on the provisions of our own constitution.”

The West Virginia State Supreme Court concluded that it was error for the trial court not to give the defendant *Martin* credit for time served. The *Martin* case is similarly unambiguous on the issue and directs the trial courts to credit a criminal defendant for the time spent in custody and is now a mandate in West Virginia.

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<sup>1</sup> Although the holding in *Martin* only referred to indeterminate sentence, the Court later explained that the rule announced in *Martin* applied equally to determinate sentence since the same constitutional concerns are raised. State ex rel. Roach v. Dietrick, 185 W.Va. 23, 25 n.5, 404 S.E.2d 415, 417 n.5 (1991).

The double jeopardy provision of the *5th Amendment* is enforceable against the states by the 14th Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056 (1969) and *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072 (1969), protects a second prosecution for the same offense after conviction.

The decision of the lower court squarely conflicts with the U.S. Supreme Court's holding in *North Carolina v. Pearce*,<sup>2</sup> 395 U.S. 711, 89 S. Ct. 2072 (1969), which held that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully "credited" in imposing sentence upon a new conviction for the same offense. Accord *Vickers v. Haynes*, 539 F. 2d 1005 (4<sup>th</sup> Cir 1976); *Durkin v. Davis*, 538 F. 2d 1037 (4<sup>th</sup> Cir, 1976).

How is a circuit judge to apply credit for the time spent so incarcerated? Is it discretionary with the Judge when there are two consecutive sentences as to which sentence the court imposes as running first? Does it matter that one of the sentences is a jail offense and one a penitentiary offense?

Petitioner Terry would cite *State v. Scott*, 214 W.Va, 1, 585 S.E. 2d 1 (2003) which held similarly in that a defendant had been sent to the Anthony Center and the Court was required to give credit for the time spent so incarcerated. This Court ruled that a youthful offender who has been sentenced to the Anthony Center, released, placed on probation and then had said

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<sup>2</sup> Pearce was convicted of assault with intent to commit rape and was sentenced to a term of 12 to 15 years in prison. His conviction was overturned several years later upon the ground that an involuntary confession had been unconstitutionally admitted in evidence against him. Pearce was retried, convicted and sentenced to an 8 year prison term which, when added to time he had already served on the original conviction, amounted to a longer total sentence than that originally imposed.

probation violated, cannot be sentenced to a greater sentence than he would have received if he had been sentenced originally as an adult. Therefore, in the case at hand the Respondent could not increase his sentence. Echard v. Holland, 177 W.Va. 138, 351 S.E. 2d 51 (1986) only applied to good time credit.

Justice Davis's dissent in both *Echard* and *Scott*.

In *Scott*, Justice Davis states:

- 1) The disposition of this case was controlled by the prior decision of this Court in Echard v. Holland, 177 W.Va. 138, 351 S.E. 2d 51 (1986). In *Echard*, the defendant was sentenced in Ritchie County to a term of five to eighteen years. He was also sentenced in Wood County to a term of five to twenty-three years. The Wood County sentence was ordered to run consecutively with the Ritchie County sentence. The defendant eventually filed a habeas corpus petition in circuit court challenging how good time credit (fn2) was awarded him while in prison. The defendant alleged that his minimum discharge date had been incorrectly calculated because good time credit was improperly being distributed between his consecutive sentences. The circuit court disagreed and dismissed the petition. The defendant appealed.
- 2) While the particular issue in *Echard* involved how good time credit was awarded, to resolve the issue of defendant's minimum discharge date, the *Echard* Court had to first determine the amount of credit earned by the defendant for time served prior to imposition of his two sentences. (fn3) After determining the amount of credit for time served by the defendant prior to imposition of his two sentences, as well as the total amount of possible good time, the Court established the following formula for determining how credit was to be distributed when consecutive sentences are imposed:
  - 3) The maximum terms of the consecutive sentences, determinate or indeterminate, must first be added together to determine the inmate's maximum discharge date. It is from this maximum discharge date that all pre-sentence and good time deduction must be made in order to establish the inmate's minimum discharge date. (fn4) *Echard*, 177 W.Va. at 143, 351 S.E. 2d at 56-57 (emphasis added. (fn5).
  - 4) Under the decision in *Echard*, in cases involving consecutive sentences, credit for time served prior to sentencing is to be applied to and deducted from the aggregate of the maximum terms of the

sentences. The ruling in *Echard* is consistent with the general rule throughout the country.

- 5) However, the syllabus point fails to explain exactly how credit for time served should be awarded. This is where the Court's prior decision in *Echard* should have been applied. Instead, however, the majority opinion chose to elaborate on the application of its syllabus point in footnote 11. (fn7).

Therefore, *Scott* appears to stand for the proposition that when there are two consecutive penitentiary sentences the court must apportion the time spent so that the defendant is eligible to see the parole board at the earliest possible time on each offence. But since the language of the case does not specifically say that, is that a correct interpretation? This case raised more issues than it answered.

The parties disputed whether and how, under W.Va. Code, § 25-4-5 [2001], a circuit judge must apply credit for a young defendant's prior time served, when the circuit judge is sentencing the defendant to consecutive terms in prison after the defendant successfully completed a program of rehabilitation at a young adult offender center, was placed on probation, and such probation is being revoked. The focus of the parties in their argument and the court's decision was whether the jail credit should be applied to the front or the back end of the sentences and not necessarily on which individual sentence the credit would be applied. *Scott* argued the credit must be applied by the circuit judge to reduce the defendant's minimum sentence that must be served before the defendant is eligible for parole; the State argued the credit must be applied by the Parole Board to reduce the defendant's maximum sentence, the total period spent in prison.

Petitioner Terry does not argue that he has a right to parole; instead that he has a right to timely appear before the Parole Board and state his case and case law concludes that "the Parole Board has a constitutional obligation to grant each prisoner eligible for parole "a timely and meaningful hearing."

Therefore, Petitioner Terry was denied his rights under both United States and West Virginia Constitutional due process and equal protection clause.

## **VII. 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 Terry asserts that this Mandamus is merely an auxiliary process in which to compel the Respondent Judge to act.<sup>3</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

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<sup>3</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).

*mandamus* to compel the performance of such duty will specify the exact mode of performance.

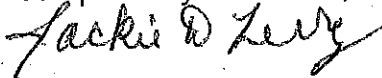
Accord State ex rel. Dillon v. Egnor, 188 W.Va. 221, 228, 423 S.E.2d 624, 631 (1992) (MILLER, J.). There is no other adequate remedy available to Petitioner Terry, at this stage of the proceedings, to compel the Respondent Judge to act. Mandamus relief is, therefore, proper.

### **VIII. RELIEF REQUESTED**

Wherefore, Petitioner Terry is petitioning this Honorable Court to GRANT his petition for Writ of Mandamus and Order the Sentencing Court Commitment Order (*Petitioner's Exhibit A*) to be corrected to clearly state the Effective Sentencing Date to be June 9, 1999.

FOR this action Petitioner shall ever pray.

Respectfully submitted,

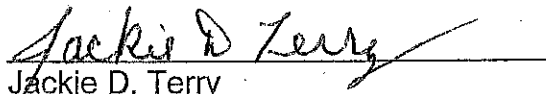


Jackie D. Terry  
DOC#-32360 – Unit G-2  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, W.Va. 26273-0001

**CERTIFICATION OF SERVICE**

I, Jackie D. Terry, DOC#-32360, Petitioner herein, does hereby certify that he have served a true copy of the foregoing "Petition for Writ of Mandamus," upon the following persons by depositing said copy in the United States Mail with First Class Postage prepaid on this 28<sup>th</sup> day of August 2007, addressed as follows;

- TO: Honorable Jay M. HOKE, Judge  
25<sup>th</sup> Circuit Court for Lincoln County  
Lincoln County Courthouse  
8000 Court Avenue  
Post Office Box No. 497  
Hamlin, West Virginia 25523
- TO: Honorable, CLERK  
Circuit Court Clerk for Lincoln County  
Lincoln County Courthouse  
8000 Court Avenue  
Post Office Box No. 497  
Hamlin, West Virginia 25523
- 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

  
\_\_\_\_\_  
Jackie D. Terry  
DOC#-32360 - Unit -G-2  
Huttonsville Correctional Center  
Post Office Box No. 1  
Huttonsville, W.Va. 26273-0001



# EXHIBIT

A

IN THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

FELONY INDICTMENT NO. 99-F-49

vs.

JACKIE DANE TERRY

RECEIVED  
MAR 23 2001  
WV DIV OF CORRECTIONS

On this 8TH day of JUNE, 2000 came the Attorney for the State and the Defendant appearing in person and represented by WILLIAM LESTER & SHAWN BAYLISS.

It is ADJUDGED that the Defendant has been convicted/found guilty by a jury/upon plea of guilty, of the offense(s) charged:  
"MURDER IN THE SECOND DEGREE"

And the Court having asked the Defendant whether he/she has anything to say why judgement should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It is ADJUDGED that the Defendant is guilty as charged and convicted.

It is ADJUDGED that the Defendant is hereby committed to the custody of the Warden of the West Virginia Penitentiary or his authorized representative for imprisonment for a period of :  
FOR A DETERMINATE TERM OF THIRTY (30) YEARS WITH CREDIT FOR TIME SERVED  
IN ALL SUCH FACILITIES OF THE WEST VIRGINIA DEPARTMENT OF CORRECTIONS

CONVICTION DATE: JUNE 8, 2000

SENTENCE DATE: JUNE 8, 2000

It is ADJUDGED that: THAT THE DEFENDANT BE TRANSPORTED TO THE SOUTH CENTRAL REGIONAL JAIL AND REMAIN THERE UNTIL SUCH TIME, AS DETERMINED BY THE WEST VIRGINIA DEPARTMENT OF CORRECTIONS, WHEN THE DEFENDANT MAY CONVENIENTLY BY TRANSFERRED AND TRANSPORTED TO THE NEXT DESIGNATED HOLDING FACILITY.

It is ORDERED that the Clerk forthwith transmit this record, duly certified, of the Judgement and commitment to the Warden of the West Virginia Penitentiary and that this record serve as the commitment of the Defendant.

LINCOLN COUNTY,

E. LEE SCHWAEGL, SR.

~~RAYMOND~~

JUDGE

GREG STOWERS

CLERK

SANDRA LIKENS

DEPUTY CIRCUIT CLERK

SIGNATURES  
E. Lee Schwaegele, Sr.  
JUDGE

Greg Stowers  
CLERK

Sandra Likens  
DEPUTY CIRCUIT CLERK

A TRUE COPY certified this 14TH day of DECEMBER, 2000

(SEAL)

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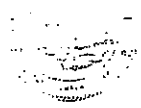
# EXHIBIT

## B

BOB WISE  
GOVERNOR

JOE MARTIN  
CABINET SECRETARY

F. DOUGLAS STUMP  
CHAIRMAN



WEST VIRGINIA PAROLE BOARD  
112 California Avenue, Room 307  
Charleston, West Virginia 25305-0700  
Telephone (304) 558-6366  
Fax Number (304) 558-5678

BOARD MEMBERS

PEGGY J. POPE

BENITA F. MURPHY  
MEMBER/SEC.

FREDERICK R. BUMGARDNER

CHRISTIE LOVE

DATE: September 11, 2003

INMATE NAME: Terry, Jackie

INMATE NUMBER: DOC# 32360

CRIME: 2nd Deg. Murder

SENTENCE: 30 yrs

EFFECTIVE SENTENCE DATE: 6-8-00

PAROLE ELIGIBILITY DATE: 6-8-10

COMMENTS: THE ABOVE PED IS BASED ON THE INFORMATION CONTAINED IN YOUR SENTENCE COMMITMENT ORDER (S) RECEIVED PRIOR TO YOUR INTAKE INTO THE WEST VIRGINIA DIVISION OF CORRECTIONS' SYSTEM. YOUR PED MAY BE ADJUSTED IF ADDITIONAL OR AMMENDED COURT ORDERS ARE RECEIVED, IF YOU ESCAPE FROM DOC'S CUSTODY, OR IF YOU RECEIVE WRITE-UPS IN THE MONTH OF YOUR SCHEDULED PAROLE INTERVIEW OR IN THE THREE MONTHS PRIOR THERETO.

AUTHORIZED BY: F. DOUGLAS STUMP, Chairman

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CC: RECORDS CLERK - MOCC  
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PAROLE OFFICER

# EXHIBIT

C

IN THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

vs.

Case No. 99-F-49

JACKIE DANE TERRY,

Defendant.

AMENDED SENTENCING ORDER

On the \_\_\_\_ day of \_\_\_\_\_, 2006, came the Defendant, by \_\_\_\_\_ and through his attorney, H. C. Woods, Jr., and appeared the State, by W. Jack Stevens, II, the Prosecuting Attorney of this County, all before the Honorable E. Lee Schlaegel, Jr., Chief Judge of the Twenty-fifth Judicial Circuit.

WHEREUPON, counsel for Defendant represented unto the Court that the original sentencing Order and Commitment as entered herein failed to give the Defendant credit for the time spent in confinement by him at the Regional Jail. Counsel for Defendant maintained that the Defendant is entitled to credit for all such time served as a matter of law. The Attorney for the State did not object to said motion.

WHEREFORE, after mature consideration of the matter, the Court does see fit to GRANT said motion and does hereby ORDER that the Defendant shall be given credit off his sentence for all time spent by him in the Regional Jails of this State, both before trial and after trial while awaiting transfer to the custody of the Department (Division) of Corrections.

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BOONE COUNTY  
CIRCUIT CLERK  
COURT HOUSE



# EXHIBIT

D

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

JACKIE D. TERRY,

Petitioner,

VS.

Case No. 01-C-124

LEE FREDERICK, Warden

Respondent.

ORDER OF DENIAL OF WRIT OF HABEAS CORPUS

This *Petition for Writ of Habeas Corpus Ad Subjiciendum* came before this court on the 3<sup>rd</sup> day of October, 2001. Petitioner filed an appeal alleging that he was denied due process due to 1) prejudicial statements of prosecuting attorney and defense counsel and 2) failure to strike two jurors for cause; the petitioner also alleged that there was insufficient evidence. This petition for appeal was denied on the 10<sup>th</sup> day of May, 2001. This *Petition* alleges 1) denial of effective assistance of counsel and 2) a belief that the pre-sentence report and sentencing order were incorrect.

This court finds that there was effective assistance of counsel according to State ex. rel. Daniel v. Legursky 195 W.Va. 314 (1995), which requires a reasonable investigation. Counsel, Mr. Lester, hired Capital City Investigations and Blue Moon Investigations, Inc., who compiled reports based on witness statements, background information, and information regarding interviews conducted.

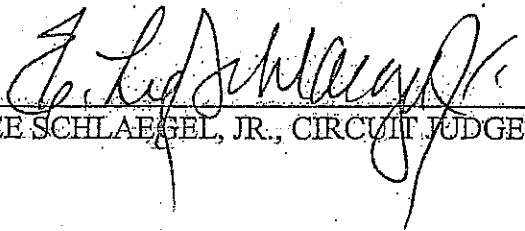
This court finds that because several witnesses not called to testify had recanted their statements or refused to testify that Mr. Lester's actions in not calling such witnesses was objectively reasonable, as required by State ex. rel. Leach v. Hamilton 179 S.E.2d 420 (1981).

This court finds that the original sentencing order was incorrect but that the order was modified by court order prepared by petitioner's counsel, Richard Thompson, entered on the 24<sup>th</sup> day of September, 2002 and that the petitioner was given credit for time served.

This court finds that all other grounds, including the characterization of the law of self-defense and retreat of Jury, fall under the category of strategy, which is governed by an objectively reasonable standard. The actions taken in this case are objectively reasonable.

The petition for writ of habeas corpus is hereby DENIED, all of which is ADJUDGED, ORDERED, AND DECREED.

ENTERED this the 2<sup>nd</sup> day of December, 2003.

  
E. LEE SCHLAEGEL, JR., CIRCUIT JUDGE

CERTIFIED A TRUE COPY OF AN ORDER	
Entered	<u>DUTY ENTERED IN</u> 20 <u>03</u>
Order Book #	Page
<u>60</u>	<u>60</u>
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<u>Ry. Stone</u>	
<u>Ry. Stone</u>	Circuit Clerk Lincoln Co. W. CLERK