

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**Alvin Lee Gregory,  
Plaintiff below, Petitioner**

vs) **No. 11-1654** (Kanawha County 03-C-1993)

**West Virginia Division of Corrections and the  
West Virginia Parole Board  
Defendants below, Respondents**

**FILED**

February 11, 2013  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

Petitioner Gregory's appeal, filed *pro se*, arises from the Circuit Court of Kanawha County, wherein his petition for writ of habeas corpus was denied by order entered on January 31, 2005. The Circuit Court of Kanawha County subsequently entered an order on October 28, 2011, which denied various motions filed by petitioner.<sup>1</sup> Respondents West Virginia Division of Corrections and West Virginia Parole Board, by counsel John H. Boothroyd, filed a response in support of the circuit court's decision.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

In 1975, petitioner was sentenced to life in prison with mercy following his guilty plea to first degree murder. In May of 1990, petitioner was released following his grant of parole. That November, petitioner was arrested for breaking and entering, of which he failed to notify his parole officer. Petitioner's parole was revoked in 1991 and he returned to prison. He was later convicted by jury of the breaking and entering charge. Following petitioner's return to prison, he had various write-ups, such as for assault, battery, and contraband. He refused to comply with pre-parole hearing reports and was repeatedly denied parole. Petitioner filed a petition for writ of habeas corpus in 2004 and the circuit court held an evidentiary omnibus hearing on this petition. In 2005, the circuit court entered its order that denied petitioner's petition for writ of habeas corpus. Petitioner subsequently filed various motions in circuit court, all of which the circuit court denied and in doing so, referenced its prior order of 2005 that denied petitioner habeas relief. Petitioner appeals.

This Court reviews appeals of circuit court orders denying habeas corpus relief under the following standard:

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<sup>1</sup> Namely, these motions were for a new trial, to vacate judgment, to reopen the case and for leave to file amended petition for writ of habeas corpus ad subjiciendum, for hearing or for judgment, and a separate motion for judgment.

“In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.” Syllabus point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 701 S.E.2d 97 (2009).

We also bear in mind the following:

A prior omnibus habeas corpus hearing is *res judicata* as to all matters raised and as to all matters known or which with reasonable diligence could have been known; however, an applicant may still petition the court on the following grounds: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law, favorable to the applicant, which may be applied retroactively.

Syl. Pt. 4, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981).

On appeal, petitioner raises five assignments of error, four of which were initially raised in circuit court and addressed by the circuit court in its 2005 order. Petitioner’s first assignment of error on appeal argues that the circuit court erred when it failed to find West Virginia Code of State Rule 90-2 (1989) as null, void, and unenforceable as a matter of law. This issue is not reviewable on appeal, however, because it was not raised below and does not satisfy any of the permissible grounds as discussed in Syllabus Point 4 of *Losh v. McKenzie*.<sup>2</sup> Having reviewed the circuit court’s “Order” entered on October 28, 2011, which references its “Final Order” entered on January 31, 2005, we hereby adopt and incorporate the circuit court’s well-reasoned findings and conclusions as to the assignments of error raised in this appeal.<sup>3</sup> The Clerk is directed to attach a copy of the circuit court’s orders to this memorandum decision.

For the foregoing reasons, we affirm the circuit court’s decision denying habeas corpus relief.

Affirmed.

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<sup>2</sup> Petitioner’s first footnote in his appellate brief incorrectly states that this Court granted review of his first assignment of error. However, the dated order he referenced concerned a separate matter.

<sup>3</sup> Aside from petitioner’s first assignment of error referenced in the preceding footnote, petitioner also argues that West Virginia Code of State Rule 90-2 (1989) violates *ex post facto* law, the revocation of his parole for an indeterminate period violates proportionality principles, the Parole Board violated its own rules in the revocation of his parole period, and the disciplinary violations that were filed against him were void.

**ISSUED:** February 11, 2013

**CONCURRED IN BY:**

Chief Justice Brent D. Benjamin  
Justice Robin Jean Davis  
Justice Margaret L. Workman  
Justice Menis E. Ketchum  
Justice Allen H. Loughry II