

ARKANSAS SUPREME COURT

No. CR 08-1172

HAROLD EDWARD CHISM
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered March 5, 2009

PRO SE PETITION FOR WRIT OF MANDAMUS; PRO SE MOTIONS FOR HEARING, FOR APPOINTMENT OF COUNSEL, FOR COUNSEL AND MEMORANDUM OF LAW, FOR EXPANSION OF BRIEF PAGE LIMIT, FOR PERMISSION TO PROCEED, AND FOR DUPLICATION OF BRIEF AT STATE EXPENSE [CIRCUIT COURT OF WASHINGTON COUNTY, CR 91-413, HON. WILLIAM A. STOREY, JUDGE]

PETITION DENIED; APPEAL DISMISSED; MOTIONS MOOT.

PER CURIAM

Appellant Harold Edward Chism, an inmate in custody of the Arkansas Department of Correction in Jefferson County, filed a petition in the court in which his convictions were entered seeking a writ of habeas corpus under Act 1780 of 2001 Acts of Arkansas, codified as Arkansas Code Annotated §§ 16-112-201 – 16-112-208 (Repl. 2006), which the court dismissed. Appellant subsequently filed a number of additional pleadings related to that petition, which the trial court also denied and dismissed. Appellant appealed the two orders to this court, and he has now filed a petition for writ of mandamus and a number of motions related to the appeal. We deny the petition for writ of mandamus and dismiss the appeal. The remaining motions are therefore moot.

In his petition for writ of mandamus, appellant fails to clearly set forth the relief he seeks.

It is clear, however, that what he seeks is in conjunction with this appeal and it appears that the relief is in fact equivalent to relief sought under the appeal. The purpose of a writ of mandamus is to enforce an established right or to enforce the performance of a duty. *Manila School Dist. No. 15 v. Wagner*, 357 Ark. 20, 159 S.W.3d 285 (2004). A petitioner must show a clear and certain right to the relief sought, and the absence of any other adequate remedy when requesting a writ of mandamus. *Johnson v. Hargrove*, 362 Ark. 649, 210 S.W.3d 79 (2005). Here, appellant's remedy is his appeal and we therefore deny the petition for the writ.

As regards appellant's appeal, this court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (per curiam). Here, it is clear that appellant's petition was not timely filed in the trial court and did not state a cause of action under Act 1780.

A petitioner who seeks a writ of habeas corpus and alleges actual innocence must do so in accordance with Act 1780. Ark. Code Ann. § 16-112- 103 (Repl. 2006). Under section 16-112-201, a petitioner must present a claim that scientific evidence establishing the petitioner's actual innocence was not available at trial or that the scientific predicate for the claim could not have been previously discovered through exercise of due diligence. The act requires a claim based upon scientific testing, and appellant's petition failed to state any such claim.

In addition, appellant's petition would not have been timely under Act 1780. Section 16-112-202(10) provides that a motion for relief under Act 1780 must be made in a timely fashion. Section 16-112-202(10) further provides for a rebuttable presumption against timeliness for any motion not made within thirty-six months of the date of conviction and lists five grounds by which the

presumption may be rebutted. To overcome the presumption against timeliness, a petitioner must establish, in the petition, one of the grounds listed in section 16-112-202(10)(B). *Douthitt v. State*, 366 Ark. 579, 237 S.W.3d 76 (2006) (per curiam). Appellant was convicted in 1991 and filed his petition more than sixteen years later. Appellant was required to rebut the presumption in his petition.

Under the act, a petitioner may establish that his petition is timely through a showing that incompetence substantially contributed to the delay, that the evidence to be tested is newly discovered, or that a new method of technology that is substantially more probative than prior testing is available. A petitioner may rebut the presumption based upon a claim that denial would result in manifest injustice, but may not do so solely through an assertion of his innocence. A petitioner can also rebut the presumption through other good cause. *See id.* Appellant's petition did not set forth any basis to rebut the presumption that his petition was untimely.

Because the trial court correctly dismissed appellant's Act 1780 petition, we dismiss the appeal. Appellant's motions are rendered moot by the dismissal.

Petition for writ of mandamus denied; appeal dismissed; motions moot.