

In the Supreme Court of the State of Nevada

NO. 60040

FRANK M. PECK,
Petitioner,

CASE No. CR-96-P-2687

Dept No. 6

VS.

Docket No. ~~57958~~

The Second Judicial District Court
of the State of Nevada, IN AND
for the County of Washoe,

FILED

JAN 13 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

Respondent.

Petition For Writ of Mandamus

Comes Now, Petitioner, FRANK M. PECK in proper person, respectfully moves this Honorable Court to issue A Petition for Writ of Mandamus to Mandate the Lower Court to Act on Petitioner's pending Petition for Writ of Habeas Corpus Post-Conviction relief, that, "this court previously directed to 'expeditiously examine' in its Order denying rehearing filed on September 15, 2011."

This Motion is made and based upon All papers and pleadings on file in this case as well as the attached Points and Authorities Ed NRS 34.150, NRS 34.310, NRAP rule 21. NRS 34.160, 34.170

RECEIVED

JAN 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

12-01353

Points and Authorities

Statement of Facts

In this Courts Order Denying Rehearing dated/ Filed on September 15th, 2011, footnote #1 "directed the District Court to 'expeditiously examine' the 2008 petition NRS 34,740. please see attached copy of Order Filed on Sep 15, 2011.

Petitioner filed his original petition on August 7th 2008 and a request for submission on August 13th 2009. The District Court dismissed the first Amended petition on Feb 9th 2011.

LEGAL Argument

To justify the issuance of a writ of Mandamus to enforce the performance of an act by a public officer, two things must occur: (1) The act must be one the performance of which the law especially enjoins as a duty resulting from an office, and (2) there must be an actual omission on the part of the respondent to perform it. State ex rel. Piper v. Gray, 11 Nev. 223, 1876 Nev. Lexis 27 (1876); State ex rel. Lawton v. Public Serv. Comm'n, 44 Nev. 102, 190 P. 284, 1920 Nev. Lexis 14 (1920).

Mandamus is ordinarily a remedy for official inaction. State ex rel. Lawton v. Public Serv. Comm'n. 44 Nev. 102, 190 P. 284, 1920 Nev.

Id

Mandamus is proper remedy to compel performance of a judicial act when there is no plain, speedy, and adequate remedy at law in order to compel the performance of an act which the law requires as a duty resulting from office. Smith v. Eighth Judicial District Court ex rel. County of Clark, 107 Nev. 674, 818 P.2d 849 (Nev 1991).

Id

An actual default or omission of duty is just as essential a prerequisite to the issuance of the writ of mandamus as is the want of an adequate remedy in the ordinary course of law. State ex rel. Piper Supra.

Id

The writ of mandamus lies to compel an inferior tribunal or board to exercise its judgment and render a decision where a failure of justice would otherwise result from delay or refusal to act. State ex rel. Hetzel v. Board of Comm'rs, 8 Nev. 309, 1873 Nev. Lexis 25 (1873).

Conclusion

Petitioner has waited a reasonable amount of time after this Court directed the District Court to expeditiously examine Petitioner's Petition.

Petitioner has satisfied the two prong requirement set forth in Piper v. Gracey Supra and fears that if this Honorable Court denies the instant Petition that it will be years before a decision is rendered.

Omission in this case exists, as the District Court has not expeditiously examined Petitioner's Petition as Directed by this Court on September 15th, 2011. It is for these reasons that this Honorable Court should GRANT Petitioner's Petition and mandate the lower Court to render a decision.

Dated this 9th day of Jan 2012.

Respectfully submitted

Frank M. Peck

Frank M. Peck 57106

HDSP Box 650

Indian Springs, NV. 89070

Petitioner, prose.

State of Nevada

County of Washoe ^{ss} Affidavit of Frank M. Peck


I Frank M. Peck do hereby swear under penalty of perjury that:

1. I am the Petitioner in Supreme Court of Nevada case no 57968.
2. I bring the attached Petition for Writ of Mandamus in good faith and for no improper reason.
3. All assertions are based on personal knowledge and that I am competent to testify to all matters contained therein.

Further Affiant Siyeth Naught

Dated this 23rd day of December 2011.

Signed under penalty of perjury NRS 208.165 and 28 USC ^{ss} 1746.



Frank M. Peck 57106

HDSP Box 650

Indian Springs, NV. 89070

Petitioner, please.

Certificate of Service and Affirmation

Pursuant to NRS 239 B 030 the Attached
Petition for writ of Mandamus does not
contain the social security numbers of
any person and a true and correct copy
was mailed to:

Second Jud Dist Court
75 Court Street
RENO NV 89501

District Attorney
75 Court Street
RENO NV 89501

Attorney General
100 N. Carson Street
Carson City, NV. 89701

Dated this 9th day of JAN 2012.

Signed under penalty of perjury 28 USC § 1746.

Frank M. Peck

Frank M. Peck 57106

HDSP Box 650

Indian Springs, NV. 89070

Petitioner, pro se.

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK MILFORD PECK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57968

FILED

SEP 15 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *H. Anderson*
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).¹

It is so ORDERED.

Saitta

Saitta

C.J.

Hardesty

Hardesty

J.

Parraguirre

Parraguirre

J.

¹This court's order of affirmance filed on July 15, 2011, disposed only of appellant's proper person petition for a writ of habeas corpus filed on April 28, 2010. We note that appellant had filed in the district court a proper person post-conviction petition for a writ of habeas corpus on August 7, 2008, and a request for submission on that petition on August 13, 2009. However, it appears that the district court has never disposed of the 2008 petition. We direct the district court to expeditiously examine the 2008 petition. NRS 34.740.

Appellant's motion for enlargement of time to file a petition for rehearing ("motion") was received on July 27, 2011. Appellant's petition for rehearing was received on August 1, 2011. We direct the clerk of this court to file the motion. Good cause appearing, we grant appellant's motion and direct the clerk of this court to file the petition for rehearing.