

IN THE SUPREME COURT OF OHIO

State ex rel. John H. Mack Jr. *Pro Se*,

Relator, Plaintiff,

**Case No. 23-1201**

v.

Richland County Sheriff's Office, J. Steve Sheldon

Defendant (collectively, "the sheriff")

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MERIT BRIEF OF RELATOR, JOHN H. MACK JR.

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John H. Mack Jr. *Pro Se*, Appellant

#794-244 Allen Correctional Institution

2338 North West Street

Lima, Ohio 45802

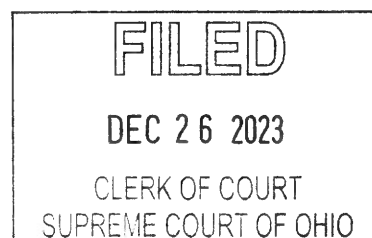
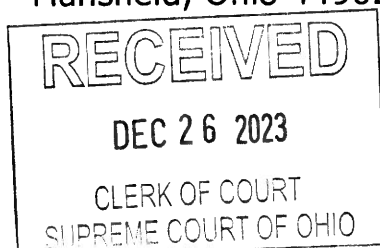
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## STATEMENT OF THE FACTS

On 2-25-2021 At approximately 1:17pm the Richland County Sheriff's Office responded to 592 Cliffside Drive in response to a missing person's report filed out of Shelby, Ohio. The Richland County Sheriff's Office contacted Ohio State Highway Patrol and had an *emergency exigent ping* done on the missing persons *two* cell phones that she was reported to be on her person. At approximately 2:00pm multiple Richland County Sheriff's Office deputies breached 592 Cliffside Drive residence with a key they waited for under the claim of exigent circumstances. Captain Donald Zehner discovered Relators iPhone 8 Plus during this initial sweep of the secure home. Detective Giovanni Masi arrived on scene at the Cliffside residence. The sheriff's department *repeatedly* searched the home and curtilage finding no sign of the reported missing person, no signs of anyone inside, and no signs of violence. The on scene Captain, Donald Zehner, and Major Joseph Masi fully aware of the missing persons cell phones were pinging miles away. Reports indicate Captain Donald Zehner sent Detective Giovanni Masi (a relative of Joseph Masi) to search for the missing person/cell phones/ or the black Volks Wagon Jetta.

Later that same day (shift change) Richland County Sheriff Deputy Morgan Scarberry was assigned to stay posted in front of 592 Cliffside in an effort to make contact with any traffic at the residence. All the other deputies left the area leaving Relators iPhone 8 Plus behind. Ultimately, few minutes after 7:00pm Richland County Sheriff Deputy Morgan Scarberry (ordered by Captain Donald Zehner) asked Whitney Mack (who was sitting in a car, in the driveway with Robyn Mack) to show her where Relators iPhone 8 Plus was within the 592 residence. Deputy Morgan Scarberry entered the 592 residence and removed/seized an iPhone 8 Plus belonging to Relator under the claim of "plain view" cloak. The iPhone 8 Plus controlled

two separate security systems KASA and ADT both live footage in addition to history footage for the interior/ exterior of the residence.

On 2-26-2021 a search warrant was issued for 592 Cliffside Drive Mansfield, Ohio 44904. During this search 3 Blue Makita Air Compressor boxes were seized that had the “shipping labels cut out of them”, Relator was charged with Receiving Stolen Property for these 3 boxes. Also on the 26<sup>th</sup> the iPhone 8 Plus/ORDER TO SEALSEARCH WARRANT signed by both detective Giovanni Masi, and J. Steve Sheldon (see: Exhibit aa page 7,9) Numerous search warrants were issued behind the iPhone 8 Plus search, and seizure. Two vehicles were seized, biological evidence, and a massive amount of personal property was seized between 2-25-2021 through 3-1-2021. Charges were filed, and a conviction was obtained. It is unclear exactly why certain items were seized or when. Relator was not present during the seizures.

On 2-27-2021 at 592 Cliffside Drive the Richland County Sheriff's Office served a search warrant drawn up by detective Giovanni Masi for suspected stolen Amazon property. Deputies seized and dismantled the homes surveillance system. This search warrant is when the bulk of the evidence was seized, including a blue 2019 Toyota Camry owned by Relator. The Toyota is not listed as an item seized. Richland County Sheriff detective Giovanni Masi has knowledge and participation in *both* matters.

Originally two separate cases were filed. Kidnapping and Receiving Stolen Property. The Kidnapping evolved into a 17 count death penalty murder indictment. The Receiving Stolen Property was dismissed. The State of Ohio later motioned the Court to drop (amend) the kidnapping charge (trade kidnapping for assault). The trial court never responded to the State of Ohio's motion. The seized evidence essentially disappeared before either case had an opportunity to go to trial. The computer hard drives, portions of the footage, cameras, and

personal property is missing from these seizures without explanation. The property was never released by the trial Court (see: Exhibit A page 11 and 12). The State of Ohio did not pursue forfeiture, nor was the property considered “contraband”. None of the evidence seized was confirmed “stolen”, or found to have been reported to be stolen.

This is Relator reasoning for seeking information for all the listed request. Richland County’s Sheriff’s Office entry into the home is currently under review in Case No. 2022 CA 0083 Fifth Appellate District. Appellate counsel has filed “ineffective assistance of appellate counsel” on himself in Relator direct appeal. Relator has made an attempt to obtain discovery material in an effort to proceed *Pro Se*.

### **Timeline of Events**

- 2-25-2021 1:17pm Richland County Sheriff’s Office arrives at 592 Cliffside Drive Mansfield, Ohio 44904 for a “welfare check.” (over 40 minutes pass)
- 2-25-2021 2:00 pm Richland County Sheriff’s Captain Donald Zehner and deputy Owen Ross (a relative of Captain Donald Zehner) breached a secured 592 Cliffside with a key provided by Relators ex-wife searching for a missing person, and discovered an iPhone 8 Plus on a table beside Relators bed. (over 5 hours pass)
- 2-25-2021 7:00 pm Richland County Sheriff’s Office reenters the home for the iPhone 8 Plus, the iPhone is seized off the living room couch and placed in “airplane mode”. (download shows activity on the iPhone less than an hour later)
- 2-26-2021 12:30am The iPhone 8 Plus had transferred custody from Richland County Sheriff to Shelby Police Department. Shelby Police Department applies for a search

warrant on the iPhone only for the 592 security videos. (download shows multiple logins for multiple websites “rummaging”)

- 2-26-2021 Exhibit d. page 20. Dawson, J. is assigned the case (not 2-25-2021 as reflected) Dawson gets a search warrant for 592 Cliffside, and another more expansive search of the iPhone 8 Plus. (this is the 1<sup>st</sup> search warrant sought for the 592 residence)
- 2-26-2021 2:15pm Numerous Richland County Sheriff Deputies were on scene at 592 Cliffside searching the property. The missing persons’ cell phones have been activity pinging miles away for 24 hours at this point-the phones, Volks Wagon, and missing person have not been located. While searching the residence boxes of new items are discovered in “plain view”, and another search warrant is sought for 2-27-2021.
- 2-27-2021 Richland County Sheriff’s Office served a search warrant drafted by detective Giovanni Masi on 592 Cliffside Drive for suspected stolen Amazon property found in “plain view”. This is when the 2019 Toyota Camry, and massive amount of evidence was seized according to the *crime scene log*.
- 10-24-2022 State of Ohio’s Response to Defendant’s Motion to Dismiss Exhibit ee page 3. At this point the Receiving Stolen Property case has been dismissed, and the prosecutor claims only the ADT camera has any relevance.
- 11-1-2022 JUDGEMENT ENTRY OVERRULING DEFENDANTS MOTION TO DISMISS Exhibit dd. Judge Brent Robinson rules the cases are not related, despite the overwhelming evidence connecting the two cases. (see: In re Disqualification of Robinson, 170 Ohio St. 3d 1283)

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Between 11-1-2022, 5-5-2023 Judge Brent N. Robinson determined that the two cases are related and denied returning property.

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- 5-5-2023 ORDER DENYING RETURN OF PROPERTY (**after trial**) Exhibit A page 11, 12. Now in this entry Judge Brent N. Robinson rules “that any personal property, vehicles, or U.S. currency evidence seized in case number 2021 CR 0221 R that is also evidence in the instant case (2021 CR 0203 R) cannot be returned due to the pending appeal.”

Because these two cases were declared separate by Judge Brent N. Robinson the State of Ohio was not required to hand over evidence from its companion case. Obviously triggering speedy trial, and evidence issues.

### **Reasoning for *in camera* review**

Richland County Sheriff's Office was overwhelmed with the amount of evidence they seized, the amount of storage space the evidence was taking up, logging issues-so they auctioned the property off/disposed of it. This would include footage from multiple warrantless searches from 2-25-2021 at the 592 residence. Most importantly the events Relator is accused of. Footage from the home (history) could exonerate Relator. According to the body camera policy provided by respondent numerous deputies should've been wearing active functioning body cameras during searches conducted on 2-25-2021, 2-26-2021, and 2-27-2021. If the body cameras were not worn or working properly a report should be on file.

Respondents failure to respond in a timely manner to the request was intentional and completely disregarded until this mandamus action. (Respondent filed a Motion to Dismiss in this case dated 10-10-2023, and claims in the Certificate of Service to have mailed it to Relator



on the 11<sup>th</sup> day of October. However, Relator did not receive this motion until November 21, 2023.) Relator is requesting a writ be granted for all requested records (provided the records are not an exception) in the Richland County Sheriffs possession, and to statutory damages. The primary duty of an agency when responding to a public-records request is set out in R.C. 149.43(B)(1).

Because Relator requested copies of the records, Respondent had a duty to provide copies within a reasonable period of time. State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Edn., 97 Ohio St. 3d 58, 2002-Ohio-5311, 776 N.E.2d 82, ¶ 37.

In this case, responsive records for request number 1, 7, and 8 are *allegedly* concerning the criminal investigation and subsequent prosecution of the Relator. To meet this burden regarding the applicability of an exception to Ohio's Public Record Act, a public office (the Richland County Sheriff) carries the burden to prove that the requested record falls squarely within the exemption. Exceptions to disclosure must be strictly construed against the public-records custodian. Any doubt should be resolved in favor of disclosure. As the records custodian, the Richland County Sheriff's Office bears the burden of proving that the requested records fall squarely within an exception. See Jones-Kelley, 118 Ohio St.3d 81, 886 N.E.2d 206, at paragraph two of the syllabus.

The Richland County Sheriff's Office is public office subject to the requirement of the Public Records Act. State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 1; State ex rel. Rocker v. Guernsey Cty. Sheriff's Office, 126 Ohio St.3d 224, 2010-Ohio-3288, 932 N.E.2d 327, ¶ 14.

Because Responded has now invoked a statutory exception to the Public Records Act's disclosure requirement, it bears the burden of proof with respect to those exceptions. State ex rel. Besser v. Ohio State Univ., 89 Ohio St.3d 396, 398, 2000- Ohio 207, 732 N.E.2d 373 (2000). To meet this burden, a custodian must prove that the requested records fall squarely within the exception. State ex rel. Miller v. Ohio State Hwy. Patrol, 136 Ohio St.3d 350, 2013- Ohio-3720, 995 N.E.2d 1175, ¶ 23.

"Any property that has been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited and that is in the custody of a law enforcement agency shall be kept safely by the agency, pending the time it no longer is needed as evidence or for another lawful purpose, and shall be disposed of pursuant to sections 2981.12 and 2981.13 of the Revised Code." R.C. 2981.11(A)(1). Breaking this statute down, R.C. 2981.11(A)(1) describes (1) the property to which it applies, (2) how long the property should be kept, and (3) what should be done with the property after that time.

Here, respondent did not demonstrate that the Honda (for example) was still needed as evidence or "for another lawful purpose". Request number 8 was months prior to the kidnapping/receiving stolen property investigation. This particular report was not allowed in the trial, and no charges resulted from the report.

For the third part of R.C. 2981.11(A)(1), because the Honda was no longer needed by the State of Ohio, the property should have been disposed of pursuant to R.C.

2981.12 and 2981.13. R.C. 2981.12 and 2981.13 apply to property that is unclaimed or forfeited. In this case, the Honda is neither.

Obviously, the Honda has not been forfeited because the state has never initiated any forfeiture proceedings.

Also obviously, the Honda is not unclaimed because the Honda belongs to Relator and he seeks to have it returned. In those situations, R.C. 2981.11(C) provides, "A law enforcement agency with custody of property to be disposed of under section 2981.12 or 2981.13 of the Revised Code shall make a reasonable effort to locate persons entitled to possession of the property, to notify them of when and where it may be claimed, and to return the property to them at the earliest possible time." See: Exhibit ee page 3, the State of Ohio on 10-24-2022 determined that the Honda (**"only the ADT camera was found to have any relevance to the kidnapping investigation"**) had no relevance. Yet the Honda, remained in the impound until Relator received notice on 3-1-2023. Note, this is not including the rest of the property, and 2019 Toyota Camry. "Thus there is an affirmative duty imposed on the law enforcement agency to ensure that the seized property is returned to the lawful owner without unnecessary delay." State v. Freeman, 8th Dist. Cuyahoga No. 111209, 2022-Ohio-2364, ¶ 3. Therefore, because the Honda has not been forfeited, and because it is no longer needed by the State of Ohio- the property should have been returned to Relator "at the earliest possible time." (this is for all of the property seized, not just the "Honda" with the exception of the ADT camera that the State of Ohio claims to have relevance)

Further, pursuant to this court's decision in State v. Athon, 136 Ohio St. 3d 43, 2013-Ohio-1956, 989 N.E.2d 1006, paragraph three of the syllabus, HN9 when an accused seeks information about his or her case through a public-records request, "that public records request is the equivalent of a demand for discovery, and a reciprocal duty of disclosure arises in accordance

with Crim.R. 16." That holding led to an amendment to Crim.R. 16(H), which now includes the following sentence: "A public records request made by the defendant, directly or indirectly, shall be treated as a demand for discovery in a criminal case if, and only if, the [\*436] request is made to an agency involved in the prosecution or investigation of that case." See 2016 Staff Note to Crim.R. 16. Appeal No. 2022-CA-0083 is still pending and was at the time of request in addition to R.S.P. Case No. 2021 CR 0203 R being dismissed "without prejudice". "Criminal defendants may use the Public Records Act to obtain otherwise public records in a pending criminal proceeding." **Page 47 Ohio Sunshine Laws 2023 An Open Government Resource Manual**

## **PROPOSITION OF LAW**

- I. To be entitled to the requested writ of mandamus a petitioner has to establish a clear legal right to the requested relief, a clear legal duty on the part of the sheriff to provide it, and the lack of an adequate remedy in the ordinary course of law. Here the sheriff has not fulfilled its duty as a public office, and Relator has no other ordinary course of law.
- II. When Respondent claims a portion of Relators public information request falls under an exception of the law they must show it to be true. Accordingly, Respondent is required to prove that the request falls squarely within an exception. To satisfy that burden, the respondent must prove that the requested records "fall squarely within the exception," State ex rel. Cincinnati Enquirer v. Jones-Kelley, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus.
- III. Does "Not provided, Prosecutor's Office Opinion per Ohio Revised Code 149-43(B)(4)." meet an "explanation" as used in R.C. 149.43(B)(3). (When

interpreting R.C. 149.43, we resolve "any doubt \* \* \* in favor of disclosure.")

Exceptions to disclosure under Ohio Rev. Code Ann. § 149.43 must be strictly construed against the public records custodian, and the custodian bears the burden to establish the applicability of an exception. "[E]xceptions to disclosure must be strictly construed against the public records custodian, and the custodian bears the burden to establish the applicability of an exception." *State ex rel. Besser v. Ohio State Univ.* (2000), 89 Ohio St.3d 396, 398, 2000 Ohio 207, 732 N.E.2d 373; *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 16 (2002). "When a governmental body asserts that public records are excepted from disclosure and such assertion is challenged, the court must make an individualized scrutiny of the records in question. If the court finds that these records contain excepted information, this information must be redacted and any remaining information must be released.

Respondent is insinuating parts of Relators request are concerning a criminal investigation or prosecution. The question in this case- is the evidence (subject to this mandamus) still in the custody of the sheriff, or did the sheriff dispose of the evidence, if so when? It's been almost three years since the sheriff seized this evidence (property). The blue 2019 Toyota Camry was towed by Shelly Smith by order of the sheriff, the vehicles seizure is undocumented, however, the sheriff has not denied seizing, disposing of, having, or having possession of the vehicle.

### Conclusion

Respondents failure to respond in a timely manner to the request was intentional. Relator is therefore requesting this writ be granted, requested records (that are not declared exempt) in the Richland County Sheriffs possession be provided, and statutory damages be awarded to Relator. The primary duty of an agency when responding to a public-records request is set out in R.C. 149.43(B)(1).

Because Relator requested copies of the records, Respondent had a duty to provide copies within a reasonable period of time. State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Edn., 97 Ohio St. 3d 58, 2002-Ohio-5311, 776 N.E.2d 82, ¶ 37

The Public Records Act reflects the state's policy that "open government serves the public interest and our democratic system." State ex rel. Dann v. Taft, 109 Ohio St.3d 364, 2006 Ohio 1825, 848 N.E.2d 472, P 20. As requested on page 7 of Relators original complaint, if this writ is refused, that an alternative writ be issued directing the Respondent to make the requested records available to the court for an *in camera* inspection to determine if the records or portions of them should be made available to Relator.

John H. Mack Jr.

**Respectfully Submitted**

**John H. Mack Jr. Pro Se, Relator**

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MERIT BRIEF OF RELATOR, JOHN H. MACK JR was served according to local rules and sent by regular U.S. Mail this 18<sup>th</sup> day of December 2023, to the Richland County Prosecutors Office.

*John H. Mack Jr.*

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